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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001176-MR

HAZEL CONNER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 99-CI-006359

SYAM S. CHILUKURI, M.D. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Hazel Conner (Conner) appeals from the judgment of the Jefferson Circuit Court following the conclusion of a jury trial, specifically the trial court's rulings admitting evidence of previous medical examinations and the court's failure to instruct the jury on the intentional tort of battery. We affirm.

In May 1998, Conner sought medical treatment from her regular physician, Dr. Mark Wheeler, for a bump between her

vagina and rectum. Dr. Wheeler referred her to a gynecologist, Dr. Sylvia Beimfohr, who performed an evaluation which included a rectal examination and determined that Conner had developed a perianal abscess, or cyst. Dr. Beimfohr lanced and drained the cyst, prescribed antibiotics, and instructed Conner in caring for her condition. After following the course of treatment prescribed, Conner suffered a recurrence of the condition with severe pain. She again sought the advice of Dr. Wheeler who referred her to Dr. Syam Chilukuri, a colorectal surgeon, for further treatment.

Dr. Chilukuri undertook an initial examination of Conner on August 31, 1998. This examination included an anorectal exam, which revealed hemorrhoids and an opening in the cystic area. His examination was, admittedly, limited due Conner's intense pain, and Dr. Chilukuri felt he could not make a conclusive diagnosis. He suspected that the opening represented a fistula, which is an abnormal passage between two organs. However, the existence of symptoms inconsistent with that condition caused some doubt; therefore, he recommended an examination under anesthesia, with the understanding that a fistulotomy would be performed if a fistula were confirmed.[1]

[1] The exact nature of the treatment recommended by Dr. Chilukuri is disputed. The parties agree that at least the fistulotomy was discussed. Conner argues that no other procedures were discussed. Dr. Chilukuri testifies otherwise. We note that the jury found that Dr. Chilukuri was not negligent in his examination or treatment of Conner.

The examination took place on September 25, 1998, during which Dr. Chilukuri discovered large hemorrhoids and two anal fissures. He performed two surgical procedures, a sphincterotomy and a hemorrhoidectomy, to correct these conditions. After the procedures were completed, Conner began suffering from leakage, incontinence, and pain associated with bowel movements. These symptoms have been attributed to the combination of the sphincterotomy—which procedure involves, in part, the intentional cutting of the internal sphincter muscle—and a pre-existing defect in Conner's external sphincter muscle, believed to have been caused during a difficult child-birth twenty years earlier, which was "unmasked" by the surgery. Dr. Chilukuri did not discover this defect in Conner's external sphincter muscle prior to proceeding with the surgical procedures.

Conner filed suit against Dr. Chilukuri on October 22, 1999, alleging that Dr. Chilukuri was negligent in his treatment, resulting in injury. More specifically, Conner's claim was based upon Dr. Chilukuri's failure to obtain her complete obstetric history, discover the defect in her external sphincter muscle, discuss/advise her of alternative treatment options and the risks associated therewith, and obtain her consent for the procedures performed. The parties disagreed as to many of the facts regarding the physician-patient

relationship between Conner and Dr. Chilukuri. After the jury's verdict was rendered, judgment was entered in favor of Dr. Chilukuri, and this appeal followed.

Conner first argues that the trial court erred when it improperly admitted evidence of previous OB/GYN examinations. She contends that the evidence lacked any probative value, rendering it irrelevant, and that the potential prejudice from its misuse by the jury outweighed any probative value it may have carried. We find no merit in this argument.

Kentucky Rule of Evidence (KRE) 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Such evidence is generally admissible pursuant to KRE 402. However, this general rule is modified by KRE 403, which permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury. . . ." Professor Lawson's book on the Kentucky Rules of Evidence indicates that the Rules "plainly manifest[] a tilt of the law toward admission over exclusion."[2] R. Lawson, *The*

[2] Professor Lawson describes this tilt toward admission as "powerful" in regard to KRE 401. Lawson, *supra*, § 2.05 at 53. Furthermore, KRE 403 should be used only "sparingly" to exclude relevant evidence: "In weighing the probative value of evidence against the dangers and considerations enumerated in Rule 403,

Kentucky Evidence Law Handbook, § 2.10 at 57 (3rd ed. 1984). A determination of whether evidence is relevant is one "which rests largely in the discretion of the trial court. . . ." Green River Electric Corp. v. Nantz, Ky. App., 894 S.W.2d 643, 645 (1995)(quoting Glens Falls Insurance Company v. Ogden, Ky., 310 S.W.2d 547 (1958).

