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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000200-MR

HOLLIE PEYTON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 03-CI-02722

DAWN ARCHER, ELIZABETH BOGS,
MELISSA MCDANIEL, TAMARA PORTER
AND MARIAN S. WILLIAMS

APPELLEES

AND

NO. 2007-CA-000740-MR

HOLLIE PEYTON

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 03-CI-02722

JED TAYLOR, ADMINISTRATOR
OF THE ESTATE OF NADI RUE TAYLOR

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: NICKELL AND THOMPSON, JUDGES; ROSENBLUM,¹ SPECIAL JUDGE.

NICKELL, JUDGE: Hollie Peyton (Peyton) has appealed from an amended agreed order granting a directed verdict in favor of Dawn Archer, Elizabeth Bogs, Melissa McDaniel, Tamara Porter, and Marian S. Williams (collectively Archer defendants), entered on January 8, 2007, by the Fayette Circuit Court. Peyton has also appealed from the March 12, 2007, order dismissing his claims against Jed Taylor, Administrator of the Estate of Nadi Rue Taylor, deceased (Taylor). We affirm.

On June 24, 2002, Peyton sustained serious injuries in a motorcycle accident. He was taken to the University of Kentucky Medical Center in Lexington (UKMC) for treatment. Among other less serious injuries, Peyton was diagnosed with a severe fracture to his right tibia and he underwent a surgical procedure that evening to stabilize the fracture. Following the procedure, the surgeon placed Peyton's leg in an open splint, packed it with gauze, and wrapped the leg in Ace bandages. After a short time in the recovery room, Peyton was admitted to the hospital for further care.

On June 26, 2002, Peyton underwent a second surgical procedure on his broken right leg. Physicians from both the orthopedic and plastic surgery departments were on hand during the surgery to consult on the injury and develop an operative plan to restore the right leg's open wound including assessing the

¹ Retired Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

necessity of muscle and skin grafts. Following the surgery, Peyton's leg was again placed in an open splint and covered as before. Upon returning to his room, Peyton complained of severe pain in his right leg, which pain continued into the following day. Physicians from the orthopedics and plastics departments separately conducted rounds twice daily, meaning four physicians interacted with Peyton each day.

On June 28, 2002, Peyton underwent a third surgical procedure. Afterwards his leg was splinted as before. No additional problems with his leg or skin tissue were noted at that time. Shortly after returning to his room, Peyton's sister, Deborah Taylor (Deborah), a nurse formerly employed at UKMC, visited with him. As she had routinely done in all of her prior visits, Deborah performed a "neurovascular assessment" wherein she checked Peyton's pedal pulses, skin color and temperature, capillary refill, and toe movement on the right leg to ensure his circulatory system had not been compromised. Deborah found nothing abnormal during this or any other of her assessments.

Peyton continued to complain of severe pain throughout that evening. Deborah contacted a "house supervisor"² to request that an orthopedic resident check on Peyton. The supervisor agreed to contact the orthopedics department as well as the acute pain management service. Following this phone call, an unidentified man checked on Peyton, received his complaints, and adjusted the

² Although this term is used in the parties' briefs it is not defined nor is a specific person named as being such a supervisor.

position of his splint. A representative of the acute pain management service assessed Peyton shortly thereafter. Peyton refused additional pain medication and insisted his pain was being caused by the tightness of the dressing applied to his leg. This complaint was referred to Peyton's primary nurse who conveyed the information to Peyton's orthopedic physician.

The following morning, a physician discontinued Peyton's self-medication pump. This decision was based on a noticeable decrease in its usage in the sixteen hours following his latest surgery, combined with the knowledge that during that same period of time, Peyton's vital signs, including his blood pressure, showed no signs of distress. Further, Peyton reported virtually no anxiety, and nothing in the medical records indicated he was experiencing extreme pain or discomfort.

Over the next two days, Peyton was seen by rounding physicians from the orthopedics and plastics departments. The leg splint was analyzed each time but no changes or corrections were made to the dressing. A representative of the physical therapy department also saw Peyton during this time period and noted the patient appeared to be feeling better.

On July 1, 2002, Peyton was taken to the operating room for additional previously scheduled surgical procedures, including muscle and skin graft procedures. Upon removal of Peyton's splint, a large area of dead skin was noted on his lower leg which had not been present during his June 28 surgery.

Additional surgical procedures were undertaken to fix this new area of injury. On July 8, 2002, Peyton was discharged.

