RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001405-MR

JOE L. YOUNG, ANCILLARY ADMINISTRATOR
OF THE ESTATE OF OWEN L. GARDNER,
DECEASED AND JUDY GARDNER, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY LANGFORD, JUDGE
ACTION NO. 01-CI-00075

DONALD DILLOW, Executor of the Estate
of Ronald Dillow, M.D.,
EDWARD B. MCWHIRT, M.D., and
HOSPITAL OF FULTON, INC., and HOSPTIAL
OF FULTON, INC., d/b/a PARKWAY REGIONAL
HOSPITAL — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

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

GUIDUGLI, SENIOR JUDGE: Joe L. Young, ancillary administrator of the estate of Owen L. Gardner, and Judy Gardner, individually, (collectively referred to hereafter as "Estate") appeal from a judgment of the Fulton Circuit Court in a wrongful death case involving medical malpractice. The Estate alleges numerous evidentiary errors and several instances of juror misconduct. We affirm.

On July 27, 2000, Owen Gardner paid a visit to Parkway Regional Hospital (Hospital) complaining of constipation. Dr. Ronald Dillow, a radiologist, performed an abdominal CT (computed tomography) scan. Dr. Dillow interpreted the scan and concluded that there was no mechanical obstruction. Gardner was discharged from the emergency room with instructions to follow up with his primary care physician. On July 29, 2000, Gardner was admitted to the Hospital under the care of Dr. Gregory Cox, an internal medicine physician. In order to determine whether Gardner had a mechanical blockage of the colon, Dr. Cox ordered a contrast enema study which was performed and interpreted by another radiologist, Dr. Robin Floyd. Dr. Floyd concluded that there was no evidence of an obstruction. Based on the results of the enema study, Dr. Cox diagnosed ileus, or pseudo-obstruction. Dr. Kofi Nuako, a gastroenterologist, prescribed a shot of the drug Neostigmine in an effort to relieve Gardner's symptoms. On August 2, 2000, Mr. Gardner suffered a perforation of his bowel.

After the perforation, Gardner was immobile for an extended duration. Dr. Edward McWhirt performed a lengthy operation and removed a section of Gardner's colon. After a period of improvement, Gardner's surgical wound

dehisced, which required an immediate second operation. Following the second operation, Dr. Shankar Kandaswaymy, a critical care specialist, prescribed the drug Heparin as a prophylaxis to guard against deep vein thrombosis (DVT). On August 14, 2000, Dr. Cox also added compression boots as a prophylaxis against DVT. Gardner's condition continued to worsen and he was transferred to Vanderbilt University Medical Center on August 29, 2000. He died of a pulmonary embolism attributable to DVT on the same day.

The Estate filed suit against all of his medical care providers in Fulton Circuit Court. At the time of trial, Drs. Dillow, McWhirt, and Nuako along with the Hospital remained as party defendants. The Estate alleged that Dr. Dillow violated the standard of care by misinterpreting the initial CT scan. Regarding Dr. McWhirt, the Estate argued that he failed to take appropriate prophylactic measures against DVT. The Estate contended that Dr. Nuako should not have proscribed Neostigmine. The basis of the Hospital's alleged liability was a theory of vicarious liability. The trial court conducted a six-day jury trial. The trial court granted Dr. Nuako's motion for a directed verdict at the close of the Estate's case-in-chief. The jury returned a ten to two verdict in favor of Dr. Dillow and a nine to three verdict in favor of Dr. McWhirt. The Estate filed two motions for a new trial which the trial court denied. This appeal followed.

EVIDENTIARY ISSUES

TESTIMONY OF DR. MILLER

Dr. McWhirt identified Dr. Frank Miller as an expert witness to testify on his behalf as to the applicable standard of care. Dr. Miller is a board-certified surgeon who serves as the Chief of General Surgery for the University of Louisville School of Medicine. An edited videotape recording of Dr. Miller's testimony was played before the jury. The controversy surrounding Dr. Miller's testimony involves statements he made during his discovery depositions. Essentially, Dr. Miller stated that there was a different standard of care in the year 2006 than there was in the year 2000. When confronted with data to the contrary during the deposition cross-examination, Dr. Miller maintained that it was his perception that the difference in standard of cares in 2000 and 2006 existed.

