

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000418-MR

CHARLOTTE HALL, INDIVIDUALLY;
CHARLOTTE HALL, AS EXECUTRIX OF
THE ESTATE OF JERRY HALL;
LISA HALL; AND BRENT HALL

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 97-CI-006492

CARITAS HEALTH SERVICES, INC.,
D/B/A CARITAS MEDICAL CENTER

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND COMBS, JUDGES.

BARBER, JUDGE: Appellants, Charlotte Hall, in her Individual Capacity and as Executrix of the Estate of Jerry Hall, and Lisa Hall and Brent Hall ("Appellants"), seek review of a summary judgment of the Jefferson Circuit Court in favor of the Appellee, Caritas Health Services, Inc., d/b/a Caritas Medical Center ("Caritas"), in this nursing negligence claim. The trial

court dismissed Appellants' claim after granting Caritas' motion in limine to exclude the testimony of Appellants' sole expert nursing witness.

We are asked to decide: (1) Whether the trial court erred in excluding the testimony of Margaret ("Peggy") Schmidt, Appellants' expert nursing witness; (2) Whether the trial court abused its discretion in precluding Appellants from offering economic expert witnesses' testimony; and (3) Whether sufficient facts exist from which a jury could find negligence by Caritas' nursing staff in the absence of Schmidt's testimony, thus making summary judgment inappropriate.

On November 11, 1996, Steven J. Reiss, M.D. removed a brain tumor from Jerry Hall at Caritas. Mr. Hall subsequently developed meningitis and died. On November 10, 1997, Appellants filed a complaint in the Jefferson Circuit Court against Dr. Reiss¹ and Caritas. Appellants claim that nursing negligence was a factor in Mr. Hall's death. To prove their case, Appellants relied upon Schmidt, who had identified herself as a registered nurse.

According to Appellants' supplemental expert witness disclosure, served February 28, 2001, Schmidt was an "R.N., B.S.N." Further:

¹ Appellants' claims against Dr. Reiss have been settled and he is not a party to this appeal.

It is Ms. Schmidt's opinion that the Caritas . . . nursing staff was negligent and their nursing care deviated from the standard of care and such negligence and deviation was a substantial factor in causing Jerry Hall's death. . . . Specifically, Mr. Hall was a patient of the Intensive Care Unit but was not mechanically monitored in any way, . . . The staff should have made his safety their priority and mechanically restrained Mr. Hall in some manner (as per their hospital policy and standard nursing practice) which would have allowed them to place him on the appropriate monitoring devices. Had he been on the oxygen saturation monitor, . . . the monitor would have alarmed prior to the Code Blue.

[Further] . . . Critical care nurses should know that this [Hall's "sleeping without distress," when he was previously confused and attempting to get out of bed] was a drastic change from previous behavior and should have been interpreted as a potentially serious change in his neurological status. If the nurse had performed a complete neurological assessment at this point, . . . the Code Blue may have been averted.

On September 20, 2001, Caritas filed a motion in limine to exclude Schmidt's testimony, on ground that Schmidt was not a licensed, practicing nurse and on ground that she was not qualified to express opinion on medical causation. Caritas explained that "[n]ot until her deposition on July 25, 2001 did Ms. Schmidt reveal that she does not have a registered nursing license. . . . In addition, when she did have a Kentucky registered nursing license, it was either suspended or on probationary status on numerous occasions." Caritas noted

Schmidt's numerous difficulties. She was suspended for practicing without a license from November 1, 1988-January 6, 1989, at Norton Kosair. She was charged with narcotics violations in 1991, resulting in a six-month suspension and fine. After her license was reinstated, with a one-year probationary period in 1994, Schmidt's nursing practice was limited and closely monitored. In 1999, Schmidt was again before the Kentucky Board of Nursing, having resigned from Baptist East over discrepancies in the documentation of controlled substances on patient records. A two-year license suspension was stayed, and Schmidt was placed on probation for two years, with restrictions upon her employment. In October 2000, Schmidt elected not to renew her nursing license at the end of the probationary period.

Caritas asserted that Schmidt lacked qualification to express expert opinion - she was not licensed to practice in the Commonwealth; she had not practiced as an R.N. -- actually caring for patients -- since 1998, and prior to that had only sporadically done so; she was never certified by the American Association of Neuroscience Nurses, and had not been certified by the American Association of Critical Care Nurses since 1990. Further, Schmidt had no specialized courses in caring for neurosurgical patients; had conducted no research and could not cite authority in support of her opinions; had not reviewed any

of the hospital's policies and procedures in forming her opinions, and admitted her lack of qualification to express medical opinion.

