

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002601-MR

YVONNE THERESE ROGERS,
EXECUTRIX OF THE ESTATE
OF DONALD ROGERS, SR.
AND YVONNE THERESE ROGERS,
INDIVIDUALLY

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOHN WOODS POTTER, JUDGE
ACTION NO. 96-CI-000644

GEORGE ARONOFF, M.D.;
UNIVERSITY MEDICAL ASSOCIATES, P.S.C.;
AND JEWISH HOSPITAL
HEALTHCARE SERVICES, INC.,
D/B/A JEWISH HOSPITAL

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Yvonne Therese Rogers, Executrix of the Estate of Donald Thomas Rogers (Rogers), and Yvonne Therese Rogers, individually, appeal from an order of the Jefferson Circuit Court which granted summary judgment in favor of appellees, Dr. George Aronoff (Dr. Aronoff), University Medical Associates, and Jewish Hospital Healthcare Services, Inc., d/b/a Jewish Hospital (the Hospital). We affirm.

On January 30, 1996, Donald and Yvonne Rogers filed a complaint against appellees.¹ In the complaint, Rogers alleged that while performing a kidney biopsy on Donald, Dr. Aronoff nicked his colon and then negligently monitored and cared for him following the procedure. Rogers further alleged that the Hospital was negligent in treating him, and that University Medical Associates was responsible for Dr. Aronoff's conduct under the doctrine of respondeat superior.

Our review of the record shows that the Hospital propounded discovery requests to Rogers in February of 1996. Dr. Aronoff alleges in his brief that he also propounded discovery requests to Rogers.

The record indicated that a pretrial conference was held on April 28, 1997. Following that conference, the trial court entered an order instructing Rogers to disclose the identity of any expert witness to be called at trial within thirty days.

It appears that Rogers made no attempt to respond to any of the discovery requests propounded by the appellees or to identify expert witnesses. Both the Hospital and Dr. Aronoff filed motions for summary judgment on the ground that Rogers had failed to identify an expert witness to testify that either of them had breached the standard of care.

The trial court held a hearing on the summary judgment motions on September 5, 1997. Rogers' attorney indicated that

¹When Donald Rogers later died of causes unrelated to this action, the action was revived in Yvonne's name in her capacity as Executrix of Donald's estate by order of the trial court.

they were going to proceed without expert witnesses under the theory of res ipsa loquitur. Based on Rogers' decision to proceed without expert testimony, the trial court entered summary judgment in favor of the Hospital at the hearing.

In support of his motion for summary judgment, Dr. Aronoff's attorney advised the trial court during the hearing that the kidney which was biopsied was a transplanted kidney, and that this was Rogers' second biopsy. Counsel for Dr. Aronoff stated that she had been informed by Rogers' attorney that informed consent was going to be at issue despite the fact that it was not raised in the complaint. She further stated that piercing of the colon was a known risk of the procedure and that Rogers had signed a full consent which identified this as a risk. Counsel for Dr. Aronoff also stated that Rogers was on medication which would make the colon fragile. Based on the foregoing, Dr. Aronoff's attorney stated that expert testimony was needed to establish deviation from the standard of care.

On September 8, 1997, the trial court entered summary judgment in favor of Dr. Aronoff, holding:

It is undisputed that the vast majority of liver biopsies are performed without a colon being punctured. Therefore, the issue becomes is this evidence of negligence. A punctured colon is a recognized complication of the biopsy procedure. Some are undoubtedly due to negligence and some are not. Therefore, the issue becomes could a layman say that of the biopsies that do result in a punctured colon, the majority are the result of negligence. The Court finds that this judgment is beyond the competence of a layman without the benefit of expert testimony.

As for the issue of informed consent, the Court finds that a jury would also need the assistance of expert testimony.

This appeal followed.

Like the trial court, we are unable to see how Rogers could prevail without expert testimony as to how the appellees violated the standard of care. We also believe that Rogers' claims are not amenable to application of the doctrine of res ipsa loquitur. Use of res ipsa loquitur is restricted to those cases where the injury complained of was a type which usually does not occur in the absence of negligence. Jewish Hospital Association of Louisville, Ky. v. Lewis, Ky., 442 S.W.2d 299, 300 (1969). The best examples of proper application of res ipsa loquitur in medical cases would be amputation of the wrong limb or sewing up a surgical instrument inside a patient.

The foregoing is especially true in regard to Rogers' claims against the Hospital. "A patient admitted to a hospital...is entitled to such reasonable care and attention for his safety as his mental and physical condition, known or discoverable by the exercise of ordinary care, may require." Miners Memorial Hospital Association of Ky. v. Miller, Ky., 341 S.W.2d 244, 245 (1960). However, this standard does not require the hospital to perform every act which would be performed by the most cautious and skilled individual. Miners Memorial Hospital, 341 S.W.2d at 245. The fact that an accident occurred in and of itself does not mean that the hospital acted in a negligent fashion. Id. at 246. In malpractice cases, "negligence must be established by medical or expert testimony unless the negligence

and injurious results are so apparent that laymen with a general knowledge would have no difficulty in recognizing it." Harmon v. Rust, Ky., 420 S.W.2d 563, 564 (1967). See also, Johnson v. Vaughn, Ky., 370 S.W.2d 591 (1963).

Having considered the parties' arguments on appeal, the orders of the trial court granting summary judgment in favor of the appellees are affirmed.

ALL CONCUR.

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