RENDERED: SEPTEMBER 28, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

SUPREME COURT ORDERED NOT PUBLISHED: MAY 13, 2009
(FILE NO. 2007-SC-000776-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001241-MR
AND
NO. 2006-CA-001501-MR

KENNETH W. DAWSON AND
ANN E. DAWSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 03-CI-007861

JEWISH HOSPITAL HEALTHCARE SERVICES, INC.,
D/B/A JEWISH HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Kenneth W. Dawson and his wife, Ann E. Dawson, filed this action against Jewish Hospital Healthcare Services, Inc. d/b/a Jewish Hospital, after he

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

alleged negligent post-surgery care by the hospital's nursing staff. A jury returned a verdict in favor of Jewish Hospital and this appeal followed. The Dawsons contend that the trial court: (1) erroneously excluded relevant and competent evidence concerning Mr. Dawson's bedsores;[2] (2) denied the Dawsons' counsel an adequate opportunity to voir dire the jury; and (3) failed to tender a loss-of-chance instruction to the jury. The Dawsons also appeal from a post-verdict order requiring them to pay Jewish Hospital's expert witness fees. The appeals were consolidated. Finding no reversible error, we affirm.

Before reciting the pertinent evidence presented at trial, we note and agree with Jewish Hospital's objection to references in the Dawsons' appellate brief to depositions not introduced into evidence at the trial. As a result, we have not considered such information in reaching our decision. *See Lucas v. Luca*s, 720 S.W.2d 352 (Ky.App. 1986).

On July 20, 2000, Mr. Dawson experienced pain in his side. He went to Tri-County Baptist Hospital where a CT scan was performed which revealed a 6cm aortic aneurysm in his chest. Mr. Dawson was referred to Dr. Matthew Jung who reviewed the CT films and recommended surgery. He discussed with Mr. Dawson the potential complications from the surgery including paraplegia (paralysis) and death.

Despite Dr. Jung's recommendation, Mr. Dawson elected to forego the surgery. He was then referred to an internist, Dr. Rick Lawson, who confirmed the need for surgery, yet, Mr. Dawson declined because he wanted to wait until April 2001 when he turned 65 so that he would be eligible for Medicare.

---

[2] The parties use the terms bedsores and pressure ulcers interchangeably.

Twenty-one months after his initial diagnosis, Mr. Dawson again saw Dr. Lawson but refused a CT scan. Two days after seeing Dr. Lawson, Mr. Dawson's pain became so severe that he returned to Tri-County Hospital. While on the gurney, the aneurysm, which was by then 7.5cm, ruptured. He survived the rupture but was still in need of surgery. After he again refused, he was admitted to the hospital as a terminal patient.

Mr. Dawson remained in the hospital for one month and then returned home. In the summer of 2002, he had another CT scan which revealed that the aneurysm had enlarged. Although the surgery was complicated by the rupture, the surgeon, Dr. Brian Ganzel, believed the aneurysm could be repaired. Dr. Ganzel testified that he fully apprised Mr. Dawson of the risks of the surgery. He drew a picture detailing the aneurysm and which illustrated the possible risks. His notes reflect that he informed Mr. Dawson that the surgery carried a 20-25% chance of paralysis and a 10-15% chance of death. He explained that the risk of paralysis existed from the time of the surgery until Mr. Dawson was released from the hospital. Mr. Dawson admits that he was informed of the risks of the surgery although he recalled that Dr. Ganzel told him that there was a 10-25% chance of paraplegia and a 3-5% chance of death. Aware of the risk, Mr. Dawson elected to have the surgery. He was admitted to Jewish Hospital where Dr. Bouvette, the hospital anesthesiologist, also reviewed the risks of the surgery with Mr. Dawson.

On September 9, 2002, Mr. Dawson underwent a repair of the aneurysm. Although immediately following the surgery Mr. Dawson was able to move his legs, he suffered kidney failure which was addressed with dialysis and, on September 17, 2002, he required a second surgery to repair a “lymph leak.”

On the afternoon of September 18, 2002, Mr. Dawson underwent dialysis at his bedside in the Intensive Care Unit. The attending nurse's notes reflect that at 4:00 p.m. that day, Mr. Dawson had full movement of his arms and legs and, in accordance with hospital policy, was due for another neurological check four hours later. However, between 4:30 and 5:00 p.m., Mr. Dawson's ICU records reveal that he had a significant drop in blood pressure. Although vital signs were to be recorded every two hours, at 6:00 p.m., the flow sheet does not indicate any recorded vital signs for Mr. Dawson. However, shortly after 6:00 p.m., a nursing assistant drew blood for a glucose test and Mr. Dawson did not indicate that he had any problems. His blood pressure was continuously monitored at the nursing station.

