

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001929-MR

CHRISTOPHER TUCKER, AS THE ADMINISTRATOR
OF THE ESTATE OF MINDI TUCKER, DECEASED;
AND KENTUCKY GUARDIANSHIP ADMINISTRATOR,
BY DONALD McNAY, AS CONSERVATOR FOR
MEGAN TUCKER, JORDAN TUCKER, AND SHANE
TUCKER, ALL MINOR CHILDREN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 05-CI-007544

WOMEN'S CARE PHYSICIANS OF LOUISVILLE, P.S.C.;
AND SUSAN BUNCH, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Christopher Tucker, as Administrator of the Estate of Mindi
Tucker and as next friend of Tucker's children, and Donald McNay, as

Conservator for Mindi Tucker's minor children (collectively "the Estate") appeal from a judgment of the Jefferson Circuit Court which confirmed a jury verdict in favor of Women's Care Physicians of Louisville, P.S.C. ("WCP") and Dr. Susan Bunch in a medical malpractice action. The Estate argues that the trial court abused its discretion by excluding the testimony of two expert witnesses. Since the Estate has not shown that the testimony was relevant to the factual issues in dispute, we find no abuse of discretion. Hence, we affirm.

The following facts are not in dispute. On August 31, 2006, Mindi Tucker was admitted to Baptist Hospital East ("Baptist East") where her obstetrician/gynecologist ("OB/GYN"), Dr. Susan Bunch, was to perform the planned cesarean section delivery of Tucker's baby. Dr. Bunch's practice, WCP, had a number of standing orders in effect for its patients at Baptist East. Among these orders, Standing Order 11 required the labor and delivery nurse to prepare 2 grams of Cefotan, an antibiotic, for infusion immediately following a cesarean section delivery. Despite the standing order, Tucker was not given the antibiotic following the delivery of her child.

After the surgery, Tucker developed an infection with a Group A Streptococcus ("Strep A") bacteria. The following day, Dr. Bunch learned of the infection and that Tucker had not been given the Cefotan at the time of the surgery. Dr. Bunch and other physicians ordered additional antibiotics. However, they were not timely given. The Strep A infection developed into necrotizing fasciitis. Tucker died from her infection on September 2, 2006.

Thereafter, the Estate brought this action against WCP, Dr. Bunch, Baptist East, and Dr. Barbara Wojda, an infectious disease specialist who consulted with Dr. Bunch. Prior to trial, the Estate settled with Baptist East and Dr. Wojda.¹ The matter then proceeded to a jury trial on the claims against Dr. Bunch and WCP. At the conclusion of the trial, the jury returned a verdict in favor of the defendants. Based on this verdict, the trial court issued a judgment which dismissed the Estate's remaining claims. The Estate now appeals.

The Estate challenges the trial court's rulings excluding the testimony of two expert witnesses. We review evidentiary rulings for abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) *citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). No evidentiary error shall be grounds for reversal unless it affects the substantial rights of the parties. Kentucky Rule of Civil Procedure ("CR") 61.01. Here, we find no abuse of discretion on either of the rulings challenged by the Estate.

The Estate's first issue concerns its attempt to present expert testimony about the meaning of Standing Order 11. Following the settlement with Baptist East, the Estate's claims against Dr. Bunch focused, in pertinent part, on the failure to give Tucker an antibiotic during surgery. Dr. Bunch and WCP

¹ The defendants filed a third-party complaint against Dr. Hassan Alharir, the on-call intensivist at Baptist East. The claim against Dr. Alharir was dismissed prior to trial.

acknowledged that this failure was a violation of the accepted standard of care. However, they argue that the failure to give the antibiotic was caused by the negligence of the circulating nurse, Janet Wilcox, R.N.

The Estate, maintains, however, that Standing Order 11 did not clearly require the circulating nurse to be responsible for giving the antibiotic to the patient. To establish negligence in the drafting of the order, the Estate sought to introduce the testimony of an expert witness, Megan Mileski, R.N. Nurse Mileski would testify that Standing Order 11 was not clearly an order to give the antibiotic to the patient. Rather, she was of the opinion that it merely required the nurse to prepare the medication and have it ready for use during surgery.

