

RENDERED: MARCH 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000551-MR

BONNIE PACK, ADMINISTRATRIX
FOR THE ESTATE OF JAMES PACK

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 02-CI-002802

CARROLL L. WITTEN, JR., M.D.;
WITTEN, SHERMAN & CATALANO, PLLC

APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Bonnie Pack appeals from a January 6, 2004,
judgment of the Jefferson Circuit Court. Following a jury
verdict in favor of the appellees, Dr. Carroll Witten, Jr., and
Witten, Sherman & Catalano, PLLC, the court dismissed her claim

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

of medical malpractice. On appeal, Bonnie contends that the trial court erred in failing to direct a verdict in her favor on the issue of Dr. Witten's alleged negligence. After our review of the record, we agree in part. Therefore, we affirm in part, vacate in part, and remand.

Bonnie Pack filed this action for medical negligence in her capacity as administratrix of the estate of James Pack, her deceased husband. James underwent hip replacement surgery on July 25, 2001. Dr. Witten, an orthopedic surgeon, performed the surgery and was assisted by his partner, Dr. Joseph Catalano. At the conclusion of the surgery while Pack was still anesthetized, Dr. Witten slipped in water in the operating room while holding Pack's leg, jerking the leg so severely as to dislocate the hip that had just been replaced. That dislocation was discovered in the recovery room. Both doctors returned to surgery and performed a closed reduction procedure, restoring the hip to its proper placement.

Pack continued to experience severe pain. His hip became dislocated again sometime after his release from the hospital on July 29, 2001. At his first post-operative appointment on August 13, 2001, Dr. Witten discovered the second dislocation and on that same day performed a second surgery -- an open reduction procedure. Prior to his release from the hospital after the second hip surgery, Pack's hip again became

dislocated. Dr. Catalano performed a third surgery on August 19, using a larger ball and stem. Pack's hip remained stable after this surgery.

On November 30, 2001, Pack was given a prescription for methadone by a doctor at a pain clinic. After filling the prescription and taking an unknown number of pills, Pack died later that evening.

On April 16, 2002, Bonnie filed a lawsuit against Dr. Witten and his medical practice. She alleged that Dr. Witten was negligent in caring for her husband; that he caused Pack to suffer great pain and anguish and to sustain severe injuries; and that he had destroyed Pack's ability to labor and earn money. The matter was tried before a jury in December 2003.

In addition to the damages that Pack sustained as a result of his three hip surgeries, Bonnie sought to link her husband's death to Dr. Witten's care. She argued that Dr. Witten's treatment set in motion a series of disastrous events that culminated in Pack's death. Among the problems allegedly triggered by the treatment was Pack's recourse to strong pain medicine to cope with the pain associated with multiple surgeries. Bonnie presented expert testimony that Pack had died from the synergistic effect of the methadone, a narcotic, and xanax, a tranquilizer, both of which were prescribed for Pack by doctors other than Dr. Witten.

Dr. Witten's experts disagreed that Pack died from a toxic mix of drugs and instead presented testimony that Pack died as a result of a congenital heart condition. Dr. Witten also presented evidence that Pack had been using narcotic pain medication for many years prior to his involvement in Pack's medical treatment.

At the conclusion of the trial, the jury returned a verdict in favor of Dr. Witten and his medical practice. Bonnie's motion for a judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial was denied on February 18, 2004.

In this appeal, Bonnie argues that she was entitled to a directed verdict on the issue of Dr. Witten's deviation from the proper standard of care. Specifically, she contends that Dr. Witten admitted to slipping in the operating room, thus causing the first dislocation of the hip. She also observes that the doctor admitted that he was negligent in performing two of the three hip surgeries, resulting in two additional open reductions. She argues that she is entitled to a new trial limited to the issues of causation and damages.

Bonnie points to Dr. Witten's admission that he slipped in the operating room while holding Pack's leg, an accident that resulted in Pack's first hip dislocation. She also highlights his testimony explaining the three primary

causes for hip dislocation following replacement surgery:
erroneous sizing of the prosthesis; improper positioning of the
prosthesis; and patient non-compliance.

Dr. Witten called Dr. Martin McTighe as his expert witness. Dr. McTighe testified that 80% of hip dislocations are related to improper sizing or positioning of the prosthesis. Dr. Witten and his expert acknowledged that they were unaware of any noncompliance on Pack's part. They also testified that the size and placement of the prosthesis were matters solely within Dr. Witten's control. Thus, Bonnie contends she was entitled to a directed verdict of negligence based on the doctor's admissions.

A motion for a directed verdict may not be granted:

unless there is a complete absence of proof
on a material issue or if no disputed issues
of fact exist upon which reasonable minds
could differ.

