Maynard, J., Dissenting Opinion, Case No.23540 Robert S. McGraw v. St. Joseph's Hospital

No. 23540 - Robert S. McGraw v. St. Joseph's Hospital, a corporation, and Thomas J. Tarnay, M.D.

Justice Maynard, dissenting:

I respectfully dissent because I disagree with the majority's conclusion that the facts surrounding the alleged negligence presented in this case are susceptible to a reasonable standard of care that can be determined by the jury without an expert.

As noted in Syllabus Point 5 of the majority opinion, "[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses." Of course, there is an exception to every rule and the exception to this rule is known as the "common knowledge" exception, which is duly noted in Syllabus Point 6 of the majority opinion. Although the common knowledge exception was originally crafted to be used only "in rare cases," Totten v. Adongay, 175 W.Va. 634, 639, 337 S.E.2d 2, 7 (1985), the majority here expands it to ridiculous proportions.

While the appellant apparently relied on three incidents of alleged negligence in bringing his complaint, it appears the only incident which suggested a fall and which merited consideration by the appellant's expert was the finding of the appellant on the floor at 3:00 a.m. on May 12, 1991. In concluding that the common knowledge exception applies to this incident, the majority relies on several hospital fall cases from other jurisdictions and the rationale used by these jurisdictions as it was articulated by the Wisconsin Supreme Court. However, the majority failed to focus on the words of our common knowledge exception as the exception is stated in Totten. It is clear that there are only two situations in which the common knowledge exception applies. These situations are "where lack of care or want of skill is so gross, so as to be apparent, or the alleged breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience[.]" Syllabus Point 4, Totten, supra. I believe that neither situation was present in this case. Instead, expert testimony was necessary here to demonstrate that there was a failure on the part of St. Joseph's Hospital to properly observe and restrain the appellant in order to prevent him from falling out of bed. Certainly, the proper procedure for evaluating a patient's susceptibility to falling in the absence of restraints and in light of the patient's present medical condition, medical history, degree of medication, etc., is an issue of medical management to be established by expert testimony. This is not something that lay jurors would immediately understand, based on common knowledge and experience.

In Waati v. Marquette General Hospital, Inc., 329 N.W.2d 526 (Mich. Ct. App. 1982) the court held that expert testimony was necessary to establish whether a seizure patient required constant medical attention or restraint in order to prevent a fall. The court stated:

Plaintiffs next assert that expert testimony was not required because only issues of ordinary negligence were presented. They claim that to leave a seizure patient unattended with the hospital bed's side rails down is so obviously negligent as to present issues cognizable by an ordinary layman. We disagree. Whether a seizure patient requires constant medical attendance or restraints is an issue of medical management to be established by expert testimony.

Id., 329 N.W.2d at 528. (Citations omitted).

Similarly, in Murphy v. Schwartz, 739 S.W.2d 777 (Tenn. App. 1986), a husband and wife filed a medical malpractice suit alleging, in part, that the wife fell from an emergency room cot because hospital physicians failed to properly attend to her. No expert testimony was offered by the plaintiffs. The trial court granted summary judgment in favor of the health care providers and the appellate court affirmed, noting that:

There is a "common knowledge" exception to the general rule, that is, the medical negligence is as blatant as a "fly floating in a bowl of buttermilk" so that all mankind knows that such things are not done absent negligence. . . . We see little difference in matters of medical malpractice between the question of the applicability of res ipsa at the close of a plaintiff's proof and the common knowledge exception to the expert medical proof requirement in a summary judgment before trial. It seems to us that the inference of negligence obtained by the application of res ipsa which creates a jury issue and the common knowledge exception to the requirement of expert testimony in summary judgments are just about Siamese twins in that both require that it be evident to all, that is judicial notice be taken, that the injury complained of does not ordinarily occur absent negligence.

Id., 739 S.W.2d at 778-79 (Citation omitted).

In this case, I would adopt the "fly floating in a bowl of buttermilk"[(1)] test and thereby properly limit the common knowledge exception to the expert witness requirement to those rare cases in which it belongs.

Also, I disagree with the majority's characterization that Dr. Henthorn "opined that the standard of care in this case, with respect to the May 12 incident, was

that of pulling up the side rails on the plaintiff's bed," and that the hospital violated this standard. A review of the record reveals that Dr. Henthorn testified that, based upon the records, there was no reason to suspect, prior to 3:00 a.m. on May 12, 1991, that the appellant was going to fall or be found lying in the floor in the middle of the night, and there was no reason for the nurses to have taken any extraordinary measures in the additional monitoring or restraining of the appellant. As noted in note 12 of the majority opinion, when asked if, in his estimation, the hospital met the standard of care, Dr. Henthorn replied "yes". Therefore, I agree with the circuit court that Dr. Henthorn testified that it was his opinion that the hospital met the applicable standard of care.

For the reasons stated above, I believe that the circuit court was correct in granting summary judgment on behalf of St. Joseph's Hospital. This is clearly a case in which expert testimony was needed, but no such testimony was, in effect, provided. Therefore, the appellant failed to produce the evidence essential to his case. In Jividen v. Law, 194 W.Va. 705, 712-13, 461 S.E.2d 451, 458-59 (1995) this Court stated:

In Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994), we clarified our view of summary disposition, in part, to disabuse litigants and circuit courts of the erroneous notion that West Rule of Civil Procedure 56 had ceased to exist. In that same vein, we recently stated that "[t]o the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message, hereby, is modified." Williams v. Precision Coil, Inc., 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995). (emphasis added). Rule 56 was incorporated into West Virginia civil practice for good reason, and circuit courts should not hesitate to summarily dispose of litigation where the requirements of the Rule are satisfied. (Footnote omitted).

Because the appellant failed to produce an expert witness to testify that St. Joseph's Hospital failed to conform to the applicable standard of care, I believe there was no genuine issue of fact which warranted a trial on the merits. Consequently, I believe the circuit court did not err in granting the appellee's motion for summary judgment.

Finally, I note that this case is governed by the Medical Professional Liability Act, W.Va. Code § 55-7B-1 et seq. W.Va. Code § 55-7B-1 (1986) provides in part:

The Legislature hereby finds and declares that the citizens of this state are entitled to the best medical care and facilities available and that health care providers offer an essential and basic service which requires that the public policy of this state encourage and facilitate the provision of such service to our citizens . . .

That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers who can themselves obtain the protection of reasonably priced and extensive liability coverage;

That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers and the injured without the full benefit of professional liability insurance coverage[.] (Emphasis added).

This Court frustrates the Legislature's policy in medical malpractice actions when it strains to allow such actions to go forward after they were properly disposed of at the circuit court level by a grant of summary judgment. Because I believe this to be the case here, I dissent.

1. This colorful but apt language comes from a Tennessee case, as cited. Since coming to this Court, I have learned to have a genuine appreciation for Tennessee opinions as a wonderful source of common sense and rational rules.