

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000075-MR

LARRY WAYNE GROSS, ADMINISTRATOR
OF THE ESTATE OF JAMES K. GROSS, DECEASED;
EMILY N. GROSS, AN INFANT, BY AND THROUGH
CONTESSA ELIZABETH WATKINS, GUARDIAN;
AND ISIAIH J. GROSS, AN INFANT, BY AND THROUGH
CONTESSA ELIZABETH WATKINS, GUARDIAN

APPELLANTS

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT CONSTANZO, JUDGE
ACTION NO. 09-CI-00445

UYI IDEMUDIA, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

DIXON, JUDGE: Appellants, Larry Wayne Gross, Administrator of the Estate of
James K. Gross, deceased, Emily N. Gross, an infant, by and through Contessa
Elizabeth Watkins, guardian, and Isiah J. Gross, an infant, by and through

Contessa Elizabeth Watkins, guardian, appeal from a jury verdict and judgment of the Bell Circuit Court finding in favor of Appellee, Uyi Idemudia, M.D., in this medical negligence and wrongful death action. Appellants also appeal from the trial court's denial of their motion for a new trial. For the reasons set forth herein, we affirm.

This is a medical negligence/wrongful death case arising out of the death of James K. Gross, who passed away on December 26, 2008 at Pineville Community Hospital in Bell County, Kentucky. Gross had been admitted to Pineville on December 23rd for treatment of intractable low back pain. Gross had injured his back in early 2008 while working as a custodian in the Pineville Independent School System. Due to his large size, Gross had been unable to obtain an MRI but, based upon clinical findings, he was diagnosed with a probable herniated disc.

Following his admission to Pineville in December 2008, Gross was treated with primarily analgesic medications including high doses of intravenous morphine. On the day before his death, Gross experienced two episodes during which his oxygen saturation dropped to a critically dangerous level. During the second event, Gross was administered Narcan per telephonic doctor's order to reverse the possible effects of the opioids he was receiving. However, on the morning of December 25th, Gross was found unresponsive. Despite CPR and resuscitative actions, Gross died.

On November 17, 2009, Contessa Elizabeth Robbins (now Watkins) filed an action in the Bell Circuit Court as Administratrix of Gross's Estate¹ as well as guardian and mother of Emily and Isiah Gross, Gross's minor children, against Pineville, Dr. Talmadge V. Hays, Dr. Martha C. Combs-Woolum, and Dr. Uyi Idemudia. Prior to trial, Appellants entered into a confidential settlement with Pineville and Dr. Hays, as well as an agreed order of dismissal with Dr. Combs-Woolum.

The case against Appellee, Dr. Idemudia, proceeded to trial in September 2013. Because the minor children sought damages for loss of parental consortium, an issue arose as to their paternity since Gross and Watkins had never married. Defense counsel's cross-examination of Watkins focused upon the date of her prior marriage to William Earl Jones, the dates of birth for both minor children, and the date the decree of dissolution of marriage with Jones was entered.² At the close of Appellants' case-in-chief, as well as the close of all evidence, Appellee moved for a directed verdict on the paternity issue, arguing that Jones was the presumed father of both children based upon the provisions of KRS 406.011.³ Appellants likewise moved for a directed verdict on the grounds that

¹ Lawrence Gross, James's father was substituted as Administrator/Plaintiff in April 2010. Due to Lawrence's failing health, Larry Gross was appointed Co-Administrator in April 2012. Watkins remained a plaintiff in her capacity as guardian of the minor children.

²

Watkins was married to Jones on April 24, 2000; was still married to Jones when Emily was born on February 19, 2007; was divorced from Jones on April 9, 2008; and gave birth to Isiah on May 2, 2008.

³ KRS 406.011 provides in relevant part: "A child born during lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife. However, a child born out of wedlock includes a child born to a married woman by a man other than her husband where evidence shows that the marital relationship between the husband and wife ceased ten (10)

KRS 406.011 was inapplicable in light of uncontroverted evidence that Gross was the children's father. Both motions were overruled.

Thereafter, the trial court instructed the jury. Appellee requested and received interrogatories directed at, in the event the jury found Appellee liable, whether Appellants had proven that the minor children were, in fact, Gross's biological children for the purpose of determining whether they were entitled to damages for loss of parental consortium. With respect to Appellee's duties, the jury was instructed as follows:

Interrogatory No. 1

It was the duty of the Defendant, Uyi Idemudia, M.D., in treating the decedent, James K. Gross, to exercise that degree of care and skill expected of a reasonably competent physician specializing in internal medicine and acting under similar circumstances.

