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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002736-MR

VENITA GAIL HARRIS, ADMINISTRATRIX OF THE ESTATE OF ROBERT BENJAMIN LEE HARRIS; AND VENITA GAIL HARRIS AND BENJAMIN J. HARRIS, INDIVIDUALLY AND AS PARENTS OF ROBERT BENJAMIN LEE HARRIS — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 00-CI-00369

KEITH A. HEWITT, M.D.; KELA L. FEE, M.D.; AND HEWITT, DAVIS AND FEE — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Venita Harris and her husband, Benjamin (Ben) Harris (collectively the appellants) have appealed from the November 6, 2003, order of the Warren Circuit Court which granted summary judgment to Keith A. Hewitt, M.D., Kela Lyons

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Fee, M.D., and the partnership of Hewitt, Davis and Fee (collectively the doctors); denied the appellants' motion for summary judgment; and excluded the testimony of their expert witness, Dr. Michael L. Resnick. We conclude that the issue of whether the trial court abused its discretion in excluding Dr. Resnick's testimony is moot. We also conclude that the trial court did not err in denying the appellants' motion for summary judgment. Thus, we affirm the trial court's order in part. We further conclude that the trial court erred in granting summary judgment to the doctors, as there was sufficient evidence to establish the standard of care and a genuine issue as to the breach of that standard of care. Thus, we reverse that portion of the trial court's order and remand for further proceedings consistent with this Opinion.

Appellants filed this action against the doctors[2] alleging medical negligence in the birth of their son, Robert Benjamin Lee Harris, which caused his death on March 23, 1999. The appellants based their claim on a lack of informed consent, alleging that Dr. Hewitt failed, during the period of Venita's prenatal care, to counsel her concerning the risks of undergoing a vaginal birth, after she had previously given birth by cesarean section (C-section) and that any counseling Dr. Fee

[2] The Medical Center at Bowling Green was originally named as a party to this action. The trial court dismissed the Medical Center from the case by summary judgment entered on March 9, 2001.

provided to Venita about the risks of the procedure and her options came after Venita was too far into labor for her to make a rational decision.

Venita and Ben were married in 1997, and on July 27, 1998, Venita saw Dr. Hewitt, who confirmed her pregnancy and began her prenatal care. Venita informed Dr. Hewitt that she had had a child by a prior marriage, approximately 16 years earlier, and that child had been delivered by C-section.[3] Dr. Hewitt informed Venita that she might be able to give vaginal birth even after having delivered by C-section (VBAC). It is undisputed that Dr. Hewitt did not document the scope of his discussions with Venita during prenatal counseling with her. However, he testified that he discussed the advantages and disadvantages of both VBAC and C-section with Venita. Dr. Hewitt stated in his deposition taken on August 21, 2000, as follows:

> Q: During your treatment of Venita after it was determined that she was pregnant, did you ever have a discussion with her about the risk of following a trial of labor?
>
> A: Yes.
>
> Q: Do you recall when that took place?
>
> A: At every visit.

[3] Venita's prior medical history included endometriosis and preeclampsia.

Q: Every visit?

A: Every visit. We talk about that every visit.

Q: Tell us exactly what you said every visit.

A: Well, basically, when they've come in with a previous C-section, I'll say: Well, you know you have the option to have a vaginal delivery, and if you desire so after we've educated you on all your findings and all the data, basically, there's risks both ways. There's risks of cesarean sections. There's risk of repeat V-backs [sic].

And I always tell them that there are things throughout the pregnancy that might change their decision. And I always try to tell them not to get bent on one decision at the beginning of the pregnancy because they may have data that pop up toward the end that will change their mind.

And that frequently happens. You'll frequently have some women that will say they want a V-back [sic] and then some that say they want a C-section, and then at the end of the pregnancy will change their mind one way or the other depending on the data.

But as data pops up, you know, that would have some influence on what choice you made, then we discuss that aspect of it too.

. . .

Well, what I actually say is, I say: Listen, there is [sic] complications both ways. If you have a repeat

cesarian [sic] section, there's [sic] complications in having the anesthetic. The anesthetic is generally a more aggressive anesthetic with the cesarian [sic] section than with the vaginal delivery.

