IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SEPTEMBER 2003 TERM

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 31314

REBECCA M. ARBOGAST AND KEVIN MARK ARBOGAST,
Plaintiffs Below, Appellees,

V.

MID-OHIO VALLEY MEDICAL CORP., A CORPORATION,
D/B/A MID-OHIO VALLEY URGENT CARE,
Defendant Below, Appellant.

Appeal from the Circuit Court of Wood County
Honorable George W. Hill, Judge
Civil Action No. 98-C-130

REVERSED

Submitted: October 8, 2003
Filed: October 31, 2003

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE MCGRAW dissents and reserves the right to file a dissenting opinion.

JUSTICE ALBRIGHT concurs, in part; and dissents, in part; and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "In a malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury." Syllabus point 4, *Short v. Appalachian OH-9, Inc*., 203 W. Va. 246, 507 S.E.2d 124 (1998).

2. "The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury." Syllabus point 2, *Walton v. Given*, 158 W. Va. 897, 215 S.E.2d 647 (1975).

3. "Whether the negligence of the defendant as charged in the declaration is the proximate cause of the plaintiff's injury, or whether the sole cause of the injury was the act of an independent third person, are questions of fact for jury determination." Syllabus point 1, *Blankenship v. City of Williamson*, 101 W. Va. 199, 132 S.E. 492 (1926).

Per Curiam:

Mid-Ohio Valley Medical Corp., d/b/a Mid-Ohio Valley Urgent Care (hereinafter referred to as "Mid-Ohio"), appellant/defendant below, appeals from a ruling by the Circuit Court of Wood County granting Rebecca M. Arbogast and Kevin Mark Arbogast (hereinafter referred to as "the Arbogasts") appellees/plaintiffs below, judgment as a matter of law on the issue of liability and a new trial on the issue of damages. Here, Mid-Ohio contends that the circuit court committed error by setting aside the jury's verdict, which jury verdict found Mid-Ohio was not liable for harm alleged by the Arbogasts. After a careful review of the briefs and record, as well as considering the oral arguments by counsel for the parties, we reverse.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On March 26, 1996, Rebecca Arbogast went to Mid-Ohio for an evaluation and treatment of respiratory problems. During the evaluation, blood was drawn from Mrs. Arbogast's left arm by Tina Dunn, a laboratory technician employed by Mid-Ohio. The blood was extracted for the purpose of performing a complete blood count. When the evaluation was completed Mrs. Arbogast went home.

On April 1, 1996, Mrs. Arbogast returned to Mid-Ohio complaining of a bruise, pain, and numbness in her left hand. Mrs. Arbogast was seen by Dr. Allen Figueroa, who

provided a diagnosis of "hematoma of the left arm."[1] Dr. Figueroa prescribed Advil for the pain. He instructed Mrs. Arbogast to apply heat to the arm, keep it elevated, and wear a sling.

Mrs. Arbogast returned to Mid-Ohio on April 8, 1996, as a result of continued pain and numbness in her left arm and hand. She was again seen by Dr. Figueroa. He noted the continued presence of hematoma on the left arm. Dr. Figueroa decided to refer Mrs. Arbogast to Dr. Yale D. Conley, a vascular surgeon, because he "was concerned that she could have some significant vascular injury."

On April 9, 1996, Mrs. Arbogast visited the medical office of Dr. Conley. In his medical notes concerning the visit, Dr. Conley wrote that Mrs. Arbogast was "experiencing pain from th[e] needle stick and maybe a small hematoma with some pressure on the nerve." Dr. Conley arranged for Mrs. Arbogast to have EMGs and nerve conduction studies on her left hand. In his follow-up medical notes dated April 24, 1996, Dr. Conley wrote:

> I have referred [Mrs. Arbogast] for nerve conduction studies and EMG's which documented a questionable very mild carpal tunnel which I feel is a coincidental finding. Obviously the needle stick could have exacerbated this problem, however,

[1]Hematoma is "a localized collection of blood, usually clotted, in an organ, space, or tissue, due to a break in the wall of a blood vessel." Richard Sloane, *The Sloane-Dorland Annotated Medical-Legal Dictionary*, 331 (1987).

> at the present time there's less pain. . . . I feel there's no problem here and this should not result in any permanent dysfunction and the inflammation that is present is resolving and should be completely resolved in the next several w[ee]ks."

