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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001010-MR

VICKIE S. PRATHER AND
ERNIE PRATHER

APPELLANTS

v. APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 05-CI-00353

THE JAMES B. HAGGIN MEMORIAL
HOSPITAL, INC.; AND CENTRAL
KENTUCKY SURGEONS, PSC.

APPELLEES

AND

NO. 2009-CA-001094-MR

THE JAMES B. HAGGIN MEMORIAL
HOSPITAL, INC.

CROSS-APPELLANT

v. CROSS-APPEAL FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 05-CI-00353

VICKIE S. PRATHER; ERNIE
PRATHER; AND CENTRAL
KENTUCKY SURGEONS, PSC.

CROSS-APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal from a jury verdict rendered in favor of the appellees. The appellant contends that while the trial court directed a verdict in her favor regarding medical battery, it gave instructions to the jury which were reflective of damages based in medical negligence. Based upon the following, we reverse the decision of the trial court and remand this case for a new trial.

BACKGROUND INFORMATION

Appellant Vickie Prather was diagnosed with aggressive breast cancer in her right breast in 1998. It was recommended that she have the right breast removed. Dr. Paul DeLuca was her surgeon. Prather also was treated with a course of chemotherapy and with radiation treatments. After the treatments concluded, Prather had reconstructive surgery on her right breast. Dr. Sandra Bouzaglou performed the reconstructive surgery.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Prather continued to have mammograms on her left breast, but it was not recommended for the reconstructed right breast. It was considered unnecessary given the removal of her natural breast and there was a possibility of damage by the procedure to the reconstructed breast. The events leading to Prather's lawsuit began on November 18, 2004. On that date, Prather went to appellant James B. Haggin Memorial Hospital (the "Hospital") to receive a mammogram on her left breast. She had been to the Hospital four times previously for the same procedure.

Dana Crain, a certified mammography technician and an employee of the Hospital, performed a bilateral mammogram on Prather. Crain stated that Dr. DeLuca had ordered that such be performed. Prather explained that she had been only having mammograms on the left breast and Crain then told her she would phone Dr. DeLuca's office, Central Kentucky Surgeons, PSC ("CKS") for clarification. Evidence at trial indicated that after Crain phoned CKS, she returned and informed Prather that a bilateral mammogram order had been confirmed.

Prather followed the direction of Crain and a mammogram was performed on both her breasts. Prather stated that she immediately felt pain from the procedure and that in the weeks following, she experienced pain, tenderness and a puss-like drainage from the scar tissue around the breast implant.

In May of 2005, Prather complained of her symptoms to Dr. Bouzaglou, the surgeon who had performed the breast implant. Due to the severity of the issues associated with her implant, Dr. Bouzaglou removed it and in May of 2006, performed a second surgery to reconstruct Prather's right breast.

On November 21, 2005, Prather and her husband, Ernie, filed a complaint in the Mercer Circuit Court against the Hospital and CKS due to injuries she associated with the mammogram performed on her right breast. The trial court found that Prather had not consented to the mammogram and directed a verdict on the issue of medical battery in favor of Prather. There remained only the issue of causation and damages for the jury.

In this appeal, Prather contends that the trial court erroneously failed to instruct the jury regarding nominal damages for medical battery and gave medical negligence causation instructions. The jury found that the mammogram of Prather's right breast was not a substantial factor in causing the injuries of which she complained. This appeal follows.

STANDARD OF REVIEW

The issue before us in this appeal is whether the trial court erred in providing the jury with instruction reflecting a medical negligence standard rather than a medical battery standard. We review allegations of jury instruction errors *de novo* as they are questions of law. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

DISCUSSION

As set forth above, the trial court directed a verdict on the issue of medical battery. In *Vitale v. Henchey*, 24 S.W.3d 651, 657 (Ky. 2000), the Kentucky Supreme Court held that a medical battery occurs where a medical procedure or surgery is performed without consent regardless of whether the actor

intended to harm the patient. The Court went on to provide that medical battery “is different from a negligence action for medical malpractice because the claim depends on neither professional judgment nor the physician’s surgical skill.” *Id.* at 656. Thus medical battery is an intentional tort, not a negligent one.

