

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000977-MR

ELIZABETH L. BLAIR

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 00-CI-004170

JAMES W. GREEN

APPELLEE

OPINION

AFFIRMING

** ** *

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. In this personal injury action filed against dermatologist James W. Green (hereinafter "Green"), Elizabeth L. Blair (hereinafter "Blair") has appealed from the Jefferson Circuit Court's final judgment entered December 6, 2001, following a jury trial, and from the order denying her motion for a new trial entered April 8, 2002. Having considered the parties' briefs and oral arguments, the extensive record, and the applicable case law, we affirm.

During the time period relative to this action, Green was a board certified dermatologist who began practicing medicine in 1980. Because of an increase in business, Green hired Cathy Richardson as a licensed physician's assistant (hereinafter "PA") in 1998. Shortly thereafter, Green hired her son, Corey Richardson (hereinafter "Richardson"), as a surgical assistant. Richardson had also been trained and certified as a PA, but had lost his California PA license. Therefore, Green hired Richardson in a position with less medical responsibility. Over time, Green allowed Richardson to assume greater responsibilities until he was effectively working as a PA.

Blair first sought treatment from Green on January 5, 1999, for complaints of an itchy back. When conservative treatment failed to resolve her complaints, Green performed a series of kenalog steroid injections in her back, which apparently resulted in some temporary dimpling on the skin of her back. At the time of her first office visit, she inquired about the possibility of undergoing liposuction, and later discussed this with the appropriate person in Green's office. Blair underwent her first liposuction procedure in April 1999, performed by both Green and Richardson. She returned for additional liposuction in October 1999, which was performed by Richardson. Green stated that he was present during the second procedure.

In June 2000, Richardson was arrested for practicing medicine without a license. The Jefferson County Grand Jury for the September 2000 term later indicted both Green and Richardson on 117 counts of Assault I and 117 counts of Wanton Endangerment I, and indicted Richardson on one count of unlawful practice of medicine without a license and for being a persistent felony offender.¹ On March 28, 2001, during the criminal trial of that matter, Green and Richardson chose to enter guilty pleas. Green entered a guilty plea pursuant to Alford v. North Carolina, 394 U.S. 956 (1969), to amended charges of complicity to unlawful practice of medicine and twenty counts of wanton endangerment I, and also agreed to plead guilty to any insurance fraud cases that arose out of the action. His twelve-month and one-year concurrent sentences were probated for five years on the condition that he pay restitution and serve six months on home incarceration.

On June 28, 2000, just following Richardson's arrest, Blair filed a complaint in Jefferson Circuit Court, naming only Green as a defendant and alleging medical negligence in both the kenalog injections and the liposuction procedures. She claimed that: (1) Green failed to adequately supervise Richardson; (2) committed battery; (3) failed to obtain her informed consent; and

¹ Blair was named in the indictment as the victim in counts for both assault and wanton endangerment.

(4) that Green's conduct was outrageous. Likewise, she alleged that Green negligently administered the kenalog injections.

A number of similar lawsuits were eventually filed in Jefferson Circuit Court, which were consolidated for common discovery purposes. However, the suits were not consolidated for trial, and Blair's case was later removed from common discovery. As the most senior of the lawsuits filed, Blair's case was the first to proceed to trial on November 27, 2001. At the close of her case, both Blair and Green moved the trial court for directed verdicts on the issues of medical negligence, informed consent, negligent hiring, battery, and outrageous conduct. The trial court denied both parties' motions as well as their renewed motions presented at the close of Green's case. The matter proceeded to the jury on instructions of negligence, lack of informed consent, failure to exercise the proper care and skill in hiring and supervising employees, battery, and punitive damages.² Blair requested damages in amounts not to exceed \$1000 for battery; \$7000 for medical expenses; \$19,000 for past and future physical, mental, and emotional pain and suffering; and \$5,000,000 in punitive damages. The jury returned a verdict in favor of Green on the negligence, informed consent and battery instructions, and found for Blair on the hiring and supervising and punitive damages instructions. The jury awarded Blair \$2000

² Blair withdrew her claim for outrageous conduct.

for pain and suffering and \$2000 in punitive damages.

