

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001612-MR

LADDIE JOYCE GILBERT, Executrix
of the Estate of HILDA PAYNE, Deceased

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 00-CI-01382

SRIHARI R. MALEMPATI, M.D. and
ANTHEM HEALTH PLANS OF
KENTUCKY, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Laddie Joyce Gilbert, executrix of the estate of Hilda Payne, appeals from a judgment of the Pike Circuit Court resulting from a jury verdict on Gilbert's medical malpractice claim against Dr. Srihari R. Malempati. Further, Gilbert appeals from an order of the Pike Circuit Court denying her motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. We affirm.

Hilda Payne was treated by Dr. Malempati for severe ulcer disease for many years. In 1994, Dr. Malempati performed a gastrectomy on Payne. Thereafter, Payne developed a stricture in the anastomotic site, and Dr. Malempati dilated the stricture from time to time so as to allow for proper digestion.

On October 1, 1999, Dr. Malempati treated Payne by doing an outpatient procedure called esophagoduodenoscopy. This procedure is commonly referred to as an EGD. As a part of the procedure, Dr. Malempati inserted a scope into Payne's stomach and duodenum in order to view the opening between her stomach and small intestine. Dr. Malempati also dilated or stretched the anastomotic site. This procedure caused a hole to form in Payne's duodenum, and Payne returned to Dr. Malempati's care complaining of severe abdominal pain. Dr. Malempati discovered and diagnosed the perforation, and he decided to observe the situation to determine if the perforation would close spontaneously without the need for surgery. The perforation did not close spontaneously, and Dr. Malempati performed a procedure known as a Billroth II on Payne on October 3, 1999. As a part of this surgery, Dr. Malempati removed a portion of the duodenum. Instead of reconnecting the stomach to the duodenum, Dr. Malempati left a duodenal stump.

Payne apparently remained in stable condition until the evening of October 17, 1999. On the following evening, she

was transferred to the care of Dr. Charles Sachatello at St. Joseph Hospital in Lexington, Kentucky.¹ Dr. Sachatello operated on Payne on the next day and discovered that the duodenal stump was completely blown-out and that the ampulla vater was almost free floating. Dr. Sachatello also performed a second surgery, and Payne spent approximately three months recuperating in the hospital.

Payne brought a medical malpractice claim against Dr. Malempati in the Pike Circuit Court in 2002. She sought compensation for medical expenses and for pain and suffering. During the pendency of the case, Payne died from the failure of a heart valve that had been surgically placed several weeks prior to her death. There was no claim that the actions of Dr. Malempati contributed in any way to Payne's death.

Payne left a will leaving the entirety of her estate to her friend, Laddie Gilbert. Gilbert was named executrix of Payne's estate, and she continued the prosecution of the medical malpractice claim in that capacity.

A jury trial was held in the Pike Circuit Court in May 2002. At trial, Gilbert contended among other things that Dr. Malempati was negligent in failing to operate on Payne before October 3, 1999, and by negligently performing the October 3,

¹ Dr. Malempati was out of town during this period of time. He had turned Payne's care over to Dr. Grady Stephens and Dr. Oon Leedhanachoke on October 15, 1999.

1999, surgery. The court instructed the jury to answer an interrogatory regarding whether Dr. Malempati failed to comply with the applicable standard of care. The jury returned a verdict in favor of Dr. Malempati, and a judgment was entered in his favor. Gilbert then filed a motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. The circuit court denied the motion, and this appeal by Gilbert followed.

Gilbert's first argument is that the circuit court erred in denying her motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial. In support of her motion, Gilbert cites Crest Coal Co., Inc. v. Bailey, Ky., 602 S.W.2d 425 (1980). In that case the Kentucky Supreme Court held that "where the record shows, as it does here, that only one fair and reasonable conclusion can be drawn from the evidence, the case should not be submitted to the jury." Id. at 427. Gilbert contends that only one fair and reasonable conclusion could be drawn from the evidence at trial in this case. She asserts that reasonable persons could not differ on the conclusion that Dr. Malempati was negligent and that his negligence caused Payne harm.

Gilbert points to the testimony of Dr. Sachatello, Payne's treating surgeon. She notes that Dr. Sachatello was not hired as an expert by either party and that his testimony that

Dr. Malempati was negligent and violated the applicable standard of care was "ideal evidence from which to draw a verdict." Further, Gilbert discounts the testimony of Dr. Malempati's expert witness, Dr. William Cheadle.

Dr. Cheadle testified that Dr. Malempati did not violate the applicable standard of care. His testimony clearly created a conflict with the testimony of Dr. Sachatello and Dr. Joseph Vitello, Gilbert's expert witness. Although Gilbert states in her reply brief that "[t]he weight of the evidence was that Appellee was negligent," it was for the jury to determine the credibility of the witnesses and the weight of the evidence. Peterman v. Darby, Ky., 419 S.W.2d 747, 749 (1967). On appeal, we will not "usurp the prerogative of a jury and decide as a matter of law which witnesses are worthy of belief and which are not." Kentucky Power Co. v. Thompson, Ky., 335 S.W.2d 915, 918 (1960). In short, the trial court did not err in denying Gilbert's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial because more than one reasonable conclusion could be drawn from the evidence due to the conflicting nature of the expert testimony.

Gilbert's second argument relates to three instances where the circuit court ruled on evidentiary matters. Each instance relates to the questioning of a witness. Our standard of review of a trial court's evidentiary rulings is whether the

trial court abused its discretion. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 577 (2000).

