

RENDERED: NOVEMBER 22, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001537-MR

ABBY ELLIS, BY AND THROUGH
HER GUARDIAN, HER SISTER,
PHYLLIS R. HODGES

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 02-CI-00987

COMMUNITY METHODIST HOSPITAL;
AND MICHAEL MAYRON, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This case involves a medical negligence claim filed in Henderson Circuit Court. Appellant, Abby Ellis, argues that the trial court: 1) improperly limited her right to discovery; and 2) erred by granting summary judgment in favor of appellees, Community Methodist Hospital (Methodist Hospital) and Dr. Michael Mayron. Finding no error, we affirm.

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

On October 23, 2001, Ellis visited her family physician, Dr. Gerald Rightmyer, complaining of weight loss, nausea, and vomiting. She was admitted to Methodist Hospital the same day. Dr. Jason Samuel and Dr. Ricardo Madella examined Ellis during her hospitalization. Dr. Madella reported that the primary cause of Ellis's symptoms was hypothyroidism and that she was not a surgical candidate. Ellis was discharged on November 3, 2001. Two days later, Ellis presented herself to the emergency room at Methodist Hospital with continued complaints of nausea and vomiting. Dr. Madella and Dr. Michael Mayron consulted on Ellis's case during the second hospitalization. Despite his earlier conclusion that surgery was not appropriate, Dr. Madella performed gall bladder surgery on Ellis. Following the surgery, Ellis suffered permanent brain damage and was placed on a ventilator. She is still incapacitated.

Ellis, through her sister and guardian, Phyllis Hodges, filed suit against Methodist Hospital and Drs. Rightmyer, Madella, and Mayron. The court found as a matter of law that Methodist Hospital did not deviate from the standard of care and that the doctors who attended Ellis were not ostensible agents of the hospital. The trial court also granted summary judgment in favor of Dr. Mayron. This appeal follows. Additional facts will be developed as necessary.

Ellis first argues that the trial court erred by limiting her right to discovery. After an in camera review, the trial court granted Dr. Mayron's motion to prohibit the discovery of a three page narrative statement concerning another case that was kept within his credentialing file. Ellis also argues that the trial court improperly limited discovery upon another portion of Dr. Mayron's credentialing file and various minutes from Methodist Hospital's board meetings.

Trial courts are committed with broad discretion concerning disputes in the discovery process. Sexton v. Bates, 41 S.W.3d 452, 455 (Ky.App. 2001). CR 26.03 allows trial courts, upon a showing of good cause, to issue protective orders limiting or prohibiting discovery in order to protect a party "from annoyance, embarrassment, oppression, or undue burden or expense..." After a hearing and an in camera review, the trial court found that the document at issue involved events occurring approximately twenty years ago, were not relevant to the present case, and would subject Dr. Mayron to embarrassment, oppression, and annoyance beyond any probative value that the document may possess. We have reviewed the document at issue and agree that it bears no relevance to the present case. There was no abuse of discretion. Regarding the other allegations of error concerning the limitation of discovery, Ellis's argument contains no citations to the record either as to preservation or

supportive reference, as required by CR 76.12(4) (c) (v).

Therefore, we will not scour the record in order to make those determinations. Phelps v. Louisville Water Co., 103 S.W.3d 46, 53 (Ky. 2003).

Ellis next argues that the trial court erred by finding that there was no issue of material fact as to whether the attending physicians were ostensible agents of Methodist Hospital. The trial court based its finding on a consent form that Ellis signed prior to admission.

The form in pertinent part reads as follows:

Consent to General Diagnostic, Medical, and Surgical Treatment: I understand am under the care of the attending physicians and the hospital is not liable for following instructions of said physicians... I understand that all physicians at Methodist Hospital including the radiologists, anesthesiologists, CRNA's, Emergency Room Physicians and Pathologists are independent contractors and are not employees or agents of Methodist Hospital.

In Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985), our Supreme Court stated that the principles of ostensible agency are generally applicable in the context of treatment at hospital emergency room "absent evidence that the patient knew or should have known that the treating physician was not a hospital employee when the treatment was performed (not afterwards)." Further, this Court has found that admission form notices can provide sufficient knowledge to the patient of

the lack of agency relationship. Floyd v. Humana of Virginia, Inc., 787 S.W.2d 267 (Ky.App. 1989).

We find that there is no issue of material fact as to the ostensible agency theory. The pertinent language in the admissions form is clear and was written in bold type. Ellis brought herself to the hospital and signed the document herself. Also as noted by the trial court, Drs. Rightmyer, Madella, and Mayron did not treat Ellis in an emergency situation such as the one in Paintsville, supra. Dr. Rightmyer was her family physician for over six years while Dr. Madella is a general surgeon and Dr. Mayron is a neurologist. Although Ellis cannot now testify as to her state of mind at the time she signed the document, this, in and of itself, does not raise an issue of material fact. Based on the evidence of record, we must conclude that Ellis was given sufficient notice of the independent contractor status of the treating physicians.

Finally, Ellis argues that the trial court erred by finding that she had failed to produce any expert testimony that Dr. Mayron's alleged deviation from the standard of care was the proximate cause of her injuries. Ellis points to the testimony of her expert, Dr. Robert Resnick, that Dr. Mayron deviated from the standard of care by failing to perform a spinal fluid test for the herpes simplex virus.

Although both parties cite to the deposition of Dr. Resnick, this deposition is not a part of the record on appeal. This deposition was not listed on the certificate designating the record on appeal by the circuit court clerk. Nor do we find any indication that this deposition was ever filed in the trial court at all. Since this deposition was never filed, we cannot consider it on appeal.

Accordingly, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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