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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001279-MR

TAMMY BARKMAN — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE WILLAIM W. TRUDE, JR., JUDGE
ACTION NO. 02-CI-00262, 02-CI-00422 & 03-CI-00192

DAVID OVERSTREET, M.D., AND
DANVILLE MEDICAL SPECIALISTS, P.S.C. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND MOORE, JUDGES.

MOORE, JUDGE: Tammy Barkman seeks review of a judgment of the Boyle Circuit Court, after a jury found David Overstreet and his company, Danville Medical Specialists, P.S.C., not liable for medical malpractice. On appeal, Barkman argues that the trial court used the wrong standard of care in the jury instructions, erred in not granting a mistrial when Overstreet mentioned insurance during his testimony and erred when it denied Barkman's request to produce a document prepared by Overstreet in anticipation of litigation. Finding no error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In May 2002, while Barkman was driving her car, a large tree limb fell on her car, apparently crushing the top of the vehicle and causing Barkman to lose control and wreck. Emergency personnel were summoned, and they transported her to the emergency room at Ephraim McDowell Regional Medical Center at approximately 3:00 p.m. At that time, Barkman could move her arms and legs, but was complaining of pain all over her body. Barkman had a deep cut on her left hand. While in the emergency room, Barkman was examined and treated by Dr. John Heiss, an emergency room doctor, who at the time found Barkman to be alert and neurologically intact. According to Heiss's trial testimony, he ordered an x-ray of Barkman's chest and hand and a Computerized Axial Tomography (CAT) scan of her head. Heiss intended to release Barkman, but Barkman's mother insisted that she be kept overnight.

Although Heiss intended to release Barkman, he ultimately contacted Dr. David Overstreet, Barkman's primary care physician. Overstreet testified that Heiss told Overstreet that he had thoroughly examined Barkman and had ordered a CAT scan performed on Barkman's head, neck and abdomen and had ordered an x-ray of her chest. At trial, Overstreet insisted that Heiss had told him that Heiss had cleared Barkman of trauma except for the deep cut on her hand. According to Overstreet, Heiss wanted Overstreet to admit Barkman into the hospital as a favor to the surgeon, who was going to perform surgery on Barkman's hand but was out of town at the time. Overstreet admitted Barkman for a twenty-three hour observation.

After Overstreet admitted Barkman, he examined her. At the time, Barkman could still move. However, several hours later, Barkman began experiencing numbness and tingling in her feet and eventually lost sensation from her chest downward. Barkman was transferred to the University of Kentucky Medical Center

(UKMC) where she was diagnosed with fractures in her neck vertebrae and a serious spinal cord injury. Despite receiving treatment at UKMC, Barkman permanently suffered paralysis of all four limbs. Dr. Deborah Blades, the neurosurgeon who treated Barkman at UKMC, testified that Barkman's spinal injury would have been reversible had she received treatment within a few hours of the accident.

Subsequently, Barkman filed a medical malpractice action in Boyle Circuit Court against Ephraim McDowell Regional Medical Center, Heiss and Overstreet. Ephraim McDowell Regional Medical Center and Heiss both entered into settlement agreements with Barkman, but Overstreet refused to settle. Due to Overstreet's refusal, Barkman proceeded to trial against Overstreet. The jury trial began in January 2006 and lasted several days. After hearing all the evidence and being instructed by the trial court, the jury found no liability on Overstreet's part.

II. ANALYSIS

A. Overstreet's Testimony Regarding Insurance

During the trial, the following exchange took place between Barkman's attorney and Overstreet:

> Barkman's attorney: OK, so you are saying that you just made up this loss of consciousness?
>
> Overstreet: I didn't make it up. I didn't make it up. But, uh, you know, the insurance companies and you guys are the ones that force us into these pigeon holes.

Several minutes later, Barkman asked the trial court to declare a mistrial because Overstreet had intentionally mentioned insurance. However, the trial court denied Barkman's request and also denied her request for an admonition regarding Overstreet's use of the word "insurance."

