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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001576-MR

KEITH SLONE and IRENE SLONE

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS CLARK, JUDGE
ACTION NO. 98-CI-02364

CENTRAL BAPTIST HOSPITAL

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Irene Slone and Keith Slone (collectively referred to as appellants) bring this appeal from a July 2, 2003, trial verdict and judgment of the Fayette Circuit Court, dismissing their medical malpractice complaint. We affirm.

On July 30, 1997, Irene Slone went to the outpatient department of Central Baptist Hospital (Hospital) to have a cardiac catheterization. Irene had previously undergone two cardiac catheterizations and had a history of hypertension,

mitral valve prolapse, hyperlipidemia and coronary artery disease. Following the catheterization, Angio-Seal was utilized to clot the groin puncture site.

Several days later, it was determined that Irene had an occluded right femoral artery. Appellants allege the occluded artery was caused by the Angio-Seal. On August 25, 1997, an aortofemoral bypass graft was performed, restoring blood flow to Irene's leg. Irene alleges she continued to suffer severe and significant leg pain even after the graft was performed.

Appellants subsequently filed a complaint in the Fayette Circuit Court alleging the Hospital was "grossly negligent in failing to ascertain . . . pulses were not present (in Irene's leg) after the catheterization procedure . . . and for falsely noting in the medical records that said pulses were present." Irene's husband, Keith, claimed loss of consortium.

Following a four-day jury trial, a verdict was returned in favor of the hospital and judgment was entered thereafter on July 2, 2003, dismissing appellants' complaint. This appeal follows.

Appellants contend the jury instructions did not adequately identify the duty of care owed by the Hospital. The jury was instructed, pursuant to the instruction submitted by the Hospital, as follows:

It was the duty of Defendant, Baptist Healthcare System, Inc.[,] d/b/a Central Baptist Hospital, acting by a[nd] through its nurse employees, to use that degree of care and skill ordinarily expected of [a] reasonably competent nurse under the same or similar circumstances as described in the evidence of this case.

Appellants submitted the following jury instruction, which was not given to the jury:

The Court instructs they jury, having heard the arguments and testimonies of all the Parties and their witnesses, that upon the occasion that is the subject of this trial, it was the duty of Defendant CENTRAL BAPTIST HOSPITAL and its employees to operate their facility exercising that standard of care required of such facilities for the safety of its patients, said duty to include the following specific duties:

- (1) To operate the facility in a careful manner with due regard and diligence regarding the safety and health of its patients;
- (2) To keep and maintain a proper observation of its patients by properly trained personnel;
- (3) To obey and follow all the facility's policies and procedures;
- (4) To give proper and just attention to complaints, comments and observations made by the patients and to make appropriate records;
- (5) To report to the necessary person or persons significant problems or complaints;
- (6) To properly staff the facility; and
- (7) To ensure that its personnel performed all of their duties as required by law, the facility's own policies and procedures, and according to the applicable standard of care for such personnel.

From the evidence presented, does the jury believe that Defendant BAPTIST HOSPITAL failed to fulfill any one or more of the duties imposed upon them by Instruction No. 1 and that such failures on their part was a substantial factor in causing the Plaintiff's injuries?

In the case of Hamby v. University of Kentucky Medical Center, 844 S.W.2d 431 (Ky.App. 1992), this Court articulated the general rule regarding jury instructions in medical malpractice cases:

We disagree that the specific enumerated duties should have been included in any instruction. Although statutory duties have been used to enumerate specific duties in certain types of automobile accident cases, we have traditionally excluded them in medical malpractice cases. (footnote omitted).

We find in Rogers v. Kasdan, Ky., 612 S.W.2d 133, 136 (1981):

The general rule for the content of jury instructions on negligence is that they should be couched in terms of duty. They should not contain an abundance of detail, but should provide only the bare bones of the question for jury determination. This skeleton may then be fleshed out by counsel on closing argument.

Rogers was a medical malpractice case wherein Rogers sought to have specific duties included in the jury instructions.

The court ruled:

Whether the hospital hired knowledgeable nurses, or had proper supervision for staff physicians, or accurate record keeping, and so forth, were all evidently questions for the jury to consider. While they constituted criteria that the jury

might use to decide the question of ordinary care, listing them in this manner was not necessary to pose the issue of the hospital's duty.

In addition, the instructions should not make a rigid list of ways in which a defendant must act in order to meet his duty.

Hamby, 844 S.W.2d at 433-434 (citation omitted).

In Humana of Kentucky, Inc. v. McKee, 834 S.W.2d 711 (Ky.App. 1992), this Court carved out an exception to the general rule for jury instructions in medical malpractice cases. In Humana, we affirmed the circuit court's instruction that contained a specific statutory duty of a hospital to administer phenylketonuria tests to newborn babies as required by KRS 214.155. The instruction was allowed because KRS 214.155 imposed a statutory duty upon the hospital; the duty was supported by expert testimony and the failure to perform the test was clearly a substantial factor in causing the injury. Id.; see also Hamby, 844 S.W.2d 431.

Contrary to appellants' assertion, the case sub judice is clearly distinguishable from Humana. The exception created in Humana is applicable when a duty is specifically created by statute or regulation and the breach of that duty would result in liability. In this case, the instruction tendered by appellants did not set forth a duty created by statute or regulation. Rather, appellants' tendered instruction attempted

to impose duties upon the hospital and its nurses that the law does not require. Appellants' assertion that KRS 314.011(4) creates a statutory duty upon the hospital or its nurses is misplaced. KRS 314.011(4) does not establish a duty, the breach of which would result in liability for the hospital. Essentially, the instruction tendered by appellants would have demanded more of the hospital than the law requires. See Humana, 834 S.W.2d 711. In sum we conclude, the instruction given to the jury complies with well-established Kentucky law, which only requires the instruction to be couched in terms of general duty.

Appellants' next contend the trial court erred by not allowing a jury instruction on punitive damages. Appellants specifically contend they were entitled to an instruction on punitive damages based upon the actions of a Hospital nurse. The Hospital contends appellants were not entitled to such an instruction.

The jury found the Hospital did not breach its duty of care, and as such, the jury never reached the issue of damages. Thus, any alleged error on the part of the trial court for failing to instruct the jury on punitive damages would be harmless error. Ky. R. Civ. P. 61.01.

For the forgoing reasons, the judgment of the Fayette
Circuit Court is affirmed.

ALL CONCUR.

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