

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NOS. **2007-SC-000916-DG**
2007-SC-000921-DG

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ROBERT BLANKENSHIP, M.D. & CARITAS HEALTH SERVS., INC. d/b/a
CARITAS MEDICAL CTR. APPELLANTS

V.

HORACE COLLIER

APPELLEE

ON GRANT OF DISCRETIONARY REVIEW FROM
KENTUCKY COURT OF APPEALS NO. 2006-CA-001612

JEFFERSON CIRCUIT COURT, DIVISION 9, CASE NO. 05-CI-01583

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BRIEF FOR APPELLEE

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CERTIFICATE OF SERVICE

This is to certify that a copy of this brief was on this 9th day of January 2009 served upon David R. Monohan & Elizabeth Ullmer Medel, *Woodward, Hobson & Fulton*, Counsel for Appellant, Caritas Health Services, Inc. d/b/a Caritas Medical Center, 2500 National City Tower, 101 S. 5th St., Louisville, KY 40202; David B. Gazak, *Darby & Gazak, P.S.C.*, Counsel for Appellant, Robert Blankenship, M.D., 3220 Office Pointe Place, Suite 200, Louisville, KY 40220; Don A. Pisacano, Counsel for Intervening Plaintiff, Anthem Health Plans of KY, 271 W. Short St., Ste. 600, Lexington, KY 40507-1292; Judge Judith McDoanld-Burkman, Jefferson Circuit Court, Division 9, 700 W. Jefferson St., Louisville, KY 40202, Sam Givens, Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229.


ATTORNEY FOR APPELLEE

I. STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does not desire an oral argument and does not believe an oral argument is helpful to resolve the issue. The issue is a procedural one and the procedure is clearly stated in the pivotal case of *Baptist Healthcare Systems, Inc. v. Miller, Ky.*, 177 S.W.3d 676 (2005).

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III. COUNTERSTATEMENT OF THE CASE

The Appellee, Horace Collier, does not accept the Appellant, Robert Blankenship, M.D.'s, ("Appellant-Blankenship") nor Appellant, Caritas Medical Center's ("Appellant-Caritas") statement of the case. The Appellee considers the following to be essential to a fair and adequate statement of the case:

This matter came before the trial court as a result of an action filed by the Appellee seeking damages from the Appellants¹ and other unknown defendants.

The within action is a claim against Appellant-Caritas for medical negligence. It is specifically alleged, inter alia, that Appellant-Caritas failed to provide hospital and medical services to the Appellee consistent with the applicable medical standards of care. A copy of the *Complaint* can be found in the Appendix behind *Tab-1*.

The within action is also a claim against Appellant-Blankenship for medical malpractice. It is specifically alleged, inter alia, that Appellant-Blankenship failed to provide hospital and medical services to the Appellee consistent with the applicable medical standards of care. A copy of the *Complaint* can be found in the Appendix behind *Tab-1*.

On February 17, 2004, the Appellee was admitted to Caritas after complaining of abdominal pain. The next day, after having tests conducted and consulting with Appellant-Blankenship, Appellee had surgery, specifically, an appendectomy. Appellee was released to return home on February 23, 2004.

On February 17, 2005, Appellee filed his complaint in the circuit court, alleging that after he was admitted to Caritas, he was not re-evaluated or treated in a timely manner. He

contended that, as a result of Appellants' negligence, he sustained permanent physical and mental injuries, inter alia.

The trial court entered a Civil Jury Trial Order settling the deadline for disclosure of Appellee's expert witnesses for January 30, 2006, and a jury trial for October 10, 2006. Appellee did not disclose an expert witness by that time nor did he disclose one by the extended deadline.

