COMMONWEALTH OF KENTUCKY
SUPREME COURT
2007-SC-0389; 2008-SC-0133

ROBERT E. SOLINGER, M.D., CHRISTOPHER JOHNSRUDE, M.D., MICHAEL RECTO, M.D., AND PEDIATRIC CARDIOLOGY ASSOCIATES, P.S.C. — **APPELLANTS**

v.

APPEAL FROM
COURT OF APPEALS NO. 2006-CA-00585
JEFFERSON CIRCUIT COURT
CIVIL ACTION NO. 05-CI-2182

MELANIE L. PEARSON — **APPELLEE**

REPLY BRIEF ON BEHALF OF APPELLANTS AND CROSS-APPELLEES

ROBERT E. SOLINGER, M.D., CHRISTOPHER JOHNSRUDE, M.D., MICHAEL RECTO, M.D., AND PEDIATRIC CARDIOLOGY ASSOCIATES, P.S.C.

Respectfully submitted,

Katherine Kerns Vesely

James P. Grohmann
Katherine Kerns Vesely
O'BRYAN, BROWN & TONER
455 S. Fourth Street, 1500 Starks Building
Louisville, KY 40202
Counsel for Appellants and Cross-Appellees, Robert Solinger, M.D., Christopher Johnsrude, M.D., Michael Recto, M.D., and Pediatric Cardiology Associates, P.S.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via U.S. Mail, on this the 3rd day of November, 2008 to the following: Hon. Alan S. Rubin, 231 S. Fifth Street, Suite 200, Louisville, KY 40202; Beth McMasters, Bradley R. Hume, Thompson, Miller & Simpson, 600 West Main Street, Suite 500, Louisville, KY 40202; Hon. Judith McDonald-Burkman, Jefferson Circuit Court, Division Nine, Jefferson Judicial Center, 700 West Jefferson St., Louisville, KY 40202; and Samuel Givens, Jr. Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. It is further certified that Appellants have not withdrawn the record on appeal.

Katherine Kerns Vesely
Counsel for Appellants and Cross-Appellees

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The court of appeals vacated the trial court's order granting Dr. Solinger and Norton summary judgment and remanded the case on a single issue: on remand, the trial court needed to comment on the six-factor analysis adopted by the court of appeals in Ward v. Housman, 809 S.W.2d 717 (Ky. App. 1991), before rendering summary judgment. Otherwise, the court of appeals concluded that the trial court used sound discretion in determining that the doctrine of *res ipsa loquitur* was not applicable and that expert testimony was required to establish claims of medical negligence in this case. (Court of Appeals' Opinion, pp. 9-10).

Several of the grounds argued in Pearson's brief are argued for the first time, have not been preserved for appeal, and must be disregarded by this Court. Skaggs v. Assad, 712 S.W.2d 947, 950 (Ky. 1986). Other issues raised in Pearson's brief were raised in her briefs before the court of appeals, but were not addressed by that court. By choosing not to address these issues, the court of appeals affirmed the trial court's handling and rulings regarding Dr. Solinger's and Norton's compliance with CR 56.01. Steel Technologies, Inc. v. Congleton, 234 S.W.3d 920, 926-27 (Ky. 2007).

ARGUMENT

I. With Pearson Not Having An Expert to Establish Breach or Causation, the Trial Court Did Not Err in Finding that It was Legally Impossible for Pearson to Prove Her Malpractice Claim.

Without experts to support her claims, Pearson has attempted to prove her burden in this medical malpractice case with lengthy references to medical textbooks and web sites, her own interpretation of her medical records, and unsubstantiated conversations

she has had with her treating physicians, all of which were not part of the evidence of record at the trial court or on appeal.

To defeat summary judgment, however, a party cannot merely rely on its own claims or arguments without significant evidence. *See* Wymer v. JH Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001). Instead, a party opposing summary judgment has an obligation to do more than rely upon the mere allegations of the pleadings and must, by counter affidavit or other testimony *in the record*, produce evidence or testimony supporting the existence of a genuine issue of material fact. Continental Gas Co. v. Belknap Hardware & Mfg. Co., 281 S.W.2d 914 (Ky. 1955) (emphasis added). When summary judgment was granted in this case, Pearson had none.

