

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

NO. 2011-CA-01523

ETHEL L. BUCKLEY

APPELLANT

VERSUS

SINGING RIVER HEALTH SYSTEM

APPELLEE

BRIEF OF APPELLEE

Oral Argument Not Requested

Appeal from Jackson County Circuit Court

Cause No. CI-2005-00143(1)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellee certifies that the following persons and/or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Appellant, Ethel L. Buckley
2. Appellee, Singing River Health System, a community owned hospital system consisting of two entities, Singing River Hospital and Ocean Springs Hospital.
3. Honorable Robert Krebs, Circuit Court Judge for the Nineteenth District
4. Counsel for Appellant: Citrin Law Firm, P.C., Daphne, Alabama
5. Counsel for Appellee: Dogan & Wilkinson, PLLC, Pascagoula, MS


THOMAS L. MUSSELMAN
Counsel for Appellee

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STATEMENT OF THE ISSUES

- ISSUE 1: The Court correctly held that Ms. Buckley failed to properly designate expert witnesses pursuant to the Mississippi Rules of Civil Procedure, the Uniform Circuit and County Court Rules and the Scheduling Order entered in the matter.
- ISSUE 2: The Court correctly found that Ms. Buckley failed to produce competent medical testimony that the injury she alleges to have suffered was proximately caused by trauma related to a fall on December 3, 2003.

STATEMENT OF THE CASE

Nature of the Case and Disposition Below

This matter commenced upon the filing of a Complaint in the Circuit Court of Jackson County, Mississippi, on June 28, 2005. The Plaintiff, Ethel L. Buckley (hereafter "Buckley"), alleges negligence on the part of the Defendant, Singing River Health System (SRHS), for injuries she allegedly suffered when she fell while working as an employee of Morrison's Cafeterias at Singing River Hospital on December 3, 2003. Singing River Health System is a community hospital system consisting of two hospitals of which Singing River Hospital is one. Therefore, any suit must be filed under the provisions of the Mississippi Tort Claims Act. The Act provides that any case filed under its provisions shall be heard by a judge sitting without a jury. § 11-46-13, *Mississippi Code of 1972 (as amended)*.

The case was assigned to Circuit Court Judge Robert Krebs. Discovery ensued, however, the matter was delayed by Hurricane Katrina and substitution of counsel for Ms. Buckley. Pursuant to the

Scheduling Order entered in this matter, Buckley was required to designate expert witnesses by November 1, 2010. Singing River Health System filed a Motion for Summary Judgment on April 1, 2011, based on Plaintiff's failure to designate expert witnesses. Judge Krebs issued his ruling granting summary judgment for SRHS from the bench on April 14, 2011, and judgment was entered on April 20, 2011. Buckley filed a Motion to Alter or Amend Judgment on April 28, 2011. The Court overruled the motion on September 19, 2011. Buckley filed her appeal on October 3, 2011.

STATEMENT OF THE FACTS

Ethel L. Buckley alleged an injury when she claimed to have slipped on a wet floor while employed by Morrison's Cafeterias at Singing River Hospital on December 3, 2003. Morrison's had a contract to provide food services to Singing River Health System (SRHS). Ms. Buckley filed suit against Singing River Health System in June of 2005 alleging negligence. SRHS answered and propounded discovery to Ms. Buckley.

Interrogatory Number 3 requested information on expert witnesses including name, address, telephone number of "each person" expected to be called as an expert witness. The interrogatory went on to request the information detailed in Rule 26(b)(4) of the Mississippi Rules of Civil Procedure including the subject matter of anticipated testimony, the substance of the facts and opinions to which the expert would testify, a summary of the grounds and the basis for each opinion held by the expert witness and documents upon which the witness relied to form any expert opinion. Ms. Buckley's response to the interrogatory was : "It is anticipated that Plaintiff will call treating physicians to testify as to their diagnosis, prognosis, examination and treatment of her and there [sic] medical opinions thereof. Plaintiff will supplement, if necessary." *Appellee's Record Excerpt #1*. Ms.

Buckley produced this response on April 9, 2007. Ms. Buckley's response to Interrogatory Number 3 was never supplemented.

An Agreed Scheduling Order was entered by the Court on October 5, 2010. *Appellee's Record Excerpt #2*. The Scheduling Order stated: "Plaintiff shall designate all her expert witnesses on or before November 1, 2010, providing such information as specified by the Mississippi Rules of Civil Procedure." Ms. Buckley failed to enter any designation of expert witnesses nor were her discovery responses supplemented to identify any expert witnesses.

