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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001352-MR
&
NO. 2009-CA-001389-MR

SUSIE PERRY AND
SUSIE PERRY, ADMINISTRATRIX
OF THE ESTATE OF
MICHAEL ANTHONY PERRY — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 02-CI-006551

DR. GERALD M. LARSON AND
UNIVERSITY SURGICAL
ASSOCIATES, P.S.C. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE AND STUMBO, JUDGES.

KELLER, JUDGE: Susie Perry (Perry) individually and as administratrix of the estate of Michael Perry (Michael) appeals from the jury verdict and judgment in

favor of Dr. Gerald M. Larson and University Surgical Associates, P.S.C. (collectively referred to as Larson). On appeal, Perry argues that the trial court erroneously admitted previously undisclosed expert opinion testimony, erroneously excluded her testimony, and erroneously dismissed her claim for loss of consortium. Perry also argues that Larson's counsel improperly commented on the evidence during closing argument. Larson argues on cross-appeal that the trial court erroneously denied his motion for a directed verdict. Having reviewed the record, we affirm.

FACTS

The underlying facts in this case are not in dispute. Michael was morbidly obese and suffered from chronic left knee pain. Because of that pain, Michael took an anti-inflammatory, Voltaren. Motivated in part by his knee pain, Michael sought treatment with Larson in the spring of 2001. Larson recommended gastric bypass as a method of weight loss, and he performed that procedure on August 31, 2001. Following the surgery, Larson prescribed thromboembolic deterrent stockings (compression stockings) and sequential compression devices (compression devices) to decrease the risk of Michael developing post-operative deep vein thrombosis (DVT). Larson did not prescribe any medication to address this risk. We note that DVT is not, in and of itself, necessarily life threatening, but can lead to life threatening or fatal consequences such as pulmonary embolism.

The surgery was uneventful and, on September 4, 2001, Michael was released from the hospital. The next morning, Michael died as a result of a

pulmonary embolism. Following Michael's death, Perry brought suit individually and on behalf of Michael's estate alleging, in pertinent part, that Larson's failure to prescribe the medication heparin after surgery violated the standard of care and was a substantial cause of Michael's death. We set forth additional facts as necessary below.

STANDARD OF REVIEW

The standards of review for the issues raised on appeal vary; therefore, we set forth the appropriate standards as we address each issue.

ANALYSIS

1. Admission of Expert Testimony

This Court reviews the trial court's rulings regarding the admission of evidence for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 577-78 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's discretion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.* at 581. With this standard in mind, we review the trial court's admission of expert testimony.

During discovery, Larson identified the expert witnesses he intended to call at trial and summarized the substance of their testimony. Perry then deposed those experts. Perry argues on appeal, in part, that three of Larson's experts testified at trial that Larson did not prescribe heparin to Michael because Michael had been taking Voltaren prior to surgery.[1] According to Perry, neither

[1] We note that Perry refers to a fourth defense expert, Dr. Brolin, in her brief. Perry notes that Dr. Brolin did not state, either by way of deposition or expert disclosure, that there was any

Larson nor his experts disclosed these opinions to Perry prior to trial, and the court should not have permitted the experts to express those opinions at trial. Larson argues that Perry "opened the door" to testimony regarding the interaction between heparin and Voltaren, and that any testimony regarding the interaction of those two medications was admissible. Because Larson's expert disclosures, deposition testimony, and testimony at trial, in conjunction with the testimony of Perry's expert, are at the heart of this appeal, we summarize each below in detail.

a. Dr. Barba

Dr. Barba, Perry's expert, testified at trial that, in 2001, he prescribed heparin, unless contra-indicated, in conjunction with compression devices for his surgical patients. He stated that Michael had a history of a prior DVT and venous deficiency in his left leg; therefore, Larson should have used compression devices in conjunction with heparin. According to Dr. Barba, Larson's failure to do so was a deviation from the standard of care. Furthermore, Dr. Barba testified that, had Larson used heparin, Michael would not have developed DVT and a pulmonary embolism.

