

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-001824-MR

TYLER JACOB LOCKARD, A MINOR,  
BY AND THROUGH HIS MOTHER AND  
NEXT FRIEND, TRACY LOCKARD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ANN O'MALLEY SHAKE, JUDGE  
ACTION NO. 02-CI-008116

NORTON HOSPITALS, INC., D/B/A  
KOSAIR CHILDREN'S HOSPITAL;  
AND MARY E. LACHER, M.D.

APPELLEES

### OPINION AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: Tyler Lockard, through his mother, Tracy Lockard, appeals from a judgment of the Jefferson Circuit Court in favor of the defendants in a medical malpractice case. At issue is the trial court's exclusion of testimony regarding the actual time of Tyler's injury. Plaintiff's mother testified by deposition that the injury occurred

---

<sup>1</sup> 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.

around 2:00 p.m. The trial court excluded testimony from Tyler and his father that the injury actually occurred around 10:00 a.m. because this contradictory testimony was not disclosed to the defendants until midway through the trial. After reviewing the record and hearing oral arguments, we affirm the trial court's exercise of discretion.

Tyler Lockard, aged seven, fell and suffered a seemingly minor abrasion on his left middle finger while playing at school on the morning of January 22, 2002. He then participated in a swim program at the YMCA and returned to school and remained there for the rest of the school day. After school, Tyler was picked up by his grandfather who cleaned and bandaged the finger. Tyler's mother, Tracy, took him home around 5:00 p.m. She noted that the injury appeared to be a minor cut, with some pinkness, but no bleeding. That evening, Tyler complained of pain. Tracy gave him Motrin and an ice pack. His finger began to swell. He went to bed around 9:00 p.m. Around 11:30 p.m., Tracy found Tyler sitting up in bed, crying. He was feverish and had vomited.

By now, his entire hand was swollen. Tracy put him in a cool bath and gave him more Motrin. Tyler's father, John Lockard, was working second shift and Tracy waited for him to get home from work before taking Tyler to the emergency room at Kosair Children's Hospital.<sup>2</sup> The Lockards arrived at the hospital seeking treatment at 3:00 a.m. Because Tyler's parents expressed a fear that his finger was broken, the resident on duty, Dr. Cynthia Greenlee, ordered x-rays. The x-rays showed no fractures, but did indicate some swelling. The attending physician, Dr. Mary Lacher, examined

---

<sup>2</sup> Kosair is part of the Norton Hospital System, but we will refer to the defendant hospital as Kosair for clarity.

Tyler's hand and diagnosed a sprained finger and a mild case of stomach flu. The discharge instructions were to keep Tyler hydrated, give him Motrin, and follow up with his pediatrician the next day.

The following day John took his son to the pediatrician. This was now two days after his fall, and Tyler had blisters on his injured finger. After examining Tyler, the doctor instructed John to take him back to the hospital immediately. At the hospital, the boy was evaluated by a plastic surgeon who performed surgery to remove dead tissue from his infected middle finger. His finger had to be amputated because the blood vessels that supplied it were completely blocked. Tyler also required further surgery on his hand. The diagnosis was necrotizing fasciitis.

Tracy filed suit on her son's behalf against Kosair and Drs. Greenlee and Lacher.<sup>3</sup> She claimed that the doctors negligently failed to diagnose necrotizing fasciitis when Tyler was first taken to the Kosair emergency room. Tracy argued that the defendants' negligence delayed treatment and caused him to lose his finger. Tyler, Tracy, and John were all deposed. Only Tracy was asked directly about when Tyler's injury occurred. She testified that the injury occurred around 2:00 p.m. Neither her husband nor her son corrected her although they were both present during her deposition.

Both sides retained expert witnesses. The plaintiff's experts testified that necrotizing fasciitis would be apparent within six to eight hours after infection and that Tyler exhibited the symptoms of necrotizing fasciitis in the emergency room. The defendant's expert testified that it would take twenty-four to forty-eight hours for the

<sup>3</sup> Dr. Greenlee was dismissed from the suit prior to trial.

infection to present diagnosable symptoms and that Tyler's symptoms at the emergency room were not consistent with a diagnosis of necrotizing fasciitis.

Three days into the trial, Tyler's counsel informed the defendants that Tyler and his father believed the injury had actually occurred four hours earlier than Tracy had testified. By then, the plaintiff's experts had given their testimony and been excused. Defense counsel asked the trial court to exclude this evidence, arguing unfair surprise. The trial court agreed and imposed a requirement that John and Tyler not mention the time of injury during their testimony. Counsel for the plaintiff was allowed to enter into the record by avowal John and Tyler's testimony regarding when the injury occurred.

The jury found for the defendants, and the trial court overruled plaintiff's request for a new trial. This appeal followed. We granted oral argument and found the well-prepared arguments from counsel on each side highly beneficial.

The sole issue on appeal is whether the trial court's decision to prevent John and Tyler from testifying that the injury occurred at an earlier time was reversible error. Kentucky Rule of Evidence (KRE) 403 allows a judge to exclude otherwise relevant evidence

if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

The standard for an appellate court reviewing evidentiary rulings is whether the trial court abused its discretion. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). Appellant argues the trial court abused its discretion by making an

arbitrary ruling which allowed erroneous factual information to stand uncorrected before the jury.

