RENDERED: JULY 1, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001005-MR

LEONA WATTS AND BOBBY WATTS — APPELLANTS

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE
ACTION NO. 96-CI-00638

APPALACHIAN REGIONAL HEALTHCARE, INC.
d/b/a HAZARD ARH HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HENRY AND TACKETT, JUDGES.

HENRY, JUDGE: Appellants Leona Watts (Leona) and Bobby Watts (Bobby) bring this appeal from an order of the Perry Circuit Court, entered April 23, 2004, which sustained the motion of appellee Appalachian Regional Healthcare, Inc. d/b/a Hazard ARH Hospital (ARH) for summary judgment in a medical malpractice action. The main question before us is whether the trial court erred in granting summary judgment by exclusion of the only evidence of causation, the recanted report of an expert witness. We affirm.

Initially, there is a procedural issue to address. Appellants Bobby Watts and his wife, Leona Watts, were the plaintiffs in the original medical malpractice complaint filed in 1996. The caption on the Notice of Appeal herein names as appellants "Bobby Watts and Leona Watts" and the notice itself names as appellants "Leona Watts, et al." While use of "et al." is not a proper designation in a Notice of Appeal (Kentucky Rules of Civil Procedure [CR] 73.03(1)), designation of the parties in the caption is sufficient. *See* Schulz v. Chadwell, 548 S.W.2d 181 (Ky.App. 1977); Blackburn v. Blackburn, 810 S.W.2d 55 (Ky. 1991). Thus, appellants to this appeal are Bobby Watts and Leona Watts.

The more troublesome issue is this: Bobby Watts died in 2001, before the entry of the summary judgment which is the subject of this appeal. Bobby's cause of action did not cease with his death, but it was necessary for his representative to file a motion to substitute within a year following his death in order to "revive" it. CR 25.01; Kentucky Revised Statutes (KRS) 411.140; 395.278. There is nothing, however, in the record to indicate that Leona Watts, as Bobby Watts' executrix, filed the proper motion to substitute, nor is there an order in the record substituting her as the estate's representative.[1] Failure to

[1] We note that although an amended complaint was ordered filed five months after Bobby Watts' death and two months after Leona Watts was appointed executrix, this amended complaint merely noted the appointment of Leona Watts

revive Bobby Watt's cause of action following his death and failure to name in the Notice of Appeal the estate as one of the party appellants leaves no representative named on behalf of his estate who could be bound by any decision this court might make. Turner v. Seale, 298 Ky. 403, 182 S.W.2d 953 (Ky. 1944). Leona Watts, individually, therefore, is the only appellant party to this appeal. Any further reference to appellant, therefore, will be limited to Leona.

A summary of the factual and procedural history is helpful before addressing the substance of appellant's arguments. On December 21, 1995, Bobby Watts discovered that he had acquired Hepatitis C. Within a year, on December 9, 1996, he and his wife filed a negligence action against six defendants: 1) ARH; 2) Sisters of Charity of Nazareth Health System, Inc. d/b/a St. Joseph Hospital (St. Joseph Hospital); 3) Dr. Mitchell Wicker (Wicker); 4) Dr. T.R. Uday Shankar (Shankar); 5) Dr. Eli Boggs (Boggs); and 6) Dr. David B. Stevens (Stevens). The complaint alleged that Bobby acquired Hepatitis C as a result of the negligent transfusion of blood by the following defendants on the following five dates: 1) against ARH and Drs. Wicker and Shankar for transfusion of contaminated

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as executrix of Bobby Watts' estate and claimed damages both on behalf of Leona personally and on behalf of the estate, but it did not follow the requirements of CR 25.01 regarding a motion for substitution in order to revive Bobby Watts' interest. And, although ARH made the failure to revive argument in a supplemental summary judgment motion in June, 2002, there is nothing in the record indicating that there was a ruling on this issue.

