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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000083-MR

BAPTIST HEALTHCARE SYSTEM, INC.
D/B/A/ CENTRAL BAPTIST HOSPITAL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 98-CI-02593

GOLDA H. MILLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BAKER, BARBER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Baptist Healthcare System, Inc., d/b/a Central Baptist Hospital has appealed from the judgment entered by the Fayette Circuit Court on December 10, 2001, which awarded Golda Miller $100,100.00 for injuries she received as a result of its negligence. Having concluded that the trial court committed no reversible error, we affirm.[1]

[1] Although Miller initially filed a cross-appeal against Central Baptist Hospital, this Court dismissed same on December 11, 2002, as it was rendered

On July 18, 1997, pursuant to a doctor's order, Miller went to the Central Baptist Hospital Satellite Laboratory to have her blood drawn. In the process of drawing blood from Miller, Beth Morris, a phlebotomist and Central Baptist Hospital's former employee, placed a tourniquet on Miller's right arm and then left the room for approximately eight minutes before returning to collect her blood vials.[2] Miller alleged that the tourniquet was on her arm for a total of ten minutes, that her arm became swollen, and that she felt pain through her right arm and shoulder. Miller incurred numerous medical expenses as a result of treatment that was required as a result of this incident.

A jury trial was scheduled for April 30, 2001. On April 9, 2001, Central Baptist Hospital moved for summary judgment on the issue of liability and a hearing was held on April 20, 2001. Central Baptist Hospital argued that it was entitled to a summary judgment because Miller had failed to identify an expert witness who could testify that it breached

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moot by the Supreme Court's recent decision in Tuttle v. Perry, Ky., 82 S.W.3d 920 (2002).

[2] Phlebotomy, also known as venipuncture, "is the procedure of collecting a blood sample through the insertion of a needle into a vein." Paige Pfenninger, Venipuncture –- Can Collection of Blood Samples Lead to Injury?, 17 NO. 7 Med. Malpractice L. & Strategy 4 (May 2000). "A phlebotomist is trained to draw blood from the human body." Speers v. Commonwealth, Ky., 828 S.W.2d 638, 640 (1992).

the standard of care in this medical malpractice action.[3] Miller argued that the case involved "ordinary negligence," rather than "medical malpractice," since phlebotomists in Kentucky are neither licensed nor regulated. Miller contended that Central Baptist Hospital's phlebotomist had failed to meet her employer's standard of care based on its own training manual and videos. The trial court determined that since phlebotomy is a widespread medical service, a specific medical standard of care is mandatory. The trial court denied Central Baptist Hospital's motion for summary judgment, continued the trial, and allowed Miller an additional 30 days to identify an expert witness.

The case was tried before a jury on September 26 and 27, 2001. Miller's expert witness was Denise Dunn, a phlebotomist at the University of Kentucky who had previously worked at Central Baptist Hospital. Dunn testified as to the standard of care for phlebotomists, and stated that a phlebotomist should never leave a patient alone and that a tourniquet should only be positioned on a patient's arm for one to three minutes. Dunn testified that if a tourniquet is left on a patient for more than three minutes, the patient's blood may become hemolyzed. Dunn described hemolyzed as where "the cells are crushed," which is the result of an improperly drawn blood sample. Furthermore, Dunn testified that leaving a

[3] Welch v. American Publishing Co. of Kentucky, Ky., 3 S.W.3d 724 (1999).

tourniquet on a patient too long may lead to an elevation in blood test results, including cholesterol. Dunn's testimony was largely premised upon a piece of paper she had obtained from her employer,[4] which she conceded she did not understand.

Central Baptist Hospital offered Cynthia Applegate, an employee and former director of its laboratories, as a witness to interpret Miller's blood report. Miller took the position that such an opinion should not be allowed since it would constitute expert testimony and Applegate had not been disclosed as an expert witness until the day before trial. The trial court ruled that Applegate could read from the report and testify that it did not indicate any problems with the blood drawn, but that she could not express an opinion about the lab report.

During closing argument, Miller's counsel read from Miller's lab report and argued that the elevated cholesterol level indicated that Miller's blood had hemolyzed and that the tourniquet had been left on her arm too long. Central Baptist Hospital objected to this line of argument, but the trial court ruled that counsel's argument was proper because counsel was only reading from the lab report, not interpreting it.

[4] The record is quite confusing concerning the origin of this paper. Apparently, this paper is found in a seminar book published by the National Committee on Clinical Laboratory Standards.

