RENDERED: FEBRUARY 1, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001696-MR

LORETTA SARGENT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-CI-00680

WILLIAM SHAFFER, M.D. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Loretta Sargent appeals from a judgment following a jury verdict finding that William Shaffer, M.D. was not liable for medical malpractice and failure to obtain her informed consent prior to a surgical procedure. She contends that the trial court erroneously refused to instruct the jury regarding Dr. Shaffer's specific duties set forth in Kentucky Revised Statutes (KRS) 304.40-320,

Kentucky's Implied Consent Statute, and when it permitted Dr. Shaffer to demonstrate the surgical procedure. We conclude there was no error and affirm.

BACKGROUND

Prior to seeking treatment from Dr. Shaffer, Sargent had a medical history of back problems and, in 2001, underwent two back surgeries performed by Dr. James Bean. Following the first surgery, she had post-surgical complications including lower extremity paralysis, numbness, and loss of motor control in her left foot. A second surgery was performed. After her second surgery, Sargent developed a condition referred to as "foot drop" requiring the amputation of her left big toe and she continued to have back and leg pain. Dr. Bean did not perform a third surgery but treated Sargent with medication, physical therapy, and epidural injections.

In 2008, Sargent saw Dr. Harry Lockstadt at Bluegrass Orthopedics. He ordered an MRI of the lumbar spine that showed a disc herniation at T12-L1, multilevel stenosis, and disc degeneration at lower levels of the spine. Sargent was referred to Dr. Shaffer, an orthopedic surgeon at the University of Kentucky.

Initially, Dr. Shaffer continued conservative treatment. However, Sargent's pain persisted and, on January 23, 2009, Dr. Shaffer agreed to perform a lumbar laminectomy and decompression procedure requiring removal of bone and scar tissue from Sargent's lumbar spine.

Dr. Shaffer performed the surgery on February 18, 2009. Following the surgery, Sargent had weakness in her lower extremities and eventually experienced paralysis and lost use of her bowel and bladder functions.

The present action was filed on February 5, 2010, and a jury trial was held. The trial court gave separate jury instructions on informed consent and medical negligence. The jury found for Dr. Shaffer on both questions of liability.

THE INFORMED CONSENT INSTRUCTION

At trial, Sargent contended that she was not informed that a known risk of her surgery was complete paralysis and loss of bowel and bladder function. Dr. Shaffer contended that he told Sargent the surgery carried risks and should be done only as a last resort. Additionally, he relied on Sargent's signature on a consent form listing the possible complications from the surgery including infection, bleeding, nerve damage, injury to sensitive structures, dural tear, and anesthesia.

The trial court held that Sargent presented sufficient evidence to warrant separate instructions on medical negligence and lack of implied consent.[1] The controversy concerns whether the implied consent instruction had to mirror the language in KRS 304.40-320, which states in part:

> 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] Because the evidence supported separate duty-of-care instructions, there was no error in giving separate instructions. *Oghia v. Hollan*, 363 S.W.3d 30 (Ky.App. 2012).

> (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[.]

Sargent argued that the specific statutory duties had to be included in the jury instruction and tendered the following instruction:

> It was the duty of William Shaffer, M.D. to obtain Loretta Sargent's informed consent before the surgery. Informed consent shall be deemed to have been given where (1) the action of Dr. Shaffer in obtaining the consent of the patient was in accordance with the accepted standard of medical practice among members of the profession with similar training and experience; and (2) a reasonable individual, from the information provided by William Shaffer, MD would have a general understanding of the procedure and medically 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.

The trial court rejected the instruction and gave the following instruction:

> With respect to disclosing to Plaintiff, Loretta Sargent, the risks and benefits of the surgical operation he proposed to perform upon her it was the duty of the Defendant, William Shaffer, M.D. to exercise the degree of care and skill expected of a reasonably competent

physician specializing in orthopedic spine surgery under similar circumstances.

