RENDERED: JUNE 18, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000818-MR

THREE RIVERS MEDICAL CENTER — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 06-CI-00051

SOPHIA SAVAGE AND
DARRELL SAVAGE, HER HUSBAND — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MOORE, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Three Rivers Medical Center brings this appeal from a March 13, 2009, judgment of the Lawrence Circuit Court upon a jury verdict awarding Sophia Savage and Darrell Savage $2,500,000 in a medical negligence action. We reverse and remand.

In 2006, the Savages filed a medical negligence action against, *inter alios*, Three Rivers Medical Center (Medical Center).[1] The Savages alleged that a surgical sponge was negligently abandoned in Sophia's abdominal cavity during a hysterectomy procedure performed at the Medical Center on December 14, 2001.

A jury trial eventually ensued in June 2008, whereupon the jury returned a verdict in favor of Sophia and awarded $800,000 in damages. Thereafter, the Medical Center filed a motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a motion for a new trial. On July 17, 2008, the trial court denied the motion for JNOV but granted the motion for a new trial and set aside the jury verdict. An appeal (Appeal No. 2008-CA-001411-MR) was pursued to this Court but was dismissed as having been taken from an interlocutory order.

Thereafter, a second jury trial ensued, and the jury ultimately awarded the Savages $2,500,000 in damages. On March 13, 2009, a final judgment was entered reflecting the jury's award. This appeal follows.

The Medical Center contends that the trial court erred by denying its motion for JNOV following the first trial. Upon review of a trial court's denial of a motion for JNOV, the Court of Appeals is bound to affirm "unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Fister v. Com.*, 133 S.W.3d 480, 487 (Ky. App. 2003)(quoting *Taylor v. Kennedy*, 700 S.W.2d, 415,

[1] Sophia Savage and Darrell Savage also named other individual medical providers as defendants. These defendants either settled the claims or were dismissed from the case.

416 (Ky. App. 1999)); *see also Disabled Am. Veterans v. Crabb*, 182 S.W.3d 541 (Ky. App. 2005).

The Medical Center specifically argues that the Savages failed to offer any medical evidence proving that the surgical sponge was abandoned in Sophia's abdomen during the 2001 hysterectomy procedure. The Medical Center points out that Sophia had undergone two prior surgical procedures – a caesarian section in 1978 and gallbladder surgery in 1982. The Medical Center argues that the surgical sponge could have been left in Sophia's abdomen during either the caesarian section or the gallbladder surgery. In the absence of some expert medical evidence demonstrating that the surgical sponge was left in Sophia's abdomen during the 2001 hysterectomy procedure, the Medical Center argues that it was entitled to a JNOV.

In an ordinary negligence action, the plaintiff must prove duty, breach of duty, causation, and damages. *See Helton v. Montgomery*, 595 S.W.2d 257 (Ky. App. 1980). Generally, a plaintiff must offer medical or expert evidence to prove negligence in a medical malpractice action. *Morris v. Hoffman*, 551 S.W.2d 8 (Ky. App. 1977). An exception to this general rule is recognized in cases of retained foreign objects in patients' bodies after surgical procedures. *Nazar v. Branham*, 291 S.W.3d 599 (Ky. 2009). Under this exception, the doctrine of *res ipsa loquitur* is utilized to create a rebuttable presumption of negligence as to the retained surgical sponge or instrument following a surgical procedure without the

need of medical evidence. *Id.; Baxter v. AHS Samaritan Hospital, LLC*, ____ S.W.3d ___ (Ky. App. 2010).

In a factual scenario similar to this case, the Court of Appeals, in *Nalley v. Banis*, 240 S.W.3d 658 (Ky. App. 2007), was faced with the question of whether an appellant must present expert medical evidence concerning small metal fragments abandoned after a surgical procedure or, instead, could rely upon the doctrine of *res ipsa loquitur*. In *Nalley*, the plaintiff had undergone previous surgical procedures in the same general area of the body. Because of the prior procedures, the *Nalley* Court concluded that plaintiff could not rely upon the doctrine of *res ipsa loquitur*:

> Importantly as well, however, is the fact that although metal fragments were discovered in Mrs. Nalley's head after her brow lift surgery performed by Dr. Banis at Norton Hospital, she had undergone other procedures in the general area of her face performed by other doctors; thus, reasonable minds could differ on which doctor was responsible for leaving the metal slivers in her head. Consequently, we agree with the circuit court that the doctrine of *res ipsa loquitur* is inapplicable to this claim. Therefore, the circuit court did not abuse its discretion in finding that expert testimony was necessary for a jury to make a determination regarding the metal fragment claim.