The Scheduling Order set the trial date for April 25, 2011. The deadline for dispositive motions was set for April 1, 2011. On April 1, 2011, SRHS filed its motion for summary judgment asserting that Ms. Buckley had not designated any expert witnesses pursuant to the Mississippi Rules of Civil Procedure and the Scheduling Order entered in the matter. Pursuant to Rule 4.04(A) of the Uniform Circuit and County Court Rules, experts could not be designated within the sixty day period prior to the April 25, 2011, trial date absent special circumstances. Thus, the time for expert designation had expired under the Mississippi Rules of Civil Procedure, the Uniform Circuit and County Court Rules and the Scheduling Order entered by the Court in the matter. Judge Krebs found that Ms. Buckley had failed to properly designate expert witnesses pursuant to those Rules.

Furthermore, Judge Krebs reviewed the deposition testimony of Edward Schnitzer, M.D., taken at the behest of Ms. Buckley. *Appellee's Record Excerpt #3*. Judge Krebs determined that Dr. Schnitzer lacked the factual basis to render opinion testimony as he had begun treating Ms. Buckley in August of 2009, failed to review any prior medical records to make his opinions, and admitted that the source of information by which he determined that Ms. Buckley suffered from injuries related to an alleged fall over five years prior to his examination came solely from a conversation with Ms.

Buckley. Dr. Schnitzer admitted in his deposition that Ms. Buckley's alleged pain could be the result of other causes than the alleged fall over five years prior to his examination. Judge Krebs found that Dr. Schnitzer lacked the requisite factual knowledge to make a determination that Ms. Buckley suffered any injury related to an alleged fall five years prior to his examination and about which the sole source of his knowledge came directly from the patient.

SUMMARY OF THE ARGUMENT

Appellant, Ethel L. Buckley, was required to produce expert witness identification and opinions pursuant to the Mississippi Rules of Civil Procedure, the Uniform Circuit and County Court Rules and the Agreed Scheduling Order entered by the trial court. Ms. Buckley failed to adhere to the Rules and Scheduling Order. Ms. Buckley never submitted any designation of expert witnesses, never supplemented her discovery response to provide the required information and failed to follow the deadlines set by the trial court.

Ms. Buckley noticed the deposition of a treating physician who had insufficient factual knowledge to pass the tests under Mississippi Rule of Evidence 702 to be admitted as an expert witness. Specifically, Dr. Edward Schnitzer based his opinion on the fact that Ms. Buckley told him that her injuries were caused by a fall. He failed to review any other records to make a determination as to the medical issues relevant in the matter. Dr. Schnitzer admitted in his deposition that other medical problems could cause the pain related to him by Ms. Buckley.

ARGUMENT

Standard of Review

The Appellate Courts apply a *de novo* standard of review of a lower court's grant or denial of summary judgment. *Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 1037, 1040 (Miss. 2003). Mississippi Rule of Civil Procedure 56(c) provides, in pertinent part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories 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." Miss. R. Civ. P. 56(c). "[W]hen a party, opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 684 (Miss.1987).

"Trial courts have considerable discretion in discovery matters, and ... will not be overturned unless there is an abuse of discretion." *Beck v. Sapet*, 937 So.2d 945, 948 (Miss.2006) (citing *Robert v. Colson*, 729 So.2d 1243, 1245 (Miss.1999)). See also *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So.2d 1037, 1042 (Miss.2003) ("[o]ur trial judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases").

Negligence is not presumed, rather it is presumed ordinary care has been used. The person charging negligence must show that the other party, by his act or omission, has violated some duty incumbent upon him and thereby caused the injury complained of. *Magnolia Hospital v. Moore*, 320 So.2d 793, 800 (Miss. 1975)(citing *DeLaughter v. Womack*, 164 So.2d 762, 769)(Miss. 1964)).

Unless an abuse of discretion is evident, a trial judge's determination on the qualification of an expert will not be disturbed on appeal. *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So.2d 1346, 1357 (Miss.1990).

The admission of expert testimony is within the sound discretion of the trial judge. “Therefore, the decision of a trial judge will stand ‘unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion.’” *Kilhullen v. Kansas City S. Ry.*, 8 So.3d 168, 172 (Miss.2009)(internal citations omitted). *See also Moss v. Batesville Casket Co., Inc.*, 935 So.2d 393, 404 (Miss.2006) (citing *Tunica County v. Matthews*, 926 So.2d 209, 216 (Miss.2006)) (as the trial court operates as the gatekeeper as to the admissibility of expert testimony, we examine the trial court's decision under an abuse of discretion standard of review).

