

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001002-MR

JASON GIBSON, INDIVIDUALLY; JASON
GIBSON, AS A PARENT AND NATURAL
GUARDIAN OF A MINOR, NICHOLAS; AND
JASON GIBSON, AS ADMINISTRATOR OF THE
ESTATE OF DANIELLE GIBSON

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 08-CI-00454

THE ST. LUKE HOSPITALS, INC.; AND
THE HEALTH ALLIANCE OF GREATER
CINCINNATI, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant, Jason Gibson, the husband of Danielle
Gibson, deceased, appeals the trial court's grant of a directed verdict on his

medical malpractice claim in favor of the Appellees, The St. Luke Hospitals, Inc. (St. Luke) and The Health Alliance of Greater Cincinnati, Inc. (Health Alliance).

Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Health Alliance is a corporate entity organized for the purpose of managing and operating participant hospitals. At the time of Gibson's death, St. Luke and the Health Alliance were parties to a Joint Operating Agreement (JOA), whereby the Health Alliance managed and operated six hospitals, including St. Luke. Under the JOA, the Health Alliance had the power to manage and operate the Participants' financial and business operations though the Participants reserved certain powers. Each Participant's medical policy committee was required to work with the Health Alliance to coordinate and cooperate between separate medical staffs as critical components of an integrated health care delivery system.

Throughout Gibson's hospitalization, St. Luke was a Participant in the Health Alliance, as was the University of Cincinnati Hospital (UC Hospital). UC Hospital was a tertiary-care facility that provided around-the-clock, specialized levels of care, staff, and experts for the purpose of treating patients with serious diseases such as acute fatty liver of pregnancy (AFLP) with which Danielle Gibson, Gibson's wife, was diagnosed. Gibson asserts that throughout Danielle's hospitalization, St. Luke and the Health Alliance were enmeshed in a legal action which put a strain on their relationship and caused St. Luke to experience declining revenues. Gibson argues that this lawsuit left St. Luke severely understaffed

because its CEO was not permitted to hire additional help. The trial court refused to admit evidence of the legal action below, a matter which Gibson now argues was error and which is discussed herein, *infra*.

On March 21, 2007, Danielle, who was 36.5 weeks pregnant with her fourth child, visited her obstetrician complaining of flu-like symptoms. At that time, she did not undergo any customary testing. She was sent home and subsequently presented to St. Luke's emergency room two days later. Upon arrival, Danielle was experiencing nausea, vomiting, and fatigue. She underwent a CT scan that day and it was determined that she was experiencing liver failure, kidney dysfunction, and respiratory distress. The fetus was determined to be in significant distress and necessitated an emergency cesarean section. Subsequently, Danielle was diagnosed with AFLP, which is a rare condition potentially lethal to mother and baby. Patients with AFLP are susceptible to developing post-partum infection. Following the cesarean section, Danielle was taken to the coronary care unit (CCU) where she remained for several days before eventually being transferred to the post-partum unit.

Dr. Baha M. Sibai was employed by the Health Alliance at UC Hospital, and was known as a preeminent authority on AFLP. Despite Dr. Sibai's opinion that Danielle needed a "prompt hysterectomy," that procedure was not performed until fourteen days later. During the time that Danielle was in the post-partum unit and prior to her hysterectomy, she developed a fever lasting for four days. Because her condition continued to deteriorate over that time, Danielle was

found to be in critical condition and was transferred back to the CCU where she was treated by Nurse Amy Cummings. Nurse Cummings had not previously treated a patient with liver disease or a post-partum problem like AFLP.

During the time that Danielle was in the CCU another CT scan was ordered. The hospital transported Danielle to radiology on April 4, just before midnight. The scan occurred on April 5, just after midnight. The April 5 CT scan indicated that Danielle had gas within her uterus, an indication of severe uterine infection. On April 6, Danielle underwent the aforementioned hysterectomy. At 11 p.m. on that date, St. Luke ordered a dialysis machine for Danielle and informed Jason that Danielle needed the machine immediately. However, St. Luke did not have a dialysis machine available and had to order one from another hospital. A clergyman sitting with Danielle in the early hours of April 7 observed a delivery person knocking on St. Luke's doors. The delivery person brought the dialysis machine into the hallway of the CCU, but several hours passed before Danielle was connected to the dialysis machine.¹ Danielle passed away on April 7 from septic shock as a result of the severe necrotizing infection that had developed in her uterus following the cesarean section.