Although the trial date was not scheduled until October of 2006, within a couple of weeks of the passage of the expert disclosure deadline, the Appellant-Caritas and Appellant-Blankenship both filed separate motions for summary judgment after the Appellee did not disclose his expert witnesses after two deadlines had passed. The matter was scheduled for a trial date after the deposition of the Appellee and his wife had been taken and some written discovery completed. After scheduling the matter for trial, the lower Court generated a pretrial order. A copy of the *Pretrial Order* can be found in the Appendix behind *Tab-2*. Within the pretrial order is a requirement that the Appellee disclose his expert witnesses within a certain period of time. The Appellee's counsel knew that the time would be a factor and requested the Court for additional time when the trial date was set, which was added to the pretrial order. In addition, recognizing that the time limits would be a factor, the Appellee subsequently requested additional time to disclose his expert witnesses, which the Court granted. A copy of the *Plaintiff's Motion for An Extension of Time To Identify Expert Witness* along with the tendered Order can be found in the Appendix behind *Tab-3*.

¹ The reference to "Appellants" does not include the Intervening Plaintiff below. The Intervening Plaintiff below is a party to the action and appears in the Certificate of Service for that purpose and that purpose only.

The extended time arrived and the Appellee was free to conclude that maybe this was a case where no expert witness was necessary. The Appellee did not meet the deadline. The trial date was not scheduled to take place for at least three (3) months, but within a couple o weeks of the passage of the expert disclosure deadline, both Appellant-Caritas and Appellant-Blankenship moved the trial court to grant summary judgment specifically on the grounds that Appellee had not timely identified his expert witnesses.

Appellee opposed the motions for summary judgment arguing that summary judgment was inappropriate where the issue was one of failure to timely disclose an expert and also questioned whether an expert was even necessary:

Appellee did not take lightly his duty to disclose the expert witnesses and acknowledged such in his response to the motions for summary judgment. A copy of the *Motion for Summary Judgment* tendered by Appellant-Caritas can be found in the Appendix behind *Tab-4*. A copy of the *Defendant, Robert M. Blankenship, M.D.'s Motion for Summary Judgment* tendered by Appellant-Blankenship can be found in the Appendix behind *Tab-5*. A copy of the *Plaintiff's Response & Opposition to Motion for Summary Judgment*, to both Appellants can be found in the Appendix behind *Tab-6*.

The trial court issued an *Opinion and Order* granting Appellant-Caritas and Appellant- Blankenship's motions for summary judgment and dismissed the Appellee's Complaint. In its *Opinion and Order*, the trial court failed to address Appellee's primary objection and opposition to the granting of the motions. Specifically, the trial court in its opinion did not address the objection raised by Appellee addressed in the cases of *Baptist Healthcare Systems, Inc. v. Miller*², *Ward v. Housman*³ and *Poe v. Rice*⁴. A copy of the

² Ky., 177 S.W.3d 676 (2005); See Appendix, *Tab 9*

³ Ky.App., 809 S.W.2d 717, 719 (991); See Appendix, *Tab 10*

Court's *Opinion and Order*, from which the Appellee appealed can be found in the Appendix behind *Tab-7*.

In its *Opinion and Order*, the trial court found that an expert was needed to testify concerning whether the delay in treating the Appellee caused his permanent injuries. The trial court stated:

[t]he Plaintiff has been instructed by this Court to demonstrate such expert testimony is available, such that a causation between Defendants' acts and Plaintiff's injuries is at least *possible*.⁵ Since Plaintiff has failed to identify and disclose any expert witness, summary judgment, as a matter of law, is appropriate in favor of Caritas and Dr. Blankenship.

The Appellee appealed to the Kentucky Court of Appeals claiming two (2) errors: (1) the circuit court erred and abused its discretion when it used CR 56 summary judgment to resolve what is essentially a procedural dispute as to the need for an expert, the disclosure of the expert's identity, and the substance of the expert's testimony, rather impose sanctions for failure to comply with the pre-trial order regarding the disclosure of expert witnesses; and (2) summary judgment was improper and is not a trick device to prematurely terminate litigation.

The matter was briefed before the Kentucky Court of Appeals. The Kentucky Court of Appeals vacated and remanded the trial court's opinion for further proceedings consistent with its *Opinion Vacating and Remanding* rendered on November 9, 2007. A copy of the Kentucky Court of Appeals *Opinion Vacating and Remanding*, from which the Appellants now appeal can be found in the Appendix behind *Tab-8*.

