RENDERED: DECEMBER 21, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001874-MR

PHILLIP SEATON AND DEBORAH SEATON — APPELLANTS

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 08-CI-00624

DR. JOHN M. PATTERSON AND
COMMONWEALTH UROLOGY, PSC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: Phillip Seaton and Deborah Seaton appeal from a Judgment of the Shelby Circuit Court reflecting a jury verdict in favor of Dr. John M. Patterson and Commonwealth Urology, PSC setting out a claim of civil battery arising from a surgical procedure. The Seatons contend that Dr. Patterson partially amputated Mr. Seaton's penis without authority, that there was no medical emergency justifying the procedure, and that the Seatons have proven the elements

of medical battery. They also argue that the circuit court improperly failed to sustain their motion for a directed verdict, and that it handed down improper jury instructions. We conclude that the jury properly determined that Dr. Patterson had consent to perform a partial penectomy and find no error.

On October 9, 2007, Dr. Patterson evaluated Mr. Seaton based on Mr. Seaton's complaints of redness, inflammation and swelling of the foreskin of his penis, along with painful urination, drainage and increased urinary frequency. Mr. Seaton was referred to Dr. Patterson after a primary care physician was unable to resolve the symptoms. Dr. Patterson diagnosed balanitis, which is an inflammation of the foreskin, and phimosis, wherein the foreskin cannot be retracted due to tightness.

Based on the symptoms and diagnosis, Dr. Patterson recommended that Mr. Seaton undergo a circumcision. On October 17, 2007, Mr. Seaton received pre-operative testing at Jewish Hospital Shelbyville. At the same time, Mr. Seaton received, signed and initialed a hospital consent form which stated that,

> I recognize that, during the course of the procedure(s), unforeseen conditions may necessitate additional or different procedures than those set out in the paragraph. I, therefore, further authorize and request that my physician, his assistants, associates, technicians or other of their designees, perform such procedures as are in my physician's professional judgment, necessary and desirable including, but not limited to, procedures involving pathology and radiology. The authorization granted under this paragraph shall extend to remedying or repairing conditions that were not known to my physician at the time the procedure(s) commenced.

It is noted in the record that Mr. Seaton has a limited ability to read or write, though he never informed Dr. Patterson of this. Nevertheless, he signed the consent form in the presence of a witness, and initialed each of the form's paragraphs. Mr. Seaton had previously signed a separate consent form in Dr. Patterson's office.

On November 19, 2007, Dr. Patterson performed the circumcision on Mr. Seaton. When Dr. Patterson made an incision into the foreskin in order to retract it from the glans penis or head of the penis, he observed an invasive tumor which he identified as likely cancerous. According to Dr. Patterson, the tumor had completely infiltrated and replaced the glans penis such that Dr. Patterson was unable to locate the urethral meatus or opening of the urethra, thus preventing him from inserting a catheter to drain urine from the bladder. Dr. Patterson would later testify that Mr. Seaton would be unable to urinate without the insertion of the catheter due to the size and location of the tumor, swelling related to the circumcision and the effects of anesthesia. He also opined that serious complications and additional surgery could result if he did not insert the catheter.

Dr. Patterson then determined that he must perform a partial penectomy to remove the tumor and allow the insertion of the catheter. This procedure involved the removal of the tumor, as well as margins to insure that all of the tumor had been excised. The result was a partial penectomy or partial amputation of the penis. Dr. Patterson performed the procedure and was able to insert the catheter.

Pathology subsequently revealed that, "the presumed head of the penis has been nearly totally replaced by a[n] indurated lobular gray-tan mass . . . [that] appears to deeply infiltrate the underlying tissue[.]" The tumor was found to be squamous cell carcinoma, and the surgery appears to have been successful in removing the tumor and restoring Mr. Patterson's urinary function.

