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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000490-MR

DEBRA GIBSON, AS PERSONAL REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF EDITH HARRIS — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 98-CI-00339

ROB LEATH, INDIVIDUALLY; AND BAPTIST HEALTHCARE SYSTEMS, INC. D/B/A BAPTIST REGIONAL MEDICAL CENTER — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Debra Gibson, as Personal Representative and Administratrix of the Estate of Edith Harris, (hereinafter "Gibson") has appealed from the Whitley Circuit Court's Summary Judgment entered March 3, 2003, following the entry of the November 19, 2002, order granting a motion to exclude testimony

as hearsay. The sole issue on appeal is whether the testimony of two witnesses as to statements attributed to Ethel Harris, now deceased,[1] comes within the excited utterance exception to the hearsay rule. We affirm.

On June 12, 1998, Gibson filed a complaint in Whitley Circuit Court against Baptist Healthcare Systems, Inc., d/b/a Baptist Regional Medical Center (hereinafter "BRMC"), BRMC employee Rob Leath (hereinafter "Leath") and unknown aids, alleging that her mother, Edith Harris (hereinafter "Edith"), was injured on July 19, 1997, while she was a patient in the rehabilitation unit of BRMC. Edith was admitted to BRMC on June 12, 1997, to receive rehabilitation from a prior hip fracture. According to the complaint, Edith was injured when Leath and an unknown aid recklessly, carelessly, negligently, and/or grossly negligently fractured two of her ribs when they threw her into her hospital bed and then continued with daily physical therapy despite her complaints of pain. Furthermore, Gibson alleged that the conduct complained of demonstrated a wanton and willful disregard for Edith's rights and safety, thereby entitling her to punitive damages. Gibson demanded medical expenses; damages for Edith's emotional and physical pain and suffering from July 19, 1997, through March 22, 1998; and punitive damages.

[1] Edith passed away on March 22, 1998, but her death was not related to the subject of her lawsuit.

Extensive discovery ensued, and a trial was eventually scheduled for October 10, 2002.[2]

On July 30, 2002, the defendants filed a motion *in limine* to exclude the testimony of two witnesses as inadmissible hearsay pursuant to KRE 802. The trial court ruled that the motion was prematurely made by order entered September 6, 2002, and indicated that the motion should be brought at trial. The defendants' motion for a partial summary judgment was also denied by the September 6, 2002, order. On October 2, 2002, the defendants filed another motion for summary judgment as well as a motion *in limine*, again to prohibit the use of hearsay testimony of Charlotte Harris and Harold Harris (hereinafter "Charlotte" and "Harold"). The trial court entertained arguments on October 10, 2002, the day of trial. Gibson argued that Edith's statement to Leath, in the presence of Charlotte and Harold, that he had broken her ribs by dropping her into her bed constituted an excited utterance and was therefore admissible through the hearsay testimony of Charlotte and Harold. The trial court determined that Edith's statement did not fall into the category of an excited utterance and excluded the testimony in question. An order memorializing this ruling was entered November 19, 2002. The trial court then entered a

[2] Prior to the trial, the parties entered into a stipulation that there was no evidence that Edith had fractured ribs upon her admission to BRMC and that she did have fractured ribs upon her discharge. The parties did not enter into a stipulation as to the causation of the rib fractures.

summary judgment for the defendants on March 3, 2003, upon Gibson's admission that she probably could not sustain her burden of proof regarding causation to defeat a motion for directed verdict without the excluded testimony. This appeal followed.

On appeal, Gibson argues that the trial court erred in excluding the testimony of Charlotte and Harold because it fell within the excited utterance exception to the hearsay rule based upon the totality of the circumstances.[3] On the other hand, BRMC and Leath argue that the trial court properly excluded the testimony in question as the statements attributed to Edith did not constitute an excited utterance, in particular because there were numerous reasons to doubt the validity of those statements.

KRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to KRE 802, "[h]earsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky." One of these exceptions is for an excited utterance, which is defined by KRE 803(2) as "[a] statement relating to a startling event or condition made while the

[3] Although Gibson argued below that the statements were admissible under several exceptions to the rule against hearsay, she only argues to this Court that the excited utterance exception applies. Therefore, we shall confine our review to that exception only.

declarant was under the stress of excitement caused by the event or condition."

In Souder v. Commonwealth, Ky., 719 S.W.2d 730 (1986), the Supreme Court of Kentucky adopted as a general rule Professor Lawson's definition of a spontaneous statement and when such spontaneous statements should be considered exceptions to the hearsay rule. Lawson cited to Souder in the latest version of his Kentucky Evidence Law Handbook as follows:

> A spontaneous statement is one uttered under the stress of nervous excitement and not after reflection or deliberation. Whether or not a given statement is "spontaneous" depends upon an evaluation of the particular circumstances under which it was made, with the following circumstances most significant: (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.

