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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2016-CA-000896-MR

H. TRIGG MITCHELL, ADMINISTRATOR OF
THE ESTATE OF ELIZABETH KESSLER MITCHELL,
H. TRIGG MITCHELL, GUARDIAN FOR
CAROLYN GRACE MITCHELL AND
H. TRIGG MITCHELL, GUARDIAN FOR
EMILY SIMMS MITCHELL — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CI-01828

BAPTIST PHYSICIANS LEXINGTON, INC. d/b/a
BAPTIST PULMONARY AND CRITICAL CARE
ASSOCIATES, MATTHEW MCINTOSH, M.D.,
AND KRISTY BRUINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: This appeal involves a young woman's death and the resulting medical malpractice claim. Elizabeth "Eli" Mitchell had acute shortness

of breath and chest pain and was rushed to the emergency room on September 18, 2013, where she became apneic and suffered cardiac arrest. She ultimately passed away on September 19, 2013. She was H. Trigg Mitchell's wife and a mother to two young girls.

During the months prior to her death, Eli dealt with shortness of breath, chest soreness, and other maladies for which she sought treatment from multiple physicians. Her death led to a medical malpractice suit against her treating medical professionals – a primary care doctor, a medical group and its pulmonary care doctor, and a pulmonary care advanced practice registered nurse. Her estate claimed the physicians failed to diagnose that Eli was suffering from chronic pulmonary emboli that occurred due to her use of birth control pills. The estate claims that the doctors failed to order VQ or CT scans of Eli, which, they claim, would have shown the chronic pulmonary emboli. Had they so discovered the alleged condition, the estate claims Eli would not have died, as the doctors could have taken Eli off of birth control pills and easily treated her. Following a multi-week-long jury trial, the jury found none of the medical professionals acted negligently.

The plaintiffs now appeal, and the main issue in this case involves whether the plaintiffs were entitled to a jury instruction for "front desk" negligence against the pulmonary group. The issue arose during one of the visits to the pulmonary practice when the nurse referred Eli to a speech therapist and told Eli to follow up with the pulmonary care doctor when her speech therapy was completed.

The front desk at the pulmonary care practice did not make a follow-up appointment for Eli.

Eli went for the speech therapy and was able to run stairs for ten minutes after a few sessions. Eli canceled her final speech therapy session. She never returned to the pulmonary care practice. Almost a year after she was referred to the speech therapist, Eli died. The trial court's jury instructions only concerned the negligence of the medical professionals, not the pulmonary care practice's front desk.

Eli's estate raises three issues relating only to the two pulmonary care medical professionals and their practice: (1) the trial court abused its discretion by failing to instruct the jury on "front desk" negligence due the alleged failure by the pulmonary group's front desk clerk to make a follow-up appointment for Eli when Eli was referred to a speech therapist; (2) the trial court erroneously instructed the jury on a "reasonably competent" standard of care rather than a "reasonably prudent" standard of care for medical professionals; and (3) the trial court erroneously limited the minor daughters' consortium damages to eighteen years of age.

Concerning the first issue, we hold that the trial court's decision to not instruct on "front desk" negligence was not an abuse of discretion. The evidence supported giving a separate instruction, and it also supported allowing the parties to argue the negligence theory as occurring by Nurse Kristy Bruins who wrote the checkout slip. Because both ways of drafting jury instructions were reasonable,

because Eli's estate argued the front desk negligence theory in its closing argument, and because the jury rejected all negligence theories, the trial court did not act arbitrarily, unreasonably, unfairly, or in a way that is unsupported by sound legal principles.

Concerning the second issue, we hold that the trial court did not err by using the "reasonably competent" standard of care, as that phrase has been utilized throughout this Commonwealth for many decades.

Concerning the third issue, as we are not reversing and remanding for a new trial, we decline to address it as its resolution is an academic exercise.

## BACKGROUND

We begin with a brief factual recitation. We initially note that we have thoroughly reviewed the trial and could write volumes regarding the evidence introduced at the two-and-a-half-week trial. Much of the testimony, though, was redundant, as all parties used a panoply of medical experts and lay testimony to support their respective theories. The parties collectively proffered nearly a dozen experts to attempt to explain whether Eli suffered from chronic pulmonary emboli, whether Eli died from a pulmonary embolus, and whether Eli's primary care physician, her pulmonary care physician, or her pulmonary care nurse practitioner violated the standard of care while treating Eli. The defense testimony was weighty. As Eli's appellant's brief summarized the multiple-days-long defense evidence: "substantial defense testimony [was introduced] that Baptist Pulmonary [and Critical Care Associates], Dr. [Matthew] McIntosh and [Kristy] Bruins met

the standard of care and that Eli did not even have [pulmonary emboli] and did not die of [a pulmonary embolus]."