Pearson cannot escape the fact that the law requires her to have a supportive expert in a medical negligence case, yet she has none. Without an expert medical witness to establish deviation from the applicable standard of care, Pearson could not prevail on her medical malpractice claim under any circumstance. Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476, 480 (Ky. 1991). Having failed to introduce evidence sufficient to establish the respective standards of care, it was a legal impossibility for Pearson to prove the essential element of any breach thereof. The trial court properly granted summary judgment.

Experts were required for Pearson to carry her burden in this case because Pearson's medical history was complex and the standard of care relating to the administration of an anticoagulation drug is not within the common knowledge of jurors. (Court of Appeals' Opinion, pp. 9-10). Yet, Pearson did not produce the necessary expert witnesses to support her claim. As of December 12, 2005, when the trial court granted

summary judgment, Pearson made no disclosure of a single expert, nor did she advance any reason why an expert had not been presented in some form.

The court of appeals has assumed that Pearson would *at some point* be able to produce experts to support her claim; yet, how can a trial court be expected to make rulings on mere speculation or a party's unsupported promises?

This Court has held that a summary judgment analysis should focus on "*what is of record* rather than *what might be presented at trial.*" Welch v. American Pub. Co. of Ky., 3 S.W.3d 724, 730 (Ky. 1990) (emphasis added). At the time summary judgment was granted, the record reflected that there was no genuine issue of material fact as to the liability of any of the defendant/healthcare providers.

Pearson argued that the trial court's order dismissing her action was a discovery sanction. This case had nothing to do with discovery; instead, it was controlled by court orders and by Pearson's failure to carry her burden to support her allegations with expert testimony in a *prima facie* case of medical negligence.

The undisputed facts remain: Without objection, the trial court's order required that Pearson disclose her experts by October 1, 2005. Without objection, that same order provided that compliance was "mandatory." When Pearson requested an extension two days after this deadline had passed, the trial court extended the deadline by an additional sixty days. Pearson did not comply with the deadline. Pearson did not comply with the trial court's order. Pearson did not comply with the requirements of CR 26.02. Pearson did not request another extension of time. Pearson did not provide the trial court with any reason as to why she was unable to comply with the court's order and her expert disclosure obligations.

Any information adequate for a Rule 26.02 disclosure should have been accessible to the trial court *before* Pearson filed her complaint. Raine v. Drasin, 621 S.W.2d 895, 902 (Ky. 1981). The trial court instituted a trial order compelling Pearson to produce expert information within a specific and reasonable period of time (less than five months before trial) and warned Pearson several times of potential dismissal of the case if she could not comply.

When a trial court's orders are disobeyed on *material* matters, the trial court must have discretion to enforce its orders, or its orders will be rendered meaningless. Rules of procedure and court orders do have a legitimate purpose. Trial courts should be empowered with the discretion to enforce their orders on *material* matters.

Pearson's actions are tantamount to cases where a plaintiff does not obtain an expert even after being ordered to do so by the trial court. If a plaintiff refuses to obtain an expert, gambling on her convictions that an expert is not necessary in her case and decides not to call one, even after the trial court has determined that an expert is necessary, summary judgment is appropriate. Green v. Owensboro Medical Health Sys., Inc., 231 S.W.3d 781, 783-84 (Ky. App. 2007). Despite the similarities between Green and this case, no where in her 65-page brief did Pearson address or attempt to distinguish her case from Green. As in Green, summary judgment was appropriate in this case because, without the necessary expert testimony, it was a legal impossibility for Pearson to establish her burden of proving a *prima facie* case of medical negligence.

Summary judgment is appropriate when a party is given an opportunity to present evidence showing a disputed material fact exists and the court ultimately finds no such dispute exists. Green, 231 S.W.3d at 784 (*citing* Hoke v. Cullinan, 914 S.W.2d 335, 337

(Ky. 1995)). Pearson had ample opportunity to present evidence showing a disputed material fact, but could not do so. The trial court ultimately found that no such factual dispute existed and appropriately granted Dr. Solinger and Norton summary judgment.