On September 15, 2008, the Seatons filed the instant action against Dr. Patterson, Commonwealth Urology and Dr. Oliver C. James in Shelby Circuit Court. The Complaint alleged that Dr. Patterson acted without consent in performing the partial penectomy, resulting in damages. Mr. Seaton alleged that had Dr. Patterson not performed the procedure without consent, Mr. Seaton could have received a second opinion from another doctor, and had the opportunity to seek other treatment options and perhaps avoid the partial penectomy. He also alleged that Dr. James, an anesthesiologist, gave him general anesthesia without consent, thereby rendering Mr. Seaton unconscious and unable to prevent the partial penectomy. Mrs. Seaton asserted a claim of loss of service, love and affection. The Seatons also sought punitive damages from both doctors.

A jury trial was conducted on August 18, 2011, where the Seatons moved for a Directed Verdict on the claim of medical battery, arguing that the Defendants failed to introduce evidence of an emergency necessitating the partial penectomy as required by *Tabor v. Scobee*, 254 S.W.2d 474 (Ky. 1953) and other case law. The court denied the motion and the jury returned a verdict in favor of the

Defendants on all claims. The Seatons' post-trial motions for a judgment notwithstanding the verdict and new trial were denied, and this appeal followed.

The Seatons now argue that the circuit court erred in denying their motion for a directed verdict. As a basis for this argument, they maintain that they satisfied the elements of medical battery, that Dr. Patterson amputated Mr. Seaton's penis without consent, and that no emergency existed which would justify the amputation. They argue that there are limited exceptions to the general rule that informed consent is required before a doctor can perform any procedure, and that no such exception existed herein. In their view, a doctor may perform a procedure without consent only where there is an emergency requiring immediate treatment and where it is not feasible to seek advice from either the patient or the patient's family. The Seatons' argument centers largely on *Tabor*, *supra*, which holds that a doctor may not perform a procedure under these circumstances even though a "delay in their removal might have proved harmful, even fatal, there still was time to give the parent and the patient the opportunity to weigh that fateful question." *Id.* at 477. In *Tabor*, a surgeon who was performing a procedure to remove the appendix observed that the patient had swollen and infected fallopian tubes. Though it was probably necessary to remove the tubes soon, the Court determined that it was not an emergency in the sense that death was not imminent and that the surgeon's decision to remove the tubes without the patient's consent constituted medical battery.

The Seatons argue that Dr. Patterson could not demonstrate that there was an emergency requiring the partial penectomy, nor that he sought to obtain consent for the procedure from either Mr. Seaton or his wife. They maintain that no harm would have resulted if Dr. Patterson has consulted with either of them before proceeding, or if he had allowed them to consult with another physician to get a second opinion or other treatment options. They claim that Dr. Patterson was unaware that Mrs. Seaton was in the waiting area during the procedure, and that he testified that he would probably not have consulted with her even if he had known this. Ultimately, the Seatons characterize *Tabor* as "remarkably similar to our facts," and argue that it forms a proper basis for concluding that they were entitled to a directed verdict below.

Surgery performed without the patient's consent gives rise to an action for the intentional tort of battery. *Vitale v. Henchey*, 24 S.W.3d 651 (Ky. 2000). While the Seatons argue that Dr. Patterson failed to demonstrate the existence of an exception to the general rule by proving that an emergency existed requiring the partial penectomy and that he was unable to get consent from either Mr. Seaton or his wife, we must first examine whether Mr. Seaton consented to the procedure. If this question is answered in the affirmative, then an element of battery is not met and there is no need to demonstrate the existence of an exception.

As noted above, Mr. Seaton executed two consent forms: one at Dr. Patterson's office, and another at the hospital. The latter consent form, in addressing unforeseen conditions that may necessitate additional or different

procedures than the circumcision, allowed Dr. Patterson to perform such procedures "as are in my physician's professional judgment, necessary and desirable" and including "remedying or repairing conditions that were not known to my physician at the time the procedure(s) commenced."