Eli was a physically competitive and active person most of her adult life. In college she played tennis, and after college she ran mini-marathons. In February of 2011, when Eli was thirty-seven years old, she began experiencing shortness of breath and chest heaviness while running. She claimed the initial symptoms began after using bleach to clean a bathroom. She initially went to her primary care physician.

Eli's appeal raises no issues concerning her primary care physician, so we only briefly address those facts. Eli visited her primary care physician many times during the few years she was treated for her various ailments prior to her death. Her primary care physician never concluded that Eli suffered from chronic pulmonary emboli, nor did she run the VQ and CT scans that Eli's estate repeatedly claimed at trial were necessary to diagnose the supposedly fatal condition. In November of 2011, the primary care physician referred Eli to Baptist Pulmonary and Critical Care Associates

At Baptist Pulmonary, Eli saw Dr. Matthew McIntosh. Various tests were ordered, the results of which led Dr. McIntosh to believe that Eli had exercise-induced asthma or a reactive airway disease. She was given inhalers that improved her symptoms, as shown by Eli's self-reporting on follow-up visits and in e-mails Eli sent to friends. She continued to have problems, though, and returned to Baptist Pulmonary on several occasions in 2012.

During these visits, she often saw Kristy Bruins, an Advanced Practice Registered Nurse. More tests were ordered, including an echocardiogram and a cardiopulmonary stress test. The results of these tests were mostly normal, showing only a slightly elevated right ventricular systolic pressure in her heart. At trial, the parties disputed whether this elevated pressure should have caused Nurse Bruins or Dr. McIntosh to suspect Eli had recurrent, chronic pulmonary emboli. Both sides introduced medical literature and experts to state whether the standard of care for a physician interpreting Eli's results would have been to order additional tests such as a VQ or CT scan to rule out pulmonary embolism as a diagnosis. The jury considered this evidence and ultimately rejected that either Nurse Bruins or Dr. McIntosh violated the standard of care.

At Eli's final visit to Baptist Pulmonary in June of 2012, Eli reported that she felt like her throat was closing up on her, and she wanted to be evaluated for vocal cord dysfunction. Eli, an attorney and competent consumer of medical services, had been researching the disease and noted that it could restrict her airflow and appear as though she had asthma. Nurse Bruins referred Eli to a speech therapist for evaluation and treatment. Nurse Bruins gave Eli a checkout sheet to take to the front desk at Baptist Pulmonary. The sheet informed the front desk to schedule speech therapy. It also ordered, "F/U with Dr. McIntosh after[.]"

Based on this checkout sheet notation, Eli's estate proffered only one medical expert who was asked whether a front desk clerk with Baptist Pulmonary was negligent by failing to schedule a follow-up appointment. Baptist

Pulmonary's attorney, who represented Dr. McIntosh and Nurse Bruins, objected because the alleged front desk negligence claim was not laid out in the Complaint. The trial court admitted the evidence because Eli's estate proffered that Dr. McIntosh and Nurse Bruins were going to introduce evidence that Eli did not return to Baptist Pulmonary after she was referred to speech therapy. The expert then opined:

> I think it would be, um, the front desk's fault that they didn't make this appointment, and if for some reason they couldn't make this appointment because it's an actual order, then they should have gone back to Kristy Bruins and told her why they couldn't make that appointment.

(Trial Video, 5/19/16, 11:20:59-11:21:14).

When the defense presented its case, Nurse Bruins testified and explained that patients are given sheets at the end of their visit to take to the front desk at Baptist Pulmonary. The sheets give instructions for the clerks to perform at checkout. The clerk scheduled the speech therapy appointment. The "F/U" note, Nurse Bruins explained, stood for "follow up" after the speech therapy was completed. Nurse Bruins stated that the clerk was not supposed to make a specific appointment at that time because the speech therapy consultation could result in a diagnosis and therapy that could last for weeks or months, thus making it impossible to know when, if at all, Eli should return. Nurse Bruins noted that Eli was very intelligent. It was Eli who researched and sought out the vocal cord dysfunction therapy. Eli sought medical care when she thought she needed it. She

would understand the need to make a follow-up appointment when she was finished with her therapy if she was still experiencing problems:

> Atty.: Why didn't you make an appointment then and there for her to come back?
>
> Bruins: Wanted to wait and see if she responded to the speech therapy, and I just wanted to make sure that she wasn't lost. So I said, "Well, just come back and call, you know, after you've done that, you know, even if it's a couple of months." Depending on her schedule, just kind of come back when you've done the speech therapy.
>
> Atty.: Did you know how long the speech therapy, or the therapy for vocal cord dysfunction, might take?
>
> Bruins: It depends on the patient. Some people go and they go one or two visits and if they're not better they come right back to me. And that's fine. Um, some people go, like she did, and do very well eventually with the treatment and then if they're feeling better, which is what I guess happened, I don't know, they don't come back.

