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Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002502-MR

GRADY EDMON, ADMINISTRATOR OF
THE ESTATE OF SUSIE TURNER,
DECEASED — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 01-CI-00456

GARY HARRIS, M.D.; LAKE
CUMBERLAND, L.L.C., D/B/A LAKE
CUMBERLAND REGIONAL HOSPITAL,
L.L.C.; AND L. CREED PETTIGREW, M.D. — APPELLEES

OPINION AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; EMBERTON,[1] SENIOR JUDGE.

ACREE, JUDGE: Grady Edmon, administrator of the estate of Susie Turner, appeals the Pulaski Circuit Court's entry of summary judgments in favor of Lake Cumberland, L.L.C. d/b/a Lake Cumberland Regional Hospital ("LCRH" or "hospital") and Gary Harris,

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

M.D., and the judgment for L. Creed Pettigrew, M.D. following a favorable jury verdict. For the reasons set forth, we affirm each of these judgments.

In May of 2000, Susie Turner was 79 years old. On the eighth day of that month, Susie went to Lake Cumberland Regional Hospital for an outpatient CT scan. Her family physician was trying to evaluate the severity of an adrenal gland mass he had discovered in her abdomen. After undergoing the scan, while getting dressed, Susie exhibited signs of having suffered a stroke. She was immediately taken to the emergency room. Within one (1) minute she was seen by Doctor Harris. The time was 2:06 p.m. Ten days after her stroke, Susie died.

The temporal focus of this appeal is the three to four hour period following the onset of Susie's symptoms. The topical focus is the medical care she received during that period, with special attention to the decision not to administer the thrombolytic agent known as Tissue Plasminogen Activator.

Tissue Plasminogen Activator, or tPA, is a blood clot-busting drug. The drug has proven effective in treating certain stroke victims. In 1996, the United States Food and Drug Administration approved the use of tPA to treat ischemic stroke during the first three hours after the onset of stroke symptoms. However, administering tPA is not without its risks. Because it breaks down the otherwise beneficial clotting properties of blood, it is essential that tPA be administered to and operate upon a closed and stable circulatory system transmitting blood that is not exhibiting abnormal properties. A patient who is experiencing bleeding is not a proper candidate. Similarly, a patient

suffering from any number of blood or circulatory problems – from anemia to infection to coagulation abnormality to hypertension – is not the most likely candidate for tPA.

The obvious challenge for any medical practitioner treating a victim of stroke is that he or she is in a race against a three-hour clock to determine whether the patient is a proper candidate for administration of tPA. Often, that is a life-and-death race. Both the failure to administer tPA to an appropriate candidate and the administration of tPA to an inappropriate candidate can have fatal consequences. That was the challenge facing Dr. Harris, Dr. Pettigrew and the staff at Lake Cumberland Regional Hospital.

Obedient to our duty to view the record in a light favorable to the Appellant, *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), we examine the circumstances of Susie's medical care from the perspective of the Appellant's expert witness, Dr. Jack Scariano.

According to Dr. Scariano, Susie suffered from diabetes and hypertension at the time of her stroke. He testified that both of these conditions are associated with a higher risk of complications with tPA. Additionally, Dr. Scariano said Susie's advanced age placed her in a category of higher risk patients. She had gastro-intestinal problems, for which she had been examined earlier that day, and this also had a potential for increasing her risk.

Susie's documented medical history indicated that she had experienced rectal bleeding within the previous few days. This, too, increased her risk. And, of

course, the CT scan of her abdomen was to determine the nature of the adrenal mass in her stomach. Depending on its nature, this mass could have increased the risk of administering tPA.

Dr. Scariano effectively testified that the proper medical standard of care required that Dr. Harris and the hospital staff conduct a series of tests to eliminate the concern that these circumstances raised, as well as other tests required for all tPA candidates. Susie received every necessary test.

Dr. Scariano testified that it was necessary to read the CT scan of Susie's abdomen to assure that the adrenal mass did not present a possibility of bleeding when, and if, tPA was administered. This test was completed at 2:36 p.m.

