

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001634-MR

ABIGAIL TUCKER

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 05-CI-00792

STEPHEN P. SCHROERING, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Abigail Tucker appeals from the Christian Circuit Court's denial of her motion for a directed verdict. For the following reasons, we affirm.

In 2003, Tucker began treatment under the care of Stephen P. Schroering, M.D., an orthopedic surgeon, after sustaining an injury to her clavicle in an ATV accident. Ultimately, Dr. Schroering elected to surgically repair the clavicle. Following the operation, and based on his review of post-operative X-

rays, he realized that he had operated on the sternoclavicular joint, rather than the clavicle.¹ Dr. Schroering then performed a second, corrective operation.

After the second operation, Tucker filed this claim of medical negligence. During trial, at the close of all the evidence, Tucker moved for a directed verdict on the basis that Dr. Schroering's testimony admitting he performed surgery at the wrong site during the first operation constituted a judicial admission of negligence. The trial court denied the motion and the jury returned a verdict in favor of Dr. Schroering. Tucker then moved for a judgment notwithstanding the verdict and alternatively, for a new trial, on substantially the same grounds as the motion for a directed verdict. The court denied both motions, and this appeal followed.

Upon consideration of a motion for a directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of [the non-moving party]. If the evidence is sufficient to induce a reasonable juror to believe . . . that the defendant is [liable], a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the [non-moving party] is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find [liability], only then the defendant is entitled to a directed verdict of acquittal.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) (citation omitted);
accord Banks v. Commonwealth, 313 S.W.3d 567, 570 (Ky. 2010).

¹ Unknown to Schroering, Tucker had suffered a previous injury to sternoclavicular joint.

Tucker avers Dr. Schroering's testimony at trial constituted a judicial admission of negligence entitling her to a directed verdict. We disagree.

Whether Dr. Schroering's testimony during trial constitutes a judicial admission is a question of law subject to *de novo* review. *Witten v. Pack*, 237 S.W.3d 133, 136 (Ky. 2007). In *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021 (Ky.App. 1941), the Court extensively addressed the issue of the weight to be given, under the rules of evidence, to admissions against interest of parties to an action, differentiating between quasi admissions and judicial admissions. The Court held a judicial admission

is conclusive, in that it removes the proposition in question from the field of disputed issue, and may be defined to be a formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it; and, as a natural consequence, allows the judge to direct the jury to accept the admission as conclusive of the disputed fact.

Id. at 749, 151 S.W.2d at 1024 (citation omitted).

In this case, Dr. Schroering presented evidence that despite mistakenly operating on the sternoclavicular joint, rather than the clavicle, he used “that degree of care and skill which is expected of a reasonably competent pract[it]ioner in the same class to which he belongs, acting in the same or similar circumstances.” *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970) (setting forth standard of care applicable to physician defendant). Dr. Schroering testified that during the first operation he made the incision where he felt to be the most

prominent area and he believed, at the time, he was at the fractured clavicle site. Even though he was actually at the sternoclavicular joint, he did not realize it because what he visually and physically encountered during the operation was not consistent with a normal sternoclavicular joint, which he would have recognized. Post-surgery, Dr. Schroering ordered a CT scan to assist him in determining whether Tucker suffered a dislocation of the sternoclavicular joint, a second fracture very close to the joint, or both. He testified that he then explained to Tucker that a second procedure was necessary and discussed with her the same risks as the first operation, before performing the second, corrective surgery.

Additionally, Dr. Schroering introduced expert medical testimony to demonstrate that he was reasonable in operating at what appeared to be the most prominent area of the clavicle, the area that had been, in his recollection, the painful prominence Tucker described, and that an additional injury existed which was not fully appreciated prior to the first operation. Testimony further established that the sternoclavicular joint quite feasibly was dislocated prior to Tucker's first operation. In addition, testimony showed that Dr. Schroering was reasonably mistaken in believing he was at the fractured clavicle site during the first operation and that, under the circumstances, based on a reasonable degree of medical probability, Dr. Schroering provided reasonably competent care to Tucker. Testimony was presented to show that although Tucker now has a mild loss of range of motion, this result is consistent with the procedures performed on her and

with the likely result she would have had from the ATV accident based on the trauma she received.

A directed verdict in Tucker's favor would have been proper if, under the evidence as a whole, no reasonable jury could have determined that Dr. Schroering exercised reasonable care in treating her. Absent authority stating that operating at the wrong site is *per se* negligence, Dr. Schroering's testimony to that effect was not a judicial admission. Furthermore, our review of the record discloses that substantial evidence was presented during trial whereby a reasonable jury could have determined that Dr. Schroering exercised reasonable care in treating Tucker. Thus, a directed verdict in Tucker's favor was not warranted.

Next, Tucker claims she was entitled to a directed verdict because she did not consent to operation on the sternoclavicular joint during the first surgery. We find this claim of error wholly intertwined with her previous claim of error, discussed above. Again, our standard for reviewing the trial court's denial of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find no liability on the part of Dr. Schroering.

In this case, the testimony of Dr. Schroering during trial reveals that he believed he was at the fractured clavicle site during the first operation. Moreover, his testimony suggests that he did not know of any irregularity at the sternoclavicular joint, or dislocation of the joint, prior to the first operation. Thus, it would not be clearly unreasonable for a jury to conclude that the consent given by Tucker prior to the first operation was indeed as informed as it could be; at the

time, Dr. Schroering diagnosed Tucker to the best of his knowledge as to the nature of her injury and advised her of the planned operation. Accordingly, a directed verdict in Tucker's favor was not warranted.

The Christian Circuit Court's denial of Tucker's motion for a directed verdict is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Donna Thornton-Green
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BRIEF FOR APPELLEE:

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