(Trial, 5/25/16, 15:05:57-15:06:47).

According to the speech therapist's notes, Eli went to multiple therapy sessions and saw improvements in her breathing. At the September 10, 2012 visit, Eli was able to perform stair exercises for 10 minutes while she controlled her breathing throughout the exercise "and did not experience throat tightness or shortness of air." She was advised to continue running and increase the length of her runs. She was also advised to discuss her treatment with her doctor. On October 8, 2012, Eli called the speech therapist's office and reported that she was

better and did not want to continue treatment. She did not return to Baptist Pulmonary.

Eli continued to frequently exercise, often attending high interval intensity training exercise classes. She also visited her primary care physician during the time period between when she last went to the speech therapist and when she passed away. She appears to have also suffered from costochondritis, an inflammation of the sternum cartilage, and sinusitis and migraine headaches. Evidence was introduced that Eli continued to suffer from shortness of breath. Eli passed away almost a year after she discontinued treatment with the speech therapist.

The medical experts who testified could not come to a consensus about Eli's death. The plaintiff's experts, in varying degrees, believed Eli died from a pulmonary embolus. The defendants' experts had no real answer as to why she died. They mostly served to dispel the theory that she perished due to pulmonary emboli. Substantial evidence regarding Eli's autopsy was introduced, including pathology reports and photographs, as well as comparative photographs and reports of people who died from pulmonary emboli.

The jury was given three separate instructions regarding negligence. They had to determine whether Dr. McIntosh, Nurse Bruins, or Dr. Monohan, Eli's internist, failed to comply with their duties to exercise the degree of care expected of a reasonably competent medical professional acting under the same or similar circumstances. Eli's estate's counsel objected to using the phrase "reasonably

competent" and asked that the phrase "reasonably prudent" be substituted. That request was denied. Eli's estate's counsel also requested a fourth negligence instruction against Baptist Pulmonary for alleged "front desk" negligence because the clerk at the front desk never scheduled a follow-up appointment for Eli at Baptist Pulmonary when Eli was referred to speech therapy. The trial court denied giving this instruction and directed the parties to flesh out that negligence theory in their closing arguments.

After reviewing all of this detailed medical evidence, the jury unanimously rejected that Eli's primary care physician breached the standard of care. In a ten-to-two decision, the jury rejected both that Eli's pulmonary care physician and her pulmonary care nurse practitioner violated their respective standards of care.

We now turn to the issues presented on appeal.

**ANALYSIS**

The two primary issues before us both involve jury instructions, and the standards of review for the two issues are substantially different. The first concerns whether the trial court erred by not giving an instruction. It is the trial court's obligation to "instruct the jury upon every theory reasonably supported by the evidence." *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015). Review of a trial judge's decision whether to give an instruction is under an abuse of discretion standard. *Id*. This standard is used because "[a] decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the

factual and evidentiary subtleties of the case that are best understood by the judge overseeing the trial from the bench in the courtroom." *Id.* The trial judge has the "superior view of that evidence[,]" meaning the trial judge's decisions are warranted a measure of deference by appellate courts. *Id*.

"The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). The standard permits a court to be "'empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions.'" *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004) (quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001)) (emphasis in original). "Put another way, we will not hold a trial court to have abused its discretion unless its decision cannot be located within the range of permissible decisions allowed by a correct application of the facts to the law." *McClure v. Commonwealth*, 457 S.W.3d 728, 730 (Ky. App. 2015) (citing *Miller*, *supra*).

The second issue concerns whether the trial court's given instruction contained erroneous law. Review of this type of instructional error is *de novo*. *Sargent*, 467 S.W.3d at 204. Under *de novo* review "we afford no deference to the trial court's application of the law to the facts found." *Laterza v. Commonwealth*, 244 S.W.3d 754, 756 (Ky. App. 2008) (citing *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998)).