Prather argues that the following instruction given by the trial court was in error:

INSTRUCTION NO. 1

Plaintiff Vickie S. Prather has claimed that when a mammogram was performed on her right breast on November 18, 2004, was [sic] a substantial factor in causing the injuries, of which she now complains.

Are you satisfied from the evidence that the mammogram performed on November 18, 2004, was a substantial factor in causing the injuries caused by plaintiff?

Yes _____ No _____

CKS contends that Prather did not preserve this alleged error for review. It argues that Prather submitted proposed instructions attached to its pretrial memorandum on November 2, 2007, and that none of the instructions proposed an instruction for nominal damages. Prather, however, argues that her trial counsel discussed and offered jury instructions to the trial court clearly presenting her position that if her claim for battery was successful, the jury should be instructed regarding damages as required by law. The proposed instructions tendered by Prather’s counsel involved instructions which are indicative of damages for the

intentional tort of medical battery. We believe such is sufficient to preserve this issue on appeal.

Prather contends that the above instruction failed to properly address the issue of damages and confused and misled the jury constituting prejudicial and reversible error. In John S. Palmore's, *Kentucky Instructions to Juries*, the following instruction is set forth as a model in medical battery cases:

§ 23.24 Battery of patient; No consent

1. You will find for P against D1 if, and only if, you are satisfied from the evidence that on occasion of X's surgery, P did not consent to D1 being the surgeon.

Otherwise you will find for D1.

2. If you find for P against D1 you will also find for P against D2 if, and only if, you are further satisfied from the evidence of the following:

That D2 communicated to D1 that P had consented to D1 performing surgery of X.

AND

That such communication was substantial factor in D1 performing the surgery.

Otherwise you will find for D2.

"Consent" as used in instruction 1 and 2 may be expressed or implied from the conduct of P.

See Kentucky Jury Instructions to Juries, Civil, Vol. 2 § 23.24 (5th ed. 2009).

Prather argues that "substantial factor," as set for the above, only applies to the communications between the doctors and the surgery and that it does not apply to the "unlawful touching" of a medical battery. As set forth in *Vitale*, 24 S.W.3d at 657, "[n]either *Holton* nor the Kentucky Informed Consent Statute transformed a

battery claim against a physician who operates without a patient's consent into a negligence action; it remains an action for battery.” *Vitale*, 24 S.W.3d at 657.

The Hospital contends that Kentucky caselaw provides that “[a] person injured as a result of a battery is entitled to recover for any damages resulting therefrom.” *Id.* at 659 (citing 22 Am. Jur. 2d *Damages* § 130 (2010); 6 Am. Jur. 2d *Assault & Battery* §§ 144 and 147 (2010)). Thus, it argues that the **damages** must be shown to be a result of the battery. The Hospital asserts that the trial court’s instruction was a reflection of this rule of law. The Hospital then goes on to argue that there is no caselaw which provides that nominal damages apply in a case of medical battery.

Vitale specifically provides that “[a] plaintiff need not prove actual damages in a claim for battery because a showing of actual damages is not an element of battery and, when no actual damages are shown for a battery, nominal damages may be awarded.” *Vitale*, 24 S.W.3d at 659 (footnotes omitted). The Hospital asserts that Prather did not claim nominal damages, but instead made a claim for failure of her reconstruction. Prather did, however, tender to the trial court a medical battery instruction. We believe nominal damages are a part of a medical battery instruction. Consequently, we believe the jury should have been able to award nominal damages and was not given an opportunity to do so. Thus, we must reverse and remand this action to the trial court for a new trial on the issue of damages.

ALL CONCUR.

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