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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000311-MR
AND
NO. 2015-CA-000427-MR

IDA ARNOLD, AS ADMINISTRATRIX
OF THE ESTATE OF JERRY ARNOLD,
AND IDA ARNOLD,
INDIVIDUALLY — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 13-CI-000891

JEWISH HOSPITAL & ST. MARY'S
HEALTHCARE, INC. AND KENTUCKYONE
HEALTH, INC. — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND TAYLOR, JUDGES.

DIXON, JUDGE: Appellants, Ida Arnold, in her individual capacity and as Administratrix of the Estate of Jerry Arnold, appeal from a judgment of the

Jefferson Circuit Court following a jury trial wherein the jury found in favor of Appellees, Jewish Hospital & St. Mary's Healthcare, Inc. and KentuckyOne Health, Inc., in Appellants' medical malpractice action. For the reasons set forth herein, we affirm.

On July 9, 2012, Jerry Arnold underwent an outpatient colonoscopy by Joel Garmon, M.D. at Saints Mary & Elizabeth Hospital ("SMEH"). During the colonoscopy, Dr. Garmon found one polyp, which he excised with an electrocautery snare. The following day, Arnold began passing blood through his rectum. He went to the emergency room at Jewish Hospital and was thereafter transferred to the SMEH ICU around 10:30 p.m. that evening. Dr. Garmon saw Arnold the following morning, and his partner, Vincent Lusco, M.D., took over Arnold's care later that day. At approximately 4:45 p.m. on July 11, 2012, after receiving Arnold's lab results on hemoglobin levels, Dr. Lusco ordered two units of blood to be transfused. The overnight ICU nurse had several conversations with Dr. Lusco that night to report results. Around 10:12 p.m., Dr. Lusco ordered two more units of blood to be transfused over the next four hours, with a complete blood count (CBC) to be done one hour after the transfusion was complete. Unfortunately, Arnold coded at 3:30 a.m. prior to blood being drawn for the CBC. Arnold remained unresponsive despite resuscitation and a subsequent EKG revealed that he had suffered an acute myocardial infarction. His family elected to withdraw life support and Arnold died on July 12, 2012.

On February 22, 2013, Appellants filed an action in the Jefferson Circuit Court against the SMEH, Dr. Garmon, and Dr. Lusco, alleging that their negligence in rendering medical care and treatment to Arnold following his colonoscopy resulted in his death. Prior to trial, Dr. Lusco and SMEH tendered motions in limine to exclude peer review documents that Appellees had produced during discovery. In their response to Dr. Lusco's motion, Appellants attached a letter that Dr. Lusco had written to the peer review committee and argued that, at a minimum, the letter should be admissible as a prior inconsistent statement. Following oral arguments on the motions, the trial court ruled that Dr. Lusco's letter was admissible but that the other peer review documents were not. Subsequently, Dr. Garmon and Dr. Lusco reached a settlement with Appellants and were not present as defendants at trial. The claims of compensatory and punitive damages against Appellees proceeded to trial on October 7, 2014. At the conclusion of a six-day trial, the jury returned a 10-2 verdict in favor of Appellees. Judgment was entered on October 22, 2104. Following the denial of Appellants' CR 59 motions for a new trial or to alter, amend, or vacate the judgment, they appealed to this Court. Additional facts are set forth as necessary.

Arnold first argues on appeal that the trial court erred in excluding the peer review documents because (1) they were relevant to their case-in-chief as they made it more probable that Appellees deviated from the standard of care in diagnosing and treating Arnold's condition than it would have been without the

evidence; (2) they were not privileged; and (3) their probative value far outweighed any prejudicial effect. We must disagree.