¹Below, and again on appeal, Gibson argues that the delayed dialysis treatment was a substantial factor which contributed to Gibson's death. We disagree, and note that witnesses called by the Appellants at trial testified that the delayed dialysis was not a substantial factor in causing Gibson's death in light of other delays and/or errors in treatment which had occurred prior to that time. Further, this Court is in agreement with the argument set forth by Appellees that any dialysis delay caused by the actions or decisions of the nurses or hospital staff would have been attributable to their employer, Health Alliance, and not to St. Luke.

Danielle's family sued several physicians involved in her care, along with St. Luke and the Health Alliance. All of the physicians involved settled with the Gibson family prior to trial, and the claims against St. Luke and Health Alliance proceeded to trial. During the course of the trial below, Gibson's experts testified that the failure of the original OB-GYN to diagnose her with AFLP and to deliver her child on March 21st was a substantial factor in causing Gibson's death. Further, experts testified that the collective failure of multiple physicians to correctly diagnose and then treat Gibson's uterine infection was also a substantial factor in causing her death. Two of Gibson's experts, Dr. Schiffrin and Dr. Hanto, emphasized that had the hysterectomy been performed one day or even twelve hours earlier, Gibson would still be alive.

At the close of Gibson's case-in-chief, the trial court refused Appellees' request for a directed verdict on punitive damages and held that Gibson had produced sufficient evidence for the jury to find that Appellees had acted with malice or reckless disregard. Nevertheless, four days later and following the Appellees' case-in-chief, the trial court granted a directed verdict in St. Luke's favor on all issues of liability. Despite permitting Gibson to focus on St. Luke throughout the five days that evidence was presented at trial, the trial court determined that St. Luke did not have any independent negligence. Accordingly, only Health Alliance was included on the jury form.

During closing argument, Gibson attempted to discuss the effect on a jury verdict of apportionment of fault between the Health Alliance and the doctors

that had treated Danielle. In response to Appellees' objection, the trial court stated, "I mean, I guess it's just you don't want to mislead the jury that, you know, that there's been no settlement with you and the doctors." The trial court then reminded the jury that Gibson had recovered from the doctors. Following the court's entry of directed judgment in favor of the Appellees, this appeal followed.

As his first basis for appeal, Gibson argues that the trial court erred by directing a verdict in favor of St. Luke. Gibson asserts that in granting the motion for directed verdict, the trial court improperly concluded that St. Luke had no independent liability. Gibson argues that when St. Luke accepted Danielle as a patient, it assumed an independent duty to administer proper care to her. He thus asserts that the trial court's decision directing a verdict in favor of St. Luke ignored established Kentucky law regarding independent duty and the potential liability of each provider of medical treatment, including nurses and hospitals. Gibson asserts that he produced competent, credible evidence that St. Luke was negligent and that its negligence proximately caused Danielle's death. Accordingly, he argues that the trial court should not have directed a verdict in St. Luke's favor.

Alternatively, Gibson argues that even if the law concerning independent duty of care and liability did not necessitate reversal, the facts in this case involving the relationship between Appellees conclusively demonstrate that the court erroneously directed a verdict in favor of St. Luke. First, Gibson asserts that the plain language of the JOA clearly demonstrates that St. Luke and the Health Alliance were two separate corporate entities, with independent duties of

care to patients.² Thus, Gibson argues that the Appellees were engaged in a joint venture, not a parent-subsidary relationship, and that both entities retained their legal and clinical independence. Gibson asserts that at the time that the incidents at issue occurred, the two entities were deeply divided because St. Luke had filed a complaint seeking to withdraw from the Health Alliance. Thus, Gibson argues that at the time Danielle was hospitalized, St. Luke was an entity which was independent from the Health Alliance, both legally and clinically, and that, accordingly, the court improperly directed a verdict in St. Luke's favor.

Finally, Gibson argues that the trial court erred in granting a directed verdict *sub judice* because it was granted on a legal issue, namely, the finding that St. Luke had no independent liability. Gibson argues that this was a determination which should have been made prior to trial, and that the court erred in making it after the presentation of evidence from both parties. He argues that it was thus fundamentally unfair for the court to refuse to allow the jury to determine whether St. Luke was liable. Gibson asserts that even if the Health Alliance ultimately ended up paying an award for damages, the court erred in refusing to allow the jury to determine whether St. Luke was independently liable because throughout the trial, Gibson – believing that the jury could find either or both Appellees liable – presented evidence that focused largely on St. Luke rather than Health Alliance.