You can have epidurals both ways, but you have general anesthetic with the cesarian [sic] section. General anesthetic is the biggest risk to pretty much any surgery; risk of aspiration, risk of wound infection, risk of retained fluid in the baby's lungs, risk of abdominal organ injury.

There's also the debilitating risks of injuring the uterus in such a way that it will hamper you with problems the rest of your life with irregular bleeding, pelvic pain, adhesions, things like that. Endometriosis is a high risk after a cesarian [sic] section.

Vaginal, you know, we bring up that vaginally is generally safer. Vaginal delivery after cesarian [sic] section can have some risks too.

One of the risks of a vaginal delivery after cesarian [sic] section is that you can labor for 20 hours and still end up with a cesarian [sic] section. You could have, you know, basically a risk of kind of putting up with all that and then having to have a C-section, and that would be the worse scenario.

Then we bring up uterine rupture. Uterine rupture, we admit to them it is a rare complication, but it can happen. It can have devastating results.

And then again, I revent, [sic] I just basically say: Listen, don't make this

> concrete decision now. Let's see how things progress, and then, you know, as we get down the line and things happen that would make you change your mind, you may change your mind.

Venita claims that Dr. Hewitt never discussed the benefits and the risks of either VBAC or C-section. Ben testified that, while he was not at every prenatal visit Venita made to Dr. Hewitt, he does not recall a discussion with Dr. Hewitt regarding Venita's delivery options during the visits he attended. Neither Venita nor Ben recalls being told by Dr. Hewitt that a trial of labor could result in a uterine rupture and death or brain damage to the baby.[4] Both Venita and Ben testified that they were not aware that Dr. Hewitt was going on vacation and they believed he would deliver their baby.

Venita's pregnancy with Robert was difficult, and she developed hypertension. On March 19, 1999, Venita thought she was having contractions and she went to the Medical Center in Bowling Green. Dr. Hewitt saw Venita at that time; and while working under the erroneous assumption that she was 37 weeks

[4] Both Venita and Ben were deposed on July 18, 2000. Venita stated in her deposition that the delivery of her first child by C-section was necessary only after her arriving at the hospital in labor and being told she had developed preeclampsia and cephalopelvic disproportion (CPD). Preeclampsia was defined by Dr. Fee as a "condition that is defined by protein in your urine, elevated blood pressures and swelling . . . only found in pregnancy." CPD is a condition where the fetal head of a baby is too large to fit through the pelvis of the mother. Venita also stated that she had discussed with Dr. Hewitt that her previous obstetrician, Dr. Hatcher, told her that she would never be able to have natural childbirth. Venita stated that Dr. Hewitt "briefly said that things had changed, there was an option of trial of labor, but he would talk to me about that at a later time."

pregnant, he determined that she was having false labor and that she was dehydrated. Dr. Hewitt treated Venita and sent her home that day. On March 19, 1999, Venita was actually 39 weeks pregnant; and Dr. Hewitt has conceded that the standard of care provides that a scheduled C-section should occur no earlier than the 39th week. In his deposition, Dr. Hewitt testified as follows:

> Q. As I understand what you've said, it's an open decision that can be changed at any point?
>
> A. Uh-huh (yes).
>
> Q. But at this point, she was going into labor, she thought. It appears that she was under the assumption that she was going to go through a vaginal deliver[y]. I would take it as that from just looking at the records.
>
> A. Right. But being 37 weeks and the repeat sections are done at 39, that was still an option too.
>
> Q. So she was still two weeks before term?
>
> A. Like if she had said, I want a repeat section, we would have done that at 39 weeks.
>
> Q. Why would you do that at 39 weeks?
>
> A. Well, you do 39 weeks because whenever you're taking it upon yourself to deliver a baby and pick the date that it comes out, you want to be pretty accurate about maturity. So you do 39 weeks.

And that’s kind of a standard of care to make sure the baby’s mature enough. You can do it a week earlier than term just to prevent having a lot of C-sections come in in the middle of the night that are in labor and want the repeat section. You try to beat labor by a little bit so you can get it scheduled.

Q. But in this case, she apparently was possibly in the early stages of labor?

A. Well, that – right. She presented herself with nausea, vomiting, dehydration, it looks like, and questionable whether she was in labor. And that’s basically her patient complaint right there.

. . .

Q. The fact that she was having contractions at all though is a product of the pregnancy and the fact that she is getting closer to her delivery?

