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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000884-MR
AND
NO. 2011-CA-000905-MR

MATTHEW MILLER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 08-CI-02176

AMBREEN FRASER, M.D.

APPELLEE/CROSS-APPELLANT

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON, LAMBERT, AND NICKELL, JUDGES.

CAPERTON, JUDGE: Matthew Miller appeals from the jury verdict in favor of the defendant, Dr. Ambreen Fraser, in a medical negligence case. On appeal, Miller argues that the trial court abused its discretion by not allowing him to present expert testimony in rebuttal to respond to a juror's question, and that the

trial court committed reversible error by ruling that Miller was not entitled to present to the jury his claim for failure to obtain informed consent on the basis that such claims only arise out of surgical procedures. Dr. Fraser cross-appeals the trial court's denial of her summary judgment and directed verdict motions on the issue of foreseeability of the injury to Miller. After a thorough review of the parties' arguments, the record, and the applicable law, we agree with Miller that the trial court abused its discretion in not allowing him to present to the jury his claim for failure to obtain informed consent, necessitating reversal. However, we affirm the trial court's denial of Dr. Fraser's motions for the reasons set forth *infra*.

Accordingly, we reverse the jury verdict and remand this matter for a new trial.

At trial, Matthew Miller testified that he presented for treatment at the Urgentcare Clinic in Bowling Green, Kentucky, on January 8, 2008, with complaints of abdominal pain, vomiting and headache. At the time, Miller was sixteen years of age. Prior to arriving at the clinic he had vomited twice and then a third time while there. According to Dr. Fraser, Miller did not appear dehydrated when he arrived. Miller had a normal pulse, normal blood pressure, and a normal pH level of his urine as shown on a urinalysis. Miller had no previous history of kidney or renal problems. Miller's mother, Tammy Miller, signed a consent form on her son's behalf for his treatment at the clinic. Said form gave the clinic permission to administer medical care, "including routine diagnostic procedures and medical treatment...as is necessary or advisable in...[the staff's] judgment."

Dr. Fraser diagnosed Miller with abdominal pain and ordered the following drugs to be administered to him: ketorolac (a non-steroidal anti-inflammatory drug “NSAID”), Rocephin (an antibiotic), and Phenergan (an anti-nausea drug). Miller went home that evening and came back to the clinic the next day with the same symptoms and was treated by Dr. Medhat Grace. Dr. Grace ordered a CT scan which was performed at Greenview Regional Hospital in Bowling Green. Miller was diagnosed with irreversible renal failure, specifically, renal cortical necrosis.

Subsequently, Miller was treated at Vanderbilt University Medical Center and further diagnosed with pancreatitis. Miller underwent dialysis and treatment at Vanderbilt for fifteen months; thereafter, he received a kidney transplant. Miller filed suit against Dr. Fraser alleging negligence in administering the dosage of ketorolac and for not informing the Millers of the risks associated with ketorolac prior to injecting Miller. Miller sought over \$20 million in damages because his medical costs at the time of trial were \$1.5 million, he faced future medical costs of \$5.5 million, and his life expectancy had been reduced by twenty years.

At issue in this case was the administration of a single injection of the 60 mg dose of ketorolac to Miller by Dr. Fraser. The jury was presented numerous medical experts by both parties on whether the ketorolac injection could have caused Miller’s irreversible renal failure. Specifically, the jury was faced with competing testimony on whether the dosage amount of ketorolac was proper since

Miller was a sixteen-year-old minor at the time; on whether ketorolac was a proper medication given that Miller was vomiting and ketorolac is contraindicated to dehydrated patients; on whether ketorolac could cause the specific type of renal failure suffered by Miller; and on whether Miller's pancreatitis had caused his renal failure.

Of contention on appeal, Dr. Benjamin Gold, a Pediatric Gastroenterologist practicing in Atlanta, opined that Miller's renal failure was caused by the administration of ketorolac. The day after Dr. Gold's testimony, a juror approached the bench during a break and asked a question of the court. The court instructed the attorneys for both parties to approach the bench and the juror stated:

I just hadn't heard the question and I was wondering about the answer and unless there is another section that comes with these people....How long does pancreatitis have to be present in order for kidney failure to happen?

