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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2000-CA-002785-MR

WILLIAM ROBERT KING, by and through his next friend, ROBERT KING; ROBERT KING and HELEN KING — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 96-CI-003881

DR. MARIA MANION and DR. NASIRUDDIN SIDDIQUI — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Robert King ("King") sued Ten Broeck Hospital of Louisville ("Ten Broeck") and two psychiatrists, Doctors Maria Manion ("Manion") and Nasiruddin Siddiqui ("Siddiqui") who have staff privileges there, on behalf of his minor son, William Robert King ("William"). King appeals from a November 6, 2000, opinion and order of the Jefferson Circuit Court that granted both Manion's and Siddiqui's motions for summary judgment. After careful review, we affirm.

In December 1994, Dr. Siddiqui began treating William, who was nine years old at the time, for anger impulsivity and enuresis (bed-wetting). Subsequently, William began to display aggressive behavior both at home and school, and his mother felt that she could not control him. On May 16, 1995, Siddiqui admitted William to Ten Broeck for inpatient treatment of his behavioral problems. While at Ten Broeck, Siddiqui diagnosed him with impulse control disorder, not otherwise specified, over-anxious disorder, and enuresis.

On May 12, 1995, Dale Robertson, Jr. ("Dale"), a ten-year-old, was admitted to Ten Broeck to be treated for depression, suicidal ideation, self-abuse, and family dysfunction. While at Ten Broeck, Dr. Manion treated Dale. Manion placed Dale on sexual precautions because he had a history of violent, aggressive behavior, and sexually acting out. On May 29, 1995, Dale was placed in the same room as William. That same day, Dale allegedly sexually assaulted William.

On July 8, 1996, King sued Ten Broeck for negligence and Siddiqui for medical malpractice in Jefferson Circuit Court. On July 6, 1999, the circuit court entered a scheduling order that required King to disclose his expert witnesses no later than August 3, 1999, and required the defendants to disclose their experts no later that September 15, 1999. King designated only one expert witness, Lane Veltkamp ("Veltkamp"), a licensed clinical social worker who treated William after the alleged sexual assault. On August 3, 1999, Ten Broeck settled with King for $266,666.67, and the circuit court dismissed it from the suit. On September 1, 1999, the circuit court granted King's

motion to amend his complaint and add Manion as a defendant. The case was set for jury trial. However, after both Manion and Siddiqui had deposed King's sole expert, Veltkamp, they each filed motions for summary judgment. Both Manion and Siddiqui argued that since King had filed a medical malpractice suit against them, he was required to have an expert witness to testify as to the requisite standard of care that they, as psychiatrists, had allegedly breached. Both argued that Veltkamp, as a social worker, lacked the training, i.e. medical school, and experience, i.e. inpatient treatment of children with mental, emotional, and behavioral problems, to testify as to the standard of care. Without an expert to establish the standard of care, both argued that King could not present his case to a jury.

On November 6, 2000, the Jefferson Circuit Court granted both motions and dismissed King's suit. The circuit court held that King's suit was one that required expert testimony to establish both the requisite standard of care and causation. The circuit court held that Veltkamp was not qualified as an expert to testify because he had no experience in treating sexual offenders like Dale; the vast majority of his work involved outpatient treatment as opposed to inpatient treatment; and he had never placed a patient under constant supervision. Further, the circuit court held neither Manion's or Siddiqui's testimony at deposition was sufficient to establish the requisite standard of care. Subsequently, King appealed.

When reviewing a motion of summary judgment on appeal, we need not defer to the trial court "since factual findings are not at issue." Webb v. Maynard, Ky. App., 32 S.W.3d 502, 508

(1999). We must review the record in a light most favorable to the party that opposes the motion and resolve all doubts in his favor. Moreover, the movant must show that the party opposing the motion could not prevail under any circumstances. Scifres v. Kraft, Ky. App. 916 S.W.2d 779, 781 (1996), quoting Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

On appeal, King presents four issues for our consideration. First, King argues that the case sub judice does not require an expert witness. King quotes Butts v. Watts, Ky., 290 S.W.2d 777, 779 (1956), contending that in a medical malpractice case, expert witnesses are only required when issues are "strictly within special and technical knowledge of the profession". King contends that the subject matter of the case sub judice is the care and supervision of children, which is well within the common knowledge and experience of any layman. Further, King quotes KRS 600.020[1] and contends that the duty to protect children is not a technical matter that requires expert testimony. Therefore, King contends the circuit court erred in granting summary judgment. We disagree.