On appeal, Barkman avers that Kentucky Rule of Evidence (KRE) 411 prohibits evidence of whether or not a person was insured against liability regarding the

issue of whether or not that person acted negligently. According to Barkman, Overstreet intentionally mentioned insurance in the exchange *supra*. Furthermore, Barkman insists that Overstreet was referring to liability insurance not health insurance; thus, she reasons that Overstreet violated the prohibition found in KRE 411. Barkman recognizes that the trial court has discretion whether or not to grant a mistrial but argues that a denial of such a request must be supported by a finding of no prejudicial impact. *Struetker v. Neiser,* 290 S.W.2d 781, 782 (Ky. 1956). According to Barkman, the trial court erred when it denied her motion for a mistrial and erred by denying her motion without making a finding of no prejudicial impact.

Kentucky Rule of Evidence 411 reads in its entirety:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

After reviewing the rule, certain precepts become apparent. First, the rule, obviously, applies only to liability insurance. Second, the rule only prohibits liability insurance evidence when it is offered regarding the issue of whether or not a party acted negligently or wrongly. Third, the rule does not prohibit evidence about liability insurance if it is offered for other purposes. Consequently, KRE 411 only applies to Overstreet's testimony if he was referring to liability insurance and if he was referring to such insurance to comment upon whether a party to the litigation had somehow acted negligently.

Turning to the record of Overstreet's testimony to resolve this issue, we find that Overstreet mentioned insurance twice while being questioned by Barkman. Barkman was inquiring into the circumstance surrounding Overstreet's decision to admit

her for a twenty-three hour observation. Overstreet explained that he had admitted Barkman for a twenty-three hour observation and explained that such an admission was different from a full admission. According to Overstreet, a twenty-three hour observation is a limited admission to give physicians an opportunity to run tests to determine if legitimate reasons exist to fully admit a patient. Overstreet explained that insurance companies prefer physicians to use a twenty-three hour admission before using a full admission. In response to questioning, Overstreet explained that he did not admit Barkman for observation as a trauma patient but as a neurological patient because it was questionable whether or not she lost consciousness during her accident. Overstreet attested that, because it was questionable whether or not Barkman lost consciousness, this was a legitimate reason to admit her for observation. At this point, Barkman's attorney accused Overstreet of fabricating the loss of consciousness and Overstreet responded, "I didn't make it up. I didn't make it up. But, uh, you know, the insurance companies and you guys are the ones that force us into these pigeon holes."

Placing Overstreet's remark into its proper context, it becomes apparent that Overstreet was referring to *health* insurance not *liability* insurance. Because KRE 411 applies only to liability insurance, we conclude the trial court did not abuse its discretion when it denied Barkman's motion for a mistrial and her request for an admonition.

B. Standard Of Care Provided In The Jury Instructions

At trial, Barkman submitted the following proposed jury instruction to the trial court:

> It was the duty of David Overstreet, M.D., in evaluating, diagnosing and treating Tammy Barkman to exercise that degree of care and skill expected of a reasonably competent physician specializing in the care and treatment of emergency patients acting under similar circumstances.

The trial court rejected Barkman's proposed instruction; instead, it instructed the jury as follows:

> You the Jury, are instructed that at the time and upon the occasion mentioned in evidence it was the duty of David Overstreet, M.D., in the care and treatment of the Plaintiff, Tammy Barkman, to exercise that degree of care and skill expected of a reasonable and prudent internal medicine physician acting under the same or similar circumstances as those in this case.

In Barkman's brief, she sets forth in detail the testimony of several of the experts who testified at the trial. According to her, these experts established that the standard of care that a physician owes to a patient is dictated by the patient's injury. In other words, the patient's condition and needs at the time that a physician assumes responsibility establishes the duty of care that the physician owes to the patient. She argues that the duty of care is not governed by the physician's specialty. According to Barkman, the trial court used Overstreet's specialty as an internal medicine physician to set the standard of care. However, she argues that the trial court should have used the standard of a physician who specializes in the care and treatment of emergency patients because at the time that Overstreet took responsibility for her treatment she was a trauma patient. Thus, she concluded that the trial court used the wrong standard of care when it instructed the jury regarding the duty of care that Overstreet owed to her.