Nalley, 240 S.W.3d at 662. In sum, the Court concluded that the doctrine of *res ipsa loquitur* was inapplicable because appellant had undergone prior surgeries and "reasonable minds could differ on which doctor was responsible for leaving the metal slivers in her head." *Id.*

Likewise, in the case at hand, Sophia had two prior surgical procedures in which a sponge could have been left in the abdominal cavity. Thus, while the doctrine of *res ipsa loquitur* may relieve the Savages from presenting expert medical evidence demonstrating that a retained surgical sponge constituted a deviation from the standard of care, it did not relieve the Savages from presenting expert medical evidence identifying the surgical procedure in which the sponge was abandoned. Stated simply, the Savages were still required to submit expert medical evidence supporting their theory that the surgical sponge was abandoned in Sophia's abdomen during the 2001 hysterectomy. We now review the evidence introduced by the Savages during the first trial to determine whether the trial court correctly granted a new trial, or in the alternative, should have granted the Medical Center a JNOV.

A review of the trial record reveals that the Savages' evidence demonstrating that the sponge was left in Sophia's abdomen during the 2001 hysterectomy procedure can be summarized as: (1) 1993 x-rays, (2) Sophia's testimony, and (3) Dorothy Cooke's testimony. We address each separately to determine whether the Savages offered medical or expert evidence to support their argument that the surgical sponge was left in Sophia's abdomen during the 2001 hysterectomy procedure.

The 1993 x-rays were offered into evidence by the Savages.[2] When admitted into evidence, a document signed by Teddy Hall, Radiology Director at Williamson Appalachian Regional Hospital (ARH), certifying the x-rays accompanied them. During trial, both parties offered testimony interpreting the 1993 x-rays. As the trial proceeded, the Medical Center discovered that Hall was not the custodian of records at Williamson ARH and that Williamson ARH possessed no x-rays of Sophia from 1993. The Medical Center moved for a mistrial upon the basis of lack of authentication. The trial court denied the motion. After the jury verdict, the trial court granted the Medical Center's motion for new trial based upon the admission of the 1993 x-rays into evidence without proper authentication. The trial court recounted the facts leading to the erroneous admission:

> Finally, the Defendants argue that admitting the x-rays into evidence was erroneous because the certification of Teddy Hall, Jr. was improper. Mr. Hall testified at the hearing on these motions on July 12, 2008. In his testimony, he stated that he was not the custodian of records for Williamson Appalachian Regional Hospital, and was not qualified to certify records. He stated that on a Sunday evening, the Plaintiffs' attorney brought some documents to him, and asked him to sign a certification. He stated that he signed the certification, but there was no notary public present to witness his signature. He testified that he had never certified medical records before. He stated that he has since learned that the certification process at the hospital includes review of the documents by the Health Information Department, the Safety Compliance Officer,

[2] The 1993 x-rays were not referenced by the Savages in their Kentucky Rules of Civil Procedure (CR) 26.02 disclosures. The x-rays were identified and copies provided a few weeks before the first trial.

> and the Legal Department. He indicated that a woman named Amy Harris was the Medical Records Director who would be the one who would ultimately certify records. With respect to the records involved in this case, he testified that the Plaintiffs' attorney presented to him the x-rays which were introduced into evidence as Exhibit 11. He stated that since they were taken so far back, the hospital did not have the x-rays nor any remaining record of the x-rays. He signed the certification based on the fact that the x-rays presented to him by the Plaintiffs' attorney appeared to have the patient's name and hospital number on the x-rays.

