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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001178-MR

WILMA HORN — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS III, JUDGE
ACTION NO. 10-CI-00980

ASHLAND HOSPITAL CORPORATION, D/B/A KING'S DAUGHTERS MEDICAL CENTER, INC.; ASHLAND HOSPITAL CORPORATION, D/B/A KING'S DAUGHTERS MEDICAL CENTER'S SPINE AND PAIN CENTER; AND LEON BRIGGS, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS AND DIXON, JUDGES.

DIXON, JUDGE: Appellant, Wilma Horn appeals from a judgment of the Boyd Circuit Court following a trial wherein the jury rendered a unanimous verdict in

favor of Appellees, King's Daughters Medical Center and Dr. Leon Briggs, in this medical malpractice action. For the reasons stated herein, we affirm.

In August 2009, Horn was referred to King's Daughters Spine and Pain Center by her primary care physician after she complained of persistent back and leg pain. As part of her treatment, Dr. Briggs performed epidural lumbar steroid injection procedures on Horn on September 14 and 21, 2009. On September 23, 2009, Horn became ill and was admitted to the King's Daughters Medical Center ("KDMC") with a diagnosis of "metabolic encephalopathy, likely due to bacterial meningitis which may have been introduced during LESI [lumbar epidural steroid injection] procedure two days ago."[1] The diagnosis of bacterial meningitis was confirmed by a lumbar puncture and subsequent culture. Horn later developed a bowel perforation which was also treated and cured.

On September 9, 2010, Horn filed a medical negligence action in the Boyd Circuit Court alleging that Dr. Briggs was negligent for failing to wear a surgical mask during either of the injection procedures and that KDMC was negligent for failing to issue a protocol requiring that masks be worn during such procedures. Thereafter on September 10, 2012, Horn filed a motion for partial summary judgment on the issue of the standard of care. Horn argued that the applicable standard of care in 2009 required the use of masks during lumbar injection procedures. In support of her motion, Horn relied on three documents.

[1] KDMC subsequently introduced evidence at trial that the epidural needle was not placed into Horn's spinal canal during the procedure and therefore could not have caused her bacterial meningitis.

First, a 2007 Guideline from the Centers for Disease Control and Prevention ("CDC") recommending that practitioners wear masks while placing a catheter or injecting material into the spinal or epidural space. The recommendation was not a mandate and, in fact, the CDC acknowledged that more studies were needed and that the use of face masks in such procedures was still being debated. Second, Horn produced a 2008 newsletter from the American Society of Anesthesiologists ("ASA") acknowledging the CDC's recommendation but indicating that further study was needed. The newsletter stated that the ASA had convened a task force to review the issue of "regional anesthesia and infection control," and that a full report would follow. Third, Horn relied upon a 2010 ASA Practice Advisory (the full report referred to above) containing the results of a survey of anonymous respondents who mostly agreed that physicians should wear masks during such procedures.

In November 2012, the trial court denied Horn's motion. Thereafter, both KDMC and Dr. Briggs filed motions in limine to preclude introduction of the 2010 ASA Practice Advisory and survey on the grounds that they were not in existence at the time Horn's epidural injections were performed and thus could not be used to establish the standard of care in 2009. After conducting a two-day hearing that focused primarily on the motions in limine, the trial court excluded the 2010 ASA Practice Guideline and survey evidence on the grounds of timeliness and unreliability.

At the May 2013 trial, the parties presented extensive evidence and conflicting expert testimony as to the standard of care in existence in 2009. At the close of all evidence, the jury returned a unanimous verdict finding that neither KDMC nor Dr. Briggs had violated the standard of care. As such, because the jury decided the case based upon the standard of care, it never reached the issue of causation. Horn thereafter appealed to this Court. Additional facts are set forth as necessary.

Horn first argues that the trial court erred in excluding the 2010 ASA practice advisory and survey evidence. Horn contends that the survey, which was conducted in 2008 and 2009, demonstrated that at the time of her procedures, a majority of practioners were wearing masks while performing epidural steroid injection procedures. Horn points out that the survey evidence was extremely important not only to demonstrate what was going on in the medical community at the time of her procedures but also to rebut Appellees' position that a majority of practioners were not wearing masks while performing such procedures in 2009.

