

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000536-MR

SANDY KELLY,
ANCILLARY ADMINISTRATRIX
OF THE ESTATE OF
GUSTAVE HOLLANDER, DECEASED

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 95-CI-03250

KENETH TUFTS, M.D.

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, KNOPF AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Sandy Kelly, Ancillary Administratrix of the Estate of Gustave Hollander (Kelly) appeals from a trial verdict and judgment entered by the Fayette Circuit Court on July 26, 1999, in favor of Kenneth Tufts, M.D. (Dr. Tufts). We affirm.

During the 1980s, Gustave Hollander (Hollander) suffered a series of strokes, including one in 1986 which left him partially paralyzed on his right side. The strokes also caused Hollander to develop multiple infarct dementia, a condition which causes agitation and combativeness.

From 1986 to 1994, Hollander lived in Illinois with his daughter, Donna Pederson (Pederson), and her husband. The Pedersons cared for Hollander with the help of a live-in attendant. Pederson testified at trial that Hollander generally had a good disposition but could become combative when they would provide for his personal needs. According to Pederson, when Hollander became agitated he could be controlled by holding his non-paralyzed arm or by using a wrist restraint. There was also testimony that some health care workers refused to care for Hollander while he lived with the Pedersons due to his combativeness.

Hollander was admitted to Pine Meadows Nursing Home (PMNH) in Lexington, Kentucky, on September 23, 1994. Although there was some controversy as to whether this was a permanent move, PMNH was chosen because Kelly, who is Hollander's granddaughter, lives in Lexington.

Dr. Tufts, the medical director of PMNH at the time of Hollander's admission, was chosen by Hollander's family to act as his attending physician. At the time Hollander was admitted, Dr. Tufts prescribed Navane, an anti-psychotic drug, to control Hollander's agitation and combativeness.

Navane was first administered to Hollander on September 26, 1994, following several instances where he struck nursing home staff. Dr. Tufts doubled Hollander's dosage on September 30, 1994. Dr. Tufts admitted at trial that he did not seek consent from Hollander's family to treat him with Navane at the time he originally prescribed it or when he doubled the dosage.

Kelly visited Hollander on September 28, 1994, and noted that he appeared to be drugged. Although she called Pederson and advised her of her concerns, neither Kelly nor Pederson objected to the use of Navane at that time. On October 7, 1994, when Kelly noticed that Hollander was too weak to sip liquids through a straw, the family was advised for the first time that he was being given Navane. They asked that the Navane be discontinued and Dr. Tufts complied with their request.

On October 13, 1994, Hollander was transferred to St. Joseph's Hospital, where he was noted to be suffering from dehydration, pneumonia, and malnutrition. Hollander died on October 17, 1994, of bilateral pneumonia and congestive heart failure.

Kelly filed suit against PMNH and Dr. Tufts. In regard to Dr. Tufts, Kelly alleged that his failure to obtain consent to treat Hollander with Navane was a breach of his duty of care.

At trial, Kelly presented expert testimony from Dr. Kelly Clark (Dr. Clark), a psychiatrist. Dr. Clark testified that Navane is an anti-psychotic medication which has sedative and tranquilizing side effects. In Dr. Clark's opinion, Dr. Tufts' use of Navane to control Hollander's behavior was improper and violative of his standard of care. Dr. Clark further testified that the use of Navane coupled with Dr. Tufts' failure to monitor Hollander's condition were substantial factors in causing his death. According to Dr. Clark, the use of Navane compromised Hollander's ability to eat, drink, and move about. This in turn weakened Hollander, making him more susceptible to

contracting pneumonia, and reduced his body's ability to recover from pneumonia once it developed. Kelly also offered expert testimony from Dr. George Nichols (Dr. Nichols), a former medical examiner. Dr. Nichols testified that Hollander died of chronic heart failure and pneumonia. Dr. Nichols could not state whether Dr. Tufts' use of Navane was a substantial factor in causing Hollander's death. Kelly did not offer any expert testimony as to whether Dr. Tufts' failure to obtain consent from Hollander's family before treating Hollander with Navane was a breach of his duty of care.

Dr. Tufts presented expert testimony from Dr. John Pappas and Dr. Larry Russell. Both Dr. Pappas and Dr. Russell testified that the standard of care does not require a physician to consult with or obtain consent from family members prior to prescribing medications such as Navane when the physician has been designated to care for a patient in a nursing home.

