

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001021-MR

MICHAEL J. BAYLESS II,
MICHAEL J. BAYLESS, and
DEBORAH BAYLESS

APPELLANTS

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 96-CI-00438

ST. ELIZABETH MEDICAL CENTER,
ROBERT L. BOYER, M.D., and
WALTER EISEMAN, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Michael J. Bayless II and his parents appeal from a judgment of the Kenton Circuit Court following a jury trial in a medical malpractice case. Bayless's claim against one of the defendant doctors was successful to an extent, but his claim against the other doctor was not. In this appeal,

Bayless seeks a new trial on all issues. We have concluded that his arguments are without merit. Thus, we affirm.

On March 12, 1995, Bayless injured his right wrist when he fell while trying to jump over a friend. Because of the pain in his wrist, he went to the emergency room at St. Elizabeth Medical Center sometime after midnight that evening. He was examined by the emergency room physician, Dr. Robert Boyer, who testified that he has no specific recollection of treating Bayless that evening. There was some evidence that Dr. Boyer performed a complete examination of Bayless's wrist. He did not order x-rays, but x-rays were ordered by a nurse.

Dr. Boyer did not remember whether he had read the x-ray of the wrist or not. However, the appellants testified that he did. The x-ray revealed that Bayless had suffered a fracture to the scaphoid bone in his right wrist. Dr. Boyer, who apparently believed the wrist was not broken, ordered an elastic bandage for Bayless's wrist and discharged him from the emergency room with written instructions that if his condition worsened he should call or see his physician or return to the emergency room.

Following Bayless's discharge from the emergency room, the x-ray of his wrist was viewed by Dr. Walter Eiseman, a radiologist. Dr. Eiseman failed to see the fracture, and Bayless was not advised of the fracture or treated for it.

At the time he suffered the injury, Bayless was beginning to play freshman baseball four days a week at his high school. Although his wrist hurt while he played baseball, Bayless never told the coach he was in pain. As soon as the baseball season ended, Bayless sought follow-up care. He sought additional medical treatment on May 17, 1995.

It was then discovered that Bayless had suffered a broken bone in his wrist. Treatment by way of a cast was no longer recommended, and Bayless's orthopedic surgeon, Dr. John Wyrick, recommended a surgical procedure to achieve union of the fractured bone. Bayless then underwent surgery by Dr. Wyrick which consisted of removing a portion of his thigh bone, compacting it, and inserting it into his wrist with a metal screw. Dr. Wyrick testified that the result of the surgery was an "excellent outcome" and that Bayless did not suffer any permanent injury as a result of surgical treatment as opposed to nonsurgical treatment. He also testified that Bayless should regain strength and have excellent function of the wrist.

Because of the missed diagnosis, Bayless and his parents filed a civil complaint in the Kenton Circuit Court against St. Elizabeth Medical Center, Dr. Boyer, and Dr.

Eiseman.¹ The basis of the Bayless's claims was that Dr. Boyer and Dr. Eiseman were negligent in failing to properly read the x-ray of his broken wrist and that he was subsequently required to have surgery rather than treatment by a cast. At the trial of the case, Dr. Boyer testified that he had no memory of treating Bayless or reading the x-ray. Dr. Eiseman admitted and stipulated that he deviated from the standard of care required of him in the reading of the x-ray.

The jury determined in their verdict that Dr. Boyer had no liability in the care and treatment of Bayless but that Dr. Eiseman did. Further, the jury determined that Bayless and/or his parents failed to exercise ordinary care for his safety and health. As a result it apportioned liability between Bayless and Dr. Eiseman on an equal, or 50/50, basis. On the issue of damages, the jury awarded Bayless \$9,802.16 for medical expenses but nothing for pain and suffering. Based on the jury's finding that Bayless was 50% at fault, the final judgment of the trial court against Dr. Eiseman was in the amount of \$4,901.08. Following the trial court's denial of his motion for a new trial, Bayless appealed.