On June 27, 2003, Peyton filed the instant action against UKMC, the Archer defendants, and Taylor, alleging their negligence caused the secondary injury to his right leg. The Archer defendants and Taylor were all nurses who worked for UKMC and provided care to Peyton during his hospitalization. On October 7, 2003, an agreed order was entered dismissing UKMC as a party to the action, and on June 16, 2006, an agreed order was entered dismissing Gayle Bourne³ as a party. On October 23, 2006, Peyton moved the court for leave to join additional parties including the doctors and nurses performing or assisting with the June 28, 2002, procedure, to which all remaining defendants objected. At the conclusion of a brief hearing on the matter, the trial court denied Peyton's request. Following extensive discovery, the matter was scheduled for a jury trial on November 20-21, 2006.

Approximately four days before the scheduled trial date, the trial court was notified that Taylor had passed away following an extended illness. Peyton promptly requested the trial date be continued as it would be legally impossible to revive the matter against Taylor's estate prior to trial. Peyton also argued the trial court had lost jurisdiction over Taylor which could not be regained until an estate

³ Gayle Bourne was a nurse at UKMC who also provided care to Peyton. The reasons for her dismissal as a party to this suit are unclear from the record.

had been created and joined as a party to the pending lawsuit. The trial court denied the request for continuance and proceeded to trial on the scheduled date.

Following Peyton's opening statement, the defendants made a joint motion for a directed verdict arguing Peyton had failed to allege a breach of the standard of care by the nurses was a substantial contributing factor to his secondary injuries. The trial court denied the motion and the case proceeded with the presentation of evidence to the jury. Following the videotaped testimony of Dr. Henry Vasconez ("Dr. Vasconez"), Peyton's treating physician, the defendants again moved for a directed verdict arguing Peyton had failed to establish a causal link even assuming, *arguendo*, that the nurses had breached the standard of care. The motion was again denied. Near the end of the second day of trial, Peyton closed his case-in-chief. The defendants renewed their motion for a directed verdict, again arguing Peyton had failed to prove a causal link between a breach of the standard of care, if any, and his secondary leg injury. The trial court granted the motion and entered a judgment accordingly on December 7, 2006. On January 8, 2007, the trial court entered an amended agreed order sustaining the directed verdict as to the Archer defendants, and sustaining Peyton's motion to alter, amend or vacate the verdict as to Taylor. Peyton timely appealed from this order.

On February 23, 2007, Taylor's estate was substituted as a defendant pursuant to CR⁴ 25.01. On March 12, 2007, the trial court entered an order dismissing the complaint against Taylor's estate, specifically finding that all

⁴ Kentucky Rules of Civil Procedure.

pretrial deadlines had expired and Peyton was unable to prove his claims against Taylor's estate for the same reasons stated at the conclusion of the earlier trial and in its December 7, 2006, order granting a directed verdict in favor of the Archer defendants. Peyton timely appealed from this decision. Peyton's two appeals were consolidated by this Court for purposes of judicial economy. We affirm.

Peyton advances three allegations of error in urging reversal. First, he contends the trial court erred in its findings underlying the granting of a directed verdict in favor of the defendants. Second, Peyton alleges the trial court erred in its treatment of Taylor's estate as a party for purposes of trial and later dismissing his claims against the estate. Finally, he alleges the trial court abused its discretion in denying his motion to join additional defendants because joinder was barred by the statute of limitations.

DIRECTED VERDICT

The standard of appellate review of a trial court's grant of a directed verdict motion is well-established. In *Bierman v. Klapheke*, 967 S.W.2d 16, 18-19 (Ky. 1998), our Supreme Court stated:

[o]n a motion for directed verdict, the trial judge must draw all fair and reasonable inferences from the evidence in favor of the party opposing the motion. When engaging in appellate review of a ruling on a motion for directed verdict, the reviewing court must ascribe to the evidence all reasonable inferences and deductions which support the claim of the prevailing party. *Meyers v. Chapman Printing Co., Inc.*, Ky., 840 S.W.2d 814 (1992). Once the issue is squarely presented to the trial judge, who heard and considered the evidence, a reviewing court cannot substitute its judgment for that of

the trial judge unless the trial judge is clearly erroneous. *Davis v. Graviss*, Ky., 672 S.W.2d 928 (1984).

In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. A reviewing court is rarely in as good a position as the trial judge who presided over the initial trial to decide whether a jury can properly consider the evidence presented. Generally, a trial judge cannot enter a directed verdict unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. 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 witnesses. *Cf. Taylor v. Kennedy*, Ky.App., 700 S.W.2d 415 (1985).

