

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001095-MR

JANET K. KING

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 06-CI-90209

BYRAM RATLIFF, II

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: NICKELL AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

NICKELL, JUDGE: Janet King has appealed from the Montgomery Circuit Court's May 12, 2009, verdict and final judgment dismissing her claims against Byram N. Ratliff, II, M.D. following a jury trial. We affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Dr. Ratliff is a medical doctor specializing in obstetrics and gynecology who had treated King since 1998 or 1999. Dr. Ratliff served as King's obstetrician during all three of her pregnancies. During King's first pregnancy in 2001, she developed a condition known as incompetent cervix resulting in a miscarriage. Her second pregnancy came in 2003. During that time, she developed a number of serious complications threatening both her life and that of her unborn child. Though a healthy daughter was born of this second pregnancy, King began premature labor at thirty-three weeks gestation and began suffering pre-eclampsia at thirty-six weeks. Following this live birth, Dr. Ratliff informed King that any future pregnancies would present even higher risks of "a bad outcome" and greatly magnified health issues.

King again became pregnant in 2005 and sought treatment from Dr. Ratliff. Precautions were taken to ensure she did not develop the same issues as in her earlier pregnancies. However, she again developed pre-eclampsia, this time in the thirtieth week of the pregnancy. She began suffering from severe headaches and contacted Dr. Ratliff's office on September 2, 2005, seeking advice. She was advised to take Tylenol, but this treatment did not resolve her headaches. On September 3, 2005, King again contacted Dr. Ratliff for advice concerning her headaches. She was advised to take a prescription medication, Imatrex. Following her first dosing of Imatrex, King began vomiting and her headache became more severe. She made the decision to go to the hospital.

King presented to the hospital with headaches, nausea, vomiting and an extremely high blood pressure. After a short time, King's condition improved somewhat. However, King suddenly experienced an eclamptic seizure followed by a severe pulmonary edema, a potentially life-threatening condition. King's condition deteriorated rapidly. The decision to perform an emergency caesarean section ("c-section") was made in order to relieve the eclampsia and pulmonary edema. King's husband, Chester, signed a consent form on behalf of his wife for Dr. Ratliff to perform the c-section. Unfortunately, the baby did not survive and was stillborn.

During the operation, Dr. Ratliff noted King was in shock and her body was shunting blood to her vital organs in her body's attempt to keep her alive. Dr. Ratliff testified he believed it was imperative that King not become pregnant again due to the severe risks he perceived another pregnancy or surgery posed to her life. King had suffered significant lung damage from the pulmonary edema, permanently reducing her lung capacity to forty percent. She also suffered a mini-stroke. Dr. Ratliff believed medically that another pregnancy or surgery would be fatal for King. Dr. Ratliff made the decision to perform a tubal ligation on King although no express consent had been given to perform the procedure. King recovered and was released from the hospital. She subsequently filed suit against Dr. Ratliff for performing the tubal ligation without consent.

In the suit, King alleged battery, negligence and outrageous conduct against Dr. Ratliff. She sought compensatory and punitive damages. Prior to trial,

King moved for summary judgment on the battery claim alleging she had provided evidence to support every element of battery as alleged in her complaint, there had been no evidence produced to refute her claim, and there existed no genuine issue of material fact on the matter. Dr. Ratliff responded to the motion alleging there existed numerous disputed factual issues, including whether he reasonably believed he had consent to perform the tubal ligation or whether a medical emergency necessitated that he perform the sterilization without first obtaining King's consent. He asserted that the reasonableness of his beliefs was a question appropriately answered only by a jury. The trial court denied King's motion, finding disputed issues of fact existed.

The case proceeded to a jury trial. During the course of the trial, Dr. Ratliff moved for, and was granted, a directed verdict on the outrageous conduct claim contained in King's complaint. At the conclusion of the testimony, both parties submitted proposed jury instructions. The trial court drafted its own instructions for the jury, and refused to instruct on medical negligence or outrageous conduct. The jury returned a verdict in favor of Dr. Ratliff. This appeal followed.

On appeal, King contends the trial court erred in failing to grant her motion for summary judgment on the battery claim. She further alleges the trial court's battery instruction was infirm, and that it was error to not instruct the jury on medical negligence and outrageous conduct. We will address each issue in turn.

King first argues the trial court should have granted her motion for summary judgment on the battery claim as there were no issues of material fact in dispute and she was entitled to a judgment as a matter of law. Dr. Ratliff contends the trial court correctly found there were issues of disputed fact sufficient to defeat King's motion and that the denial of a summary judgment motion is not an appealable issue. We agree with Dr. Ratliff.

The general rule under CR 56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact. *Bell v. Harmon*, Ky., 284 S.W.2d 812 (1955).

However, there is an exception to the general rule found in *Gumm v. Combs*, Ky., 302 S.W.2d 616 (1957), and subsequently approved in *Loy v. Whitney*, Ky., 339 S.W.2d 164 (1960), and *Beatty v. Root*, Ky., 415 S.W.2d 384 (1967). The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom. Then, and only then, is the motion for summary judgment properly reviewable on appeal, under *Gumm*.

Transportation Cabinet, Bureau of Highways, Com. of Kentucky v. Leneave, 751 S.W.2d 36, 37 (Ky. App. 1988). Additionally, to be final, "[t]he judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding." *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975).

