

RENDERED: OCTOBER 27, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000949-MR

JENNIFER MORRISON; AND
JONATHAN MORRISON

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CI-00453

KURT JAENICKE, M.D.; AND
ASHLAND WOMEN'S CARE, P.S.C.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND VANMETER, JUDGES; EMBERTON,¹ SENIOR JUDGE.
BARBER, JUDGE: A Boyd County jury returned a verdict in favor
of Appellees, Dr. Kurt Jaenicke and Ashland Women's Care, P.S.C.
Based on the verdict, the circuit court entered a judgment
dismissing the complaint of the Appellants, Jennifer Morrison
and Jonathan Morrison. The Morrisons' action was for injuries

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

to Jennifer resulting from the alleged medical malpractice of Dr. Jaenicke during the birth of their child.

The question for our court is whether the jury verdict was flagrantly against the evidence presented or induced by passion or prejudice. Following a review of the record, we affirm.

Background

On April 30, 2001, Jennifer went into labor with the parties' first child.² The couple went to King's Daughter's Medical Center for the birth. A healthy baby boy was born at 5:38 p.m. the same day.³ The delivery was performed by Rhonda Dendinger, a certified nurse midwife.⁴

Following the birth, a complication arose. While Dendinger was delivering the placenta, it remained attached to the uterus and a uterine inversion occurred.⁵ Dendinger called Dr. Jaenicke for assistance who arrived within minutes. Dr. Jaenicke removed the placenta before attempting re-inversion. Neither Dr. Jaenicke nor Dendinger was able to re-invert the uterus while in the labor and delivery room. Jennifer was then moved to surgery.

² Jennifer was twenty years old.

³ Jennifer had a vaginal delivery.

⁴ Ms. Dendinger is a former employee of Ashland Women's Care.

⁵ A uterine inversion occurs when the uterus turns inside out. In Jennifer's case, the inverted uterus was partially outside her body through her vagina with the placenta attached.

In the operating room, Jennifer was given a medication to relax her uterus, Desflurane. Attempts to re-invert her uterus were still unsuccessful. Dr. Jaenicke called in another doctor from his office, Dr. Guilherme Cantuaria, to assist. Dr. Jaenicke then performed a laparotomy⁶ in an effort to help with the re-inversion. Dr. Cantuaria was able to re-invert the uterus following the laparotomy. Dr. Cantuaria left after this procedure. Jennifer's uterus failed to contract following the re-inversion.

Medications were given to Jennifer to help stimulate uterine contractions.⁷ None of them were successful. Dr. Jaenicke then consulted with a physician from the University of Kentucky who recommended another drug to stimulate contractions.⁸ This treatment was also unsuccessful.

Dr. Jaenicke decided a hysterectomy was necessary to save Jennifer's life due to her continuing blood loss. Dr. Cantuaria was called back in to assist with the procedure. The surgery went well and Jennifer's bleeding ceased. She had a full recovery.

⁶ A laparotomy is a surgical incision of the abdominal wall.

⁷ Pitocin, Methergine, and Hemabate were first used.

⁸ Cytotec was the recommended drug.

One year later, the Morrisons filed suit against Dr. Jaenicke and Ashland Women's Care⁹ alleging Jennifer's hysterectomy was the result of medical negligence. A jury trial was held for one week. Following a brief deliberation,¹⁰ the jury returned a unanimous verdict¹¹ for Dr. Jaenicke and Ashland Women's Care. The trial court subsequently entered a judgment dismissing the Morrisons' complaint. The Morrisons now appeal to our court.

Standard of Review

The Morrisons do not allege any errors occurred at the trial court level. The finding of the jury will not, in the absence of error on the part of the trial court, be disturbed upon appeal by the qualification that it would be set aside, if it appears that it was wholly unsupported by or was flagrantly against the evidence, or had been superinduced by passion or prejudice on the part of the jury. Illinois Central Railroad Co. v. Long, 142 S.W. 212, 213 (Ky. 1912), see also Louisville & N.R. Co. v. Rowland's Administrator, 14 S.W.2d 174, 178 (Ky. 1929) and Bristow v. Taul, 219 S.W.2d 641, 642 (Ky. 1949).