Dr. Tufts and Dr. Russell also testified that the use of Navane to treat agitation and combativeness in nursing home patients is an acceptable "off label" use of Navane. They further stated that the use of and doubling of the dosage of Navane was appropriate in Hollander's care, as was its discontinuation at the family's request. Dr. Russell further testified that he frequently uses Navane in his practice and that he does so without seeking or obtaining consent to treatment with Navane from family members. Dr. Tufts offered similar testimony.

At the close of evidence, Kelly sought a directed verdict against Dr. Tufts on the issue of Dr. Tufts' liability in

battery based on his admission that he failed to obtain consent from Hollander or a family member prior to treating him with Navane or doubling the dosage. Kelly's motion was denied.

Kelly also tendered the following jury instruction regarding Dr. Tufts' failure to obtain consent:

You will find for [Kelly] against Kenneth Tufts, M.D., if you are satisfied from the evidence that [he] initiated treatment of [Hollander] with the drug, Navane, without the consent of Mr. Hollander or the consent of a responsible family member. Otherwise, you will find for [Dr. Tufts] under this instruction.

The trial court refused this instruction. Kelly also tendered the following instruction as to Dr. Tufts' duty of care:

The Court instructs the Jury that it was the duty of [Dr. Tufts], in rendering care to [Hollander], to exercise the degree of care and skill expected of a reasonably competent physician acting under similar circumstances as those in this case.

If you are satisfied from the evidence that [Dr. Tufts] failed to comply with this duty and that such failure was a substantial factor in causing [Hollander] to receive improperly prescribed or improperly monitored medication, then you will find for [Kelly]; otherwise you will find for [Dr. Tufts] under this Instruction.

The trial court refused this instruction and instead instructed the jury as follows:

It was the duty of [Dr. Tufts] in treating [Hollander] to exercise the degree of care and skill expected of a reasonably competent physician specializing in internal medicine and acting under the same or similar circumstances as in this case.

This was the only instruction given which pertained exclusively to Dr. Tufts.

Following deliberations, the jury returned a verdict in favor of Dr. Tufts, and on July 26, 1999, the trial court entered judgment in favor of Dr. Tufts.¹ This appeal followed.

- I. DID THE TRIAL COURT ERR IN FAILING TO GRANT A DIRECTED VERDICT IN KELLY'S FAVOR ON THE ISSUE OF DR. TUFTS' FAILURE TO OBTAIN CONSENT FROM HOLLANDER'S FAMILY PRIOR TO TREATING HIM WITH NAVANE?

Based on Dr. Tufts' admission that he did not obtain consent to treat Hollander with Navane, Kelly contends that the trial court erred in refusing to grant her motion for directed verdict as to Dr. Tufts' liability in battery. We disagree.

Kelly's argument on this area overlooks the fact that Hollander's family chose Dr. Tufts to act as Hollander's treating physician and consented to his treatment of Hollander. Kelly's reliance on Vitale v. Henchy, Ky., 24 S.W.3d 651 (2000) is misplaced as that case involved a surgeon who operated on a patient without consent. The same is true of Kelly's reliance on Coulter v. Thomas, 33 S.W.3d 522 (2000), which involved revocation of consent to a medical procedure. There has never been any allegation that Dr. Tufts continued to treat Hollander with Navane after his family asked that it be stopped, or that his family revoked their consent to Dr. Tufts' treatment of Hollander. Nor do we believe that Tabor v. Scobee, Ky., 254 S.W.2d 474 (1951) applies as that case involved a surgeon who performed an unauthorized surgical procedure during the course of an authorized surgery. We find that the fact that Hollander's

¹The jury did, however, return a verdict in Kelly's favor on her claims against PMNH.

family selected Dr. Tufts and gave consent to his treatment of Hollander removes the matter from the scope of battery, and we agree with Dr. Tufts that the proper question to be resolved by the jury was whether he acted outside the accepted standard of medical care in prescribing Navane to Hollander without the family's specific consent to the medication.

I. DID THE TRIAL COURT ERR IN FAILING TO GIVE THE INSTRUCTION TENDERED BY KELLY PERTAINING TO DR. TUFTS' STANDARD OF CARE?