The court thanked the juror and counsel for Dr. Fraser informed the juror that they would try to answer that question. The court then proceeded to have a detailed discussion with counsel on the propriety of Miller's calling Dr. Gold for rebuttal evidence to answer the juror's question. Counsel for Miller informed the court that they had arranged to question Dr. Gold and could present his testimony for rebuttal concerning the juror's question. The court informed counsel that Dr. Gold had already made his point that pancreatitis did not cause the renal failure to Miller and that he was not going to allow Miller to call Dr. Gold either in his current case-in-

chief or for rebuttal. In addressing this matter, the court stated, “Well just because one juror has a question, that doesn’t mean, that doesn’t mean anything.” The court then went on to state that he thought that Dr. Gold had already answered the juror’s question through his testimony. The court denied counsel’s request to recall Dr. Gold for further testimony relating to the juror’s question.

The jury returned a verdict in favor of Dr. Fraser, finding that the administration of ketorolac was not a substantial factor in causing Miller’s kidney failure and resulting legal damages. It is from this verdict that Miller now appeals. Dr. Fraser cross-appeals the trial court’s denial of her motions for summary judgment and directed verdict on the issue of foreseeability of the injury to Miller.

On appeal Miller presents two arguments, namely: (1) that the trial court abused its discretion in not allowing him to present expert testimony in rebuttal to a juror’s question; and (2) the trial court committed reversible error by ruling that Miller was not entitled to present to the jury his claim for failure to obtain informed consent on the basis that such claims only arise out of surgical procedures. Dr. Fraser disagrees with the arguments asserted by Miller and contends that the trial court did not err. In addition, on cross-appeal, Dr. Fraser argues that the trial court should have granted her motions for summary judgment and/or directed verdict on the issue of the foreseeability of the injury to Miller. We now turn to the arguments raised by Miller.

First, Miller argues that the trial court abused its discretion in not allowing him to present expert testimony as rebuttal in response to a juror’s

question. In support thereof, Miller argues that Dr. Gold did not, in fact, address the juror's question in his testimony regarding the length of time pancreatitis must be present to cause renal failure. Miller states that Dr. Gold, if recalled, would have explained that the length of time that one has pancreatitis is not a factor in its association with renal failure; rather, the severity of the disease is the key consideration.

At the outset we note that this matter is governed by Kentucky Rules of Civil Procedure (CR) 43.02, which states:

When the jury has been sworn, the trial shall proceed in the following order, unless the court, for special reasons otherwise directs:

(a) The plaintiff must briefly state his claim and the evidence by which he expects to sustain it.

(b) The defendant must then briefly state his defense and the evidence he expects to offer in support of it.

(c) The party on whom rests the burden of proof in the whole action must first produce his evidence; the adverse party will then produce his evidence. The party who begins the case must ordinarily exhaust his evidence before the other begins. But the order of proof shall be regulated by the court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence.

(d) The parties will then be confined to rebutting evidence, unless the court, for good reasons in furtherance of justice, permits them to offer evidence in chief.

(e) The parties may submit or argue the case to the jury. In the argument, the party having the burden of proof shall have the conclusion and the adverse

party the opening. If there be more than one speech on either side, or if several defendants having separate defenses appear by different counsel, the court shall arrange the relative order of argument.

CR 43.02 (emphasis added).

In light of CR 43.02, the order of proceeding in trial is left to the sound discretion of the court. We review a trial court's ruling regarding the admission or exclusion of evidence for abuse of discretion. *See Clephas v. Garlock, Inc.*, 168 S.W.3d 389, 393 (Ky. App. 2004); *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber* at 581, citing *English* at 945.

In *Ochsner infra* the high court in Kentucky addressed CR 43.02(4):

CR 43.02(4) authorizes the trial court to permit the introduction of evidence in chief at the rebuttal stage upon 'good reasons in furtherance of justice.' There having been no showing of such reasons in this instance, and the evidence offered being non-vital, it is our opinion that there was no abuse of discretion.

Commonwealth, Dept. of Highways v. Ochsner, 392 S.W.2d 446, 448 (Ky. 1965).