Accordingly, on December 6, 2001, the circuit court entered a judgment against Green for \$4000.

On December 14, 2001, Blair filed a motion to set aside the judgment pursuant to CR 59 and CR 60, arguing that there were errors of law during the trial, that the verdict was contrary to the law, that the damages awarded were inadequate, that the trial court's abuse of discretion deprived her of a fair trial, and that a directed verdict on battery should have been granted. Green filed an objection, and following an oral hearing, the trial court denied the motion on April 8, 2002. This appeal followed.

On appeal, Blair argues that the trial court should have granted her motions for directed verdict on negligence, battery, and informed consent; that the trial court improperly excluded evidence of Green's similar acts and conduct; that the trial court improperly limited discovery; that Green admitted that his treatment fell below the standard of care; and that Green's admission of gross negligence was improperly ignored. In her argument regarding the directed verdict on negligence, Blair includes an allegation that an inconsistency in the verdict requires reversal for a new trial. In his brief, Green opposed each of Blair's arguments, and further argued that the jury's

finding regarding the administering of the kenalog injections not be disturbed as Blair did not address it in her brief.

MOTIONS FOR DIRECTED VERDICTS

The standard of review for an appellate court in reviewing a decision of a trial court on a motion for directed verdict made pursuant to CR 50.01 is well settled in the Commonwealth:

In ruling on either a motion for a directed verdict or a motion for judgment notwithstanding the verdict, a trial court is under a duty to consider the evidence in the strongest possible light in favor of the party opposing the motion. Furthermore, it is required to give the opposing party the advantage of every fair and reasonable inference which can be drawn from the evidence. And, it is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ.

Taylor v. Kennedy, Ky.App., 700 S.W.2d 415, 416 (1985).

Furthermore, an appellate court's standard for reviewing a trial court's denial of a motion for a new trial is whether the decision was clearly erroneous. Miller v. Swift, Ky., 42 S.W.3d 599 (2001). We hold that the trial court properly denied Blair's motions for a directed verdict in each instance.

1) NEGLIGENCE

Blair first argues that Green was negligent *per se* due to the violation of the licensing statutes, and that as such, she

was entitled to a directed verdict on negligence, citing Newman v. Lee, Ky., 471 S.W.2d 293 (1971). We agree with Green's argument on this issue and his interpretation of the Newman case as it applies to the matter before us. Furthermore, we agree with Green's argument and his reliance upon Lewis v. B&R Corp., Ky.App., 56 S.W.3d 432 (2001), to the effect that even if Green were negligent *per se*, Blair failed to prove through any expert testimony that his negligence was a substantial factor in causing her injuries.

Blair next argues that the jury's verdict was inconsistent because she received a favorable verdict only on the negligent hiring instruction, but not on an independent tort from which her damages arose. On the other hand, Green argues that the verdict was consistent, and that in any event Blair failed to timely raise the issue. We agree with Blair's contention that a jury's verdict must be consistent.³ In Callis v. Owensboro-Ashland Co., Ky.App., 551 S.W.2d 806, 808 (1977), this Court stated, "[t]he true test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issue as submitted." Again, we agree with Green's

³ We note that in her brief, Blair cited to two cases in support of her proposition that jury verdicts must be consistent. One of those cases has been explicitly overruled, and the other has been implicitly overruled. However, Blair's proposition regarding consistency in jury verdicts remains valid.

argument that the jury's verdict was in no way inconsistent. It is very logical to conclude that the jury determined that Blair incurred no damages from a tort independent of the negligent hiring, but only sustained mental and/or emotional suffering as a result of the negligent hiring and supervision. We also note that counsel for Blair specifically accepted the instructions prior to their submission to the jury, and did not object to the alleged inconsistent verdict immediately upon its return.

