

IN THE COURT OF APPEALS OF TENNESSEE  
WESTERN SECTION AT JACKSON

**KACY L. HIGGINS,**

Plaintiff/Appellant,

**VS.**

**BLOUNT LAW FIRM,  
JAMES E. BLOUNT, III,  
JOSEPH M. SPARKMAN, JR.,  
JOHN APPMAN,**

Defendants/Appellees.

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**Shelby Circuit No. 59491 T.D.**

**Appeal No. 02A01-9503-CV-00043**

**FILED**

**March 18, 1996**

**Cecil Crowson, Jr.**  
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY  
AT MEMPHIS, TENNESSEE  
THE HONORABLE KAY S. ROBILIO, JUDGE

**ABBY RUBENFELD**

Nashville, Tennessee

**MARK BURNETTE**

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Little Rock, Arkansas

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**BLOUNT LAW FIRM**

Memphis, Tennessee

**JOSEPH M. SPARKMAN, JR.**

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Attorneys for Appellees Blount Law Firm, James E. Blount, III  
and Joseph M. Sparkman

**RICHARD GLASSMAN**

**JAMES F. HORNER**

**GLASSMAN, JETER, EDWARDS & WADE, P.C.**

Memphis, Tennessee

Attorney for Appellee John Appman

**AFFIRMED**

**ALAN E. HIGHERS, J.**

**CONCUR:**

**DAVID R. FARMER, J.**

**HOLLY KIRBY LILLARD, J.**

Kacy L. Higgins ("plaintiff") filed this legal malpractice against his former attorneys,

James E. Blount, III, Joseph M. Sparkman, and John Appman ("defendants"), seeking damages caused by defendants' alleged negligence during their representation of plaintiff in a medical malpractice suit. The trial court granted summary judgment in favor of defendants because plaintiff did not file an expert affidavit in opposition to defendants' motion for summary judgment. Plaintiff contends on appeal that the entry of summary judgment was improper because defendants' affidavit in support of their motion was insufficient. For the reasons hereafter stated, we affirm the judgment of the trial court.

Plaintiff filed his complaint on February 4, 1994. In response, defendants filed a motion to dismiss or alternatively, for summary judgment, which was supported by the affidavit of an attorney, Wilbur C. Ruleman. In his affidavit, Ruleman stated that he was familiar with the standard of care for the legal profession in Shelby County, Tennessee, that he reviewed the complete legal file of plaintiff, and that, in his opinion, defendants did not deviate from the applicable standard of care. Ruleman's affidavit was notarized by Karen Peterson, a notary public, on April 7, 1994. The notarization, however, stated that Karen Peterson's commission as a notary public expired on March 28, 1994.

On May 20, 1994, the trial court held a hearing on defendants' motion for summary judgment. At that time, the trial judge afforded plaintiff thirty additional days to produce an expert affidavit stating that defendants deviated from the recognized standard of care for lawyers. Plaintiff failed to produce an expert affidavit. Consequently, the trial court granted defendants' motion to dismiss or alternatively, for summary judgment, and dismissed plaintiff's case against all defendants.

Plaintiff argues on appeal that summary judgment was improperly granted because the Ruleman affidavit was insufficient to support defendants' motion. Plaintiff first contends that the affidavit had no legal effect because the document stated that the notary's commission had expired before the date that Ruleman signed the affidavit. Plaintiff further contends that the affidavit affirmatively failed to establish Ruleman's competency to testify about the legal malpractice case.

Plaintiff's first issue, which relates to the expired commission date, is not properly before this court because it does not appear from the record that the issue was presented to the trial court. Defendants stated in oral argument that the commission was still in effect and that the wrong date was inadvertently inserted. In any event, issues not raised in the trial court cannot be raised for the first time on appeal. Simpson v. Frontier Community Credit Union, 810 S.W.2d 147, 153 (Tenn. 1991).

Plaintiff's second contention is that the Ruleman affidavit was insufficient to support defendants' motion for summary judgment because it failed to establish Ruleman's competency to opine as to whether defendants breached the standard of care in their representation of plaintiff.