Prior to trial, Dr. Bunch and WCP moved to exclude Nurse Mileski's testimony, arguing that the interpretation of Standing Order 11 was not a proper matter for expert testimony. The trial court declined to rule on the motion *in limine* before trial. However, the court held that the Estate must lay a sufficient foundation for admission of the testimony. Specifically, the trial court held that the Estate must establish that Nurse Wilcox did not have the same understanding of the order as did Dr. Bunch.

At trial, Nurse Wilcox testified that she was not confused about the meaning of Standing Order 11. She stated that she understood it was her responsibility to get the antibiotic, put it on the tray during surgery, and to hand it to the anesthesiologist when it came time for the cord clamping. She stated that she had become distracted before the surgery and simply forgotten to prepare the

antibiotic and bring it to the operating room. Based on this testimony, the trial court found that the expert testimony of Nurse Mileski was not relevant.

In arguing that the testimony was relevant, the Estate relies heavily on the pretrial deposition testimony of Dr. Bunch and Nurse Wilcox. In her deposition testimony, Dr. Bunch stated that she expected the antibiotic would be given as set out in Standing Order 11. Nurse Wilcox, however, was equivocal on the meaning of the order. When asked if it was the responsibility of the circulating nurse to make sure that antibiotics are given, Nurse Wilcox replied, “It’s not my duty to make sure they are given. It’s my duty to make sure, as this order says, that it’s there on the unit ready to give. I don’t actually give it.” (Deposition of Janet Wilcox, January 10, 2007, p. 33.)

The Estate vigorously cross-examined Nurse Wilcox about the inconsistencies between her deposition and her trial testimony. The Estate contends that these inconsistencies were sufficient to raise an issue of fact about whether Standing Order 11 was a clear order. Thus, the Estate argues that it was entitled to present Nurse Mileski’s testimony to show that the order was not clear.

The question in this case does not concern the qualifications of Nurse Mileski or the reliability of her opinions. Rather, the only question is whether her expert opinion was relevant to the matters in dispute at trial. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Kentucky Rule of Evidence (“KRE”) 401. Expert

testimony is appropriate if the specialized knowledge “will assist the trier of fact to understand the evidence or to determine a fact in issue. . . .” KRE 702. If any evidence does not meet this standard, it is not admissible. KRE 402.

We agree with the Estate that the interpretation of a medical order, such as Standing Order 11, involves matters outside of the common knowledge of lay persons. *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680 (Ky. 2005). However, we agree with the trial court that the interpretation of Standing Order 11 is only relevant if there was evidence that the order was subject to different interpretations by Dr. Bunch and Nurse Wilcox and that this confusion was the cause of Nurse Wilcox’s failure to prepare the antibiotic for infusion. Nurse Wilcox’s deposition testimony may suggest that she had a different interpretation of the order than Dr. Bunch intended. At several points in her deposition, Nurse Wilcox states that Standing Order 11 required her merely to make sure that the antibiotic was available if needed. She stated that it was not her responsibility to bring it to the operating room. These statements are clearly inconsistent with her trial testimony.

However, even in her deposition, Nurse Wilcox testified that she was distracted because Tucker was so nervous and she spent much of her time trying to calm her down. As a result, Nurse Wilcox stated that she did not bring the antibiotic into the operating room for the anesthesiologist. Thus, even if there was some evidence that Nurse Wilcox had a different interpretation of Standing Order

11 than Dr. Bunch, the evidence does not support a conclusion that such confusion resulted in Nurse Wilcox's failure to bring the antibiotic into the operating room.

The Estate also notes that Dr. Bunch was allowed to testify that she expected the antibiotic would be given as set out in the Order. In addition, Dr. Bunch's expert witness, Dr. Thomas Nolan, testified that Dr. Bunch reasonably relied on the operating room staff to administer the antibiotic as directed in Standing Order 11. The Estate contends that this testimony opened the door to admission of Nurse Mileski's testimony to show that the order was not clear.