It was also necessary to perform a separate CT scan of Susie's brain to assure that the stroke was ischemic and did not involve intracerebral or subarachnoid hemorrhage. Dr. Scariano was critical of the excessive amount of time it took the hospital to conduct the test and report the results to Dr. Harris. In fact, this was his only criticism of the hospital or Dr. Harris. This CT scan of Susie's brain was performed and the results reported to Dr. Harris not later than 3:20 p.m.

A thorough battery of blood tests was also essential. They would determine whether Susie was anemic, a contraindication for tPA. They would also let the physicians know if Susie's blood was electrolytically imbalanced, another contraindication. Equally important was the need to know if Susie had a normal "bleeding time."

Dr. Scariano noted that bleeding time is also "called protime and also PTT which would tell us if there is any type of actual platelet problem that would [make Susie] more likely to actually bleed." He said the specific test is "called a PT/PPT test." This test was no less critical than any other because if Susie's protime or PTT was abnormal, administration of tPA could cause bleeding and result in death, said Dr. Scariano. The results of Susie's PT/PPT test were first available to Dr. Harris at 3:34 p.m.

Dr. Scariano did not criticize Dr. Harris for ordering any of these tests before making a decision regarding administration of tPA. He also specifically testified that any PT/PTT test takes a significant amount of time to complete and that it was completed in this case in "good time." Furthermore, he said, "I don't think he [Dr. Harris] could have actually given tPA until he had the protime and PTT back."

In his response to a single question, Dr. Scariano summarized his view of the delay in administering tPA, from the time of the onset of Susie's stroke symptoms around 2:00 PM, until Dr. Harris had the results of the PT/PPT test at 3:34 p.m.

> Q: [A]lthough you may be critical of how long it took to get the CT scan [of Susie's brain], it did not affect or cause any problem in delaying Dr. Harris', the emergency room physician's, ability to determine if this patient was an appropriate candidate for tPA, right?
>
> A: Right, based on that, because there isn't any way that he could give her the tPA if he didn't have the actual protime and PTT in hand.

Dr. Scariano also acknowledged that, for the remainder of the three-hour window available to administer tPA, Dr. Harris was appropriately relying on the advice of two neurologists he had consulted by telephone. He first contacted a Somerset neurologist, Dr. Patel, who declined to take Susie as a patient himself, but recommended that Dr. Harris contact Dr. Pettigrew, the head of the "Stroke Center" at the University of Kentucky Hospital in Lexington. Dr. Harris did so.

Once they discussed Susie's case, Dr. Pettigrew told Dr. Harris not to administer tPA and, instead, to transfer Susie to the University of Kentucky Hospital. Using a form designed for the transfer of a patient from Lake Cumberland Regional Hospital to another medical facility, hospital staff members obtained the consent of Susie's family for her transfer. The University of Kentucky Hospital helicopter arrived at 4:30 p.m. Susie was placed on the helicopter in stable condition. She arrived at the University of Kentucky Hospital at approximately 5:15 p.m., too late for administration of tPA. She eventually slipped into a coma.

Susie's son, Grady Edmon, was appointed administrator of his mother's estate. On the estate's behalf, Edmon brought suit against Dr. Harris, Dr. Pettigrew, and Lake Cumberland Regional Hospital. He specifically claimed three acts of negligence.

1. "the delay by LCRH in getting the CT scan results"
2. "the failure of Dr. Harris to give tPA at the LCRH"
3. "Dr. Pettigrew's advice to withhold tPA until Ms. Turner arrived at UKMC"

Edmon initially engaged Lawson Bernstein, M.D. as an expert to establish that these acts were breaches of the parties' respective standards of care. During his deposition, Dr. Bernstein did testify that tPA should have been administered at LCRH. However, during cross-examination, he revealed that he was a specialist in neuro-psychiatry who did not himself order the administration of tPA because he treated stroke patients only in consultation with a "team of doctors," including emergency room physicians and other specialists who actually did administer the drug. When he was asked to identify the members of that team of doctors, he refused. The trial court ordered Dr. Bernstein to answer the question. Rather than comply, Dr. Bernstein withdrew as the estate's witness. The estate replaced him with Dr. Scariano.

More than four years after initiating the lawsuit, the estate filed a motion pursuant to Kentucky Rule of Civil Procedure (CR) 15.01 to amend the complaint by adding a claim for violation of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. The trial court denied the motion, and the estate did not seek reconsideration of that ruling.