A. Right. I mean that can go on for weeks in the later stages of pregnancy.

Q. There’s no documentation there that you had any kind of discussion with her about V-back [sic] versus C-section?

A. Not for that specifically, no.

Q. And you don’t have any recollection of any conversation like that?

A. Other than that I always do every time somebody comes in and they had a previous cesarian [sic] section. After I’ve looked at the monitor, I always say, you know, we’re always open here. We can go either way.

> In this instance, I'm sure most of my discussion was pointed toward telling the patient how this could be labor; this may not be labor; we'll have to watch you for a while and see what you do; and go from there.

On March 21, 1999, two days after Dr. Hewitt's examination, Venita returned to the Medical Center complaining of pain. Since Dr. Hewitt was in Florida on vacation, Dr. Fee, who is one of Dr. Hewitt's associates, was the group physician on call when Venita arrived at the Medical Center. Dr. Fee testified that it was the doctors' normal practice that when one doctor was on vacation, the doctor on call would become familiar with the charts of all of the vacationing doctor's patients who were close to their delivery dates. However, Dr. Fee stated in her deposition that she was not familiar with Venita's chart or any aspect of her treatment with Dr. Hewitt until the evening of March 21, 1999. The hospital called Dr. Fee and she gave orders for Venita to go home and to return when her water broke or her contractions were five minutes or less apart.

Later that day, at approximately 7:25 p.m., Venita went into labor and was admitted to the Medical Center. Venita's medical records indicate that Dr. Fee did not physically examine her until approximately 11:00 p.m., but she did give telephonic orders at 9:00 p.m. to augment Venita's labor with Pitocin. Upon her arrival at the hospital, Dr. Fee

discussed with Venita and Ben the risks versus the benefits of VBAC, including the possibility of death or brain damage to the baby. Dr. Fee gave them privacy to discuss this matter and to decide what type of delivery Venita would undergo. Venita and Ben testified that this was the first time they had been informed of these risks and they did not know what course of treatment to choose. They testified that they understood Dr. Fee to say that VBAC was the safer route and they agreed to it. Thus, Dr. Fee continued her treatment of Venita with the objective of a vaginal delivery.

Dr. Fee testified in her deposition on July 18, 2000, as follows:

> A: I got a history from the nurse. And upon hearing her history, knew that Mrs. Harris was a VBAC candidate. And I even asked the nurse – I said does she plan on VBAC'ing, and the nurse said, yes, she does, as if it had already been decided. And I said, well, I'll be in very soon, because when a patient is VBAC'ing, I stay in the hospital.[5]
>
> . . .
>
> Then I wrote my assessment as she's at term with spontaneous membranes and I

[5] This response is perplexing since obviously the doctor would have to stay in the hospital if Venita were to have a C-section. Further, this testimony is contrary to Dr. Hewitt's testimony that when he examined Venita just two days earlier no decision as to delivery had been made. Of course, Dr. Hewitt's admission that he thought Venita was in her 37th week of pregnancy when in fact she was in her 39th week indicates that if a C-section were to be the first option then it should have been scheduled on March 19, 1999, the 39th week.

noted that she was a VBAC. I wrote that I counseled her at length. She was aware of the risk.

. . .

Q: Okay. Do you know when Venita made a conscious decision to have a VBAC, to go into a trial of labor?

A: When they told me to my face in that room that that is what they desired. I don't know if she had made that before she came into the hospital. I don't know if she had made that with Doctor Hewitt. I don't know when that had been her major decision. All that concerned me was that I knew – I sat down on the side of her bed, talked to her and her husband not briefly, but in detail, mentioned the fact that her uterus could rupture, even fetal death can occur, possibility of transfusion, infection – risk involved. Left the room to let them think about it, walked back in and they said they wanted to go ahead with the trial of labor. That's when I knew her decision had been made.[6]

Dr. Fee further stated in her deposition taken on May 13, 2003, as follows:

A: I sat down on Ms. Harris' bed after I had reviewed her records at the desk and checked her cervix. She was five to six centimeters, in good labor, completely thinned out, and the baby was low in her pelvis. And I talked to Ms. Harris and her husband that I understood they were VBAC'ing when they came in, but because I was the doctor on call that night, I wanted to make

[6] This testimony actually supports Venita's claim that Dr. Hewitt had not discussed with her the option of a C-section on March 19, 1999, since her 39th week of pregnancy would have dictated an immediate scheduling of the C-section.

sure that we were all on the same page as far as the risks that that procedure can have.