Bayless's first argument is that the trial court erred in not granting him a new trial on the issue of damages for pain

¹ The appellants have not pursued an appeal of the portion of the judgment dismissing their claim against St. Elizabeth Medical Center.

and suffering. As we have noted, the jury awarded Bayless damages against Dr. Eiseman for medical expenses, but it awarded nothing for pain and suffering. Bayless's motion for a new trial was filed pursuant to CR 59.01(d) which allows a trial court to grant a new trial based on inadequate damages.

Since it was uncontroverted that Bayless's broken wrist could have been treated with a cast rather than surgery had the fracture been detected in a timely manner, Bayless maintains that he was entitled to an award of pain and suffering due to the surgery. In support of his argument, Bayless cites Hazelwood v. Beauchamp, Ky. App., 766 S.W.2d 439 (1989), wherein the court held that "[w]hile it is true that the jury did not have to believe Hazelwood's testimony regarding the pain he claims to have endured, it was not free to disregard the uncontroverted evidence of the accident itself and the medical procedures performed." Id. at 441.²

In Miller v. Swift, Ky., 42 S.W.3d 599 (2001), the Kentucky Supreme Court stated that "[t]he law in Kentucky, however, does not require a jury to award damages for pain and suffering in every case in which it awards medical expenses." Id. at 601. In response to Bayless's argument that he was

² In Hazelwood this court reversed the trial court's denial of a new trial motion where the jury awarded only \$250 for pain and suffering in a case where an individual's hand was lodged in a hay bailer and severely damaged and where the individual underwent three surgical procedures to repair it. Id.

entitled to pain and suffering damages, Dr. Eiseman asserts that the jury was not required to award such damages since Bayless "was destined to incur pain and suffering regardless of whether the scaphoid fracture was treated by way of cast or surgery." To support this argument, Dr. Eiseman cited the testimony of the orthopedic surgeon, Dr. John Wyrick. Neither Dr. Wyrick nor any other witness testified that the surgery resulted in any more pain for Bayless than cast treatment would have.

Bayless also testified to pain incurred due to the surgery itself. However, the surgery was performed while Bayless was anesthetized and thus unable to feel any pain. Although Bayless testified to the pain brought about by the surgery, the jury was not bound to believe his testimony. See Spalding v. Shinkle, Ky. App., 774 S.W.2d 465, 467 (1989).

In the Miller case the court was faced with a similar situation concerning whether the injured party suffered any additional pain due to the negligence of the other party. The court stated that:

The civil justice system uses juries to decide exactly these types of factual disputes, and the testimony and evidence at trial in this case contained substantial support for the jury's verdict. Both parties presented the jury with probative evidence on the issue of whether this collision caused Miller any additional pain and suffering, and the trial court properly denied Miller's motion for a new trial.

Id. at 603. Our review of the trial court's denial of Bayless's motion is confined to whether such denial was clearly erroneous.

Id. at 601. We conclude that the jury's failure to award damages for pain and suffering was supported by the evidence and that the trial court was not clearly erroneous in denying the motion for a new trial.

Bayless next argues that the jury's verdict was not based on sufficient evidence to support it because the jury 1) disregarded the uncontroverted evidence as to the "Anatomical Snuff-Box" test, 2) disregarded evidence as to the x-rays, and 3) disregarded uncontroverted evidence as to the discharge instructions issued by Dr. Boyer. Each of these arguments relates to Bayless's claim against Dr. Boyer.

Bayless first argues it was uncontroverted that Dr. Boyer did not perform a palpation known as the "Anatomical Snuff-Box" test to the wrist and that had he done so the break in the bone would have been discovered. However, even though Dr. Boyer testified that he had no specific recollection of treating Bayless, based on the records and testimony we conclude there was sufficient evidence for the jury to conclude that Dr. Boyer conducted a proper examination of Bayless and did not obtain information that would have indicated a fractured bone.