⁴ Ky.App., 706 S.W.2d 5 (1986); See Appendix, *Tab 11*

⁵ The record is void of any written instruction or an order regarding whether the trial court had made a decision that this case required expert testimony prior to the submission of motions for summary judgment.

IV. ARGUMENTS

- I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT USED CR 56 SUMMARY JUDGMENT TO RESOLVE WHAT IS ESSENTIALLY A PROCEDURAL DISPUTE AS TO THE NEED FOR AN EXPERT, THE DISCLOSURE OF THE EXPERT'S IDENTITY, AND THE SUBSTANCE OF THE EXPERT'S TESTIMONY RATHER THAN IMPOSE SANCTIONS FOR FAILURE TO COMPLY

The trial court erred and abused its discretion when it used CR 56 Summary Judgment to resolve what is essentially a procedural dispute as to the need for an expert, the disclosure of the expert's identity and the substance of the expert's testimony rather than impose sanctions for failure to comply.

The only issue before the trial court was the failure of the Appellee to timely identify and disclose his expert witnesses. In *Baptist Healthcare Systems, Inc. v. Miller*⁶, this Court held that it is inappropriate to use summary judgment to resolve what is essentially a procedural dispute as to the need for an expert, the disclosure of the expert's identity, and the substance of the testimony.⁷ In *Poe v. Rice*,⁸ the Court held that summary judgment was inappropriate to resolve an "essentially procedural conflict". Likewise, in *Ward v. Housman*,⁹ the Court held that it was improper to grant summary judgment as a sanctioning tool where the plaintiffs' counsel failed to comply with the court's discovery schedule by not disclosing in a timely manner an indispensable expert witness.

⁶ Ky., 177 S.W.3d 676 (2005)

⁷ Id. at 681-682

⁸ Ky.App. 706 S.W.2d 5 (1986)

⁹ Ky.App., 809 S.W.2d 717, 719 (991)

In the case at hand, it was clearly inappropriate for the trial court to grant summary judgment and the granting of same is clearly an abuse of discretion and not consistent with the applicable appellate cases on this very issue.

In *Baptist Healthcare Systems*, the defendants complained that summary judgment should have been granted on the grounds that the plaintiff never identified an expert witness. It was later determined that the field of phlebotomy may not have required the same level of expert attention as the medical field, the Court nevertheless made it very clear that CR 56 is not a rule to be used as a sanctioned tool (emphasis added).¹⁰ In fact the Court made clear that the trial court retains its discretion to sanction the offending party for failure to comply.¹¹ Clearly, the *Baptist Healthcare Systems* case is on point and the trial court has abused its discretion in using CR 56 to resolve what is essentially a procedural dispute as to the need for an expert, the disclosure of the expert's identify, and the substance of the expert's testimony.¹²

In *Poe v. Rice*, this Court's holding was the same that summary judgment standard could not be used to resolve a dispute arising from the disclosure of an expert witness.¹³ The rule was reiterated by the Court of Appeals in *Ward v. Housman*.¹⁴

The abuse of discretion is further illuminated when this Court considers the trial court's pretrial order. See Appendix, *Tab-2*. In paragraph 17 of the Court's Pretrial Order (titled "*Full and complete compliance with this order is mandatory*"), dismissal is not one of the sanctions mentioned. This paragraph in the Pretrial Order is consistent with the case law that the sanctions for failure to comply with the court's pretrial order of discovery are found and authored by CR 37.

For these reasons, the ruling of the Court of Appeals reversing the trial court must be affirmed.

¹⁰ See *Baptist Healthcare Systems*, at 682

¹¹ *Id.*

¹² *Id.*

¹³ See *Poe v. Rice*, Ky.App., 706 S.W.2d 5 (1986)

¹⁴ Ky.App., 809 S.W.2d 717, 718 (1991)

II. SUMMARY JUDGMENT IS IMPROPER AND IS NOT A TRICK DEVICE TO PREMATURELY TERMINATE LITIGATION

Summary judgment is improper and is not a trick device to prematurely terminate litigation.

