

RENDERED: FEBRUARY 12, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001778-MR

JENNY BLEVINS AND ROBERT
STEVEN BLEVINS

APPELLANTS

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 02-CI-00455

FADI BACHA, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MOORE AND STUMBO, JUDGES.

DIXON, JUDGE: On August 11, 2001, Appellant, Robert Blevins, was injured while working as a lineman for Kentucky Utilities (“KU”). Apparently, Blevins had just finished repairing a damaged electrical line and was descending the pole when another piece of electrical equipment exploded. As a result, Blevins was

struck by a foreign object in the upper-right part of his chest, just below his clavicle. Despite his injury, Blevins was able to get to his truck and call for help.

Blevins was thereafter taken to Clark Regional Medical Center with chest pain and shortness of breath. Dr. Timothy Carroll, the examining physician, obtained a medical history and performed a physical examination, noting a small wound approximately one-half inch in length on Blevins' upper right chest. Based upon this initial information and Blevins' description of the explosion, Dr. Carroll included the possibility of a "retained foreign body" in his differential diagnosis¹. Thereafter, Dr. Carroll probed the wound, as well as ordered an EKG, an anterior to posterior chest x-ray and various lab tests. None of the tests indicated the presence of a foreign body.

Blevins was thereafter observed in the ER for over five hours, during which time his vital signs and symptoms improved. After ordering additional lab tests, Dr. Carroll's shift ended and he was relieved by Appellee, Dr. Fadi Bacha. Dr. Carroll testified at trial that he specifically informed Dr. Bacha that he had ruled out a retained foreign object and that Blevins could be discharged pending the outcome of the lab results. In fact, all of Blevins' vital signs and lab results were either normal or improved and, as a result, after performing his own physical examination, Dr. Bacha discharged Blevins with a diagnosis of chest wall contusion and puncture wound.

¹ "Differential Diagnosis" is a methodology used by doctors to determine what could be wrong with a patient whereby, based upon factors such as history, physical examination and testing, the doctor makes a list of all *possible* diagnoses.

Five days later, Blevins experienced a sudden onset of shortness of breath and chest pain, and thereafter collapsed. He was transported by ambulance to Clark Regional Medical Center and was thereafter transferred to University of Kentucky Medical Center by helicopter. At the UK Medical Center, a CT scan of Blevins' chest was initially read as normal. However, a further review of the CT scan the following day revealed a metallic foreign body embedded in the wall of Blevins' aorta. Surgery successfully removed the foreign body; however, because Blevins' brain was deprived of blood and oxygen, he suffered an ischemic, hypoxic stroke resulting in serious and permanent brain damage.

On August 9, 2002, Blevins filed an action in the Clark Circuit Court against Clark Regional Medical Center, Dr. Carroll and Dr. Bacha seeking damages for injuries sustained as a result of each defendant's negligent medical care. Dr. Carroll subsequently settled with Blevins and was not a party at trial or in this appeal. During the August 2008, trial, the primary issue was whether the appropriate standard of care required multiple x-ray views to rule out the possibility of a retained foreign object. Blevins theory of the case was that once Dr. Carroll included the possibility of a retained foreign object in his differential diagnosis, the appropriate standard of care required the doctors to locate the object or conclusively rule out its presence. Blevins' experts testified that had Dr. Carroll or Dr. Bacha ordered a lateral x-ray or a CT scan, they would have discovered the object lodged in Belvins' aorta.

At the close of all evidence, the trial court sustained Blevins' motion for a directed verdict as to causation and special damages, but submitted to the jury the question of whether Dr. Bacha and Clark Regional Medical Center breached their duty to Blevins. The jury returned a verdict in favor of both defendants. Following the denial of his motions for judgment notwithstanding the verdict and a new trial, Blevins appealed to this Court as a matter of right. Additional facts are set forth as necessary.

Blevins first argues that the trial court erred in denying his motions for a directed verdict and new trial. It is his position that based upon all of the evidence and testimony presented at trial, a reasonable juror could have only concluded that defendants breached the appropriate standard of care. As such, in reviewing the evidence in the light most favorable to Blevins, the jury's verdict was palpably and flagrantly against the evidence. We disagree.

On a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998). Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as matters affecting the credibility of witnesses. *Id.* at 18-19. *Cf. Taylor v. Kennedy*, 700 S.W.2d 415 (Ky. App. 1985).

Our standard of review on appeal is set forth in *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988), wherein the Kentucky Supreme Court held that when an appellate court is reviewing evidence supporting a judgment entered upon a jury verdict, the role of that court is limited to determining whether the trial court erred in failing to grant the motion for a directed verdict. All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984), *overruled on other grounds* by *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002).² Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is palpably or flagrantly against the evidence so as to indicate that it was reached as the result of passion or prejudice. *Hornung*. If it was not, the jury verdict should be upheld. *Id.*

Blevins focuses on the fact all of the expert witnesses essentially agreed that no individual test performed by Dr. Carroll or Dr. Bacha ruled out the presence of a foreign body. From that, Blevins concludes that the evidence was susceptible to only one interpretation – that the doctors breached the standard of

² *Sand Hill* was subsequently vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028, 123 S.Ct. 2072, 155 L.Ed.2d 1056 (2003).

care by failing to either detect the object or conclusively rule out its presence.