Following a hearing on October 31, 2001, the trial court entered an order granting Caritas' motion in limine, because "Schmidt's proffered testimony fails to meet the threshold requirements articulated in Daubert v. Merrill Dow Pharmaceuticals, Inc., 506 U.S. 579 (1993) and its progeny. Ms. Schmidt is prohibited from testifying at the trial of this action for the reasons stated on the record at the 10/31/01 hearing."

The court compared the situation to allowing a disbarred attorney to testify as an expert in a legal malpractice case. The court explained that it would be abdicating its role as a gatekeeper to put Schmidt before the jury to testify about standard of care, where she had shortchanged her own patients of their narcotic medication, had failed to document records and had failed to meet basic standards of a nurse. The court was concerned about Schmidt's having practiced without a license while working at Norton Hospital. The court also considered that a lot of what Schmidt had to say was more in the nature of medical opinion, than nursing opinion.

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings. . . . A trial court's ruling on the admission of expert testimony is reviewed under the same standard as a trial court's ruling on any other evidentiary matter."² On appeal, Appellants acknowledge that admissibility of expert testimony is committed to the sound discretion of the trial court, but argue that rejection of such testimony is the exception rather than the rule.

Appellants contend that that the circuit court focused upon Schmidt's drug addiction and loss of license, but "did not criticize Schmidt's reasoning, methodology³, opinions or expertise." Appellants assert that the issue of Schmidt's licensing and drug abuse problems went to her credibility and was for the jury to decide. We are inclined to agree; nevertheless, we affirm the summary judgment in favor of Caritas. Schmidt's testimony does not supply the competent medical causation testimony Appellants need to establish negligence on the part of Caritas' nursing staff. By Opinion

² *Goodyear Tire & Rubber Co. v. Thompson, Ky.*, 11 S.W.3d 575, 577-89 (2000).

³ Appellants do not explain what methodology Schmidt may have employed in formulating her opinion. We are not aware of any. Schmidt testified that she reviewed Mr. Hall's medical records and some depositions. Schmidt's testimony did not concern any novel scientific techniques. We question whether her testimony "trigger[ed] the necessity of applying the Daubert analysis." *Collins v. Commonwealth, Ky.*, 951 S.W.2d 569, 575 (1997). We believe the issue is more simply whether Schmidt was qualified as an expert under KRE 702.

and Order, entered January 24, 2002, the trial court held, in pertinent part, that:

Jerry Hall was admitted to Caritas on or about November 11, 1996 . . . to remove a left cerebellar . . . tumor. Pursuant to doctor's orders, Mr. Hall was to be given a neurologic assessment (the Glasgow Coma test) every hour by the Caritas nursing staff. Mr. Hall was also to be given one-on-one nursing care. On November 17, Laura Mitchell began caring for Mr. Hall at 7:00 p.m. The outgoing nurse, Nancy Gilpin, had performed a complete neurologic evaluation at 7:00 p.m. and reported to Ms. Mitchell that while Mr. Hall had been combative throughout the day, he had become calmer and was resting.

Ms. Mitchell performed another complete neurologic evaluation of Mr. Hall at 7:30 p.m. At that same time, Dr. John Rogers, an infectious disease physician, also evaluated Mr. Hall and performed a neurologic examination as well. At approximately 8:20 p.m., Ms. Mitchell was advised by Mr. Hall's wife that Mr. Hall's breathing had changed. Ms. Mitchell moved Mr. Hall into an upright position and began suctioning brown drainage. Mr. Hall suffered respiratory failure, was placed on a respirator, and subsequently died.

Plaintiffs brought this action alleging medical malpractice. . . . Plaintiffs concede that Mr. Hall would have eventually died as a result of meningitis. However, Plaintiffs now argue that "but for the CARITAS nursing staff's failure to assess and chart Mr. Hall's deteriorating neurologic condition, Mr. Hall's aspiration could have been prevented or corrected, . . ."

* * *

A medical negligence claim in Kentucky must be grounded in expert testimony "because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert

testimony." Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122 (1991). Expert testimony is needed unless the injury is so apparent that laymen with general knowledge would have no difficulty recognizing that it could not have occurred if proper care and skill had been used. Perkins v. Hausladen, Ky., 828 S.W.2d 652 (1992). . . .

