RENDERED: JULY 31, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001050-MR

JACQULYN G. HARRINGTON — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 08-CI-01512

ALEX ARGOTTE, M.D. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Jacqulyn G. Harrington brings this appeal from a March 21, 2014, directed verdict of the McCracken Circuit Court dismissing her medical negligence action against Alex Argotte, M.D. We reverse and remand.

In May 2005, Argotte performed gastric bypass surgery upon Harrington. Prior to the gastric bypass surgery, Argotte surgically implanted an

Inferior Vena Cava Filter (IVC filter) in Harrington. The IVC filter was intended to prevent the complication of pulmonary embolism.

Over two years later, in December 2007, Harrington experienced severe chest pain and was seen at an emergency room. It was discovered that the IVC filter had fractured causing fragments of the filter to migrate and eventually lodge in Harrington's lungs. Harrington underwent surgery to remove the fragments from her lungs, but not all fragments could be successfully extracted.

In December 2008, Harrington filed a complaint alleging medical negligence against Argotte. Harrington claimed, *inter alia*, that Argotte failed to obtain adequate informed consent for the surgical implantation of the IVC filter. In particular, Harrington asserted that Argotte failed to inform her that the IVC filter was retrievable and possibly could have been removed prior to its fragmentation. Also, Harrington maintained that Argotte failed to inform her that the IVC filter could fracture.

The case came before the trial court for a jury trial on March 17, 2014. A jury was empaneled, and the case proceeded to opening statements. After Harrington presented her opening statement, Argotte moved for a directed verdict. Kentucky Rules of Civil Procedure (CR) 50.01. Argotte argued that Harrington admitted during her opening statement that no expert witness would testify as to whether Argotte breached the standard of care as to Harrington's claim of lack of informed consent.

The trial court sustained the motion for directed verdict, thus concluding the trial proceedings without any evidence being presented. The trial court entered a written order granting the directed verdict on March 21, 2014. Therein, the circuit court agreed with Argotte that a medical expert was necessary to prove Harrington's medical negligence claim of lack of informed consent. Thus, the circuit court granted the directed verdict and dismissed Harrington's claim. This appeal follows.

Harrington contends that the circuit court erred by rendering the directed verdict dismissing her negligence claim for lack of informed consent. Harrington argues that it was error to render the directed verdict after her opening statement and prior to presentation of any evidence to the jury.

A directed verdict under CR 50.01 is proper when drawing all inferences from the evidence in favor of the nonmoving party, a reasonable jury could only find for the moving party. *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963). The language of CR 50.01 plainly contemplates the introduction of some evidence at trial before granting a directed verdict:

> A party who moves for a directed verdict **at the close of the evidence** offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

CR 50.01 (emphasis added). Additionally, an opening and closing statement at trial does not constitute "evidence" but rather is intended to merely inform the jury of the case and the issues therein. *Wheeler v. Commonwealth*, 121 S.W.3d 173 (Ky. 2003); *Co-De Coal Co. v. Combs*, 325 S.W.2d 78 (Ky. 1959).

In *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998), the Kentucky Supreme Court established a strict standard of review for appellate courts in review of rulings by trial courts on motions for directed verdict. The Court stated:

> 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. 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.
>
> In reviewing the sufficiency of evidence, the appellate court must respect the opinion of the trial judge who heard the evidence. . . .

Id. at 18 (citations omitted).

However, in this case, there was no evidence introduced or considered by the trial court. Even the informed consent form upon which Argotte relies was not introduced into evidence and thus is not part of the record on appeal for this Court to review.

Based upon our review of Kentucky law, a directed verdict may be rendered after opening statement in very limited cases where counsel made an admission unequivocally fatal to her cause of action. *Riley v. Hornbuckle*, 366 S.W.2d 304

(Ky. 1963); *Samuels v. Spangler*, 441 S.W.2d 129 (Ky. 1969). It must be emphasized that a "directed verdict at this stage of the proceedings is never based on the mere insufficiency of the opening statement to support a case, but always upon the presence of admissions that are fatal to the case." *Riley*, 366 S.W.2d at 305. Additionally, our Supreme Court has warned that a directed verdict after opening statement "is [] dangerous [practice] and should be exercised with caution." *Raco Corp. v. Edwards*, 272 S.W.2d 345, 347 (Ky. 1954); *see also CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 78 n.8 (Ky. 2010); *Green v. Owensboro Medical Health System, Inc.*, 231 S.W.3d 781 (Ky. App. 2007).