However, Blevins fails to consider that the defense experts also testified that the combination of the physical examination, the normal x-ray and improved lab results ruled out a retained foreign body within a reasonable degree of medical probability. In fact, emergency physician Dr. Kenneth Boniface testified that prior to this case he would have thought it impossible for a patient to have had a piece of metal penetrate the chest wall, go through the lung and enter the wall of the aorta without any signs of pneumothorax, hemothorax, pulmonary contusion, or air in the diaphragm. Similarly, another emergency physician, Dr. Charles Eckerline, testified that in nearly *all* cases of penetrating chest trauma, one would find pneumothorax present. Yet the evidence herein was that Blevins had no decreased breath sounds, no evidence of internal injuries, and no indication of a retained foreign body in his chest cavity.

We would note that Blevins continues to focus on the *defendants'* breach of duty despite the fact that Dr. Carroll was not a party at trial and neither Dr. Carroll nor Clark Regional Medical Center are parties to this appeal. Thus, the sole issue before us is whether there was sufficient evidence presented at trial from which a reasonable jury could have concluded that Dr. Bacha met the appropriate standard of care. We believe that there was. Certainly, there was evidence to support each party's position. Nevertheless, looking at the evidence as a whole, and in the light most favorable to Blevins, we simply cannot conclude that the jury's verdict was palpably and flagrantly against the weight of the evidence so as

to be the result of passion or prejudice. *Hornung*, 754 S.W.2d at 860. As such, the trial court did not err in denying the motion for a directed verdict.

Blevins next argues that the trial court erred by precluding the use of a treatise to impeach Dr. Bacha during his testimony. During Blevins' case-in-chief, Dr. Bacha testified that the one x-ray in conjunction with the other tests was sufficient to rule out the presence of a foreign body, and that his treatment of Blevins fell within the appropriate standard of care. Blevins argues in his brief that counsel thereafter sought to cross-examine Dr. Bacha regarding a treatise entitled *Emergency Medicine, A Comprehensive Study Guide* (popularly referred to by its principal editor's name "*Tintinalli's*"). In a particular chapter, Dr. Bacha's expert witnesses, Dr. Charles A. Eckerline, writes that in order to meet the appropriate standard of care, a physician must take multiple x-rays to determine whether a puncture wound contains a retained foreign body. Blevins maintains that he should have been permitted to impeach Dr. Bacha by showing that he failed to follow the standard of care espoused by his own expert witness.

We have reviewed Dr. Bacha's testimony in its entirety and find absolutely no reference to *Tintinalli's* or Dr. Eckerline's writings therein. At one point, Blevins' counsel sought to question Dr. Bacha about an article authored by John A. Marx contained in another treatise, *Emergency Medicine* (5th Edition 2002). However, the trial court properly sustained Dr. Bacha's objection on the grounds that such treatise was published a year after Blevins' injury and was thus

not in existence at the time of his treatment. Accordingly, the basis for Blevins' argument has no support in the record.

Blevins also argues that the trial court erred in prohibiting the chapter of text in the Tintinalli treatise authored by Dr. Eckerline to be admitted into evidence and given to the jury as an exhibit. Blevins claimed at trial that what Dr. Eckerline stated in his chapter directly contradicted his opinion at trial that Dr. Basha met the appropriate standard of care. Thus, citing KRE 801A and *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969), Blevins moved to have the entire chapter admitted as a prior inconsistent statement. Further, Blevins also sought to refute Dr. Eckerline's claim that the chapter was limited to puncture wounds of the hands and feet. Defense counsel, however, argued that under the medical treatise exception to the hearsay rule, a written statement contained in a published medical treatise, if admissible, may be read into evidence but not received as an exhibit. KRE 803(18). In addition, defense counsel argued that the chapter would be confusing and misleading to the jury. The trial court ultimately ruled that Blevins' counsel had thoroughly cross-examined Dr. Eckerline about the chapter, his statements therein, and its applicability to Blevins' case, but that the writing itself would not benefit the jury and was subject to misuse since the jurors were not trained medical professionals.

The admissibility of evidence is within the trial court's discretion and its ruling will not be disturbed on appeal absent an abuse of that discretion.

Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999). The test for an abuse

of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Goodyear Tire and Rubber Company v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). We find that it was not.

During his testimony, Dr. Eckerline testified that the chapter he authored related to puncture wounds of the hand and feet. Indeed, the chapter entitled, "*Puncture Wounds and Bites*" details clinical features and treatment for puncture wounds to soft tissue. Dr. Eckerline explained that Blevins' injury was a penetrating wound to a cavity area, which he described as a "totally different animal" that was specifically addressed in another chapter of *Tintinalli's* entitled "*Thoracic Trauma*." Nevertheless, Blevins' counsel thoroughly cross-examined Dr. Eckerline as to whether the appropriate standard of care required similar medical evaluation for both types of injuries.

After reviewing Dr. Eckerline's testimony and the chapter in question, we agree with the trial court that it would not have been helpful to the jury and would have likely led to confusion and misuse. We are of the opinion that the information contained therein was not applicable to Blevins' type of injury. Nor do we agree with Blevins that the writing constituted an inconsistent statement. Dr. Eckerline clearly differentiated between the two types of injuries and the appropriate standard of care for each. His opinion at trial that the single x-ray in conjunction with the other tests performed sufficiently ruled out the presence of a foreign body was in no manner inconsistent with his writing that soft tissue

wounds require multiple x-rays to rule out such presence of such body. The two are simply not related.

The trial court did not base its ruling on either KRE 801A or KRE 803(18). Rather, it ruled that the chapter's probative value was substantially outweighed by the danger of misleading the jury KRE 403, a decision well within its discretion. No error occurred.

The judgment of the Clark Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Robert E. Sanders
Covington, Kentucky

Heidi Engel
Winchester, Kentucky

BRIEF FOR APPELLEE:

Mark E. Nichols
Carl W. Walter
Dan T. Wellman
Lexington, Kentucky