"[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000); *see also* Nantz, 894 S.W.2d at 645, "This court will not disturb a lower court's discretionary ruling on appeal absent an abuse of discretion." Lawson, *supra,* § 2.00 at 22 (2nd ed. 1984)). Such relief, however, is rare.[3] Lawson, *supra*, § 2.05 at 55 ("Abuse of discretion is not often found."). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[4] Thompson, 11 S.W.3d at 581 (citation omitted). Review of evidentiary rulings is further limited by KRE 103(a), which

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the general rule is that the balance should be struck in favor of admission." Id. § 2.10 at 57-58 (citations omitted).

[3] The deference granted to the trial judge's exercise of discretion is not intended to suggest that trial judges have an arbitrary power to wield over relevancy issues; it is not intended to suggest that there is no reviewability of relevancy determinations. It is intended only to suggest that relevancy battles must be vigorously fought in the trial court and that the likelihood of relief on appeal is remote.
Lawson, *supra*, § 2.05 at 55.

[4] Professor Lawson argues that "the trial judge is entitled to an 'enlarged amount of deference' in balancing probative value against harmful effects, and that the discretion granted by Rule 403 is 'broad' and 'considerable.' Id. § 2.10 at 59.

provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ."

In order to prevail at trial, Conner needed to convince the jury that Dr. Chilukuri was negligent, i.e., that he failed "to exercise the degree of care and skill ordinarily expected of a reasonably competent Colon and Rectal Surgeon acting under the same or similar circumstances." Record, p. 808 (Jury Instruction No. 1). Conner sought to prove this through the testimony of Dr. Wayne Tuckson,[5] who testified that the pre-existing defect in Conner's external sphincter was "obvious." Dr. Chilukuri sought to rebut this testimony, in part, through the admission of the evidence now in dispute.

To meet KRE 401's test of relevancy,[6] "evidence need not even be moderately probative of a pertinent proposition. Relevance is established by any showing of probativeness, *however slight*." Lawson, *supra*, § 2.05 at 53 (emphasis added). Something is "obvious" when it is "[e]asily discovered, seen, or understood; readily perceived. . .; plain; patent; apparent . . ." Black's Law Dictionary 972 (5th ed. 1979). Dr. Tuckson's description of Conner's condition as "obvious" implies that, at

[5] Dr. Tuckson became Conner's treating physician after her last appointment with Dr. Chilukuri.

[6] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

the very least, any physician examining the general area of the defect should have discovered it. Dr. Chilukuri simply sought to demonstrate that the defect was not as obvious as Dr. Tuckson's testimony suggested, at least not so obvious that other physicians examining the same general area also failed to discover its existence.[7] Furthermore, Dr. Chilukuri's expert, Dr. James Moss, testified that previous gynecological examinations were factors he considered in his review of the case. The evidence of other Ob/Gyn examinations was relevant. Its admission was not an abuse of discretion.

This relevant evidence, however, may be excluded pursuant to KRE 403 if its prejudices outweighs its probative value. Conner argues that the introduction of this evidence misled or confused the jury when it improperly allowed the jury, "in derogation of the Court's instructions, to measure the performance of a colorectal physician . . . by the standards applicable to an Ob/Gyn" and that this potential for misuse by and confusion of the jury "far outweighed" its probative value. Brief for Appellant, pp. 10-11. This, it is argued, warrants its exclusion. We disagree.

[7] The Ob/Gyn examinations in issue include some during which a rectovaginal examination was performed. Expert testimony revealed that a rectovaginal examination performed by an Ob/Gyn is not identical to a rectal examination performed by a colorectal surgeon. It does, however, focus on the area between the rectum and vagina, the same area in which Conner's defect was located. The specifics of a rectovaginal examination were disputed, but we find such dispute unimportant.

The trial court instructed the jury to measure Dr. Chilukuri's performance against that of other Colon and Rectal Surgeons.[8] In Kentucky, it is presumed that the jury will follow the instructions issued to it by the trial court. Johnson v. Commonwealth, Ky., 105 S.W.3d 430, 436 (2003) (citing Scobee v. Donahue, Ky., 164 S.W.2d 947, 949 (1942) ("It is to be assumed that the jury . . . followed the evidence and instructions in their entirety."); United States v. Davis, 306 F.3d 398, 416 (6th Cir. 2002)("Juries are presumed to follow the instructions they are given.") We believe the trial court did not abuse its discretion in overruling Conner's objection.