During the mid-trial hearing on defense counsel's motion *in limine*, the trial court gave its reasons for preventing Tyler or John from testifying that the injury occurred earlier than the time stated by Tracy. First, the plaintiff delayed in making the defendants aware of the time discrepancy until midway through the trial and after one set of experts was no longer available. In addition, the element of unfair surprise was present in that defense experts had determined whether infection had sufficient time to manifest based on a belief that Tyler injured his hand at 2:00 p.m. Counsel for the plaintiff asserted that the surprise only occurred because defense counsel failed to ask either Tyler or John about the timing of the injury. This argument did not persuade the trial court, nor does it persuade this Court.

KRE 403 specifically lists “considerations of undue delay” as a reason for excluding otherwise relevant evidence. Tyler and John were present during Tracy's deposition when she testified that Tyler's hand was hurt at 2:00 p.m., but they allowed the 2:00 p.m. time to stand uncorrected for two years. In fact, in his own deposition, Tyler stated that he hurt his finger while he was waiting for the bus to take him swimming. Counsel for Dr. Lacher next asked Tyler whether he then went swimming in the afternoon. Neither the question nor the answer appears focused on the time of day, but rather the sequence of events. Tyler nevertheless reinforced his mother's testimony by

answering affirmatively. While we have no doubt Tyler did not do so intentionally, the effect was the same as if he had.

Plaintiff's counsel argued at trial that his clients had no understanding of the importance timing would play until they reviewed the defense expert's deposition. Nevertheless, this expert gave his deposition three weeks prior to trial, and no effort was made to advise the defendants at that time or in the intervening period before trial that there was contradictory evidence regarding the timing of Tyler's injury. During the hearing, the trial court stated that the situation would have been different had the plaintiff come forward with evidence of a morning injury "a year ago or two years ago or six months ago."

The trial court also found that allowing Tyler and John to testify that the injury occurred at 10:00 a.m. would be unfair to the defendants. One of the matters in contention between the plaintiff's and defendants' respective experts was whether there was sufficient time between Tyler's injury and his arrival at Kosair for symptoms of necrotizing fasciitis to manifest. Plaintiff's counsel had allowed defendants' experts to express their opinions to the jury based on the shorter interval. The trial court believed, and we agree, it would be unduly prejudicial to the defendants to permit testimony expanding that interval by four hours. Undue influence is a ground for excluding otherwise relevant evidence under KRE 403. We are bound to affirm the trial court's ruling on evidentiary matters unless "the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear*, 11 S.W.3d at

581. In this case, the trial court found present two of the considerations listed in KRE 403. This provided sufficient grounds for excluding the evidence.

Furthermore, examination of the testimony of the expert witnesses shows us that exclusion of this evidence did not prejudice Tyler's substantial rights in presenting his case. Kentucky Rule of Civil Procedure (CR) 61.01. Tyler's expert testified that the boy could have shown symptoms of necrotizing fasciitis less than twelve hours after his fall.

On the other hand, the defendants' expert testified that it would take a minimum of twenty-four hours for infection to develop. Expanding the interval between the reported time of his injury and the time at which Tyler arrived at Kosair by four hours (from twelve to sixteen) would not have assisted the jury in determining whether or not Tyler was actually showing symptoms of infection during his emergency room visit. In addition, his expert witness testified to his belief that Tyler was, in fact, showing symptoms of infection at the emergency room. Defendants' expert, who unlike plaintiff's expert was a specialist in treating children with infectious diseases, expressed three major opinions. He stated that the emergency room doctors treated Tyler with the appropriate standard of skillful care, that there was insufficient time between his reported injury and his arrival at the emergency room for necrotizing fasciitis to develop, and that Tyler did not have symptoms consistent with such an infection when he presented at the hospital. Furthermore, according to this witness, earlier treatment of the infection would not have

saved Tyler's finger. Thus, any error occasioned by the trial court's exclusion of evidence was harmless. CR 61.01.

A careful review of the record and the arguments leads us to the conclusion that the trial court did not abuse its discretion in excluding this evidence. Neither do we believe that admission of the excluded evidence would have altered the jury's verdict. For the forgoing reasons, we affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Liz J. Shepherd  
Tyler S. Thompson  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Martin Kinney  
Louisville, Kentucky

BRIEF FOR APPELLEE, MARY E. LACHER, M.D.:

William P. Swain  
Susan D. Phillips  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE, MARY E. LACHER, M.D.:

Susan D. Phillips  
Louisville, Kentucky

BRIEF FOR APPELLEE, NORTON HOSPITALS, INC., D/B/A KOSAIR CHILDREN'S HOSPITAL:

Shannon M. Gordon  
Karen L. Keith  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE,  
NORTON HOSPITALS, INC., D/B/A  
KOSAIR CHILDREN'S HOSPITAL:

Karen L. Keith  
Louisville, Kentucky