The Estate argues that the pertinent medical literature Dr. Miller used as the basis of his opinion does not, in fact, support the opinion he offered in his testimony. As a result, the Estate contends the only basis for Dr. Miller's opinions was based on his unsupported "perception" and is, therefore, unreliable and inadmissible.

Generally, appellate courts review rulings on the admission of expert testimony according to the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). However, "the distinct aspects of the *Daubert* analysis--the findings of fact, i.e., reliability or non-reliability, and the discretionary decisions, i.e., whether the evidence will assist [the] trier of fact and the ultimate decision as to admissibility--must be reviewed under different standards." *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004).

Therefore, the preliminary findings of fact are reviewed for clear error before the ultimate admissibility decision is reviewed for an abuse of discretion. *Id.* A finding of fact is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence taken by itself or as a whole that "has sufficient probative value to induce conviction…" in the minds of reasonable persons. *Commonwealth of Kentucky, Cabinet for Human Resources v. Bridewell*, 62 S.W.3d 370, 373 (Ky. 2001).

> Kentucky Rules of Evidence (KRE) 702 states:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The case of *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993) established standards for the admission of expert testimony which have been adopted in Kentucky. *Miller,* 146 S.W.3d at 914. In discharging its gatekeeper function, the trial court must assess whether the reasoning and methodology underlying the proposed scientific testimony is valid and whether the application of that reasoning and methodology is relevant to the facts at issue. *Id. Daubert* set forth certain factors that a trial court may consider when evaluating the reliability of scientific testimony: "(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high

known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community." *Id.* These *Daubert* factors do not constitute an exclusive list. *Id.* Moreover, the factors may not even be pertinent given the specific circumstances of a particular case because the gatekeeper function must be "tied to the facts." *Id.* at 918.

We have reviewed the entirety of Dr. Miller's deposition and trial testimony. Dr. Miller's qualifications as an expert have not been challenged. In our view, these qualifications as well as his personal experience and education as a general surgeon provide the reliability of his opinion in terms of admissibility under KRE 702. Dr. Miller reviewed the work of Dr. McWhirt through Owen Gardner's medical charts. He stated his opinion that Dr. McWhirt acted within the standard of care as it existed in 2000 based on his education and experience. Moreover, Dr. Miller did not state that he actually relied on or accepted each and every proposition contained in his research of medical literature for this case. He simply stated that the research assisted him in formulating his opinion. The substance of Dr. Miller's testimony was that of one surgeon evaluating the work of another. Any lack of support in the medical literature as of 2000 would go toward the weight of Dr. Miller's testimony rather than its admissibility. We find that Dr. Miller's testimony was sufficiently reliable and that the trial court did not abuse its discretion.

Next, the Estate argues that the trial court erred by limiting its cross-examination of Dr. Miller to medical literature published in the year 2000 or before despite the fact that Dr. Miller considered up-to date literature in forming his opinion in this case. During his deposition, a large amount of testimony was developed following Dr. Miller's assertion that the standard of care in the year 2006 was different from the year 2000. The trial court did not permit any of this testimony to come before the jury.

Physicians are "under a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances." *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky.1970). Therefore, the issue in this case is whether Dr. McWhirt satisfied the standard of care as it existed in the year 2000 when the alleged malpractice took place. The trial court did not abuse its discretion in excluding this evidence.

TESTIMONY OF DICK SWADER AND CONNIE DILLOW

Prior to trial, the Estate filed a combined motion in limine to exclude the testimony of Dick Swader and Connie Dillow on the grounds of relevancy and undue prejudice. Dick Swader was employed at the Parkway Hospital as the Director of Imaging Services in the radiology department. At a pretrial hearing, the Estate did not request a ruling on its motion to exclude Swader's testimony. The Estate informed the court that it would take up the issue when and if Swader was called to testify. At trial, no objection was made to the introduction of

Swader's testimony. We find that any objection to the introduction of Swader's testimony was not properly preserved for appellate review.