The approach taken to jury instructions in this Commonwealth has been often repeated: "Kentucky law mandates the use of "bare bones" jury instructions in all civil cases." *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). The question on appeal is not whether the trial court's instructions "best stated the law, but rather whether the delivered instructions misstated the law." *Id*. at 230. In *Olfice*, the Court emphasized that if counsel believes the instructions being used need more elaboration, they can be fleshed out by counsel in closing arguments. *Id*.

Prior to the adoption of KRS 304.40-320, this Commonwealth recognized a claim against a physician for failure to adequately explain the risk of a medical procedure as a negligence claim. *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1976). In *Vitale v. Henchey*, 24 S.W.3d 651, 656 (Ky. 2000), the Court clarified that the statute did not change the existing common law when it stated that "as a result of *Holton* and the Kentucky Informed Consent Statute, an action for a physician's failure to disclose a *risk or hazard of a proposed treatment or procedure* is now undisputedly one of negligence and brings into question professional standards of care." Therefore, the law regarding instructions in medical malpractice actions controls.

Instructions in medical malpractice actions follow the general bare-bone approach. In *Rogers v. Kasdan*, 612 S.W.2d 133 (Ky. 1981), the Court

directly addressed whether specific duties owed by a hospital should have been included in the instructions. Noting that a medical malpractice claim is one for negligence, the Court recited the rule that an instruction should be "couched in terms of duty" and should not contain an "abundance of detail." *Id*. at 136. "[I]nstructions should not make a rigid list of ways in which a defendant must act in order to meet his duty." *Id*. Regarding the specific instruction sought by the plaintiff, the Court held:

> Whether the hospital hired knowledgeable nurses, or had proper supervision for staff physicians, or accurate record keeping, and so forth, were all evidently questions for the jury to consider. While they constituted criteria that the jury might use to decide the question of ordinary care, listing them in this manner was not necessary to pose the issue of the hospital's duty.

Id.

Sargent argues that, unlike the list of duties sought to be included in *Rogers*, Dr. Shaffer had specific duties imposed by KRS 304.40-320 and, therefore, her claim for failure to obtain informed consent falls with an exception to the bare-bones approach created in *Humana of Kentucky, Inc. v. McKee*, 834 S.W.2d 711 (Ky.App. 1992). She reads *Humana* too broadly.

Humana involved a claim that the hospital negligently failed to diagnose a newborn with phenylketonuria (PKU) because it did not test for PKU in violation of KRS 214.155, requiring hospitals to perform the test within twenty-four hours of a child's birth. This Court held that the trial court did not err by

instructing the jury on the hospital's specific statutory duty to administer the test. It distinguished *Rogers* and held:

> In *Rogers,* the court found error in the instructions because they were too detailed and because they imposed more duties upon the defendant hospital than the law required. However, the court did not hold, as Humana suggests, that the duty instructions in a hospital liability case must be limited to a single instruction on ordinary care. On the contrary, hospitals are required to comply with many statutory duties in addition to that of exercising ordinary care. If a plaintiff, as here, in part bases his or her claim upon proof as to a hospital's negligent failure to comply with a statutory duty, the court obviously is required to instruct the jury regarding that duty because the violation of such a duty, standing alone, may be sufficient to support a claim of negligence.

Id. at 722.

In *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431 (Ky.App. 1992), the limited application of *Humana* was explained and its holding justified, because "the statute was so specific, the expert testimony supported the duty, and failure to perform the required test was a clear substantial factor in causing [the plaintiff's] problems[.]" *Id*. at 433 n. 1. In contrast, when liability for medical malpractice is premised on the care and skill of an ordinary prudent and competent physician specializing in a particular field, "[s]pecific enumeration of duties would tend to overemphasize the requirement rather than to create or expand the duty." *Id*. at 434.

This Court also distinguished *Wemyss v. Coleman*, 729 S.W.2d 174 (Ky. 1987), and *Risen v. Pierce*, 807 S.W.2d 945 (Ky. 1991), involving the

negligent operation of automobiles from a medical malpractice action. It focused on the specific duties and statutes applicable to operating an automobile and corresponding "undisclosed duties" to the jury.