## I. First allegation of instructional error: alleged failure to give instruction on "front desk" negligence.

Using these standards of review, we turn first to whether the trial court abused its discretion by not giving an instruction on "front desk" negligence. Whether to give instruction is fact-based. *Sargent*, 467 S.W.3d at 203. It is not the duty of the parties to ensure that the proper instructions are given; instead, "[t]he duty to give proper instructions lies clearly in the hands of the trial court[.]" *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008). That duty requires the trial court to give "bare bones" instructions that "leave[] it to counsel to assure in closing arguments that the jury understands what the instructions do and do not mean." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 60 (Ky. 2010). The instructions must be based on the evidence and "neither confuse nor mislead jurors." *Id*. (citing *Drury v. Spalding*, 812 S.W.2d 713 (Ky. 1991)).

To resolve, then, whether the trial court abused its discretion in its duty to give a jury instruction on a fact-based negligence theory, we must answer the following question: was the trial court's decision to give only the instruction against Nurse Bruins within the range of permissible decisions based on the facts presented at trial? We find that it was within the range.

Here, the evidence presented at trial may have supported both giving a separate instruction against Baptist Pulmonary and not giving a separate instruction. The evidence favoring giving the instruction was loose – it was based on a negative inference from the fact that no follow-up appointment was

scheduled, and one plaintiff's expert's opinion about what he believed a front desk clerk should have done with the order Nurse Bruins wrote on the discharge sheet. That expert opined that the front desk clerk should have either: (1) made a follow-up appointment; or (2) gone to Nurse Bruins and told her why the front desk could not make the appointment. Appellants point us to no other evidence to support their negligence theory, and our review of the trial has unearthed none in the plaintiff's case-in-chief.

Based just on this negative inference and the expert's opinion's first option, it is possible that a negligence instruction against Baptist Pulmonary was warranted. In *Wong v. Chappell*, 773 S.E.2d 496 (Ga. App. 2015), an ordinary negligence instruction was warranted against a medical practice when the front desk clerk misplaced an antibiotic prescription as a patient was checking out.[1] In comparison to the instant case, if the front desk clerk's obligation to Eli was to make a follow-up appointment and none was made, then an instruction against Baptist Pulmonary would have been appropriate.

On the other hand, it was also reasonable for the trial court to instruct the jury only about Nurse Bruins' professional negligence. The plaintiff's expert's second theory of professional negligence was that the desk clerk was negligent by not telling Nurse Bruins that he or she could not make an appointment. But under this theory, the front desk clerk would not have been negligent, as the clerk

[1] We note in *Wong* the issue was not whether to give an instruction, but, rather, whether the instruction should be for ordinary negligence or the heightened standard applied to medical professionals. In the present case, the plaintiff only requested an instruction under the heightened standard.

correctly followed Nurse Bruins' orders and did not make a follow-up appointment.

During the defense's presentation of evidence, Nurse Bruins testified that she informed Eli that she wanted Eli to return for a follow-up appointment. Not knowing if any speech therapy would occur, nor knowing when any speech therapy would end, Nurse Bruins testified that she wrote the discharge note intending for the front desk clerk to not make a specific follow-up appointment.

If Eli's estate's expert was correct that the applicable, professional standard of care was that a pulmonary care group should make a specific follow-up appointment, the only reason one was not made here was because Nurse Bruins intended one not to be made and wrote a discharge sheet to that effect. It was not the front desk clerk's failure. Thus, the breach of the standard of care was Nurse Bruins' alone. If the evidence only points to an agent of a medical group being negligent, and there is no specific evidence that the medical group is guilty of independent negligence, then no separate jury instruction against the medical group is warranted. *See, e.g., Hamby v. Univ. of Kentucky Med. Ctr.*, 844 S.W.2d 431, 435 (Ky. App. 1992). Accordingly, it was reasonable for the trial court to instruct only on Nurse Bruins' professional negligence.

Alternatively, any error was harmless. The instruction as given permitted Eli's estate to argue that the jury should find that the defendants breached their standard of care by not giving Eli a follow-up appointment. Eli's estate made that argument during its closing. In this sense, the "bare bones"

instruction given by the trial court comported with its duty to instruct on the negligence theories supported by the evidence. *See Stearns Coal & Lumber Co. v. Williams*, 171 Ky. 46, 186 S.W. 931 (1916) ("And, although the instruction offered by appellant was not technically correct, it was the duty of the court to prepare and give a proper instruction upon the question."). The given instruction permitted the parties to argue the theory that the standard of duty was breached by failing to make a specific follow-up visit. The jury should have found against Nurse Bruins if it believed that theory, as it was her decision to have the front desk not make a follow-up appointment. The jury's verdict rejected *in toto* that Nurse Bruins breached the standard of care.

