

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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-002095-MR

DEBRA IRELAND

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARTIN F. MCDONALD, JUDGE  
ACTION NO. 01-CI-002245

JONATHAN E. HODES, M.D.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Debra Ireland brings this appeal from an October 3, 2005, judgment upon a jury verdict dismissing Ireland's medical malpractice claim against Jonathan E. Hodes, M.D. We reverse and remand.

The genesis of this dispute surrounds two spinal surgeries performed by Dr. Hodes upon Ireland in 2000. As a result of the surgeries, Ireland filed a medical malpractice

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<sup>1</sup> Senior Judge David C. Buckingham 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.

claim against Dr. Hodes in 2001. In her complaint, Ireland alleged that Dr. Hodes was negligent in performing the surgeries and caused her to suffer from a permanent condition diagnosed as "cauda equina syndrome." The syndrome caused Ireland to suffer loss of voluntary bladder function, loss of sensation of the clitoris, vulva, rectum and perineal region, and decreased sphincter tone. Additionally, as a result of these alleged injuries, Ireland must self-catheterize six to eight times per day and is now incontinent of the bowel.

It is undisputed that Ireland suffered cauda equina syndrome as a result of the spinal surgeries performed by Dr. Hodes. Dr. Hodes argues that this syndrome is a known risk of the surgery which Ireland acknowledged prior to surgery. At trial, the parties focused upon whether this syndrome was negligently caused by Dr. Hodes when he performed the surgeries.

Dr. Hodes retained an expert witness, Dr. Lawrence M. Shuer, who testified that Dr. Hodes was not negligent in his performance of the surgical procedures upon Ireland. Specifically, Dr. Hodes claimed that cauda equina syndrome was a known risk of this type of spinal surgery and occurred in the absence of any negligence.

Ireland retained Dr. Robert Winter to provide expert testimony that Dr. Hodes was negligent in performing the spinal surgeries and that such negligence caused the cauda equina

syndrome. The matter was submitted to a jury, and the jury returned a verdict in favor of Dr. Hodes. The circuit court subsequently dismissed the medical malpractice claim, thus precipitating this appeal.

Ireland initially contends the circuit court committed reversible error by denying her motion in limine to exclude certain evidence surrounding the medical licenses of her expert, Dr. Winter. Dr. Winter was licensed to practice medicine in Minnesota and Wisconsin. The record indicates that Dr. Winter was involved in sexual relations with a patient in Minnesota in the early 1980s. However, a complaint was not filed against him by the patient until 1990. As a result, Dr. Winter entered into a stipulation with the Minnesota Board of Medical Practice to retire from the active practice of medicine effective June 1, 1995. However, Dr. Winter retained his medical license in Minnesota, which was in good standing at the time of the trial. Sometime after 1995, the record indicates that the Wisconsin Medical Examining Board learned of Dr. Winter's conduct with the patient. In subsequent proceedings, Dr. Winter voluntarily surrendered his medical license in Wisconsin.

Prior to trial, Ireland filed a motion in limine seeking to exclude evidence concerning Dr. Winter's stipulation upon and surrendering of his medical license and of his affair with the female patient. By order, the circuit court denied the

motion.<sup>2</sup> For the reasons hereinafter stated, we hold that the circuit court erred by admitting evidence surrounding the stipulation upon his medical license in Minnesota and the voluntary surrendering of his medical license in Wisconsin.

In this Commonwealth, it is well-established that a witness cannot be cross-examined on a collateral matter that is irrelevant to an issue in the case. In Morrow v. Stivers, 836 S.W.2d 424 (Ky.App. 1992), our Court specifically held that the past temporary suspension of an expert witness's medical license was a collateral matter in a medical malpractice action and should be properly excluded. The Court in Morrow recognized that the prior temporary suspension of an expert witness's medical license was simply irrelevant to the issue of negligence and unduly inflammatory. Id.

In this case, Dr. Hodes' counsel engaged in a vigorous cross-examination of Dr. Winter concerning the stipulation upon his medical license in Minnesota and the subsequent surrendering of his medical license in Wisconsin. Dr. Hodes' cross-examination of Dr. Winter on the medical license issue lasted for over ten minutes. In direct examination by appellant, Dr. Winter admitted that he was licensed to practice medicine in

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<sup>2</sup> We observe the Kentucky Supreme Court held that a motion in limine, which specifies the evidence to be excluded and denied by order of the circuit court, was sufficient to preserve the evidentiary issue for appellate review. See Metcalf v. Commonwealth, 158 S.W.3d 740 (Ky. 2005). The Supreme Court specifically held that a contemporaneous objection to the evidence at trial was unnecessary. Id.

Minnesota. He made no reference to his Wisconsin license. Under the circumstances, we believe the cross-examination was improper and constituted collateral evidence that was simply irrelevant to the issue of Dr. Hodes' medical negligence. Moreover, we view this evidence as extremely inflammatory in nature.

Dr. Winter was Ireland's only medical expert upon the issue of Dr. Hodes' negligence. Under Morrow, collateral evidence is not admissible in a medical malpractice case if the evidence does not reflect the expert's knowledge or ability to testify on the matters at issue, such as in this case, the causation of Ireland's condition and any deviation by Dr. Hodes from the standard of care. Id. Dr. Winter's license status was not in dispute or issue and did not reflect on his knowledge or ability to testify about Ireland's condition or Dr. Hodes' alleged deviation from the standard of care.

The improper cross-examination concerning the stipulation upon and surrendering of Dr. Winter's medical licenses undoubtedly prejudiced the jury against Dr. Winter. The prejudicial effect diminished the credibility of Dr. Winter's testimony concerning Dr. Hodes' negligence. The alleged negligence of Dr. Hodes was not within the purview of a lay person; rather, expert testimony was needed to establish the negligence and to aid the jury in determining whether Dr. Hodes

was negligent. By allowing such a collateral and inflammatory cross-examination of Dr. Winter, we hold that the trial court committed reversible error. Simply put, we think there exists a reasonable probability that but for the introduction of such collateral evidence the jury's verdict may have been different. See Crane v. Commonwealth, 726 S.W.2d 302 (Ky. 1987). We, thus, reverse and remand this matter to the circuit court for retrial. Upon retrial, Dr. Hodes should not be permitted to introduce any evidence surrounding the stipulation upon or suspension of Dr. Winter's medical licenses in 1995.

Ireland also alleges the trial court committed error by admitting into evidence an informed consent form signed by Ireland. We believe the informed consent form was relevant to Dr. Hodes' defense and, thus, properly admitted into evidence.

Ireland further contends the circuit court committed error by admitting testimony concerning various complications suffered by past spinal surgery patients of Dr. Winter. Dr. Hodes contends that "[c]omplications that Dr. Winter's patients have incurred in the past are relevant to his expertise as a physician criticizing the care and treatment provided by Dr. Hodes." Dr. Hodes Brief at 10. Generally, the scope of cross-examination of a witness is within the discretion of the trial court. Moreover, Ky. R. Evid. 611(b) clearly permits cross-examination upon any issue relevant to the case. Here, we

believe the complications suffered by Dr. Winter's spinal patients to be reasonably relevant to Dr. Winter's expertise. Thus, we hold that the trial court did not abuse its discretion.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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