II. The Doctrine of *Res Ipsa Loquitur* Does Not Apply.

The trial court determined, and the Court of Appeals affirmed, that *res ipsa loquitur* did not apply in this medical malpractice case.

Pearson's Complaint confirms the absolute need for Pearson to have presented expert testimony at the trial court level. Her Complaint states that she was suing for the following injuries: "irreversible vascular and/or cerebral injury"; "dilatation of the heart, left atrium and left ventricle"; "pleural effusion of her left lower lung"; "pericardial pleural"; "atrial fibrillation"; "toxic" blood; "internal bleeding of her organ and/or organs"; "brain damage"; "cerebral aneurysms"; and "significant damage to her central nervous system, heart, lungs and brain". (T.R. 1-7, Complaint, ¶ 11, 12, 14, 17, 18, 20). Pearson's concern in this case had to do with the dosage and side effects of her medications. The risk of *different* medications at *different* doses in the face of Pearson's complex presentation cannot be determined by a jury without the assistance of appropriate medical expert testimony.

May a jury decide, without the guidance of an appropriate medical expert, how best to surgically and medically manage someone suffering from Marfan's Syndrome MVP, mistrial insufficiency, tricuspid valve prolapse, mild tricuspid insufficiency, mildly dilated aortic route, mildly dilated pulmonary artery with significant aortic insufficiency, and atrial fibrillation? Without medical expert testimony on this issue, the facts of this case fall outside the doctrine of *res ipsa loquitur*.

"Ordinarily negligence cannot be inferred from an 'undesirable result.'" Perkins v. Hausladen, 828 S.W.2d 652, 655 (Ky. 1992) (*quoting* PROSSER AND KEETON, TORTS, Sec. 39, 259 (5th ed. 1984)). Unless a "laymen is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care[,]" expert testimony is required to prove a deviation from the standard of care in a medical malpractice action. Id. at 655.

The types of cases in which the doctrine of *res ipsa loquitur* would be appropriate consist of those "where the surgeon leaves a foreign object in the body or removes or injures an inappropriate part of the anatomy." Id. (*quoting* PROSSER AND KEETON, TORTS, Sec. 39, 256 (5th ed. 1984)). For example, Kentucky courts have applied the doctrine of *res ipsa loquitur* in medical malpractice actions in which a sponge was left in the patient during a surgical procedure, a bone was broken during therapy, and a scalpel blade was left in the patient's bladder after abdominal surgery. Laws v. Harter, 534 S.W.2d 449 (Ky. 1975); Meiman v. Rehabilitation Ctr., Inc., 444 S.W.2d 78 (Ky. 1969); City of Somerset v. Hart, 549 S.W.2d 814 (Ky. 1977), respectively.

Pearson's cited authority does not support the contention that *this* medical malpractice case did not require support from medical expert testimony. A lay person could not conclude from common knowledge or experience that the prescriptions provided to Pearson by Dr. Solinger should have been different or were inappropriate.

To obtain an understanding of the effect of certain drugs administered to a patient requires an expert because knowledge of these effects is "beyond the pale of common knowledge." Fisher v. Heckerman, 772 S.W.2d 642, 645 (Ky. App. 1989) (*citing* Howard v. Kingmont Oil Co., 729 S.W.2d 183, 186 (Ky. App. 1987)).

Pearson was on a chronic regimen of Amniodarone at the time of the alleged negligence. The Physicians Desk Reference and web sites, upon which Pearson relies, do not contradict the medical care she received. Pearson's misuse of these texts demonstrates the dangers (and risks of injustice) when lay persons interpret medical texts without expert guidance. That is why such literature is not even admissible without the expert on the witness stand. KRE 803(18).

The only other exception to the rule requiring expert testimony in a medical malpractice case occurs when a "defendant doctor makes admissions of a technical character from which one could infer that he or she acted negligently." Andrew v. Begley, 203 S.W.3d 165, 170-71 (Ky. App. 2006); Court of Appeals' Opinion, p. 9. As both the trial court and the court of appeals determined, this second exception to the expert testimony requirement in medical negligence actions also does not apply in this case. Dr. Solinger has made no admission whatsoever from which one could infer that he, his partners, or his group acted negligently.