⁹ The Morrisons claimed Ashland Women's Care was vicariously liable for the alleged negligence of Dr. Jaenicke.

¹⁰ The jury deliberated for less than one hour.

¹¹ A unanimous jury verdict does not resolve the issue of the sufficiency of the evidence to support the verdict. Thompson v. Hardy, 43 S.W.3d 281, 286 (Ky.App. 2000).

Legal Authority and Analysis

Where there is conflicting evidence, it is the responsibility of the jury to determine and resolve such conflicts, as well as, matters affecting the credibility of the witnesses. Bierman v. Klapheke, 967 S.W.2d 16, 19 (Ky. 1998). A jury may believe any part or all of the testimony of any of the witnesses, or may disbelieve all of it. Gillispie v. Commonwealth, 279 S.W. 671, 672 (Ky. 1926).

At trial, the Morrisons claimed Jennifer required a hysterectomy because Dr. Jaenicke administered Desflurane at the same time as the uterine contracting drugs. They maintain this was proven by the anesthesia record¹² and a home video¹³ made at the hospital.

Neither party disputed that all of the contracting drugs were tried before Jennifer underwent the hysterectomy. The dispute among the parties concerned the times these medications were given to Jennifer as well as when the hysterectomy occurred.

¹² The anesthesia record was completed in the operating room at periodic intervals, 5 to 15 minutes, during the procedures. Deposition of Vicki Blair, February 13, 2004, pp. 57-58.

¹³ Daryl Ebersole, electrical engineer, testified on behalf of the Morrisons regarding the date stamp on the home video. However, he testified that he did not view the original 8mm tape made by the family. Ebersole reviewed a VHS copy of the 8mm original. He testified that it was not necessary to view the original for his analysis. Ebersole concluded that the Morrisons' camcorder clock was accurate. Tr. of Daryl Ebersole, Vol. II at pp. 278-304.

The anesthesia record shows that Desflurane was run from 6:15 p.m. until 7:00 p.m.¹⁴ Neither party disputes these times. The dispute arose primarily in relation to two of the four contracting drugs.¹⁵ The anesthesia record read that Pitocin was given at 18:15, i.e. 6:15 p.m., and 18:30, i.e. 6:30 p.m., and Methergine was given at 18:20, i.e. 6:20 p.m.¹⁶ The Morrisons also relied upon their home video. The video showed Dendinger at 6:32 p.m.¹⁷ telling the family that contracting drugs had been given to Jennifer but did not work.¹⁸ However, evidence was introduced which contradicted these times.

Vicki Blair, certified registered nurse anesthetist, filled out the anesthesiology record until 8:35 p.m.¹⁹ Blair testified she made a mistake on the anesthesiology record.

¹⁴ The anesthesia record for Desflurane was listed in a grid at the top of the record.

¹⁵ Only Pitocin and Methergine were listed on the anesthesia record. The other two drugs, Hemabate and Cytotec, were not given intravenously by the anesthesia team. Thus, they were not contained in the anesthesia record. They were given as an injection (Hemabate) and rectally (Cytotec).

¹⁶ The anesthesia record for these two drugs was not located in the grid. There was a small box at the lower right side with the names of the drugs pre-printed on the form. A nurse was to fill in the amount and time the two drugs were given.

¹⁷ We note that no clocks were shown on the portion of the video shot on April 30, 2001. A hospital clock was shown in the background during taping May 4, 2001. Also, during this portion of the video, the camera was pointed towards the floor and the most one can see are the lower extremities of the individuals in the room.

¹⁸ The relevant conversation with Dendinger began at 6:29 p.m. on the home video. Dendinger stated Jennifer had already received Pitocin, Hemabate, and Methergine. She did not mention Cytotec.