Thus, we can say with fair assurance that the jury's rejection of Nurse Bruins' negligence equates to a rejection of the front-desk negligence theory, as the evidence is unequivocal that it was Nurse Bruins who ordered the front desk to not make the follow-up appointment. Because the alleged breach of duty for the failure to make a follow-up appointment was wholly a factual determination under Nurse Bruins, if the trial court erred by failing to give a separate instruction against Baptist Pulmonary on the front-desk negligence theory, that failure was harmless. *See, e.g., Risen v. Pierce*, 807 S.W.2d 945, 947-48 (Ky. 1991) (finding failure-to-instruct error was not harmless because jury's verdict did not encompass all breaches of duty, thus jury had no opportunity to find the causation of the harm).

In summary, the trial court was in the best position to view the evidence, and it made a decision that was within the range of permissible

decisions. It did not abuse its discretion. Alternatively, any error was harmless because the jury rejected that Nurse Bruins, who was the alleged cause of Eli's failure to obtain a follow-up appointment, breached her duty of care. We therefore affirm the judgment entered in favor of the defendants.

## II. Second allegation of instructional error: alleged error in negligence instructions by using term "competent" instead of "prudent"

Having found no error with the first allegation, we now turn to the second allegation of instructional error. The Appellants claim the trial court erroneously used the phrase "reasonably competent" rather than "reasonably prudent" in the jury instructions when referring to the standards of care for the medical professionals. We review this claim *de novo*, and we find no merit to Appellants' argument.

The instructions given in the instant case asked the jury to determine whether the medical professional, in his or her treatment of Eli, violated his or her duty "to exercise that degree of care as would be expected of a reasonably competent [pulmonary physician/advanced practice registered nurse] acting under the same or similar circumstances." Appellants had requested the trial court use the word "prudent" rather than "competent" in the instructions. The trial court denied this request, finding the word "competent" comported with Kentucky law and was consistent with Justice Palmore's learned treatise on jury instructions. We agree it was proper to use the word "competent."

Over forty years ago our state's then-highest Court established the proper verbiage for jury instructions in medical negligence cases:

> It 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.

*Blair v. Eblen*, 461 S.W.2d 370, 373 (Ky. 1970). This standard has been cited as authoritative multiple times over. *See, e.g., Seaton v. Rosenberg*, 573 S.W.2d 333, 337 (Ky. 1978); *Reams v. Stutler*, 642 S.W.2d 586, 588 (Ky. 1982); *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991); *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 687 (Ky. 2003); *Wilbourn v. Shiben,* 2003 WL 21299627 (Ky. App. Jun. 6, 2003) (unreported); *Mitchell v. Baptist Healthcare Sys., Inc.*, 2015 WL 6082806 (Ky. App. Oct. 16, 2015) (unreported); *Yonts v. Bux*, 2017 WL 129066 (Ky. App. Jan. 13, 2017) (unreported) (disc. rev. denied Jun. 8, 2017).

As this holding is not *dicta* and has been used for almost half a century, we cannot overturn this holding. Rules of the Supreme Court (SCR), Rule 1.030(8)(a) ("The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court."); *Buckler v. Mathis*, 353 S.W.3d 625, 631 (Ky. App. 2011) ("Because the instructions provided by the trial court are in line with binding precedent . . . we

uphold those instructions as proper."). Accordingly, we affirm the judgment entered in favor of Dr. McIntosh and Nurse Bruins.

### III. Damages claim.

Because we are not reversing on Appellants' first two claims, we need not address Appellants' final claim regarding damages. The judgment in favor of all of the defendants – with no damages awarded – is being affirmed.

## CONCLUSION

Using the abuse of discretion standard to review whether the trial court erred by not giving a separate jury instruction against Baptist Pulmonary, we find no error as the trial court made a decision that was within the realm of reasonable decisions. Alternatively, we find that any error was harmless, as the jury rejected that Nurse Bruins breached the duty of care in any aspect, including in her decision to order that no follow-up appointment be made by Baptist Pulmonary's front desk. Applying *de novo* review to the claim that the trial court should have used the phrase "reasonably prudent" rather than "reasonably competent," we likewise find no error, as the latter phrase was established by the Commonwealth's High Court more than four decades ago. Finally, because we are not reversing for a new trial, we decline to address any allegation of error with the damages.

DIXON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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