

RENDERED: DECEMBER 21, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000059-MR

SHELLIE TOMES

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 08-CI-00471

ROBERT L. HALTERMAN, D.O.; AND
LOGAN MEMORIAL HOSPITAL, LLC,
D/B/A LOGAN MEMORIAL HOSPITAL

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Shellie Tomes appeals from a Judgment of the Logan Circuit Court reflecting a jury verdict in favor of Dr. Robert L. Halterman in her action alleging medical negligence. Tomes contends that the trial court erred in refusing to allow her trial counsel to question Dr. Halterman's qualifications to render expert medical opinions regarding whether his treatment of Tomes fell within the

appropriate standard of care. Tomes also argues that the court erred when it responded to a juror's question by stating that evidence of Tomes's medical insurance, if any, was not relevant. We find no error, and affirm the Judgment on appeal.

In 2003, Tomes began experiencing abnormal menstrual bleeding accompanied by pelvic pain. She was examined by her primary care physician, Dr. Patrick Hayden, who recorded her symptoms as including prolonged heavy periods, passing blood clots, and pelvic pain.

The symptoms worsened over the next four years. On August 28, 2007, Tomes was examined by Dr. Halterman, who practiced gynecology. Tomes and Dr. Halterman discussed the possibility of Tomes undergoing a hysterectomy to relieve the symptoms. In October, 2007, Dr. Halterman diagnosed uterine fibroids and menometrorrhagia (excessive uterine bleeding during and between menstrual periods).

On October 15, 2007, Dr. Halterman performed a laparoscopic hysterectomy on Tomes at Logan Memorial Hospital, where Dr. Halterman was an employee. During the course of the operation, Tomes's bladder was lacerated. The laceration went undetected. After being discharged from the hospital, Tomes experienced painful bladder spasms, urine leakage and urgency, and a distended abdomen. Two days later, Tomes returned to the hospital for treatment of these symptoms, where it was discovered that her blood sugar was elevated. Tomes was also diagnosed with renal insufficiency and an intestinal blockage.

After being discharged from the hospital, Tomes continued to experience abdominal pain and an inability to control her bladder. In November, 2007, she was examined by urologist Dr. Vivek Narain, who suspected the presence of a vesicovaginal fistula or abnormal opening allowing urine to flow from the bladder into the vagina. Subsequent testing confirmed the diagnosis, and Tomes later met with Dr. Mark Bigler to discuss a surgical repair of the fistula. On March 11, 2008, Dr. Bigler repaired the fistula, and Tomes was discharged from the hospital the following day. The record reveals that Tomes's symptoms partially improved, though as of late 2011 she continued to complain of fatigue and frequent urination.

Tomes later filed the instant action against Dr. Halterman and Logan Memorial Hospital in Logan Circuit Court. She alleged Dr. Halterman committed medical malpractice by failing to advise her of the risks of the hysterectomy and alternative options, and by performing the procedure. She also claimed that Dr. Halterman did not diagnose her evolving bladder injury in a timely manner, and failed to address her blood glucose levels before and after the procedure. She did not allege that Dr. Halterman was negligent in the actual performance of the hysterectomy. In support of her claims, Tomes offered the testimony of expert witness and urogynecologist, Dr. Robert Lobel. Dr. Halterman tendered the testimony of expert witness and Director of Gynecology at the University of Louisville School of Medicine, Dr. James Shwayder. Dr. Shwayder testified that Dr. Halterman complied with the standard of care of a reasonably competent

OB/GYN throughout his treatment of Tomes, and that the fistula did not form until weeks after the surgery and nothing could have been done to repair it sooner.

After hearing the proof, the jury returned a verdict in favor of Dr. Halterman. A judgment reflecting the verdict was rendered on October 17, 2011. Tomes's motion for a new trial was denied, and this appeal followed.

During the course of the trial, the jury posed three written questions to the circuit court seeking clarification or expansion of the testimony it had just heard. Tomes's appeal centers on the manner in which the trial court addressed two of these questions. Tomes first argues that the trial court erred in its response to a juror's question of whether Dr. Halterman continued to practice gynecology and see patients at the time of trial. After the question was asked, Judge Gill then questioned Dr. Halterman outside the presence of the jury and in the presence of counsel. Dr. Halterman responded affirmatively to both elements of the question. Defense counsel sought to end the questioning there, whereas Tomes's counsel argued that since Dr. Halterman failed to provide a *curriculum vitae* as requested, more questions on this issue were appropriate. Tomes's counsel was denied his request to introduce avowal testimony, and the jury was informed that Dr. Halterman continued to practice medicine and see patients. Prior to this answer being presented to the jury, Judge Gill told them that the answer was not relevant but that if the question went unanswered the jury might incorrectly assume that there was a "bad" reason for not answering the question.