It is undisputed that Hall was not the custodian of the 1993 x-rays and that the 1993 x-rays were not records then kept by Williamson ARH. As such, we believe that the trial court correctly concluded that the 1993 x-rays were not properly authenticated under either KRS 422.300 or Kentucky Rules of Evidence (KRE) 902(11).[3] *See Matthews v. Com.*, 163 S.W.3d 11 (Ky. 2005). As the 1993

[3] Kentucky Revised Statues (KRS) 422.300 provides:

> Medical charts or records of any hospital licensed under KRS 216B.105 that are susceptible to photostatic reproduction may be proved as to foundation, identity and authenticity without any preliminary testimony, by use of legible and durable copies, certified in the manner provided herein by the employee of the hospital charged with the responsibility of being custodian of the originals thereof. Said copies may be used in any trial, hearing, deposition or any other judicial or administrative action or proceeding, whether civil or criminal, in lieu of the original charts or records which, however, the hospital shall hold available during the pendency of the action or proceeding for inspection and comparison by the court, tribunal or hearing officer and by the parties and their attorneys of record.

Kentucky Rules of Evidence 902(11) reads, in part:

> (11) Business Records
>
> (A) Unless the sources of information or other circumstances indicate lack of trustworthiness, the original or a duplicate of a record of regularly conducted activity within the scope of KRE 803(6) or KRE 803(7), which the custodian thereof

x-rays were improperly authenticated, we also agree with the trial court that the admission of such constituted error.

Since the admission of the 1993 x-rays was erroneous, the 1993 x-rays cannot be relied upon as "medical evidence" demonstrating that the surgical sponge was left in Sophia's abdomen during the 2001 hysterectomy procedure. Likewise, any witness's testimony based upon the 1993 x-rays must also be disregarded.

We next examine Sophia's testimony at trial. Sophia testified that she believed the surgical sponge was abandoned in her abdominal cavity during the 2001 hysterectomy procedure. She justified this belief by recounting symptoms of abdominal pain and diarrhea that started after the 2001 hysterectomy procedure and that reached a climax in 2005. Sophia, however, testified as a lay witness and not as an expert.[4] KRE 701. As such, Sophia's testimony, while compelling and otherwise supportive of appropriate medical evidence, could not constitute medical or expert evidence that the surgical sponge was retained in the abdomen during the

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certifies:

(i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(ii) Is kept in the course of the regularly conducted activity; and

(iii) Was made by the regularly conducted activity as a regular practice.

[4] The record reveals that Sophia Savage was a registered nurse.

2001 hysterectomy procedure. Without expert medical evidence to support Sophia's theory that the sponge was left in the 2001 surgery, her testimony alone would not support a judgment.

Accordingly we must now examine the trial testimony of Dorothy Cooke. Dorothy Cooke was a registered nurse and a nurse practitioner. She also had a Master of Science degree in nursing and held a Ph.D. in health organization research.[5] Cooke testified that she was a military nurse during the Vietnam War and routinely inspected x-rays to determine if foreign objects (bullets or shrapnel) were present in soldiers' bodies. She also testified that she was a professor of nursing at Washington University in St. Louis, Missouri. In such capacity, she testified that she would review x-rays to determine if central lines used to administer medications were properly placed in patients. Based upon Cooke's education and experience, the trial court determined that she was qualified to give expert testimony interpreting the 1993 x-rays. However, as we have previously determined, the 1993 x-rays were improperly admitted and should have been excluded. Thus, we believe Cooke's expert testimony at trial concerning these x-rays should have been disallowed and otherwise must be disregarded in determining the Medical Center's liability.

Without considering the 1993 x-rays, Cooke also testified that based upon Sophia's symptoms and other factors, the surgical sponge was probably left

[5] We note that the Savages' CR 26.02 disclosures indicated that nurse Dorothy Cooke would testify as an expert regarding the care and treatment provided by the Medical Center and its nurses, not as an expert in reading and interpreting x-rays.

in Sophia's abdomen during the 2001 hysterectomy. At trial, the Medical Center again objected and argued that Cooke was not qualified to express such an opinion. The trial court overruled the objection.

It is well-established that the qualification of a witness as an expert rests within the discretion of the trial court. *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675 (Ky. App. 2000). Under KRE 702, a witness may qualify as an expert "by knowledge, skill, experience, training, or education." While Cooke may have arguably possessed the experience and education to express an opinion upon the 1993 x-rays, there was nothing in the record indicating that Cooke possessed any medical qualifications to express an opinion concerning when the surgical sponge was abandoned in Sophia's abdomen. Such medical testimony was clearly outside the scope of Cooke's qualifications as a nurse.