At approximately 7:00 p.m., Nurse Deborah Clark came on duty and was assigned to Mr. Dawson. At approximately 8:00 p.m., in the course of assessing Mr. Dawson, she found that he was not responding to her requests that he move his legs or to reflex reactions on his feet. She then called her supervisor, Theresa Hagan, to examine Mr. Dawson. After she could not elicit a response, Nurse Hagan notified Dr. Ganzel's on-call Fellow, Dr. Minoo Kavarana. Dr. Kavarana directed Dr. Ganzel's resident, Dr. Lanny Gore, to examine Mr. Dawson. After Dr. Gore's examination, Dr. Ganzel called Dr. Bouvette and asked him to place a lumbar drain in Mr. Dawson. Dr. Bouvette had the drain in place by 10:40 p.m. but it did not reverse the paralysis.

At trial, the Dawsons presented the testimony of Dr. Lansing Cowles and a nursing expert, Valerie Batezel, who testified that the nursing staff's conduct fell below the standard of care. Dr. Cowles testified that if Mr. Dawson's condition had been detected while his paralysis was progressing, it was 100 percent reversible.

Dr. Ganzel testified that even if the paralysis had been treated earlier, there was no chance of a reversal and success would be "highly unusual." Dr. Bouvette also testified that the "late onset of paralysis has been known and accepted as a complication well into the second week following surgery." He further stated that "there is usually nothing you can do for it. It's almost impossible to treat it, and have a good result, once its occurred." Of the five other patients Dr. Bouvette has seen paralyzed from a similar surgery, not one has recovered from the paralysis. Dr. Luis Mispereta testified that although there have been a "few anecdotal reports" of reversal of paralysis caused by "compartment syndrome," there has not been one instance when paralysis caused by a blood clot such as in Mr. Dawson's case has been reversed. Jewish Hospital also produced the testimony of Dr. Henry Garreston, a neurosurgeon, who testified that once Mr. Dawson was paralyzed, it was irreversible.

Other facts will be developed as relevant to the issues discussed.

THE TRIAL COURT'S DENIAL OF ANY EVIDENCE RELATING TO MR. DAWSON'S BEDSORES

The Dawsons' complaint alleged negligence as a result of which Mr. Dawson was paralyzed. On December 31, 2003, the Dawsons answered Jewish Hospital's first interrogatories and requests for production of documents. In response to

Jewish Hospital's request that the Dawsons detail the nature of Mr. Dawson's injury, they stated:

> Plaintiff believes that due to the failure of Jewish Hospital in maintaining constant monitoring of Plaintiff, Plaintiff experienced an "ischemic spinal injury" on September 18, 2002, during or immediately after dialysis, resulting in permanent paralysis.

At no time in their answers did the Dawsons mention bedsores. The existence of the bedsores, however, was referred to in their depositions.

On August 1, 2005, Jewish Hospital moved for a trial date, and the court entered a pretrial order requiring that the Dawsons furnish CR 26.02 information by September 2, 2005, and scheduling a trial to be held on January 10, 2006. The pretrial order clearly stated:

> There must be a literal compliance with the requirements of CR 26.02(4)(a)(i). A party must identify each person whom the party expects to call as an expert witness at trial, and state the substance of the fact and opinions to which the expert is expected to testify and a summary of the grounds of each opinion. Failure to comply with the letter and spirit of the aforesaid civil rule may result in the suppression of the expert's testimony. (Emphasis in the original).

Despite the direct order of the court, outside the disclosure deadline, on December 5, 2005, the Dawsons attempted to supplement their expert disclosures to include expert opinions from Dr. Cowles and Nurse Batezel concerning bedsores and itemized medical expenses which included 53 providers different from those previously disclosed.

Claiming that the CR 26.02 disclosure was untimely and that it subjected it to unfair surprise, Jewish Hospital moved for a pretrial order excluding any evidence regarding bedsores, any evidence regarding the alleged breach of the standard of care as it related to bedsores, and any evidence regarding damages that related to bedsores.