Regarding the standard of care that should be included in a jury instruction in a medical malpractice case, the Court of Appeals, now the Supreme Court of Kentucky, stated unequivocally that "[i]t is our conclusion that the jury should be instructed that the defendant was under a duty to use that degree of care and skill which is expected of a reasonably competent practioner [sic] in the same class to which he belongs, acting in the same or similar circumstances." *Blair v. Eblen,* 461 S.W.2d 370,

373 (Ky. 1970); *see Hamby v. University of Kentucky Medical Center,* 844 S.W.2d 431, 434-435 (Ky. App. 1992); John S. Palmore, & Ronald W. Eades, *Kentucky Instructions To Juries, Civil* § 23.01, comment (4th ed. 1989) ("The standard of care for physicians and surgeons is established by the medical profession itself. The practitioner is held to the standard of competence expected of the class of physicians or specialists to which he belongs.").

At trial, Overstreet testified that he specialized in internal medicine. So when it came time to instruct the jury, the trial court instructed that "it was the duty of David Overstreet, M.D., in the care and treatment of the Plaintiff, Tammy Barkman, to exercise that degree of care and skill expected of *a reasonable and prudent internal medicine physician acting under the same or similar circumstances* as those in this case." (Emphasis added.) Obviously, even a cursory reading of the trial court's instruction reveals that it comports with the holding found in *Blair*, 461 S.W.2d 370, which is the law regarding the standard of care in medical malpractice cases in the Commonwealth. Therefore, the trial court did not err when it rejected Barkman's proposed instruction and, instead, chose to instruct the jury in accordance with the holding in *Blair*.

C. Overstreet's Document Production

At trial, Barkman called Overstreet as a witness in her case-in-chief. When Overstreet took the stand, he had several pieces of paper with him, consisting of portions of medical records, portions of depositions and a sealed document that he prepared. Early into Overstreet's testimony, Barkman's attorney asked Overstreet about his notes, and Overstreet allowed Barkman's attorney to look at the documents. Several minutes later, the parties' attorneys engaged in a bench conference with the court and discussed the document prepared by Overstreet. At that time, Overstreet's

attorney explained that the document was a handwritten timeline prepared by Overstreet. The document was sealed, and the court stated that it would review the document *in camera*. At that time, Barkman's attorney did not object to the document nor did he make any motions regarding the document. Overstreet then continued to testify without the document.

Eight days later, after the evidence had been presented and during a conference in the trial court's chambers, Barkman's attorney returned to the subject of Overstreet's handwritten timeline. At that time, Barkman's attorney moved the court to order Overstreet to produce the document so he could inspect it. According to Barkman's counsel, he was entitled to view it because Overstreet used the document to refresh his memory.

To the contrary, Overstreet's attorney claimed that Overstreet had written the document on May 17, 2002, in anticipation of litigation to discuss the situation with his lawyer at that time. Additionally, Overstreet's counsel claimed that Overstreet had not referred to the document at trial, had not used it to refresh his memory at trial, and had not used it to refresh his memory since his deposition. In response, Barkman's counsel cited Kentucky Rule of Civil Procedure (CR) 26.02(3)(a) and argued that, although he did not know the contents of Overstreet's document, he had no other way to get to the information in the document except by requesting it from the trial court. Furthermore, Barkman's attorney insisted that he needed to see the document and insisted that it was discoverable. Subsequently, the trial court reviewed the document *in camera* a second time and denied Barkman's motion to produce it.

On appeal, citing CR 26.02, KRE 803(5), and *Disabled American Veterans, Department of Kentucky, Inc. v. Crabb,* 182 S.W.3d 541, 553 (Ky. App. 2005), Barkman claims that if an opposing party establishes a witness's use of notes while

testifying, this constitutes a proper application of the doctrine of past recollection recorded; a trial court should allow the opposing party to review the notes in order to adequately prepare for cross-examination. Thus, Barkman maintains she is entitled to review the document. We disagree.

