

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002202-MR

WILBERT E. HORSLEY

APPELLANT

ON REMAND FROM SUPREME COURT
2015-SC-000232-DG

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 10-CI-002420

KENNETH R. SMITH, M.D.,
INDIVIDUALLY AND D/B/A
KS EYEWORKS

APPELLEES

OPINION
REVERSING

** ** * ** * **

BEFORE: ACREE, DIXON, AND VANMETER, JUDGES.

ACREE, JUDGE: Appellant, Wilbert Horsley, appealed the judgment of the Jefferson Circuit Court entered after a jury verdict in favor of Appellees, Dr.

Kenneth Smith and KS EyeWorks. On February 13, 2015, this Court rendered an

opinion affirming the judgment. On February 10, 2016, the Kentucky Supreme Court, on discretionary review, vacated our opinion and remanded the case for further consideration in light of its decision in *Sargent v. Shaffer*, 467 S.W.3d 198 (Ky. 2015). For the reasons set forth in *Sargent*, we reverse the Jefferson Circuit Court judgment.

FACTS AND PROCEDURE

Dr. Smith, a Louisville ophthalmologist and owner of KS EyeWorks, specializes in cataract and refractive eye surgery. Dr. Smith first consulted Horsley in 2006 regarding Horsley's diminishing eyesight, later becoming his treating physician. Dr. Smith determined that Horsley suffered from cataracts. He initially prescribed eyeglasses as a conservative course of treatment. Eventually, Horsley's eyesight deteriorated so that it rendered corrective lenses ineffective. Dr. Smith again consulted Horsley and scheduled him for cataract surgery.

As part of the work-up for surgery, Dr. Smith explained the procedure and its attendant risks to Horsley. The procedure included administering a local anesthetic to the eye by injection – an injection which risked hitting one of the eye's many blood vessels. After explaining this, Dr. Smith left Horsley to consider whether to proceed with surgery and provided him a consent document to be signed and returned. The consent document included this statement: "The ophthalmologist or the anesthesiologist/nurse anesthetist will make your eye numb with either drops or an injection (local anesthesia)." The document also listed a

host of risks related to the procedure, including “total loss of vision, or even loss of the eye . . .”

After weighing his options, Horsley decided to have the surgery and signed and returned the consent form to the doctor.

Dr. Smith performed the first surgery on Horsley’s right eye. As was his practice, Dr. Smith used a needle to administer the anesthetic. The surgery was successful and Dr. Smith scheduled a second operation for Horsley’s left eye about a month later.

As with the right eye surgery, Dr. Smith began the procedure on the left eye by administering an anesthetic injection. This time, there were complications when the needle ruptured a blood vessel in Horsley’s left eye resulting in blindness in that eye.

Horsley filed a medical malpractice action in Jefferson Circuit Court against Dr. Smith, individually, and against the doctor’s practice, KS EyeWorks. The stated claim was one count of common law medical negligence and included allegations that:

4. [I]t was the duty of [Dr. Smith] to exercise that degree of learning, skill, ability, care, attention, diligence, prudence, common sense and vigilance ordinarily possessed by physicians, surgeons and ophthalmologists, practicing under the same or similar circumstances and to obtain [Horsley’s] informed consent regarding the surgical procedures to be performed

5. [Dr. Smith was] negligent in the care and treatment of [Horsley] in that [he] failed to use the same degree of skill, diligence and care as is possessed by prudent,

skillful, careful and knowledgeable physicians, surgeons and ophthalmologists under the same or similar circumstances and otherwise deviated from the standard of care applicable thereto.

6. [Dr. Smith] failed to obtain [Horsley's] informed consent regarding the surgical procedures performed upon [Horsley].

7. As a direct and proximate result of [Dr. Smith's] negligence, deviations from the standard of care and lack of informed consent, [Horsley] sustained severe, permanent and disabling injuries

After an appropriate period of discovery, the case was tried on three consecutive days. Horsley argued both that Dr. Smith negligently administered the anesthesia, and that he failed to adequately explain the anesthesia could have been administered by using numbing drops instead of injection. Horsley claimed that had Dr. Smith made him aware of these alternative methods, his decision to undergo surgery may have been different.

On cross-examination, Horsley's counsel presented Dr. Smith with a page from the American Medical Association (AMA) website. Dr. Smith agreed with the statement there that, depending on the situation, it is appropriate to inform a patient of alternatives to the proposed course of treatment and associated risks.

Dr. Smith admitted further that although there are several ways to administer anesthesia before cataract surgery, his standard practice was to perform an injection. While Dr. Smith recalled discussing with Horsley the different ways of administering anesthesia, he conceded that he did not give Horsley the option of selecting his choice of anesthesia.

At the close of evidence, Horsley moved for a directed verdict on the issue of informed consent. The trial court denied the motion, and proceeded to address arguments about jury instructions.