Connie Dillow is the widow of Dr. Dillow and worked in his medical office for several years as the billing clerk. Dr. Dillow died prior to the commencement of this suit. Connie Dillow was unable to attend the trial for medical reasons. The trial court allowed a redacted video recording of her testimony to be played before the jury. The Estate objected on grounds of relevancy and undue prejudice. The prejudice alleged is that Connie Dillow's testimony would establish Dr. Dillow's compliance with the standard of care through impermissible character evidence and would elicit sympathy on her behalf. We have reviewed Connie Dillow's testimony. Most of her testimony concerns background information about Dr. Dillow's medical practice, his education and training, as well as experience in practice. We cannot conclude that this testimony was overtly intended to elicit sympathy. There was no mention in her actual testimony of how the potential outcome of this trial would affect Connie Dillow as a widow or anything else of the sort. While her testimony might not have tended to prove or disprove issues in dispute, Connie Dillow's testimony provided valuable background information that is permitted by the rules of relevancy. *See* Robert G. Lawson, *Kentucky Evidence Law Handbook*, §2.05, 81 (4th Ed., LexisNexis 2003). The trial court did not abuse its discretion.

TESTIMONY OF DR. WASHINGTON

Dr. Mary Kay Washington testified on behalf of Dr. Dillow and stated that in her opinion Owen Gardner did not suffer from a mechanical obstruction of his bowel, but rather from a pseudo-obstruction or ileus. Dr. Washington specializes in pathology at Vanderbilt University. The Estate argues that Dr. Washington's testimony was unreliable under *Daubert* and should not have been admitted. Also, the Estate claims that Dr. Washington's failure to provide a case list detailing her testimonial history warrants reversal. We are not directed to where these alleged errors were preserved for review in the record as required by Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Therefore, we will not consider them.

TESTIMONY OF DR. LAINE

Dr. Nuako designated Dr. Loren Laine as an expert witness prior to trial. The Estate deposed Dr. Laine during discovery. Dr. Laine is a professor of medicine at the University of Southern California Medical School and Chief of Gastroenterology at the USC Medical Center in Los Angeles. The trial court allowed Dr. Dillow to play the video deposition before the jury. The Estate argues that the deposition was for discovery purposes only and not for proof. The Estate further argues that Dr. Dillow should have taken a second deposition or called Dr. Laine to testify at trial. We are cited to no authority in support of this proposition. However, CR 31.02(c)(i) provides:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness: (i) is at a greater distance than 100 miles

> from the place where the court sits in which the action is pending or out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition…

Dr. Laine resides in California. This is not disputed. Admission of the video deposition was proper.

EXCLUSION OF LITERATURE PROVIDED BY DR. WILLIAMS AND DR. GRAY

The Estate designated Dr. Scott Williams and Dr. Samuel Gray as expert witnesses. Dr. Williams is board-certified in radiology and serves at the Director of Interventional Neuroradiology at the University of Tennessee College of Medicine. Dr. Gray is a member of the American College of Surgeons and worked as general surgeon who practiced medicine in Atlanta, Georgia. Dr. Gray had retired prior to his testimony in this case. Both Dr. Williams and Dr. Gray provided medical literature as well as radiological images published after the year 2000. We have already addressed this argument and found that it was proper to exclude evidence of the standard of care that was published after the year 2000 in this case. The trial court allowed the use of certain radiological images of the bowel wall as demonstrative evidence. However, articles describing the images that were published after 2000 were not admitted. The trial court held a lengthy in camera hearing regarding this issue. We cannot discern any abuse of discretion.

The Estate also argues that the trial court erred by permitting Dr. Gray to be cross-examined concerning the American College of Surgeons'

recommendation that its members only offer testimony on procedures that they actively perform. This is not a *Daubert* issue. Dr. Gray stated in his deposition that he adhered to the standards of the College. Cross-examination on this matter went to the weight and credibility of Dr. Gray's testimony rather than its admissibility.