The law governing summary judgments in Kentucky is clear. In *Steelvest, Inc. v. Scansteel Service Ctr.*,¹⁵ the Supreme Court reaffirmed its strict standard for granting summary judgment, rejecting the turn to a more liberal approach found in recent federal cases. *Steelvest* cites *Paintsville Hosp. Co. v. Rose*,¹⁶ which stated:

“The proper function for a summary judgment in a case of this nature ‘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 and against the movant.’ [Case cited]... Summary judgment ... is not a substitute for trial, nor is it the functional equivalent of a motion for directed verdict.”

In *Conley v. Hall*,¹⁷ the court stated:

“We think that it should be borne in mind that the motion for summary judgment is not a *trick device* for the premature termination of litigation. Its function is to secure a final judgment as a matter of law when there is no genuine issue of a material fact . . . The burden is on the movant to establish the nonexistence of a material fact issue. He either establishes this beyond question or he does not. If any doubt exists, the motion should be denied.” *Id.* (emphasis added)

¹⁵ Ky., 807 S.W.2d 476 (1991)

¹⁶ Ky., 683 S.W.2d 255, 256 (1985)

¹⁷ Ky., 395 S.W.2d 575, 580 (1965)

All of the previously cited cases reiterate the summary judgment standard. When the trial court applied this standard to the facts and circumstances of this case, clearly the application of CR 56 is inappropriate. The Appellants simply attempted to use the summary judgment rule as a trick device to prematurely terminate the litigation below. The Appellee is well aware of his duty to comply with the trial court's pretrial orders and understands that his failure to so comply is subject to appropriate sanctions prior to the trial of the case. Yet the Appellee should not be the victim of the inappropriate application of the summary judgment standard.

III. THE TRIAL COURT IMPROPERLY GRANTED SUMMARY JUDGMENT TO BOTH APPELLANT-CARITAS & APPELLANT-BLANKENSHIP AND RULING OF THE COURT OF APPEALS REVERSING THE TRIAL COURT MUST BE AFFIRMED

The trial court improperly granted summary judgment to both Appellant-Caritas and Appellant-Blankenship and the ruling of the Court of Appeals reversing the trial court must be affirmed.

Both Appellants argue that the trial court was correct in granting summary judgment.

Appellant-Caritas argues in support of its position that expert testimony is required in medical malpractice cases as a general rule with some exceptions. The Appellee does not dispute this but this is not the issue before this Court nor should it have been the issue before the trial court.

The Appellant-Caritas is putting the cart before the horse. All this rhetoric about experts and medical malpractice cases is truly a waste of time in this matter. The issue before the Court is whether it is appropriate to grant summary judgment when the sole grounds for same is the failure to timely disclose an expert witness? This issue has been

appropriately addressed in the aforementioned cases of *Baptist Healthcare Systems, Inc. v. Miller, Ward v. Housman* and *Poe v. Rice*.

The Appellant-Caritas argues further that the Kentucky Courts routinely grant summary judgment when a party fails to identify an expert in a case requiring expert testimony. In support thereof, Appellant-Caritas cites the cases of *Turner v. Reynolds*,¹⁸ *Neal v. Welker*,¹⁹ , *Nalley v. Banis*, Ky.App., 240 S.W.3d 658 (2007) and *Green v. Owensboro Medical Health System, Inc.*, Ky.App., 231 S.W.3d 781 (2007). The cases cited by the Appellant-Caritas are way off base. Each is addressed separately below.

The cases of *Turner v. Reynolds* (1977) and *Neal v. Welker* (1968) are distinguishable from the case at bar because those cases predated the cases of *Baptist Healthcare Systems, Inc. v. Miller, Ward v. Housman*, and *Poe v. Rice* and the whole issue of whether the summary judgment rule was being abused was not addressed.