On cross-examination, Dr. Barba admitted that heparin and compression devices work equally to reduce the risk of DVT in a normal patient. Furthermore, Dr. Barba admitted that, in 2001, there was a lack of consensus about whether the use of heparin or compression devices was more effective. However,

"medical contraindication" to the use of heparin. Perry has not pointed to any place in the record where Dr. Brolin's testimony at trial varied from his discovery disclosures. Therefore, we are not summarizing Dr. Brolin's testimony herein.

Dr. Barba stated that he recommended heparin, particularly with a high risk patient such as Michael.

On re-direct examination, counsel for Perry asked Dr. Barba to read a portion of the Physicians' Desk Reference (PDR) stating that studies had shown heparin to be an effective treatment for prevention of post-operative DVT. On re-cross examination, over Perry's objection, Dr. Barba read that portion of the PDR which states that "patients receiving . . . platelet active drugs" drugs such as Voltaren "should be excluded from [heparin] treatment."[2]

After reading this portion of the PDR, Dr. Barba testified that the statement in the PDR regarding platelet active drugs was simply a warning, not a contraindication. Dr. Barba stated that he would use heparin in a patient who had been taking Voltaren, but would more carefully monitor that patient for signs of increased bleeding.

b. Dr. Anthony Comerota

In his expert witness disclosure regarding Dr. Comerota, Larson stated as follows:

> The substance of the facts and opinions to which Dr. Comerota will testify include his opinion that the care and treatment of Michael Perry by Dr. Gerald Larson was in compliance with the applicable standard of care and that the decision making process employed by Dr. Larson was in accordance with sound medical judgment.

[2] The record does not contain a copy of the cited page and/or pages from the PDR; however, Perry does not contest that the above cited passage is within the section of the PDR addressing the use of heparin.

> It is expected that Dr. Comerota will testify that Dr. Larson's decision to order operative and post-operative use of T.E.D. hose and sequential compression devices following a vertical band gastroplasty, when combined with early and frequent ambulation, was appropriate for a patient with a medical history like Michael Perry. Dr. Larson's treatment fell in line with the guidelines in effect from the American College of Chest Physicians in 2001. The applicable standard of care did not require utilization of a post-operative anticoagulant, such as heparin, in Mr. Perry's case. Further there is no way of determining whether utilization of heparin would have prevented the death of Mr. Perry. In offering his medical opinions, Dr. Comerota is expected to disagree with the opinions levied by Dr. Carlos Barba and support the actions of Dr. Larson.

In his deposition, Dr. Comerota identified several risk factors for DVT: obesity, history of DVT, and not being fully ambulatory, at least immediately after surgery. Because bariatric surgery patients, by definition, are obese, there is an increased risk for deep vein thrombosis with that surgery.

In 2001, when Michael's surgery took place, the risk of DVT could be managed mechanically and pharmacologically. The mechanical methods included leg elevation, compression stockings, and compression devices. Of the three, Dr. Comerota believes that the compression devices are the most effective. A combination of compression stockings and compression devices is better than the devices alone, but these can result in some discomfort for the patient while being worn. The most common pharmacological method of risk management is heparin. The advantage of heparin is that it is injected either once or twice a day and does not cause discomfort other than at the time of the injection. The drawback is

increased risk of bleeding and possible allergic reaction; however, Dr. Comerota noted that there is a risk of bleeding with any blood thinner.

According to Dr. Comerota, "there was no recognition" that using mechanical and pharmacological treatments was "the best practice" in 2001. In the majority of cases involving high risk patients in 2001, Dr. Comerota used both compression stockings and compression devices in tandem. Dr. Comerota would have used the preceding in combination with pharmacological methods. Dr. Comerota disagreed with Dr. Barba's opinion that "co-factor heparin is the best method to decrease DVT." Dr. Comerota believes that, as of 2001, the two best methods were compression devices with a compression stocking or "low-molecular-weight heparin." In conclusion, Dr. Comerota stated that he had no other opinions about which he intended to testify.

