Emmitt Ray Edwards v. Dr. Richard W. Baehler; and

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NOT TO BE PUBLISHED

OPINION

AFFIRMING ** ** ** ** ** BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: Emmett Ray Edwards (Edwards) appeals from the circuit court's order dismissing his medical malpractice claims against Dr. Richard W. Baehler and Nephrology Associates, Inc. (Dr. Baehler). On appeal, Edwards argues that the circuit court based its dismissal on a misinterpretation of a settlement agreement from the multidistrict class action litigation involving the drug Redux.

For the following reasons, we affirm.

FACTS

The underlying facts are not in dispute. Edwards's wife, Teresa, suffered from kidney failure. She had found a matching donor; however, before her physicians would undertake a kidney transplant, they advised weight loss. To that end, Dr. Baehler prescribed Redux, a weight loss medication. Edwards alleges that, after she began taking Redux, Teresa developed a number of symptoms, including shortness of breath, peripheral neuropathy, abnormal tiredness, dizziness, pain, insomnia, increased glucose levels, edema in her extremities, and intravascular clotting. Edwards alleges that he and/or Teresa advised Dr. Baehler of these symptoms but that Dr. Baehler, or his office personnel, advised Teresa to continue taking Redux. Three and a half months after she began taking Redux, Teresa died.

In 1998, approximately one year after Teresa's death, Edwards filed a medical malpractice claim against Dr. Baehler and products liability claims against Interneuron Pharmaceuticals, Inc. (Interneuron), the manufacturer of Redux, and American Home Products/Wyeth-Ayerst Laboratories (Wyeth), the distributors of Redux. After filing his claim, Edwards obtained and filed a report from Nachman Brautbar, M.D. In his report, Dr. Brautbar reviewed Teresa's medical records, noting in particular the records related to her last hospitalization and death. Based on his review of those records, Dr. Brautbar stated that "[i]t was below the standard of care to administer Redux to a patient, specifically this patient, without informed consent . . . [and] to administer Redux for a period of 4 months without medical supervision." Dr. Brautbar did not render any other opinions.

Edwards also obtained and filed a report from Alice Oldfield, FNP, MSN. In her report, Ms. Oldfield stated that there is no indication in the medical records that Teresa was advised of the potential side effects of Redux. Furthermore, Ms. Oldfield stated that there was no indication in the medical records that Dr. Baehler had examined Teresa before or after prescribing Redux. Ms. Oldfield indicated that the preceding amounted to a violation of the standard of care. It is doubtful that Ms. Oldfield's opinion would be admissible with regard to the appropriate standard of care for Dr. Baehler; therefore, we do not further consider her opinion.

During the following nine years, Wyeth moved to involuntarily joinEdwards in a national class action against Wyeth. Edwards resisted that joinder.[1]

In 2002, the class action settled; however, the federal district court handling the class action did not render a final decision regarding Edwards's joinder until 2007. The class actionsettlement agreement provided for a release of all claims against Wyeth and for the release of claims against physiciansresulting from "the prescription or dispensing of . . . Redux in a manner consistent with the product labeling; and/or" if the physician's "liability stems solely from having prescribed or dispensed . . . Redux." The agreement further providedthat"[p]hysicians are not Released Parties with respect to any claims based on their independent negligence or culpable conduct . . . ." We note that, pursuant to the settlement agreement, Edwards dismissed his claims against Wyeth.

Meanwhile, the Fayette Circuit Court issued several orders requiring the parties to show cause why Edwards's claims pending in that court should not be dismissed for lack of prosecution. Based on Edwards's responses and the then pending class action litigation, the court did not dismiss Edwards's claims.

In 2003, after the settlement in the class action had been approved, but before Edwards's status as a member of the class had been resolved, Dr. Baehler filed a motion to dismiss. In that motion, Dr. Baehlerargued that all of Edwards's claims related to Redux were released by the settlement in the class action. Furthermore, Dr. Baehler argued that any claims not related to Redux shouldbe dismissed because Edwards had failed to prosecute them. Edwards filed a motion to stay the Fayette Circuit Court proceedings pending final resolution of his status as a member in the class action. The court granted Edwards's motion to stay the Fayette Circuit Court proceedings and stated that it would address Dr. Baehler's motion to dismiss once the issues regarding Edwards's membership in and other matters related to the class action were resolved.