> In our case there was no "undisclosed" specific duty, as they had all been explained through expert testimony and exhibits. 2 J. Palmore & R. Eades, *Kentucky Instructions to Juries* §§ 16, 23 (1989), makes it clear that more specific instructions are given in automobile cases than in medical malpractice cases. There are numerous specific instructions to give to juries when there is an automobile collision, because the jury would not otherwise be aware of those specific duties and statutes governing driving. However, in medical malpractice cases, expert testimony is always used to show the standard of care for a particular type of practice and procedure. The standard of care for physicians and surgeons is established by the medical profession itself.

Hamby, 844 S.W.2d at 434.

Likewise, Sargent's proposed instruction would not have instructed the jury on any undisclosed specific duty created by statute. KRS 304.40-320 is a codification of a general duty owed by medical providers to be set forth by expert testimony and left to be "fleshed out" by counsel in closing arguments. *Olfice*, 173 S.W.3d at 230. The bare-bones instruction properly reflected the applicable law and was not erroneous.

DR. SHAFFER'S DEMONSTRATION

Sargent's medical malpractice claim was based on the theory that by using a posterior approach to the spine, Dr. Shaffer did not have sufficient space to safely

pass Sargent's spinal cord to reach the disc on the other side. Dr. Shaffer defended on the basis that it was not negligence to use a posterior approach.

Both parties identified spine models on their respective exhibit lists. Dr. Shaffer's counsel had the opportunity to examine a model intended to be used by Sargent's experts, and Sargent's counsel was provided a picture of the model to be used in Dr. Shaffer's defense. Although Sargent's counsel alleges that repeated requests were made to physically inspect the model, a motion was not filed to compel its production.

During the presentation of Sargent's case, two experts used spine models to point out to the jury that there was insufficient room in the vertebral column to use a posterior approach. Using pituitary forceps, Dr. Delong demonstrated how Dr. Shaffer would have removed the disc and testified that by using a posterior approach, there was insufficient room to safely remove the disc. Sargent's other expert, Dr. Banco, used his finger on a spine model to demonstrate the same approach.

After Sargent presented her expert testimony, Dr. Shaffer's counsel informed the court and Sargent's counsel that Dr. Shaffer would be using a spine model to demonstrate how he performed the surgery. Because of the jury's viewing angle and small size of the model, counsel requested permission to use a video camera to provide a live feed to a projector screen. Sargent objected arguing that Dr. Shaffer could not demonstrate the surgery when it had not been established that the reenactment was substantially similar to the actual surgery performed.

Further, she argued that the demonstration was a surprise because it was not disclosed prior to trial.

After a hearing, the trial court permitted Dr. Shaffer to use the model as proposed. Noting that Sargent's experts had used models to illustrate their testimony, the trial court held that it was "only fair" to permit Dr. Shaffer to use a model to illustrate how he performed the surgery and refute the demonstrations performed by Sargent's experts and their testimony.

The trial resumed. While at a table, Dr Shaffer referred to the small spine model and described Sargent's surgeries performed by him and Dr. Bean. The model used by Dr. Shaffer was not the same as represented in the photograph provided in discovery, which appeared to be unaltered. The actual model had been physically modified so that pieces could be easily removed. As he testified, Dr. Shaffer removed the pieces. He testified that he performed microscopic surgery and displayed instruments to the jury that were either used during the surgery or were the same as those used and emphasized that they were smaller than the pituitary forceps used during Dr. Delong's testimony. Dr. Shaffer repeatedly reminded the jury that he was not simulating the actual surgery that lasted over six hours. His demonstration lasted approximately fifteen minutes.

