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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001095-MR

PAMELA S. COMPTON APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 13-CI-00237

DR. EDUARDO GONZALES; AND TWIN LAKES MEDICAL FOUNDATION, INC., D/B/A TWIN LAKES SURGICAL ASSOCIATES APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND JONES, JUDGES.

JONES, JUDGE: The Appellant, Pamela S. Compton, appeals from a judgment entered by the Grayson Circuit Court following a defense verdict by the jury. Compton asks this Court to set aside the jury's verdict and remand this matter for a new trial based on allegedly infirm jury instructions. Specifically, Compton takes issue with the trial court's decision to break up her negligence claim into separate

instructions/interrogatories for breach and causation. Compton maintains that use of separate instructions/interrogatories subjected her to a heightened standard of proof and created juror confusion. Having carefully reviewed the record in conjunction with all applicable legal authority, we discern no error. Accordingly, we affirm.

I. BACKGROUND

On April 2, 2012, Dr. Eduardo Gonzales performed a laparoscopic Nissen fundoplication[1] on Compton. In August 2012, Compton disrupted her prior Nissen procedure following a fall at home. Dr. Gonzales repaired the Nissen and placed a stomach tube that inadvertently dislodged. On August 31, 2012, Dr. Steven Thomas, on call for Dr. Gonzales, placed a percutaneous endoscopic gastrostomy ("PEG") tube in place of the dislodged stomach tube. Dr. Gonzales removed the PEG tube during a post-operative visit on September 18, 2012. Dr. Gonzales used the "cut-and-push" technique to remove the tube. Use of this method involves the surgeon pushing the tube back into the stomach to allow it to pass out of the body through a natural bowel movement.

The following day, September 19, 2012, Compton sought treatment at the Twin Lakes Emergency Room for severe abdominal pain. Dr. Gonzales

[1] During the procedure, the patient's stomach is wrapped around the esophagus to create a new "functional valve" between the esophagus and the stomach. This prevents reflux of the acid and bile from the stomach into the esophagus.

assured Compton that the PEG tube had passed even though Compton reported not having had a bowel movement. Compton last treated with Dr. Gonzales on September 26, 2012, at which time Dr. Gonzales again assured Compton that the PEG tube was gone.

Following her last visit with Dr. Gonzales, Compton continued to experience "episodic abdominal pain, nausea, and vomiting . . ." She was eventually diagnosed with a small bowel obstruction. On November 12, 2012, Compton underwent surgery to remove the remainder of the PEG tube and a portion of her small intestine.

Subsequently, Compton filed a medical malpractice action against Dr. Gonzales. She also filed a claim against Twin Lakes for negligent hiring/retention. Specifically, Compton alleged the "method and manner selected by Dr. Gonzales to remove this PEG tube" deviated from the standard of care. Compton also alleged that Dr. Gonzales was negligent in his follow-up care and that Twin Lakes was negligent in hiring and retaining Dr. Gonzales. The trial court bifurcated the claims. Pursuant to the trial court's order, Compton's medical negligence claim against Dr. Gonzalez was to be tried first; if Compton prevailed on her claim against Dr. Gonzalez, the trial court would then set a second trial for her claim against Twin Lakes.

The parties tried Compton's medical negligence claim over the course of five days. Each party tendered its own set of jury instructions. Compton's proposed instructions included breach and causation as part of a single instruction. Dr. Gonzales, however, tendered instructions that separated breach and causation into two separate instructions and interrogatories. Over Compton's objection, the trial court instructed the jury using the form proposed by Dr. Gonzalez. As relevant to this appeal, the jury was instruction as follows:

> INSTRUCTION NO. 2
>
> It was the duty of Eduardo Gonzales, M.D. employee of Twin Lakes Surgical Associates, in his treatment of Pamela Compton, to exercise the degree of care as would be expected of a reasonably competent general surgeon acting under the same or similar circumstance as this case.
>
> Do you believe from the evidence presented that Eduardo Gonzales, M.D., failed in his duty?
> Yes: __
> No: __
>
> INSTRUCTION NO. 3
>
> Having found that Eduardo Gonzales, M.D. failed to exercise that degree of care as would be expected of a reasonably competent general surgeon acting under the same or similar circumstances as in this case, do you believe from the evidence presented that such failure was a substantial factor causing the alleged injuries to Pamela Compton?
> Yes: _
> No: _

