

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002442-MR

MARY C. LINTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NO. 95-CI-005699

BEREL L. ABRAMS, M.D. AND JEWISH
HOSPITAL HEALTH CARE SERVICE, INC.

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: COMBS, EMBERTON, AND KNOPF, JUDGES.

COMBS, JUDGE: The appellant, Mary C. Linton (Linton), appeals from a decision of the Jefferson Circuit Court granting summary judgment in favor of the appellees, Dr. Berel L. Abrams and Jewish Hospital Healthcare Services, Inc. (Jewish Hospital). After reviewing the record and legal arguments, we vacate and remand the judgment of the Circuit Court.

On October 14, 1994, Linton was admitted to Jewish Hospital for a left modified radical mastectomy. Dr. Abrams successfully removed the malignant tumors. However, following the surgery, Linton's surgical wound became infected. She had developed Heavy Growth Hemolytic Streptococcus Group B, Heavy

Growth Coag Negative Staph, and Heavy Growth Corynebacterium Species. The infection was treated with antibiotic therapy, and ten days after Linton's operation, the wound was reopened and cleaned. Linton was eventually discharged from the hospital, but the mastectomy wound site continued to need special attention; the wound had to be cleaned and re-packed twice a day.

By the early part of 1995, even though Linton's mastectomy wound had healed, she continued to experience difficulties – such as recurrent infections, soreness, and swelling. On October 31, 1995, Dr. Liliana J. Torres-Popp, a plastic surgeon, reopened the mastectomy wound, excising scar and subcutaneous tissue and cleaning out the infection processes. Despite the corrective surgery, Linton continues to experience problems related to the surgical wound site.

On October 11, 1995, Linton filed a medical negligence claim against Jewish Hospital and Dr. Abrams.¹ Alleging negligence, she claimed that both Dr. Abrams and Jewish Hospital had failed to comply with the accepted standards of medical care and had failed to render safe or proper medical care. The record reveals that Linton had some difficulty in finding an expert witness to testify at trial. The trial was rescheduled several times by the court, and the record indicates that much of the delay was attributable to Linton's difficulties in obtaining an expert witness. On November 25, 1996, Dr. Abrams filed a motion for summary judgment on the ground that Linton had failed to

¹Linton's complaint also named five other parties as defendants. Linton agreed to the dismissal of those parties from the action, and they are not parties to this appeal.

produce expert testimony to establish negligence on his part. The court denied the motion, and, on December 10, 1996, Linton identified as her expert witness Dr. C. William Kaiser from New Hampshire. Accordingly, the court set the trial for June 11, 1997.

Approximately one week before trial, the parties went to New Hampshire to depose Dr. Kaiser over the course of two days: June 3 and June 4, 1997. He gave his trial deposition as an expert witness for Linton. Almost immediately after the depositions, the court conducted a hearing on June 6, 1997, as to the competency of Dr. Kaiser's testimony as an expert witness. It entered summary judgment that same day in favor of both Dr. Abrams and Jewish Hospital, finding that Dr. Kaiser's testimony could not be introduced at trial because he "want[ed] to establish a much higher standard [of care] on hospitals and doctors than is required in Kentucky." The court concluded that without Dr. Kaiser's testimony (he was Linton's only expert witness), it would be impossible for her to establish at trial that Dr. Abrams and Jewish Hospital had been negligent. Thus, the court held that summary judgment in favor of the appellees was appropriate. Linton filed a motion asking the court to reconsider and vacate its judgment. The court denied that motion, and this appeal followed.

Linton argues that the court erred in granting summary judgment in favor of Dr. Abrams and Jewish Hospital. She contends that Dr. Kaiser testified as to the proper standard of care imposed upon doctors and hospitals in Kentucky and that he

did not attempt to enlarge the standard or to establish a higher standard of care. Thus, she submits that the court's entry of summary judgment was premature.

In order to qualify for summary judgment, the movant must "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that consequently the moving party was entitled to judgment as a matter of law. "The record must be viewed in the light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary judgment should be used only "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." Id. at 483, citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Moreover, "[c]ase law in our jurisdiction is manifest that summary judgment is to be cautiously applied, especially in allegations involving negligence." Poe v. Rise, Ky. App., 706 S.W.2d 5, 6 (1986).