Ms. Buckley Failed to Properly Designate Expert Witnesses

The trial court dismissed the instant matter due to the failure by Ms. Buckley to properly designate any expert witnesses pursuant to the Mississippi Rules of Civil Procedure, the Uniform Circuit and County Court Rules and the Scheduling Order entered by the court. Buckley is required to produce expert testimony to prove that she suffered an injury proximately caused by a breach of a duty owed her by Singing River Health System. *Day v. Ocean Springs Hospital*, 923 So.2d 246, 252 (Miss. App. 2006). The nature of a medical injury is beyond the common knowledge of laypersons and requires expert medical testimony. Buckley failed to properly designate any witness qualified to testify that the injury she alleges was proximately caused by an injury suffered at Singing River Hospital.

The instant matter is uncannily similar to the factual scenario in *Bowie v. Montfort Jones Memorial Hospital*, 861 So.2d 1037 (Miss. 2003). In *Bowie*, the plaintiff failed to designate expert

witnesses pursuant to the scheduling order entered by the trial court. The trial court granted summary judgment to the defendant based upon the failure of the plaintiff to identify expert witnesses. The Court of Appeals reversed stating that dismissal was too harsh a result for a discovery violation. The Supreme Court granted *certiorari* and reversed the Court of Appeals, reinstating the trial court's grant of summary judgment.

The facts as stated in the opinion show that the trial court entered a scheduling order defining the dates for the designation of experts for both parties. The plaintiff failed to designate any expert witnesses by the deadline set in the scheduling order. The defendants filed their expert designations pursuant to the scheduling order deadline. Defendants then filed motions for summary judgment based upon the argument that the plaintiff could not prove a *prima facie* case for negligence as no expert witness had been timely designated. The plaintiff filed a late designation which the trial court found to be inadequate to defeat the motion for summary judgment. *Bowie*, at pp. 1039-1040.

In the instant matter, the trial court entered a scheduling order setting November 1, 2010, as the deadline for Buckley to designate expert witnesses. Buckley failed to designate any experts, either prior to November 1, 2010, or thereafter. SRHS designated its expert witnesses by the deadline set in the scheduling order. SRHS filed a motion for summary judgment arguing that Buckley failed to file a proper expert witness response to SRHS's interrogatory, failed to obey the Agreed Scheduling Order which required expert witness submission compliant with the Mississippi Rules of Civil Procedure by a set deadline and that the scheduling order deadline to designate expert witnesses had expired. Buckley responded that her interrogatory response was sufficient to put SRHS on notice that any treating physician would be called as an expert witness.

Buckley responded to SRHS's discovery interrogatory requesting expert witness information

by a generalized statement “that Plaintiff will call treating physicians to testify as to their diagnosis, prognosis, examination and treatment of her and there [sic] medical opinions thereof. Plaintiff will supplement, if necessary.” *Buckley’s Response to Interrogatory Number 3, Appellee’s Record Excerpt #1*. This response was provided in April of 2007, nearly two and a half years prior to Buckley’s first visit to Dr. Schnitzer. Buckley could not have anticipated naming Dr. Schnitzer as a treating physician expert witness two and a half years prior to her being treated by him. Buckley’s response to Interrogatory Number 3 was never supplemented despite the statement contained in her response.

Rule 26(b)(4) of the Mississippi Rules of Civil Procedure is very clear on the information required to be produced in response to a discovery request regarding expert witness identification.

Rule 26(b)(4)(A)(i) states:

A party may through interrogatories require any other party to identify *each person* whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

M.R.C.P., Rule 24(b)(4)(A)(i), emphasis added.

The Scheduling Order entered in the instant matter required both the Plaintiff and the Defendant to identify expert witnesses by set deadlines and to provide “such information as specified by the Mississippi Rules of Civil Procedure.” *Appellee’s Record Excerpt #2, Scheduling Order of October 5, 2010*. Buckley not only failed to identify “each person” in her discovery response but also failed to file any designation of expert witnesses as required by the Scheduling Order. Ms. Buckley’s counsel are Mississippi licensed attorneys and should be familiar with the Mississippi Rules of Civil Procedure.

Buckley failed to seasonably supplement her discovery responses. “Discovery responses are to be seasonably supplemented pursuant to Rule 26(f) of the Mississippi Rules of Civil Procedure.

It has been held that “[s]easonably does not mean several months later. It means immediately.” *Bowie*, at 1041, citing *West v. Sanders Clinic for Women, P.A.*, 661 So.2d 714, 721 (Miss. 1995). Buckley’s initial response to SRHS’s expert interrogatory was filed in 2007. Buckley had the duty to seasonably supplement her responses to provide the required information on Dr. Schnitzer. She failed to do so at any time. Buckley merely noticed his deposition without submitting any of the required information pursuant to the Rules and the Agreed Scheduling Order.