On appeal, we consider a motion for summary judgment in the same manner as we would consider a motion for a directed verdict. All of the evidence must be viewed in a light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent. It is only where there are no disputed issues of material fact that summary judgment should be granted by the trial court and sustained by this court. Daniels v. White Consol. Industries, Inc., 692 S.W.2d 422, 424 (Tenn. App. 1985). As explained by our Supreme Court in Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993):

When the party seeking summary judgment makes a properly supported motion, the burden then shifts to the nonmoving party to set forth specific facts, not legal conclusions, by using affidavits or the discovery materials listed in Rule 56.03, establishing that there are indeed disputed, material facts creating a genuine issue that needs to be resolved by the trier of fact and that a trial is therefore necessary. The nonmoving party may not rely upon the allegations or denials of his pleadings in carrying out this burden as mandated by Rule 56.05. Id. at 215.

In the present malpractice case, plaintiff had the burden of proving: (1) the employment of the attorney; (2) negligent breach of duty by the attorney; and (3) damages resulting from the alleged negligence. Blocker v. Dearborn & Ewing, 851 S.W.2d 825, 827 (Tenn. 1992). Except in the most unusual or extreme cases, a lawyer's standard of care should be established and proved through expert testimony. Cleckner v. Dale, 719

S.W.2d 535, 540 (Tenn. App. 1986). Moreover, the question of whether a lawyer's conduct constituted a departure from the applicable standard of care should also be proved by expert testimony. Id.

In the affidavit filed by defendants in support of their motion, the affiant stated as follows:

- 1) My name is Wilbur C. Ruleman and I am an attorney licensed to practice in the State of Tennessee. I have been practicing in my chosen field since 1956 with the majority of my practice being conducted in Memphis, Shelby County, Tennessee.
- 2) I am personally aware of the recognized standard of acceptable professional practice in the profession in Memphis, Shelby County, Tennessee.
- 3) I have reviewed the complete legal file of Kacy L. Higgins which was compiled by James E. Blount, Joseph M. Sparkman, Jr., and John Appman, Attorneys at Law, as a result of an injury sustained on February 17, 1992. The file reflects that Mr. Higgins received blunt trauma to his face as a result of an altercation on the aforesaid date and received medical treatment at Methodist Hospitals of Memphis.
- 4) After careful and thoughtful review, I am of the professional opinion that Blount Law Firm, James E. Blount, III, Joseph M. Sparkman, Jr., and John Appman did not act with less than, nor did they fail to act with ordinary and reasonable care in accordance with the recognized standard of acceptable legal practice in Memphis, Shelby County, Tennessee or in a similar community in representing and preparing Mr. Higgins' case.

Tennessee Rule of Civil Procedure 56.05 requires that affidavits in support of motions for summary judgment be executed by an affiant competent to testify as to matters therein. The affidavit must be based on personal knowledge and must set forth facts that would be admissible into evidence. Tenn. R. Civ. P. 56.05.

The affidavit filed by the defendants satisfy these requisites. Ruleman's years of experience as an attorney in the Memphis and Shelby County area render him competent to opine as to the standard of care. Ruleman stated in his affidavit that he reviewed the complete file and concluded that defendants did not breach that standard of care. (TR 11) This affidavit served to shift to the plaintiff the burden of producing a countervailing affidavit. If the sole issue in a case is one that requires expert testimony, and the nonmoving party provides no counter-affidavit in opposition to the moving party's expert

testimony, then summary judgment is proper. Ayers v. Rutherford Hospital, Inc., 689 S.W.2d 155, 160 (Tenn. App. 1984). Because plaintiff failed to counter defendants' expert testimony, plaintiff failed to establish that there exist genuine issues of material fact to be resolved by the trier of fact.

We hold that summary judgment was properly granted in favor of defendants. Costs of this appeal are taxed to plaintiff.

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HIGHERS, J.

CONCUR:

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FARMER, J.

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LILLARD, J.