As a result of continued pain, on July 12, 1996, Mrs. Arbogast went to the medical office of Dr. Gregg M. O'Malley, an orthopedic surgeon. Dr. O'Malley's medical notes from the visit ruled out signs of early or late complex regional pain syndrome (hereinafter referred to as "CRPS").[2] The notes also indicated that "[a]ll of her muscles in the forearm and hand function normally." Dr. O'Malley was unable to definitively diagnose the cause of Mrs. Arbogast's pain. He believed it might be attributed to carpal tunnel syndrome.

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[2]CRPS is caused by damage to a nerve. CRPS is also called reflex sympathetic dystrophy. During the trial, Dr. James Powers gave the following description of CRPS:

> Q. Thank you. Now, would you explain for the jury what is complex regional pain syndrome, as best you can?
>
> A. Yeah. This is a syndrome that actually was first described in the civil war, a hospital in Philadelphia. A physician had this group of patients who had this complex set of problems, and it has been known as a number of things: shoulder/hand syndrome, causalgia, atrophy. It deals with someone who has had some injury. It may be a blunt trauma. It may be a nerve injury that doesn't heal as most injuries to the body do.
>
> It sets off a reverberating circuit, if you will, of pain and discomfort, and changes in the limb. And it is an entity whose name has changed over the years because, as time has gone on, we have different opinions as to what caused it. Like many things in medicine, we can describe them, and we can treat some things, but we don't always know what triggers them to start. And this is certainly one of those very difficult problems to deal with.

On August 9, 1996, Mrs. Arbogast went again to Dr. O'Malley's office. Dr. O'Malley recommended surgery for nerve release at the left forearm level and carpal tunnel release on the left wrist. The surgery was performed on August 21, 1996.

Mrs. Arbogast continued to experience pain and numbness in her left arm and hand after the surgery. During a follow-up visit with Dr. O'Malley on March 7, 1997, he observed that Mrs. Arbogast's left arm was purplish and cold. Dr. O'Malley indicated that this might be an early sign of CRPS. Dr. O'Malley recommended treatment at a pain clinic.

On July 29, 1997, Mrs. Arbogast visited the medical office of Dr. James Powers. Mrs. Arbogast was referred to Dr. Powers by her counsel, in order "to come to some conclusions as to her problem, to make suggestions as far as treatment, and also to look at prognosis." Dr. Powers diagnosed Mrs. Arbogast as suffering from CRPS.

On March 20, 1998, Mrs. Arbogast and her spouse, Kevin Mark Arbogast, filed the instant action against Mid-Ohio, alleging negligence in the drawing of her blood which negligence was the proximate cause of her developing CRPS.[3] The case eventually went to trial in April of 2002. The jury returned a verdict for the defendant. The Arbogasts filed post-verdict motions for judgment as a matter of law or new trial. The circuit court granted

[3]The complaint listed several other defendants, all of whom appear to have settled prior to trial.

the Arbogasts' motion for judgment as a matter of law on the issue of liability. The circuit court also granted a new trial on the issue of damages. Thereafter, Mid-Ohio filed this appeal.

II.

STANDARD OF REVIEW

In this proceeding, we are asked to review the circuit court's order granting a post-verdict motion for judgment as a matter of law on the issue of liability, and a new trial on the issue of damages. In Syllabus point 3 of *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996), we stated:

> The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a [judgment as a matter of law] will be reversed.

We explained this standard in syllabus point 3 of *Alkire v. First National Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996), in part, by holding that "[w]hile a review of this motion is plenary, it is also circumscribed because we must review the evidence in a light most favorable to the nonmoving party." Moreover, in syllabus point 5 of *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983), we indicated, in part, that in our review we must

"[1] assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; [2] assume as proved all facts which the prevailing party's evidence tends to prove; and [3] give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." Further, in syllabus point 2 of *Alkire v. First National Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996), we held, in part, that:

> In reviewing a trial court's granting of a motion for [judgment as a matter of law], it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below.

With due consideration for the foregoing standards, we now consider the substantive issues raised.

III.

