

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001735-MR

ALAN ASHER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 15-CI-04079

ANESTHESIA ASSOCIATES, PSC;
CYNTHIA LEE WORLEY, M.D.; AND
MARK GORDON, CRNA

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: GOODWINE, TAYLOR, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Alan Asher appeals from a judgment of the Fayette Circuit Court entered after a jury returned a verdict in favor of Anesthesia Associates, PSC; Cynthia Lee Worley, M.D.; and Mark Gordon, CRNA in this medical malpractice action. Asher argues that there was no expert testimony to

support the apportionment instruction given by the trial court and the instruction was prejudicial, warranting a new trial.

On November 6, 2014, Asher had an MRI performed at Saint Joseph Hospital to assess an ongoing colon condition. The anesthesia required for the MRI was provided by Mark Gordon, CRNA and Cynthia Worley, M.D. Ray Walters, a radiology technician employed by St. Joseph Hospital, prepared Asher for the MRI and performed the MRI. During the MRI, Asher suffered a second degree burn on his left elbow as a result of a disposable metallic pulse oximeter left on his arm. During the healing of the burn, Asher developed an infection which required two surgeries, including a skin graft.

This action was filed against Central Kentucky Radiology; Anesthesia Associates, PSC; Dr. Worley; Gordon; St. Joseph Hospital; and Carolyn Sherrow, RN. Central Kentucky Radiology was dismissed by agreed order on May 8, 2017. A motion to amend the complaint was granted and Asher asserted claims of *res ipsa loquitur* and punitive damages. St. Joseph Hospital and Sherrow reached a settlement with Asher and were dismissed by agreed order on November 8, 2017.

Trial proceeded against Anesthesia Associates, PSC; Dr. Worley; and Gordon. At trial, Asher produced two experts, John Eichhorn, M.D., and Robert K. Stoelting, M.D., who testified as to the applicable standard of care for an

anesthesiologist and certified registered nurse anesthetist. Neither doctor testified as to the applicable standard of care for a radiology technician.

Walters also testified at trial. At the time he performed Asher's MRI, he was the lead MRI technologist at St. Joseph Hospital and had performed approximately 30,000 MRIs during his career. Walters testified that he did not violate the standard of care in the administration of Asher's MRI and he had never had the issue arise before with the pulse oximeter. However, he also testified that as a radiology technician, it was his responsibility to ensure that no metallic objects went into the MRI machine with the patient. He was aware that the pulse oximeter connector cord was on Asher prior to the MRI and he chose to leave the device on Asher. Walters testified that he actually straightened the pulse oximeter connector cord and placed it back on Asher prior to Asher entering the MRI machine.

Walters also testified that the MRI technologist does not rely on anesthesia providers to assist with the screening process for metallic objects prior to a patient entering the MRI machine and he did not rely on Dr. Worley or Gordon to remove such objects from the patient.

Asher objected to an apportionment instruction as to Walters' fault on the basis that no expert testified as to the applicable standard of care for Walters.¹

¹ Walters' trial testimony was consistent with his deposition testimony. Based on that testimony, Asher filed a motion *in limine* to exclude Walters from the jury verdict form, which was denied, and filed proposed jury instructions consistent with that motion.

The trial court ruled that fault could be apportioned to Walters and instructed the jury accordingly. The jury returned a verdict finding that Dr. Worley and Gordon had not deviated from the standard of care in their treatment of Asher.

Consequently, as instructed, the jury never considered the apportionment of fault to Walters. Asher appealed.

“Each party to an action is entitled to an instruction upon his theory of the case if there is evidence to sustain it.” *Farrington Motors, Inc. v. Fidelity & Cas. Co. of N.Y.*, 303 S.W.2d 319, 321 (Ky. 1957) (citations omitted). The trial court must decide “whether the evidence would permit a reasonable juror to make the finding the instruction authorizes.” *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015) (quoting *Springfield v. Commonwealth*, 410 S.W.3d 589, 594 (Ky. 2013)).

In *Sargent*, our Supreme Court explained that the standard of review when the issue is whether an instruction was supported by the evidence is an abuse of discretion. *Id.* As the Court noted, “a trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Id.* “Because such decisions are necessarily based upon the evidence presented at the trial, the trial judge’s superior view of that evidence warrants a measure of deference from appellate courts that is reflected in the abuse of discretion standard.” *Id.* (footnote omitted).

If the issue is “whether the text of the instruction accurately presented the applicable legal theory—a different calculus applies.” *Id.* at 204. Where the content of a jury instruction is questioned, it is an issue of law that is subject to *de novo* review by the appellate courts. *Id.*

The substantive content of the apportionment instruction given in this case is not an issue. The issue is whether the evidence supported the instruction. Consequently, our standard of review is an abuse of discretion.

“Under Kentucky law, a plaintiff alleging medical malpractice is generally required to put forth expert testimony to show that the defendant medical provider failed to conform to the standard of care.” *Blankenship v. Collier*, 302 S.W.3d 665, 670 (Ky. 2010) (citation omitted). However, two exceptions to this general rule exist. Expert testimony is not required in *res ipsa loquitur* cases. *Id.* In those cases, “the jury may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant’s relation to it[.]” *Id.* (quoting *Perkins v. Hausladen*, 828 S.W.2d 652, 655-56 (Ky. 1992)). The second instance when expert testimony is not required is “where the defendant physician makes certain admissions that make his negligence apparent.” *Id.* (citation omitted).

The same general rule that expert testimony is required to establish the standard of care in medical malpractice cases and its exceptions are equally applicable to “a defendant who wishes to apportion fault for an injury to a medical

provider based upon an allegation of medical negligence[.]” *Savage v. Three Rivers Med. Ctr.*, 390 S.W.3d 104, 118 (Ky. 2012). The defendant “must put forth expert testimony to show that the medical provider failed to conform to the appropriate standard of care.” *Id.* (citation omitted). In *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 74 (Ky. 2010), the Supreme Court explained this requirement is applicable to empty-chair defendants.

Empty-chair defendants who have settled are to be treated no differently than participating defendants in regard to what must be proved to apportion fault against them. Though the empty-chair defendant will not actually be held liable in the trial, since it is literally not on trial, a participating defendant must still prove liability on the part of the tortfeasor onto whom it seeks to shift some of the blame.

No expert specifically testified that Walters breached the standard of care when performing the MRI by not removing the pulse oximeter connector cord from Asher’s arm. While Walters testified it was his responsibility as a radiology technician to ensure no metallic material went into the MRI machine and he chose to leave the device on Asher, he also testified that he had never had this type of injury occur with a pulse oximeter.

However, there was expert testimony that the disposable pulse oximeter cord should not have gone into the MRI with Asher or any other patient. Indeed, the entire theory of Asher’s malpractice case was that it was a breach of the standard of care required not to remove the disposable pulse oximeter from

Asher prior to the MRI. The only question was who should have removed it. Walters testified that it was his responsibility. Therefore, we cannot say it was an abuse of discretion to submit the apportionment instruction to the jury.

We also note that Asher’s argument that he was prejudiced by the instruction is strained. The jury never reached the issue of damages or apportionment because the jury found Dr. Worley and Gordon met the standard of care in their treatment of Asher. The jury was “presumed to follow instructions” so it would not have considered the apportionment instruction after finding in favor of Dr. Worley and Gordon. *See Jewish Hospital & St. Mary’s Healthcare, Inc. v. House*, 563 S.W.3d 626, 638 (Ky. 2018).

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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