Breathitt Funeral Home v. Neace, Ky., 437 S.W.2d 490 (1969).

2) BATTERY

In support of this argument, Blair avers that Green allowed Richardson to unlawfully "touch" her during the liposuction procedures, thereby necessitating a directed verdict on the battery claim in her favor. On the other hand, Green relies upon the Supreme Court's decision in Vitale v. Henchey, Ky., 24 S.W.3d 651 (2000), and argues that the jury must determine as a question of fact whether a battery took place and that Blair failed to prove that there was an intent to cause unlawful or offensive contact with her. Furthermore, Green argues that there was sufficient evidence to allow a jury to determine from an objective standard that Richardson's participation would not have violated a reasonable person's sense of personal dignity.

We agree with Green's argument that there was sufficient evidence in the record regarding whether he intended to cause unlawful or offensive contact to Blair to defeat her motion for a directed verdict and to allow the matter to go to the jury.

3) INFORMED CONSENT

Blair argues that Richardson performed illegal medical procedures on her with the agreement and assistance of Green, thereby causing her to be touched without her consent. However, Green argues that the informed consent forms obtained prior to both liposuction procedures adequately informed Blair of the risks or hazards of the proposed procedure based upon the testimony of the expert witnesses, including that of Blair's expert witness, Dr. Dubou. Furthermore, Green argues that Blair's claim that the lack of informed consent arose from his failure to tell her Richardson did not have a PA's license is in reality a claim for battery, citing Vitale v. Henchey, supra. We again agree with the trial court's determination that there was sufficient evidence to defeat Blair's motion for a directed verdict and to allow the issue to go to the jury for a factual finding.

PRE-TRIAL DISCOVERY ISSUES

1) EXCLUSION OF GREEN'S SIMILAR ACTS AND CONDUCT

Blair argues that the trial court improperly excluded evidence of Green's similar acts during which he conspired to allow Richardson to illegally perform medical procedures on other patients. This limited the jury's access to proof, which in turn affected its decision regarding punitive damages. Blair apparently claims that the trial court excluded evidence from two witnesses who were both patients of Green, which would have established that Green was aware of Richardson's actions and that he voluntarily collaborated in Richardson's actions, as well as the pervasive extent of his actions. Green argues that the other patients Blair sought to call as witnesses did not meet the "similar occurrences" requirement, that Blair did not preserve their testimony by avowal, and that Blair had adequate opportunities to present proof regarding the likelihood of harm to others, profitability and duration.

We first note that Blair has not indicated in her brief exactly where in the record this issue was preserved for review, hindering our ability to review this matter. However, we are aware of the trial court's August 31, 2001, order granting Green's August 17, 2001, motion *in limine* to exclude testimony from other of Green's patients. In her response to this motion, Blair argued that she only wanted to introduce their testimony

for the limited purpose of illustrating that Green misrepresented Richardson's qualifications, and that she had no intention of introducing evidence of his treatment of them. The trial court granted the motion *in limine* and excluded the testimony, reasoning that although the evidence was relevant and probative, its effect would be unduly prejudicial based upon the nature of the case.

Pursuant to KRE 404(b)(1), evidence of other crimes, wrongs or acts is not admissible to prove a person's character unless it is offered for another purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In Bell v. Commonwealth, Ky., 875 S.W.2d 882 (1994), the Supreme Court set out a three-prong test regarding the admission of evidence concerning other crimes, wrongs or acts, which includes the relevance and probativeness of the evidence as well as whether its prejudice substantially outweighs its probative value. Pursuant to Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999),

[t]he balancing of the probative value of such evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge. . . . The standard of review is whether there has been an abuse of that discretion. . . . The test for abuse of discretion is whether the trial judge's decision was arbitrary,

unreasonable, unfair, or unsupported by sound legal principles. (citations omitted)

In the present matter, the trial court found that the evidence of similar acts was both relevant and probative, but that it was unduly prejudicial. Having reviewed the decision, we conclude that the trial court did not abuse its discretion in granting the motion *in limine* and not allowing Blair to introduce testimony from any of Green's other patients.