At trial, Dr. Comerota testified consistently with his deposition testimony. Additionally, in response to a question from Larson's counsel regarding why he believed Larson acted reasonably when he decided not to use heparin, Dr. Comerota stated that heparin was a blood thinner, which increased the risk of bleeding. He also stated that there was an additional risk for Michael, namely "that he was on another medication." Before Dr. Comerota could name that medication or make any further mention of that medication, Perry objected. The court sustained that objection and Dr. Comerota made no further comment about any medication Michael may have taken pre-surgery.

c. Dr. David R. Flum

In his expert witness disclosure regarding Dr. Flum, Larson stated as follows:

> The subject matter upon which Dr. Flum is expected to testify include [sic] principles of bariatric surgery, clinical indications for surgery, management of the patient pre- and post-operatively, and the specific course of care and treatment provided by Michael Perry.
>
> The substance of the facts and opinions to which Dr. Flum will testify include his opinion that the care and treatment of Michael Perry by Dr. Gerald Larson was in compliance with the applicable standard of care and that the decision making process employed by Dr. Larson was in accordance with sound medical judgment. It is expected that Dr. Flum will testify that Michael Perry was an appropriate candidate for a vertical band gastroplasty give [sic] his morbid obesity. Dr. Larson appropriately evaluated Mr. Perry prior to surgery and conducted the surgery itself in a sound manner. Post-operatively, Dr. Larson's clinical decision making met the applicable standard of care and his utilization of T.E.D. hose and sequential compression devices were within physician judgment and appropriate under the circumstances. In offering his medical opinions, Dr. Flum is expected to disagree with the opinions levied by Dr. Carlos Barba and support the actions of Dr. Larson. Specifically, Dr. Flum will testify that utilization of heparin was not required by the standard of care given the circumstances presented.

In his deposition, Dr. Flum testified that, in 2000-2001, he used both mechanical compression devices and heparin post-operatively to decrease the risk of DVT. That was the standard of care within his practice at the medical center at the University of Washington and that is what he taught his students. However, Dr. Flum testified that he did not believe that was the standard of care in the general medical community or that a consensus existed regarding the use

mechanical versus pharmacological prevention of DVT. Taking these factors into consideration, Dr. Flum stated that Larson had acted within the standard of care when he chose not to use heparin for post-operative prevention of DVT.

Dr. Flum also testified that he could not state, within medical probability, that use of heparin would have prevented Michael from developing a DVT/pulmonary embolism. Finally, Dr. Flum noted that Michael had requested Voltaren, apparently for leg pain, on September 3, 2001. Dr. Flum testified that he generally does not prescribe Voltaren because it acts as a blood thinner and may increase the risk of bleeding.

At trial, Dr. Flum testified consistently with his deposition, including testifying that Voltaren and other non-steroidal anti-inflammatory medications act as blood thinners and can increase the risk of bleeding. Additionally, Dr. Flum testified that the PDR indicates that use of heparin before and after surgery will reduce the risk of DVT and embolism. However, the PDR also states that patients taking platelet active drugs, such as Voltaren, should be excluded from treatment with heparin.

d. Larson

Larson testified as both a fact and expert witness. In his expert witness disclosure, Larson stated as follows:

> It is expected that Dr. Larson will testify in accordance with his deposition taken in this action. Dr. Larson is expected to testify that throughout his care and treatment of Mr. Perry, he complied with the applicable standard of care and his actions were not deviations from the

> prevailing standard of care for a surgeon acting under like or similar circumstances. . . . Dr. Larson is expected to disagree with the opinions offered into evidence by Dr. Carlos Barba.

In his deposition, Larson testified that he prescribes compression stockings and devices for patients following surgery. He generally discontinues use of compression stockings and devices once a patient becomes ambulatory, which usually occurs within twenty-four to forty-eight hours after surgery. Larson admitted that some surgeons routinely prescribe heparin following surgery; however, he does not and none of his colleagues do. According to Larson, the efficacy of heparin "has not been demonstrated to [his] satisfaction," and it carries an increased risk of bleeding that compression stockings and devices do not.

