

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-001924-MR

DEBORAH HOWARD, AS THE  
ADMINISTRATRIX OF THE ESTATE  
OF STEPHEN MICHAEL HOWARD

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE HON. THOMAS D. WINGATE, JUDGE  
ACTION NO. 12-CI-00143

NDT CARE SERVICES, LLC, D/B/A  
~~HOMPLACE~~~~HOMEPLACE~~ SUPPORT SERVICES LLC;  
STEPS AHEAD; AND  
JILL K. BROWN

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: Deborah Howard, as Administratrix of the Estate of Stephen Michael Howard (the Estate), appeals from an order of the Franklin Circuit Court granting summary judgment and dismissing its wrongful-death and negligence

claims against NDT Services LLC d/b/a Homeplace Support Services LLC, Steps Ahead, and Jill K. Brown (collectively, the Appellees). The Estate argues that summary judgment was not appropriate because the applicable standard of care and causation could be established without expert testimony. In the alternative, the Estate contends that the trial court abused its discretion without giving it an opportunity to explain its failure to designate an expert.

However, we agree with the trial court that expert testimony was necessary to establish essential elements of its claims. Furthermore, the trial court afforded the Estate a full opportunity to complete discovery and designate a qualified expert, but it failed to do so and provided no grounds for further delay of the case. Therefore, the trial court did not abuse its discretion by ruling on the Appellees' motion for summary judgment without addressing the Estate's motion to hold the case in abeyance. Hence, we affirm.

The relevant facts of this action are not in dispute. At the time of his death, Stephen Howard was 36 years old. He had been diagnosed with mild mental retardation, as well as a variety of mental illnesses. In addition to other physical conditions, Stephen's esophagus was deformed and scarred, and he had a history of aspirating. Despite these conditions, Stephen did not have an appointed guardian, and he was able to communicate, make decisions, and live on his own for the most part.

In December, 2009, Stephen moved from his mother's home to a group home, and then later to an apartment. During this period, Stephen was a recipient of Supports for Community Living (SCL), which is a Medicaid waiver program administered by the Department for Community Based Services. Under SCL, Stephen received community living support, which included day treatment, job supports, and case-worker support to allow him to live independently. NDT Home Services, LLC, d/b/a Homeplace Support Service (Homeplace), provided daytime support services, job supports, and respite services to Stephen. Steps Ahead provided SCL case management services to Stephen. Jill Brown served as Stephen's case manager. She also is an owner and director of Steps Ahead.

Stacy Soard and Kristy Hall, two employees of Homeplace, provided daily SCL services to Stephen. On the morning of October 4, 2011, when Hall arrived, Stephen informed her that he was not feeling well. Hall called Soard to help her take Stephen for treatment. Before going to the hospital, Stephen asked Soard and Hall for chicken soup and Sprite for lunch. They briefly left to purchase the items, then returned and prepared Stephen's lunch.

While he was eating, Stephen spilled some soup on his shirt, and then went to his bedroom to change the shirt. When Stephen did not return, Soard and Hall went to check on him. They found him sitting on the side of the bed, conscious but not responsive. Soard called 911 and Hall began administering

CPR. Upon arriving, the emergency responders took over CPR. Stephen later died at the hospital. The cause of his death was aspiration of fluids into his lungs.

Following Stephen's death, his mother, Deborah Howard, qualified as administratrix of his estate. Thereafter, on February 3, 2012, the Estate brought this action against Homeplace. In an amended complaint, the Estate also brought claims against Hall, Soard, Steps Ahead, and Brown. The Estate asserted that Stephen's death was caused by a failure to provide adequate care. With respect to Steps Ahead, the Estate alleged that Brown failed to note Stephen's aspiration risk in his case plan and that she otherwise violated Steps Ahead's policy and procedure manual. With respect to Homeplace, Hall, and Soard, the Estate alleged that Hall and Soard negligently failed to recognize that Stephen was suffering from silent aspiration and so properly failed to treat his condition.

