

FILED  
CHARLES D. SUSANO III  
CLERK

**IN THE CIRCUIT COURT FOR KNOX COUNTY, TENNESSEE**

2020 APR -8 PM 3:45

**KEELA L. BAILEY and husband  
ROBERT S. BAILEY,**

*Plaintiffs*

v.

**METRO KNOXVILLE HMA, LLC.,  
D/B/A PHYSICIANS REGIONAL  
MEDICAL CENTER,**

*Defendant*

KNOX COUNTY CIRCUIT  
CIVIL, PROBATE,  
AND JUVENILE COURTS

No. 3-2-19

*Notice of Entry Required*

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

This is a healthcare liability as a result of a claim for injury resulting from a hospitalization in late May through early June 2014. Notice was timely given, and suit was filed and then a nonsuit was taken on September 11, 2017. Notice was resent on August 24, 2018, and suit was filed on January 3, 2019.

Plaintiff Keela Bailey was found unresponsive in her home on May 17, 2014 and was transported by ambulance to Tennova Hospital (Metro Knoxville, HMA, LLC d/b/a Tennova Healthcare – Physicians Regional Medical Center) (hereinafter referred to a “PRMC”). The agreed undisputed facts are as follows:

1. Plaintiff presented to her neurosurgeon, Dr. Boyer on June 14, 2010 and reported pain in her hands.
2. Plaintiff had an anterior cervical discectomy at C3-C4 and C4-C5 on July 9, 2010.
3. On November 14, 2011, Plaintiff reported continued problems with pain in her neck and reported feelings of her hands going numb while driving.
4. In September 2012, Plaintiff returned to Dr. Boyer to address continued symptoms in her neck and left arm. She reported that she had severe pain from her neck going into her left shoulder, down the arm involving the second, third and fourth fingers of her left hand. “She had numbness and tingling coming down in a similar distribution.”

5. On December 20, 2012, Plaintiff underwent a second neck surgery which did not resolve her problems.
6. In March 2013, Plaintiff had a third neck surgery for symptoms in neck and left arm.
7. In August of 2013, it was noted that her preoperative left arm pain had initially resolved but was starting to return. She did not have pain in her upper arm but does have pain in her hands which she described as firecrackers trying to burst through her fingers. As of March 2014, Plaintiff was using prescription strength pain medication to treat pain in her neck and left arm.
8. On May 17, 2014, Plaintiff, who weighed over 300 lbs., was found unresponsive in her recliner by her husband who reported that she was slumped over the recliner with her head leaning over the side of the rail.
9. She was taken by EMTs to PRMC on May 17, 2014 and was intubated and sedated upon arrival.
10. On May 30, a member of the nursing staff documented a report of left arm weakness from Plaintiff.
11. On June 1, Dr. Belcher, an orthopedic surgeon, assessed Plaintiff and by neurologist, Dr. Munir. Dr. Munir's differential diagnosis included left brachial plexopathy, multiple focal neuropathies in the left arm (mononeuritis multiplex), or end organ damage to nerves due to ischemia.

Plaintiffs' complaint alleges that Mrs. Bailey suffered a "stretch injury" to her left brachial plexus which she alleges occurred during her hospitalization at PRMC. Plaintiff further alleges that her treating neurologist, Dr. Thomas, has diagnosed her with Complex Regional Pain Syndrome (CRPS), which resulted from the injury to her left brachial plexus. The Plaintiffs allege that "the Defendants were negligent under the doctrine of *res ipsa loquitur*, Tenn. Code Ann. § 29-26-115(c). She further alleges that her left arm and hand were fully functional when she entered the hospital and that she was under the exclusive control of PRMC when her injury occurred. Between her admission on May 17 through May 28, Mrs. Bailey was on a ventilator and often sedated. When she was extubated on May 30, Mrs. Bailey complained of weakness, loss of feeling, and decreased sensation in her upper left extremity and left hand. The complaint further alleges that ultimately, Drs. Belcher and Munir diagnosed a left brachial plexus injury.

On June 13, 2019, the Defendant PRMC filed a Motion for Summary Judgment pursuant to Rule 56 of the Tennessee Rules of Civil Procedure. The motion asserts that the Plaintiffs cannot rely on *res ipsa loquitor* under § 29-26-115(c) because her treating physician testified that her injury may have occurred before her admission to PRMC and that there were causes other than the one alleged that could have caused her injuries. The motion states that the Defendant can negate an essential element of the Plaintiffs' claim. The memorandum of law in support of the motion states that in the original action filed by Plaintiffs, the parties exchanged written discovery and completed 19 depositions. A trial date was set for October 9, 2011, and the Plaintiffs filed a Voluntary Nonsuit pursuant to Rule 41 of the Tennessee Rules of Civil Procedure on September 11, 2011.