Lawson, The Kentucky Evidence Law Handbook § 8.60, at 454 (3d ed. Michie 1993)(quoting Souder v. Commonwealth, 719 S.W.2d at 733). The Supreme Court held further in Souder that:

> Whether or not a particular statement qualifies as "spontaneous" must "depend upon the particular circumstances in each case." Consolidated Coach Corp. v. Earl's Adm'r, 263 Ky. 814, 94 S.W.2d 6, 8 (1936). Thus,

> to a certain extent, because the circumstances in each case are different, no case is exactly in point as precedent. Deciding whether the circumstances in which a particular statement was made qualify as (sufficiently) "spontaneous" to admit the evidence, is sometimes an arguable point, and when this is so the trial court's decision to admit or exclude the evidence is entitled to deference.

Id. See also Jarvis v. Commonwealth, Ky., 960 S.W.2d 466 (1998). The Supreme Court went on to refine this definition in Smith v. Commonwealth, Ky., 788 S.W.2d 266, 268 (1990), another pre-code case: "Souder is not a strict true-false test for the admission of excited utterances, but provides guidelines for consideration."

The same year Smith was rendered, the Supreme Court stated in a subsequent opinion that, "[t]he theory behind the rule is that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." Mounce v. Commonwealth, Ky., 795 S.W.2d 375, 379 (1990)(citing Preston v. Commonwealth, Ky., 406 S.W.2d 398, 401 (1966), cert. denied 386 U.S. 920, 87 S.Ct. 886, 17 L.Ed.2d 792 (1967), quoting 6 J. Wigmore on Evidence, § 1747 at 136 (1976)). The Supreme Court restated the premise for this exception in Noel v. Commonwealth, Ky., 76 S.W.3d 923, 926 (2002):

> The premise for the exception is that statements made under the stress of the

> excitement caused by a startling occurrence are more likely the product of that excitement and, thus, more trustworthy than statements made after the declarant has had an opportunity to reflect on events and to fabricate.

Furthermore, we note "the party seeking admission of hearsay evidence has the burden to prove that it falls within an exception to the hearsay rule." Id.

Lastly, the Supreme Court addressed the standard of review to be utilized in these cases in Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001):

> Whether a particular statement qualifies as an excited utterance depends on the circumstances of each case and is often an arguable point; and "when this is so the trial court's decision to admit or exclude the evidence is entitled to deference." Souder, supra, at 733. That is but another way of saying that when the determination depends upon the resolution of a preliminary question of fact, the resolution is determined by the trial judge under KRE 104(a) on the basis of a preponderance of the evidence, Bourjaily v. United States, 483 U.S. 171, 175, 107 S.Ct. 2775, 2778-79, 97 L.Ed.2d 144 (1987); and the resolution will not be overturned unless clearly erroneous, i.e., unless unsupported by substantial evidence. Cf. Commonwealth v. Deloney, Ky., 20 S.W.3d 471, 473-74 (2000)(trial judge's findings of fact are not clearly erroneous if supported by substantial evidence).

Id. at 167.

In the present matter, Gibson had the burden to prove that statements attributed to Edith came within the excited

utterance exception to the hearsay rule. Charlotte, who is Edith's daughter-in-law, testified both by deposition and at the hearing on October 10, 2002. In her deposition, she testified as follows when asked about what she knew about what had happened to Edith at BRMC:

> But there was a young man[4] that came in, and he was filling her water pitcher, and when he walked in she said, "What are you doing here," to that effect. And she said, "You are the one that broke my ribs." And he said, "I don't reckon." And she said, "Have you paid my doctor bill yet?" And he said, "I don't know what you mean." So she was, you know, pretty upset when he walked in, and then he went out. (footnote added).

Charlotte testified similarly at the hearing, when she also stated that the statements were made between July 20 and July 23 and that Edith "was very angry and upset" at the time she made them. Harold, who is Edith's son and Charlotte's husband, testified by deposition and at the hearing as well. In addition to testifying about the exchange between Edith and the hospital worker, Harold testified that Edith "told me that that boy jerked her out of bed there. She said that he jerked her up out of bed and hurt her, is the way she explained it to me." Harold also testified that Edith's statements were not elicited by any questioning from him.

[4] The young man was later identified as Leath.

In applying the facts of this case to the law, we must hold that the trial court properly excluded the testimony in question as it does not meet the definition of an excited utterance. As to the time factor, at least one day, but possibly more, had elapsed from the time of the incident when Edith was injured to her confrontation with Leath. The time lapse in this case would not be determinative by itself, but it must be viewed in conjunction with the other factors established by the evidence. There was also a valid argument that Edith fabricated her claim that Leath caused her to be injured. The record contains evidence to the effect that Edith's family members did not believe her accusations when she made them, that Edith was known to be confused at times, that Edith wanted to go home rather than continue with her therapy at BRMC, and that Edith told different versions of how she became injured. Furthermore, medical evidence established that Edith could have sustained her rib injury in many ways unrelated to negligence or abuse.

The circumstances set forth above do not lend themselves to supporting the trustworthiness of Edith's statement, which is the premise of the excited utterance exception. For this reason, we must hold that substantial evidence supports the trial court's decision to exclude Charlotte's and Harold's testimony regarding causation and that

therefore the trial court was not clearly erroneous in so ruling. Accordingly, Gibson failed in her burden of proof to establish that the statements attributed to Edith fell within the excited utterance exception to the hearsay rule.

For the foregoing reasons, the Whitley Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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