State whether the jury is satisfied from the evidence that the Defendant failed to comply with the duty described above.

YES _____

NO _____

FOREPERSON

IF THE JURY ANSWERED "YES" ABOVE, PLEASE PROCEED TO THE NEXT PAGE. IF THE JURY ANSWERED "NO" ABOVE, YOUR DELIBERATIONS ARE CONCLUDED AND YOU SHALL RETURN TO THE COURTROOM.

months prior to the birth of the child."

The jury answered “NO” to the above interrogatory, finding no liability on the part of Appellee. Nevertheless, the jury ignored the directive to return to the courtroom and instead proceeded to answer the remaining Interrogatories, including Interrogatories No. 8 and 10 where the jurors indicated they were not “satisfied from the evidence beyond a reasonable doubt” that either minor child was Gross’s biological child. The jury further completed the damages portion of the interrogatories, awarding zero damages, a finding that was consistent with its finding of no liability on the part of Appellee. In accordance with the jury’s findings, the trial court entered its judgment in October 2013 dismissing the claims against Appellee. The judgment did not make any reference to either the paternity or damages interrogatories. Appellants subsequently filed a motion for a new trial arguing that the paternity issue had prejudiced the jury with respect to its finding of no liability on the part of Appellee. In support of their motion, Appellants submitted DNA results proving that the minor children were indeed Gross’s biological children. The trial court denied Appellants’ motion and this appeal ensued.

On appeal, Appellants argue that paternity is an affirmative defense and Appellee’s failure to plead such constituted a waiver. Furthermore, Appellants contend that jury interrogatories 8 and 10 were erroneously given because (1) KRS 406.011 was inapplicable given the uncontradicted evidence of paternity; (2) the trial court lacked jurisdiction to adjudicate a paternity issue; and (3) defense counsel’s pretrial statement that there were “no issues” other than liability

constituted a binding judicial admission. Significantly, however, Appellants do not challenge, or even address, the threshold liability issue of whether Appellee was at fault in causing Gross's death.

It is well-settled that in any negligence case, the claimant must prove (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992). With respect to medical malpractice, the defendant is held to "a duty to use that degree of care and skill which is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances." *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970); *Grubbs ex rel Grubbs v. Barbourville Family Health Ctr., PSC*, 120 S.W.3d 682, 687 (Ky. 2003). Herein, five medical experts testified on behalf of Appellee, all opining that he did not deviate from the standard of care applicable to him.

Again, Appellants do not argue that the jury's verdict was not supported by substantial evidence or that Appellee failed to sufficiently prove he was not medically negligent. Instead, Appellants contend that a "strong inference of prejudice" was demonstrated by the jury's inexplicable disregard of the trial court's instruction to cease deliberations after finding no liability on the part of Appellee. As such, Appellants believe that the outcome of the trial would have been different but for the improper insertion of the paternity issue.

Despite Appellants' arguments to the contrary, the record is devoid of any evidence that the paternity issue somehow prejudiced the jury's findings with

respect to Appellee's liability. The question of Appellee's liability is the crux of this action and is wholly unrelated to the paternity of the minor children. Paternity would only have come into play had the jury found Appellee liable and awarded damages. Even if we were to conclude that the paternity interrogatories were erroneously given, any error would necessarily be harmless since the verdict was supported by substantial evidence. *Conley v. Fannin*, 308 Ky. 534, 537, 215 S.W.2d 122, 123. Certainly, there is no evidence or indication that the outcome of the trial would have been different absent the paternity issue. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky. App. 2007).

In their reply brief, Appellants argue that Appellee has misconstrued the scope of appeal because the issue is not the sufficiency of the evidence but rather the failure to plead a defense and the application of KRS 406.011. We disagree. Appellants filed a medical negligence/wrongful death action. At the close of the evidence, the jury was required to determine whether it believed Appellee breached his duty of care and, if so, whether such was a substantial factor in causing Gross's death. Once the jury determined that Appellants failed to prove that Appellee was liable, any issues regarding damages, including who was entitled to such, were irrelevant. Accordingly, we are of the opinion that all of the issues raised by Appellants with regard to paternity are moot in light of the jury's verdict in favor of Appellee.

The judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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