The dispositive question, then, is whether the removal of the penile carcinoma was in Dr. Patterson's opinion "necessary and desirable." We must answer this question in the affirmative for at least two reasons. First, Dr. Patterson testified that Mr. Seaton presented with urinary symptoms including difficulty in urinating, burning, discomfort and frequency. Dr. Patterson opined that it was necessary to place a catheter in the urethra to address these symptom, which would only worsen post surgically due to swelling of the tissues from the circumcision, an infection of the area from which Mr. Seaton suffered prior to the procedure, and the effects of anesthesia. Due to the progression of the disease, the glans penis was completely replaced by the tumor making it impossible for Dr. Patterson to locate the urethral meatus. For this reason alone, the resection of the tumor was "necessary and proper" in the context of inserting a catheter. Additionally, there is uncontroverted testimony in the record that if Mr. Seaton were not treated for the penile cancer, it would prove fatal in the future. This, in our view, properly characterizes the removal of the tumor as necessary and proper.

Second, the Seatons' argument on this issue must be considered in the context of the circuit court's denial of their motion for a directed verdict. This Court will review a trial court's refusal to direct a verdict under a clear error

standard. *See Radioshack Corp. v. ComSmart, Inc.,* 222 S.W.3d 256 (Ky. App. 2007). The question of whether to direct a verdict rests on a determination of whether the jury's verdict can be supported with all evidence construed in favor of the prevailing party. *Lewis v. Bledsoe Surface Mining Co.,* 798 S.W.2d 459, 461 (Ky. 1990). An appellate court may reverse the denial of a directed verdict if it determines, after reviewing the evidence in favor of the prevailing party, that the verdict is "'palpably or flagrantly' against the evidence so as to 'indicate that it was reached as a result of passion or prejudice.'" *Id.* at 461–62, *quoting Nat'l Collegiate Athletic Ass'n v. Hornung,* 754 S.W.2d 855, 860 (Ky. 1988).

Given the totality of the record, including the express language of the consent forms, the rare and unexpected presentation of penile cancer during the circumcision procedure which completely infiltrated and replaced the glans penis, and the necessity of removing the tumor in order to facilitate the placement of the catheter, we cannot conclude that the verdict was palpably or flagrantly against the evidence so as to indicate that it was reached as a result of passion or prejudice. *Lewis*, *supra.* This conclusion centers on Mr. Seaton's execution of the consent forms,[1] as well as the clear requirement that on a motion for a directed verdict all of the evidence must be construed in favor of the prevailing party. *Id*. Accordingly, we find no error in the circuit court's denial of the Seatons' motion for a directed verdict.

[1] Though claiming that Mr. Seaton was functionally illiterate, the Seatons do not maintain that Mr. Seaton's execution of the consent forms was voidable, that he did not know what he was signing, nor that the content of the consent forms was not fully explained to him.

The Seatons also argue that the circuit court handed down jury instructions which were improper as they were not in conformity with *Tabor*. The focus of their argument on this issue is that the court "did not address the requirement that an emergency must exist before there is a change from the *express* authorization to the performance of a penectomy." That is to say, in the Seatons' view the instructions improperly focused on whether Dr. Patterson had consent to perform the penectomy, whereas the instructions should have included the element that an emergency must exist in order to conduct a procedure to which Mr. Seaton did not consent.

We find persuasive Dr. Patterson's argument on this issue, as the *Tabor* emergency doctrine does not apply. Having determined that Mr. Seaton consented to unexpected procedures, which in Dr. Patterson's judgment were necessary and desirable, and for the reasons stated having found that the removal of the tumor was necessary and desirable under the circumstances, we need not consider the *Tabor* analysis of whether an emergency existed which justified a medical procedure to which the patient had not consented. We find no error on this issue. Additionally, we find *Tabor* to be distinguishable from the instant facts, in that the patient in *Tabor* did not expressly consent to other necessary procedures as was done herein, the *Tabor* patient was a minor, and the unexpected procedure was not performed on the same body part or organ system to which express consent had been given to operate.

For the foregoing reasons, we affirm the Judgment of the Scott Circuit Court.

DIXON, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

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