

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000105-MR

ANN MCGINNIS

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE ROBERT B. OVERSTREET, SPECIAL JUDGE
ACTION NO. 04-CI-00390

CHRISTOPHER J. THEUER, M.D.
AND SURGICAL ASSOCIATES, P.S.C.

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Ann McGinnis appeals from a December 12, 2005, judgment of the Shelby Circuit Court following a jury verdict in favor of Christopher J. Theuer, M.D. We affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On July 15, 2003, Dr. Theuer performed a laparoscopic cholecystectomy or gallbladder surgery upon McGinnis. It is undisputed that the surgery was necessary and medically indicated. Within a few days of McGinnis's surgery, she presented to Jewish Hospital in Shelbyville complaining of abdominal pain. McGinnis was subsequently transferred to Jewish Hospital in Louisville (Jewish Hospital). While at Jewish Hospital, Dr. Whitney F. Jones performed an endoscopic retrograde cholangiopancreatography on McGinnis. Dr. Jones determined that a surgical clip had been placed on McGinnis's common hepatic duct and that the clip was preventing McGinnis's liver bile from draining into her small intestine. It is undisputed that Dr. Theuer inadvertently placed the clip on McGinnis's common hepatic duct during surgery to remove her gallbladder. Dr. Jones referred McGinnis to Dr. Mariano S. Dy-Liacco for treatment. Dr. Dy-Liacco surgically removed the clip and reconnected McGinnis's hepatic duct to her small intestine.

On July 15, 2004, McGinnis initiated this medical malpractice action by filing a complaint in the Shelby Circuit Court. Therein, McGinnis alleged that Dr. Theuer negligently performed surgery to remove her gallbladder. McGinnis retained Dr. Christopher Daly to present expert testimony at trial. Dr. Theuer offered expert testimony on his own behalf and also retained Dr. John Kelly Wright, Jr. Dr. Jones and Dr. Dy-Liacco also testified as McGinnis's treating physicians.

Dr. Daly and Dr. Theuer testified as to the procedure of a routine laparoscopic gallbladder surgery and both showed a video of such a procedure to the jury.

According to the testimony presented, the surgery is initiated by filling the abdomen with gas and inserting the necessary camera and surgical equipment. Any visible tissue or adhesions are then cleared from the surgical site. The patient's liver is lifted to expose the gallbladder. The gallbladder is also lifted and any tissue or adhesions covering the cystic duct and cystic artery are dissected. The cystic duct and cystic artery are both cut in order to remove the gallbladder. Surgical clips are placed on the cystic duct and cystic artery to stop the flow of bile and blood into the gallbladder. Three clips are typically placed on the cystic artery. Two clips are placed above where the cystic duct is cut to ensure an unobstructed view of the surgical site in the event one clip becomes dislodged. A third clip is placed at the end of the duct nearest the gallbladder. Three clips are similarly placed on the cystic artery. The gallbladder is then removed.

According to Dr. Theuer's testimony at trial, McGinnis had an unusually large cystic vein draining her gallbladder. Dr. Theuer testified that he clipped and cut the cystic vein, rather than cauterize it, because of its large size. Dr. Theuer believes he inadvertently clipped McGinnis's common hepatic duct when he clipped the cystic vein.

The matter was ultimately submitted to the jury and the jury found that Dr. Theuer's treatment did not fall below the acceptable standard of care. Consequently, the trial court entered judgment dismissing the claims against Dr. Theuer and Surgical Associates P.S.C. This appeal follows.

McGinnis contends the trial court erred by granting Dr. Theuer's motion to limit the scope of McGinnis's closing argument. Dr. Theuer made a motion to prohibit

McGinnis from arguing to the jury that placement of two clips in an unidentified location somewhere above the hepatic duct was evidence of negligence. It is undisputed that the cause of McGinnis's injury was the placement of a third clip by Dr. Theuer upon McGinnis's common hepatic duct. McGinnis agrees that her injury resulted from the third clip being placed on her hepatic duct, but asserts that the other two clips placed in the unidentifiable location are also evidence that Dr. Theuer acted negligently in performing the surgery. The trial court granted Dr. Theuer's motion to limit the testimony and in so doing emphasized that no expert testified that these two clips were causally related to McGinnis's injury.

It is well-established that counsel is permitted great latitude in its closing argument. *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675 (Ky.App. 2000). Counsel may not, however, argue facts in closing that have not been admitted into evidence or cannot be reasonably inferred from the evidence. *Garrett v. Commonwealth*, 48 S.W.3d 6 (Ky. 2001).

In the case *sub judice*, McGinnis wanted to argue in closing that the two clips placed in the unidentifiable location were evidence that Dr. Theuer was negligent. However, not one expert testified as such. McGinnis's own expert witness, Dr. Daly, testified that the two clips were not related to the clip placed on McGinnis's hepatic duct that caused her injury. As such, we cannot say that the trial court abused its discretion by granting Dr. Theuer's motion to limit McGinnis from arguing that the two clips were

evidence that Dr. Theuer acted negligently by breaching the standard of care required of Dr. Theuer in performing the surgery.

McGinnis next asserts that the trial court erred by refusing to answer two questions submitted by the jury during deliberation. During its deliberation, the jury forwarded a note to the court containing the following two questions:

[1.] If the jury finds for Mrs. McGinnis will the doctor lose[sic] his license to operate?