"[T]he general rule is that expert testimony is required in a malpractice case to show that the defendant failed to conform to the required standard, which is, such reasonable and ordinary knowledge, skill, and diligence as physicians in similar neighborhoods and surroundings ordinarily use under like

[1] KRS 600.020 defines "abused or neglected child" for the purposes of the Unified Juvenile Code. It does not establish a standard of care regarding children for the purpose of civil lawsuits.

circumstances." Jarboe v. Harting, Ky., 397 S.W.2d 775, 778 (1965). See also, Hamby v. University of Kentucky Medical Center, Ky. App., 844 S.W.2d 431 (1992); Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122 (1991); Morris v. Hoffman, Ky. App., 551 S.W.2d 8 (1977); Tanner v. Sanders, 247 Ky. 90, 56 S.W.2d 718 (1933). Thus, courts have required expert testimony in medical malpractice cases for many years. However, exceptions to this general rule do exist.

One exception is where no expert testimony is required because "any layman is competent to pass judgment and conclude from common experience that such things do not happen if there has been proper skill and care". Perkins v. Hausladen, Ky., 828 S.W.2d 652, 655 (1992). See also, Turner v. Reynolds, Ky. App., 559 S.W.2d 740 (1977); Jewish Hospital Association of Louisville, Ky. v. Lewis, Ky., 442 S.W.2d 299 (1969); Jarboe, 397 S.W.2d 775. King argues that the case sub judice falls within this exception since the care and supervision of children is within the common experience and knowledge of practically every adult who would serve as a juror. However, this case is not simply about the supervision of children. This case encompasses the standard of psychiatric care rendered by Doctors Manion and Siddiqui to two children, both of whom suffered from various mental, emotional, and behavioral problems. The issue is whether these two psychiatrists deviated from this standard of care by letting William and Dale share a room. This implicates not only the psychiatrists' individual care and treatment of their patients, but also Ten Broeck's policies and procedures regarding the admission and room assignment of children who have mental,

emotional and behavioral problems. It is unrealistic to think that the psychiatric care of such children was within the common knowledge and experience of laymen who would comprise a jury. Furthermore, we doubt that any potential jurors would be familiar with the policies and procedures of any psychiatric hospital let alone the policies and procedures of Ten Broeck. Therefore, in this case, we believe that expert testimony would be necessary to establish the requisite standard of care.

King argues that even if an expert witness is required, his expert, Lane Veltkamp, is qualified to testify to the requisite standard of care. King contends that both Manion and Siddiqui testified at deposition that Veltkamp, who is a licensed clinical social worker, was qualified as an expert. Furthermore, King contends that, given Veltkamp's impressive credentials, Veltkamp obviously is an expert qualified to testify about the requisite standard of psychiatric care. We disagree.

After reviewing both Manion's and Siddiqui's deposition, we are of the opinion that neither admitted that Veltkamp was a qualified expert. In Siddiqui's deposition, King asked Siddiqui whether other health care professionals, if properly trained and experienced, would be qualified to give opinions about treatment and care of children with mental and emotional problems. Siddiqui answered yes, from a therapeutic standpoint but not from a medical standpoint. Siddiqui did not admit or affirm that Veltkamp was qualified as an expert on psychiatry. In Manion's deposition, King asked if a social worker would be qualified to give opinions regarding the care of children with mental and emotional problems. Manion replied that

everyone is entitled to their opinion, but for a social worker to render an expert opinion, that social worker must be an expert, and she could not testify whether or not a social worker was an expert. Likewise, Manion did not affirm that Veltkamp was an expert. The circuit court decides, in its discretion, whether a witness is qualified as an expert and such decisions are rarely disturbed on appeal. Gentry v. General Motors Corporation, Ky. App., 839 S.W.2d 576, 578 (1992).

Despite his impressive credentials, the circuit court found that Veltkamp was not qualified as an expert. We agree. This case is analogous to Morgan v. Hill, Ky. App., 663 S.W.2d 232 (1984). In Morgan, this Court held that a medical doctor could not testify to the requisite standard of care regarding chiropractors. Id. at 234. This Court stated that a medical doctor did not have "the appropriate training and experience to determine what constitutes chiropractic malpractice." Id. If a medical doctor cannot testify to the standard of care regarding the closely related discipline of chiropractic, then we believe that a social worker cannot testify regarding the standard of care for the discipline of psychiatry, a field of medicine. While we cannot find a case directly on point in Kentucky, we agree with the Kansas Supreme Court which held that a licensed clinical social worker was not qualified to diagnose and testify about medical and psychiatric conditions such as post-traumatic stress disorder because only a psychiatrist has the requisite professional qualifications to make and testify about such diagnoses. Tompkins v. Bise, 910 P.2d 185, 190 (1996).

