

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000476-MR

PHILLIP WESLEY MANN, AN INCOMPETENT
BY HIS GUARDIAN, CHARLOTTE HOOTS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 99-CI-002362

NORTON HOSPITALS, INC.,
DBA KOSAIR CHILDRENS HOSPITAL;
GREGORY B. NAZAR, M.D.;
NEUROSURGICAL INSTITUTE OF KENTUCKY, P.S.C.;
AND VICKIE LEE MONTGOMERY, M.D.

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

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

BARBER, JUDGE: The Appellant, Phillip Wesley Mann, an incompetent, by his Guardian, Charlotte Hoots, seeks review of orders of the Jefferson Circuit Court granting summary judgment in favor of the Appellees, Norton Hospitals, Inc., d/b/a Kosair Children's Hospital ("Kosair Children's"), Gregory B. Nazar,

M.D. and Neurosurgical Institute of Kentucky ("Dr. Nazar"), and Vickie Lee Montgomery, M.D. ("Dr. Montgomery"), and denying Appellant's motion to vacate.

The relevant facts in this medical negligence case are well summarized in the parties' briefs and in the Opinion and Order of the trial court. We refer to the record as necessary to resolve the issues before us, namely:

I. PLAINTIFF HAVING ESTABLISHED TO A REASONABLE MEDICAL CERTAINTY THAT DEFENDANTS' FAILURE TO PERFORM AN ANGIOGRAM OR TO TIMELY TRANSFER HIM TO A FACILITY CAPABLE OF PERFORMING THAT VITAL DIAGNOSTIC PROCEDURE WAS A DEVIATION FROM ACCEPTED STANDARDS OF MEDICAL PRACTICE, THAT THE DEVIATION INCREASED THE RISK OF HARM FROM A PREEXISTING CONDITION, AND THAT THE INCREASED RISK WAS A SUBSTANTIAL FACTOR IN CAUSING THE HARM THAT HE ULTIMATELY SUSTAINED, THERE EXIST GENUINE ISSUES OF MATERIAL FACT THAT PRECLUDE SUMMARY JUDGMENT.

and

II. THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING OSTENSIBLE AGENCY, PURSUANT TO THE DOCTRINE OF APPARENT AUTHORITY ESTABLISHED BY THE COURTS OF KENTUCKY, KOSAIR SHOULD BE HELD LIABLE TO PLAINTIFF FOR INJURIES THAT HE SUSTAINED BECAUSE OF THE MALPRACTICE OF DEFENDANT PHYSICIANS.

(I)

The trial court granted summary judgment in favor of Dr. Nazar and Dr. Montgomery, because:

Dr. Stellar [Appellant's expert] cannot supply the medical causation testimony required by Kentucky law. Even if his testimony criticizing the delay in obtaining an angiogram or

transferring Phillip is deemed sufficient to establish a breach of the applicable standard of care (a matter on which this Court has grave doubts), there is no question that his testimony is devoid of any credible opinion regarding a treatment which would have given Phillip Mann a reasonable probability of a better outcome. In short, Dr. Stellar criticized what he perceived as delay in obtaining the angiogram and emphasized repeatedly the necessity of transferring the patient to a medical facility where this extremely rare condition could be treated, but he gave no viable testimony regarding where that facility was located or what would have awaited Phillip Mann at that facility. Asked repeatedly by different defense attorneys to identify the course of treatment that would have been offered, he repeatedly refused to do so. Opining that a proper diagnostic procedure should have been done sooner to enable a prompt transfer to a different facility where an unknown surgical intervention may or have not been attempted is patently deficient expert testimony.