¹⁹ Patty Wolf, CRNA, relieved Blair.

Specifically, she had trouble converting to military time.²⁰ She made similar mistakes on all eight blood slips.²¹

Mistakes were also made on another hospital record. The peri-operative record²² incorrectly listed the Hemabate being given at 16:20, i.e. 4:20 p.m., and 16:30, i.e. 4:30 p.m.²³ These times were prior to the Morrison's baby being born and all parties acknowledge the report's times were incorrect. Further, no time was listed for the Cytotec in the same record.²⁴ There was also support for the inaccurate times through other witness testimony.

Dr. Ho Jung, Jennifer's anesthesiologist, testified multiple times that he had never run Desflurane simultaneously with Pitocin and Methergine.²⁵ Similarly, Dr. Jaenicke testified

²⁰ Deposition of Vicki Blair, February 13, 2004, p. 24.

²¹ Blood slips are completed when a transfusion of blood or plasma is given to a patient. The top portion of the slip, including the dispensing time, is filled in by a computer. The bottom transfusion portion is completed by a nurse.

On all eight slips Vicki Blair listed the wrong start and end times in the transfusion section. She had times listed which were earlier than the times the blood was dispensed from the blood bank. All of the times, except one, were mistakes of one hour where she listed the incorrect military time. In one instance, she missed the time by an hour and a half. See Deposition of Vicki Blair, February 13, 2004, pp. 27-38.

²² This form was not filled out by Vicki Blair.

²³ Cathy Spence, RN, testified that the Hemabate information was in Connie Gill's handwriting. Tr. of Cathy Spence, Vol. I at p. 177.

²⁴ Cathy Spence testified that she wrote the Cytotec information on the form. Tr. of Cathy Spence, Vol. I at p. 169.

²⁵ Deposition of Ho Jung, M.D., February 13, 2004, pp. 54, 65-66, and 68.

that he ordered the Desflurane be turned off prior to any uterine contracting drug being given.

In relation to the hysterectomy, the Morrisons argued that the anesthesia record and home video established that the hysterectomy began at 6:44 p.m. The anesthesia record had a notation in the "surgery start" section of "open 18:44." The video contained the conversation with Dendinger wherein she told the family a hysterectomy was going to be performed on Jennifer.

The Morrisons argued this evidence proved Jennifer's hysterectomy was performed at 6:44 p.m. Therefore, she had received all uterine contracting drugs prior to that time. However, several witnesses, including Dr. Jaenicke,²⁶ Dr. Jung,²⁷ and Vicki Blair,²⁸ each testified that the laparotomy²⁹ began at 6:44 p.m., not the hysterectomy.

After reviewing the evidence the Morrisons felt garnered a jury verdict in their favor at the trial level, (i.e. the Morrisons' home video and the anesthesia record), we again note that a jury can choose what to believe. However, in order to reach a decision in this matter, we must examine the required elements of the Morrison's malpractice action.

²⁶ Tr. of Dr. Kurt Frederick Jaenicke, Vol. III at pp. 490 and 494.

²⁷ Deposition of Dr. Ho Jung, February 13, 2004, p. 17.

²⁸ Deposition of Vicki Blair, February 13, 2004, p. 17.

²⁹ On the anesthesia record, Rocu-Ronium, an abdominal muscle relaxant, was given around 6:45 p.m.

The elements of a medical malpractice action are the same as any negligence action (i.e. duty, breach, causation, and injury). Grubbs ex rel. Grubbs v. Barbourville Family Health Center, P.S.C., 120 S.W.3d 682, 687 (Ky. 2003), (citing Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245 (Ky. 1992)). If a physician's service falls below the expected level of care and skill and this negligence proximately caused injury or death, then all elements of a malpractice action have been met. Id. at 688, (citing Reams v. Stutler, 642 S.W.2d 586 (Ky. 1982)).