King also argues that even if an expert is required and even if Veltkamp is not qualified as an expert, the circuit court erred because both Manion and Siddiqui testified at deposition as to the requisite standard of care and their breach thereof. According to King, Siddiqui testified that he controlled all aspects of William's treatment; that roommate assignments were an aspect of treatment; that he could have inquired about William's roommates; that he could have instructed Ten Broeck's nursing staff about William's roommate assignments or could have ordered constant supervision and that he did none of the above. According to King, Manion testified that she knew Dale had a long history of sexual aggression and violent behavior; that she considered Dale dangerous to other children; that she controlled Dale's roommate assignment; that she could have inquired about Dale's roommates; that she ordered only routine supervision and that she left only a brief note to another doctor who covered for her while she was out of town.

The second exception to the general rule regarding expert witnesses in medical malpractice suits is "that the necessary expert testimony may consist of admissions by the defendant doctor." Jarboe, 397 S.W. 2d at 778. In Jarboe, defendant doctor diagnosed plaintiff with a uterine tumor and operated on her to remove it. During the operation, defendant doctor discovered that plaintiff had no tumor but was pregnant. Three weeks after the operation, plaintiff miscarried and, subsequently, sued defendant doctor for malpractice. Plaintiff did not have an expert witness to testify as to the requisite standard of care; however, the former Court of Appeals (now the

Kentucky Supreme Court), held that defendant doctor's statement to plaintiff after the surgery that he should have run a routine pregnancy test coupled with the fact that the subject of the suit, pregnancy, was within the common experience and knowledge of laymen was sufficient to overcome plaintiff's lack of an expert witness. Id. at 778-779.

In Perkins v. Hausladen, Ky., 828 S.W.2d 652 (1992), defendant doctor performed surgery on plaintiff's inner ear and as a result of the doctor's error, plaintiff went blind. After the surgery, defendant doctor told plaintiff's husband that he had hit a blood vein and had to abort the surgery. Id. at 653. Plaintiff sued but did not have an expert witness to testify as to the standard of care. Subsequently, defendant doctor testified that one of the prime objectives in this particular operation was to avoid hitting the very blood vessel that he had accidently damaged. Id. at 654. The Kentucky Supreme Court held that defendant doctor's statements and testimony combined with common knowledge was sufficient to overcome plaintiff's lack of an expert witness. Id. at 656.

While King is correct that admissions by the defendant doctor can overcome the lack of expert testimony, we opine that neither Manion's or Siddiqui's testimony satisfy King's need for expert testimony. In Jarboe, the defendant doctor admitted he should have performed a routine pregnancy test. Neither Manion nor Siddiqui testified that they should have or could have done anything more than they did to avoid this incident or to keep William safe. In Perkins, the defendant doctor testified that proper way to perform said operation was to avoid hitting a blood

vessel which he admitted he did. Neither Manion or Siddiqui testified that they did something that they should not have done. Neither Manion or Siddiqui admit to any wrongdoing on their respective parts. Furthermore, in both Jarboe and Perkins, the defendant doctors' admissions were coupled with subject matters that were within the common knowledge and experience of laymen. In the case sub judice, neither Manion's or Siddiqui's testimony established the requisite standard of care, and even if they had, the subject matter of the case sub judice is certainly not within the common knowledge or experience of laymen.

Finally, King argues that discovery was not complete because he had difficulty deposing Manion and Siddiqui, and because the order that set an August 3, 1999 deadline to designate expert witnesses was modified by a subsequent jury trial order. After reviewing the record, it appears that any delays in deposing Manion and Siddiqui were caused by King. Furthermore, after reviewing the subsequent jury trial order, we note that paragraph thirteen of this order addresses expert witnesses and states that both parties will comply with CR 26.02; identify each expert they intend to call; state the subject matter of their experts' testimony; and state the substance of their experts' opinions. With this order, the circuit court merely explained how the parties should designate their respective expert witnesses, not when. That was controlled by the August 3, 1999 deadline. Manion's and Siddiqui's motions for summary judgment were not premature and the circuit court did not err in granting them.

For the foregoing reasons, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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