In a negligence case, the plaintiff bears the burden of establishing that the defendant failed to discharge a legal duty or to conform his conduct to the standard required. Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991). In Kentucky, a doctor owes his patient a duty to "use that degree of care and skill which is

expected of a reasonably competent practitioner in the same class to which [the physician] belongs, acting in the same or similar circumstances." Blair v. Eblen, Ky., 461 S.W.2d 370, 373 (1970).

And:

[a] patient admitted to a hospital operated for private gain 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 Kentucky v. Miller, Ky., 341 S.W.2d 244, 245 (1960). In medical negligence 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). In general, expert testimony is a necessary component in negligence cases involving a post-operative infection. The presence of an infection following an operation is not *prima facie* evidence of negligence since an expertise beyond general knowledge would be required to determine whether the infection had been the result of negligence. Harmon, supra.

In the case before us, Linton was attempting to prove that the infection she developed at the surgical wound site and the complications that followed were the result of negligence on the part of Dr. Abrams and Jewish Hospital. Since this case was based upon a post-operative infection, expert testimony was necessary to establish negligence. In his trial deposition taken on June 4, 1997, Dr. Kaiser testified that both of the appellees had breached the standard of care which they owed to Linton.

Upon direct examination, Dr. Kaiser testified that the standard of care owed to Linton by Dr. Abrams as general surgeon was "that degree of care and skill which an ordinarily careful, skillful, knowledgeable and prudent physician specializing in general surgery would exercise under similar circumstances." Dr. Kaiser also explained the ways in which Dr. Abrams had breached the standard of care owed to Linton. In essence, Dr. Kaiser testified that based upon several factors such as her medical history and her weight, Linton was at high risk for developing a post-operative infection and that Dr. Abrams had failed to take prophylactic measures to decrease her chances for developing an infection. Dr. Kaiser stated that a competent general surgeon would have taken such measures and that Dr. Abram's failure to do so constituted a breach of the standard of care he owed to Linton.

Dr. Kaiser also testified in the trial deposition as to Jewish Hospital's standard of care. He stated that a hospital had "a responsibility to ensure that the care a patient received under its direction and within its walls or within its area of health care delivery [was] appropriate and in accord with the standard of care." Dr. Kaiser reiterated the word *ensure* several times during his testimony, and he explained his use of the word as follows:

I think to take the appropriate steps whereby the hospital in particular is reviewing, assessing and evaluating its medical staff members to make certain that they deliver proper care in the context of this particular case.

After identifying the standard of care owed to a patient by a hospital, Dr. Kaiser then testified as to how in his opinion Jewish Hospital had breached this standard with regard to Linton.

The court held that Dr. Kaiser's testimony could not be introduced at trial because he had incorrectly stated the standards of care which the appellees owed to Linton. The court found that Dr. Kaiser effectively imposed upon the doctor and the hospital an inappropriately high standard of care, rendering them virtual insurers or guarantors of a patient's safety. This finding was based wholly upon Dr. Kaiser's use of the word *ensure* and the following colloquy between Linton's attorney and Dr. Kaiser:

Mr. McCullum: Now is a hospital or a surgeon an insurer or a guarantor of a patient's safety?

Dr. Kaiser: Yes, sir, they are.

This exchange occurred after Dr. Kaiser had testified as to the correct standard of care owed by a doctor to his patient.

Semantically, safety and standard of care are not interchangeable. The order granting summary judgment incorrectly treated these terms as synonymous.

With the exception of this one question, a careful review of Dr. Kaiser's depositions reveals that he repeatedly stated the correct standards of care pursuant to Kentucky law. While the court may have ordered the above-cited exchange stricken from the record, we cannot conclude that the entirety of Dr. Kaiser's testimony was excludable since he repeatedly stated

the correct standards of care. After our review, we hold that the bulk of Dr. Kaiser's testimony was admissible.

In light of the stringent Steelvest standard, we cannot agree as a matter of law that the appellees are entitled to summary judgment.

For the foregoing reasons, we vacate the order of the Jefferson Circuit Court granting summary judgment in favor of both appellees and remand this matter for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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