

Russo v. Davis

Appeals Court of Massachusetts

January 18, 2013, Entered

11-P-2093

Reporter

2013 Mass. App. Unpub. LEXIS 58 *; 83 Mass. App. Ct. 1107; 981 N.E.2d 233; 2013 WL 184079

ALICIA RUSSO vs. SUSAN DAVIS.

Notice: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

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Subsequent History: Appeal denied by Russo v. Davis, 464 Mass. 1108, 985 N.E.2d 399, 2013 Mass. LEXIS 255 (2013)

Disposition: [*1] Judgment affirmed.

Judges: Kantrowitz, Berry & Grainger, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Alicia Russo, brought a medical malpractice action against her chiropractor, Susan Davis, seeking damages for an injury she alleges she sustained as a result of a negligent chiropractic manipulation performed by Davis in February, 2004. The plaintiff appeals from a Superior Court judgment entered

after a judge denied her motion to continue the trial date and granted the defendant's motion for summary judgment. We affirm.

More than four years after filing suit, and almost seven years after the underlying events, the plaintiff retained Dr. Pierre Abdilmasih as her expert on chiropractic medicine. During his deposition by the defendant's counsel, Dr. Abdilmasih testified that he could not render an opinion whether the defendant's treatment of the plaintiff was negligent.¹

Thereafter, two weeks before trial, the plaintiff filed an emergency motion for a further continuance of the previously continued trial date in order to allow her to locate a new chiropractic expert. The defendant filed a motion for summary judgment. The judge denied the plaintiff's motion for a continuance of the trial, and subsequently granted the defendant's motion for summary judgment. On appeal, the plaintiff argues that the motion judge abused his discretion by failing to treat her motion for a continuance of the trial as a motion for a continuance of the decision on summary judgment under Mass.R.Civ.P. 56(f), 365 Mass. 824 (1974). We are unable to find any indication in the record below that the plaintiff moved pursuant to rule 56(f) or that she requested the motion judge to consider her motion under that rule.² Because the plaintiff failed to raise this argument below, it is foreclosed on appeal. See, e.g., Gerber v. Ty-Data, Inc., 5 Mass. App. Ct. 898, 898-899, 370 N.E.2d 445 (1977).

We thus limit our review to considering whether the motion judge abused his discretion by denying the plaintiff's motion for a continuance of the trial. "Whether a case shall be continued or proceed to trial is within the sound discretion of the judge." Beninati v. Beninati, 18 Mass. App. Ct. 529, 534, 468 N.E.2d 644 (1984), citing Nobel v. Mead-Morrison Mfg. Co., 237 Mass. 5, 16, 129 N.E. 669 (1921). At the time the plaintiff's motion for a continuance was filed, the case was more than four years old, and it was just two weeks before trial. Given the age of the case and the imminent trial date, the plaintiff's delay in locating and meeting with her expert, the burdens imposed on the defendant by further delay, and the dislocation of the court's agenda, the judge did not abuse his discretion or otherwise err in denying the plaintiff's motion to continue.

¹ In particular, Dr. Abdilmasih testified that the plaintiff could not recall how much force the defendant used, where the defendant placed her hands while performing the chiropractic manipulation, or what position the plaintiff's head was in at the time. Without these details, Dr. Abdilmasih testified that he could [*2] not give an opinion whether there was negligence in this case.

² The plaintiff's motion for a continuance was styled as "Plaintiff's Emergency Motion To Continue Trial," and the substance of her motion sought to [*3] continue the trial date, not to delay disposition of the summary judgment motion. The record is entirely devoid of any reference to issues relevant to rule 56(f) such as, for example, the unavailability of affidavits.

Next, the plaintiff argues that the trial judge erred by granting summary judgment in favor of the defendant. We begin with the familiar principle [*4] that "[t]he standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120, 571 N.E.2d 357 (1991). See Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002).

"[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734 (1991). Here, after the judge denied the plaintiff's motion for a continuance of the trial, the plaintiff was left without expert testimony. As the plaintiff conceded, she was required to present expert testimony at trial on the issues of the standard of care and the defendant's negligence. See Harlow v. Chin, 405 Mass. 697, 702, 545 N.E.2d 602 (1989); Palandjian v. Foster, 446 Mass. 100, 104, 842 N.E.2d 916 (2006). Without expert testimony, the plaintiff had no reasonable expectation of proving [*5] an essential element of her claim at trial.³

Judgment affirmed.

By the Court (Kantrowitz, Berry & Grainger, JJ.),

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³We note as well that the testimony of the plaintiff's former expert strongly suggests that the retention of another expert would have been futile because the plaintiff could not supply the necessary factual basis for any expert to give an opinion.