> In *Crabb*, 182 S.W.3d at 551-552, the Court stated
>
> [t]he difference between these two evidentiary concepts is subtle and is often the cause of confusion. As explained by the United States Court of Appeals for the Third Circuit in *United States v. Riccardi* [, 174 F.2d 883 (3rd Cir., 1949)]:
>
> > The primary difference between the two classifications is the ability of the witness to testify from present knowledge: where the witness'[s] memory is revived, and he presently recollects the facts and swears to them, he is obviously in a different position from the witness who cannot directly state the facts from present memory and who must ask the court to accept a writing for the truth of its contents because he is willing to swear, for one reason or another, that its contents are true.
>
> Citing the case of *Jewett v. United States*, [15 F.2d 955, 956 (9th Cir., 1926)] the *Riccardi* Court commented that " '[i]t is one thing to awaken a slumbering recollection of an event, but quite another to use a memorandum of a recollection, fresh when it was correctly recorded, but presently beyond the power of the witness so to restore that it will exist apart from the record.'"
>
> In Kentucky, we recognize that present memory refreshed requires proof "that the witness has a memory to be refreshed," and "that it needs to be refreshed." The rule permits the use of "[a]lmost any kind of writing . . . to refresh memory, if the trial judge finds that the witness needs to review the writing to refresh memory and that the writing will likely serve that objective." Because the writing "is only being used to refresh memory . . . [it] never acquires independent status as evidence in the case." Rather, "the evidence is the witness's refreshed memory and not the writing that was used to bring that memory to the surface."
>
> On the contrary, past recollection recorded "allows a witness with a faded memory to testify from notes or a memorandum that the witness can show was made by her or under her

> direction while the information was fresh in the witness'[s] memory and reflects that knowledge correctly." The rule "requires the offering party to prove and the trial judge to find that the witness 'has insufficient recollection to enable the witness to testify fully and accurately' (taking into account the extent to which the memory can be refreshed from examination of the writing)." Under KRE 803(5), "the recorded recollection is admissible, but only after verification of its accuracy. Even if admitted, 'the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.' " If a party's notes do refresh the party's recollection, "there is no need to admit the recording into evidence, because the witness will be able to testify from his or her refreshed memory."

(Citations omitted.)

Consequently, under the concept of present memory refreshed, a document must have awakened a witness's memories after the witness reviewed a document, allowing the witness to testify based on his present knowledge. In contrast, for a document to fall under the concept of past recollection recorded, the witness must be unable to testify based on his present knowledge even after reviewing a document. Due to this inability to remember even after reviewing a document, the witness may then, if allowed by the trial court, read the document into evidence. Under either concept, an adverse party is entitled to review the document. *See* KRE 612; *Crabb,* 182 S.W.3d at 554.

However, neither concept applies to this present case. After reviewing the record of Overstreet's testimony, we find that when Overstreet initially took the stand, he had the document in question with him. However, he did not review it while on the stand nor did he refer to it during his testimony. In short, Overstreet did not use the document at trial. Accordingly, Barkman was not entitled to review the document under the concept of present memory refreshed or past recollection recorded.

In addition to the concept of past recollection recorded, Barkman cites to CR 26.02(3)(a) to support her argument that the trial court erred. That rule reads in pertinent part that

> a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Consequently, for Barkman to gain access to Overstreet's document via CR 26.02, she was required to show that she had a substantial need for the document and that she was unable without undue hardship to obtain a substantial equivalent of the document by other means. At trial, Barkman claimed that she needed Overstreet's document and could only obtain the information contained therein by having Overstreet produce it. The trial court reviewed the document to determine whether Barkman had a substantial need for it and whether it contained information Barkman could not obtain from other sources already available to her. The trial court found against Barkman on both claims. Upon review, we cannot say this was an abuse of discretion. Accordingly, because Barkman failed to establish the requirements set forth in CR 26.02(3)(a) when she requested production of Overstreet's document, we conclude the trial court did not abuse its discretion when it denied that request.

For the reasons set forth above, the judgment of the Boyle Circuit Court is affirmed.

ALL CONCUR.

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