I told her that there can be a need for a C-section, a quick C-section, that she had a good chance of having a successful VBAC because of her exam and the labor that she was in. I told her the risks can include bleeding, rupture of the uterus and even fetal death. And I told that to Ms. Harris and her husband sitting there on her bed.

And I said, you make your decision. If you want to proceed with a vaginal delivery, I will be here by your side the entire time of your labor. And if you want a C-section, I will be glad to perform that for you also. And I said I'll be back in a few minutes; I'm going to go do some paperwork. I left their room, left them alone, and I came back later and they felt very comfortable with their decision.

. . .

Q: Now, if she had been your patient from the beginning of her pregnancy and prenatal course, you would have sat down and had that discussion with her and her husband much earlier far before they come into the hospital; is that correct?

A: Yes sir.

. . .

Q: And I think you have already testified in your first deposition that you don't know whether or not that had taken place or not in this particular situation, do you?

A: I feel very strongly that it did.

Q: And what are you basing that on?

A: Because she came to the hospital knowing exactly what she was going to do. She told the nurse she was going to have a VBAC, and that's not a term you pick up on the street. And I believe that Dr. Hewitt has the foresight and the knowledge to counsel his patient regarding that. If she had been a planned C-section, that would have been scheduled already and on the books.[7]

The trial of labor continued for approximately three more hours and then Venita's uterus ruptured, causing extreme distress to the baby, and requiring Dr. Fee to perform an emergency C-section. When the baby was delivered, he had poor tone and color and required artificial resuscitation. The baby and Venita were transferred to Vanderbilt University Children's Hospital ICU. The baby died there on March 23, 1999, from complications of "unexpected uterine rupture and asphyxia."

On March 22, 2000, the appellants' filed a pro se complaint in the Warren Circuit Court against the doctors and the Medical Center, claiming the doctors had been negligent in the care they provided to Venita, deviating from "acceptable

[7] This testimony also supports Venita's claim that Dr. Hewitt had not discussed the options of a VBAC or a C-section on March 19, 1999. Dr. Fee indicates that since Venita was 39 weeks pregnant on March 19, 1999, then the decision would have been made by that date and she was convinced that the VBAC had been chosen, but Dr. Hewitt testified that on March 19, 1999, Venita was only in her 37th week and that both options were still open to her.

standards of medical care" and causing Robert's death. The doctors filed a response on April 7, 2000, and subsequently filed several discovery requests. On June 30, 2000, the appellants obtained counsel to represent them.[8]

On December 12, 2000, the doctors deposed Dr. Resnick,[9] pursuant to a notice by the appellants that Dr. Resnick would serve as an expert witness in their case. Dr. Resnick stated that Venita initially saw him as a patient two or three times post-birth, and then Venita requested that Dr. Resnick review her medical records in regards to Robert's death. It was Dr. Resnick's opinion from reviewing the records and the depositions of Dr. Hewitt and Dr. Fee that Venita did not meet the criteria for a VBAC.

On July 23, 2001, the doctors filed their first motion for summary judgment stating that since the appellants had retained counsel, no amended pleadings had been filed on their

[8] The appellants deposed all of the doctors' identified experts, along with the nurse and pediatrician who were on duty at the Medical Center and assisted in the birthing process, as well as Dr. Hewitt's and Dr. Fee's office staff. None of these individuals stated in their depositions that either Dr. Hewitt or Dr. Fee had deviated from the standard of care in their treatment of Venita or her child.

[9] Dr. Resnick had been practicing in the fields of obstetrics and gynecology for approximately 25 years. He practiced in Russellville, Kentucky, for two years. It was during that time that Venita first heard of Dr. Resnick when he was a guest on a radio talk show in Russellville. Dr. Resnick currently lives and has a medical practice in Las Vegas, Nevada.

behalf.[10] On August 2, 2001, the appellants filed a response and a motion for leave to file an amended complaint, along with a copy of the amended complaint. The trial court granted the motion and the amended complaint was filed on August 6, 2001. The appellants filed their response to the doctors' motion for summary judgment on August 13, 2001. The trial court summarily denied the doctors' motion for summary judgment on September 17, 2001.[11]

On December 15, 2001, the appellants' counsel deposed Dr. Bruce Flamm,[12] who had been listed by the doctors as an expert witness in this case. Dr. Flamm stated that he had reviewed Venita's medical history prior to 1999; the prenatal, labor, and delivery records relating to Robert; the records from Vanderbilt University Medical Center; and various depositions. While Dr. Flamm was unable to testify concerning the substance of any discussions between Venita and either of the doctors, he

[10] The doctors argued that Venita could only have filed a pro se complaint on her behalf and because the statute of limitations had run, the claims made by Venita on behalf of Ben and the estate of Robert had expired.