Following the close of proof, the jury deliberated for several hours and at one point requested clarification from the trial court regarding Instruction No. 2. Regarding Instruction No. 2, the jury asked when they answered the inquiry "reasonably competent general surgeon . . . if yes were they saying incompetent in all cases or just in this case?" The trial court did not answer the jury's question and referred them back to the instructions.

Ultimately by a 9-3 vote, the majority of the jury answered "yes" to Instruction No. 2 finding that Dr. Gonzales had breached his duty of care to Compton. Accordingly, the jury proceeded to Instruction No. 3. By a 9-3 vote, the majority of the jury answered "no" to Instruction No. 3 finding that Dr. Gonzales's breach was not a substantial factor causing the alleged injuries to Pamela Compton. This appeal followed.

II. STANDARD OF REVIEW

There are two types of instructional errors. The first type of error is implicated when the appellant maintains that the trial court either failed to give an instruction required by the evidence or gave an instruction that was not sufficiently supported by the evidence. We review this type of error for abuse of discretion. *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). The second type of error is implicated when the appellant argues that the text of the instruction given by the trial court did not accurately present the applicable legal theory. *Id.* at 204. We

review errors directed at the content of jury instruction using the *de novo* standard. *Id*.

The issue Compton raises in this appeal does not fall squarely into either category. She does not argue that the trial court failed to give or gave an instruction that was not supported by the evidence. Likewise, she does not take issue with the actual verbiage used by the trial court with respect to the elements necessary for her prevail. Rather, she takes issue with the form the trial court used to present those elements to the jury. She maintains that the trial court erred because it broke up breach of duty and causation into separate instructions each containing an interrogatory for the jury to answer. According to Compton, doing so placed a "higher burden" on her and likely confused the jury. While Compton does not take issue with the actual words used in the instructions, she argues that the form used to present those words had the practical effect of misstating the law. In this way, Compton's argument is more akin to the second type of instructional error. Accordingly, we review her appeal under the less deferential *de novo* standard.

III. ANALYSIS

"The purpose of jury instructions is to define the law on issues that are raised." *Keller v. Eldridge*, 471 S.W.2d 308, 310 (Ky. 1971). Proper jury instructions "guide jurors in applying the law correctly to the facts in evidence."

CSX Transp., Inc. v. Moody, 313 S.W.3d 72, 82 (Ky. 2010). Kentucky law requires the use of "bare bones" jury instructions, leaving it to counsel to flesh out the case. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). The concept of fleshing out bare bones instructions permits counsel to attempt to explain the instructions to the jury. *See id*. However, counsel is not expected or allowed to "correct erroneous jury instructions" as part of closing arguments. *Harp v. Commonwealth*, 266 S.W.3d 813, 820 (Ky. 2008).

Additionally, bare bones instructions may not be so vague or diluted so as to obscure the jury's findings. To ensure a fair trial and avoid unnecessary appellate procedure, they must be sufficiently clear to reveal precisely the jury's conclusions. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006). "All essential aspects of the law necessary to decide the case must be [correctly] integrated into the instructions." *Sargent*, 467 S.W.3d at 209.

To prevail on a claim for negligence, a plaintiff must prove: duty, breach, causation, and injury. *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003). Specifically, "[i]n medical malpractice cases the plaintiff must prove that the treatment given was below the degree of care and skill expected of a reasonably competent practitioner and that the negligence proximately caused injury or death." *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982). "The absence of any one of the three elements is fatal to the

claim." *Illinois Cent. R. R. v. Vincent*, 412 S.W.2d 874, 876 (Ky. 1967) (quoting *Warfield Nat. Gas Co. v. Allen*, 248 Ky. 646, 59 S.W.2d 534, 536 (1933)).