The more recent cases cited by Appellant-Caritas are likewise distinguishable and improperly cited. Appellant-Caritas argues on page 12 of its brief that “[i]ronically, the very same panel which rendered the decision in the case at bar rendered another decision reaching exactly the opposite result in a case involving virtually identical facts.”²⁰

The problem with the aforementioned statement is that it is patently untrue and flagrantly false.²¹ In *Nalley v. Banis*,²² the Court clearly states:

“We believe it imperative to note that the Nalleys do not complain to this Court that the circuit court erred in granting summary judgment solely on their failure to meet the deadlines to name expert witnesses set forth in the pre-trial order and the extensions thereof.”²³

Clearly if the Court is addressing and focusing on different issues raised by the moving party and the facts are similar and the result is different, the Court has not erred. It is a

¹⁸ Ky.App., 559 S.W.2d 740 (1977)

¹⁹ Ky., 426 S.W.2d 476 (1968)

²⁰ See page 12 of Brief of Appellant-Caritas, paragraph 2.

²¹ Unless one believes that the word “virtually” serves as an outlet to imply that the facts are *almost* similar.

²² Ky.App., 240 S.W.3d 658 (2007)

²³ Ky.App., 240 S.W.3d 658, 661 (2007)

very misleading argument to argue that the facts of this Court of Appeals case warrants the same result of another Court of Appeals case, albeit the facts might be similar, but the issue raised and addressed are grossly differently. Clearly under these circumstances one must expect a different result.

The same applies to the case of *Green v. Owensboro Medical Health System, Inc*²⁴. The issue before the Court in *Green* is stated as follows:

“On appeal, Green first contends the trial court abused its discretion in requiring her to offer expert standard of care testimony to prove her claim of medical negligence. She contends such expert testimony on the standard of care was unnecessary because jurors, based upon common knowledge and experience alone, could have inferred negligence from the facts. Green also contends the trial court erroneously entered summary judgment in favor of all three appellees.”²⁵

Clearly in the *Green* case the Movant did not raise the procedural issue of the abuse of CR 56 and, as such, the case is distinguishable from the case at bar.

The Court of Appeals’ decision is very clear that the trial court stated that a directive had been issued that expert testimony was required yet the record was void of such an order.

Appellant-Blankenship in his brief repeats the same behavior of Appellant-Caritas by hashing out quite a bit of law that is well settled about medical malpractice cases. This cloud of smoke is released in these briefs to hide the real issue as discussed by this Court in the cases of *Baptist Healthcare Systems, Inc. v. Miller*, *Ward v. Housman*, and *Poe v. Rice*. Again the real issue is not whether medical malpractice cases require expert testimony and whether there are exceptions to that rule but instead when can a trial court simply determine that a directed verdict is warranted before any evidence is offered and

²⁴ Ky.App., 231 S.W.3d 781 (2007)

²⁵ Id.

in a case such as this one before a determination is made that expert testimony is required?

Appellant-Caritas further argues in its brief that the action of the trial court was not one of a sanction in violation of the cases of *Baptist Healthcare Systems, Inc. v. Miller*, *Ward v. Housman*, and *Poe v. Rice*. Appellant-Caritas argues erroneously that Appellee was ordered to respond to expert interrogatories.

Once again, Appellant-Caritas is attempting to mislead this Court. Neither Appellant filed a motion to compel under CR 37. The trial court record is void of such. That was part of the discussion in the Court of Appeals' decision that sanctions were appropriate under a motion pursuant to CR 37. If such a motion had been filed and such an order existed, then this discussion would be moot.

Appellant-Caritas further goes on to argue that the case of *Ward v. Housman*²⁶ stands for the proposition that dismissal is proper when a party has no expert.²⁷ This argument is ludicrous as if such was the rule then there would be no reason to discuss the exceptions to the general rule that experts are required in medical malpractice cases.

Both Appellants in their second arguments in their briefs attempt to address the Court of Appeals' decision that a court should make a ruling whether an expert is necessary and give the plaintiff reasonable time to secure an expert.

Appellant-Blankenship argues that the Court of Appeals' decision is a new standard and conflicts with the case of *Steelvest, Inc. v. Scansteel Service Ctr*²⁸.

Appellant-Blankenship is comparing apples and oranges. The *Steelvest* decision and the line of cases leading up to the *Baptist Healthcare Systems, Inc. v. Miller* decision are on two different levels. One offers a guide to the trial courts when addressing summary judgment motions and the other specifically directs a trial court on the procedure when a pretrial order has not been followed. The two are not the same.