In July 2007, the Fayette Circuit Court issued an order requiring the parties to show cause why Edwards's claims should not be dismissed for lack of prosecution. Following a short hearing, at which Edwards was not represented, the court dismissed Edwards's claims against Dr. Baehler but did not dismiss his claims against Interneuron or Wyeth. Edwards then filed a motion asking the Fayette Circuit Court to set aside the dismissal, noting that the Fayette Circuit Court case had been stayed in 2003 and that the stay had not been lifted.

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In September 2007, the Fayette Circuit Court held a hearing on Edwards's motion. The court noted that there was no written order regarding a stay of proceedings in the record; however, the parties acknowledged that a previous circuit court judge had verbally stated that the proceedings should be stayed pending resolution of issues in the class action. The Fayette Circuit Court did not issue a written order setting aside its dismissal but did issue an order scheduling a pretrial conference and, at least by implication, set aside the order of dismissal.

It appears that the parties attended a pretrial conference on October 15, 2007. We have no record of what transpired at that conference other than an order from the court giving the parties time limits to brief the issues raised by Dr. Baehler in his 2003 motion to dismiss. Following receipt of those briefs, the court issued an order on January 15, 2008, dismissing all of Edwards's claims against Dr. Baehler. In dismissing Edwards's claims against Dr. Baehler, the court stated:

On the last page of his report, Dr. Brautbar reiterates that it would be his Opinion that ". . . it was below the standard of care to administer this medication (Redux) without informed consent, and to administer that medication (Redux) without medical supervision over a period of 4 months." Comparing these Opinions as to the alleged negligent conduct of moving Defendants Baehler and Nephrology Associates, Inc. with the Settlement Agreement, Subsection I.48(e)(4), it is obvious that the claims upon which the Plaintiff could offer expert testimony are claims ". . . based on the physician's prescription or dispensing of Redux." As such, the Settlement Agreement prohibits further prosecution of these claims against the moving Defendants in the case at bar as they are included in the global settlement of theClass Action Litigation. Subsection I.48(e)(4) includes these moving Defendants as "Released Parties" from any claims for having prescribed or dispensed Redux.

Edwards then filed a motion to alter and vacate under Kentucky Rule(s) of Civil Procedure (CR) 59.05. In that motion, Edwards argued that the circuit court had misinterpreted and misapplied the settlement agreement. He also argued that he had asserted claims of negligence that were completely independent of the prescription of Redux, including a failure to change the type of dialysis prescribed and a failure to adequately respond to Teresa's "dramatically rising blood sugar levels."

Edwards also filed a "Declaration of Jeffrey M. Blum, Esq. to Clarify Scope of Expert Testimony that Plaintiff Intends to Introduce at Trial." In that document, counsel stated that the report from Dr. Brautbar was not intended to set forth all of his opinions, but only those opinions related to whether Dr. Baehler had acted "negligently in prescribing Redux and failing to act with the necessary due care." Furthermore, counsel stated that he had "spoken with Dr. Brautbar on repeated occasions about his likely testimony and [Dr. Brautbar] has made clear that he views the Nephrology Associates Defendants' care of Ms. Edwards as being clearly negligent with respect to dialysis, blood work and other matters not involving Redux."

Finally, Edwards filed a document he purported to be part of the Redux labeling. However, because neither that document nor counsel's declaration were filed before the circuit court issued its

summary judgment, we cannot substantively rely on them in reviewing this matter. Gullion v. Gullion, 163 S.W.3d 888, 893 (Ky. 2005).

In his response, Dr. Baehler argued that the circuit court had correctly determined that the opinions of Dr. Brautbar placed this claim within the purview of the settlement agreement and correctly dismissed Edwards's claim.

Edwards then filed a reply and a separate motion for sanctions in which he accused counsel for Dr. Baehler of filing frivolous pleadings, making false and misleading statements to the court, requesting a "favor" from the court, and attempting to "trick" the court.

While Edwards's CR 59.05 motion was pending, Interneuron filed a motion to dismiss. In support of its motion, Interneuron noted that it was not a released party under the settlement agreement and that Edwards could have and should have pursued his claims against it. Edwards filed a response and motion for sanctions, noting that the court had stayed proceedings in 2003. We note that, in making his response, Edwards's counsel referred to Interneuron's motion as "nonsense" and accused Interneuron of attempting to "bait Plaintiff's counsel."

