

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001360-MR

RICKY MCDOWELL

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 95-CI-00464

OUR LADY OF BELLEFONTE HOSPITAL;
AND MANUAL GARCIA, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND HUDDLESTON, JUDGES

BARBER, JUDGE: Appellant, Ricky McDowell, appeals from a judgment entered after the circuit court directed verdict entered in favor of the Appellee, Our Lady of Bellefonte Hospital ("the hospital") and a jury returned a verdict in favor of Manuel Garcia, M.D., in this medical negligence case.

McDowell first contends that the trial court erred in excluding evidence that he lacked medical insurance as motive for Dr. Garcia's alleged failure to order tests to rule out

appendicitis. The standard of review of a trial court's evidentiary rulings is abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."¹

McDowell's reliance upon Kentucky Rules of Evidence 411 is misplaced. The rule deals with the admissibility of evidence of *insurance against liability of the person who acted negligently or otherwise wrongfully*. Equally misplaced is McDowell's reliance upon *Wallace v. Leedhanachoke*,² which dealt with evidence of liability insurance in a medical negligence case. This Court held that the "trial court did not abuse its discretion by ruling inadmissible evidence that the defendant-physician and his expert shared the same liability carrier. . . . [I]ts arguable relevance or probative value is insufficient to outweigh the well-established rule as to the inadmissibility of evidence as to the existence of insurance. . . ."³

McDowell has provided no authority to convince us that the trial court erred in excluding evidence that he had no medical insurance. We find no abuse of discretion.

¹ *Goodyear Tire and Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575, 581 (2001).

² Ky. App., 949 S.W.2d 629 (1996)

³ *Id.*, at 628.

Next, McDowell asserts that the trial court erred in refusing to permit him to treat Dr. Bailey as a "hostile witness." McDowell's complaint appears to be that the trial court refused to allow Dr. Bailey, a treating physician, to offer opinion about standard of care. At trial, defense counsel objected to Dr. Bailey's opinion, on grounds that he had never been identified as an expert on the issue. McDowell maintained that Dr. Bailey had been identified as an expert in correspondence stating that he was the treating physician. Although Dr. Bailey's deposition had been taken, objection was made to the standard of care questions and no opinion was ever given. The trial court sustained the objection to Dr. Bailey's standard of care testimony:

I've looked at this deposition of Dr. Bailey, and that - there was an objection placed on the record. He was never asked that. I think it would be unfair at this point to allow you to use this witness to go to the ultimate issue. I mean, you can ask him in his expert opinion whether or not he thought that he had a ruptured appendix, and I thought that was what you were going to do. But, as far as the ultimate issue, . . . you've got somebody for that as your witness, and . . . I think that's the one that you should use. So, I'm going to sustain the objection on this issue.

Dr. Garcia responds, and we agree, that the issue was not preserved for review, because McDowell did not offer the

excluded testimony by avowal.⁴ Nevertheless, we find no abuse of discretion in the trial court's exclusion of Dr. Bailey's opinion testimony.⁵

Next, McDowell asserts that the trial court erred directing a verdict in the hospital's favor. Upon motion for directed verdict, "the trial court must consider the evidence in its strongest light in favor of the party against whom the motion was made and must give him the advantage of every fair and reasonable intendment that the evidence can justify. On appeal the appellate court considers the evidence in the same light."⁶

McDowell contends that Dr. Heiskell's opinion established causation by his testimony that the nurses should have notified Dr. Garcia of a change in McDowell's condition:

Q. Do you have an opinion within a reasonable degree of medical probability whether or not the nurses [sic] failure to notify Doctor Garcia of the changes in Mr. McDowell's condition affected Mr. McDowell?

* * *

A. As a surgeon taking care of a patient, any information I can get that may jog me to think "Is something else going wrong; am I missing something; do I need to get any more tests?" is valuable information

⁴ *Charash v. Johnson*, Ky. App., 43 S.W.3d 274 (2002).

⁵ McDowell acknowledges that Dr. Bailey's opinion on standard of care "corroborated" that of his expert, Dr. Heiskell.

⁶ *Sutton v. Combs*, Ky., 419 S.W.2d 775, 777 (1967).

because it often leads to those tests. I cannot say what would have happened had they notified Doctor Garcia. I think they needed to do that, but I don't know what he would have done.

McDowell argues that the trial court should have let the jury decide, because no witness could ever testify "as to what another person would do with the same information."

Circumstantial evidence may be sufficient to prove reasonable probability or proximate cause, where it reasonably establishes a causal connection between the alleged negligence and the injury.⁷ Here, Dr. Heiskell could not say and did not know. This falls far short of establishing the essential causal connection. A jury may not be permitted to reach a verdict upon speculation or conjecture.⁸ We find no error.

The final issue McDowell raises is whether the verdict is supported by substantial evidence. McDowell acknowledges Dr. Aaron's testimony that Dr. Garcia did not breach the standard of care, but contends this was "insufficient," because it was refuted by other evidence. In essence, McDowell is trying to shift his burden of proof to Dr. Garcia. "Proximate causation between negligence and the injury complained of in a medical malpractice case must be established by expert testimony. . . .

⁷ *Johnson v. Vaughn*, Ky. 370 S.W.2d 591 (1963).

⁸ *Wiser Oil v. Conely*, Ky., 380 S.W.2d 217, 219 (1964).

On the other hand, the defendant need not disprove causation. Rather, he must produce credible evidence which tends to discredit or rebut the plaintiff's evidence."⁹

We do not determine the weight of the evidence.

[W]e are to determine the question as to whether or not the verdict is palpably contrary to the evidence. It is not for this court to reverse a judgment because the evidence was conflicting. . . . Nothing short of a conclusion that the verdict is flagrantly against the evidence will give this court authority to disturb it on the ground insisted.¹⁰

We affirm the judgment of the Greenup Circuit Court, entered April 24, 2001.

ALL CONCUR.

BRIEF FOR APPELLANT:
Teresa Cunningham
Florence, Kentucky

BRIEF FOR APPELLEE OUR LADY OF
BELLEFONTE HOSPITAL:
Karen A. Carroll
Cincinnati, Ohio

BRIEF FOR APPELLEE MANUAL
GARCIA, M.D.:
David O. Welch
Ashland, Kentucky

⁹ *Sadler v. Anesthesiology Assocs. PSC.*, Ky. App., 50 S.W.3d 210, 214 (2001).

¹⁰ *Adams v. Sexton*, 265 Ky. 722, 97 S.W.2d 602, 604 (1936).