On appeal, a trial court's determination as to the admissibility of evidence is reviewed under an abuse of discretion standard. *See Goodyear Tire & Rubber Co., v. Thompson*, 11 S.W.3d 575 (Ky. 2000). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

As previously noted, the trial court excluded the survey evidence because the practice advisory containing the results was not published until 2010, after the events in question, and also because the survey results were unreliable. Because we agree that the survey is unreliable and thus, inadmissible, we necessarily do not reach the timeliness issue.

In concluding that the survey was unreliable, the trial court relied upon the unpublished opinion in *Sparks v. Downing*, 2009-CA-001349 (Ky. App. 2010), wherein a panel of this Court upheld the exclusion of survey results in a medical malpractice case as the survey was being proffered to prove the standard of care. In *Sparks*, the plaintiff had undergone cataract surgery to correct her vision. During the procedure, the defendant doctor found a tear in the capsular bag where the STAAR lens was designed to be implanted and, as a result, decided to place the lens into the sulcus – the larger space in front of the capsular bag. After suffering numerous post-operative problems, the plaintiff was required to have the lens removed and ultimately underwent a cornea membrane transplant. At the ensuing trial on the plaintiff's medical malpractice claim, the trial court prohibited the plaintiff's expert from testifying about an internet listserv survey conducted by his colleague as to whether the STAAR lens in question could be implanted in a patient's sulcus.

On appeal, a panel of this Court first determined that the proposed testimony was hearsay under KRE 801(c) because it included statements from listserv members regarding their opinion as to whether a STAAR lens should be

implanted in the sulcus. Further, because the plaintiff's expert acknowledged that he did not rely on the results of the listserv survey in reaching his opinions, the evidence was not admissible under KRE 703(a) and (b). The panel additionally concluded:

> [Dr. Krasnow] did not assist in creating the survey and had no personal knowledge regarding the specific questions posed . . . or the qualifications of the respondents to the survey. Dr. Krasnow also conceded that none of the respondents had been provided with specifics regarding Appellant's medical history. Accordingly, the trustworthiness of the responses was in question, particularly given that the respondents were unavailable for cross-examination and their credentials were otherwise unverified. The trial court also expressed doubt as to whether such a survey could be reasonably relied upon under these circumstances—a sentiment with which we are inclined to agree. (Slip op. p. 8).

Herein, the results published in the ASA's practice advisory were derived from a two-part survey. The first part was administered to "consultants," purportedly doctors who perform the specific type of procedures at issue, asking their opinion on a number of issues including whether or not a mask should be worn during lumbar epidural spinal injections. Approximately 46 consultants, or 39% percent of those surveyed, responded. The second part was simply a random survey of ASA members, of which there are approximately 30,000. Of the total membership, only some 233 people responded to the survey.

There is no dispute that most of the survey respondents agreed it was appropriate to wear a mask, and that the ASA's advisory ultimately included a recommendation that both a cap and mask be worn for epidural injections.

Notably, however, the advisory states that it is "not intended as standards, guidelines, or absolute requirements. . . . Practice advisories are not supported by scientific literature to the same degree as standards or guidelines because of the lack of sufficient numbers of adequately controlled studies."

As in *Sparks*, the survey herein failed to identify who responded to the survey, any background information about the respondents, or the respondent's practice types, credentials, geographic locations or any other identifying information. As the trial court observed during the hearing, "One of my biggest concerns is . . . you're bringing in a hundred doctors as experts via their result on this survey and they're not here to cross-examine. . . . [W]e don't even know who they are, if they've answered truthfully."

We are of the opinion that the survey herein, as in *Sparks*, was clearly hearsay under KRE 801(c). Also similar to *Sparks*, Horn's experts did not rely upon the survey in formulating their opinions so as to make it admissible under KRS 703. Accordingly, we cannot conclude that the trial court erred in ruling that the survey results lacked sufficient reliability to be admissible.