At trial Central Baptist Hospital moved the trial court to limit Miller's recovery of medical expenses to those that are considered "paid in full." Central Baptist Hospital argued that it was only liable for medical expenses up to the amount actually allowed by Miller's Medicare coverage. In the interests of judicial economy, the trial court denied Central Baptist Hospital's motion for a directed verdict regarding Miller's medical expenses and reserved ruling on its motion until after the jury's verdict.

The jury found that Central Baptist Hospital breached its duty to Miller and returned a verdict for her in the amount of $154,000.00. However, the jury also assessed 35% comparative fault against Miller, thus reducing her recovery to $100,100.00. At a post-trial hearing held on December 14, 2001, the trial court denied Central Baptist Hospital's motion on the issue of the medical expenses reasoning that if there was to be any "windfall" that it should go to Miller who was the injured victim and not Central Baptist Hospital as the negligent party. This appeal followed.

Central Baptist Hospital claims the trial court erred by denying its motion for summary judgment because at the time the motion was heard Miller could not have prevailed at trial without expert testimony concerning the phlebotomist's standard of care. For negligence to be established there must have been

(1) a duty owing the plaintiff by the defendant, (2) a breach of that duty which (3) was the proximate cause of the injuries which resulted in (4) damages.[5] "[I]n medical malpractice cases, expert testimony is always used to show the standard of care for a particular type of practice and procedure."[6] Furthermore, the Supreme Court of Kentucky has noted that

> [i]t is an accepted principle that in most medical negligence cases, proof of causation requires the testimony of an expert witness because the nature of the inquiry is such that jurors are not competent to draw their own conclusions from the evidence without the aid of such expert testimony [footnote omitted].[7]

While the above statements of the law are not in dispute, we believe the issue can be more clearly stated as whether the trial court abused its discretion by allowing Miller additional time to identify an expert witness in phlebotomy. Since the trial court ruled that an expert would be required to prove any medical negligence by Central Baptist Hospital, it was not unreasonable for the trial court to allow Miller additional time to identify such an expert witness. The former Court of Appeals has held that "[t]he action of the trial court on

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[5] Helton v. Montgomery, Ky.App., 595 S.W.2d 257, 258 (1980).

[6] Hamby v. University of Kentucky Medical Ctr., Ky.App., 844 S.W.2d 431, 434 (1992).

[7] Baylis v. Lourdes Hospital, Inc., Ky., 805 S.W.2d 122, 124 (1991) (citing Jarboe v. Harting, Ky., 397 S.W.2d 775 (1965); Johnson v. Vaughn, Ky., 370 S.W.2d 591 (1963)).

motions for a continuance will, from the very nature of things, be upheld by this court unless there appears from the record something to show an abuse of the discretion lodged in that court."[8] We cannot say that the trial court's decision to allow an additional 30 days for this purpose was an abuse of discretion.

Central Baptist Hospital also claims the trial court erred by improperly limiting its evidence regarding the lab report and by allowing Miller's counsel to make an improper closing argument on the same issue. Since Applegate was not an expert witness, the trial court correctly ruled that she could not express an expert opinion about Miller's lab report or testify with regard to what constitutes a hemolyzed blood draw.

Furthermore, the trial court did not err by allowing Miller's counsel to read from the lab report during closing argument. Contrary to Central Baptist Hospital's argument, Miller's counsel did not provide an unimpeachable expert opinion. The record reflects that during closing argument Miller's counsel only read from Miller's lab report, not that he interpreted the results of the lab report. The record further reflects that the trial court offered Central Baptist Hospital's counsel the opportunity to read from the lab report but she chose not to. The trial court commented that "anybody" could

[8] Holliday v. Cornett, 196 Ky. 427, 431, 244 S.W. 875, 876 (1922).

read the results of Miller's lab report to determine if her cholesterol level was increased. Central Baptist Hospital's allegation that Miller's counsel expressed an expert medical opinion is unsubstantiated by the record.

Central Baptist Hospital's final claim is that the trial court should have granted its motion for a directed verdict on the issue of Miller's medical expenses. Miller requested a recovery of $40,922.08 to satisfy her medical expenses from different healthcare providers; however, the jury awarded her $34,000.00 for her reasonable and necessary medical expenses. Central Baptist Hospital argues that

> [Miller] should not be allowed to recover the entire billed amount [of medical expenses] despite the fact that [she], nor any collateral source on her behalf, has any legal obligation to pay the difference. [Miller] should have been limited to recover only those expenses that constitute "full payment."