²⁶ Ky.App., 809 S.W.2d 717 (1991)

²⁷ See Brief of Appellant-Caritas, page 17, first full paragraph.

²⁸ Ky., 807 S.W.2d 476 (1991)

Appellant-Caritas attempts to make the same argument but from a different angle. Appellant-Caritas argues that a pretrial decision that an expert is needed, as ordered by the Court of Appeals, must be reversed.

The problem the argument presents is that if the decision is reversed, then this Court would have to vacate the whole line of cases leading up to the *Baptist Healthcare Systems, Inc. v. Miller* decision. The rule is sound and was pronounced by this Court. The Court of Appeals appropriately reasoned and stated:

“In *Baptist Healthcare Systems*, the defendants filed for summary judgment within three weeks of the trial date based on plaintiff’s failure to name an expert witness to prove medical malpractice. Rather than grant the summary judgment motion, the court, *after a hearing on the issue*, made a determination that an expert was needed and granted the plaintiff thirty days to name an expert. This required the trial court to continue the trial date. The trial court informed the plaintiff that if she failed to name an expert in the time given, dismissal would be granted. The Kentucky Supreme Court noted that “the trial court properly exercised its discretion to announce a ruling on the necessity of an expert witness and to grant [plaintiff] a reasonable time in which to procure an expert.” *Baptist Healthcare Sys., Inc.*, 177 S.W.3d at 681. The Court then found that, “[u]nder these circumstances, not only did the trial court *not* err in failing to grant summary judgment, to have done so would have been *extraordinary*.” *Id.* (emphasis added). The Court continued, holding that

[i]t is inappropriate to use a CR 56 summary judgment to resolve what is essentially a procedural dispute as to the need for an expert, the disclosure of the expert’s identity, and the substance of the testimony. In such disputes, it is with the trial court’s discretion to impose sanctions for failure to comply rather than to grant a summary judgment as a procedural sanction except in rare cases.²⁹

The remainder of the briefs for the Appellant-Caritas and Appellant-Blankenship contain various misstatements of the record and continue to skate around the procedural issues before this Court.

²⁹ See *Opinion of the Court of Appeals*, p. 7-8.

For instance, Appellant-Caritas argues that somehow the Court of Appeals' decision prohibits trial courts from set and enforcing reasonable pretrial deadlines. This is clearly not the case. As the Court of Appeals noted that the trial court retains jurisdiction to issue appropriate sanctions to enforce it's orders, however the trial courts must follow the precedent and procedure as mandated by this Court.

Appellant-Blankenship, for instance, asserts that there was no dispute as to the need for an expert. Again, Appellant-Blankenship is making his own record. The Appellee never agreed that an expert witness was mandated in this case. Instead Appellee simply failed to meet the deadlines to disclose an expert. The Appellee and his legal team, even after the trial court has given numerous opportunities to disclose an expert, may reserve the right not to call an expert witness. If he so chooses, then Appellee understands, as well as any litigant, that there is a chance a verdict might be directed at the close of his case because evidence offered may be excluded because the Court may determine that the evidence can only be offered by an expert. This is purely within a plaintiff's right in employing the strategy of his case.

The case at bar is a simply one. For instance, if we assume that Appellant-Blankenship simply was on call because another doctor had called in sick and was determined to do as little as possible until his shift was done, it does not take an expert to offer an opinion that as a medical doctor Appellant-Blankenship had deviated from the standard of care for being a lazy and angry because he did not want to be on call. If such was the case, the plaintiff clearly has the right to rely on such and not offer expert testimony.

As for Appellant-Caritas, let's assume an x-ray laid and was never read for nearly 24 hours after it was ordered. If the plaintiff chooses not to hire an expert witness, he simply takes the chance that his case may not survive a directed verdict.

The point here is simply, the Appellee and his attorney reserve the right to employ their own legal strategy and it is not for the Court or Appellants to violate the procedural rules to prematurely terminate litigation.

CONCLUSION

For all the foregoing reasons, Appellee, Horace Collier, respectfully requests that this Court to affirm the ruling of the Court of Appeals.

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