

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-001291-MR

JOE RAMEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LEWIS G. PAISLEY, JUDGE  
ACTION NO. 95-CI-000414

BAPTIST HEALTH CARE SYSTEMS, INC.;  
SIBU SAHA, M.D.; AND  
ANTHONY ROGERS, M.D.

APPELLEES

OPINION  
REVERSING AND REMANDING  
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BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Joe Ramey (Ramey) appeals from an order of the Fayette Circuit Court entered May 1, 1997, which dismissed his claim against appellees, Baptist Health Care Systems, Inc. (the Hospital), Dr. Sibü Saha (Dr. Saha), and Dr. Anthony Rogers (Dr. Rogers). We reverse and remand.

In December 1993, Dr. Rick McClure (Dr. McClure) advised Ramey that he needed to undergo a heart catheterization. The procedure was originally scheduled for January, and on December 22, 1993, Ramey signed a consent form for the heart catheterization. The procedure was rescheduled and eventually

performed at the hospital by Dr. McClure on February 7, 1994. It appears that Ramey may have executed another consent to this procedure on the day it was performed.

The heart catheterization showed that Ramey had significant multi-vessel heart disease and that immediate treatment was necessary. Consequently, a coronary artery bypass graft and aortic valve replacement was performed on February 8, 1994, by Dr. Rogers. During the course of the bypass procedure, veins were removed from Ramey's left leg for use as bypass veins. Dr. Saha also rendered treatment to Ramey during this time. Although a signed consent form for the bypass surgery was produced during discovery, Ramey denies that the signature on the form is his. In fact, Ramey alleges that he was unconscious for forty-three days after the heart catheterization.

Several days after the bypass surgery, Ramey developed severe circulatory problems in his legs. The problems worsened to the point that it became necessary to amputate Ramey's left leg on February 18, 1994. It appears that all parties agree that Ramey was unable to give informed consent for the amputation and that Ramey's wife signed a consent form for the amputation on February 18, 1994.

On February 6, 1995, Ramey filed a pro se complaint wherein he alleged:

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3. That on, or about, February 8, 1994 plaintiff underwent heart surgery at defendant Hospital. The defendant Hospital, by and through its agents, servants and employees, and defendants, Siby Saha, M.D., Anthony Rogers, M.D., and Rick McClure, M.D.,

were careless and negligent in the following acts of commission or omission in that said defendants:

(a) Failed to warn plaintiff of the risks and dangers associated with said surgery;

(b) Failed to adequately investigate the dangers to plaintiff of removing veins from his leg to repair and/or replace veins in his heart, or cardiac system;

(d) [sic] Were negligent in their care of plaintiff;

(e) Failed to timely and properly communicate with the other attending physician or physicians

4. That as a direct result of the heart surgery performed by defendants upon plaintiff on February 8, 1994 and removal of veins from plaintiff's leg, plaintiff was caused to sustain the amputation of his leg on February 18, 1994.<sup>1</sup>

It appears from the record that Ramey did not obtain counsel until September 1995.

By order of the trial court entered September 27, 1995, Ramey was given ninety days to identify his expert witnesses. Ramey failed to comply and the appellees moved for summary judgment. In support of their motion, the appellees argued that expert testimony was required to establish negligence and summary judgment was appropriate due to Ramey's failure to identify expert witnesses.

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<sup>1</sup>Dr. McClure was later dismissed by agreed order.

In response to the appellees' arguments, Ramey maintained that "the primary thrust of this lawsuit is directed at defendants [sic] respective and joint failure to obtain plaintiff's consent prior to subjecting him to the surgical procedure in question." Ramey also alleged that the proof showed that he was unconscious when the decision to perform open heart surgery was made and his daughter urged the doctors to obtain his consent prior to conducting open heart surgery but they refused. Ramey argued that under Keel v. St. Elizabeth Medical Center, Ky., 842 S.W.2d 860 (1992), expert testimony was not necessary to establish lack of informed consent "where the failure is so apparent that laymen may easily recognize it or infer it from evidence within the realm of common knowledge." Keel, 842 S.W.2d at 862. The appellees countered Ramey's argument by alleging that numerous consents were signed by both Ramey and his family.

In an opinion and order entered March 22, 1996, the trial court recognized that Keel controlled and denied the appellees' motions for summary judgment. The trial court found that under Keel, expert testimony is not required in cases involving the question of whether the patient was ever informed of any risks associated with a surgical procedure and that this was what Ramey was alleging. The trial court held:

At trial, the plaintiff shall be barred from asserting claims other than consent and shall not be permitted to pursue the question of the scope of information provided the Plaintiff when his consent was sought. The plaintiff remains free to pursue the question of whether any information was provided and whether the Plaintiff was competent to consent. Naturally the Defendants remain unhampered in asserting that consent was

unnecessary given the emergency of the situation.

Despite the trial court's ruling, the appellees again moved for dismissal and/or summary judgment on April 8, 1997. It is clear from appellees' memorandum in support of their motion and their arguments at hearing that they were focusing on the amputation of the leg as opposed to the bypass surgery. Appellees argued that Ramey's family had consented to the amputation and that even if they had refused to give consent it was not necessary due to the emergency which required the procedure.

At the hearing, counsel for Ramey once again pointed out that the consent issue arose from the bypass surgery and not the amputation. Ramey's attorney argued that Ramey's wife and daughter had refused to consent to the bypass, denied that the signature on the consent form was Ramey's, and maintained that had Ramey been conscious and informed of the risk, he would not have consented.

At the hearing the trial court indicated that it would grant summary judgment in favor of the appellees. The trial court found that if possible loss of a leg was a known complication of the procedure Ramey should have been informed, but that expert testimony was needed to establish that the possible loss of a limb was a complication from the bypass surgery. An order dismissing Ramey's claim with prejudice was entered on May 1, 1997, and this appeal followed.

Ramey argues that the trial court erred in granting the summary judgment on the ground that a material issue of fact

remained as to whether informed consent was given to the bypass surgery. Ramey agrees that summary judgment would be appropriate as to the amputation of his leg, but maintains that the true issue in this case revolves around the bypass procedure. Summary judgment is inappropriate as long as a material issue of fact remains. Steelvest v. Scansteel Service Center, Ky., 897 S.W.2d 476, 480 (1991). Even if the trial court believes the party opposing the motion cannot prevail, summary judgment is not appropriate where material issues of fact capable of resolution by a jury remain. Steelvest, 807 S.W.2d at 480.

After reviewing the record on appeal, the videotape of the hearings, and relevant case law, we believe that appellees and the trial court have overlooked the fact that Ramey's cause of action stems from his allegation that he did not give consent, informed or otherwise, to the bypass surgery. Ramey is not seeking redress for the amputation of his leg, nor does it appear that he is alleging that the bypass procedure was done negligently. Instead, he is alleging that he never gave consent to the bypass surgery and thus was deprived of the opportunity to decide what was best for himself. Keel clearly establishes that expert testimony in lack of consent cases is not required when a plaintiff alleges that he was never informed of the possible risks accompanying a medical procedure.

The record also supports Ramey's argument that a material issue of fact remains regarding whether Ramey consented to the surgery. In a nutshell, Ramey maintains that he never consented to the bypass while appellees have produced a consent

form which they allege he signed. As both parties are presenting conflicting evidence on this issue, the trial court erred in granting summary judgment.

Having considered the parties' arguments on appeal, the decision of the Fayette Circuit Court is reversed, and this matter is remanded with instructions to reinstate Ramey's cause of action.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

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