We believe *sub judice* that the juror's question, which was relevant to the issue of causation, warranted the opportunity for Miller to present further testimony, this being "good reasons in furtherance of justice." We disagree with the court that such a singular question from a juror, which was relevant, "doesn't mean anything." However, we disagree with Miller that such evidence by

necessity required Dr. Gold to be recalled. We decline to address whether such an exercise of discretion by the trial court amounted to an abuse of discretion in light of our remand for a new trial based on Miller's second argument, that the court should have permitted Miller to present to the jury his claim for failure to obtain informed consent.

Second, Miller argues that the trial court committed reversible error by ruling that Miller was not entitled to present to the jury his claim for failure to obtain informed consent on the basis that such claims only arise out of surgical procedures. Miller was prepared to offer evidence from Dr. Craig Denham of Maysville, Kentucky, that Dr. Fraser deviated from the standard of care by failing to obtain informed consent. Dr. Fraser argues that there is no jurisprudence in Kentucky requiring a physician to obtain informed consent prior to administration of therapeutic medication, in direct contrast to requiring informed consent prior to a medical procedure. We note that this issue has not been specifically addressed by our courts.

In Kentucky, the issue of informed consent is truly an action for negligence¹ "in failing to conform to a proper professional standard..." *Keel v. St.*

¹ Dr. Fraser urges this court to adopt the rulings in several Pennsylvania cases holding that the administration of medication does not require informed consent. We decline to follow the Pennsylvania jurisprudence for two reasons. First, the Pennsylvania cases are premised on a theory of battery and not of negligence as evidenced in *Morgan infra*, unlike our Kentucky jurisprudence which is premised on negligence. Second, the Pennsylvania cases seem to make an exception for when the claimed injury is for the medication itself and not the administration thereof. As stated in *Morgan v. MacPhail*, 550 Pa. 202, 207, 704 A.2d 617, 618-620 (1997):

The sole issue before this Court in these consolidated appeals is whether the doctrine of informed consent should be expanded to include the non-surgical administration of medication

Elizabeth Medical Center, 842 S.W.2d 860, 861 (Ky. 1992)(citing *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1975)). See also *Vitale v. Henchey*, 24 S.W.3d 651, 656 (Ky. 2000) (differentiating between negligence and a battery theory of consent). Accordingly,

[A] physician ordinarily is not liable for an honest mistake in judgment, when he follows acceptable medical standards for examination and diagnosis and treatment, then the extent of disclosure relevant to securing the patient's consent must be evaluated in terms of what the physician knew or should have known at the time he recommended the treatment to the patient.

Holton v. Pfingst, 534 S.W.2d 786, 789 (Ky. 1975).

As evidenced in *Holton* and reiterated in *Keel*, the relevant inquiry delves into the acceptable medical standards for examination, diagnosis, and treatment.² Indeed, this is codified in Kentucky Revised Statutes (KRS) 304.40-320, which addresses an informed consent action and does not limit such to only procedures:

In any action brought for *treating, examining, or operating* on a claimant wherein the claimant's informed

where the claimed injury results from the method and location of administration of the medication rather than the medication itself...

The rationale underlying requiring informed consent for a surgical or operative procedure and not requiring informed consent for a non-surgical procedure is that the performance of a surgical procedure upon a patient without his consent constitutes a technical assault or a battery because the patient is typically unconscious and unable to object. *Gray v. Grunnagle*, 423 Pa. [144] at 155, 223 A.2d [663] at 668-69 [1966]. Appellants here argue that the traditional battery or assault-based theory should be abandoned in favor of a negligence standard.

² We note that “treatment” may easily include medication.

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

KRS 304.40-320 (emphasis added).

While our current jurisprudence concerning informed consent has only addressed cases involving medical procedures, this does not mean its application is limited to cases involving medical procedures. Thus, we hereby recognize that the issue of informed consent is not limited to surgery as argued by Dr. Fraser; instead, the question becomes whether such disclosures are required under the applicable professional standard of care upon which Miller was prepared to offer evidence of such via Dr. Denham and which Dr. Fraser would be free to contest. Accordingly, the trial court erred in disallowing Miller to assert his claim

of negligence for lack of informed consent, necessitating reversal of the jury verdict and remand for a new trial on all issues.

On cross-appeal, Dr. Fraser argues that the trial court should have granted her motions for summary judgment and/or directed verdict on the issue of the foreseeability of the injury to Miller.