[11] This motion for summary judgment was partially renewed on February 28, 2002, in regards to Venita's claims on behalf of Benjamin and the estate of Robert. Although it is unclear from the record what the outcome of this motion was, we must assume that it was ultimately denied.

[12] Dr. Flamm worked as an obstetrician/gynecologist for Kaiser Permanente in Riverside, California. He also served as the research chairman and a clinical professional at the University of California at Irvine. He had served as an expert witness in over 200 VBAC cases in the last decade.

opined that Dr. Fee's documented counseling alone would not meet the standard of care they owed Venita.

On January 28, 2002, the appellants' counsel deposed Dr. Frank Boehm,[13] who was listed by the doctors as an expert witness in this case. Dr. Boehm stated in his deposition that he had reviewed all the medical records of Venita and the baby from prenatal care through delivery, as well as Venita's medical records from the birth of her first child in 1983. Dr. Boehm acknowledged that "the real risk [in a VBAC] is uterine rupture[,]" which would be "disastrous." He further testified that "[t]he decision of whether to do a cesarean section and delivery is a big issue" and "that it would be below the standard of care to never mention [the risks of a VBAC] in the prenatal course."

After being continued twice, a jury trial was set for November 24, 2003.[14] On August 15, 2003, the doctors filed a notice to take another deposition of Dr. Resnick,[15] which was heard at the pretrial conference held on September 15, 2003.

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[13] Dr. Boehm served as director of maternal-fetal medicine at Vanderbilt University Medical Center in Nashville, Tennessee, and had served as an expert witness in several other VBAC cases.

[14] Because the transcript of Dr. Resnick's deposition had not been prepared, on January 10, 2001, the doctors moved the trial court to continue the trial scheduled for March 28, 2001. The motion was granted and the trial was rescheduled for September 25, 2001.

[15] The doctors explained the request was because two years had passed since Dr. Resnick's deposition had been taken, and the Medical Center had been dismissed as a defendant since the earlier deposition.

The appellants' attorney stated in court on that date that if the deposition was not arranged, then the appellants would not call Dr. Resnick at trial. The trial court entered an order on September 22, 2003, requiring the appellants to produce Dr. Resnick for the deposition, or he would not be allowed to testify as an expert witness at trial. The deposition set for October 7, 2003, did not take place as Dr. Resnick failed to appear. The doctors, on October 10, 2003, filed a motion to exclude Dr. Resnick as an expert witness and they renewed their motion for summary judgment. The doctors stated that because of the appellants' failure to produce Dr. Resnick for deposition, the appellants were without any expert testimony to present at trial. The appellants filed a motion for partial summary judgment based on the depositions of Dr. Hewitt, Dr. Fee, Dr. Flamm, Dr. Boehm, and themselves, claiming they had established that Venita's consent was not informed.

On November 6, 2003, the trial court entered an order 1) denying the appellants' motion for partial summary judgment, 2) granting the doctors' motion to exclude Dr. Resnick as an expert witness, and 3) granting the doctors' motion for summary judgment. The appellants filed a motion to alter, amend, or vacate the order on November 14, 2003, claiming that the trial court had failed to consider, in a light most favorable to them, the evidence which created an issue of fact regarding the

doctors' negligence. The trial court denied the motion by order entered on December 1, 2003, and this appeal followed.

Under Kentucky law, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[16] The trial court must review the pleadings, depositions, and discovery evidence to determine whether summary judgment is proper.[17] Since "factual findings are not at issue,"[18] an appellate court need not defer to the trial court's decision on summary judgment. An appellate court will review the issue de novo since it "involves only legal questions and the existence of any disputed material issues of fact."[19] The Supreme Court has stated that "[t]he proper function for a summary judgment . . . 'is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.'"[20]

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[16] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03.