blood during a surgical operation (endoscopy) on February 1, 1993;[2] 2) against St. Joseph Hospital and Dr. Stevens for transfusion of contaminated blood during a surgical operation on July 1, 1970 (disc excision), May 30, 1973 (disc fusion), and August 14, 1978 (laminectomy); and 3) against ARH and Dr. Boggs for transfusion of contaminated blood during an examination for treatment for hematemesis and possible hiatus hernia and anemia on September 22, 1977.[3] During the course of the action, Bobby and Leona were permitted to amend their complaint three times – once on July 14, 2000, to include a battery claim against ARH for the transfusion of contaminated blood without Bobby's consent or medical necessity; and twice on June 4, 2001, to include among other claims loss of consortium for Leona after Bobby's death.[4] A fourth amendment, providing for loss of parental consortium for Bobby's children, appears of record without any order allowing its filing.

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[2] It is undisputed that Bobby received blood transfusions on each date except for that alleged received at ARH on February 1, 1993, where there is a dispute between the medical records and testimony of Bobby's family and friends (indicating a transfusion) and the testimony of the attending medical staff (indicating that the records are in error). For the purposes of the summary judgment motion, however, ARH accepted as true the allegation that the blood transfusion was given.

[3] For ease in discussion of these events, they will be referred to by the year of their date of allegation: 1993; 1970-1973-1978; and 1977.

[4] As the third amended complaint was not filed in the record, it is unknown what it claimed.

As the case progressed, apparently all defendants except ARH were either dismissed or had summary judgment sustained, and only the 1993 allegation remained against ARH.[5]

During the course of the action ARH filed several summary judgment motions. On April 7, 2000, ARH filed a motion for summary judgment addressing for the first time the issue of lack of evidence on causation.[6] In support, ARH referred to the testimony of two of Bobby's medical experts on the issue of causation, who both testified that Hepatitis C exposure could lay dormant for ten to twenty years and that it was impossible to say within a reasonable degree of medical probability when Bobby was exposed to and contracted Hepatitis C.

Most damaging however, was the retraction by Bobby and Leona's expert, Dr. Sundaram. In a 1997 report, Dr. Sundaram concluded that the 1993 blood transfusion at ARH was the sole

[5] On June 2, 1997, Bobby and Leona entered into an agreed order pertaining to the 1970-1973-1978 allegations which dismissed, without prejudice, St. Joseph Hospital, and left Dr. Stevens as the only defendant for these occurrences, but there is no order in the record indicating the resolution of the allegations against Dr. Stevens. On May 4, 1998, Bobby and Leona entered into an agreed order pertaining to the 1977 allegation which dismissed, with prejudice, Dr. Boggs, and left ARH as the only defendant for that allegation, but there is no order in the record indicating the resolution of ARH's case as relates to the 1977 allegation. On March 23, 2000, a summary judgment in favor of Drs. Wicker and Shankar was granted pertaining to the 1993 allegation which left ARH as the only defendant for that allegation. An appeal of this summary judgment order was affirmed by this Court in an unpublished opinion rendered May 25, 2001 (Bobby Watts and Leona Watts v. Mitchell Wicker, M.D. and T.R. Uday Shankar, M.D., 2000-CA-001006-MR; discretionary review denied, Bobby Watts and Leona Watts v. Mitchell Wicker, M.D., et al., 2001-SC-00500-D). It is the remainder of this 1993 allegation against ARH which forms the basis for the summary judgment at issue herein.

[6] As indicated above, for the purposes of the summary judgment motion, ARH accepted the allegation as true that Bobby had received a blood transfusion on February 1, 1993 while a patient at ARH.

cause of the transmission of Hepatitis C, indicating that as a new disease, no one really knew how fast it spread, but "in all medical probability and in our professional opinion, if [Bobby] had contracted this disease in [prior operations], [he] would probably have already been deceased." In his deposition on January 26, 2000, however, Dr. Sundaram appeared to change his 1997 opinion. He indicated that it was hard to say which transfusion caused the transfer of the disease, basing this opinion on two medical publications that concluded that the spread of Hepatitis C was slow and no symptoms or physical signs may be noted for decades after the infection. Upon questioning by Bobby and Leona's attorney, however, Dr. Sundaram appeared to equivocate on the causation issue to the extent that he testified to still standing by his 1997 report. On April 27, 2000, Bobby and Leona filed a memorandum in opposition to the summary judgment motion and on May 8, 2000, the trial court denied summary judgment.