Concerning the argument that the jury disregarded evidence as to x-rays, Bayless argues it is uncontroverted that

Dr. Boyer read the x-rays but failed to diagnosis the bone fracture and that such failure was below the professional standard of care applicable to him as an emergency room physician. Again, Dr. Boyer stated he had no recollection of treating Bayless and could not state whether he had read the x-rays. Nevertheless, since Dr. Eiseman admitted that he misread the x-rays following Bayless's discharge from the emergency room, we conclude there was sufficient evidence for the jury to believe that any failure on the part of Dr. Boyer in reading the x-rays was not a substantial factor in causing further injuries or damages to Bayless and that it was Dr. Eiseman's negligence that caused the further damages.

Bayless also contends that the jury disregarded the uncontroverted evidence as to the discharge instructions issued by Dr. Boyer. We again conclude that there was sufficient evidence to support the jury's verdict in favor of Dr. Boyer. Bayless was discharged with instructions that if his condition worsened, he should call his physician or return to the emergency room. Bayless did neither, and we perceive nothing wrong with the discharge instructions.

The next argument raised by Bayless is that the trial court erred in submitting the issue of comparative negligence to the jury. As we have noted, the court submitted such an instruction and the jury returned a verdict finding Bayless and

Dr. Eiseman equally at fault. Because Bayless did not seek additional medical treatment for 66 days after leaving the emergency room even though he continued to have pain, and in light of the testimony by Dr. Ungar that it was the duty of any patient to seek follow-up treatment by assessing for themselves their progress or lack thereof, we conclude there was sufficient evidence to submit this issue and instruction to the jury.

Bayless next argues that the trial court erred in not granting a new trial based on juror misconduct. He asserts that one juror did not find against Dr. Eiseman and that "[t]his illogical vote demonstrates a clear bias and prejudice which forecloses the ability to achieve a fair trial when a juror ignores stipulations and a court's directive." In support of the argument, Bayless notes that Dr. Eiseman stipulated that he had deviated from the standard of care and that the court had instructed the jury of that fact.

Bayless's argument is without merit for two reasons. First, Bayless cites no authority to support the argument, and we are not aware of any. Second, the issue of whether Dr. Eiseman met the standard of care required of him and the issue of whether his failure to comply with that duty was a substantial factor in causing Bayless further injuries or damages are separate matters. In other words, the jury could have found that Dr. Eiseman did not meet the standard of care

required of him but could also have determined that such failure was not a substantial factor in causing Bayless further injuries or damages. In short, we reject Bayless's argument that the juror's vote was an "illogical vote."

Bayless next argues that the trial court erred in not granting a new trial based on misconduct of the parties or their attorneys. He maintains that Dr. Eiseman attempted to defend himself when called as a witness by Bayless even though he stipulated that he had violated the standard of care applicable to him. Bayless states that "[o]ne should not be permitted to contest an admitted fact in front of the jury." We have reviewed Dr. Eiseman's testimony and find no "misconduct" by either he or his attorney.

Along this same line, Bayless maintains misconduct by the doctors or their attorneys in representing to the court that they each needed three preemptory challenges in the jury selection process.³ Bayless claims that the doctors represented that they had antagonistic interests, but that no such antagonism or adversity was demonstrated during the trial. We likewise reject this argument. The interests of Dr. Eiseman and Dr. Boyer were antagonistic as evidenced by counsel for Dr. Boyer arguing to the jury in his closing statement that even if it found Dr. Boyer deviated from the standard of care, such

³ See Kentucky Rules of Civil Procedure (CR) 47.03(1).

deviation was not a substantial factor in causing the injuries since Dr. Eiseman had stipulated that he misread the x-ray. This was an obvious attempt by Dr. Boyer to lay any blame on Dr. Eiseman.

Bayless's next argument is that the court erred to his prejudice in prohibiting him from cross-examining defense witnesses as to their bias, interest, and prejudice. He cites KRE⁴ 104(e) to support his argument. Specifically, Bayless maintains that the court erroneously prohibited him from cross-examining defense expert witnesses as to the issue of commonality of insurance carrier between the expert witnesses and the defendant doctors and as to the matter of the amount of compensation that was paid to the experts.