Horn next argues that the trial court erred by refusing to allow her to introduce the survey evidence after Dr. Briggs and Dr. Richard Rauk repeatedly violated the trial court's pretrial order barring any evidence relating to post-2009 standard of care. Specifically, during his case-in-chief, Dr. Briggs mentioned the 2008 ASA Newsletter and began to discuss the last paragraph wherein it refers to the formation of a task force. Horn's counsel objected before Dr. Briggs actually

made any mention of such. Next, during cross-examination, Horn's counsel questioned Dr. Briggs as to whether he agreed that the article set forth the standard of care on mask-wearing. Dr. Briggs disagreed and, attempting to explain his reasoning, stated, "The summary of the article, in its last paragraph . . . ." Dr. Briggs did not finish his response before counsel objected. At the ensuing bench conference, the trial court noted that Dr. Briggs had been at the point of disclosing the task force but did not. Counsel was directed to engage in a different line of questioning.

Similarly, Dr. Rauk, Dr. Briggs' expert, testified that in 2009 he was not instructing his fellows to wear masks during epidural steroid injection procedures. He was then asked whether fellows throughout the United States were taught to wear masks during that time period. Dr. Rauk responded, "[T]here was a debate about it and there still is now but certainly in 2009 there was a debate about masks and when to wear them and when not to." Horn's counsel objected and argued that Dr. Rauk "kicked the door wide open," warranting admission of the survey results. In the alternative, Horn's counsel requested a mistrial.

Although the trial court was clearly angered by Dr. Rauk's violation of its pretrial order, it nevertheless concluded that to admit the survey evidence would compound the error, commenting that "two wrongs do not make a right." The trial court noted that it believed Dr. Rauk's comment was unintentional and that an admonition would cure any error. The trial court thereafter admonished the jury

that "[F]or the purposes of this case, the standard of care that the hospital and Dr. Briggs are held to is that of the time period of 2009 only."

"Opening the door," sometimes referred to as curative admissibility, is a form of waiver where by one party's use of inadmissible evidence justifies the opposing party's rebuttal of that evidence with equally inadmissible proof. *Commonwealth v. Stone*, 291 S.W.3d 696, 701-702 (Ky. 2009). However,

> [t]he open the door doctrine does not pave the way for responsive evidence just because it fits in the same general category as evidence already admitted. . . . The question in each case is not whether initial proof shares some common quality with proof offered in response. Rather, it is whether the latter answers the former, and whether it does so in a reasonable way without sacrifice of other important values.

Id. at 702. (Quoting 1 Mueller & Kirkpatrick, *Federal Evidence,* § 1:12, 75–76 (3d ed. 2007). Without question, the doctrine "is supposed to prevent prejudice (not to introduce it or exacerbate it) . . . ." Robert G. Lawson, *The Kentucky Evidence Law Handbook*, Note 15 § 1.10 [5], at 46 (4th ed. 2003). Significantly, a trial court's decision whether to allow such rebuttal evidence is reviewed for abuse of discretion.

With respect to Dr. Briggs, we agree with the trial court that he never actually referenced the last paragraph of the 2008 newsletter and thus the jury was never informed about the task force. Thus, he neither violated the trial court's order nor opened the door to the admission of the survey evidence. Further, while we believe that Dr. Rauk's testimony clearly violated the pretrial order, we cannot

conclude that the trial court's decision to admonish the jury rather than admit the survey results was an abuse of discretion. Further, even had the trial court exercised its discretion to apply the curative admission doctrine, Horn would have only had the ability to respond with like kind evidence as to whether there still existed a controversy today regarding the use of masks. The 2010 practice advisory and survey results would not have accomplished such a purpose.