The trial court entered summary judgment in favor of Dr. Harris on the basis of Dr. Scariano's deposition testimony that Dr. Harris' actions met the standard of care in regard to his medical care of Susie.

Later, the trial court entered summary judgment in favor of Lake Cumberland Regional Hospital. The judgment was granted because Dr. Scariano mooted his own criticism of the hospital's delay in obtaining results of the CT scan of Susie's

brain by testifying that Dr. Harris could not have made an informed decision until he received the PT/PPT results. These results, again according to Dr. Scariano, were received later than the CT scan results, but still in a timely manner.

The case against Dr. Pettigrew went to trial before a jury. The jury returned a verdict in Dr. Pettigrew's favor. The estate then brought this appeal.

The appeal presents several issues: (1) whether the estate presented a valid claim of a violation of EMTALA; (2) whether the trial court abused its discretion by excluding Dr. Bernstein's testimony; (3) whether the trial court erred in granting summary judgment for Dr. Harris; (4) whether the trial court erred in granting summary judgment for LCRH. We will consider these arguments in this order.

The estate's first argument, that LCRH violated EMTALA, is not before us. Nor was this claim before the trial court. The estate tried to get the issue before the trial court by moving to amend its complaint to add this statutory cause of action. The trial court denied the estate's motion, exercising the discretion granted to it by CR 15.01. The estate has not asked this Court to review the denial on the ground that the trial court abused its discretion as would be proper. *Laneve v. Standard Oil Co.*, 479 S.W.2d 6, 8 (Ky. 1972).[2] Instead, we are asked to skip directly to a substantive holding that EMTALA establishes a duty of care that LCRH and Dr. Harris failed to meet. That issue was never before the trial court because that court did not grant the motion to amend.

[2] We note, however, that on its face the trial court's order denying such a motion does not appear to be an abuse of discretion. The motion was brought four-and-one-half years after the complaint was filed and more than three years after the deposition of Nurse Latham whose testimony was cited as the basis for amending the complaint.

We also note that the estate did not include this issue in its prehearing statement as one proposed to be raised on this appeal. CR 76.03(8) states that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See Osborne v. Payne*, 31 S.W.3d 911, 916 (Ky. 2000). As the estate failed to preserve this issue for appeal, we shall not consider it.

The only issue affecting the appeal of the jury verdict in favor of Dr. Pettigrew is the second issue: whether the trial court abused its discretion by excluding the testimony of Dr. Bernstein. The estate argues that if Dr. Bernstein's testimony had been admitted, it would have resulted in a different verdict and, furthermore, would have prevented the grant of summary judgments in favor of Dr. Harris and LCRH. We find that the trial court did not abuse its discretion in excluding Dr. Bernstein's testimony.

The estate relies on *Primm v. Isaac*, 127 S.W.3d 630 (Ky. 2004). In *Primm*, our Supreme Court said it was reviewing the third in a series of cases "concerning the extent to which a party can discover and prove the *positional bias* of an adverse party's expert witness." *Id.* at 631 (emphasis supplied). The Court did not define the term "positional bias." However, it is obvious from context that the term describes generally that bias impacting an otherwise objective opinion, resulting from the position in which the expert has placed himself. Which party employed him? *Id.* at 631-32, *citing Tuttle v. Perry*, 82 S.W.3d 920 (Ky. 2002)("it is widely believed that [expert witnesses] may be expected to express opinions that favor the party who engaged

them[.]"). How much does he charge? *Id.* Has he shifted his vocation away from that of a practitioner of an art or science, to that of the professional expert who critiques others who choose to remain in practice? *Id.* at 632, *citing Metropolitan v. Overstreet*, 103 S.W.3d 31 (Ky. 2003). Often, as in *Primm*, such questions involve a balancing of "a litigant's need for discovery of impeachment evidence against a nonparty witness's perceived right of privacy with respect to his or her financial records." *Id.* at 632.

Contrary to *Primm*, the questions Dr. Bernstein refused to answer had nothing to do with his "positional bias." He testified that he only treated stroke patients in the context of a "team of doctors" and then refused to identify those doctors. The litigant's need for discovery of impeachment evidence was not weighed against Dr. Bernstein's perceived right of privacy, nor need it be, for no such right of privacy is implicated. The appellees were entitled to the answers to questions that were clearly within the scope of CR 26.02(1), and the trial court did not abuse its discretion when it ordered Dr. Bernstein to answer the questions.