Concerning the issue of commonality of insurance carrier between the doctors and their expert witnesses, Bayless cites cases from the Ohio Supreme Court. However, he failed to cite the relevant Kentucky case addressing this issue. In Wallace v. Leedhanachoke, Ky. App., 949 S.W.2d 624 (1996), this court held that the mere fact that the doctor and his medical expert witness may have shared the same professional liability insurance carrier does not clearly show bias by the expert "absent a more compelling degree of connection." Id. at 628.

⁴ Kentucky Rules of Evidence.

As Bayless has not argued that a more compelling degree of connection existed, his argument is without merit.

Bayless also argues that the court erred in not allowing his counsel to cross-examine the doctors' expert witnesses as to the amount of compensation they were paid. Since the briefs in this case were filed, the Kentucky Supreme Court has rendered an opinion relevant to this issue in the case of Tuttle v. Perry, Ky., 82 S.W.3d 920 (2002). In that case the Kentucky Supreme Court reversed a judgment in favor of defendant doctors in a medical malpractice case on the ground that the trial court erred in not allowing the plaintiff's counsel to cross-examine expert witnesses as to the amount of their fees and compensation for testifying in the case. Id. at 924. In so ruling, the court overruled Current v. Columbia Gas of Kentucky, Ky., 383 S.W.2d 139 (1964).

We might feel compelled to reverse the judgment in this case based on the Tuttle case had Bayless preserved error. However, we have reviewed the record and note that this particular issue was neither raised by counsel nor preserved for review by a timely objection.⁵ See Kentucky Rules of Evidence (KRE) 103(a)(1). Bayless urges to to review the issue under the

⁵ It was certainly understandable that Bayless's attorney would not raise the issue since the Current case prohibited such testimony at the time of the trial.

authority of Mitchell v. Hadl, Ky., 816 S.W.2d 183 (1991),⁶ but we decline to do so.

Bayless next argues that the trial court erred in refusing to submit his parents' claim for loss of parental consortium to the jury. His argument is without merit because such a claim in cases like this is not recognized under Kentucky law. See Humana of Kentucky, Inc. v. McKee, Ky. App., 834 S.W.2d 711, 725 (1992).

Bayless's next argument is that the trial court erred in failing to provide the jury with meaningful instructions. He asserts that there were "no jury instructions which were of assistance in defining terms or any meaningful legal burdens for the jury to use." He maintains that the instructions gave the jury "no legal direction at all."

Bayless's arguments are again without merit. Although he complains that the jury instructions did not instruct on the burden of proof, Kentucky law has long held that "the jury should not be told specifically that the burden of proof is on one party or the other. It has been held enough that the instructions be so framed as to appropriately indicate which litigant has the affirmative burden of persuasion." Burns v.

⁶ In the Mitchell case the Kentucky Supreme Court held that "[w]hen the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of law." Id. at 185.

Capitol Beverage Co., Ky., 472 S.W.2d 510, 511 (1971). The instructions given by the trial court to the jury in this case properly indicated that Bayless had the affirmative burden of persuasion.

Although Bayless argues that the instructions gave the jury "no legal direction at all," he does not further elaborate. Presumably, he means that the instructions were not sufficiently detailed and specific. Under Kentucky law, however, jury instructions "should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire." Cox v. Cooper, Ky., 510 S.W.2d 530, 535 (1974).

In a like manner, Bayless complains that the jury instructions "were of no assistance in defining terms." We decline to address this argument since he did not state which term or terms he believed the court should have defined in the instructions.

Finally, Bayless argues that he is entitled to a new trial on all issues. Because we have discerned no error, it is not appropriate to vacate or reverse the judgment and grant a new trial.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

John H. Metz
Kenneth J. Koenig
Cincinnati, Ohio

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, ROBERT BOYER, M.D.:

Frank V. Benton, IV
Newport, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, WALTER EISEMAN,
M.D.:

David A. Futscher
Covington, Kentucky