

**IN THE COURT OF APPEALS OF TENNESSEE**  
**FILED**

December 17, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

**AT KNOXVILLE**

ERNEST E. WALKER,	)	No. 03A01-9903-CV-00085
and wife, ANDRA WALKER	)	
	)	
Plaintiffs/Appellants,	)	
	)	
v.	)	Appeal As Of Right From
	)	WASHINGTON COUNTY LAW
DR. RICHARD L. ELLIOTT, and	)	
JOHNSON CITY UROLOGICAL	)	
CLINIC, P.C.	)	
	)	
Defendants/Appellees.	)	JUDGE THOMAS J. SEELY, JR.

**For the Appellant:**

David W. Blankenship  
Kingsport

**For the Appellee:**

James E. Brading  
Johnson City

AFFIRMED

Swiney, J.

**OPINION**

This is an appeal from a jury verdict. Plaintiffs, Ernest and Andra Walker filed a medical malpractice suit relating to a vasectomy, alleging negligence on the part of Defendants Richard L. Elliott, M.D. (Dr. Elliott) and Johnson City Urological Clinic (Clinic). The issues on appeal are (1) whether the Trial Court erred by responding in writing to a question submitted by the jury during deliberations, and

(2) whether based upon the written question asked by the jury and the Trial Court's response to that question, did the Trial Court err in denying Plaintiffs' Motion For New Trial and Motion For Mistrial/Motion To Conform The Pleadings To The Proof. For the reasons set forth below, we affirm the Trial Court's ruling on Plaintiffs' post-trial motions, find no prejudice to Plaintiffs in the manner in which the Trial Court responded to the question from the jury, and affirm the Trial Court.

### **BACKGROUND**

Ernest Walker had a vasectomy performed by Dr. Elliott at the Clinic offices on December 7, 1995. Plaintiffs alleged that Mr. Walker experienced discomfort in a related area within a few days, and a few months later underwent surgery to remove an atrophied testicle. Walker alleged that the vasal artery and testicular artery were compromised during the surgery performed by Elliott, and that this was the proximate cause of the atrophied testicle. The claims of Plaintiff, Andra Walker, in this suit are derivative of her husband's claims. During a three-day trial of this matter, the jury heard testimony of several expert witnesses, in addition to the testimony of the parties and presentation of numerous exhibits admitted by the Trial Court. During deliberations, the jury submitted this written question: "[d]oes the applicable standard of care apply only to the surgery or to the total care provided the plaintiff by Dr. Elliott?" After discussing the issue with counsel for the parties, the Trial Court determined that only Dr. Elliott's preoperative care and conduct during the operation were at issue, and this response was reduced to writing and delivered to the jury in the jury room. The jury then found in favor of Defendants, and the case was dismissed.

Plaintiffs filed a motion for new trial, and subsequent motions to conform the pleadings to the evidence and for mistrial. Defendants filed a response to Plaintiffs' motions and an alternative motion for directed verdict. The Trial Court discussed the issues in a four-page Order and Opinion, overruled Plaintiffs' motions, and declared Defendants' motion moot as a result. It is from this Order of the Trial Court that Plaintiffs appeal.

### **DISCUSSION**

The issues on appeal are whether the Trial Court erred by submitting to the jury his

written response to a written jury question, and whether the Trial Court erred in denying Plaintiffs' motions for mistrial, to conform the pleadings to the proof, and for a new trial. The motions for mistrial and to conform the pleadings to the proof were dismissed in the same Order of the Trial Court as the motion for new trial, and for the purposes of this appeal all post-trial motions are treated as one issue. As both of the issues on appeal are questions of law, our standard of review is *de novo*, with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

Plaintiffs argue that it was improper for the Trial Court to respond in writing to a question submitted by the jury during deliberations, and that this error constitutes grounds for a new trial. The question submitted by the jury was, “[d]oes the applicable standard of care apply only to the surgery or to the total care provided the plaintiff by Dr. Elliott?” The Trial Court held an off-the-record discussion with the attorneys for the parties, and then offered into the record the answer, “[t]he applicable standard of care applies throughout Dr. Elliott’s treatment. However, plaintiffs are alleging that Dr. Elliott was negligent only as respects the surgery and before the surgery.” This answer to their question was provided in writing by the Trial Court to the jury, in the jury room. Shortly after receiving this response, the jury returned its verdict in favor of Defendants.