First, Gilbert argues that the circuit court erred when it allowed the jury to hear only a part of Dr. Sachatello's answer to a question. Dr. Sachatello was asked by Dr. Malempati's counsel whether he was telling the jury that Dr. Malempati was "a problem surgeon or a bad surgeon." Dr. Sachatello responded that he was not telling the jury that, but the circuit court did not allow the jury to hear the remainder of Dr. Sachatello's answer given during his deposition. Therein, Dr. Sachatello responded that he had testified for Dr. Malempati in a prior lawsuit.

Gilbert argues that the circuit court improperly excluded Dr. Sachatello's answer and that the testimony was admissible to show that a reasonable person could conclude both that Dr. Malempati was a competent surgeon but that he was negligent in this case. Gilbert asserts that the jury could have been operating under a misconception that Dr. Sachatello gave inconsistent testimony when he stated that Dr. Malempati was not a bad surgeon but was negligent in this case.

The trial court ruled the testimony inadmissible because it involved evidence of a prior medical malpractice suit against Dr. Malempati. Dr. Sachatello's testimony in this case was clear that Dr. Malempati was negligent in treating Payne.

We fail to perceive how the jury could misconceive his testimony or consider it inconsistent merely because he also testified that he did not consider Dr. Malempati to be a bad surgeon. Further, any perceived inconsistency could have been clarified upon further questioning of Dr. Sachatello.² In short, we concluded that the trial court did not abuse its discretion in not allowing the testimony.

Second, Gilbert argues that the circuit court erred for another reason in not allowing the jury to hear testimony that Dr. Sachatello was an expert witness for Dr. Malempati in the prior case. Citing Parsley v. Commonwealth, Ky., 306 S.W.2d 284, 285 (1957), Gilbert maintains that the interest of a witness is not a collateral matter and may always be proved to determine credibility. Gilbert asserts that this testimony would have bolstered the credibility of Dr. Sachatello by revealing that, even though he was testifying against Dr. Malempati in this case, he had testified in favor of Dr. Malempati in a prior case.

Again, we conclude that the trial court did not abuse its discretion in not allowing the testimony. We begin by

² Gilbert relies on Tuttle v. Perry, Ky., 82 S.W.3d 920 (2002), for the premise that evidence having a tendency to make the existence of any fact, of consequence to the determination, more or less probable is admissible. Id. at 922. However, Gilbert has failed to demonstrate how the fact that Dr. Sachatello testified for Dr. Malempati in a prior malpractice claim makes any fact in this case more or less probable.

noting that the Parsley case made it clear that "[t]he scope and extent of cross-examination for this purpose rests within the sound discretion of the court." 306 S.W.2d at 285. Further, the testimony would have had the effect of informing the jury that a prior medical malpractice action had been filed against Dr. Malempati. Thus, even if we accept Gilbert's argument that the evidence was admissible, the trial court was within its discretion in excluding it on grounds that its prejudicial impact outweighed its probative value. See Green River Elec. Corp. v. Nantz, Ky. App., 894 S.W.2d 643, 645 (1995).

Third, Gilbert argues that the trial court erred by not allowing her attorney to cross-examine Dr. Oon Leedhanachoke's testimony that Dr. Malempati was a "great surgeon." Dr. Leedhanachoke was one of the doctors who assumed responsibility for Payne's care when Dr. Malempati left town on October 15, 1999. In response to a question, Dr. Leedhanachoke testified that Dr. Malempati was a "great surgeon." Pursuant to KRE³ 405(b), Gilbert's attorney attempted to ask Dr. Leedhanachoke about his knowledge of specific incidents where other patients had accused Dr. Malempati of malpractice and, in one case, where a settlement of a claim resulted. The trial court again denied the testimony because it related to collateral claims against Dr. Malempati.

³ Kentucky Rules of Evidence.

We again conclude that the trial court did not abuse its discretion in refusing to allow this testimony. KRE 405(b) allows a character witness to be cross-examined to inquire if the witness has heard or knows about relevant specific instances of conduct. However, Dr. Leedhanachoke was not a character witness nor did he testify as to Dr. Malempati's character. Further, Dr. Malempati's character was not an issue in dispute under Gilbert's claims as required under KRE 405(b). Finally, we see no indication that Gilbert's attorney preserved any error in this regard.

Gilbert's third and final argument involves two allegations of improper conduct by Dr. Malempati's attorney during the trial. First, she argues that Dr. Malempati's attorney improperly cross-examined her expert, Dr. Joseph Vitello, resulting in unfair prejudice. The matter involved whether Dr. Vitello had reviewed all relevant medical records before arriving at an opinion concerning whether Dr. Malempati violated the applicable standard of care. Gilbert asserts that Dr. Malempati's attorney deliberately misled the jury into believing that Dr. Vitello had testified in his deposition that he had only reviewed part of the records. Because Gilbert has not demonstrated that any error in this regard was preserved for appellate purposes and because Gilbert's attorney had the opportunity to clarify any misconception upon redirect

examination of the witness, we fail to perceive either error or attorney misconduct.

In her second allegation of improper conduct by Dr. Malempati's attorney, Gilbert argues that counsel "crossed the line when she insinuated through her questioning that Ms. Payne and Ms. Gilbert shared a homosexual relationship." She asserts that the matter was irrelevant and prejudicial. In reviewing this issue, we first note that no questions relating to homosexuality were asked by counsel. Second, Gilbert's counsel did nothing to preserve error such as requesting that the jury be admonished or that a mistrial be declared. In short, we do not perceive either error or counsel misconduct in connection with the questions and testimony involving this matter.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Della M. Justice
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Pamela May
Pikeville, Kentucky