Kelly contends that the trial court erred in refusing the instruction she tendered in regard to the negligence of Dr. Tufts. Kelly maintains that the tendered instruction "was modeled upon the instruction discussed and approved in the case of Deutsch v. Shein, Ky., 579 S.W.2d 141 (1980)." Kelly also relies on House v. Kellerman, Ky., 519 S.W.2d 380 (1974), and Harris v. Thompson, Ky., 497 S.W.2d 422 (1973), in support of the tendered instructions. After reviewing the cases cited by Kelly, we are not convinced that the trial court's refusal to use Kelly's instruction was erroneous as the type of instruction she sought "is only to be used in cases involving superseding/intervening causes." Welsh v. Galen of Virginia, Inc., ____ S.W.3d ____ (2000).

In Deutsch, the plaintiff was hospitalized to determine the cause of her nausea and weakness. The defendant doctor submitted the plaintiff to numerous x-rays without first performing a pregnancy test. When plaintiff later learned she was pregnant at the time the x-rays occurred, she made the agonizing decision to terminate her pregnancy due to her fears that the radiation had damaged the fetus. In explaining the jury's decision, the Court noted:

The jury found that Dr. Shein failed to use that degree of care and skill which is expected of a reasonably competent practitioner specializing in internal medicine, acting in the same or similar circumstances, by not obtaining a pregnancy test before Mrs. Deutsch was administered x-rays. The jury further found, however, that Dr. Shein's failure to obtain a pregnancy test, coupled with the administering of x-rays, was not a substantial factor in causing the injury of which Mrs. Deutsch complained.

Deutsch, 597 S.W.2d at 143. The Court found that it was erroneous for the jury to find that the doctor's actions were not a substantial factor in causing the plaintiff's injury once it had decided that he was negligent in failing to administer the pregnancy test. In so holding, the Court stated that:

[t]he jury's finding in the negative was encouraged by the use of "substantial factor in causing the injury of which Mrs. Deutsch complained" in the instructions. Our use of the substantial factor test shows the test applied to the event which results in the injury, not the injury itself. [Citations omitted.] The injury need only flow directly from the event.

Id. at 145. Stated another way, the Court recognized that the x-rays, and not the doctor's failure to perform a pregnancy test, were what caused the injury. Therefore, since the x-ray caused the injury, the jury had no choice but to absolve the doctor under the instructions as it was given. Thus, the jury should have been instructed to find for the plaintiff if it determined that the doctor's failure to administer a pregnancy test was a substantial factor in causing the event that led to the injury.

Welsh, ____ S.W.3d at ____ . The instruction given by the trial court does not constitute reversible error.

I. DID THE TRIAL COURT ERR IN ADMITTING THE RESULTS OF AN ACTION BY THE KENTUCKY BOARD OF MEDICAL LICENSURE INTO EVIDENCE?

After Hollander's death another daughter, Barbara Echeverri, filed a grievance against Dr. Tufts with the Kentucky Board of Medical Licensure (the Board). Following an investigation consisting of a review of Hollander's medical records and witness interviews, the Board concluded that Dr. Tufts' care of Hollander did not violate the Kentucky Medical Practices Act. Prior to trial, Kelly filed a motion in limine seeking to preclude any mention of the Board's findings or conclusions at trial, but the motion was denied. Although the trial court permitted counsel to ask expert witnesses at trial whether the findings of the Board impacted on their opinions, the trial court refused to admit the Board's written report into evidence.

Kelly maintains that the admission of the results of the Board's investigation of Dr. Tufts is reversible error. In support of her argument, she relies on Shatz v. American Surety Company of New York, Ky., 295 S.W.2d 809 (1955), which held that a judgment of acquittal rendered by a jury in a criminal proceeding is not admissible as evidence in a civil action based on the same facts.

Even if we were to find that the admission of the Board's findings was erroneous, we believe that any error resulting therefrom was non-prejudicial and does not require reversal. Kentucky Lake Vacation Land v. State Property and Buildings Commission, Ky., 333 S.W.2d 779, 781 (1960). As Dr.

Tufts points out, the actual written report rendered by the Board was not admitted into evidence, and it appears that its use was limited to asking several expert witnesses whether the Board's findings had any impact on their opinion regarding Dr. Tufts' care of Hollander.

The trial verdict and judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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