In May 2012, the Appellees served the Estate with Interrogatories requesting that it identify any expert witnesses. However, the Estate did not initially identify any such experts. After several motions by the Appellees and a change of counsel by the Estate, the trial court directed the Estate to disclose its experts no later than March 16, 2015. The Estate eventually identified two experts: Jennifer Fugate, LPN, who was to testify about the Appellees' standard of care in providing services, and Dr. Fred Johnson, who was to testify about Stephen's loss of earnings and potential future lost income.

However, Fugate proved to be an unreliable witness and refused to attend her scheduled depositions. The Appellees moved to exclude Fugate due to her lack of cooperation and lack of expert qualification. Shortly after that motion was filed, the Estate advised the court that its attorney had to withdraw due to an illness. The trial court continued the trial date and gave the Estate thirty days to obtain new counsel.

On September 28, 2015, the Appellees moved for summary judgment. In October 2015, the Estate's new counsel voluntarily withdrew Fugate as an expert witness. The Estate also moved to hold the case in abeyance to allow its newly hired counsel time to review the case file, designate additional experts, and conduct further discovery. The Appellees objected to the motions, noting that the Estate had never disclosed a qualified expert, and that they had fully complied with all discovery motions.

Subsequently, on November 15, 2015, the trial court granted the Appellees' motion for summary judgment. The court concluded that the Estate could not prevail without an expert witness as to the standard of care and causation. The court recognized that it could exercise its discretion to reopen discovery. However, the court declined to do so, noting that the Appellees had fully complied with all discovery deadlines, and that the Estate had repeatedly

failed to comply with the court's discovery orders on expert testimony. This appeal followed.<sup>1</sup>

The Estate argues that the trial court erred in granting summary judgment without allowing it the opportunity to be heard on the status of its expert. "The proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR<sup>2</sup> 56.03. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. *Steelvest*, 807 S.W.2d at 480. The trial court must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. *Id.*

Although a party is permitted to move for a summary judgment at any time, a trial court should not take up a summary judgment motion prematurely, but

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<sup>1</sup> In its notice of appeal, the Estate only named Homeplace as an appellee, and did not separately name Hall and Soard.

<sup>2</sup> Kentucky Rules of Civil Procedure.

only after the opposing party has been given ample opportunity to complete discovery. *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010), citing *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988). On the other hand, a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *Steelvest*, 807 S.W.2d at 481. Since a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

As noted above, the trial court concluded that the Estate could not prevail without an expert witness to testify regarding the applicable standard of care and causation. Since the discovery deadline had passed for the disclosure of expert witnesses, the trial court concluded that the Estate's claim failed as a matter of law. A plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care. *Perkins v. Hausladen*, 828 S.W.2d 652, 655–56 (Ky. 1992).

The Estate suggests that expert testimony is not necessary because the applicable standard of care can be established by lay testimony, and with reference to the applicable statutes, regulations, and Stephen's case plan. The Estate further

argues that causation may be inferred by the failures of Homeplace and Steps Ahead to conform to that standard of care. We disagree.

The test for determining whether actions for personal injuries may be maintained on dual theories of medical malpractice or simple negligence

involves a matter of science or art requiring special knowledge or skill not ordinarily possessed by the average person or is one where the common everyday experiences of the trier of the facts is sufficient in order to reach the proper conclusion. In the former, expert opinion testimony is ordinarily required to aid the trier of the facts; in the latter it is unnecessary.

*Andrew v. Begley*, 203 S.W.3d 165, 171 (Ky. App. 2006), quoting *Twitchell v. MacKay*, 434 N.Y.S.2d 516, 78 A.D.2d 125, 127–128 (N.Y. A.D. 1980).