Conner also argues that the trial court erred when it refused to instruct the jury on the intentional tort of battery. Specifically, Conner claims that she never consented to the surgical procedures performed by Dr. Chilukuri. Despite the fact that she did not include a claim of battery in her complaint, never attempted to amend her complaint to include that claim, failed to tender adequate instructions for a battery claim, and failed to request an instruction on battery when she objected to the trial court's instructions, Conner now argues

[8] The trial court instructed the jury as follows:

> Instruction No. 1
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> It was the duty of Defendant, Syam S. Chilukuri, M.D.,...to exercise the degree of care and skill ordinarily expected of a reasonably competent ***Colon and Rectal Surgeon*** acting under the same or similar circumstances.

Record, p. 829 (emphasis added).

that the trial court erred when it failed to instruct the jury on battery because the evidence presented at trial was sufficient to warrant an instruction. We disagree.

Conner's position is untenable because she failed to preserve the error. The requirements for preservation are codified in Kentucky Rule of Civil Procedure (CR) 51(3):

> No party may assign as error. . .the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

Because Conner failed to tender an adequate instruction or to state specifically the matter and grounds of her objection, she is not entitled to relief.

Conner's amended tendered jury instructions were inadequate because they departed from Kentucky's rule requiring instructions to be limited to the "bare bones," Hamby v. University of Kentucky Medical Center, Ky. App., 844 S.W.2d 431, 433 (1992), and because they failed to fairly and adequately present her position. "Bare bones" instructions do not include "an abundance of detail," but rather, provide a "skeleton [that] may then be fleshed out by counsel on closing argument." Id. These skeletal instructions should not include specifically enumerated duties. Id. Conner's instructions violated this

principle. *See* Plaintiff's Amended Tendered Jury Instructions, Record at 819-26.

Furthermore, only a negligence instruction was tendered. *See* Record at 820 (Instruction II). Conner's citation of Vitale v. Henchey, Ky., 24 S.W.3d 651 (2000), in subpart (3) of that instruction is significant.[9] In Vitale, the Supreme Court recognized an action for negligence where the physician failed to obtain the patient's *informed* consent and an action for battery where a procedure was performed without consent.[10] Id. at 656. While the distinction between consent and informed consent may be subtle,[11] Vitale clearly demonstrates that these present separate causes of action. Id.

Because Conner cited to Vitale in her *negligence* instruction, we believe that she was attempting to enumerate the duty to obtain informed consent as part of her negligence claim.

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[9] The area of the law regarding consent in tort cases, especially medical torts, has recently been the source of confusion. After the Legislature enacted the Informed Consent statute, KRS 304.40-320, doubt arose as to whether the traditional approach for remedying a physician's failure to obtain the patient's consent as an intentional tort premised upon a battery action, had been subsumed by informed consent, an approach treating the issue as a negligence action. *See* Leibson, Kentucky Practice, Vol. 13, Tort Law § 10.21 at 147-48; KRS 304.40-320. The Supreme Court, however, resolved these questions in Vitale.

[10] Vitale held that the circumstance where the patient did not consent to a particular surgeon performing a procedure is "wholly distinguishable from cases in which the physician obtains consent, but fails to disclose the risks of surgery to a patient." 24 S.W.3d at 655. The Court noted that "nothing in case law or secondary sources...suggest[s] that the doctrine of informed consent has displaced the common law remedy of battery in cases of no consent." Id. at 657.

[11] Consent occurs when a patient agrees to allow a physician to perform an examination or treatment. *See* Vitale, 24 S.W.3d at 656. Informed consent involves such consent with the patient's "general understanding of the procedure...acceptable alternative procedures or treatments and substantial risks...inherent in the proposed treatments...." KRS 304.40-320(2).

After a careful review of Conner's testimony on the issue of consent and the arguments of counsel in requesting a Vitale negligence instruction, we conclude that Conner never sought an instruction on the *intentional tort* of battery. Thus, she did not "fairly and adequately" present her position in an offered instruction.

