RENDERED: FEBRUARY 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001861-MR

PAMELA SOWDERS, MICHAEL BRADLEY SOWDERS AND MICHAEL GLEN SOWDERS — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, SPECIAL JUDGE
ACTION NO. 03-CI-00467

CHARLES P. CATRON, M.D., AND CHARLES P. CATRON, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellants, Pamela Sowders, Michael Bradley Sowders, and Michael Glen Sowders, appeal the April 24, 2009, judgment of the

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

Whitley Circuit Court in favor of the Appellees, Charles P. Catron, M.D. and Charles P. Catron, P.S.C., in accordance with a jury verdict. On appeal, Appellants assert that the court should have granted a mistrial on the basis of undisclosed expert testimony provided at trial. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

In September of 1998, Michael Bradley Sowders, age twelve, was suffering from hip pain, and was treated by the Appellee, Dr. Charles Catron. Dr. Catron examined Michael on September 22, 1998, and again on September 29, 1998. Below, the Appellants argued that at the time Michael first saw Dr. Catron, he was already showing signs and symptoms of a septic hip infection. It was the Appellants' theory that Michael suffered trauma to his hip when tackled on a football field approximately ten days to two weeks before seeing Dr. Catron, which ultimately led to the infection.

Dr. Catron eventually diagnosed septic arthritis, an infection of the hip, in October of 1998. However, by that time, Michael had sustained irreparable damage to the cartilage and joint. Accordingly, he underwent a complete hip replacement in 1999. Contrary to the assertion of the Appellants, the Appellees retained experts, most of whom opined that there was osteoarthritis present in Michael's femur which travelled to the hip area weeks after Dr. Catron had seen Michael.[2]

[2] In support of this assertion, Appellees draw the Court's attention to the fact that there was a CT scan conducted on Michael's hip on October 8, 1998, which showed absolutely no indication of infection in the hip.

The Appellants argued that Dr. Catron should have diagnosed Michael's infection on September 22 or September 29, and that if he had done so, Michael's hip would have been saved. During the course of litigation, numerous expert witnesses were retained by the parties. The Appellants retained orthopedic surgeons Drs. John Ogden and Edwin Seasons, and Dr. Catron obtained orthopedic surgeons Drs. James Harkess, Martin Schiller, and Paul Griffin. Extensive pretrial discovery was conducted, including interrogatories concerning the expert witnesses and their opinions. Additionally, the expert witnesses were disclosed and the parties submitted expert disclosure statements setting forth the opinions of the witnesses.

As noted, the opinions of the experts retained by the Appellants were that Michael suffered from septic arthritis when he was seen by Dr. Catron in September of 1998, and that Dr. Catron should have diagnosed that condition at that time, which would have enabled Michael's hip to be saved. Dr. Catron responded with witnesses who essentially testified that his failure to diagnose the septic arthritis in September was not a breach of the standard of care.

The parties agree that during the course of the time that discovery was exchanged below, no witness opined that Michael's septic arthritis resulted from an infection caused by a heating pad burn. Likewise, no witness testified to this effect during the course of a deposition. Nevertheless, during the course of trial below, Dr. Griffin testified as to his opinion that Michael had burned himself with a heating pad after he saw Dr. Catron on September 29, 1998, and that this burn

caused the infection to be in his bloodstream, and to travel to his hip where septic arthritis eventually formed. All parties acknowledge that Dr. Griffin had not previously expressed this opinion. Prior to that time, it had been the defense's position that no one could say for certain when the underlying infection started. [3]

Following this testimony from Dr. Griffin, Appellants moved for a mistrial. In response, the Appellees agreed that the opinion had not been previously disclosed, and had not been formulated until right before trial, stating:

> We agree, your Honor. What happened was late preparation for this case, when we finally deciphered Dr. Weisert's notes it was in Dr. Weisert's notes and it's referred to in the Kentucky Physical Therapy records that he had scars on his hip and in fact that Plaintiffs were questioned about the heating pad burns when their depositions were taken in 2004. The connection, frankly, was not made until right before trial, and that's why it is. (T.R. 04-3-15, 9:07:37).