[17] CR 56.03.

[18] Barnette v. Hospital of Louisa, Inc., 64 S.W.3d 828, 829 (Ky.App. 2002).

[19] Lewis v. B & R Corp., 56 S.W.3d 432, 436 (Ky.App. 2001).

[20] Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (quoting Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974)). See also Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

The term "impossible" is to be applied in a practical sense, not in an absolute sense.[21] However, summary judgment is not considered a substitute for a trial, so the trial court must review the evidentiary record not to decide any issue of fact, but to determine if any real factual issue exists and whether the non-movant can prevail under any circumstances.[22]

Moreover, "[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[23] The movant bears the initial burden of convincing the trial court by evidence of record that there is no genuine issue as to any material fact, which then shifts the burden to the party opposing summary judgment. "[A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial,"[24] but the threshold is quite low.[25] In other words, the evidence presented by the moving party in support of its summary judgment "must be of such a nature that no genuine issue of fact remains to be

[21] Perkins v. Hausladen, 828 S.W.2d 652, 654 (Ky. 1992).

[22] Steelvest, 807 S.W.2d at 480.

[23] Id.

[24] Id. at 482.

[25] Commonwealth, Transportation Cabinet, Dept. of Highways v. R.J. Corman Railroad Co./Memphis Line, 116 S.W.3d 488, 498 (Ky. 2003).

resolved."[26] Otherwise, summary judgment is improper even if the party opposing summary judgment presents no contradicting evidence.[27]

As stated earlier, the appellants' claims against the doctors are based on a lack of informed consent. The law of informed consent in Kentucky is codified in KRS[28] 304.40-320,[29]

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[26] Hartford Insurance Group v. Citizens Fidelity Bank & Trust Co., 579 S.W.2d 628, 631 (Ky.App. 1979).

[27] Hartford, 579 S.W.2d at 631; Carter v. Jim Walter Homes, Inc., 731 S.W.2d 12, 14 (Ky.App. 1987).

[28] Kentucky Revised Statutes.

[29] KRS 304.40-320 provides:

> In any action brought for treating, examining, or operating on a claimant wherein the claimant's informed consent is an element, the claimant's informed consent shall be deemed to have been given where:
>
> (1) The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience; and
>
> (2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures;
>
> (3) In an emergency situation where consent of the patient cannot reasonably be obtained before providing health care

and is guided by "the accepted standard of medical . . . practice among members of the profession with similar training and experience[.]"[30] Subsection (2) of KRS 304.40-320 deals specifically with what a reasonable person should be told before being deemed to have given informed consent, including "substantial risks and hazards inherent in the proposed . . . procedures[.]" An action based on lack of informed consent "is in reality one for negligence in failing to conform to a proper professional standard . . . ."[31] The general rule in a medical malpractice case is that expert testimony will likely be required to negate informed consent[32] and to establish proximate cause between the negligence and the injury.[33]

We first address the trial court's exclusion of Dr. Resnick's testimony. It is undisputed that appellants' counsel stated at a hearing that if Dr. Resnick was not produced for a second deposition, then he would not be called to testify in

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> services, there is no requirement that a health care provider obtain a previous consent.

[30] Id.

[31] Holton v. Pfingst, 534 S.W.2d 786, 788 (Ky. 1975).

[32] Keel v. St. Elizabeth Medical Center, 842 S.W.2d 860, 862 (Ky. 1992); see also Hawkins v. Rosenbloom, 17 S.W.3d 116, 119 (Ky.App. 2000).

[33] Sakler v. Anesthesiology Associates, P.S.C., 50 S.W.3d 210, 214 (Ky.App. 2001). (As the Court in Perkins, 828 S.W.2d at 654-55, noted, there are exceptions to the rule. However, since the appellants are relying on the doctors and the doctors' experts, they do not need to meet one of the exceptions to prove their case.)

this case. The trial court entered an order providing that Dr. Resnick would not be allowed to testify at trial if the second deposition was not given. It is undisputed that Dr. Resnick was not produced; and as this case stood in 2003, it was not an abuse of discretion for the trial court to prohibit him from testifying at the trial scheduled for November 24, 2003. However, the fact that Dr. Resnick was not allowed to testify should not have prohibited the case from going to the jury.[34]