This failure, alone, does not preclude Conner from assigning error on appeal under CR 51(3). However, when combined with her failure to state specifically the grounds for her otherwise timely objection to the trial court's instructions, as required by the Rule, Conner failed to preserve the issue. Id. Her objection did not even contain the words "intentional tort" or "battery." Such has precluded review in similar circumstances. Brumley v. Richardson, Ky., 273 S.W.2d 54, 56 (1954)("the instructions offered by him did not make clear his position on the specific question of right of way; in fact, they did not even contain the words 'right of way'. . . . Because the grounds of appellant's objections to the instructions given by the court were neither stated by him at the time he objected, nor made clear in the instructions offered by him, the appellant is not in a position to assert the one error he complains of. . . .").

While Conner referred to Vitale in her objection,[12] she did so in her argument for a more-detailed negligence instruction than the one offered by the trial court. Therefore, because informed consent is a negligence issue and lack of consent implicates the intentional tort of battery, we must assume that Conner was arguing for instruction on the former. Further evidence of Conner's meaning can be garnered from her tendered instructions, which, as described above, operated solely within a negligence framework. If Conner meant to object on the basis of her entitlement to a battery instruction, her lack of specificity cannot be excused and is fatal to her appeal. She had myriad opportunities to clearly state her objection (or otherwise make a battery claim). Her failure stripped the trial court of its opportunity to avoid potential error,[13] which is the object of the rule. Chaney v. Slone, Ky., 345 S.W.2d 484, 486 (1961). Conner failed to preserve this issue for appeal.

Furthermore, we hold that Conner was not entitled to an instruction on the intentional tort of battery. CR 15.02 allows for amendment of a party's pleadings at any point, even after trial, to conform to the evidence. Essentially, a party

[12] Conner objected to the court's instructions and requested a "Vitale instruction."

[13] As explained, *infra*, we do not think Conner was entitled to amend her pleadings to conform to the evidence pursuant to CR 15.02. Thus, regardless of preservation, Conner was not entitled to an instruction on the intentional tort of battery.

is entitled to an instruction on any issue not raised by the pleadings, but tried by the express or implied consent of the parties. *See* CR 15.02.

The issue of lack of consent was not tried by the express or implied consent of the parties. Trial by express consent occurs where the parties, expressly, treat an issue as raised and address proof toward the adjudication of that issue. Thomas v. Thomas, Ky., 379 S.W.2d 743, 748 (1964). Where a party fails to object to the introduction of evidence on an issue not raised in the pleadings, he impliedly consents to the trial of the issue. Blakeman v. Joyce, Ky., 511 S.W.2d 112, 114 (1974).

Evidence of informed consent and lack of consent are, necessarily, similar. We hold that there could be no implied consent because Dr. Chilukuri could not even have been aware that an issue extraneous to the pleadings was being presented. While the Kentucky Supreme Court rejected this position in Nucor Corp. v. General Elec. Co., Ky., 812 S.W.2d 136, 146 (1991), we distinguish that case from the one *sub judice*, because in Nucor, the prevailing party asked and was allowed to amend its pleadings. Here, Conner never attempted to amend her pleading to include a claim for battery. Dr. Chilukuri would have suffered prejudice because he was unaware of the need to and, thus, "unable to present a defense which would have been

otherwise available." *See* Id. Conner was not entitled to an instruction or an amendment to the pleadings because the issue of lack of consent was not tried by the express or implied consent of the parties.

Most importantly, Conner's failure to raise the issue of battery prior to asserting it as a basis of error on appeal deprived the trial court of an opportunity to rule on whether the evidence presented at trial supported a battery instruction. "It is an elementary rule that trial courts should first be given the opportunity to rule on questions before those issues are subject to appellate review. Akers v. Floyd County Fiscal Court, Ky., 556 S.W.2d 146 (1977); Pittsburg and Midway Coal Mining Company v. Rushing, Ky., 456 S.W.2d 816 (1969); Kaplon v. Chase, Ky. App., 690 S.W.2d 761 (1985); Carr v. Cincinnati Bell, Inc., Ky. App., 651 S.W.2d 126 (1983)." Swatzell v. Natural Resources and Environmental Protection Cabinet, Ky., 962 S.W.2d 866 (1998). Conner's failure to present the issue of her entitlement to a battery instruction to the trial court precludes our consideration of its merits on appeal.

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

BARBER, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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