As Cooke was not qualified to express an expert opinion identifying which surgical procedure was responsible for leaving the sponge in Sophia's abdomen absent the 1993 x-rays, the Savages were without any expert medical evidence upon this crucial issue of fact. As previously stated, it was incumbent upon the Savages to offer expert evidence to prove negligence against the Medical Center. Specifically, the Savages were required to submit expert evidence proving that the surgical sponge was abandoned in Sophia's abdomen during the 2001 hysterectomy.

We note that in the trial court's order of July 17, 2008, granting a new trial, the trial court noted that even without the x-rays there was "ample evidence

upon which the jury could determine that the sponge left in the Plaintiff's abdomen was left during the surgery performed by Three Rivers Medical Center in December 2001." However, from our review of the record, absent the evidence we have discussed in this opinion, there appears very little evidence to support this conclusion and what evidence is available is not competent to support the trial court's conclusion or a jury verdict. Without the necessary expert evidence, "there [was] a complete absence of proof on a material issue in the action," thus entitling the Medical Center to a JNOV. *Fister*, 133 S.W.3d at 487 (quoting *Taylor*, 700 S.W.2d at 416.).

Accordingly, we must reluctantly conclude that the trial court erred by denying the Medical Center's motion for JNOV after the first trial.

We view the Medical Center's remaining arguments as moot.

For the foregoing reasons, the judgment of the Lawrence Circuit Court is reversed and remanded for proceedings consistent with this opinion.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. My basis for doing so is that I believe the majority erroneously concludes that the trial court should have granted the Medical Center a JNOV after the first trial and has mistakenly invoked the rule regarding authentication of x-rays.

During the first trial, the Savages introduced the 1993 x-rays through KRE 902(11) and KRS 422.300 pertaining to the authentication of business records. It became apparent to the parties and the court at the hearing on the JNOV motion and motion for a new trial that Hall was not the custodian of the records for Williamson ARH and that the hospital no longer had the x-rays. However, the trial court found that there was sufficient evidence for the jury to determine that the sponge was left when Mrs. Savage had surgery at the Medical Center regardless of the x-ray evidence.

There was ample evidence that Mrs. Savage's symptoms first appeared after her hysterectomy performed at the Medical Center and there was only a remote chance that it could have gone unnoticed for an extended time. Thus, even without the admission of the x-rays, the trial court properly found that there was not a complete absence of proof on a material issue. Nevertheless, concluding that the x-rays were not properly authenticated, under the circumstances the trial court properly denied the JNOV but granted the Medical Center's motion for a new trial.

The erroneous admission of the x-rays during the first trial did not preclude the Savages from seeking their admission at the second trial. The trial court's 2003 order does not limit evidence to be introduced at the second trial and does not prevent the Savages from invoking a rule other than KRE 902(11).

Simply phrased, KRE 902(11) and KRS 422.300 are inapplicable to this case. Through no fault of either party, the x-rays are no longer kept as

business records at the hospital where they were taken. If the majority is correct that KRE 902(11) and KRS 422.300 are applicable, Mrs. Savage and other similarly situated litigants would be precluded from admitting highly relevant and sometimes determinative evidence. However, the law does not impose such an injustice.

KRE 1001 through 1008 specifically apply to x-rays and the situation presented by lost or destroyed x-rays, not lost or destroyed by the proponent in bad faith. In such situations, the original is not required and other evidence is admissible to authenticate the x-ray. KRE 1004(1). The x-ray was labeled with Mrs. Savage's name, the date it was taken, and the name of the hospital at which it was taken. Mrs. Savage testified that she received the x-ray from Williamson ARH and had since that time kept it in her possession. At this point in the trial, it was then incumbent upon the Medical Center to submit expert testimony that the x-rays were not Mrs. Savage's. Because it did not, it presumably could not produce such evidence.

On two occasions, the jury found that Mrs. Savage has been injured by Williamson ARH's negligence and has awarded substantial damages. I believe that the majority has misconstrued our rules of evidence to the detriment of Mrs. Savage whom our jury system has found to be entitled to compensation for her injuries.

Accordingly, I would affirm.

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