

RENDERED: JANUARY 13, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000017-MR

RICKIE W. YONTS AND JANICE YONTS

APPELLANTS

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 10-CI-00496

ANJUM BUX, M.D.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Rickie W. Yonts and Janice Yonts appeal from a Trial Verdict and Judgment of the Boyle Circuit Court reflecting a jury verdict in favor of Dr. Anjum Bux. The jury answered in the negative the instruction asking whether Dr. Bux failed to exercise a degree of care and skill expected of a reasonably competent physician specializing in pain management, and whether

such failure was a substantial factor in causing injury to Rickie Yonts. The Yontses argue that the trial court erred in failing to instruct the jury in terms of traditional negligence language by failing to include the duty of “prudence” rather than “competence” in the instructions. We find no error, and AFFIRM the Judgment on appeal.

On July 2, 2009, Rickie Yonts (“Mr. Yonts”) saw Dr. Bux for treatment of chronic back pain. Dr. Bux administered three steroid injections which did not provide much relief. Thereafter, Dr. Bux permanently implanted in Mr. Yonts’ abdomen a Medtronic morphine pump. The pump introduced morphine directly into Mr. Yonts’ spinal column through a catheter.

Mr. Yonts subsequently developed a granuloma at the tip of the catheter. A granuloma is an area of inflammation that compresses or irritates the spinal cord resulting in neurological dysfunction. Over a period of weeks or months, Mr. Yonts experienced increasing symptomatology allegedly including permanent paresthesia (pain and tingling), urinary incontinence, fecal incontinence and erectile dysfunction. Eventually, Mr. Yonts underwent surgical removal of the catheter and pump at the University of Kentucky Hospital on November 27, 2009.

The Yontses filed the instant medical malpractice action against Dr. Bux and other defendants not parties to this appeal. They alleged that Dr. Bux deviated from the standard of care in his treatment of Mr. Yonts, and otherwise failed to diagnose and treat Mr. Yonts for complications and side effects of the implantation procedure. The matter proceeded to trial, whereupon Mr. Yonts

offered expert testimony that Dr. Bux deviated from the standard of care in failing to adequately monitor Mr. Yonts post-operatively, failing to order proper diagnostic testing and failing to timely diagnose the granuloma. Dr. Bux responded with expert witnesses in pain management and neurosurgery who opined that he complied with the standard of care in his post-operative management of Mr. Yonts.

At the conclusion of the proof, both parties, through counsel, tendered proposed jury instructions. Dr. Bux's proposed instructions were taken from Palmore and Eades, *Kentucky Instructions to Juries*, 4th Edition, Civil at Section 23.01. The proposed instruction stated,

Instruction No. 1
Duty of Dr. Anjum Bux

It was the duty of Dr. Anjum Bux to exercise the degree of care and skill ordinarily expected of a reasonably competent physician specializing in pain management and acting under the same or similar circumstances.

Are you satisfied from the evidence that Dr. Anjum Bux failed to comply with this duty, and that such failure was a substantial factor in causing injury to Rickie Yonts?

YES _____ NO _____

Mr. Yonts objected to the instruction, arguing that the “reasonably competent physician” standard was too rigorous. Instead, Mr. Yonts maintained

that the instruction should read “reasonably prudent physician.” The court overruled Mr. Yonts’ objection, and accepted the instruction tendered by Dr. Bux. The matter was submitted to the jury, which unanimously answered Instruction No. 1 in the negative. This appeal followed.

The Yontses now argue that the Boyle Circuit Court erred in overruling their objection to Instruction No. 1. They first maintain that the court improperly failed to employ a traditional negligence standard in the instruction by referencing duty, breach, causation and injury. Specifically, and citing *Smith v. Collins*, 277 S.W.2d 38, 42 (Ky. 1955), the Yontses note that “ordinary care” is that degree of care which an ordinarily *prudent* person usually exercises under the same or similar circumstances. Because the instruction did not mention ordinary care, nor did it require any “prudence” by Dr. Bux, they argue that they had to meet the unacceptably high standard of demonstrating that Dr. Bux acted with a lack of competence. Citing Black’s *Free Online Legal Dictionary*, 2nd Ed., the Yontses contend that “prudence” and “competence” are not synonymous. While acknowledging that Kentucky courts employ the “reasonably competent physician” standard, they contend that it is not consistent with the general law of negligence in Kentucky. As such, they maintain that the jury instruction at issue is erroneous and presumed to be prejudicial. They seek an Order reversing the Judgment on appeal and remanding the matter for a new trial.

Alleged errors in jury instructions are questions of law, which we examine under a *de novo* standard of review. *Sargent v. Shaffer*, 467 S.W.3d 198,

204 (Ky. 2015). The sole issue for our consideration is whether the Boyle Circuit Court committed reversible error in denying the Yontses' objection to Dr. Bux's tendered instruction. We must answer that question in the negative.

Mr. Yonts objects to the "reasonably competent physician" standard employed by the Boyle Circuit Court in Instruction No. 1, instead asserting that a "reasonably prudent physician" standard more closely comports with general negligence law in Kentucky. It is well-established in Kentucky, however, that the dispositive inquiry in medical malpractice cases is whether the physician exercised the degree of care and skill expected of a competent practitioner of the same class and under the same circumstances. This duty of care derives from *Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970), wherein the Kentucky Supreme Court held,

[i]t is our conclusion that the jury should be instructed that the defendant was under 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. (Emphasis added).

As Dr. Bux properly contends, this concise statement of a physician's duty has been utilized consistently by Kentucky's trial courts and practicing attorneys since 1970, and is well-incorporated into the case law of the Commonwealth.¹

Instruction No. 1 correctly described the duty owed by Dr. Bux to Mr. Yonts.

Mr. Yonts asserts that the "reasonably competent practitioner" standard is at odds with the general negligence duty of "reasonable prudence," thus

¹ A panel of this Court reaffirmed the "reasonably competent practitioner" standard most recently in *Mitchell v. Baptist Healthcare System Inc.*, 2015 WL 6082806 at 7 (Ky. App. 2015).

creating an intractable conflict in the law which must be resolved. As such, he asks this Court to address this alleged conflict and clarify the medical malpractice standard in Kentucky. We decline to do so. *Blair* and its progeny are well-established in Kentucky's jurisprudence, and any amendment to the principles set out in *Blair* must come from Kentucky's high Court.

In sum, Instruction No. 1 properly stated the reasonably competent practitioner standard established in *Blair*, and we find no error in the Boyle Circuit Court's denial of Mr. Yonts' objection to the instruction. For the foregoing reasons, we AFFIRM the Trial Verdict and Judgment of the Boyle Circuit Court.

ALL CONCUR.

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