Bobby died on January 5, 2001. The death certificate listed four causes of death, with Hepatitis C as the last cause. Leona was appointed executrix of Bobby's estate on April 18, 2001. (Perry District Court Case No. 01-P-00065).

On June 19, 2001, ARH filed a subsequent motion for summary judgment. In the motion, ARH cited this Court's May 25, 2001, unpublished opinion in Bobby Watts and Leona Watts v.

Mitchell Wicker, M.D. and T.R. Uday Shankar, M.D., 2000-CA-001006-MR, which affirmed summary judgment in favor of Drs. Wicker and Shankar on the 1993 allegation, concluding that the doctors had no duty to screen blood obtained from a donor blood bank. ARH argued "law of the case" as to any negligence by ARH, and further argued that Bobby and Leona's battery claim was barred by the statute of limitations. Bobby and Leona opposed this motion by response filed July 5, 2001. The record is silent as to any ruling on this motion.

Nearly one year later, on March 12, 2002, ARH again filed a motion for summary judgment, citing testimony from a July 5, 2001 deposition by Dr. Sundaram (subsequent to the January 26, 2000 deposition testimony recanting and then appearing to equivocate on the 1997 opinion) in which he again recanted the 1997 opinion but this time unequivocally indicated that he could not, within a reasonable degree of medical probability, state that Bobby contracted Hepatitis C as a result of the 1993 transfusion. As such, ARH argued that summary judgment was appropriate as there was no evidence of causation. ARH also renewed its arguments from the June 19, 2001, summary judgment motion. Bobby and Leona filed an opposing response on

April 5, 2002, and ARH filed a responsive pleading on April 25, 2002.[7]

On June 20, 2002, Special Judge John David Caudill, sitting for Judge Douglas C. Combs, Jr., entered an order granting ARH's motion for summary judgment, dismissing all of Bobby and Leona's complaints with prejudice.[8]

Upon further argument by both parties, however, Judge Combs entered an order on September 6, 2002, summarily granting Bobby and Leona's motion to vacate the summary judgment granted by Special Judge Caudill.[9] On October 4, 2002, Judge Combs amended the above order to include findings adopting the reasoning of the Watts' authority of Dinett v. Lakeside Hospital, 811 So.2d 116 (La.App. 2002), finding "as a matter of law that the dispute regarding the testimony of Plaintiffs' expert Dr. R. Sundaram involves his conclusion rather than his

[7] During this same time period, on April 1, 2002, ARH also filed a motion for partial summary judgment on the claims of Bobby and Leona's children for loss of parental consortium, contending that Kentucky law does not recognize an adult child's claim for loss of consortium. On June 18, 2002, ARH supplemented this motion, claiming that the children of Bobby and Leona were barred from bringing their action due to a failure to timely revive the action and violations of CR 8.01. The record is silent as to any ruling on this motion, although the record does contain a copy of the motion for leave to file a fourth amended complaint along with a copy of the complaint alleging damages for the children of Bobby Watts, filed July 12, 2002, the same date as the motion was noticed for hearing.

[8] Leona Watts' appeal of this order was dismissed by this court on January 15, 2003, for failure to file a preheating statement (Leona Watts; et al. v. Appalachian Regional Healthcare, Inc., D/B/A Hazard-ARH Hospital, 2002-CA-001596-MR).

[9] ARH's appeal of this order was dismissed by this court on June 17, 2003, as interlocutory (Appalachian Regional Healthcare, Inc., D/B/A Hazard-ARH Hospital v. Leona Watts; et al; 2002-CA-002094-MR).

methodology and reasoning, and that Goodyear Tire and Rubber Co. v. Thompson, Ky. 11 S.W.3d 575 (2000) therefore has no application," and that "Dr. Sundaram sufficiently stated in his January 26, 2000 deposition that Bobby Watts' Hepatitis C was caused by the alleged 1993 blood transfusion at Defendant's facility, and . . . as a matter of law that Dr. Sundaram's retraction of that opinion in his July 5, 2001 deposition does not prohibit Plaintiffs from presenting Dr. Sundaram's January 26, 2000 deposition testimony to the jury."