The motion for summary judgment in this case was initially set to be heard on June 13, 2019 and by agreement of the parties was reset for hearing on December 20, 2019. The motion filed by the Defendant was accompanied by a Memorandum of Law in Support of the Motion for Summary Judgment and a Statement of Undisputed Material Facts with specific citation to the record as required by Rule 56.03. Defendant relies heavily on the deposition testimony of Plaintiff's treating physician, Dr. Thomas and the affidavit of Defendant's expert, Dr. Hagenau.

Pursuant to Rule 56, the adverse party may serve and file opposing affidavits not later than five (5) days before the hearing. T. R. Civ. P. 56.04. Additionally, any party opposing a motion for summary judgment must, not later than (5) days before the hearing, serve and file a response to each fact set forth by the movant. In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute. T.R. Civ. P. 56.03.

As stated, the motion was set by agreement for hearing on December 20, 2019. The deadline for filing a response, additional facts and/or supporting affidavits would have been December 13, 2019. Pursuant to Rule 6.01 of the Tennessee Rules of Civil Procedure, when computing time as prescribed in the Rules, Saturday and Sunday are excluded from the computation if the period of time is less than 11 days. Rule 56 would require the response to be filed five days before the hearing, excluding Saturdays and Sundays and the "date of the event", as such, with the hearing scheduled for Friday the 20<sup>th</sup>, the response would be due on Friday the

13<sup>th</sup>. See, Cartwright v Tennessee Farmers Mutual Insurance Company, 453 SW 3d 910 (Tenn. Ct. App. 2014).

Plaintiffs' response was sent to the clerk of the court by facsimile, on Monday December 16, 2019 at 4:18pm but was not in compliance with Rule 5A.02 of the Tennessee Rules of Civil Procedure. Rule 5A.02 states that any facsimile filings shall be accompanied by a uniform cover sheet. In this case, the filing sent to the clerk by facsimile on December 16 did not include the required cover sheet. In addition, Rule 5A.02 contemplates the filing of an entire document as the original which may not exceed 50 pages.

A cover letter sent with the facsimile filed pleadings, indicates that Plaintiff was providing "Plaintiffs' Motion Opposing Summary Judgment, Memorandum of Law, and Response to the Defendant's Statement of Undisputed Facts. Due to the number of exhibits, we are only depositing the pleadings in the night drop box. We will bring the exhibits to you tomorrow morning, December 17." The letter bears a facsimile transmission stamp of "12/16/19, 19:18, 8659714298, page 10/24". The 8659714298 number is the same facsimile number listed on Plaintiffs' counsel letterhead for their office.<sup>1</sup> . The response has a certificate of service indicating that it was placed in the U.S. Mail to opposing counsel on December 16, 2019. When the original of the pleadings and the exhibits referenced in the letter were delivered to the clerk, they were stamped as filed by the clerk of the court on December 17, 2019 at 11:33 am. Regardless of whether, the facsimile pleading is considered filed on the 16<sup>th</sup> or 17<sup>th</sup>, it was not timely.

Although not included with the papers that Plaintiff attempted to file on the 16<sup>th</sup>, on December 17, 2019, the Plaintiffs filed a Motion to Accept Late Filing of the response to Defendant's Motion for Summary Judgment. The motion is accompanied by an affidavit of counsel indicating that they had contacted Dr. Boyer on December 10, 2019 to "discuss the content of his expert affidavit in the above-styled case". The affidavit states that Dr. Boyer has been unavailable to review or sign his affidavit. The affidavit further states that counsel was required to make significant changes to the response to the motion for summary judgment and delete references to Dr. Boyer's affidavit. The affidavit also states that the Defendant would not

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<sup>1</sup> The letter of December 16, 2019, and the attached pleadings are contained within the file for this case maintained by the Clerk of the Circuit Court. Neither the letter nor the pleadings bear a date filed stamp from the clerk. The document, as it exists in the file of the clerk, has a handwritten note attached as follows: "not properly fax filed. Spoke w/ Bianca & Lori. They will file it today 12/17."

be prejudiced by the late filing. The affidavit is signed by affiant, but it was not notarized. No affidavit has ever been submitted and signed by Dr. Boyer.