[2.] Does her [McGinnis's] insurance cover any, if so how much of these costs? How much out of pocket expenses were incurred?

The Court informed the jury it was “unable to comment on either of these questions.” As the discussion between counsel and the court was not recorded, it is unclear whether McGinnis contemporaneously objected to the court's refusal to answer these questions. After the jury returned its verdict in favor of Dr. Theuer, McGinnis objected on the record to the Court's refusal to answer the questions submitted by the jury.

Generally, the decision whether to answer questions posed by the jury rests within the sound discretion of the trial court. 89 C.J.S. *Trial* § 810 (2001). Absent an abuse of that discretion, the trial court's decision will not be disturbed on appeal. *Id.*

In this case, the jury requested “facts” that were not put into evidence during trial. Indeed, information concerning insurance coverage is clearly inappropriate for the jury to consider in reaching a verdict. Also, whether Dr. Theuer would retain his medical license was irrelevant to the issue of his negligence. Accordingly, we conclude

the circuit court did not abuse its discretion by refusing to answer the questions submitted by the jury during deliberation.

McGinnis next argues that the trial court erred by failing to admit McGinnis's certified hospital records into evidence at trial. Specifically, McGinnis argues that:

The Court denied [McGinnis's] request to have the certified records admitted into evidence. The tendered Order and certified hospital records remained with Judge Overstreet for inclusion in the Court's record for the case. However, they were not included in the Shelby Circuit Court record certified by the Clerk on this appeal. [McGinnis] does not know what happened to the original documents that were provided to the Court. . . .

[McGinnis] did preserve this issue on the record by a formal objection during the trial. The Trial Court ruled that the only medical records that would be admissible were those that were sought to be introduced by a witness testifying in court with personal knowledge of the information contained on the page of the hospital record sought to be introduced. . . .

McGinnis's Brief at 24.

Ky. R. Evid. (KRE) 103 identifies the proper procedure for preserving claims of error for exclusion of evidence. KRE 103 states, in relevant part:

- (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

. . . .

- (2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.

It is well-established that KRE 103 requires allegations of error regarding excluded evidence to be preserved by requesting the court to enter the evidence into the record by avowal or by counsel offering a proffer of the evidence. *Hart v. Commonwealth*, 116 S.W.3d 481 (Ky. 2003).² “Without an avowal, or a crystal ball,” a reviewing court has no mechanism for reviewing the evidence submitted to determine whether exclusion was prejudicial. *Id.* at 484 (quoting *Commonwealth v. Ferrrell*, 17 S.W.3d 520, 525 (Ky. 2000)).

In this case, McGinnis did not request that the medical records be placed in the record by avowal or by proffer. As such, the issue concerning the evidence was not preserved for our review. *See Hart*, 116 S.W.3d 481.

McGinnis finally contends the court erred by failing to instruct the jury on the increased risk of future harm. Specifically, McGinnis asserts that she was entitled to have the jury instructed as to the increased risk of future harm from surgery to reconnect her common hepatic duct.

As we have affirmed the jury's verdict finding that Dr. Theuer was not negligent in his treatment of McGinnis, we believe this contention is likewise without merit. We interpret *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984)³ and *Capital Holding*

² Although Ky. R. Evid. 103 is “couched in terms of preserving oral testimony” it applies equally to introduction of real evidence. *Hart v. Commonwealth*, 116 S.W.3d 481 (Ky. 2003)(quoting *Garrett v. Commonwealth*, 48 S.W.3d 6, 15 (Ky. 2001)).

³ *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984) was overruled on other grounds by *Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 493-95 (Ky. 2002). *Sand Hill* was subsequently vacated by *Ford Motor Co. v. Estate of Smith*, 538 U.S. 1028 (2003).

Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994) as requiring plaintiff to have suffered a present injury caused by defendant's negligence in order to support a claim for increased risk of future harm. As the jury determined that McGinnis suffered no present injury caused by Dr. Theuer's negligence, and we have affirmed the verdict, we view this contention to be without merit.

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

WINE, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION. I fully concur with the majority opinion dealing with the appellant's claims of error regarding the jury instructions, the questions submitted by the jury, and the trial court's decision not to allow the introduction of the medical records. I respectfully dissent, however, regarding the trial court's ruling limiting the scope of counsel's closing argument. The expert witness for appellees, Dr. John Kelly Wright, testified that in determining whether a physician had breached the standard of care, he looked for evidence that the physician was "out of control." He also gave examples of things that would tend to indicate that a physician was out of control. There is no legal basis for a requirement that, in order to be found negligent, a physician must be shown to be out of control. It was Dr. Theuer's own expert who interjected the "out of control" issue into this case. Appellant's counsel should have been permitted to discuss this evidence and argue any reasonable inferences that could be drawn therefrom.

“Great latitude must be allowed counsel in presenting an argument to the jury.” *Jones v. City of Bowling Green*, 354 S.W.2d 749, 751 (Ky. 1962). I believe the trial court abused its discretion when it limited the scope of counsel's closing under these circumstances. I would reverse and remand for a new trial.

**BRIEFS AND ORAL ARGUMENT
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