Blair has also argued that the trial court erred by not allowing her to introduce testimony regarding the likelihood of harm to others, profitability, and duration. Again, we agree with Green that Blair had the opportunity to present such evidence and did in fact produce some such evidence.

2) LIMITATION ON PRE-TRIAL DISCOVERY

Blair argues that the trial court improperly limited her discovery by 1) staying discovery in all civil actions against Green pending the resolution of criminal proceedings against him, 2) finding that Green had a right to assert his Fifth Amendment privilege and then not allowing her an adverse inference instruction based upon his refusal to testify, 3) temporarily consolidating the civil actions for common discovery purposes, and 4) appointing a guardian *ad litem* for Richardson. Green countered each argument in his brief.

As to the issue of consolidation for common discovery, the Court of Appeals in Ray v. Stone, Ky.App., 952 S.W.2d 220, 223 (1997), stated, “[t]he civil rules afford a trial court broad power to control discovery and prevent its abuse.” As in the Ray case, Blair cannot establish that she was deprived of her meaningful right to discovery. The trial court did not abuse its discretion in allowing for common discovery based upon the large number of lawsuits against Green and Richardson for which similar discovery would be propounded. Furthermore, Blair was permitted to withdraw from common discovery months prior to trial and to proceed with her own discovery. Therefore, she cannot argue that she was denied the opportunity to obtain discovery.

Furthermore, we agree with Green that the trial court did not abuse its discretion in staying the matter or in making its determination regarding Green’s right to assert his Fifth Amendment privilege. The trial court stayed the matter only as it pertained to the discovery of information that may require Green or Richardson to invoke their Fifth Amendment rights, and the stay only lasted about four months. Additionally, Green never asserted his Fifth Amendment right so that Blair would not be entitled to a reverse inference instruction.

Lastly, we cannot determine what harm as far as increased costs Blair could have incurred as a result of the

appointment of a guardian *ad litem*. Following the trial in the matter, the trial court assigned the cost associated to the guardian *ad litem* to Green.

GREEN'S "ADMISSIONS"

1) ADMISSION OF GROSS NEGLIGENCE DURING ALFORD PLEA

Blair argues that the trial court improperly excluded Green's admission, made during his Alford⁴ plea at his criminal trial, that he was grossly negligent, likening this statement to a judicial admission. Green, on the other hand, argues that the trial court properly excluded this statement pursuant to KRE 410 and properly excluded the avowal testimony of investigator Art Rodgers in regard to the Alford plea.

It is undisputed that the testimony Blair sought to introduce into evidence was Green's statement made during his Alford plea that he was grossly negligent in the matter. Blair is correct that Green made this statement on the record and in open court. However, KRE 410(2) provides that "evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions: . . . (2) . . . a plea under Alford v. North Carolina, 394 U.S. 956 (1969)." KRE 410(3) also provides that statements made during the course of an Alford plea negotiation are also inadmissible. Therefore,

⁴ Alford v. United States, 400 U.S. 24, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 171 (1970).

the trial court properly excluded both Green's statement and the avowal testimony of Art Rodgers and did not abuse its discretion in doing so.

2) ADMISSION ON CROSS-EXAMINATION DURING TRIAL

Finally, we address Blair's argument that Green admitted during the trial that his medical treatment of her fell below the standard of care, entitling her to a directed verdict on liability. Green argues that he never admitted that the medical treatment rendered to Blair fell below the standard of care. Green merely acknowledged that in retrospect, he should not have used Richardson in the way that he did, although at the time he thought he was using him as a surgical assistant.

We agree with Green that this issue properly went to the jury for a factual finding regarding whether the level of medical treatment provided was appropriate.

CONCLUSION

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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