The trial court noted that Dr. Chyatte, the neurosurgeon who treated Phillip at Northwestern, provided testimony that "underscored the fatal flaw in Plaintiff's loss of chance theory." Dr. Chyatte explained that the treatment he performed after rupture of Phillip's aneurysm (coil embolism) would not have been performed *before* the rupture, because it carried a significant risk of death. According to Dr. Chyatte, giant basilar fusiform aneurysms are considered untreatable by a large number of experts, because the available treatments have very high morbidity and mortality rates, and lesser treatments may not cure the problem. The trial court noted Dr. Chyatte's testimony regarding his own experience treating this rare type

of aneurysm, and that he thought it "fair to say that no one has the answer on how to treat these lesions [giant basilar fusiform aneurysms]".

The trial court further explained the basis for granting Appellees' motions for summary judgment:

Dr. Stellar had no opinion as to a specific surgical treatment which Phillip Mann could have had but was denied as a result of Dr. Nazar's alleged failure to promptly perform an angiogram and/or transfer the patient. Coupled with Dr. Stellar's inability to offer such testimony is Dr. Chyatte's considerable real life experience with this extremely rare form of aneurysm. Simply put, Dr. Stellar fails to offer the medical proof necessary to establish Plaintiff's claim and Dr. Chyatte's experience clearly illustrates why such testimony would not be forthcoming from Dr. Stellar or any other neurosurgeon. In 1993 and even today medical science simply does not have "the answer" to a giant basilar fusiform aneurysm. . . .

We review summary judgments *de novo*.¹ In essence, Appellant asserts that the physicians should be estopped from relying upon any failure of proof as a defense, where their negligent delay in getting an angiogram precluded Appellant from obtaining proof of proximate cause. Appellant states that "because the angiogram had not been performed before the aneurysm ruptured and altered the architecture of Phillip's brain, Dr. Stellar could not opine to which [sic], if any, of the treatments that were available for such conditions in 1993,

¹ *Deaton v. Connecticut General Life Insurance*, Ky. App., 17 S.W.3d 896 (2000).

. . . could have been employed, and with what success." The logic of this argument is illusory.

Appellant does not dispute the diagnosis of a giant fusiform aneurysm of the basilar artery.² Dr. Stellar's inability to give an opinion about appropriate treatment options for that condition was not "caused" by any failure to timely obtain an angiogram. Expert medical testimony established that in 1993, there was no surgery, intravascular intervention, or medical intervention that would have prevented the aneurysm from rupturing and that would have provided Phillip with a reasonable clinical outcome.³ Dr. Stellar conceded as much:

Q. If you block off the blood supply to the proliferating arteries but maintained the blood supply up through the neck through the basilar artery in to the Circle of Willis would the loss of those proliferating arteries still cause a morbid or perhaps mortality affect [sic] on a healthy patient.

A. They would.

² Kosair Children's expert, Rafael Tamargo, M.D., explained that a fusiform aneurysm is a dilation and weakness involving the entire circumference of the artery itself, as contrasted to a saccular aneurysm which is a bubble arising from the parent vessel. The type of aneurysm determines the treatment options which may be available. The basilar artery supplies the brain stem, the cerebellum and the back portion of the cerebrum, as well as the deep thalamic structures. The brain stem is probably the most important part of the brain in terms of survival and provides direction for all basic functions, such as blood pressure control, heart rate, and respiration. Transcript, Dr. Tamargo (video) deposition, 1/11/2002, pp. 25-26, 28-29.

³ According to Dr. Tamargo.

Q. If you were to block off the blood supply of the entire basilar artery I assume it would have the same affect [sic]?

A. Yes, or even more.

Q. Do you know what procedure was done at Northwestern Hospital on this patient?

A. No. I didn't get to read that in the operative report. I think you remember when I looked for it.

Q. Are you aware of a procedure that was being done and I will represent to you that it was experimental but it was being done in 1993 called platinum coil embolization?

A. Yes, there were coils of various kinds.

Q. Those are actually placed within an artery; is that correct?

A. Yes.

Q. If I were to represent to you that Philip had 28 of these platinum coils placed within his basilar artery at Northwestern, first would you have any information to contradict that?