Before discussing the authorities cited by the parties, it is interesting to note that this particular issue was anticipated and covered in the jury instructions, and that Plaintiffs did not object at that time. The instructions from the Trial Court included the following:

If a question arises during deliberations and you need further instructions, please print your question on a sheet of paper, knock on the door of the jury room and give the question to the Court officer. The Judge will then read your question and either answer it in writing or the Judge may call you back into the courtroom to try to help you.

Please understand the Judge can only answer questions about the law and cannot answer questions about the evidence.

As Defendants did not raise the issue of waiver by Plaintiffs regarding these instructions and the manner in which the Trial Court answered the jury question, we will resolve the question based upon the authorities cited to this Court.

Plaintiffs assert that the Trial Court erred by not recalling the jury to the courtroom to respond to the question submitted. Plaintiffs cite Tenn. Code Ann. § 20-9-501 in support of this position. The statute reads:

On the trial of all civil cases, it shall be the duty of the judge before whom the same is tried, at the request of either party, plaintiff or defendant, to reduce every word of his charge to the jury to writing, before it is delivered to the jury, and all subsequent instructions which may be asked for by the jury, or which may be given by the judge, shall, in like manner, be reduced to writing before being delivered to the jury.

It is clear that this statute does not stand for the proposition stated by the Plaintiffs, and is apparently inapposite to a requirement that the Trial Court recall the jury to the courtroom to answer a question. “[T]he decision to provide the jury with a written copy of the instructions in a civil case remains discretionary with the trial court.” *Ladd by Ladd v. Honda Motor Co., Ltd.*, 939 S.W.2d 83, 104 (Tenn. Ct. App. 1996)(discussing Tenn. Code Ann. § 20-9-501). “We do not think that the record shows any error in this case. A trial judge responding to questions from individual jurors could hardly be expected to take down the questions, write out his answers, and then read his answers back to the jury.” *Matter of Estate of Depriest*, 733 S.W.2d 74, 78 (Tenn. Ct. App. 1986)(discussing the apparent preference for written instructions under Tenn. Code Ann. § 20-9-501).

Plaintiffs offer supporting case citations in *Spencer v. A-1 Crane Service, Inc.*, 880 S.W.2d 938 Tenn. 1994), and *In re Rhodes’ Estate*, 436 S.W.2d 429, 222 Tenn. 394 (Tenn. 1968).

The following material from *Spencer* is paraphrased by Plaintiffs:

Of course, the only proper response by a trial judge to a question from the jury or an individual juror is to recall the jury, counsel, and parties into open court, hear the question, reinstruct the jury on the portion of the charge that responds to the question, if necessary, and make clear that the repeated instruction should not be considered as emphasis of that portion of the charge.

*Spencer*, 880 S.W.2d at 941.

*Spencer* is distinguished from the present issue in that, in *Spencer*, the judge had participated in an *ex parte* discussion with the jury foreman in the hallway outside the jury room rather than follow proper

procedures to receive and respond to a jury question. The *Spencer* Court does, however, establish that the standard under which communication between a judge and jury should be analyzed is specific prejudice to the complaining party. *Id.* at 941. Reversal is not appropriate where there is no specific prejudice, but only a finding of harmless error. *Id.* at 942. Here there was no prejudice to the Plaintiffs.