DISCUSSION

To reach its verdict, the jury had to determine that Mid-Ohio did not breach the applicable standard of care and therefore was not liable. Alternatively, to reach its verdict, the jury had to determine that Mid-Ohio breached the applicable standard of care; but, that such breach *was not* the proximate cause of Mrs. Arbogast's injury.[4] The circuit court rejected the jury's verdict. The circuit court concluded that the evidence established that Mid-Ohio did in fact negligently breach the applicable standard of care and that such

[4]The jury verdict form did not separate the issues of negligent breach of the standard of care and proximate cause. However, the jury was properly instructed on these issues.

negligence was the proximate cause of Mrs. Arbogast's injury. In Syllabus point 5 of *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964), we made clear that "[q]uestions of negligence [and] proximate cause . . . present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable [persons] may draw different conclusions from them." In the instant proceeding we will address the propriety of the circuit court's ruling on negligence and proximate cause separately.

A. Negligence

During the trial of this case, Mrs. Arbogast contended that Mid-Ohio breached the medical standard of care in extracting blood from her left arm. This Court has recognized that a "'jury cannot consider whether a medical malpractice defendant has acted negligently until it has determined the standard against which the defendant's conduct is to be measured.'" *Reynolds v. City Hosp., Inc.*, 207 W. Va. 101, 108, 529 S.E.2d 341, 348 (2000) (per curiam) (quoting *Bell v. Maricopa Med. Ctr.*, 755 P.2d 1180, 1183 (Ariz. App.1988)).

Mrs. Arbogast sought to establish the standard of care for extracting blood from a patient's arm through the expert testimony of Dr. Beverly Kovanda. Dr. Kovanda testified that the standard of care for drawing blood from a patient was established in the National Committee for Clinical Laboratory Standards (hereinafter referred to as "NCCLS"). Under standards set by NCCLS, the person extracting blood should have the patient sit in a

phlebotomy or venipuncture chair which has "armrests [to] provide support while preventing backbending of the elbow and subsequent flattening of the vein." Further, the NCCLS requires the person extracting the blood "[h]ave the patient position his/her arm to form a straight line from the shoulder to the wrist. The arm should be supported firmly by the armrest and should not be bent at the elbow."

In contrast, Mid-Ohio presented the expert testimony of Dr. Bruce Newman to address the issue of the standard of care for extracting blood. Dr. Newman testified that the standard established by the NCCLS "is what should be done under ideal conditions, but not what is being practiced. What is being practiced is the standard of care." Dr. Newman provided no data to support his opinion that a standard different from that established by NCCLS was being followed.

Mrs. Arbogast contends that Dr. Newman's testimony created a "locality rule" standard; yet, our case law requires the standard of medical care be a national standard. We agree. In the single syllabus of *Plaintiff v. City of Parkersburg*, 176 W. Va. 469, 345 S.E.2d 564 (1986), we succinctly held that "[t]he 'locality rule' in medical malpractice cases is abolished." Whether Dr. Newman's testimony was establishing a local or national standard of care was unclear at best. In fact, Dr. Newman's testimony left open for the jury to determine whether he was referring to a national standard or a local standard. Notwithstanding Dr. Newman's unsupported testimony on the standard of care, we are of the

opinion that Dr. Kovanda clearly established the standard of care for extracting blood from a patient, as being that which was outlined by the NCCLS.

The evidence revealed the following procedure was used in extracting blood from Mrs. Arbogast's left arm. Mrs. Arbogast was seated on the edge of an examining table and instructed to hold out her left arm, with the knuckles of her hand lying on the inside of her left knee. No support was used to stabilize her left arm. A needle was thereafter inserted into her arm. Dr. Kovanda was asked to render an opinion as to whether the manner in which blood was extracted from Mrs. Arbogast complied with the national standard of care:

> A. In my opinion, it did not meet the appropriate standard of care.
> Q. Why not?
> A. The arm was not supported. It was just extended in the air.
> Q. And what is the purpose of having the arm supported by something?
> A. For one thing, it is much easier to control how deep the needle goes, control where it goes. The anatomy is lined up in a very specific way when the arm is supported versus when it is just extended.

Dr. Newman testified that the manner in which blood was extracted from Mrs. Arbogast met the standard of care.

We have little hesitancy in determining that the evidence conclusively established that the standard of care for extracting blood, as set out by the NCCLS, was not followed. To the extent that the trial court found that the jury could not have reached a

different conclusion, we agree. However, our inquiry does not end at this juncture.