In the case *sub judice*, King's argument is based primarily upon her contention that no genuine issues of material fact existed. Although many of the

facts are undisputed, the record clearly reflects a factual dispute as to whether Dr. Ratliff had consent to perform the tubal ligation or whether an emergency existed at the time the tubal ligation was performed such that it was necessary to operate without first obtaining King's consent. Therefore, because the issue is whether there exists a material issue of fact, the *Gumm* exception does not apply and we decline to address this issue on appeal, deeming it to be interlocutory in nature and evading review.

Second, King argues the trial court's instruction on battery was not in keeping with the law and created a substantial likelihood that the jury was confused or misled. King contends, citing *Tabor v. Scobee*, 254 S.W.2d 474, 476 (Ky. 1951), that the instruction did not accurately convey that the tubal ligation could only have been performed without her consent "had there been a life-threatening emergency existing at the time of the C-section" making it medically necessary to perform the tubal ligation without obtaining her consent. Thus, she alleges the instruction was infirm, and the trial court erred in refusing to utilize the instruction she tendered.

Kentucky employs the use of "bare bones" jury instructions. *Hilsmeier v. Chapman*, 192 S.W.3d 340, 344 (Ky. 2006). "Instructions must be based upon the evidence and they must properly and intelligibly state the law." *Howard v. Commonwealth*, 618 S.W.2d 177, 178 (Ky. 1981). "The purpose of an instruction is to furnish guidance to the jury in their deliberations and to aid them in arriving at a correct verdict." *Ballback's Adm'r v. Boland-Maloney Lumber*

Co., 306 Ky. 647, 652, 208 S.W.2d 940, 943 (1948). Proper instructions inform the jury “what it must believe from the evidence in order to return a verdict in favor of the party who bears the burden of proof.” *Olface, Inc. v. Wilkey*, 173 S.W.3d 226, 229 (Ky. 2005). “Technically incorrect instructions are not grounds for reversal when the rights of the losing party are not prejudiced.” *Miller v. Miller*, 296 S.W.2d 684, 687 (Ky. App. 1956). “If the statements of law contained in the instructions are substantially correct, they will not be condemned as prejudicial unless they are calculated to mislead the jury.” *Ballback’s Adm’r*, 208 S.W.2d at 943. Alleged errors regarding jury instructions are questions of law that we review under a *de novo* standard. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006).

The instruction given by the trial court was as follows:

The court instructs the jury that on or about September 4, 2005[,] Dr. Ratliff was expressly authorized to operate on the plaintiff, Janet King, to perform a Caesarean section, but that he was not expressly authorized to perform a tubal ligation, and you shall find for the plaintiff, Janet King, for the unauthorized tubal ligation under Instruction No. 4 unless you believe from the evidence that her condition was such that if Dr. Ratliff had not performed the tubal ligation on her at that time it would have endangered her life or her health and it was impracticable at the time for Dr. Ratliff to obtain the consent of Janet King before performing the tubal ligation, in which event, you will find for the defendant, Dr. Ratliff.

After examining the record and the law, we cannot say the trial court erred in giving the instruction it gave. Although the trial court did not specifically

instruct the jury as King requested, the court provided a broad instruction consistent with case law under which the jury could have awarded King damages resulting from Dr. Ratliff's actions. The trial court discussed the factual differences in *Tabor* and the instant case in explaining to the parties the instruction it would be giving and the reasoning for not including King's proposed language. It indicated the facts and evidence presented did not warrant the inclusion of a statement that an emergency must exist at the time of the surgery, that it believed *Tabor* was ambiguous as to the "immediate danger" requirement, and both sides were free under the instruction to present their theory of the case. King's counsel had the opportunity during closing arguments to flesh out the bare bones instruction and explain to the jury how the instruction should apply to King's situation. *Cox v. Cooper*, 510 S.W.2d 530, 535 (Ky. 1974) We are unable to conclude that the instruction given prejudiced King's rights, *Miller*, nor that the instruction was calculated to mislead the jury. *Ballback's Adm'r*. Thus, we hold the trial court did not err in instructing the jury as to King's battery claim.

Third, King alleges the trial court erred in failing to instruct the jury on medical negligence. She contends the trial court should have instructed the jury on the standard of care and duties owed by Dr. Ratliff to King. However, the evidence and testimony to which she refers in making this argument more closely resemble battery than medical negligence. In *Vitale v. Hinchey*, 24 S.W.3d 651, 656 (Ky. 2000), our Supreme Court held that where an operation is performed

without the patient's consent, the physician may be liable for a battery. The

Supreme Court went on to state that:

[s]uch an action is different from a negligence action for medical malpractice because the claim depends on neither professional judgment nor the physician's surgical skill. It also does not involve the type of negligence that occurs when a physician has not made a proper disclosure of the risks inherent in a treatment or procedure. Battery is an intentional tort; it is not committed by a negligent act.

Id. (internal citations omitted). Nothing in the record indicates King's battery claim was transformed into a negligence action by virtue of Dr. Ratliff's failure to obtain her consent prior to performing the tubal ligation or by operation of his professional judgment. It remained an action for battery. Thus, the trial court was correct to refuse to instruct the jury on the issue of medical negligence.

Finally, King contends the trial court erred in failing to instruct the jury on her outrageous conduct claim. She contends sufficient evidence was presented to support the giving of such an instruction. However, the trial court granted Dr. Ratliff a directed verdict on King's claim of outrageous conduct, and no appeal has been taken from that ruling. It is axiomatic that the grant of a directed verdict removes an issue from the purview of the jury. Thus, it would have been wholly improper for the trial court to instruct the jury as King suggests. There was no error.

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

ALL CONCUR.

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