“A directed verdict is appropriate when, ‘drawing all inferences in favor of the nonmoving party, a reasonable jury could only conclude that the moving party was entitled to a verdict.’” *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 775 (Ky. App. 2000) (quoting *Buchholtz v. Dugan*, 977 S.W.2d 24, 26 (Ky. App. 1998)). Recently, in *O’Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006), our Supreme Court reiterated a long-standing rule of law, explaining “[t]his Court has often stated that ‘speculation and supposition are insufficient to justify a submission of a case to the jury, and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation.’” *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951).” A plaintiff must introduce evidence sufficient to provide a reasonable basis for concluding that the conduct of the defendant is more likely than not a substantial factor in bringing about the plaintiff’s injury. *Texaco, Inc. v. Standard*,

536 S.W.2d 136, 138 (Ky. 1975). “A mere possibility of such causation is not enough and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced it becomes the duty of the court to direct a verdict for the defendant.” *Id.*

In the case *sub judice*, Peyton contends the trial court made incorrect findings and erroneously directed a verdict in favor of the defendants. He claims the trial court did not draw all inferences in his favor and thus erred in finding he had failed to prove a breach of the duty of care and in finding he had failed to prove a causal link between the defendants’ allegedly negligent actions and his injury. Peyton then contends the trial court compounded its errors in using these incorrect findings as a basis for directing a verdict for the defendants.

In this Commonwealth, to sustain an action for negligence, “a plaintiff is required to establish: (1) a duty on the part of the defendant; (2) a breach of the duty; and (3) a causal connection between the breach and an injury suffered by the plaintiff.” *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp 1054, 1056 (E.D.Ky. 1995) (citing *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992)). Thus, if unsatisfactory evidence is produced in any of these three areas, the trial court must direct a verdict.

The Supreme Court of Kentucky has recognized a “universal duty” of care whereby “every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury.” *Grayson Fraternal Order of*

Eagles, Aerie 3738, Inc. v. Claywell, 736 S.W.2d 328, 332 (Ky. 1987). We believe it is clear that medical professionals have a duty to care for their patients to ensure, to the best of their ability, that no harm befalls those entrusted to their care. No argument to the contrary has been advanced in the instant case. Thus, there being no genuine issue as to the existence of a duty, the question becomes whether there was sufficient presented evidence to overcome a directed verdict regarding a breach of that duty and a causal connection between the breach and Peyton's injury.

The theory of Peyton's case was that his lateral leg injury was a pressure sore caused by excessive pressure from the splint placed on his leg following the June 28, 2002, surgery. Peyton argued the nurses breached the standard of patient care by failing to remove the splint or requesting that a doctor do so and that this failure was the proximate cause of his lateral leg injury. Thus, he argues the directed verdict was improperly granted. We disagree.

The undisputed testimony elicited at trial was that the nurse defendants did not apply Peyton's splint. Further, it was undisputed that nurses at UKMC were not permitted to remove surgical dressings, such as the one applied to Peyton's leg, without specific orders from a physician. Peyton's nursing expert, Willetta Hano ("Hano"), testified she believed nurses could possibly remove the outer bandaging of a surgical dressing to better assess the condition of casted or splinted areas of their patients, but admitted that the removal of such bandaging would not alleviate any pressure from a splint or a cast. Thus, when taken in the

light most favorable to Peyton, the evidence clearly does not support his contention that the nurses breached an affirmative duty by failing to remove the surgical dressing from his lower leg.

Peyton alternatively argues that the nurses had an affirmative duty to call a doctor to request that the splint be removed and their failure to do so was a breach of the standard of care. However, our review of the record reveals Peyton's argument neglects to acknowledge the undisputed evidence contained within his own medical records that at least two physicians per day—one from each of two different specialty departments, orthopedics and plastics—rounded on him and assessed his condition during the time when his secondary injury is alleged to have occurred and that his reports of pain and discomfort decreased during this same time period. Peyton did not report any excruciating pain to the doctors or request they loosen or remove the surgical dressing. Despite daily visits, none of physicians adjusted or loosened the splint nor ordered the nurses to do so. Peyton did not present any expert testimony indicating what, if anything, further the nurses could or should have done under the circumstances. In fact, the only complaint Peyton's witnesses adequately raised against any of the nurse defendants was Hano's criticism of the failure to properly chart Peyton's neurovascular assessments over the weekend following his third surgery. However, Hano admitted this deficiency would not have caused nor contributed to Peyton's secondary leg injury. Again, even when taken in the light most favorable to

Peyton, we are unable to conclude the defendant nurses breached any standard of care.