Kentucky does not mandate the use of any set form for jury instructions. Instead, "[r]egardless of what form jury instructions take, they must state the applicable law correctly and neither confuse nor mislead jurors." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 60 (Ky. 2010). While the trial court could have instructed the jury using a single instruction with a comma or semicolon separating the elements of breach and causation, it was not required to do so. So long as the instruction correctly states the law, the trial court has discretion to use the form it finds most suited to the case at hand. *Clement Bros. Const. Co. v. Moore*, 314 S.W.2d 526, 531 (Ky. 1958) ("Whether or not a case should be submitted to the jury on interrogatories, thus requiring specific answers to major issues as well as finding a general verdict, is within the discretion of the trial court.").

The jury instructions given by the trial court in this case accurately state Kentucky law. *Howard*, 618 S.W.2d at 178. We do not agree with Compton that the separate instruction created any additional burden that she was required to prove at trial. Under Kentucky law for purposes of a claim of medical negligence, Compton was already required to prove the elements of breach and causation. *Reams*, 642 S.W.2d at 588. The trial court's separate instructions on those

elements did not change or create any additional burden on Compton. The separate instructions merely asked the jury whether Compton had met her burden at trial for each element of her alleged medical negligence claim.

To this end, we fail to appreciate how use of two interrogatories created confusion. In fact, it seems to us, that use of the separate interrogatories would assist the jury in understanding the necessity of considering each element of a negligence claim. *Oghia v. Hollan*, 363 S.W.3d 30, 33 (Ky. App. 2012) (holding that it was not error to give two, separate breach of duty instructions given facts of the case). Likewise, use of two interrogatories for the separate elements of a negligence action allows the trial court as well as the appellate court to ascertain whether the jury properly considered each element. *See Hilsmeier*, 192 S.W.3d at 344.

In addition to creating jury confusion, Compton argues that the separate instructions in this case unfairly prejudiced her. Nine jurors answered "yes" to the question of breach; however, a different set of nine answered "no" to the question on causation. Compton points out the verdict makes clear that only three jurors would have answered "yes" to both breach and causation, while three others would have answered "no" to both breach and causation. She reasons that if the jury had been instructed with breach and causation as one question, six jurors would not have answered it with a singular "yes" or "no" resulting in a hung jury.

Our case law is clear that when a jury is presented with separate interrogatories, the same jurors do not have to agree on each interrogatory. "If we require agreement of the same nine persons on each of numerous disputed questions of fact, we invite a greater number of mistried cases." *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503, 505 (Ky. 1989). "A better approach is to treat each special interrogatory submitted to the jury as a separate verdict which may be reached by any nine or more members of the panel." *Id.* "[T]he requirement of 'agreement of at least three-fourths (¾) of the jurors' contained in KRS 29A.280 is satisfied by the agreement of any nine jurors on any issue separately submitted to the panel." *Id.* at 506.

Next, we turn to Compton's position that the trial court erred by failing to answer the jury's question regarding Instruction No. 2. According to Compton it was reversible error for the trial court not to answer the jury's question regarding clarification of Instruction No. 2 as trial court should have answered the jury's question so as to provide sufficient information to the jury to make it fully aware of its respective legal duties. We disagree.

The jury's question was regarding Instruction No. 2, which addressed the breach of standard of care. The jury asked the trial court to clarify whether this instruction was directed at Dr. Gonzalez's conduct generally or with respect to

Compton's specific case. The trial court refused to answer the question and referred the jury to the instructions in general.

Generally, whether and how to answer a jury question are matters left to the trial court's discretion. 89 C.J.S. *Trial* § 810 (2001). The instructions actually contained the answer to the jury's question because they referred specifically to Dr. Gonzalez's "treatment of Pamela Compton." Accordingly, the trial court did not abuse its discretion when it declined to directly answer the jury's question, but referred the jury to the original instructions. Consequently, we find no error.

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the judgment of the Grayson Circuit Court.

ALL CONCUR.

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