About four months after Arnold's death but prior to the commencement of any litigation, SMEH initiated a peer review process –an informal process that may include independent chart review, case discussion among independent physicians of differing backgrounds in the Surgery Quality Assessment & Improvement Committee, and correspondence with treating physicians. SMEH initiates a peer review after any unexpected death. The peer review process in Arnold's case included a partial chart review by an independent physician, three committee meetings, written correspondence with Arnold's treating surgeons, and a discussion with the Director of Nursing and Risk Management. However, neither the independent reviewer nor the committee members spoke directly with Arnold's treating physicians or nurses, and the committee did not review Arnold's entire medical chart or have access to his prior medical records. Nevertheless, Appellants maintain that the peer review documents generated in Arnold's case should have been admitted because they included statements that the appropriate standard of care was not met, and that there existed concerns about the lack of communication between surgeons and nursing staff, as well as incomplete charts.[1]

[1] We would note that although Appellees produced the peer review records during discovery over objection and under an agreed confidentiality order, they were never made part of the record. Consequently, we are unable to review the documents and verify Appellants' assertions of what are contained therein.

We recently addressed this issue in another medical negligence case, *Pauly v. Chang*, 498 S.W.3d 394 (Ky. App. 2016), wherein the appellants also sought to admit peer review documents as evidence that the appellees rendered treatment that was below the required standard of care. The trial court in *Pauly* excluded the documents on the grounds that they were not admissible under the Kentucky Rules of Evidence and also that exclusion was necessary under public policy of promoting quality healthcare by encouraging such reviews. Affirming the trial court on appeal, this Court stated,

> Kentucky is only one of two states that even permit discovery of peer review documents in a subsequent civil action. Appellants do not cite to, and we have found no cases directly on point addressing the admissibility of such evidence at trial. However, simply because the information is discoverable does not necessarily mean that it is relevant or admissible. As noted by our Supreme Court in *Ewing v. May*, 705 S.W.2d 910, 912 (Ky. 1986),
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> > CR 26.02 provides that the parties may obtain discovery of any matter not privileged which is relevant to the subject matter in the pending action. Relevancy is more loosely construed for purposes of discovery than for trial. It is not necessary that the information sought be admissible as competent evidence at trial. Even though it might be otherwise incompetent and inadmissible, information may be elicited if it appears reasonably calculated to lead to the discovery of admissible evidence. It is allowable if there is a reasonable possibility that the information sought may provide a lead to other evidence that will be admissible.

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable." KRE 401. However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." KRE 403.
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> Appellants claim that the peer review documents were relevant because they made it more probable that Appellees deviated from the standard of care in diagnosing and treating Arnold's condition than it would have been without the evidence. We must disagree.
>
> "[I]n Kentucky, a physician has the duty to use the degree of care and skill expected of a competent practitioner of the same class and under similar circumstances." *Grubbs v. Barbourville Family Health Center*, P.S.C, 120 S.W.3d 682, 687 (Ky. 2003). In a medical negligence case, the plaintiff is required to provide expert testimony to prove that the treatment at issue fell below the standard of care expected of reasonably competent providers, and that such negligent care proximately caused the plaintiff's injuries. *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982). Indeed, in this case, expert testimony was presented on both sides as to whether Appellees complied with the requisite standard of care. However, we must disagree with Appellants that the evidence relating to the peer review was also relevant to Appellees' standard of care.

Id. at 408-409.

Herein, Appellees point out that the discussion and concerns expressed during peer review committee meetings are not intended to be legal conclusions about compliance with the standard of care, but rather a collective analysis of the process and systems involved in an effort to promote learning opportunities and

improve patient care. In accordance with *Pauly*, we are of the opinion that the peer review documents were not relevant to whether Appellees complied with the requisite standard of care.

Assuming *arguendo* that the peer review documents were relevant, we nevertheless believe that any probative value is outweighed by the danger of unfair prejudice and confusion of the jury. During the hearing, Appellees pointed out, and Appellants did not dispute, that the documents contained significant ambiguous and contradictory information regarding the time line of events as well the level of interaction between Arnold's treating physicians and nurses. Even more significant, although the peer review documents apparently describe concerns of "inadequate communication" between Dr. Lusco, nurses, and the lab, they do not include specifics as to which communications were inadequate or which nurses were involved. Given that the peer review committee did not review Arnold's case in its entirety or directly speak with the nurses or doctor involved in his case, we must agree with Appellees that there is a risk of jury confusion or misinterpretation that a committee concern is the equivalent of a legal standard of care violation. As such, any relevance of the documents is clearly outweighed by their prejudicial effect. KRE 403.