A. No, I wouldn't have such information.

Q. Second question, would this be the sort of procedure that would be performed upon a healthy patient?

A. A healthy patient?

Q. Let me strike that?

A. Do you mean an otherwise healthy patient?

Q. Would this be the sort of procedure that could be performed on Phillip Mann in his preruptured condition?

A. It could well be.

Q. Would you still expect a morbid result from the blocking of Phillip Mann's proliferating arteries?

A. You wouldn't do the coil operation to block off those arteries. You would be doing it to block off the aneurysm.

Q. Okay. If the aneurysm itself involved the entire basilar artery would that not have the same affect [sic] of blocking off the blood flow through the proliferating arteries?

A. It might well.

Q. Are you aware of any other procedure other than embolization that may have been available for Phillip Mann in 1993?

A. No. Assuming that he had a fusiform aneurysm no, I don't think there was anything else.

Q. This was not a clippable aneurysm, was it?

A. No, as far as I know it wasn't.

Q. Similarly, I believe there was a procedure involving a detachable balloon that was filled with silicone.

A. Yes.

MR. RHATICAN: That was not a question. That was your statement.

Q. Was there a procedure in which there was a detachable balloon that could be filled with silicone for the blocking of certain arteries?

A. Yes, I am not sure if that would be appropriate here though.

Q. Why would that not be appropriate here?

A. I am not sure. Because you wouldn't want to block off the artery completely. You would want

to block off only what you could really call the aneurysm and it might not be possible. If it's in continuity you might not have no choice [sic].

Q. I assume in all of your testimony today you are leaving open the possibility that this aneurysm may have been inoperable?

A. Yes.⁴

Kentucky law requires that the plaintiff in a malpractice suit present evidence "reflecting medical reasonable probability of proximate cause for the claimed adverse result as related to the charge of negligence."⁵ We agree with the trial court that "Dr. Stellar cannot supply the medical causation testimony required by Kentucky law. . . .[because] his testimony is devoid of any credible opinion regarding a treatment which would have given Phillip Mann a reasonable probability of a better outcome."

Accordingly, we affirm the Opinion and Order granting summary judgment in favor of the physicians.

(II)

The trial court also granted summary judgment in favor of Kosair Children's, having determined that the disclaimer in the "Conditions of Admission and Authorization for Treatment" Form, signed by Appellant, was sufficient to alert the public that the physicians were not hospital employees. We agree with

⁴ Transcript Dr. Stellar deposition, 9/26/2001, pp. 189-92.

⁵ *Walden v. Jones*, Ky. 439 S.W.2d 571, 576 (1969).

Kosair Children's that summary judgment in favor of Dr. Nazar and Dr. Montgomery operates in favor of the Hospital, as a matter of law.

We affirm the Opinion and Order of the Jefferson Circuit Court entered January 16, 2002, granting motions for summary judgment in favor of the Appellees, Norton Hospital, Inc., d/b/a Kosair Children's Hospital, Gregory B. Nazar, M.D., Neurosurgical Institute of Kentucky, P.S.C. and Vicki Lee Montgomery, M.D. and dismissing the complaint against them with prejudice; and the Order denying the motion to vacate entered February 5, 2002.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Z. Lance Samay
Morristown, New Jersey

Peter E. Rhatican
Mendham, New Jersey

Edward F. Harrington, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE, NORTON
HOSPITALS, INC. DBA KOSAIR
CHILDRENS HOSPITAL:

Frank P. Hilliard
Ed Monarch
Louisville, Kentucky

BRIEF FOR APPELLEE, GREGORY B.
NAZAR, M.D. AND NEUROSURGICAL
INSTITUTE OF KENTUCKY, P.S.C.:

Gerald R. Toner
Cathleen C. Palmer
Louisville, Kentucky

BRIEF FOR APPELLEE, VICKIE LEE
MONTGOMERY, M.D.:

Richard P. Schiller
Kimberley S. Naber
Louisville, Kentucky