Counsel for SRHS objected in the deposition to Dr. Schnitzer providing expert opinion testimony. *Appellee’s Record Excerpt #3, Schnitzer depo.*, at p. 10. Counsel agreed that SRHS could have a continuing objection to opinion testimony elicited from Dr. Schnitzer. Yet, Buckley never attempted to remedy the failure to properly designate Dr. Schnitzer as an expert witness. As Buckley intended Dr. Schnitzer to be deposed as a medical expert and the deposition could then be offered at trial, it is equivalent to Buckley producing expert testimony on the day of trial with no prior notice.

This is not a matter of the mere violation of a discovery rule but one compounded by the failure to comply with the trial court’s scheduling order. “Our trial court judges are afforded considerable discretion in managing the pre-trial discovery process in their courts, including the entry of scheduling orders setting out various deadlines to assure orderly pre-trial preparation resulting in timely disposition of the cases.” *Bowie*, at 1042. *See also, Mallett v. Carter*, 803 So.2d 504, 507-08 (MSCA 2002)(trial court did not abuse discretion in dismissing case for failure to timely designate expert witnesses within time allowed by the trial court’s scheduling order). In the instant matter, the trial court did not abuse its authority in dismissing the case for Buckley’s failure to designate expert witnesses pursuant to the court’s scheduling order.

Further, Buckley failed to seasonably supplement her interrogatory responses to provide the

information required by Rule 26(b)(4). The scheduling order also required Buckley to produce expert witness information as specified by the Mississippi Rules of Civil Procedure. Despite the demands of the aforementioned Rules and the Scheduling Order, Buckley failed to designate any expert witnesses. The trial court was within its discretion in granting summary judgment as Buckley failed to properly designate or identify any expert witness to testify on the critical elements of a claim of negligence against Singing River Health System.

Ms. Buckley Failed to Produce Competent Medical Testimony

Expert witnesses must be qualified under Rule 702 of the Mississippi Rules of Evidence to give opinion testimony. Edward Schnitzer, M.D., lacked sufficient factual knowledge to provide expert opinion testimony in this matter. The information Dr. Schnitzer possessed related to this matter was received strictly from what Ms. Buckley told him concerning her condition.

In *John Morrell & Company v. Schultz*, 208 So.2d 906 (Miss. 1968), the plaintiff claimed to have suffered food poisoning from a meat product marketed by the defendant. The plaintiff's doctor testified that in his opinion the product was defective and caused the plaintiff's illness based strictly upon the history she provided. On cross examination, the doctor admitted that his opinion was based upon what the plaintiff told him and that her illness might as easily have resulted from another cause. The Court stated that "[i]t is well settled in this jurisdiction that a verdict may not be based upon surmise or conjecture and that to prove a possibility only is insufficient to make a jury issue." *Id.*, at 907.

Likewise, in the instant matter, Dr. Schnitzer formed any opinion he may have held based strictly upon the history provided by his patient, Ms. Buckley. He reviewed no other physician's

records, sought out no information about any prior preexisting illnesses nor did he review any records from her worker's compensation case. *Appellee's Record Excerpt #3, Schnitzer depo.*, at pp. 23-27. He admitted in his deposition that Ms. Buckley had degenerative changes in her back and could be experiencing pain for more than one reason. *Schnitzer depo.*, at p. 28. Dr. Schnitzer was not qualified to be accepted as an expert witness due to his lack of knowledge of the specific facts of this matter to testify as to Ms. Buckley's alleged medical condition and whether it was proximately caused by any negligence by SRHS. *Day v. Ocean Springs Hospital*, 923 So.2d 246, 252 (Miss. App. 2006).

The trial court reviewed the information provided by Buckley concerning the content of Dr. Schnitzer's anticipated testimony. The trial court determined that the testimony was insufficient to raise an issue of material fact in dispute. The trial court properly found that Dr. Schnitzer lacked the factual knowledge to provide expert testimony in this matter.

CONCLUSION

The trial court did not abuse its discretion, was not manifestly wrong, was not clearly erroneous and did not apply an erroneous legal standard in its ruling. The trial court issued a correct ruling based upon the lack of competent evidence produced by Buckley to prove the critical elements of a claim of negligence against Singing River Health System.

Respectfully submitted,

SINGING RIVER HEALTH SYSTEM

BY: _____


THOMAS L. MUSSELMAN
Counsel for Appellee

CERTIFICATE OF SERVICE

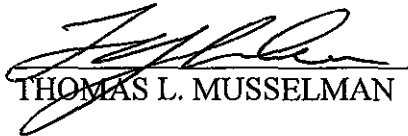
I, THOMAS L. MUSSELMAN, of the firm of Dogan & Wilkinson, PLLC, do hereby certify that I have served by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing

Appellee's Brief to:

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THIS, the 28th day of FEBRUARY, 20 12.


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