In response to Appellants' motion for a mistrial, the court acknowledged that according to Dr. Griffin's testimony, Michael himself had caused his hip infection by burning himself with the heating pad, and questioned whether Dr. Griffin's "heating-pad opinion" was the basis for the Appellee's tendered jury instruction on contributory negligence. Nevertheless, the court stated that the case had been pending for years and overruled the Appellant's motion for

[3] In disagreement with that assertion, the Appellants direct this Court's attention to the fact that Dr. Catron's expert, Dr. James Harkess, testified in his discovery deposition that a September 18, 1998, x-ray was consistent with septic hip, and that Michael had septic hip when he saw Dr. Catron in September. Dr. Harkess further stated that if the septic hip had been diagnosed at that time, treatment would have been drainage and IV antibiotic, and Michael would not have needed hip replacement. Dr. Catron himself, during the course of his discovery deposition testified that in retrospect, it appears the septic hip condition was in fact present when he saw Michael in September of 1998.

mistrial. It did, however, specifically admonish the jury at the request of the Appellants, stating:

> [F]or a number of legal reasons that testimony (the heating pad testimony) was not appropriately given at that time, and you as the jury … are admonished not to remember or certainly take no notice of the heating pad (testimony) that was given yesterday.
> That testimony was not properly given and should not be considered by you for any reason. (4-13-15; 9:28:23).

Appellants subsequently filed a Kentucky Rules of Civil Procedure (CR) 59 motion for a new trial, which was also overruled by the court, and this appeal followed.

Our standard of review of a trial court's ruling as to admitting or excluding evidence is limited to determining whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Clephas v. Garlock*, 168 S.W.3d 389, 393 (Ky. App. 2004). We review this matter with this standard in mind.

On appeal, the Appellants make one argument, namely that the introduction of Dr. Griffin's undisclosed expert opinion deprived them of a fair trial, and that, accordingly, the circuit court erred in overruling both the motion for a mistrial and the CR 59.01 motion for a new trial. The Appellants direct this court's attention to the fact that Dr. Griffin's opinion concerning the heating pad burn was never mentioned before trial, and that, indeed, during the course of his

discovery deposition, Dr. Griffin was asked whether he had any other opinions and he replied that he did not. Further, Appellants argue that Dr. Griffin's testimony concerning the heating pad was not only a surprise but was also contrary to the other expert testimony which was given[4] and was the only evidence presented as to when the underlying infection actually started. Moreover, Appellants assert that if Dr. Griffin's testimony were accepted, it would render the opinions of the Appellant's experts impossible, as the heating pad burn had not even occurred at the time Dr. Catron examined Michael in September. Accordingly, they argue that Dr. Griffin's testimony was so unfair and prejudicial as to be a violation of Appellee's duties under CR 26.05, and to require a mistrial.

The Appellants rely on both the civil rules and on the decision of this Court in *Clephas v. Garlock*, 168 S.W.3d 389 (Ky. App. 2004). They argue that in *Clephas* the defendant had disclosed a certain physician as an expert witness but failed to provide detailed opinion disclosures. The trial court nevertheless allowed the introduction of the physician's testimony, causing Clephas to appeal, arguing that the introduction of the physician's opinions resulted in an inherently unfair trial by surprise. This Court agreed, holding that the admission of previously unrevealed opinions resulted in an unfair proceeding, which constituted an abuse of discretion. The Appellants argue that in the matter *sub judice*, as was the situation in *Clephas*, the introduction of Dr. Griffin's testimony concerning the

[4] In support of that assertion, Appellants note that prior to trial, the Appellee's experts opined that Michael's hip infection had started earlier, and note that both Dr. Catron and Dr. Harkess both opined that in hindsight Michael did in fact have a septic hip infection at the time he was examined in September of 1998.

heating pad was prejudicial, and seriously undermined the opinions of their own experts, thereby depriving the Appellants of a fair trial. Thus, they argue that the trial court abused its discretion in failing to grant a new trial pursuant to CR 59.01.