Every expert who testified in this case opined as to the proper standard of care required to establish informed consent. Thus, the appellants can establish the standard of care owed Venita without Dr. Resnick's testimony. Further, a determination of whether the standard of care was breached by Dr. Hewitt and/or Dr. Fee does not require expert testimony. The standard of care in this case is that Dr. Hewitt and Dr. Fee should have informed Venita of the risks and the benefits of undergoing a C-section or VBAC prior to her giving birth to Robert. Both Dr. Hewitt and Dr. Fee stated that they fully explained the risks versus the benefits of both procedures to Venita. Venita testified that Dr. Hewitt never gave her an explanation concerning the procedures; and that when Dr. Fee

[34] Since we are reversing the trial court's granting of summary judgment, the question of Dr. Resnick's availability in October 2003, is moot. On remand, if the appellants should desire to call Dr. Resnick as an expert witness, the trial court will need to assess the status of discovery in light of the new trial date.

gave her an explanation, she was in labor and under such stress that she was incapable of making an informed decision.

This case is similar to Merker v. Wood,[35] where the former Court of Appeals reversed the trial court's granting of a directed verdict to the defendant doctor. Mrs. Merker had claimed that Dr. Wood had been negligent by failing or refusing to see her for a follow-up X-ray for a broken leg. Dr. Wood denied this failure and claimed that Mrs. Merker failed to present herself for examination. The Court of Appeals noted that the testimony of Dr. Wood and Dr. Hudson[36] had established that the standard of care for "orthopedic surgeons in Louisville in this character of injury requires that an X-ray check of the patient should be made frequently after the fracture is reduced."[37] The Court then stated:

> It is patent there is a conflict between the testimony of the daughter and that of Dr. Wood on this very important telephone conversation of August 24th. If the daughter's testimony is believed, then Dr. Wood was negligent in not directing that Mrs. Merker return to the hospital without delay for an X-ray examination to determine whether the cast had slipped and whether the fractured members were in apposition or were out of alignment. If the testimony of Dr.

[35] 307 Ky. 331, 210 S.W.2d 946 (1948).

[36] It is unclear from the case if Dr. Hudson was an expert for the plaintiff or the defendant, but it does not matter, since it is clear that Dr. Wood's testimony alone would have been sufficient evidence to establish the standard of care.

[37] Merker, 307 Ky. at 337.

> Wood is believed, then he was not negligent because he testified he directed the daughter to bring her mother to the hospital immediately for a check up. Thus we see there is an issue of fact for the jury's determination.
>
> . . .
>
> Dr. Sacklette testified that he contacted Dr. Wood and told him that Mrs. Merker needed attention; that Dr. Wood assured him there was no danger and he would take care of Mrs. Merker, but that it would not be necessary for him to see her until after the six weeks were up.
>
> . . .
>
> Thus we see there is an issue between Dr. Sacklette and Dr. Wood on a material point; also, between Dr. Wood and Mrs. Merker's daughter as to whether he would see his suffering patient within a reasonable time after notice from her daughter that she needed his attention. If the jury should reject the testimony of Dr. Wood and accept that of Dr. Sacklette relative to his conversation with Dr. Wood, or accept that of Mrs. Merker's daughter relative to returning her mother to the hospital,[38] then Dr. Wood would be guilty of negligence and malpractice according to the standard he, himself, set as to the ordinary medical or surgical skill applied to the handling of such a case[.][39]

Likewise, in the case before us the standard of care has been established as a matter of law. The disputed issue in

[38] We note that Dr. Sacklette was testifying on this point as a fact witness and not as an expert. Further, by using "or" the Court clearly indicated that Mrs. Merker's daughter's testimony alone was sufficient to get this disputed fact to the jury.

[39] Merker, 307 Ky. at 334-35.

this case is one of fact and it centers on the conflicting evidence as to whether the doctors properly obtained informed consent from Venita. It will be the jury's role to determine whether informed consent was properly given. Therefore, summary judgment was erroneously granted to the doctors, and the appellants were properly denied summary judgment. Thus, we reverse that portion of the trial court's order granting summary judgment to the doctors, affirm that portion of the order denying summary judgment to the appellants, and hold the issue concerning Dr. Resnick's testimony to be moot.

ALL CONCUR.

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