B. Proximate Cause

Merely finding that the evidence established that Mid-Ohio violated the standard of care for extracting blood *does not alone* impose liability for Mrs. Arbogast's injury. We have held that "[i]n a malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury." Syl. pt. 4, *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998). Further, "[t]he burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury." Syl. pt. 2, *Walton v. Given*, 158 W. Va. 897, 215 S.E.2d 647 (1975).

Mrs. Arbogast contended that, because Mid-Ohio did not follow the standard of care in extracting blood from her arm, the needle damaged a median vein in her arm, which resulted in her developing CRPS. In other words, Mid-Ohio's negligence was the proximate cause of her injury. Both parties presented hotly contested evidence on this issue.

Mrs. Arbogast testified that when the needle was placed in her arm she felt excruciating pain in her body. She did not scream out or inform Ms. Dunn of the pain. During the testimony of Dr. Powers, a witness for Mrs. Arbogast, he stated that although the EMG's did not reveal median nerve damage, the EMG's were not conclusive because they

were taken for the purpose of examining the left wrist area. Dr. Powers was of the opinion that a thorough examination of the area where the needle was inserted may have revealed nerve damage. Dr. Powers also opined that the CRPS resulted from nerve damage caused by the insertion of the needle in Mrs. Arbogast's arm. Mrs. Arbogast's treating physician, Dr. Michael Shramowait, testified that Mrs. Arbogast, in fact, had median nerve damage in her left arm.

Mid-Ohio took the position that, if Mrs. Arbogast had CRPS, it was caused by the surgery performed by Dr. O'Malley. Mid-Ohio presented the videotaped deposition of Dr. Mark J. Brown. Dr. Brown opined that the needle insertion did no damage to the nerve in Mrs. Arbogast's arm. During cross examination, Dr. Powers conceded that the carpal tunnel surgery performed by Dr. O'Malley could have caused the CRPS. During cross examination of Dr. Shramowait, he acknowledged that the surgery performed by Dr. O'Malley could have contributed to the development of CRPS. Further, during cross examination of Dr. Kovanda, she testified that she would expect a patient to voice a complaint if a median nerve was damaged and caused the type of pain experienced by Mrs. Arbogast. Dr. Brown also testified that had a median nerve been struck, Mrs. Arbogast "would have jumped, screamed, called it to someone's attention."

In our review of the evidence we are left with the definite conclusion that both parties presented strong and conflicting evidence on the issue of proximate cause. "The

conflict between the[ir] two positions involves credibility and other factual determinations, issues within the province of a jury." *Gaither v. City Hosp., Inc*., 199 W. Va. 706, 710 n.4, 487 S.E.2d 901, 905 n.4 (1997). *See also Brown v. Carvill*, 206 W. Va. 605, 611, 527 S.E.2d 149, 155 (1998) ("If reasonable persons could differ on the issue, the question is one for the jury[.]"). Indeed this Court has long held that "[w]hether the negligence of the defendant as charged in the declaration is the proximate cause of the plaintiff's injury, or whether the sole cause of the injury was the act of an independent third person, are questions of fact for jury determination." Syl. pt.1, *Blankenship v. City of Williamson*, 101 W. Va. 199, 132 S.E. 492 (1926). *See also* Syl. pt. 2, *Evans v. Farmer*, 148 W. Va. 142, 133 S.E.2d 710 (1963) ("The questions of . . . proximate cause [and] intervening cause . . . are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable [persons] may draw different conclusions from them."). The jury heard the conflicting evidence on the issue of proximate cause and found Mid-Ohio's evidence to be more convincing. Therefore, the trial judge improperly substituted its opinion on this hotly disputed factual issue. In *Toler v. Hager*, 205 W. Va. 468, 519 S.E.2d 166 (1999), we address this point as follows:

> If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury. The weight of a jury's verdict, when there is credible evidence upon which it can be based, is not overborne by the trial judge's disapproval.

Toler, 205 W. Va. at 476, 519 S.E.2d at 174 (quoting *Commonwealth v. McNeely*, 204 Va. 218, 222, 129 S.E.2d 687, 690 (1963)).

IV.

CONCLUSION

We reverse the trial court's order granting the Arbogasts judgment as a matter of law on the issue of liability and a new trial on damages. This case is remanded with instructions to reinstate the jury's verdict in favor of Mid-Ohio.

Reversed.