Appellants next argue that the trial court erred in denying their motion to strike two jurors for cause because they exhibited bias and lack of impartiality. Specifically, Juror 1219622 was an attorney who practiced with a medium-sized law firm in Louisville. At the time of the trial in this matter, Appellants' counsel

was engaged in a legal malpractice lawsuit against the juror's law firm. Juror 1219622 acknowledged that she was aware of the lawsuit, but that she did not know Appellants' counsel was involved in the matter and that such would not affect her ability to make a fair decision. Appellants moved to strike Juror 1219622 for cause, arguing that the lawsuit automatically rendered her disqualified. The trial court denied the motion. In this Court, Appellants argue that the relationship between their counsel and Juror 1219622 "flatly and blatantly demonstrated her inability to be fair and impartial," notwithstanding her affirmation that she could render an impartial and unbiased verdict.

Next, Juror 1219437 stated during voir dire that he had multiple family members in the healthcare profession, including his wife who was a nurse in an ICU unit and his sister who had previously worked as a registered nurse. Further, Juror 1219437 stated that he was unclear about the legal definition of negligence, but that he personally believed it required someone not taking an action when he knew he should have. Juror 1219437 did acknowledge that he would follow the law even if it differed from his personal opinion. Appellants moved to strike Juror 1219437, arguing that he would impose a higher burden for negligence that the law required. Again, the trial court denied the motion.

After the trial court ruled on the parties' motions to strike for cause, Appellants' counsel asked the court to randomly remove five jurors so that twenty-two remained in the pool and the parties' peremptory strikes would have the most value. Appellees did not object. Appellants thereafter used two peremptory strikes

to remove Juror 1219622 and Juror 1219437. After the trial court empaneled the fourteen-member jury, Appellants identified that they would have removed two empaneled jurors had they not been required to use their strikes on the jurors they challenged for cause.

In this Court, Appellants contend that the trial court erred in denying their motions to strike for cause Juror 1219622 and Juror 1219437 because both manifested a lack of impartiality and bias, and made it such that it was "highly unlikely that the average person could remain impartial under the circumstances." *Rankin v. Commonwealth*, 327 S.W.3d 492, 496-97 (Ky. 2010). Consequently, Appellants maintain that their use of peremptory strikes to remove biased jurors rendered the jury selection process unfair. We are of the opinion that this issue is unpreserved for review.

In *Gabbard v. Commonwealth*, 297 S.W.3d 844, 854 (Ky. 2009), our Supreme Court held that "in order to complain on appeal that he was denied a peremptory challenge by a trial judge's erroneous failure to grant a for-cause strike, the defendant must identify on his strike sheet any additional jurors he would have struck." The Court subsequently applied this rule to civil cases in *Grubb v. Norton Hosps., Inc.*, 401 S.W.3d 483, 488 (Ky. 2013). The rationale, as explained in *Hurt v. Commonwealth*, 409 S.W.3d 327 (Ky. 2013), is as follows:

> The practice of designating jurors on a strike sheet preserves the challenge by indicating before the seating of the jury exactly who the party was unable to strike as a result of the trial court's allegedly erroneous failure to excuse a juror for cause. Then if jurors whom the party

> wished to use a peremptory challenge against actually serve on the jury, it is clear such a jury is "not the jury [the] party was entitled to select."

Id. at 329 (quoting *Shane v. Commonwealth*, 243 S.W.3d 336, 340 (Ky. 2007)).

The record herein contains no indication as to who counsel would have struck, orally or on the strike sheet. Finding this issue to be preserved merely because counsel moved to strike Juror 1219622 and Juror 1219437 for cause would effectively eviscerate the Court's holding in *Gabbard*. As such, "[b]ecause Appellant[s] . . . failed to assert that [they] would have peremptorily struck another prospective juror, this issue was not preserved; and because none of the challenged jurors sat on the jury there is no basis for a finding of palpable error." *McDaniel v. Commonwealth*, 415 S.W.3d 643, 649–50 (Ky. 2013); CR 61.02.