Almost two years later, on April 5, 2004, ARH again moved for summary judgment, arguing that Dr. Sundaram's original 1997 opinion was inadmissible because he later retracted it and it was also based on flawed methodology. Following a responsive pleading from Bobby and Leona,[10] Special Judge Caudill again granted ARH's motion, stating:

> [T]he opinion originally stated by the Plaintiffs' expert, Dr. R. Sundaram, was based on flawed methodology which rendered it inadmissible under the Kentucky Rules of Evidence. The Court furthermore finds that Dr. Sundaram withdrew his original opinion on the issue of causation and that it therefore has no evidential value, even if it was otherwise admissible. The Plaintiffs have therefore failed to present the required expert testimony on the issue of causation.

[10] Due to conflicts in their schedules, neither party's attorney could be present on the date scheduled to hear the summary judgment motion. Bobby and Leona's attorney asked for a continuance on the summary judgment hearing, but alternatively agreed to have the motion decided on the pleadings, which was what occurred.

This appeal followed.

Before us, appellant contends that the trial court erred in its grant of summary judgment to ARH. More specifically, appellant argues that 1) ARH's renewed motion for summary judgment is frivolous pursuant to CR 11 as it had already been denied by the trial court; 2) Dr. Sundaram's original opinion is an admissible conclusion of an expert; 3) Dr. Sundaram's original opinion is admissible as substantive evidence; 4) Appellant has a viable battery claim based upon informed consent/battery; 5) causation is supported by circumstantial evidence; and 6) a jury issue exists on damages for an increased risk of harm due to an improper transfusion.

The standard of review on appeal of a summary judgment under Kentucky law is well-settled:

> The 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. Kentucky Rules of Civil Procedure (CR) 56.03. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992). "The 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." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). Summary "judgment is only proper where the

> movant shows that the adverse party could not prevail under any circumstances." Steelvest, 807 S.W.2d at 480, *citing* Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor ..." Huddleston v. Hughes, Ky.App., 843 S.W.2d 901, 903 (1992), *citing* Steelvest, supra (citations omitted).

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

At the point of summary judgment, the record consisted of Dr. Sundaram's original report (1997) and his two depositions (2000 and 2001). The 1997 report, while acknowledging no knowledge of the speed of progression of the disease, concluded by process of elimination that the disease was transferred by the more recent 1993 transfusion as opposed to the prior transfusions; the 2000 deposition retracted the 1997 opinion, relying on medical publications that indicated a slow progression of the disease, but appeared to equivocate by still standing by the 1997 report; and the 2001 deposition unequivocally retracted the 1997 opinion on causation which linked the 1993 transfusion with Hepatitis C.

The question for our review is whether the trial court properly excluded Dr. Sundaram's 1997 opinion which provided the only causation between the 1993 blood transfusion and Bobby's contracting of Hepatitis C, for without it, there is no competent evidence of causation and summary judgment is proper.

The trial court excluded Dr. Sundaram's 1997 opinion "based on flawed methodology which rendered it inadmissible under the Kentucky Rules of Evidence." The trial court made no other express findings of fact. It is our responsibility as the reviewing court, without benefit of any express findings of fact, to determine if the trial court's findings are clearly erroneous, or stated another way, if there is substantial evidence to support the trial court's ruling. Miller v. Eldridge, 146 S.W.3d 909, 917 (Ky. 2004).

Both parties, in addressing the admissibility of Dr. Sundaram's 1997 expert opinion, argue the applicability of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1973) (adopted by the Kentucky Supreme Court in Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995), *overruled on other grounds*, Fugate v. Commonwealth, 993 S.W.2d 931 (Ky. 1999)). Applying Daubert, the record contains uncontroverted evidence indicating that Dr. Sundaram's 1997 opinion was untested, unsupported by peer review and publication, subject to a high rate of error, and without general acceptance in the medical community. There is thus substantial evidence to support the trial court's conclusion that the 1997 opinion was inadmissible as based on flawed methodology.