Plaintiffs' filings include a response to the movant's statement of undisputed facts. Rule 56.03 of the Tennessee Rules of Civil Procedure sets forth the way a party opposing a motion for summary judgment shall respond. The party must respond by "(i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record." In addition, the non-movant may cite additional facts that the non-movant contends are material and in dispute. "Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute." *Id.* In the present case, the Plaintiff responded to numerous statements of facts by the Defendant by responding "Disputed as phrased" or by responding that a fact is not disputed with qualification language. Neither response would be a proper response under Rule 56.

Plaintiff also filed a "Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment." The Memorandum includes additional facts with citations to the record and depositions. The additional facts are not set forth in separate numbered paragraphs as contemplated in Rule 56.03. The purpose of these requirements is to assist the court on focusing on crucial portions of the record. *Owens v Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 774 (Tenn. Ct. App. 2001) citing Advisory Committee Comment to Tenn. R. Civ. P. 56.03.

In *Owens*, the Defendant filed a Motion for Summary Judgment, a Memorandum of Law and a Statement of Undisputed Material Facts pursuant to Rule 56.03. The plaintiff, two days before the hearing, filed a response to the statement of material facts with some citations to newly filed affidavits and to depositions. "The plaintiff also filed a memorandum of law, which contains a statement of all of the facts alleged by the plaintiff to be in dispute, including some facts that are in the record but are not referred to in the plaintiff's response to the defendant's Rule 56.03 statement." As such, the trial court did not consider the facts relied on by plaintiff that were not cited in the response to the defendant's statement of material facts. The plaintiff argued on appeal that the trial court was in error in applying Rule 56.03 in an "unjustifiably mechanistic fashion". It is not simply a matter of the trial court having a preferred format but the requirements of Rule 56.03. *Owens*, 77 S.W. 3d 773-775.

In the present case, the Plaintiffs' response to the Defendant's Statement of Undisputed Material Facts contains five (5) citations to the record. In the Memorandum of Law filed by Plaintiffs' in opposition to the motion for summary judgment, there are 34 footnotes including citations to the record, of which only two (2) of the citations are included in the response to the statement of undisputed material facts. The Plaintiffs did not file a separate supplemental statement of material facts.

In evaluating whether this Court should grant the Plaintiffs' motion to accept the late filed response to the motion for summary judgment; the Court has considered *Kenyon v Handal*, 122 S.W.3d 743 (Tenn. Ct. App 2003), perm. app. den., and *Cartwright v Tennessee Farmers Mutual Insurance Company*, 453 S.W.3d 910 (Tenn. Ct. App. 2014).

*Kenyon* involved a late filed response to a motion for summary judgment. The court noted that "lawyers who wait until the last minute to comply with a deadline are playing with fire." When faced with a motion for summary judgment, the party opposing the motion can either serve and file an affidavit by the deadline, obtain a continuance of the hearing from opposing counsel, or file a properly supported motion pursuant to Rule 56.07 requesting a continuance to obtain the needed affidavit. *Kenyon* at 753. In *Kenyon*, the Court of Appeals noted that the court should follow the standard in Rule 6.02 in determining whether the party was entitled to an enlargement of time. Requests for enlargement of time made after the expiration of the original time period, should be judged against an excusable neglect standard and a showing that the opposing party has not been prejudice. *Id.* at 756. Excusable neglect is an equitable standard "taking account of all relevant circumstances surrounding the party's omission."

In evaluating whether to grant an extension, this Court considered the fact that the Defendant's motion for summary judgment was filed in June of 2019 and initially set for August 23, 2019. On September 6, 2019, a new notice was filed that set the hearing for December 20, 2019. In addition, the Court considered that the incident involved in this healthcare liability action is alleged to have occurred in late May of 2014. This case was previously set for trial and depositions had been taken and experts disclosed when the Plaintiffs took a voluntary nonsuit. Plaintiffs' affidavit filed in support of the extension indicates that counsel met with Dr. Boyer on December 10 to discuss the content of an expert affidavit. On December 13, 2019, counsel was advised that Dr. Boyer would not be available to review and file the final affidavit until December 17. Plaintiffs then revised the response to the motion for summary judgment without

using an affidavit of Dr. Boyer and specifically states that the response relies entirely on proof adduced in the previous case (docket no. 3-446-15) and the disclosure of Defendant's expert. Plaintiffs did not seek an extension of time to obtain the affidavit of Dr. Boyer, which could have been filed on December 13, 2019 pursuant to Rule 56.07. Additionally, Plaintiffs' Response to Defendant's Motion to Strike states that Dr. Boyer is not a new witness. Plaintiffs' response indicates that counsel has met with Dr. Boyer on multiple occasions since June of 2017 to discuss his treatment of Mrs. Bailey. Finally, this Court has considered the fact that in the end, Plaintiffs chose to defend the motion for summary judgment without utilizing any proof from Dr. Boyer.