Each party presented expert testimony. The Morrisons' expert, Dr. Thomas Benedetti,³⁰ opined that Dr. Jaenicke's actions fell below the standard of care, i.e. breach of duty, and that the running of Desflurane at the same time as the uterine contracting medications made it necessary to perform the hysterectomy, i.e. cause.³¹

Dr. Jaenicke and Ashland Women's Care presented two experts, Dr. Watson A. Bowes, Jr.³² and Dr. Jonathan William Weeks.³³ Each opined at trial that Dr. Jaenicke met the standard

³⁰ Dr. Benedetti was an obstetrician-gynecologist who specialized in maternal fetal medicine, which involves the care of high-risk pregnancies.

³¹ Dr. Thomas Benedetti deposition, March 2, 2005, pp. 7 and 38.

³² Dr. Bowes was an obstetrician-gynecologist.

³³ Dr. Weeks was an obstetrician-gynecologist who specialized in maternal fetal medicine.

of care.³⁴ Further, each testified that even if the contracting drugs were given at the same time as Desflurane, it would not have caused the uterus to remain inactive.³⁵

The Morrisons' argue that the jury verdict is flagrantly against the evidence primarily because of their home video. We do not believe this video alone helps establish either a breach of duty or causation in this matter. Moreover, Dr. Jaenicke's experts acknowledged viewing the video and each testified his opinion remained unchanged.³⁶

Dr. Jaenicke's experts testified at trial that Dr. Jaenicke met the standard of care and even if the drugs were run simultaneously, it would not have caused Jennifer to have a hysterectomy. We believe this expert testimony supports the jury verdict.

As stated earlier, a jury may believe any part or all of the testimony of any of the witnesses, or may disbelieve all of it. Gillispie, supra, 279 S.W. at 672. In this instance, the jury chose to believe the testimony favorable to Dr. Jaenicke and Ashland Women's Care. It is not for us to criticize the jury for its choices. Rather we must determine

³⁴ Tr. of Dr. Watson A. Bowes, Jr., Vol. II at pp. 344 and 374. Tr. of Dr. Jonathan William Weeks, Vol. II at p. 408.

³⁵ Tr. of Dr. Watson A. Bowes, Jr., Vol. II at pp. 369-374. Tr. of Dr. Jonathan William Weeks, Vol. II at pp. 417, 430, and 448.

³⁶ Tr. of Dr. Watson A. Bowes, Jr., Vol. II at p. 374. Tr. of Dr. Jonathan William Weeks, Vol. II at pp. 423-424.

whether its verdict is supported by the evidence presented. We believe that it was. As such, we do not believe that the jury verdict³⁷ in favor of Dr. Jaenicke and Ashland Women's Care was flagrantly against the evidence or induced by prejudice or passion.

Conclusion

The Morrisons' argue that the jury verdict against them was the result of prejudice or passion. After a thorough review of a lengthy record, we believe the jury's verdict was supported by sufficient evidence. Therefore, we affirm the Boyd Circuit Court's judgment dismissing the Morrisons' suit against Dr. Jaenicke and Ashland Women's Care.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth R. Seif
Lexington, Kentucky

BRIEF FOR APPELLEE:

Tracy S. Prewitt
Michael R. McDonner
Louisville, Kentucky

³⁷ All elements of a medical negligence action were combined into Jury Instruction No. 2 which read as follows:

It was the duty of the Defendant, Kurt Jaenicke, M.D., in treating Jennifer Morrison to exercise the degree of care and skill expected of a reasonably competent obstetrician/gynecologist acting under similar circumstances.

Are you satisfied from the evidence that the Defendant, Kurt Jaenicke, M.D., failed to comply with that duty and that such failure was a substantial factor in causing Jennifer Morrison's injuries?

YES _____ NO _____

If you answered "No", enter your verdict in favor of the Defendant, Kurt Jaenicke, M.D. on Verdict Form A and return to the courtroom. If you answered "Yes", enter your verdict in favor of the Plaintiffs, Jennifer Morrison and Jonathan Morrison, on Verdict Form B and return to the courtroom.