Because of the volume of pending evidentiary motions, the trial court determined that it could not rule on the motions prior to the January trial, and as a result, *sua sponte* rescheduled the trial from January to April and instructed the parties that discovery was closed. On December 20, 2005, the trial court sustained Jewish Hospital's motion to exclude any reference during the trial to bedsores.

We review a trial court's decision to admit or to exclude evidence for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). A trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id*. at 581. In this case, we cannot conclude that the denial of the evidence concerning bedsores constituted reversible error.

The purpose of our discovery rules is to: simplify and clarify the issues in the case; eliminate or significantly reduce the element of surprise; achieve a balanced search for the truth; and encourage the settlement of cases. *Clephas v. Garlock, Inc.,* 168 S.W.3d 389, 393 (Ky.App. 2004). The discovery of the substance of an expert witness's anticipated testimony is crucial to trial preparation. *Id*. at 394. This is particularly true in medical malpractice cases where the cause of the injury is often complex and subject to differing expert opinions. *See Baptist Health Care Systems, Inc. v. Miller*, 177 S.W.3d 676, 679 (Ky. 2005) (the general rule in medical malpractice cases is that a medical expert is required to show that the defendant failed to conform to the required standard of care).

Only three weeks prior to the original trial date and months after the time for discovery ordered by the trial court had passed, the Dawsons attempted to insert an entirely new theory of liability into the case by expanding the testimony of their two

experts as to the cause of Mr. Dawson's bedsores. Although throughout the Dawsons' depositions there were references to Mr. Dawson's bedsores, there was no suggestion or testimony that the bedsores were caused by the negligence of the Jewish Hospital staff. Unaware during the discovery process that the Dawsons alleged that the bedsores were the result of the Jewish Hospital staff's negligence rather than a consequence of Mr. Dawson's paralysis, Jewish Hospital was denied the opportunity to prepare for and defend against this new theory. The trial court, therefore, did not abuse its discretion when it excluded all evidence offered to establish that the bedsores were the result of Jewish Hospital's negligence.

The Dawsons argue that, at the very least, medical testimony regarding the existence of Mr. Dawson's bedsores was admissible for the purpose of the assessment of damages naturally flowing from his paralysis. Even if the Dawsons' assertion is correct, the jury unanimously agreed that Jewish Hospital was not liable for Mr. Dawson's paralysis. Thus, if the bedsores were a natural consequence of the paralysis, Jewish Hospital cannot be liable for any damages incurred as a result of the bedsores; any error, therefore, was not prejudicial. *American States Insurance Co. v. Audubon Country Club*, 650 S.W.2d 252, 254 (Ky. 1983).

THE DENIAL OF APPELLANTS' REQUEST TO CONDUCT REBUTALL VOIR DIRE

The Dawsons contend that they are entitled to a new trial because the trial court refused to allow them to reopen voir dire after Jewish Hospital had finished questioning the jury. The court permitted each party's counsel to question the jury and, at the close of Jewish Hospital's voir dire, counsel asked, without objection, two questions:

> Defense Counsel: Does anybody here think lawsuits are driving up the costs of health care?
> Defense Counsel: Does anyone here think that Kentucky is losing doctors as result of lawsuits?

The Dawsons contend that "approximately 50% of the jury panel raised their hands." After Jewish Hospital's counsel sat down, their counsel's request to re-voir dire the jury panel was denied. Thus, they surmise, they "were left with a panel, 50% of which clearly indicated that they personally felt that the Dawsons' lawsuit would drive-up their health care costs and result in physicians leaving the state."

It is established that the trial court has discretion in extending or limiting voir dire examination of prospective jurors. *Davies v. Griffin*, 470 S.W.2d 323 (Ky. 1971). Equally embedded in our law is that any challenge to a juror must be made before the jury is seated and, consequently, is waived by the failure to object only after a verdict is rendered. "The trial lawyer has a specific procedure to follow when he believes a juror is biased." *Pelfrey v. Commonwealth*, 842 S.W.2d 524, 526 (Ky. 1992).

The Dawsons did not object to a single voir dire question; did not challenge a juror for cause on the basis of bias, and, when asked if they accepted the jury, their counsel responded affirmatively. Any contention that the trial court abused its discretion when it denied the Dawsons the opportunity to have the last word in the jury selection process was waived.