It is also noted, as set forth above, that the Response to the Motion for Summary Judgment and the accompanying Response to the Statement of Undisputed Material Facts filed by Plaintiffs did not comply with Rule 56. The memorandum cites to numerous records and depositions taken in the first case, but those records and the depositions are not cited in response to the Defendant's Statement of Undisputed Facts or an Additional Statement of Undisputed Facts filed by the Plaintiffs as required by Rule 56.03. As such, many of the facts asserted in the response are not properly before the Court.

This Court further finds that the actions of the Plaintiffs caused prejudice to the Defendant. As indicated in the Affidavit of Plaintiffs' counsel, Plaintiffs are relying on materials that were in the proof adduced in the previous case, docket no. 3-446-15. While the current matter (docket no. 3-02-19) was not set for trial, the Defendant's motion for summary judgment had been pending for six months and the claims against the Defendant have been pending for more than five years. Additionally, due to the late filing and the large number of exhibits filed with the memorandum of law, there would be insufficient time for Defendant to review and respond to the "supplemental facts" asserted by Plaintiffs. For these reasons, this Court is going to deny the Plaintiffs' Motion to Accept Late Filing of the response to the Motion for Summary Judgment. Based upon all the circumstances set forth above, this Court finds that there is an insufficient bases for a finding of excusable neglect and this Court finds that the allowance of the late filing would cause harm and prejudice to the Defendant.

This Court has also reviewed the Summary Judgment Motion, Memorandum of Law and Statement of Undisputed Material Facts filed by Defendant and find that the Defendant has met their burden by properly negating an essential element of the Plaintiffs' claim. The elements for

*res ipsa* in the context of a healthcare liability action are set forth in *Anderson v Ming Wang*, No. M201800184COAR3CV, 2018 WL 4847114 (Tenn. Ct. App. Oct. 5, 2018), appeal denied (March 27, 2019). In the case at hand, Plaintiff's treating physician, Dr. Thomas confirmed that there were other potential causes of her brachial plexus injury and that the mechanism of injury was inconsistent with the patient being pulled by the armpit as alleged by Plaintiffs. Defendant's expert, Dr. Hagenau confirms that Ms. Bailey's injury is inconsistent with any type of mechanical injury. Dr. Thomas also testified that the injury could have occurred before her admission to PRMC on May 17, 2014. (Thomas dep., p.64). Dr. Thomas further testified that Mrs. Bailey could fit the pattern of idiopathic chronic brachial plexopathy, and she could fit other potential etiology as well. (Thomas dep., p. 62-63, 72-73). Dr. Hagenau testified that he believed Mrs. Bailey developed an idiopathic brachial neuritis and the most likely cause of the idiopathic brachial neuritis was her pneumonia. (Declaration of Dr. Hagenau).

Based upon these considerations and under the standards set forth in *Rye v Women's Care Center of Memphis, M PLLC*, 477 S.W.3d 235, 231 (Tenn. 2015) and Tenn. Code Ann. § 20-16-101 the Defendant has submitted affirmative evidence negating an essential element of Plaintiffs' claim.

**IT IS THEREFORE ORDERED** that the Plaintiffs' Motion to Accept Late Filing of the Response to Defendant's Motion for Summary Judgment is **DENIED** and the Defendant's Motion to Strike Plaintiff's Response to Motion for Summary Judgment is **GRANTED**. Without a timely Response, Plaintiffs have failed to properly dispute the material facts asserted by Defendant.

**IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment is **GRANTED** and designated as a final judgment pursuant to Rule 54. Costs are taxed to the Plaintiff.

Enter this 8 day of April, 2020.

ATTEST  
Charles B. [Signature]  
CERTIFIED A TRUE COPY  
[Signature]  
CIRCUIT COURT CLERK

[Signature]  
JUDGE DEBORAH C. STEVENS  
CIRCUIT COURT DIV. III



**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify pursuant to Rule 58.02 TRCP that a copy of this ORDER has been served upon the following counsel of record and case parties by First Class U.S. Mail:

James A. H. Bell  
Jacob Feuer  
10 Emory Place  
Knoxville, TN 37934

C.J. Gideon  
J. Blake Carter  
315 Deaderick St. Suite, 1100  
Nashville, TN 37238

This 9th day of April, 2020.

Charles D. Susano, III, Clerk

By Caulem Proctor D.C.  
Deputy Clerk