As for the content of the response to the jury question at issue, even excluding the issue of waiver by Plaintiffs, we find no error in the actions of the Trial Court. The only objection Plaintiffs offered to the response was that the Trial Court “. . . may be commenting on the evidence . . .,” and that the question should only be answered, “yes.” Aside from the inappropriateness of a simple yes or no response to the compound question submitted by the jury, there is no evidence in the record that prejudice to the Plaintiffs resulted, and in fact, the record shows no prejudice to the Plaintiffs. As there was neither an allegation of negligence nor expert proof adduced at trial on issues of negligence relating to medical treatment provided by Defendants after the surgery, the Trial Court’s response to the jury question was appropriate. Of particular importance is the complete absence of any proof through expert testimony and opinion that Dr. Elliott deviated from the acceptable standard of care in his post surgery care of Mr. Walker. As for the manner of the response, any error in the Trial Court’s providing a written response to the jury in the jury room rather than orally reading the same response in the courtroom is harmless under these particular circumstances.

Plaintiff offers *In re Rhodes’ Estate* as supporting the contention that the Trial Court should have conformed the pleadings to include medical care after the surgery as an issue to be decided by the jury. The Trial Court properly addressed this issue in the Order on Plaintiffs’ post-trial motions by examining and discussing the testimony of the expert witnesses, and concluded that there was not sufficient grounds in the evidence to conform the pleadings as requested by Plaintiffs.

I have no problem in conforming the pleadings by amendment to conform to the evidence. You know, that’s the rule and I don’t have any problem with that. But there was only one bit of testimony in this entire trial that was close to being susceptible of one physician saying that Dr. Elliott was negligent. And the only testimony with respect to that

is Dr. Monte's testimony and it was so close I started to direct a verdict in this case. Dr. Monte never specifically testified that Dr. Elliott deviated from the standard of care even in the surgery on Mr. Walker. . . . Nowhere in the proof of this case is there any testimony that even comes close to one physician saying that Dr. Elliott or Johnson City Urology Clinic deviated from the standard of care in their treatment of Mr. Walker during the postoperative procedure. . . . [I] could not tell the jury they could consider the postoperative treatment of Mr. Walker because that issue was not before the jury. . . .

The questions weren't asked, and the testimony wasn't given.

This excerpt of the thorough analysis by the Trial Court clearly shows that there was not sufficient evidence that the aftercare issue was tried by express or implied consent so as to support a motion to conform the pleadings. We have reviewed the record and agree with the Trial Court's conclusion that there was no expert testimony presented to the jury that either of the Defendants deviated in any way from the acceptable standard of care in their post surgery treatment of Mr. Walker. Absent such proof, there was no evidence in the record concerning any deviation by the Defendants' from the acceptable standard of care in their post surgery treatment to which the pleadings should have been conformed. Defendants alleged post surgery deviation from the acceptable standard of care was not tried by either expressed or implied consent of the parties.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

*Childs v. Roane County Bd. of Educ.*, 929 S.W.2d 364, 366 (Tenn. Ct. App. 1996).

It is apparent from the record that the Trial Court both understood its role in considering a motion for new trial, and applied the proper material evidence analysis in upholding the verdict of the jury. *Turner v. Jordan*, 957 S.W.2d 815, 824 (Tenn. 1997). The Trial Court found no evidence of a deviation from the acceptable standard of care in the Defendants' post surgery care sufficient to support

the motion for new trial, and insufficient evidence to sustain the motion to conform the pleadings. Likewise, the Order of the Trial Court and our review of the record on the motion for mistrial demonstrates that the substance of the response by the Trial Court to the jury question was not inappropriately coercive. *Ladd*, 939 S.W.2d at 91-92. As there was no proof by expert medical opinion submitted to the jury that Dr. Elliott deviated from the acceptable standard of care in his post surgery treatment of Mr. Walker, the Trial Court's answer to the written question from the jury was appropriate. The Trial Court's denial of the Plaintiffs' post trial motions was appropriate.

### CONCLUSION

The judgment of the Trial Court is affirmed. Costs of this appeal are assessed to Appellants.

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D. MICHAEL SWINEY, J.

CONCUR:

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HOUSTON M. GODDARD, P.J.

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HERSCHEL P. FRANKS, J.