The trial court alternatively concluded that the withdrawal of the 1997 opinion by Dr. Sundaram rendered it of no evidential value and thus inadmissible. As stated in Miller, supra at 919, analysis under Daubert is not necessarily required, as "we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue." In this particular case, under the trial court's alternative conclusion, Dr. Sundaram's 1997 opinion is inadmissible due to his retraction based upon unrefuted medical publications. *See* Spencer v. City Taxi Service, Inc., 439 S.W.2d 74 (Ky. 1969); Ingram v. Galliher, 309 S.W.2d 763 (Ky. 1958). As such, this retraction provides substantial evidence to support the trial court's findings that Dr. Sundaram's 1997 expert opinion was without any evidential basis and thus inadmissible.

Under either theory, the trial court's exclusion of an expert's opinion is reviewed under an abuse of discretion standard, or whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Miller, supra, at 914, citing Goodyear Tire, supra, 11 S.W.3d at 581. Herein, the doctor's 1997 opinion was flawed under Daubert and

had been unequivocally retracted by the doctor. We can thus find no abuse of discretion in the trial court's exclusion of the 1997 opinion.

"(P)roximate causation between negligence and the injury complained of in a medical malpractice case must be established by expert testimony," (Sakler v. Anesthesiology Associates, P.S.C., 50 S.W.3d 210, 214 (Ky.App. 2001), citing Wilder v. Eberhart, 977 F.2d 673 (1st Cir. 1992), *cert. denied* 508 U.S. 930, 113 S.Ct. 2396, 124 L.Ed.2d 297 (1993)). Herein, with the exclusion of the 1997 evidence, appellant has failed to provide any expert testimony linking the 1993 blood transfusion to Bobby's acquisition of Hepatitis C, making it impossible for her to prevail. As there was no genuine issue of fact as to causation, the trial court's order of summary judgment was proper.

Leona alternatively argues that conflicting evidence on whether Bobby was given a blood transfusion in 1993 provides a genuine issue of material fact on the battery claim, and as such the battery claim should have withstood summary judgment.

Despite the lack of specific mention of the battery claim in the summary judgment, the claim was argued in the numerous summary judgment pleadings before the court as well as in the motion and response referred to in the judgment. All claims, including battery, were thus disposed of by the trial

court's finding "that there are no genuine issues of material fact and that it would be impossible for the Plaintiffs to produce evidence at trial warranting a judgment in their favor" due to lack of expert testimony on the issue of causation.

We find this disposition correct on the battery claim as well. Even though a question of fact exists as to whether the transfusion was given, a review of the amended complaint indicates that appellant's battery claim is based on contraction of Hepatitis C from the 1993 transfusion. Or, stated another way, appellant's battery claim fails if there is no evidence that the Hepatitis C was caused by the 1993 blood transfusion. As we have indicated above, there is no evidence of causation between the contraction of Hepatitis C and the 1993 blood transfusion. There is thus no genuine issue of material fact and the trial court's summary judgment was proper.

We need not reach the remainder of appellant's arguments. Judge Combs' order vacating Special Judge Caudill's summary judgment in ARH's favor is not "law of the case" as that doctrine holds that *an appeal* settles all errors that were or might have been relied upon. *Cf*. Sowders v.. Coleman, 223 Ky. 633, 4 S.W.2d 731 (Ky. 1928). *See also* Siler v. Williford, 375 S.W.2d 262, 263 (Ky. 1964): "When an appellate court decides a question concerning evidence or instructions, the question of law settled by the opinion is final upon a retrial in which the

evidence is substantially the same and precludes the reconsideration of the claimed error on a second appeal." And, appellant failed to present for our review the issues of causation by circumstantial evidence and compensatory damages for an increased risk of harm due to an improper transfusion as she failed to raise them in her prehearing statement. CR 76.03(8).

For the foregoing reasons, the order of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
John H. Metz Cincinnati, Ohio	Johann F. Herklotz Lexington, Kentucky