RENDERED: December 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000344-MR

SHEILA FARRELL and RICK FARRELL — APPELLANTS

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CI-000722

TRI-STATE DIAGNOSTICS, INC. — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: JOHNSON, KNOX, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order granting appellee summary judgment in a medical malpractice case. The issue raised is whether appellants were required to use the testimony of an expert witness to prove lack of informed consent. We agree with appellants that given the facts of this case, they were not. Hence, we reverse and remand.

Appellant Sheila Farrell (Farrell) underwent a magnetic resonance imaging (MRI) of the head at Tri-State Diagnostics Center on July 27, 1995. In preparation therefor, she was administered a direct injection of a contrast agent. Two days later, she developed swelling, red streaks, and disability in the

arm in which she was injected. Farrell was diagnosed with thrombophlebitis and also claims to have developed a staph infection.

Farrell brought suit on the grounds of medical negligence and lack of informed consent. This appeal concerns only the latter claim. Appellee moved for summary judgment on the basis that Farrell had no expert testimony. The circuit court granted the motion, finding Keel v. St. Elizabeth Medical Center, Ky., 842 S.W.2d 860 (1992), which held that expert testimony is not always needed in an informed consent case, distinguishable:

> Plaintiff Sheila Farrell was presented with a detailed set of inquiries and questions concerning her history and the MRI procedure. She was also presented with a document which she signed which acknowledged that she had been informed about the procedure and the possible complications.

In Keel, 842 S.W.2d 860, the patient underwent a CT scan, which included the injection of a contrast. He was given no information about the risks of the procedure, although he may have provided answers to routine questions about allergies, medications, whether he had ever undergone a similar procedure involving a contrast medium, and if so, whether he had had any adverse reaction. Like Farrell, Keel developed thrombophlebitis at the site of the injection. In bringing suit, Keel offered no expert medical testimony on the issue of informed consent. The Court held that "expert evidence is not required in all instances where the claim is lack of informed consent." Id. at 862. The

Court set forth the special circumstances of the case which exempted Keel from needing expert testimony:

> St. Elizabeth offered Keel *no information whatsoever* concerning any possible hazards of this particular procedure, while at the same time the hospital admits that it routinely questions every patient about to undergo a dye injection as to whether he/she has had any previous reactions to contrast materials. If we are to analogize consent actions to negligence actions, we must also acknowledge that a failure adequately to inform the patient need not be established by expert testimony where the failure is so apparent that laymen may easily recognize it or infer it from evidence within the realm of common knowledge. In the present case, a juror might reasonably infer from the non-technical evidence that St. Elizabeth's utter silence as to risks amounted to an assurance that there were none, whereas its own questions to patients regarding reactions to this specific procedure demonstrate that St. Elizabeth itself, as the health care provider performing the treatment, recognized the substantial possibility of complications, and whereas (subject to further proof) a complication did in fact result.

Id. (citations omitted).

Appellants argue that summary judgment was inappropriate because, as in the Keel case, a juror might reasonably infer that she was not specifically informed that she could suffer thrombophlebitis or a staph infection, and that if she had been so informed, she would not have consented to the MRI or the injection.

Prior to the circuit court's ruling on the motion, the evidence gathered by appellants included the depositions of the appellee's MRI supervisor, the neurologist who treated Farrell for the thrombophlebitis, and the forms she completed prior to

the MRI. Farrell signed a "CONSENT TO CARE AND TREATMENT" form, which states:

> I understand that I am suffering form [sic] a condition requiring diagnosis and medical treatment. I hereby consent to rendering [sic] such care, which includes MRI/MRA examination and my [sic] include a [sic] injection of gadolinium contrast agent (if ordered by referring physician). I further consent to such medical care to be necessary or appropriate.
>
> I understand that the practice of medicine is not a [sic] exact science and that diagnosis and treatment may involve risk or [sic] injury, or even death. I acknowledge that no guarantees have been made to me as to the result of examination in the facility.
>
> I understand that I have the right to refuse consent to any proposed procedures. I understand that it is my responsibility to advise my physician if I desire to refuse a proposed procedure.
>
> This form has been fully explained to me, I have been given a [sic] opportunity to ask questions, and I am satisfied that I understand its contents and significance.

Farrell also answered screening questions, asked by her physician, to elicit whether she had any condition which would contraindicate an MRI. There is no question as to whether the patient had any history of an adverse reaction to contrast dye. Farrell herself completed a form entitled, "THE FOLLOWING ITEMS MAY BE HAZARDOUS OR MAY INTERFERE WITH THE MRI EXAMINATION BY PRODUCING A [sic] ARTIFACT [sic]." Again, there was no mention of a prior reaction to contrast dye. Finally, Farrell executed a screening form specifically for undergoing a head procedure. This form included the question, "Have you ever had a reaction to a contrast medium used for MRI or CT?" Farrell answered in the negative.