During trial, Larson testified that he asks his patients to stop taking non-steroidal anti-inflammatory medications a week before surgery because of the increased risk of bleeding. Voltaren is one of those medications, and Larson asked Michael to stop taking it one week before surgery. Michael did not stop taking Voltaren until the day before surgery; however, Larson decided to go forward with the surgery because he was not going to be prescribing heparin.

We note that, although a juror might infer from Larson's testimony that one reason he did not use heparin was because Michael was taking Voltaren, Larson did not specifically give that as a reason. In fact, Larson specifically testified that he did not use heparin, believing compression stockings and devices to be as effective in preventing DVT without increasing the risk of bleeding.

As noted by Perry, Kentucky Rule of Civil Procedure (CR) 26.02 provides that a party may discover the identity and opinions of the opposite party's expert witnesses. This Court and the Supreme Court of Kentucky have affirmed decisions by trial courts which excluded expert testimony at trial that was not properly disclosed. *See Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41 (Ky. App. 2001); *Kemper v. Gordon*, 272 S.W.3d 146 (Ky. 2008). Furthermore, as noted by Perry, this Court determined in *Welsh* that, if the trial court had permitted previously undisclosed expert opinion evidence, "prejudice would have resulted to the" party opposing the evidence. *Id.* at 48. However, this Court did not hold, as Perry argues, that the opposing party was "unduly prejudiced" and neither this Court nor the Supreme Court has held that such evidence must be excluded.

Based on the preceding, we must first determine if the trial testimony of Drs. Comerota, Flum, and Larson at trial differed from their expert disclosures and deposition testimony. If the testimony differed, we must then determine if, as argued by Larson, Perry opened the door to that testimony. Finally, we must determine if the court acted arbitrarily, unreasonably, or without legal justification. Because the three physicians testified somewhat differently, we analyze each separately.

Dr. Comerota's testimony at trial was the same as his testimony during his deposition and was consistent with his expert disclosure. The only deviation was his statement that there was an additional consideration regarding use of heparin for Michael, that being "another medication." Perry objected and

Dr. Comerota did not identify the medication in question and did not testify regarding how that medication would or would not have had an impact on decision making or the standard of care. In fact, Dr. Comerota expressed no opinion whatsoever regarding "another medication." Therefore, Dr. Comerota's testimony at trial did not differ from his expert disclosure or his deposition testimony and the trial court did not abuse its discretion by admitting it.

During his deposition, Dr. Flum testified that he did not prescribe drugs like Voltaren because of the possibility of increased bleeding. He also noted that there "is a debate" about the use of non-steroidal anti-inflammatory drugs because of that risk. Dr. Flum testified at trial that Voltaren is a platelet active drug and "the common sense of the medical community" is that its use would preclude the use of heparin. That testimony is not wholly inconsistent with Dr. Flum's deposition testimony that Voltaren, like heparin, increases the risk of bleeding. Furthermore, we note that, although Dr. Flum did testify about the blood thinning attributes of Voltaren, he did not testify that Larson considered or even should have considered Michael's use of Voltaren when he determined not to use heparin.

Finally, as to Dr. Flum, we note the parties' argument regarding the "rule of completeness." Larson argues that, once Perry introduced a portion of the PDR section concerning use of heparin through Dr. Barba, he was entitled to introduce the entire article. Perry argues that she had Dr. Barba read from the PDR to show that there were studies in 2001 showing that heparin was effective in

reducing the risk of DVT. According to Perry, Larson's introduction of that portion of the PDR setting forth contraindications was not admissible under the rule of completeness because it was apparently for a different purpose. We disagree.