JUROR MISCONDUCT

The Estate raises five instances of juror misconduct: (1) the jury foreman declared "Me and my wife are strong Christians, so you know how I am going to vote;" (2) one juror revealed that Dr. McWhirt had diagnosed her cancer and she believed he saved her life; (3) Marian Roberts was the only juror to look at the exhibits; (4) one of the jurors had a family member who was arrested by Owen Gardner's brother and did not reveal that during voir dire; and (5) some of the jurors refused to discuss the court's instructions in reaching a verdict. The Estate claims that it established juror mendacity and that if these jurors had truthfully answered questions during voir dire, then they would have been challenged for cause. The Estate brought affidavits from its counsel C. Wesley Fowler and juror Marian Roberts to the attention of the trial court. The court denied the motion for a new trial.

In *Ligon Specialized Hauler, Inc. v. Smith*, 691 S.W.2d 903, 904 (Ky.App. 1985), this Court explained the requirement for timeliness in motions for a new trial involving allegations of juror misconduct as follows:

> A motion for a new trial under CR 59.01 is the proper vehicle for correcting the effects of a juror's misconduct. Although Ligon filed a bare motion for a new trial within 10 days of judgment, it failed to submit supporting grounds and affidavits for almost three weeks. The rules do not expressly require these documents to be filed at any given time, but CR 59.03 states that "[w]hen a motion for a new trial is supported by affidavits the opposing party has 10 days after the service within which to serve opposing affidavits ..." The rule's opening language and constraints on the opposing party imply that the moving party must satisfy CR 59.02's 10 day deadline for supporting grounds and affidavits, as well as the motion itself.

The judgment in this case was entered on February 12, 2007. On February 21, 2007, the Estate filed its first motion for a new trial. The first motion contained numerous bare allegations of error. The allegation regarding juror misconduct was supplemented by the affidavit of its counsel, C. Wesley Fowler. On April 25, 2007, the Estate filed a second motion for a new trial supported by a memorandum of law and the affidavit of Marian Roberts, a dissenting juror. The trial court held a hearing on April 26, 2007. The trial court entered an order on June 14, 2007, denying the motions and finding that no juror misconduct occurred.

The circumstances of this case are similar to the tactics rejected by *Ligon*. The Estate presented a bare motion for a new trial within the ten-day limit. Although Fowler's affidavit was attached to the motion, this affidavit consisted solely of hearsay statements and did not name any of the specific jurors nor any specific instances where any juror failed to honestly answer specific questions during voir dire. The affidavit of Marian Roberts, a dissenting juror, was not

presented until the second motion for a new trial, almost two months after judgment was entered. "[T]he plain purpose of CR 59.02 would stand defeated if we allow appellant to toll its provisions by filing a timely but unexplained CR 59.01 motion, while submitting grounds and affidavits to the court at its leisure." *Ligon*, 691 S.W.2d at 904. The motion for a new trial was not timely filed and, therefore, the trial court had no discretion to consider it. *Id.*

MISCELLANEOUS ISSUES

The Estate next argues that the trial court erred by refusing to allow them to inform the jury that the Hospital was a party to the case. We fail to discern any error in this regard given the agreed order dismissing any claims of negligence against the hospital and the Hospital's concession that the defendant physicians were its ostensible agents. The Hospital did not participate in the trial. Another agreed order was entered which stated that jury instructions would not include any reference to the Hospital. Further, no objection was made to the trial court's announcement that there were only three defendants in the case. In response to the motions for a new trial, the Hospital filed an agreement with the Estate entered on January 6, 2007, which limited their reference to the Hospital to closing argument and the cross-examination of certain witnesses. Any restraint the Estate may have experienced was self-imposed.

We find that the Estate's arguments concerning loss of consortium and joint and several liability are moot given our conclusions above.

Accordingly, the judgment of the Fulton Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS IN RESULT ONLY.

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