"The collateral source rule is applicable when an injured plaintiff has received compensation from a third party having no connection with the wrong inflicted by the defendant."[9] Miller argues that the "law in Kentucky has been well established that the tortfeasor is not to benefit because of the [p]laintiff's foresight in having collateral insurance to assist her in paying of her medical expenses." "In such cases, the

[9] Usaco Coal Co. v. Liberty National Bank & Trust Co. of Louisville, Ky.App., 700 S.W.2d 69, 72 (1985) (citing 22 Am.Jur.2d Damages § 206 et seq. (1965)).

court is faced with a choice of recognizing the collateral contribution and thus a 'windfall' to the wrongdoer, or not recognizing the receipt of collateral funds and essentially allowing plaintiff to be overcompensated."[10]

In O'Bryan v. Hedgespeth,[11] the Supreme Court held KRS 411.188[12] to be unconstitutional. The Court declared that

> [b]efore KRS 411.188 was enacted, evidence of payments to the plaintiff from medical or disability insurers was excluded as irrelevant, recognizing that such payments have no bearing on the issue to be judicially decided, the amount of damages the plaintiff has incurred and is entitled

[10] Id. at 72.

[11] Ky., 892 S.W.2d 571 (1995).

[12] KRS 411.188 provides as follows:

> (1) This section shall apply to all actions for damages, whether in contract or tort, commenced after July 15, 1988.
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> (2) At the commencement of an action seeking to recover damages, it shall be the duty of the plaintiff or his attorney to notify, by certified mail, those parties believed by him to hold subrogation rights to any award received by the plaintiff as a result of the action. The notification shall state that a failure to assert subrogation rights by intervention, pursuant to Kentucky Civil Rule 24, will result in a loss of those rights with respect to any final award received by the plaintiff as a result of the action.
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> (3) Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.
>
> (4) A certified list of the parties notified pursuant to subsection (2) of this section shall also be filed with the clerk of the court at the commencement of the action.

> to recover from the wrongdoer in the civil action, nor does it matter that the source of the collateral source benefits may be entitled to reimbursement from the recovery because of contractual or statutory subrogation rights. See, e.g., Davidson v. Vogler, Ky., 507 S.W.2d 160, 164 (1974) and, more recently, Burke Enterprises, Inc. v. Mitchell, Ky., 700 S.W.2d 789, 796 (1985), stating that "to depart from the collateral source rule would provide the tortfeasor a 'windfall' to the substantial detriment of the injured party." There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall" for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment, and benefits received are usually subject to subrogation so there is no "double recovery" by any stretch of the imagination.[13]

Central Baptist Hospital argues that "there is no legal reason why the tort victim should receive a 'windfall' and a 'double recovery' when the tort victim, the tort victim's insurer, or other collateral source payors are not responsible for payment of the benefits." Additionally, Central Baptist Hospital asserts that "[o]ne does not have to stretch the imagination to see that claimants are receiving double recoveries in courts everyday when they are allowed to submit their medical bills rather that amount actually paid or payable as full payment is submitted to the jury." Accordingly, Central Baptist Hospital contends that Miller's recovery of the

[13] O'Bryan, 892 S.W.2d at 576.

difference between the amount indicated on her medical bills and the amount actually owed as full payment provides her with a windfall or double recovery.

The former Court of Appeals has held "that an injured person who carries hospitalization or medical expense insurance may recover hospital and medical expenses from the tortfeasor who injured [her], although [she] has been or will be reimbursed for those expenses by the insurance carrier."[14] Additionally, the Supreme Court has "allowed an injured plaintiff to recover all medical expenses incurred even though a substantial portion of the bill was paid by Medicare."[15] The collateral source rule "provides that 'a defendant must bear the full cost of the injury he caused the plaintiff, regardless of any compensation the plaintiff receives from an independent or 'collateral' source.'"[16] It is clear under Kentucky law that Central Baptist Hospital may not benefit from the fact that Miller received payment of her medical expenses from a third party or that her required payment was reduced by law. The trial court correctly denied Central Baptist Hospital's motion.

[14] Conley v. Foster, Ky., 335 S.W.2d 904, 907 (1960) (citing Taylor v. Jennison, Ky., 335 S.W.2d 902 (1960)).

[15] Daugherty v. Daugherty, Ky., 609 S.W.2d 127, 128 (1980) (citing Our Lady of Mercy Hospital v. McIntosh, Ky., 461 S.W.2d 377 (1970)).

[16] McCormack Baron & Associates. v. Trudeaux, Ky.App., 885 S.W.2d 708, 710 (1994) (citing Daena A. Goldsmith, A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation, 53 J. Air L. & Com. 799 (1988)).

For the foregoing reasons, the judgment of the trial court is affirmed.

ALL CONCUR.

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