* * *

In this case, Plaintiffs have offered two expert witnesses: Dr. Richard Sokolov and Margaret Schmidt. . . . [T]his Court entered its Order on October 31, 2001, excluding the testimony of Ms. Schmidt in its entirety. Dr. Sokolov, Plaintiff's remaining expert, has expressed no criticism of the Caritas nursing staff.

Plaintiffs argue that they still have expert testimony with which to prove their case [and] that the testimony of Caritas' own employees is sufficient to create a question of material fact precluding summary judgment. Specifically, Plaintiffs assert that Ms. Mitchell acknowledges that a change in consciousness could be indicative of a change in neurologic status. According to Plaintiff, Mr. Hall's transition from restlessness to sound sleep should have alerted Ms. Mitchell to the existence of a neurologic change.

. . . .Kentucky has recognized that a defendant physician can by his or her own admission provide the necessary expert testimony. For example, in Perkins v. Hausladen, supra, . . . the Defendant admitted initially to the patient's husband that he had . . . drilled into the vein, causing blindness. Even though the Defendant later retracted the statement, Justice Leibson noted there was sufficient evidence from the Defendants' deposition and the depositions of subsequent treating physicians "regarding causation" of the blindness to allow the case to go to the jury.

In this case, Plaintiffs suggest that the Caritas nurses' own observation of Mr. Hall's change from restlessness to sound sleep provides sufficient expert evidence of the nurses' breach of the appropriate standard of care. Ms. Mitchell's testimony also shows, however, that she performed complete neurologic checks on Mr. Hall above and beyond the hourly evaluations ordered by Mr. Hall's physician, and that during those checks nothing in Mr. Hall's responses indicated any respiratory or neurological complication. Rather the examination . . . revealed nothing unusual. This case, unlike Perkins, is not one where the necessary expert testimony can be found in the statements of those who provided the care.

The court was inclined to agree with Defendants that Plaintiffs had attempted to mislead the court by providing only selective portions of Mitchell's testimony; further, that Plaintiffs had failed to mention evaluations performed by Gilpin at 7:00, and by Mitchell and Dr. Rogers at 7:30. In addition, the court also noted the opinion of William Kohorst, M.D. that Mr. Hall's respiratory failure was due to a catastrophic central nervous system event - meaning that the respiratory center of his brain quit functioning because of severe brain injury. According to Dr. Kohorst, aspiration was the result, *not the cause*, of his respiratory arrest, an event that could not be prevented or anticipated by neurological examination. Nothing was offered to contradict Dr. Kohorst.

Appellants maintain that the deposition testimony of Caritas nurses, Laura Mitchell and Nancy Gilpin, "should have been considered sufficient expert testimony to show causation."

Appellants cite Am.Jur.2d and authority from other states to the effect that a defendant, or a defendant's employee, can provide expert testimony for a plaintiff in a medical malpractice action. However, Appellants have failed to cite any competent causation testimony from a defendant, or a defendant's employee, *in this case* to support their argument.

Instead, Appellants proceed to argue that an issue of fact exists as to whether or not Nurse Mitchell performed a "proper neurological assessment." Appellants base this argument upon their assertion that a disparity exists between Nurse Mitchell's testimony⁴ and the medical records.⁵ Assuming, *arguendo*, that such a disparity exists, Appellants' negligence claim against Caritas still must fail, because they have no competent expert opinion establishing a causal connection between any nursing negligence and Mr. Hall's aspiration/death. "Proximate causation between negligence and the injury complained of in a medical malpractice case must be established by expert testimony."⁶ The trial court did not err in granting summary judgment.

⁴ Mitchell testified that there were doctor's orders for a Glasgow coma check every hour.

⁵ Appellants assert that the records do not indicate Mitchell sufficiently woke Mr. Hall to have checked his neurologic signs.

⁶ *Sakler v. Anesthesiology Associates*, Ky. App., 50 S.W.2d 210, 214 (2001).

The remaining issue Appellants raise is whether the trial court abused its discretion in excluding the testimony of their economic experts, because they were not timely identified. In light of our holding herein, we agree with Caritas that the issue is moot.

We affirm the Opinion and Order granting summary judgment in favor of Caritas.

ALL CONCUR.

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