In the current case, even if the standard of care could be established by lay testimony, expert testimony was still required to prove that the Appellees deviated from that standard. That determination is clearly outside of the ordinary experiences of likely jurors. Likewise, we conclude that expert testimony was essential to establish that such deviation was the proximate cause of Stephen's death. Therefore, the trial court correctly found that the Estate could not prevail without designating an expert witness on these issues.

The Estate primarily argues that the trial court abused its discretion by ruling on the Appellees' motion for summary judgment without first addressing its motion to hold the case in abeyance. In *Blankenship v. Collier, supra*, the Kentucky Supreme Court held that, in an action where expert witnesses are



required, a defendant may be entitled to summary judgment if the plaintiff fails to identify any expert witnesses within a reasonable amount of time. *Id.* at 675. “The curtain must fall at some time upon the right of a litigant” to put forth the most basic level of proof and the plaintiff’s bare assertion “that something will ‘turn up’ cannot be made basis for showing that a genuine issue as to a material fact exists.” *Id.*, quoting *Neal v. Welker*, 426 S.W.2d 476, 479-80 (Ky. 1968).

In response, the Estate points to *Solinger v. Pearson*, No. 2007-SC-000389-DG, 2010 WL 1006072 (Ky. 2010), as somewhat ameliorating the harshness of this rule. In *Solinger*, as in the present case, the plaintiff in a medical malpractice case failed to identify an expert witness within the discovery deadline set by the trial court. The trial court had previously passed discovery deadline several times. The defendants moved for summary judgment based on the lack of an expert witness. *Id.*, 2010 WL 1006072 at \*2.

The trial court heard both motions at a previously scheduled status conference. The plaintiff could not attend due to an illness, but sent a letter requesting an additional enlargement of time to disclose her experts because she still had been unable to obtain the necessary funds to retain them. But shortly after the status conference, the trial court granted the defendants’ motion for summary judgment. *Id.* at \*3-4.

The Supreme Court agreed that the plaintiff was required to present expert testimony in support of her medical negligence claim, and her failure to do

so would be grounds for summary judgment. *Id.* at \*6-7. Nevertheless, the Court concluded that the trial court should have rescheduled the status conference prior to granting summary judgment. In the alternative, the Court held that the trial court should have at least notified the plaintiff of its intent to rule on the summary judgment motion and determined the status of her efforts to fund an expert witness prior to ruling on the motion. *Id.* at \*8. While the Court acknowledged that trial courts have discretion to rule on motions promptly, the Court determined that the trial court abused its discretion by failing to give the plaintiff an adequate opportunity to explain her failure to disclose her expert witness. *Id.*

Along similar lines, the Estate argues that the trial court abused its discretion by granting the Appellees' motion for summary judgment without giving it an opportunity to explain its failure to name an expert witness. The Estate also maintains that it should not be penalized for the negligence and illness of its prior counsel. But the Court in *Solinger* emphasized that its conclusion was based on the particular facts of that case. In particular, the trial court in *Solinger* previously advised the plaintiff that "nothing would happen" if her health problems prevented her from attending any future court appearance and she gave advance notice of her absence. *Id.* at \*2. Furthermore, the trial court ruled on the defendant's summary judgment motion only eleven days after the discovery deadline expired, and only three days after the court conducted a status conference that the plaintiff could not attend. *Id.* at \*8.

In the current case, the Estate withdrew its expert witness well after the discovery deadline had passed. The Estate's second counsel had withdrawn, and new counsel gave no indication of how or when the matter could proceed without completely reopening discovery. The Estate's new counsel had a full opportunity to address issues presented in the Appellees' renewed motion for summary judgment.

As the trial court recognized, this case was at a crossroads. The Appellees had fully complied with their discovery obligations, but the Estate consistently failed to do so. Furthermore, the Estate had a full opportunity to conduct discovery and to address the issues presented in the Appellees' summary judgment motion. Under the circumstances, we cannot find that the trial court abused its discretion by declining to reopen discovery and by ruling on the pending motion for summary judgment.

ALL CONCUR

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