This is plainly not a *res ipsa loquitur* case. This is a medical malpractice case that requires the support of expert opinions to prove a *prima facie* case of negligence. The Court of Appeals' Opinion and the trial court's ruling on this issue should be affirmed.

III. Dr. Solinger's "Motion for Ruling on Defendants' Motion for Summary Judgment" Did Not Raise Any New Issues.

A. Dr. Solinger's Motion Complied With CR 56.01.

Under CR 56.01, a party may move for summary judgment "at any time after the expiration of 20 days from the commencement of the action" and may do so "with or without supporting affidavits[.]" CR 56.01. Norton Hospital moved for summary judgment on May 19, 2005. This motion raised Pearson's failure to support her claim

with expert opinions demonstrating that there was a deviation from the standard of care. (Motion for Summary Judgment on Behalf of Defendant, Norton Hospitals, Inc., May 19, 2005). Dr. Solinger's motion also raised Pearson's admissions that the defendant/healthcare providers neither deviated from standards of care nor contributed to any alleged injury.

After the trial court granted Pearson an extension of time, Pearson responded but failed to address her lack of expert testimony. In addition, the trial court reminded Pearson at status conferences in July and October that these motions remained pending. The basis for the motions, including Pearson's lack of expert witnesses, were also clarified for Pearson at that time.

Plaintiff never objected to her expert deadline. On December 1, 2005, after Pearson had been granted extensions of time by the trial court, Pearson failed to disclose her experts or provide the trial court with any other proof of a genuine issue of material fact in this medical malpractice case. Prior to that date, Pearson never moved for an extension of time to disclose this information. The dates simply came and went without Pearson tendering anything to the trial court.

On December 12, 2005, the trial court concluded that "Plaintiff is unable to sustain her burden of proof against any of the defendants without competent expert testimony[,]" and, in the absence of any expert to testify for Pearson, "there are no genuine issues of material fact[.]" The trial court entered summary judgment in favor of Dr. Solinger and Norton.

B. Dr. Solinger's "Motion for Ruling on Defendants' Motion for Summary Judgment" Did Not Raise Any New Issues.

The fact that Pearson had not provided expert testimony to support the allegations of medical malpractice was not a new issue. By December, Pearson's failure to disclose any expert witnesses constituted noncompliance with the trial court's order. The fact that this coincided with prior motions for summary judgment based on the absence of any expert does *not* make it a "new ground."

Pearson claims that CR 56.03 provides her with the "right to file Affidavits in opposition to a Motion for Summary Judgment." (Pearson's Brief, p. 44). Pearson had ample opportunity to file affidavits during the *seven months* Dr. Solinger's motion for summary judgment was pending before the trial court, but she failed to do so. If Pearson indeed had expert witnesses ready to support her allegations before December 1, 2005, then she had a *duty* to comply with the trial court's order and disclose them. Pearson did not.

IV. Pearson's Other Arguments Should Not Be Considered by this Court.

Pearson argues that the trial court violated Jefferson Rules of Practice 401 by not following the 20-day period for a response by opposing counsel when a motion for summary judgment is filed. Yet, Pearson had ample opportunity to respond with an expert disclosure over seven months. The 20-day response period under JRP 401 was met.

Pearson argues that Dr. Solinger should not have attached a summary of Pearson's voluminous medical records to one of his trial court briefs. Pearson had these records, and a summary comports with KRE 1006. Besides, the summary was never the basis for any motion or ruling at the trial court level or at the court of appeals.

CONCLUSION

Due to the nature of the medical issues involved in this case, expert testimony had been required. After extensions and court orders requiring this necessary expert testimony, Pearson offered none. When, by the deadline agreed to by Pearson, no expert existed, dismissal was appropriate. It was not a delay in disclosure but a complete absence that supported the trial court's judgment.

Respectfully submitted,

James P. Grohmann
Katherine Kerns Vesely
O'Bryan, Brown & Toner
1500 Starks Building, 455 South Fourth Street
Louisville, KY 40202
Counsel for Appellants/Cross-Appellees, Robert Solinger, M.D., Christopher Johnsrude, M.D., Michael Recto, M.D., and Pediatric Cardiology Associates, P.S.C.