However, Dr. Bunch and Dr. Nolan were testifying about the standard of care to which an OB/GYN in these circumstances would be held. In addition, Dr. Nolan was specifically addressing the Estate's contention that Dr. Bunch had specifically opted not to give Tucker the antibiotic. Neither witness explicitly stated that Standing Order 11 was a clear order – only that Dr. Bunch reasonably expected that it would be carried out. Moreover, as noted above, there was no evidence that the failure to give the antibiotic was caused by differing interpretations of Standing Order 11. In the absence of such evidence, Nurse Mileski's testimony was not relevant to show that Dr. Bunch did not reasonably rely on the order in expecting that the antibiotic would be given. Consequently, the trial court did not abuse its discretion by excluding Nurse Mileski's testimony.

The Estate next argues that the trial court abused its discretion by prohibiting it from cross-examining one of Dr. Bunch's experts with the deposition testimony of another of the Estate's experts. Dr. Bunch and WCP presented the

testimony of an infectious disease specialist, Dr. Charles Stratton, who testified that a two gram dose of Cefotan would not have been sufficient to prevent the Strep A infection which Tucker contracted. The Estate sought to cross-examine Dr. Stratton with the deposition of another expert retained by Dr. Bunch and WCP, Dr. Jeffrey Allen. The Estate maintains that Dr. Allen's testimony would have contradicted Dr. Stratton's opinion.

We agree with the Estate that it may have been entitled to use Dr. Allen's deposition to impeach Dr. Stratton's opinions. *See* CR 32.01. *See also Davenport By and Through Davenport v. Ephraim McDowell Memorial Hospital, Inc.*, 769 S.W.2d 56, 61 (Ky. App. 1988). Furthermore, a party is entitled to cross-examine an expert on any subject that reflects on the expert's credibility. *See Tuttle v. Perry*, 82 S.W.3d 920, 923-24 (Ky. 2002). However, after reviewing the trial record, we cannot find that the Estate clearly showed that it intended to introduce the deposition testimony for this purpose.

At trial, Dr. Bunch and WCP objected to the use of Dr. Allen's deposition because he had not been called as a witness in the Estate's case-in-chief. Consequently, they contended that it would be unfair to allow the Estate to present the substance of Dr. Allen's testimony after it had closed its case. The Estate's counsel did not immediately explain that he was offering the deposition testimony to impeach Dr. Stratton. In fact, the Estate did not even suggest that it intended to offer Dr. Allen's deposition testimony for impeachment purposes until after the trial court had ruled that it was inadmissible. Even at that point, the Estate did not

explain how Dr. Allen's testimony would contradict Dr. Stratton's. (VR 56, 5/28/08; 2:16:00.)

Given the record, we cannot find that the Estate adequately preserved its objection to the limitation on its cross-examination. The Estate did not clearly advise the trial court that it was offering Dr. Allen's deposition testimony to impeach Dr. Stratton's opinions. Furthermore, even when the Estate belatedly raised this issue, it did not seek a ruling from the court that the testimony was admissible for this purpose.

And finally, the Estate has not shown that Dr. Allen's deposition testimony would contradict Dr. Stratton's opinion. In the section of his deposition which the Estate cites, Dr. Allen was testifying generally about his use of prophylactic antibiotics during surgery. He admitted that he does not use Cefotan, but opined that a two gram dose of a different antibiotic, Kefzol, generally would be sufficient to prevent post-operative infections. However, Dr. Allen noted that Kefzol covers a different range of organisms than Cefotan. Furthermore, he did not discuss whether either antibiotic would be sufficient to prevent the particular Step A infection which Tucker contracted. Consequently, we conclude that the Estate has not shown that Dr. Allen's testimony was relevant to impeach Dr. Stratton's testimony. Thus, the trial court did not abuse its discretion by excluding the testimony.

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

ALL CONCUR.

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