² In support of that assertion, Gibson states that St. Luke had an independent duty of care for patients, autonomous medical credentialing, independent coordination of care, treatment, and services, a separate board of directors, control over its day-to-day operations, and a separate corporate charter.

In response to Gibson's arguments, the Appellees argue that the trial court properly granted the directed verdict and, alternatively, that error, even if it did occur, was harmless because the jury found that any negligent conduct on the part of Health Alliance was not the proximate cause of Danielle's death. First, Appellees argue that the grant of directed verdict was properly entered because there was no evidence to support a verdict against St. Luke. The Appellees assert that it was undisputed that the nurses and hospital staff involved in Danielle's care were employees of the Health Alliance, and not St. Luke, and that there was simply no evidence that an employee of St. Luke was negligent in any way.

Alternatively, the Appellees argue that the jury found that any negligent conduct on the part of Health Alliance was not the proximate cause of Danielle's death. In support of this argument the Appellees note that the jury was instructed, albeit erroneously, that it could attribute the actions of St. Luke employees to the Health Alliance. Thus, the Appellees assert that after considering all of the evidence, the jury expressly found that hospital conduct was not the proximate cause of Gibson's death.

Prior to addressing the arguments of the parties, we note that when considering a motion for directed verdict the court has a duty to consider evidence in the strongest possible light in favor of the nonmoving party, and must give the nonmoving party every favorable and reasonable inference which can be drawn from the evidence. *Reece v. Nationwide Mut. Ins. Co.*, 217 S.W.3d 226, 231 (Ky. 2007). Indeed, a trial court should not grant a directed verdict unless there is a

complete absence of proof on a material issue. *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998). We review the arguments of the parties with this in mind.

As this Court has previously held, every health care provider that treats a patient accepts an independent duty of care and the potential for independent liability. *NKC Hosps. Inc. v. Anthony*, 849 S.W.2d 564, 568-69 (Ky. App. 1993). Further, we have held that, if a hospital accepts a patient for treatment:

[T]hat patient is owed a duty by the hospital through its employees and staff, including independent staff personnel, to exercise appropriate care to provide for the patient's well-being and to promote his cure. A breach of this duty may expose the hospital to liability in tort. Any lesser rule would be insensible to the true role of a hospital as an institution in present day society.

Williams v. St. Claire Medical Center, 657 S.W.2d 590, 597 (Ky. App. 1983).

While we agree that this is so, we simply cannot, upon review of the record, find sufficient evidence to establish that St. Luke's own employees, and not those of the Health Alliance, were responsible for Danielle's death. Moreover, we are in agreement with the Appellees that even if such evidence existed, the jury was clear in its finding that Health Alliance was negligent but that such negligence did not proximately cause Danielle's death. While the court did err in instructing the jury that it could attribute the negligence of St. Luke employees to the Health Alliance, it is clear that the jury, under that belief, considered the evidence with respect to both St. Luke and Health Alliance and determined that hospital conduct was not the proximate cause of Danielle's death. Indeed, Gibson's claim against

St. Luke is based upon the same conduct that supported the claim against Health Alliance. As our courts have repeatedly held, error is harmless where the court cannot conclude that the outcome of the trial would have been any different.

Davis v. Fischer Single Family Homes, Ltd., 231 S.W.3d 767, 776 (Ky. App. 2007). Believing such to be the case *sub judice*, we affirm.

Having so found, we now turn to Gibson's second basis for appeal, wherein he argues that the trial court abused its discretion and affected Gibson's substantial rights by admitting evidence that Gibson had settled with physicians. He asserts that the admissibility of settlement agreements is limited under Kentucky law and that the admission of the evidence *sub judice* did not qualify for any legal exception. Gibson asserts that the court's decision to permit evidence of settlement agreements was unreasonable, unfair, and arbitrary, and served no legitimate purpose.

In response, the Appellees argue that Gibson himself repeatedly and voluntarily disclosed the fact that he had settled with the treating physicians. Moreover, Appellees note that at no time during trial was evidence of the settlement admitted, other than one question directed to a witness by Gibson's counsel. Instead, Gibson's counsel addressed the settlement during the opening statement and in closing arguments. Accordingly, Appellees argue that even if the court's statement was in error, Gibson cannot now seek to gain an advantage from that error when he made mention of the settlement as well. Accordingly, Appellees urge this Court to affirm.