Bierman v. Klapheke, 967 S.W.2d 16, 18-19 (Ky. 1998). This court's function in determining whether a trial court erred in failing to grant a motion for a directed verdict is carefully defined and narrowly circumscribed:

Upon review of the evidence supporting a judgment entered upon a jury verdict, the role of an appellate court is limited to determining whether the trial court erred in failing to grant the motion for directed verdict. *All evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to*

determine credibility or the weight which should be given to the evidence, these being functions reserved to the trier of fact. [Citations omitted.] The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence. Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'" [Citation omitted.] If the reviewing court concludes that such is the case, it is at liberty to reverse the judgment on the grounds that the trial court erred in failing to sustain the motion for directed verdict. Otherwise, the judgment must be affirmed. (Emphasis in original.)

Humana of Kentucky, Inc. v. McKee, 834 S.W.2d 711, 718 (Ky.App. 1992) (quoting Lewis v. Bledsoe Surface Mining Co., 798 S.W.2d 459, 461-62 (Ky. 1990). After reviewing all of the evidence presented at trial and utilizing the required standard of review, we conclude that the trial court erred as a matter of law in failing to direct a verdict as to the initial negligent act of Dr. Witten in jerking Pack's leg in the operating room. However, we are unable to conclude as a matter of law that the trial court erred in refusing to direct a verdict on the remaining claims of medical negligence.

Proof relating to the standard of care was presented by both parties. Bonnie's expert, Dr. Alice Martinson, an orthopedic surgeon, believed that Dr. Witten deviated from the standard of care by failing to modify his post-operative regimen

in light of the dislocation that occurred immediately after surgery. She also criticized his failure to order a brace to prevent extension and external rotation of the hip. It was her opinion that if the initial complication had been managed appropriately, the second and third surgeries would not have been necessary. Dr. Martinson did not believe that Dr. Witten's slip in the operating room constituted a deviation from the standard of care; nor did she criticize the doctor's choice of the size or positioning of the prosthesis.

Dr. Witten presented two orthopedic surgeons as his expert witnesses. Dr. Catalano and Dr. McTighe both testified that Dr. Witten did not deviate from the standard of care in any manner in his treatment of Pack. The opinions of both sets of experts conflicted with one another.

Bonnie argues that Dr. Witten's testimony as to the slip in the operating room constituted a binding admission of negligence. In order to become a judicial admission, a party's trial testimony must be "deliberate and unequivocal and unexplained or uncontradicted." Bell v. Harmon, 284 S.W.2d 812, 815 (Ky. 1955). In Hamby v. University of Kentucky Medical Center, 844 S.W.2d 431, 436-437 (Ky.App. 1993), this court held that the conclusiveness of a judicial admission should be determined "in light of all the conditions and circumstances proven in the case."

Dr. Witten unequivocally admitted to slipping in the operating room. Although the slip was not attributable to his own negligence, he nonetheless could not avoid the fall due to the presence of liquid on the floor. It is undisputed that he was holding Pack's leg at the time of the fall and that the hip became dislocated as a direct result of his pulling on the leg. Pack remained anesthetized and could not have contributed in any manner to the injury. The closed reduction procedure that followed was necessary in order to correct this displacement.

However, beyond this point, we do not agree that Dr. Witten's testimony constituted any further admission of negligence. Dr. Witten testified concerning three possible causes of hip dislocation: improper sizing, erroneous placement of the prosthesis, and patient noncompliance. He did not suggest that he had been negligent in selecting the size of Pack's new hip or in acting to position it. Instead, Dr. Witten testified in some detail as to the care he took in deciding upon the size and placement of the prosthesis both before and during Pack's hip replacement surgeries. Dr. McTighe concurred that Dr. Witten did not deviate from the standard of care in choosing the size and placement of Pack's new hip. Reasonable minds could have differed as to whether Dr. Witten was negligent in selecting the size and placement of the prosthesis, and the issue was properly one for the jury.

We cannot speculate as to whether the act of jerking the leg ultimately caused Pack's death. Many other possible causes were presented into evidence at trial. However, three surgical procedures -- one closed reduction and two open reductions -- were required following the operating room accident. These procedures resulted in significant pain for Pack. While reasonable minds could disagree concerning Dr. Witten's selection and positioning of the prosthesis implanted, the jury should have been instructed that the doctor was negligent as a matter of law with respect to the initial accident of the jerking of his patient's leg in the operating room. Because we are unable to determine the possible impact on the jury caused by the trial court's failure to direct a verdict on this issue, the entire verdict is tainted.

Therefore, the judgment of the Jefferson Circuit Court is vacated, and this matter is remanded for a new trial consistent with this opinion.

ALL CONCUR.

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