During opening statement at trial, Harrington's counsel stated that he did not intend to call a medical expert to testify on the informed consent issue. Harrington asserted that a medical expert was unnecessary as Argotte's failure to adequately inform her of the risks and hazards associated with the IVC filter was so apparent that a layman could easily recognize it. And, when questioned by the circuit court after the directed verdict motion was made, Harrington insisted that expert testimony was not needed as breach of the standard of care was within the realm of common knowledge. Particularly, Harrington believed Argotte's failure to disclose that the IVC filter was retrievable was such an obvious deviation from the standard of care that a layperson could recognize it.

In rendering the directed verdict after Harrington's opening statement, the circuit court concluded that expert testimony was essential to prove Harrington's negligence claim based upon lack of informed consent:

> [Harrington's] action actually turns on her claim that she was not told about certain specific risks relative to such filters or about options relating to subsequent removal or nonremoval of the filter. Specifically, [Harrington] claims she was not told that the filter could fracture, was not told the filter was retrievable, and was not told that Dr. Argotte did not have privileges to remove the filter (*i.e.*, that he would not be the one who could perform the retrieval). [Harrington's] complaint alleges that it was medical negligence not to give this additional information relative to the procedure. These contentions, however, require expert medical proof.
>
> [Harrington's] admission establishes that she gave written informed consent for the procedure; and, under the circumstances presented, it was absolutely necessary for her to present expert testimony to establish and support her criticisms. She admitted that there was no expert support for her theory. [Harrington] failed to articulate an alternative basis for proceeding without expert testimony and confirmed for the Court that she had no intention (or request) to take an alternate course of action. The record in this action presents no alternative basis for proceeding without expert proof as there are no admissions by [Argotte] supporting the theory and the claim is not one which can be placed before a jury without expert testimony.

Order at 3. As Harrington was given some "information" about the IVC filter, the circuit court believed that expert testimony was required to prove breach of the standard of care and cited to *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860 (Ky. 1992). Later, in an order denying Harrington's CR 59 motion, the court elaborated that a "lay jury cannot speculate" as to the standard of care; rather, the court postulated that "[t]o determine whether the facts establish that there was a valid informed consent, the jury must have information as to what constitutes a valid informed consent." Because Harrington admitted to signing a written

informed consent applicable to the IVC filter, the court basically viewed Harrington's statement that no medical expert would testify as an admission fatal to her claim of lack of informed consent. Therefore, the pivotal inquiry is whether Harrington's admission that she would offer no expert testimony constituted an admission unequivocally fatal to her medical negligence claim of lack of informed consent. *See Riley*, 366 S.W.2d 304; *Samuels*, 441 S.W.2d 129.

It is well-established that "[a]n action based on lack of informed consent 'is in reality one for negligence in failing to conform to a proper professional standard . . . .'" *Hawkins v. Rosenbloom*, 17 S.W.3d 116, 119 (Ky. App. 1999) (quoting *Holton v. Pfingst*, 534 S.W.2d 786, 788 (Ky. 1975). To prevail upon a claim of lack of informed consent, "the general rule is that expert testimony is required to negate informed consent." *Hawkins*, 17 S.W.3d at 119. An exception to this general rule is recognized and is applicable "where the failure is so apparent that laymen may easily recognize it or infer it from [the] evidence." *Keel v. St. Elizabeth Medical Center*, 842 S.W.2d 860, 862 (Ky. 1992). And, the decision that expert testimony is required is within the circuit court's discretion.

In the case *sub judice*, the circuit court prematurely determined that expert testimony was required to demonstrate the standard of care and breach thereof by Argotte. In a medical negligence claim, the law recognizes an exception where expert testimony is unnecessary if the failure to disclose is so obvious that a layperson can recognize the necessity of such disclosure to a patient. The circuit court viewed this exception as only being triggered in cases where no consent was

given by the patient. We disagree with this narrow limitation. Rather, the application of the exception is highly fact-specific and is dependent upon whether the failure to disclose is obvious and apparent to a layman based upon the underlying facts as established by the evidence introduced at trial. As no evidence was heard or introduced before the directed verdict was granted, the circuit court could not have properly determined whether the exception to the general rule requiring expert testimony was applicable.[1]

We view any remaining contentions of error as moot or without merit.

In sum, we hold the circuit court erred by rendering a directed verdict after the opening statement by Harrington.

For the foregoing reasons, the order of the McCracken Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

[1] In considering a summary judgment motion, the circuit court may consider the facts as established by depositions and affidavits. However, when ruling upon a directed verdict, it is improper for the court to consider depositions and affidavits. *Riley v. Hornbuckle*, 366 S.W.2d 304. Rather, the circuit court must solely rely upon evidence introduced at trial, which, in this case, there was no evidence entered for the court to consider.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Clifton A. Boswell
Owensboro, Kentucky

BRIEF FOR APPELLEE:

James A. Sigler
Jonathan R. Oliver
Paducah, Kentucky

ORAL ARGUMENT FOR APPELLEE:

James A. Sigler
Paducah, Kentucky