Edwards then filed a CR 60.02 motion asking the court to correct its mistakes and to reinstate his claims against Dr. Baehler. In that motion, counsel for Edwards refers to the circuit court's interpretation of the settlement agreement as "wildly inaccurate" and accused Dr. Baehler of trying to "embarrass the Fayette Circuit Court by eliciting open defiance of [Federal District Court] Pretrial Orders 1415 and 2702."[2]

The circuit court ultimately denied Edwards's CR 59.05 and 60.02 motions and Interneuron's motion to dismiss for lack of prosecution. Edwards appeals from the circuit court's opinion and orders dismissing his claims against Dr. Baehler and denying his CR 59.05 and 60.02 motions.

STANDARD OF REVIEW

The trial court considered matters outside the pleadings; therefore, we will treat the dismissal as a summary judgment. Waddle v. Galen of Kentucky, Inc., 131 S.W.3d 361, 363 (Ky. App. 2004). "The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc., 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when "it would be impossible for the respondent to produce any 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). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." Id. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must

present affirmative evidence in order to defeat a properly supported motion for summary judgment. Id. at 481.

ANALYSIS

At the outset, we note that we agree with Edwards that he raised two types of negligence claims against Dr. Baehler -- claims related to Redux and claims unrelated to Redux. We address the latter claims first.

1. Non-Redux Claims

As noted above, Edwards alleged that Dr. Baehler, among other non-Redux related errors, placed and kept Teresa on the wrong type of dialysis, failed to adequately respond to her rising blood sugar levels, and failed to respond to evidence of heart failure. However, the only expert opinion Edwards has produced indicated that Dr. Baehler's responses were below the standard of care as related to Redux. That expert did not express any opinions regarding any violations of the standard of care by Dr. Baehler separate and apart from Redux.

A claimant is required to produce an expert witness in a medical malpractice case unless one of two exceptions applies. One exception involves those cases wherein any layperson could judge whether the treatment fell below the standard of care, such as when a physician performs surgery on the wrong limb. The second exception involves an admission by a physician from which a violation of the standard of care can be inferred. See Perkins v. Hausladen, 828 S.W.2d 652, 655 (Ky. 1992). Neither of these exceptions applies to the case herein. Whether a physician made the appropriate determination regarding the type of dialysisorthe appropriate response to rising blood sugar levels and symptoms of heart failure is beyond the scope of what a reasonable layperson would know. Furthermore, there is no indication that Dr. Baehler made any admissions from which anyone could infer that he violated the standard of care. Therefore, to support his non-Redux related claims of negligence, Edwards was required to offer an expert opinion. Furthermore, he was required to produce that expert opinion in response to a motion for summary judgment. See Turner v. Reynolds, 559 S.W.2d 740, 741-42 (Ky. App. 1977).

Edwards argues that his responses to interrogatories, Dr. Brautbar's report, and his counsel's declaration regarding the expert testimony he intended to introduce at trial were sufficient to meet that requirement. He is mistaken. In his answers to interrogatories, Edwards discusses the symptoms and conditions Teresa had and gives his opinion as to what Dr. Baehler did or should have done in response. In his declaration regarding expert testimony, counsel states what testimony he expects an expert will give regarding the standard of care based on Teresa's condition and symptoms. However, Edwards does not provide any opinion from an expert regarding what that standard of care is or whether Dr. Baehler violated that standard.

As noted by the circuit court, Dr. Brautbar only identified two deficiencies, both of which are related to Redux. Dr. Brautbar does not express any opinions regarding Dr. Baehler's non-Redux related care. When ruling on a motion for summary judgment, the court's focus must be on what is of record, not what might be presented at trial. Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). The circuit court correctly focused on what was actually of record, rather than what Edwards indicated might be presented at trial. Because Edwards had produced no expert opinion regarding his non-Redux related claims, we discern no error in the circuit court'ssummary judgment regarding those claims.