Nevertheless, even if we were to assume there was a breach of the standard of care, we believe Peyton also failed to meet his burden of proving a causal link between such breach and his secondary injuries. The testimony of his medical expert exposes this fatal flaw. Hano was not qualified to testify as to causation, so the testimony given by Dr. Vasconez was the only evidence Peyton elicited regarding causation.

Although Dr. Vasconez indicated he would be speculating as to the actual medical cause of the lateral leg injury, he opined that pressure from the cast was the most likely cause. Peyton believes the trial court placed improper weight on the use of the word “speculate” as she was required to take the evidence in the light most favorable to him. While the trial court discussed Dr. Vasconez’s inability to unequivocally state the medical cause of Peyton’s injury, there is a more serious flaw in his testimony. In his deposition, Dr. Vasconez was specifically asked whether Peyton’s nursing care was in any way responsible for his surgical outcome. The answer—“No.” Regardless of the medical cause of the secondary injury, Dr. Vasconez could not point a finger at any of these nurses’ actions or inactions as proximately causing Peyton’s injury. Thus, Peyton failed to carry his burden of proof and the trial court correctly granted the directed verdict.

TAYLOR’S ESTATE

Next, Peyton contends the trial court erred in its treatment of Taylor's estate. He initially argues the trial court abused its discretion in allowing trial to proceed with Taylor remaining a named defendant following her death and before an estate had been created. Although we agree the trial court lost jurisdiction over Taylor at her death, our review of the record indicates the trial court properly corrected its earlier mistake when it granted Peyton's motion to vacate its judgment in favor of Taylor, permitted the substitution of her estate in her stead, and allowed Peyton's claim to go forward against the estate. Thus, any error in allowing the trial to go forward was harmless at best.

Peyton then contends the trial court erroneously granted a directed verdict in favor of Taylor's estate. He argues the trial court erroneously held that all pretrial deadlines had passed as to Taylor's estate and he could not prove his claims against the estate for the same reasons stated in the earlier directed verdict in favor of the Archer defendants. He believes that Taylor's death and the subsequent revival of the action against her estate freed him from the earlier mandates of the trial court regarding pretrial deadlines. Thus, Peyton argues he should have been allowed "to alter his case against the estate to comport with the Court's understanding of the law of causation during a new trial." We disagree.

Although the trial court lost jurisdiction over Taylor at her death, Peyton's claim against her was merely abated pending revival. His claim was not lost, nor was he required or allowed to begin the proceedings against Taylor's estate anew. The thrust of Peyton's argument is to the contrary. Peyton directs us

to no authority supporting his position that when an action is revived and a personal representative is substituted as a party the litigation begins anew. In the case at bar, discovery had been completed, all pretrial deadlines had expired, and the matter was ready for trial prior to Taylor's death. None of these events was affected or nullified by her death. Peyton's contentions to the contrary are misplaced.

Peyton neither pled nor proved any facts or legal theories of liability against Taylor that were different from those raised against any of the other nurse defendants. As he was unable to overcome a directed verdict at trial against the Archer defendants, the trial court correctly found he would be unable to sustain his burden of proof against Taylor's estate. There was no error.

JOINDER

Finally, Peyton contends the trial court erred in denying his motion to join additional parties. He further claims the trial court abused its discretion in holding that the statute of limitations barred joinder of the doctors and nurses who performed or assisted with the June 28, 2002, procedure, and the doctors who allegedly failed to remove the splint after he complained about it being too tight, although Peyton has never specifically named any of these parties. Peyton argues he first became aware of his cause of action against these parties following the 2006 deposition testimony of Dr. Jerald Friesen, an expert retained by the Archer defendants, wherein Dr. Friesen opined that Peyton's secondary lateral leg injury was caused by the improper casting of the leg. Thus, he contends the statute of

limitations did not begin to run on this claim until the date of Dr. Friesen's deposition. We disagree.

First, we are unable to find in the record where the trial court ever considered or ruled upon Peyton's argument that his request was not time-barred by the statute of limitations. Thus, we do not believe this argument is properly before us for review. As such, we find it unnecessary to discuss Peyton's argument regarding the "discovery rule" or the statute of limitations.

Finally, a trial court has discretion to allow the joinder of parties or consolidation of actions arising from the same or similar facts. *Reed v. Hostetler*, 245 S.W.2d 953, 956 (Ky. 1952). Peyton's argument to the contrary is without merit. Under the circumstances presented in this matter, we are unable to conclude the trial court abused that discretion.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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