Nor did the trial court abuse its discretion when, upon motion of Dr. Harris and Dr. Pettigrew, it excluded Dr. Bernstein's testimony. Dr. Bernstein's refusal to answer these questions was properly viewed by the trial court as contempt. CR 37.02(1)("If a deponent fails . . . to answer a question after being directed to do so by the court . . . , the failure may be considered a contempt of that court.").

Furthermore, under CR 26.02, a trial court has the discretion to exclude the testimony of a party's expert witness for a pretrial discovery violation. *See Harville v.*

Vanderbilt University, Inc., 95 Fed.Appx. 719, 724-25 (6th Cir. 2003)(construing federal analog to CR 26). An expert witness's contempt in refusing to obey a court's order to answer a proper question constitutes such a pretrial discovery violation. In exercising his contempt powers, the court below excluded Dr. Bernstein's testimony, but allowed the estate to substitute Dr. Scariano as its expert despite the fact the trial was only a few weeks away. Such was not an abuse of discretion.

We are bolstered in our confidence of this ruling by logic which steers us in no other direction. If the trial court's order excluding Dr. Bernstein's testimony were impermissible in this case, we would be encouraging expert witnesses to answer questions on direct examination only, and refuse cross-examination entirely. The trial court's order excluding Dr. Bernstein's testimony was not an abuse of discretion.[3]

The remaining two arguments challenge the propriety of the trial court's entry of summary judgments in favor of Dr. Harris and LCRH. Our standard of review when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996), *citing* Kentucky Rules of Civil Procedure (CR) 56.03. "The

[3] We note that three of the five judges who presided in this case shared the same view. Senior Judge Overstreet, who was assigned temporarily after Judge Venters retired and Judge Gillum died in office, entered the order compelling Dr. Bernstein to disclose the names of the team members with whom he worked. Judge Cain, Pulaski Circuit Court, Division Two, covering the docket in Division One, denied the motion to reconsider Judge Overstreet's order and ordered Dr. Bernstein's testimony excluded. Finally, Judge Tapp, who was appointed to fill the vacancy left by the death of Judge Gillum, denied a second motion to reconsider Judge Overstreet's order compelling disclosure, and denied a motion to reconsider Judge Cain's order excluding Dr. Bernstein's testimony.

trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky.App. 2001), *citing Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991)." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Lewis, supra*.

We have set forth the facts as the estate's expert witness would relate them. The trial court did the same, quoting additional testimony not set forth in this opinion. It is inescapable that the testimony of Dr. Scariano, the estate's own expert witness, would absolve both Dr. Harris and LCRH of liability.

The estate claimed that a proximate cause of Susie's injuries and death was LCRH's delay in getting the results of the CT scan to Dr. Harris. Dr. Scariano said that delay was irrelevant to Dr. Harris' decision whether to administer tPA because another equally important test necessarily took longer to obtain results.

The estate claimed that a proximate cause of Susie's injuries and death was Dr. Harris' failure to administer tPA while Susie was at LCRH. Dr. Scariano said Dr. Harris followed the proper standard of care by waiting to have the results of the PT/PPT test before deciding. He also said Dr. Harris followed the proper standard of care when

he complied with the consult of a qualified specialist, neurologist Dr. Pettigrew, not to administer tPA.

We have examined the record closely, with particular attention to Dr. Scariano's testimony and to the references in the record cited by the estate[4], and we cannot find any genuine issue of any material fact that would justify reversal of the trial court's grant of summary judgment in favor of Dr. Harris and LCRH.

For the foregoing reasons, the summary judgments in favor of Lake Cumberland, L.L.C. d/b/a Lake Cumberland Regional Hospital and Gary Harris, M.D., and the trial verdict in favor of L. Creed Pettigrew, M.D., are AFFIRMED.

ALL CONCUR.

[4] The estate also argues that the trial court should not have considered the affidavit of Regina Strong. However, we see no indication that the trial court *did* consider that affidavit. Therefore, we see no reason to address the argument.

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