As noted, the Appellees concede that none of their experts testified prior to trial that a heating pad burn may have been a possible entry site for the infection in Michael's hip. However, the Appellees argue that this is ultimately not of importance as the "heating pad theory" was simply not part of their explanation as to how the infection invaded Michael's hip. Indeed, the Appellees argue that the actual manner of infection was not important, and that, regardless of how the infection entered the hip, it did not invade the hip until long after Dr. Catron saw Michael on September 29, 1998.[5] Further the Appellees assert that, despite the lack of immediate objection from the Appellants, they did not ask any follow-up questions of Dr. Griffin concerning the heating pad testimony, that at no time was the heating pad theory argued to the jury, nor was it mentioned to the jury by counsel in any way.

Moreover, the Appellees argue that the Appellants' reliance upon *Clephas* is misplaced. They find *Clephas* distinguishable, insofar as there was a total failure to disclose the opinions of the medical expert, and that at the time the physician's name was disclosed, the expert had no opinions on the medical

[5] To that end, Appellees argue that if the testimony of Dr. Griffin is viewed in its entirety, it supports their ultimate theory that Michael did not have a septic hip on September 22 or 29, 1998, nor were there any signs and symptoms of same because the infection was in the femur at that time and not the hip. Further, the Appellees argue that Dr. Griffin clearly testified that he disagreed with Appellant's theory that trauma caused the infection of the hip, and stated instead that there was "no way to know when the infection started." (4-02-15;6:23:31).

condition about which he ultimately testified. Secondly, they note that in *Clephas,* the medical expert was never presented for a discovery deposition despite a court order to do so. Third, they note that the physician in *Clephas* did not even formulate his opinions until a few hours prior to his testimony at trial and that his opinions were pivotal to the case. Finally, they note that, contrary to the matter *sub judice*, there was no admonishment given to the jury in *Clephas*.

Instead, the Appellees direct this Court's attention to the cases of *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky. 2005), and *Bills v. Commonwealth*, 851 S.W.2d 466 (Ky. 1993), which hold, respectively, that the legally sufficient remedy for a nonresponsive answer that is not argued to the jury or used in trial is an admonishment, and that an admonishment is sufficient when the answer was not deliberately elicited and was isolated and brief. Thus, the Appellees argue that in the matter *sub judice*, the admonishment given by the court was sufficient to cure any prejudice caused by the unsolicited testimony of Dr. Griffin.

We have long held that an admonition is usually sufficient to cure an erroneous admission of evidence, and there is a presumption that the jury will heed such an admonition. A trial court only declares a mistrial if a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way. Stated differently, the court must find a manifest, urgent, or real necessity for a mistrial. The trial court has broad discretion in determining when such a necessity exists because the trial

judge is "best situated intelligently to make such a decision." Ultimately, the trial court's decision to deny a motion for a mistrial should not be disturbed absent an abuse of discretion. *See Matthews v. Commonwealth*, 163 S.W.3d 11, 17 (Ky. 2005)(internal citations omitted).

Indeed, an admonition is insufficient only when one of the following conditions exists: (1) there is an overwhelming probability that the jury will not follow the admonition and the introduced evidence will be devastating to the defendant, or (2) the question had no factual basis and was inflammatory or highly prejudicial. *Johnson v. Commonwealth,* 105 S.W.3d 430, 441 (Ky. 2003).

Having reviewed the arguments of the parties and the applicable law, we are in agreement with the Appellants that Dr. Griffin's testimony was both surprising and undisclosed prior to the time it was given. However, considering the totality of the evidence presented, we simply cannot find that the testimony was of such a magnitude as to deny the Appellants their right to a fair and impartial trial. This is particularly so as the unexpected testimony was not argued in either opening or closing, was not referred to in any other way, was not followed with other questioning of a similar nature, and was testimony that was isolated and brief. Ultimately, the trial court was in the best position to determine whether a mistrial was appropriate. In the matter *sub judice*, the trial court believed that an admonition was sufficient to cure the error. An admonition was given, and we find no reason to assume that the jury did not follow that admonition.

Wherefore, for the foregoing reasons, we hereby affirm the April 24, 2009, judgment of the Whitley Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Larry F. Sword
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Lee Turner
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BRIEF FOR APPELLEES:

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