Horsley first tendered a general instruction regarding a physician's duty of care. The instruction stated, in pertinent part: "it was the duty of [Dr. Smith] to exercise that degree of care and skill which an ordinarily careful, skillful, knowledgeable and prudent physician specializing in Ophthalmology would use under circumstances like or similar to those shown in this case." (Plaintiff's Tendered Instruction No. 1).¹

Horsley also tendered a second instruction which he attributed to *Palmore*, Kentucky Instructions to Juries, Fifth Ed. § 23.10. The instruction stated: "With respect to disclosing to [Horsley] the risks of the surgical operation he proposed to perform on him, it was the duty of [Dr. Smith] to exercise the degree of care and skill expected of a reasonable competent practitioner specializing in ophthalmology and acting under similar circumstances." (Plaintiff's Tendered Instruction No. 2). Except for the introductory clause regarding disclosing risks, the two proposed instructions are substantively identical. However, Horsley did not offer this instruction as an alternative, but in addition to the first instruction.

¹ This instruction is incorrectly attributed to "*Palmore*, Kentucky Instructions to Juries, Fifth Ed., § 23.12 *et seq.*" Section 23.12 is a model instruction for "Wrongful Death of Fetus; Issue of Viability." The language that most closely resembles Horsley's instruction is found in § 23.01, entitled, "Liability of Physician or Surgeon to Patient; Standard of Care." This misidentification has no effect on our review.

Largely consistent with Horsley's first instruction and paragraph 4 of his complaint, the circuit court instructed the jury as follows:

It was the duty of Dr. Kenneth Smith in treating Wilbert Horsley to exercise the degree of care and skill of a reasonably competent ophthalmologist acting under similar circumstances. If you are satisfied from the evidence that Dr. Smith failed to comply with this duty, and further satisfied that such failure was a substantial factor in causing the injuries complained of by Wilbert E. Horsley, then you will find Dr. Smith at fault.

The jury found for Dr. Smith. Horsley's motions for a new trial or judgment notwithstanding the verdict were denied, and the trial court entered judgment in accordance with the verdict. Horsley now brings this appeal.

ANALYSIS

Horsley presents four arguments on appeal. Those arguments are: (1) the trial court erred by failing to instruct separately on Smith's duty to obtain Horsley's informed consent; (2) the trial court erred by excluding an exhibit Horsley tendered; (3) the trial court erred by overruling Horsley's directed verdict motion; and (4) the trial court erred by failing to strike Smith's answer to the complaint.

The holding in *Sargent v. Shaffer* compels us to reverse the Jefferson Circuit Court's judgment on the basis of Horsley's first argument – improper jury instructions. His other arguments, therefore, are moot.

“[A] trial court’s decision on whether to instruct on a specific claim will be reviewed for abuse of discretion; the substantive content of the jury instructions will be reviewed *de novo*.” *Sargent*, 467 S.W.3d at 204.

The rule regarding the first category of jury instruction error is that “[t]he trial court must instruct the jury upon every theory reasonably supported by the evidence.” *Id.* at 203. Although refuted by Dr. Smith, there was never a question regarding the sufficiency of evidence to support an instruction that the doctor failed to disclose all risks and options to anesthesia. The appeal, then and now on remand, addressed itself to the substantive content of the instructions.

The trial court concluded, and a majority of the panel² initially agreed, that its instruction which tracked paragraph 4 of Horsley’s complaint was adequate. Consistent with Kentucky’s bare-bones approach to jury instructions, we held that it was appropriate to instruct the jury generally as to a medical professional’s duty to his patient, allowing the attorneys during closing to flesh out how the duty was breached, whether by negligent diagnosis or negligent surgery or negligently failing to inform.

Sargent corrects the majority’s misunderstanding. Our approach allowed an instruction that “was incorrectly stated so as to misrepresent the applicable law to the jury.” *Id.* “[I]n addition to the general duty of ordinary professional care, health care providers are subject to special duties created by the legislature, which must be incorporated into jury instructions in medical negligence cases.” *Id.* at

² One member of the panel, Judge Dixon, dissented from the majority opinion.

206. “KRS 304.40–320 is an exercise of the legislature’s prerogative to amplify, or expound upon, the general duty of a medical provider to obtain a patient's informed consent with specific conditions for compliance.” *Id.*

Therefore, in a medical malpractice action that includes a claim that the medical professional failed in his duty to obtain the patient’s informed consent, there must be a more specific instruction.

In *Sargent*, the Supreme Court provided guidance as to how that instruction should look. Referring to *Sargent*’s jury instruction rejected by the circuit court, the Court stated it “is simple and uncluttered by complex or confusing verbiage [and w]ith minor variations based upon the peculiarities of the particular case, it would serve well as an appropriate model for similar cases.” *Id.* at 210. We quote that instruction here, with modifications, for use in a re-trial of *Horsley*’s case against Dr. Smith.

It was the duty of [Kenneth Smith], M.D. to obtain [Wilbert Horsley’s] informed consent before surgery. Informed consent shall be deemed to have been given where (1) the action of Dr. S[mith] in obtaining the consent of the patient was in accordance with the accepted standard of medical practice among members of the profession with similar training and experience; and (2) a reasonable individual, from the information provided by [Kenneth Smith], MD, would have a general understanding of the procedure and medically acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other, health care providers who perform similar treatments or procedures.

Id.

CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Gary R. Hillerich
Louisville, Kentucky

Irwin M. Ellerin
Atlanta, Georgia

BRIEF FOR APPELLEE:

Bradley R. Hume
Chad O. Propst
John F. Parker
Patricia C. LeMeur
Frank P. Doheny, Jr.
Louisville, Kentucky