The rule of completeness, Kentucky Rule of Evidence (KRE) 106, provides that, "[w]hen a writing . . . or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part . . . which ought in fairness to be considered contemporaneously with it." Only that part of the writing that concerns the matter introduced by the adverse party is admissible. *Young v. Commonwealth*, 50 S.W.3d 148, 169 (Ky. 2001).

As noted in *Young*, evidence is admissible under KRE 106 if it concerns the matter introduced by the adverse party. The subject matter introduced by Perry through the PDR involved the efficacy of heparin in reducing the risk of DVT. The additional portion of the PDR introduced by Larson indicated that there are risks associated with the use of heparin in conjunction with other medications. That concerns the subject matter introduced by Perry, the efficacy of heparin, and therefore is admissible under KRE 106.

Based on the above, we discern no abuse of discretion by the trial court in admitting Dr. Flum's testimony.

Dr. Larson testified at trial as both a fact and expert witness. As a fact witness, Dr. Larson testified about what medications Michael took before surgery, what instructions he gave to Michael regarding those medications, whether

Michael followed those instructions, and what the course of his treatment of Michael was. In that capacity, Larson testified at trial that Michael was taking Voltaren, that he told Michael to stop taking Voltaren a week before the surgery, that Michael stopped taking Voltaren the day before surgery, and that Michael did not receive any heparin following surgery.

As an expert, Larson testified at trial about the blood thinning effect of Voltaren, testimony consistent with the PDR. As noted above, this testimony was permissible under KRE 106, and we discern no error in the trial court's admission of same.

Larson testified at trial about his concern regarding bleeding during and after surgery and that he only used compression socks and compression devices after surgery because of that concern. That testimony was consistent with his deposition testimony and its admission was not error.

Finally, we note that Larson did not testify that he took Michael's use of Voltaren into consideration when determining whether to use heparin. In fact, he testified in his deposition and at trial that he never used heparin. Again, the testimony does not differ from what Larson testified to during his deposition. Therefore, we discern no abuse of discretion by the trial court in admitting that testimony.

2. Loss of Consortium Claim

Perry argues that, since the trial of this matter, the law on spousal loss of consortium has changed and that her claim should be allowed. *Martin v. Ohio*

County Hospital Corp., 295 S.W.3d 104 (Ky. 2009). However, since we are affirming the verdict of the jury that Dr. Larson did not violate the standard of care and the court's consistent judgment, this issue is moot.

3. Closing Argument by Counsel

During closing argument, defense counsel stated that "from the bottom of [his] heart [he] believe[d] Dr. Larson acted appropriately. . . ." Perry argues that interjection of counsel's personal belief was inappropriate and constitutes grounds for reversal.

Initially, we note that counsel for Perry did not object to the statement made by Larson's counsel during closing argument. "The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review." *Kaplon v. Chase,* 690 S.W.2d 761, 763 (Ky. App. 1985). Because counsel did not bring this matter to the attention of the trial court, we need not address it. However, for the sake of completeness, we do so below.

In support of her argument, Perry cites to three criminal cases, *Armstrong v. Commonwealth*, 517 S.W.2d 233 (Ky. 1974); *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982); and *U.S. v. Bess*, 593 F.2d 749 (6th Cir. 1979). In *Armstrong*, the prosecutor commented on his belief that a witness "was honest and conscientious, and that his word was worthy of belief." 517 S.W.2d at 236. Although the Court held that the statement was improper, it determined that the defendant had not been prejudiced thereby. *Id.*

In *Moore*, the prosecutor stated that a witness was "one of the most dangerous and vicious killers" he had seen. 634 S.W.2d. at 437. The Court determined that such personal comments by the prosecutor about the character of a witness were not proper and reversed Moore's conviction. *Id.* at 438. However, that reversal was based on a number of errors at the trial court level, not just the prosecutor's statement during closing argument.

In *Bess*, the prosecutor stated that

> [i]f the United States did not believe the defendant was guilty of committing these charges in the indictment, based on the evidence that has been presented to you, this case, of course, would have never been presented to you in the first place. It never would have been presented to you.