Jana Conn, the MRI supervisor, testified that the Consent to Care form did not specifically warn about thrombophlebitis or a staph infection. She deposed that Farrell knew she'd be getting an injection and had ample opportunity to ask questions.

Dr. S. Douglas Deitch is a neurologist who treated Farrell. He diagnosed thrombophlebitis secondary to complications from her IV[1]. He testified that this condition is a known, but not a normal, complication of an IV. Reluctant to give any opinion on the informed consent issue, he did state that it was his experience that the informed consent she signed was consistent with the way informed consent is procured for similar diagnostic studies.

When considering a summary judgment, we view the evidence in the light most favorable to the party opposing summary judgment. Dossett v. New York Mining & Mfg. Co., Ky., 451 S.W.2d 843 (1970). In comparing the facts of this case to those of Keel, we note that Keel was offered no information on the possible hazards of the CT scan. Farrell was not informed about the possibility of thrombophlebitis, even though Dr. Deitch averred that it is a known complication of an injection, and Keel tells us the same.

Farrell did, however, complete the informed consent document, which warned her of the possibility of injury or death.

[1] Dr. Deitch wrongly assumed Farrell had an IV, when, in fact, she underwent a direct injection of the contrast dye.

It cannot be gleaned from Keel whether the patient signed a boiler-plate informed consent document. Assuming he did not, this fact differentiates the present case from Keel. Thus, we must ask whether the notice that the MRI could result in injury or even death was sufficient to have informed Farrell about the possibility of thrombophlebitis.

"[T]he extent of disclosure relevant to securing the patient's consent must be evaluated in terms of what the physician knew or should have known at the time he recommended the treatment to the patient." Holton v. Pfingst, Ky., 534 S.W.2d 786, 789 (1975). Moreover, KRS 304.40-320 requires informed consent to be "in accordance with the accepted standard of medical . . . practice among members of the profession with similar training and experience." It also dictates that a reasonable person have a general understanding of the "substantial risks and hazards inherent in the proposed . . . procedures which are recognized among other health care providers who perform similar . . . procedures" based on the information given by the health care provider. In addition, our Supreme Court recently announced:

> The very basis of an informed consent is the discussion between physician and patient regarding the nature and purpose of the proposed operation, the risks and possible complications thereof, and possible alternative methods of treatment.

Kovacs v. Freeman, Ky., 957 S.W.2d 251, 255-56 (1997).

Appellants have provided proof, through Dr. Deitch's deposition, that thrombophlebitis is a known complication of the procedure. Since Farrell was not informed of this substantial

risk, she can establish that the consent form does not meet the requirements of KRS 304.40-320. We also find it curious that although the informed consent form was specific enough to note that Farrell may receive an injection of gadolinium contrast, it only generally stated that the procedure might involve risk of injury or death. Surely the same can be said of any medical procedure, but clearly, Farrell was at no point informed of the risk of thrombophlebitis or any other specific risks. The burden is on the health care provider to disclose risks, not on the patient to ask. A first-time MRI patient may not even know what contrast dye is, not to mention have the forethought to inquire about any complications it may cause.

In Keel, the hospital admitted that it routinely asked CT patients if they had previous reactions to contrast materials. The Court reasoned that the hospital's silence as to risks was an assurance that there were none, whereas its practice of asking about reactions to contrast dye evidenced its knowledge of the possibility of complications due thereto. Here, one of the documents completed by Farrell demonstrated the appellee's routine of inquiring about reactions to contrast dyes. We do not believe it would be a stretch for a juror to conclude that Tri-State Diagnostics, Inc., like St. Elizabeth Hospital, recognized the possibility of complications yet remained silent as to them, and its silence was tantamount to an assurance that the procedure carried no risk other than the general disclaimer of injury or even death. Since the inconsistency would be evident to any

layman, expert testimony is not necessary. Snawder v. Cohen, 804 F. Supp. 910 (W.D. Ky. 1992).

Because we believe that appellants "present[ed] at least some affirmative evidence showing that there is a genuine issue of material fact for trial," Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991), we reverse the judgment of the trial court, granting summary judgment to appellee, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jeffrey L. Preston
Catlettsburg, Kentucky

BRIEF FOR APPELLEE:

Carl D. Edwards, Jr.
Ashland, Kentucky