Edwards also argues that the circuit court, by granting summary judgment, performed some "kind of fast shuffle" and "imposed nunc pro tunc an unspecified deadline that [had] already passed." In addition to being offensive, that argument is without merit. As noted above, a plaintiff is required to present an expert opinion to overcome a motion for summary judgment. When Dr. Baehler filed his 2003 motion for summary judgment, albeit designated as a motion to dismiss, Edwards had the obligation to obtain an expert opinion. However,during the four years between the filing of that motion and the circuit court's order dismissing the non-Redux claims, Edwards did nothing.

Furthermore, we note that the circuit court, in July and September 2007, expressed its displeasure with Edwards's failure to prosecute his non-Redux related claims. If he had not been put on notice in 2003, he certainly was put on notice in July 2007. Edwards's failure to provide the necessary expert opinion and the consequences of that failure lie with him, not with the circuit court.

Finally,we note that the record contains numerous arguments by Edwards regarding how the court should proceed, but it does not contain a request by Edwards for additional time to obtain an expert opinion. Edwards had nearly ten years to obtain an expert opinion regarding Dr. Baehler's alleged non-Redux related negligence. He did not have to wait, as he implies, for a scheduling order from the court. By his own admission, counsel for Edwards spoke with Dr. Brautbar on a number of occasions throughout the years. According to counsel, Dr. Brautbar often expressed his opinion regarding deficiencies in Dr. Baehler's non-Redux related treatment of Teresa. The only excuse Edwards offered for failing to obtain Dr. Brautbar's opinion in writing, either by way of report or affidavit, is that he needed to conduct discovery first. However, by counsel's admission, Dr. Brautbar had an opinion, which Edwards had an obligation to obtain and present to the court.

Based on the foregoing, we discern no error in the circuit court's summary judgment as to Edwards's non-Redux related claims of negligence.

2. Redux-Related Claims

Edwards argues that the circuit court misinterpreted the settlement agreement as covering his allegations regarding Dr. Baehler's prescription of Redux. We disagree.

The settlement agreement releases physicians from liability related solely to their prescription of Redux. However, it does not release them from their independent negligence and culpable conduct. A physician has a duty to obtain consent from a patient before undertaking treatment and that consent must be informed. See KRS 304.40-320 and Vitale v. Henchey, 24 S.W.3d 651 (Ky. 2000). Put another way, the duty to obtain informed consent does not arise until a course of treatment is prescribed. Dr. Baehler's duty to obtain informed consent did not arise until he prescribed Redux. Therefore, that duty arosebecause he prescribed Redux and any liability for breach of that duty is solely related to the prescription of Redux.

Similarly, with regard to follow-up care, Dr. Baehler had "a duty to use that degree of care and skill which is expected of a reasonably competent practioner [sic] in the same class to which he belongs, acting in the same or similar circumstances."Blair v. Eblen, 461 S.W.2d 370, 373 (Ky. 1970). The duty to provide follow-up care with regard to Mrs. Edwards's use of Redux arose directly from the prescription of Redux. Stated another way, until Dr.Baehler prescribed Redux, he had no duty to provide follow-up care regarding any Redux-related symptoms. Therefore, his duty to provide follow-up care, and any liability for breach of that duty, arose solely from the prescription of Redux.

Furthermore, we note that Dr. Brautbar's opinion ties Dr. Baehler's alleged violations of the standard of care directly to the prescription of Redux. Dr. Brautbar does not express any opinions regarding the standard of care that is independent of the prescription of Redux, nor does he suggest any culpability on the part of Dr. Baehler that is independent of the prescription of Redux. The settlement agreement releases physicians from liability related solely to the prescription of Redux. Any liability Dr. Baehler may have arises solely from his prescription of Redux, and Edwards has no expert opinionregarding the violation of thestandard of care separate and apart from the prescription of Redux. Therefore, the circuit court appropriately granted summary judgment regarding Edwards's Redux-related claims.

CONCLUSION

For the foregoing reasons we affirm the circuit court's summary judgment of Edwards's non-Redux and Redux-related claims.

ACREE, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

1. We note that the record contains lengthy explanations by Edwards regarding the impropriety of his involuntary joinder in the class action. However, that issue was resolved by the federal district court handling the class action and is not before us.

2. In addition to the derogatory comments listed in the body of this Opinion, counsel for Edwards stated in

correspondence to the circuit court that "[a]lthough a certain amount of name calling may now be appropriate on this matter I will reserve it for our reply . . . ." Counsel is advised that "name calling" is never appropriate nor helpful.