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY REGARDING LOSS-OF-CHANCE

On the date this opinion is written, *Gordon v. Kemper*, 2002-CA-001983-MR, remains under discretionary review with the Supreme Court. In that case, this court adopted the "loss-of-chance" doctrine in medical malpractice cases. Realizing that the

Gordon case was pending at the time of trial, the Dawsons' counsel astutely tendered an instruction in conformity with *Gordon.* The trial court rejected the instruction and instructed on the all-or-nothing approach traditionally accepted in this Commonwealth as the appropriate instruction in medical malpractice cases. Although we could delay this case pending the Supreme Court's decision, we find that even if the Supreme Court recognizes loss-of-chance as a separate compensable injury, the evidence in this case did not warrant the instruction and, therefore, a delay would be futile.

The loss-of-chance doctrine has been adopted in other jurisdictions in response to the "all-or-nothing rule." *See e.g. Thompson v. Sun City Community Hospital*, *Inc*., 141 Ariz. 597, 688 P.2d 605 (Ariz. 1984); *Sharp v. Kaiser Foundation Health Plan*, 710 P.2d 1153 (Colo.App. 1985); *Lord v. Lovett*, 146 N.H. 232, 770 A.2d 1103 (N.H. 2001). Under the all-or-nothing rule, the plaintiff in a medical malpractice case must prove within a reasonable probability that the defendant's breach of the standard of care was a substantial factor in causing the underlying injury. *Walden v. Jones*, 439 S.W.2d 571 (Ky. 1968). In contrast, the loss-of-chance doctrine views the compensable injury as the last chance to recover or survive the underlying injury. However, under the loss-of-chance doctrine, the plaintiff must still prove that the defendant breached the applicable standard of care and the breach was a substantial factor in causing a diminished chance of recovery or survival from the underlying disease or injury. In *Gordon*, this court summarized its holding as follows:

> Accordingly, we now hold that lost chance of recovery/survival should be recognized as a legally compensable injury in medical malpractice cases where the chance of recovery/survival is 50 percent or less before the negligent act or omission. In cases where the chance of recovery/survival was greater than 50 percent, the traditional

all-or-nothing approach would apply and the compensable injury would still be viewed as the underlying injury.

In this case, the Dawsons' expert, Dr. Cowles, stated that with earlier medical intervention, there was a 100% chance of recovery. In complete contrast, all of the other medical testimony was that reversal of Mr. Dawson's paralysis would be "highly unusual", that it was "irreversible", and that to the experts' knowledge in such cases, reversal had never occurred. Although we recognize that there are proponents of the theory that "anything is possible," such speculation cannot serve as an evidentiary foundation in our legal system. "Chance" as used in the context of the loss-of-chance doctrine requires a cognizable statistical probability of recovery or survival. Here, there was no testimony of such a probability. According to Dr. Cowles it was greater than 50 percent and the remainder of the expert opinions were that statistically, the chance of reversal of Mr. Dawson's paralysis was essentially zero. Based on the evidence, regardless of whether the Supreme Court agrees with our decision in *Gordon*, a loss-of-chance instruction was not warranted.

THE AWARD OF REASONABLE COSTS OF DEPOSING JEWISH HOSPITAL'S EXPERT WITNESSES

The final issue arises from a post-verdict order awarding Jewish Hospital's motion to recover expert witness fees. Specifically, the court ordered that pursuant to CR 26.02(4), the Dawsons pay the following amounts:

1. Dr. Henry Garretson $1,000.00
2. Dr. Thomas Flynn $1,800.00
3. Dr. Luis Mispireta $2,062.50
4. Nurse Devin Carr $ 600.00

The order was entered pursuant to CR 26.02(4) and not CR 54.04(2) as suggested by the Dawsons. The expert fees included in the court's order are the result of the time spent by Jewish Hospital's expert witnesses giving depositions to the Dawsons' counsel. Jewish Hospital agreed to produce its experts for depositions and confirmed, in writing, that the Dawsons would be responsible for the fees. After the experts were deposed, the Dawsons ignored the requests for payment and Jewish Hospital moved the court for payment under CR 26.02(4)(c). That section states that unless a manifest injustice would result, the court "shall require that party seeking discovery pay the expert a reasonable fee" for depositions or written questions obtained under section (4)(a)(ii) of that same rule.

The rule contemplates that the court require that the party seeking discovery, pay the expert a reasonable fee. Although the rule permits the court to order that the deposition of an expert be taken, such an order is unnecessary when the parties have agreed to cooperate and produce the expert voluntarily. We find no error in the award of expert witness fees.

The judgment and the order of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Kenneth Baker Louisville, Kentucky	Timothy H. Napier Louisville, Kentucky