593 F.2d at 753. The prosecutor also stated that he believed beyond a reasonable doubt that Bess was guilty. *Id.* The United States Court of Appeals for the Sixth Circuit determined that these statements by the prosecutor were not only improper but violated applicable ethical rules of conduct. However, the Court stated that it would not adopt a *per se* rule that such statements mandated reversal. Rather, it held that such statements would not constitute reversible error if the evidence of guilt was overwhelming, if the statements were not flagrant, if the statements were not objected to, or if the trial court did not properly admonish the jury following an objection. *Id.* at 757-58. Because counsel for Bess did object and the court did not admonish the jury, the Court reversed and remanded.

As noted by Larson, the preceding cases are distinguishable because they all involve criminal defendants and statements by prosecuting attorneys. Such attorneys have a heightened duty to seek the truth rather than to simply advocate a position. However, attorneys in both civil and criminal cases have a duty to refrain from "stat[ing] a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." Rule of the Supreme Court 3.130(3.4)(e).

Taking the above into account, we conclude that the statement by Larson's counsel regarding his personal belief that Larson acted appropriately appears improper. However, immediately after he made that statement, Larson's counsel stated that the jury, not he, was to determine what to believe, and Perry's counsel failed to object. Therefore, we hold that the statement by Larson's counsel was not sufficiently egregious as to merit reversal.

4. Exclusion of Testimony by Perry

At trial, Perry played the video deposition of Dr. Hunsaker, who performed Michael's autopsy. Dr. Hunsaker indicated in his report that Michael died as a result of a pulmonary embolism that came from his left leg. Larson spent a significant amount of time during the deposition questioning Dr. Hunsaker's opinion regarding the origin of the embolus. Perry argued that the trial court should have permitted her to testify regarding complaints Michael made of left leg pain while in the hospital and thereafter to corroborate Dr. Hunsaker's testimony regarding the origin of the embolus. The trial court held that such

testimony was not relevant because the only question for the jury was whether Larson violated the standard of care by not prescribing heparin.

As noted above, whether to admit or exclude evidence is within the sound discretion of the trial court. *Goodyear Tire and Rubber Co. v. Thompson,* 11 S.W.3d 575, 577-78 (Ky. 2000). Dr. Barba, Perry's expert, testified that Larson should have prescribed heparin to Michael because he had undergone abdominal surgery, was obese, and had a history of previous DVT. He did not state that Larson should have prescribed heparin because Michael complained of left leg pain, nor did he question Larson's treatment of Michael after those complaints were made. Because Dr. Barba's criticism of Larson's treatment had no direct relationship to Michael's complaints of left leg pain, testimony regarding that pain was not relevant. Therefore, we discern no abuse of discretion by the trial court in excluding Perry's testimony.

5. Directed Verdict

Larson argues that the trial court erred by not granting his motion for directed verdict.

> On 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., 840 S.W.2d 814 (Ky. 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. *Bierman v. Klapheke*, 967 S.W.2d 16, 18 (Ky. 1998).

Dr. Barba testified that the standard of care at the time of Michael's surgery included use of heparin and that, if Larson had prescribed heparin, Michael would not have developed or died from a pulmonary embolism. While there was evidence to the contrary, the trial court, construing this evidence in the light most favorable to Perry, did not abuse its discretion when it denied Larson's motion for directed verdict.

CONCLUSION

We discern no error in the trial court's admission of testimony regarding the PDR and Michael's use of Voltaren. Furthermore, we discern no error in the trial court's exclusion of Perry's testimony regarding Michael's complaints of leg pain. Although interjection of his personal opinion into closing argument by Larson's counsel was not appropriate, it was not sufficiently egregious to warrant reversal. Because we are affirming the trial court, Perry's argument that the trial court erred in not permitting her to pursue a loss of consortium claim is moot. Finally, we discern no error in the trial court's denial of Larson's motion for directed verdict. Therefore, we affirm.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS/CROSS-APPELLEES:

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