

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000839-MR

ROSELEIGH CARMACK

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 99-CI-01603

GEORGE S. HALL, M.D.;
PREFERRED SURGICAL CARE, P.S.C.;
AND CAROL MILBURN, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, BAKER, AND JOHNSON, JUDGES.

BARBER, JUDGE: The Appellant, Roseleigh Carmack ("Carmack"), seeks review of a trial order and judgment of the Kenton Circuit Court entered upon a jury verdict in favor of the Appellees, George Hall, M.D. and Preferred Surgical Care, P.S.C.(collectively "Dr. Hall"), and Carol Milburn, M.D. ("Dr. Milburn"), in this medical negligence case. We are asked to decide whether the trial court erred in directing a verdict on the issue of informed consent and in prohibiting Carmack from

including informed consent in her closing argument. Finding no error, we affirm.

We refer to the record as necessary to resolve the issue before us. KRS 304.40-320 provides:

In any action brought for treating, examining, or operating on a claimant wherein the claimant's informed consent is an element, the claimant's informed consent shall be deemed to have been given where:

(1) **The action of the health care provider in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with the accepted standard of medical or dental practice among members of the profession with similar training and experience;** and

(2) A reasonable individual, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedure and medically or dentally acceptable alternative procedures or treatments and substantial risks and hazards inherent in the proposed treatment or procedures which are recognized among other health care providers who perform similar treatments or procedures;
(Emphasis added)

In *Hawkins v. Rosenbloom*¹, a panel of this Court explained:

An action based on lack of informed consent "is in reality one for negligence in failing to conform to a proper professional standard...." *Holton v. Pfingst*, Ky., 534 S.W.2d 786, 788 (1975). **As in any medical malpractice case, the general rule is that expert testimony is required to negate informed consent.** *Keel v. St. Elizabeth Medical Center*, Ky., 842 S.W.2d 860, 862 (1992). In *Keel*, the hospital administered a CT scan that involved injecting a contrast dye

¹ Ky. App., 17 S.W.3d 116, 119 (1999).

into the patient's system. The patient later developed thrombophlebitis at the site of the injection. The Supreme Court found that expert testimony was not required to establish informed consent in this case because the patient was given absolutely no information whatsoever regarding the risks and hazards of the procedure. . . . Thus, *Keel* is limited in its application to situations where no information is given to the patient regarding the risks and hazards of the procedure. (Emphasis added)

Here, information was given to the patient. Moreover, Carmack signed both the Preferred Surgical Care P.S.C. "Informed Surgical Consent" form authorizing Dr. Hall to perform a right modified radical mastectomy, as well as the St. Elizabeth Medical Center "Consent for Surgical Treatment" form, authorizing Dr. Hall to perform the procedure. Thus, expert testimony was required in this case.

Carmack asserts that Dr. Donna Glover, one of her expert witnesses, testified as to the standard of care; however, she does not cite any testimony from Dr. Glover that Dr. Hall's action in obtaining consent was in not accordance with the accepted standard of medical practice among members of the profession with similar training and experience. Carmack states that "Dr. Glover testified live. TAPE 2; 03/21/2002; 09:29:20, et seq." Carmack then notes Dr. Glover's testimony about prophylactic mastectomies; however, the case *sub judice* does not involve a prophylactic mastectomy. Appellees assert that Dr.

Glover did not address the issue of proper informed consent. We decline to search the record to determine if any of Dr. Glover's testimony might support Carmack's position.

Carmack does provide specific references to portions of Dr. Spratt's testimony. Appellees respond that Dr. Spratt testified repeatedly that he did not know anything about the discussions Dr. Hall had with Carmack. Having reviewed Dr. Spratt's testimony in its entirety, we agree. Dr. Spratt's opinion on the subject is, in fact, no opinion at all. The trial court properly granted a directed verdict and properly precluded Carmack from arguing lack of informed consent in closing, where she failed to present any competent testimony on the issue.

Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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