We preface our discussion by stating the well-established standard of review that the admissibility of evidence is discretionary and will not be disturbed unless that discretion was abused. *Rankin v. Commonwealth*, 327 S.W.3d 492, 499 (Ky. 2010). A trial court abuses its discretion when it acts "arbitrarily, unreasonably,

unfairly, or in a manner unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

Our Supreme Court has stated the benefits of demonstrative evidence and encouraged its use. "Such evidence usually clarifies some issue, and gives the jury and the court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses." *Gorman v. Hunt*, 19 S.W.3d 662, 667 (Ky. 2000) (quoting *Cincinnati, N.O. & T.P. Ky. Co. v. Duvall*, 263 Ky. 387, 92 S.W.2d 363, 366 (1936).

Nevertheless, because it appeals to the jury's sense of sight, demonstrative evidence has a high potential of persuasiveness and, like all evidence, its use is subject to the general rules of relevance. *Rankin*, 327 S.W.3d at 498. Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Kentucky Rules of Evidence (KRE) 401. Our rules further provide that although relevant, evidence is inadmissible if its probative value is outweighed by its prejudicial effect. KRE 403.

Although closely linked to issues of relevancy and prejudice, an additional requirement is imposed when evidence is used to reenact the event in litigation. To prevent the possibility that a reenactment might mislead the jury as to the actual event, dramatic presentations or experiments intended as simulations of actual events must be substantially similar to the subject of the litigation. *Rankin*, 327 S.W.3d at 498-499. However, if the presentation or experiment is

only intended to demonstrate a "general principle bearing on what could or what was likely to have happened," the similarity does not need to be as strong. *Id*. The closer the appearance to the actual event, the more probable it is that the jury will be misled and the need for similarity greater. As this Court recently noted, differences in a model from the original will not prevent its admission in evidence or its use for purposes of demonstration or illustration, where such dissimilarity is clearly explained to the jury, or where the difference is not such as to mislead the jury. *Jones v. Overstreet*, 371 S.W.3d 727, 737 (Ky.App. 2011) (quoting 29A Am. Jur.2d *Evidence* § 1006 (2011)).

Dr. Shaffer's description of how he performed the surgery was relevant and necessary to Dr. Shaffer's defense. Moreover, the use of a small spine model as a visual aid was not inflammatory or otherwise highly prejudicial. Sargent does not argue otherwise. However, she argues that the demonstration in which the model was used was a reenactment of the surgery and failed to meet the substantial similarity requirement.

Applying the principles stated, we arrive at the conclusion that Sargent's assertion that Dr. Shaffer used a model to reenact the actual surgery blurs the distinction of a spine model used purely for illustrative purposes and its use to reenact the actual surgery. Obviously, Dr. Shaffer did not purport to perform a complex microscopic surgery on a small spine model in a courtroom in a fifteen-minute demonstration. In fact, the jury was repeatedly informed that he was not simulating the actual conditions of surgery and that the spine model did not

resemble Sargent's unique anatomy. It is simply implausible that the jury believed it was watching a reenactment of the surgery instead of viewing a visual aid to illustrate the procedure. We conclude that the trial court did not abuse its discretion.

Sargent argues that while the demonstration "probably could have been done had defense counsel advised [her] prior to trial," the trial court should have excluded the demonstration because she was unfairly surprised. We reject her contention.

Dr. Shaffer listed a spine model on his exhibit list. Although Sargent contends she made repeated requests to view the model, she did not file a motion to compel discovery. Moreover, Sargent was provided a photograph of the model and she does not provide any insight how physically viewing the model would have changed her trial strategy. The record reveals that Sargent cross-examined Dr. Shaffer following the demonstration using her own spine model and post-operative images.

Dr. Shaffer used the model to describe the surgery to refute the testimony provided by Sargent's experts and their use of spine models. "It should always be anticipated that the opposing party intends to prove his case with whatever means are available." *Brawner v. Commonwealth*, 344 S.W.2d 833, 836 (Ky. 1961). We conclude there was no error.

For the reasons stated, the judgment of the Fayette Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Joe C. Savage
Darren T. Sammons
Lexington, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Joe C. Savage
Lexington, Kentucky

BRIEF FOR APPELLEE:

Bradley A. Case
Stephen J. Mattingly
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Bradley A. Case
Louisville, Kentucky