Thereafter, Judge Gill changed his mind and sustained Tomes's request to produce avowal testimony on this question outside the jury's presence. Dr. Halterman then testified outside the jury's presence as to the employment he had subsequent to working for Logan Memorial, including that he was now working in Florida.

On this issue, Tomes now contends that the trial court committed reversible error in refusing to allow her counsel to question Dr. Halterman regarding his qualifications to render medical opinions that his own treatment was within the standard of care.¹ We find no error. The jury question at issue was whether Dr. Halterman continued to practice medicine and see patients. That question was answered before the jury. By seeking to expand the questioning of Dr. Halterman on this issue to include the nature and extent of Dr. Halterman's then-current practice and his qualifications to testify as to the standard of care, Tomes effectively sought to re-open her case in chief by introducing additional evidence that went beyond the scope of the jury question. The trial court reasonably exercised its discretion in denying this request. *Insko v. Cummins*, 423 S.W.2d 261 (Ky. 1968). Additionally, Dr. Halterman's pretrial Kentucky Rules of Civil Procedure (CR) 26 disclosure did not hold him out as an expert on the standard of

¹ Dr. Halterman addresses other issues in his written argument, including Tomes's purported argument that she should have been able to cross-examine Dr. Halterman on an unauthenticated internet printout from the Florida Department of Health website. However, the only issue directly and clearly articulated by Tomes in this section of her written argument is whether the court erred in refusing to allow her to question "the qualifications of Dr. Halterman to render medical opinions that his own treatment of Ms. Tomes was within the standard of care[.]"

care, but limited Dr. Halterman's "expert opinions . . . to his care and treatment of Mrs. Tomes[.]"

Additionally, *Charash v. Johnson*, 43 S.W.3d 274, 280 (Ky. App. 2000), limits defendant-physicians' non-expert testimony to "the facts they had learned and the opinions they had formed based on first-hand knowledge and observation." More broadly, however, when viewing the record as a whole, and in light of the trial court's sound discretion in matters related to expert testimony, *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368 (Ky. 2000), we find no error on this issue.

Tomes also argues that the circuit court's response to another juror's question constitutes reversible error. In the early stages of the trial, members of the jury asked whether Tomes had medical insurance. In response, Judge Gill stated to the jury as follows: "With regard to the second question it raises an issue that is not relevant to any issue in this case, so I will not answer the second question." Tomes contends that this response constitutes reversible error as the juror who posed the question "was left to assume that insurance may have in fact existed," that it had may have paid for Tomes's medical bills, and that Tomes would be receiving a windfall from any subsequent jury verdict. Tomes maintains that, "[b]y allowing this seed to be planted, the trial judge set the scene for a discussion by the jury of insurance. It certainly could have affected their ultimate decision to find no liability on the part of the defendants, and thus constituted prejudicial error."

Setting aside the question of whether this issue was preserved for appellate review,² Tomes asserts that in response to Judge Gill’s statement to the jury that evidence of Tomes’s medical insurance, if any, was not relevant, the juror who posed the question *may have assumed* that Tomes had insurance and that she would receive a “windfall” by a verdict in her favor. The Kentucky Supreme Court has held that evidence of collateral sources of recovery, such as medical insurance, is irrelevant, prejudicial and inadmissible. *O’Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995). Had Judge Gill informed the jury that Tomes had medical insurance, it is likely that Tomes would now be characterizing *that* decision as erroneous and prejudicial - and perhaps properly so. We find no error in Judge Gill’s characterization of evidence relating to Tomes’s medical insurance, if any, as not relevant and inadmissible.

For the foregoing reasons, we affirm the Judgment of the Logan Circuit Court.

ALL CONCUR

BRIEFS FOR APPELLANT:

B. Alan Simpson
Bowling Green, Kentucky

BRIEF FOR APPELLEES:

Bradley A. Case
James N. Martin, Jr.
Louisville, Kentucky

² Dr. Halterman contends that that Tomes did not preserve this issue for appellate review. In response, Tomes directs our attention to a bench conference memorialized in the recorded trial proceeding on September 12, 2011 at 4:32.23. Tomes claims that she made a specific objection during this conference, thus preserving the issue for appellate review. The digital recording of this exchange is virtually inaudible because the parties are whispering, and it is difficult or impossible to discern which counsel is speaking.