We also find no merit in Horn's claim that an admonition was insufficient and that she was entitled to a mistrial following Dr. Rauk's testimony. "[A] mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way." *Gould v. Charlton Co.*, 929 S.W.2d 734, 738 (Ky. 1996). It is well settled in Kentucky that "[w]hether removal of prejudice can be accomplished by a curative admonition or whether a mistrial is necessitated is a matter within the sound discretion of the trial court." *Id.* at 740. Finally, "[a] jury is presumed to follow an admonition to disregard evidence and the admonition thus cures any error." *Johnson v. Commonwealth*. 105 S.W.3d 430, 441 (Ky. 2003). We are of the opinion that a mistrial was not warranted and the trial court's admonition to the jury that Dr. Briggs and KDMC were held to the standard of care in 2009 was sufficient to cure any error.

Next, Horn argues that the trial court abused its discretion in prohibiting her niece, Diane Himes, who works as a registered nurse at Princeton Community Hospital in West Virginia, from testifying about the practices at her hospital. Specifically, Himes was disclosed as a fact witness who would testify about her first-hand knowledge of Horn's treatment at KDMC. However, at trial, Horn's counsel stated that Himes' testimony would not only include her observations about Horn's care at KDMC, but also that physicians at Princeton Community Hospital had been wearing masks during epidural procedures since at least 2007. Appellees' counsel responded that Himes' anticipated testimony amounted to undisclosed expert opinion testimony. During the ensuing bench conference, the trial court noted that if Himes was to offer testimony that related to any standard of care argument, she should have been disclosed as an expert witness. We must agree.

Under Kentucky law, expert testimony is required to establish the standard of care. *Hamby v. University of Kentucky Medical Center*, 844 S.W.2d 431, 434 (Ky. App. 1992). Horn is insistent that Himes' testimony was nothing more than a factual observation of the practices employed at the hospital where she worked. However, it is clear that the issue of what other hospitals were doing in 2009 and earlier is in the nature of expert testimony and was clearly being offered in an attempt to bolster Horn's argument that the standard of care in 2009 required the use of a mask. There simply is no other legitimate reason for the testimony. Horn contends that the exclusion of Himes' testimony was unfair and prejudicial

because KDMC's and Dr. Briggs' experts testified as to the infection control policies at their respective facilities. However, Horn fails to recognize that those witnesses were, in fact, disclosed as experts. Further, the witnesses that Horn disclosed as such were also permitted to and did testify about the policies at their facilities.

We are of the opinion that the trial court correctly found that the issue was whether Appellees could have reasonably anticipated that Himes would offer such testimony based upon Horn's witness disclosure. We agree that Himes' proposed testimony was offered for the purpose of showing the standard of care at her hospital in 2009 and that Appellees could not have reasonably anticipated such. Accordingly, the trial court did not abuse its discretion in excluding the testimony.

Finally, Horn argues that the trial court erred in denying her motion in limine to limit Appellees' allocation of peremptory strikes under CR 47.03 because they did not have antagonistic interests. Again, we must disagree.

CR 47.03 provides that "[i]n civil cases each opposing side shall have three peremptory challenges, but co-parties having antagonistic interests shall have three peremptory challenges each." Elements that bear upon whether co-parties have antagonistic interests are whether (1) they are charged with separate acts of negligence; (2) they share a common theory of the case; (3) they have filed cross-claims; (4) they are represented by separate counsel; and (5) fault will be subject to apportionment. *Sommerkamp v. Linton*, 114 S.W.3d 811, 815 (Ky. 2003). Significantly, "[i]nherent in the Kentucky law of apportionment, KRS 411.182, is

that the interests of codefendants may be considered antagonistic." *Id.* at 816. Finally, this Court will "not substitute [our] judgment for that of the trial judge in determining whether antagonistic interests exist for the purpose of awarding peremptory challenges in the absence of an abuse of discretion." *Id.* 814-15.

Herein, KDMC and Dr. Briggs were charged with separate acts of negligence. It would have been possible for a jury to have concluded that Dr. Briggs' failure to wear a mask was negligent but that KDMC's failure to implement a policy regarding masks was not. Further, although KDMC and Dr. Briggs did not file cross-claims, they were represented by separate counsel and were subject to apportionment of fault. Therefore, we cannot conclude that the trial court abused its discretion in finding that there existed some degree of antagonism so as to warrant separate peremptory challenges.

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

COMBS, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

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