In reviewing these arguments, we note that the applicable 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56.03. The trial court must view the record “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 v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only “where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* However, “a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial.” *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992), citing *Steelvest supra*. See also *O'Bryan v. Cave*,

202 S.W.3d 585, 587 (Ky. 2006); *Hallahan v. The Courier Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004). Since summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In reviewing the denial of a directed verdict, our role as an appellate court is to determine whether it was error for the trial court to not grant a directed verdict motion. *Lewis v. Bledsoe Surface Min. Co.*, 798 S.W.2d 459 (Ky. 1990).

In making our determination we must bear in mind that:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. [judgment notwithstanding the verdict] unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, 700 S.W.2d 415, 416 (Ky. App. 1985).

This Court is not at liberty to make credibility determinations or determine the weight which should be given to the evidence because this is a function for the trier of fact. *Lewis v. Bledsoe* at 461. “Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts.” *Gibbs v. Wickersham*, 133 S.W.3d 494, 495 (Ky. App. 2004). The

denial of a directed verdict motion should only be reversed on appeal when it is shown that the jury verdict was palpably or flagrantly against the evidence such that it indicates the jury reached the verdict as a result of passion or prejudice. *Lewis v. Bledsoe* at 462. Given these standards of review, we now turn to the substance of Dr. Fraser's cross-appeal.

Dr. Fraser argues that the court erred in not granting either summary judgment or a directed verdict because the specific type of injury suffered by Miller - irreversible kidney failure - was not foreseeable given the lack of reported incidents and the lack of manufacturer's warning for the specific injury. Accordingly, Dr. Fraser asserts that she had owed no duty to prevent the injury and the negligence claim must fail as a matter of law.

In Kentucky "foreseeability as it relates to duty is a pure question of law to be decided by the court." *Lee v. Farmer's Rural Elec. Co-op. Corp.*, 245 S.W.3d 209, 217 (Ky. App. 2007). However, as explained in *Lee*, foreseeability is often a complicated issue:

In Kentucky, the scope and character of a defendant's duty is largely defined by the foreseeability of the injury: "[E]very person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury. Even so, such a duty applies *only* if the injury is foreseeable." *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999) (citations and quotation marks omitted) (emphasis added). "[F]oreseeability is to be determined by viewing the facts as they reasonably appeared to the party charged with negligence, not as they appear based on hindsight." *James v. Wilson*, 95 S.W.3d 875, 891 (Ky. App. 2002).

Foreseeability inquiries are often complicated by the tendency to confuse foreseeability and proximate cause. Whether a harm was foreseeable in the context of determining duty depends on the general foreseeability of such harm, not whether the specific mechanism of the harm could be foreseen. See, e.g., Bolus v. Martin L. Adams & Son, 438 S.W.2d 79, 81 (Ky. 1969) (“It is not necessary, to impose liability for negligence, that the defendant should have been able to anticipate the precise injury sustained, or to foresee the particular consequences or injury that resulted. It is enough that injury of some kind to some person could have been foreseen.”); Eaton v. Louisville & N.R. Co., 259 S.W.2d 29 (Ky. 1953) (precise form of injury need not be foreseen). In determining whether an injury was foreseeable, we look to whether a reasonable person in a defendant's position would recognize undue risk to another, not whether a reasonable person recognized the specific risk to the injured party.

Lee v. Farmer's Rural Elec. Co-op. Corp., at 212-13 (emphasis added).

Sub judice, the trial court was correct to deny Dr. Fraser's motions based on the issue of foreseeability and duty. Clearly, injecting medication into a person and having an injury result therefrom was foreseeable. This is further supported by the manufacturer's warning accompanying the medication which disclosed known reversible renal dysfunction.³ While Dr. Fraser argues about the specific injury being unforeseeable, this is a separate inquiry from the question of law concerning duty.⁴ As such, the trial court properly denied Dr. Fraser's motions.

³ We decline to address Dr. Fraser's arguments concerning an “eggshell plaintiff” in light of the correct trial court ruling.

⁴ See *Lee supra* for a learned discussion on the difference between the two foreseeability issues.

In light of the aforementioned, we affirm the trial court's denial of Dr. Fraser's motions for summary judgment and directed verdict, and reverse and remand this matter for a new trial.

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