Appellants next complain that the trial court erred in prohibiting them from playing during opening statements several video deposition clips of Nurse Beverly Boggess, a charge nurse employed at SMEH who provided care to Arnold during his first night at SMEH. Therein, Nurse Boggess testified that if a patient were deteriorating it was the responsibility of the nurses on duty to notify the doctor. Boggess was then asked if failing to call a doctor when a patient was deteriorating would be an example of not complying with the standards the hospital would expect. Nurse Boggess responded that calling the doctor under such circumstances was an expectation. Appellees objected to playing the video on the grounds that (1) it was an undisclosed expert opinion; (2) Nurse Boggess was a fact witness, not a retained expert; (3) it was testimony that could only be

given by someone designated by Appellees as a CR 30.02 corporate representative; and (4) Nurse Boggess was required to assume facts not in evidence. The trial court agreed with Appellees' first two grounds and ruled the testimony should not come in during opening statements. However, the trial court specifically stated that its ruling was limited to opening statements and that it was not ruling on Appellants' ability to question Nurse Boggess regarding her deposition testimony during the trial. Nevertheless, Appellants subsequently did not question Nurse Boggess about her statements when she later testified. In fact, she only testified for approximately four minutes, during which time she stated that she was not even present at SMEH on the night that Arnold died.

On appeal, Appellants argue that Nurse Boggess's testimony in question was admissible as admissions by a party opponent that were inconsistent with SMEH's assertion that the nurses had not deviated from the standard of care on the night in question. As such, Appellants contend that had Nurse Boggess's testimony been presented at trial, Appellees would have had to address an SMEH employee's admission that the nurses' failure to notify the doctors when Arnold's condition deteriorated was a deviation from the standard of care. We disagree.

We grant attorneys wide latitude during opening statements. However, "[t]he only legitimate purpose of an opening statement is so to explain to the jury the issue they are to try so that they may understand the bearing of the evidence to be introduced." *Fields v. Commonwealth*, 12 S.W.3d 275, 281 (Ky. 2000) (*quoting Lickliter v. Commonwealth*, 249 Ky. 95, 60 S.W.2d 355, 357

(1933). As our Supreme Court noted in *Fields*, "we have never sanctioned the playing of a witness's prerecorded *testimony* during opening statement . . . ." *Id.* (Emphasis in original). While there is certainly the temptation to advance one's argument at the beginning of the trial so that the jury understands not only what the testimony is expected to be, but the proponent's theory of the case as well, this is not the intent of opening statements. *Parker v. Commonwealth*, 241 S.W.3d 805 (Ky. 2007). Accordingly, we conclude that the trial court herein properly ruled that Nurse Boggess's video testimony was not admissible during opening statements. Furthermore, as Appellants did not seek to question Nurse Boggess regarding the statements at issue during their case-in-chief, the trial court was not afforded the opportunity to rule on their admissibility, and thus the issue is not preserved for review in this Court.

Finally, Appellants argue that the trial court erred in denying their motion for a directed verdict on Appellees' liability. They point out that during opening statements, Appellees' counsel stated that the ICU nurses on duty the night Arnold died assessed, reported and communicated appropriately, with one exception – when Nurse Kelly Enis failed to call Dr. Lusco regarding Arnold's deteriorating condition – and that Appellee "admit[s] that, no question about it." Appellants contend that counsel's statement was tantamount to a "clear[ ] and unequivocal[ ]" representation that "his client made errors in the medical care and treatment of Arnold that ultimately led to his death" and was a "fatal admission . . . .that [Appellees'] actions fell below the standard of care and, ultimately, Arnold

died as a result of such actions." Accordingly, Appellants believe that this so-called fatal admission should have served as the basis for a directed verdict in their favor. We find this argument wholly without merit.

We must agree with Appellees that Appellants' characterization of counsel's opening statement is alarmingly inaccurate. Counsel actually stated that the evidence would show that all nursing care was appropriate, with the exception of Nurse Enis's failure to call a doctor at 2:00 a.m. when Arnold was deteriorating, but that this single standard of care violation did not, in fact, cause or contribute to Arnold's death. Unquestionably, counsel's statements did not support Appellants' motion for directed verdict and we cannot conclude that, based on the totality of the evidence presented at that point, the trial court erred in denying Appellants' motion.

For the reasons set forth herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR

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