Upon review of the record and applicable law, we are in agreement with the Appellees that Gibson repeatedly and voluntarily disclosed the settlement with the treating physicians.³ We cannot find that Appellants were in any way forced to disclose the settlement. As we have previously held, a party is estopped to take advantage of an error produced by his own act. *Wright v. Jackson*, 329 S.W.2d 560 (Ky. App. 1959); *McVey v. Berman*, 836 S.W.2d 445, 450 (Ky. App. 1992). Thus, even if error occurred, it was invited by Appellants who repeatedly disclosed and discussed the fact of settlement in front of the jury. Finding no basis for reversal, we affirm.

As his third and final basis for appeal, Gibson argues that the trial court abused its discretion and affected Gibson's substantial rights by refusing to admit evidence that a lawsuit between the Appellees caused St. Luke to be underfunded, understaffed, and chaotic. Gibson asserts that this evidence was probative for the purpose of showing that St. Luke was unequipped to handle high-risk patients. Specifically, Gibson argues that evidence of underfunding and understaffing would have demonstrated critical problems with Danielle's care, such as: (1) the failure to transfer Danielle to UC Hospital, where the world's expert in AFLP worked; (2) lack of appropriately educated staff to care for Danielle's condition; (3) disarray in the hospital as a result of the changes in the

³ These references included plainly stating that Appellants had, "worked out our differences" with the doctors; telling the jury during closing argument that any apportionment of fault to the settling doctors would reduce the financial recovery by Gibson's family; and stating to the jury during closing argument that, "We have settled with the doctors. Okay. You are not allowed to know the amount. I am not allowed to tell you," as well as saying, "I'm not saying we haven't settled with the doctors." VR No. 26: 04/30/12; 01:22:09-01:22:41.

relationship between St. Luke and the Health Alliance; (4) that individuals who played an important role in Danielle's care or lack thereof were effectively working more than one job, and thus were unable to provide the adequate level of care; and (5) people who should have provided oversight had been laid off, thus allowing problems to slip between the cracks. Gibson asserts that the probative value of the aforementioned evidence strongly outweighed the risk of any claimed prejudice to Appellees.

In response, the Appellees argue that the trial court properly excluded evidence of the lawsuit between them as the relationship between the Appellees was not related to the alleged negligent medical care and would have been prejudicial to Appellees. Appellees assert that though Gibson asserts that the operations at St. Luke were underfunded and understaffed, he has not cited to any evidence that would causally link any alleged underfunding to the negligent care of Mrs. Gibson.

The Appellees further assert that while Gibson argues that certain evidence of negligent care would have been presented if the lawsuit was admissible, such evidence was presented to the jury regardless including: (1) testimony by witnesses for Gibson concerning the failure of the hospital to transfer Danielle to UC Hospital; (2) that Gibson was seen and treated by Dr. Hnat, a member of the same medical practice as the "world's expert in AFLP"; and (3) evidence introduced to suggest that the nurses were not educated about Gibson's condition. The Appellees assert that exclusion of evidence of the lawsuit itself did

not prevent Gibson from presenting evidence on each of these issues. Finally, the Appellees argue that evidence of the lawsuit would be duplicitous, as the jury already found that Health Alliance (and/or St. Luke) was negligent, and simply found that such negligence was not the proximate cause of Danielle's death. Accordingly, the Appellees argue that the excluded evidence does not in any way help to establish causation, and is therefore not reversible error.

Upon review of the arguments of the parties and applicable law on this issue, we are in agreement with the Appellees that by excluding evidence of the lawsuit, the court did not prevent Gibson from submitting evidence on each of the matters at issue. For reasons previously set forth herein, we note that because the jury already found that hospital negligence was not the proximate cause of Danielle's death, the excluded evidence at issue would only have been cumulative in nature. While Appellants sought to use the excluded evidence to establish negligence, we note that the jury had already found that Health Alliance was negligent, and that such negligence was not the proximate cause of Gibson's death. Accordingly, we find that the exclusion does not constitute reversible error, and we affirm. Wherefore, for the foregoing reasons, we hereby affirm the May 8, 2012, judgment of the Campbell Circuit Court in favor of the Appellees, The Health Alliance of Greater Cincinnati, Inc. and St. Luke Hospitals, Inc., the Honorable Julie Reinhardt Ward presiding.

ALL CONCUR.

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