



05/15/92 NANNIE HOPPER v. A.L. SCHRADER

1992 | Cited 0 times | Court of Appeals of Tennessee | May 15, 1992

TOMLIN, P.J., W.S.

This is a medical malpractice case. Nannie Hopper, one of the plaintiffs, brought suit in the Circuit Court of Gibson County against Dr. A. L. Schrader, an osteopathic physician. Following a jury trial, a verdict was returned in favor of defendant. On appeal plaintiffs raise the following two issues, both of which relate to the failure of the trial court to admit certain testimony into evidence: Whether the trial Judge erred: (1) in refusing to allow plaintiff's treating physicians to express their opinions regarding the standard of care as it pertained to the defendant; and (2) in refusing to allow plaintiff to cross-examine defendant concerning certain alleged prior bad acts. We resolve these issues in favor of defendant and affirm.

Plaintiff was defendant's patient. Subsequent to a hospitalization by defendant for the treatment of gallbladder problems, plaintiff again saw defendant, complaining of gastric pain. Defendant admitted plaintiff to Forum Hospital, where he performed a cholecystostomy (the opening of the gallbladder with the insertion of a drainage tube). Upon performing the opening incision in plaintiff's abdomen, defendant found an abscess between the liver and the gallbladder. He testified that as he was unable to visualize the common duct connecting into the gallbladder, he elected to remove the abscess and to install a drain rather than removing the entire gallbladder. Only that portion of plaintiff's gallbladder that contained dead tissue was removed for biopsy.

Slightly over a month following her discharge from the hospital plaintiff went to defendant to have the drainage tube removed from her abdomen. Several days thereafter she returned to defendant's office, complaining of abdominal problems. At that time defendant referred her to Dr. Charles Hertz, a gastroenterologist. Following an examination Dr. Hertz referred plaintiff to Dr. Edward Crocker, a general surgeon. Dr. Crocker diagnosed plaintiff as having an abdominal wall abscess. He drained the abscess and inserted a tube. She was discharged some two days thereafter. Several days later she was readmitted to the hospital, where Dr. Crocker removed the remainder of her gallbladder. Plaintiffs filed this suit against defendant, alleging that defendant was negligent in not removing her entire gallbladder at the occasion of the initial operation in February, 1989.

I. THE TREATING PHYSICIAN AS AN EXPERT WITNESS

As to this issue, in the statement of the issues in their brief, plaintiffs couched the alleged error of the trial Judge in the plural, contending that the trial court refused to allow their "treating physicians to express their opinions", thus indicating that the court erred as to both physicians. However,



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taking the brief as a whole and from oral argument it is clear that plaintiffs intend to raise this issue only as to Dr. Hertz.

In interrogatories defendant posed this question: "Please identify each person whom you expect to call as an expert witness at trial . . . ". The sole response given by plaintiffs was "David K. McAfee, M.D. Dr. McAfee will testify regarding the standard of care, causation and damages."

Defendant referred Nannie Hopper to Dr. Charles Hertz when she came forward with postoperative complaints. After making a diagnosis of gallbladder abscess Dr. Hertz referred plaintiff to Dr. Crocker. Dr. Hertz testified that as a gastroenterologist, which is a subspecialty of internal medicine, he treated diseases of the stomach and intestinal tract. He further testified that he was not a surgeon, and that he has never performed gallbladder surgery, or performed what might be called true, open surgical procedures.

Shortly after counsel for plaintiffs began examining Dr. Hertz, counsel for defendant, at a bench conference, objected to the line of questioning on the ground that Dr. Hertz had not been identified by plaintiff as an expert witness in answers to interrogatories. The trial Judge then excused the jury, whereupon he and counsel for the parties explored the entire line of testimony that counsel for plaintiff sought to elicit from Dr. Hertz. Ultimately, counsel for plaintiff outlined to the court the questions she desired and contemplated asking Dr. Hertz, as noted by the following excerpt from the transcript:

THE COURT: What are you going to ask him?

MS. ISHEE: In regard to his medical treatment of Nannie Hopper, did any medical treatment - was her medical condition on February 10, 1989, was it so critical as to, you know, which would render her unable to withstand a general anesthetic. That -- Medicine doctors are called in to give this type of testimony.

MR. HARRELL: Judge, that absolutely puts him in the category as an expert witness. I didn't cross-examine him at all on this deposition. I'm being robbed of my chance to discover this expert. I'm hearing this for the first time as we stand here today. I asked for an appropriate interrogatory. Identify all your expert witnesses. Tell me what their opinions are, the basis for their opinions, the facts supporting their opinions. That interrogatory wasn't --

THE COURT: All right. I've heard both of you argue. What are the questions you intend to ask this witness? Tell me what they are. Write them down so we don't mess it up. What questions do you intend to ask him?

MS. ISHEE: "When you refer a patient to a surgeon for a workup and possible gall bladder surgery, do you generally keep up with them whether or not the patient actually has surgery? Do you keep up



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with them, see them again whether or not the patient has gall bladder surgery? Are you familiar with the term 'cholecystectomy'? Are you aware of any other type of gall bladder surgery - about the cholecystostomy? Have you ever had occasion to treat patients who underwent a cholecystostomy or simply had a drain put in their gall bladder whenever suffering from gall bladder disease? Can you tell me anything about that patient's condition? Have you had occasion to see a patient by the name of Nannie Jane Hopper?" and then I go through specifically what he did, what his treatment for Mrs. Hopper was. "What was your diagnosis of her condition? Did you order any tests? Did you consult any other doctors?"

THE COURT: All those are fine and I don't think there's any objection to those type of questions.

MR. HARRELL: I don't hear a standard of care question, Your Honor.

THE COURT: Yes.

MS. ISHEE: "Before testifying here today, did you review the treatment of Nannie Hopper in January and February, 1989?"

MR. HARRELL: Can I address the Court on that one issue?

THE COURT: Sure.

MR. HARRELL: Under the case of Alessio vs. Crook, if he goes back outside his records to review anything in preparation for his testimony at trial --

THE COURT: He has come as an expert witness. He's -- You're right about that.

MR. HARRELL: That makes him an expert witness.

THE COURT: There's no question about that and you'd better stay away from that.

MS. ISHEE: Okay. I was also prepared to ask him if he had an opportunity to review the Jackson-Madison County Hospital records pursuant to her treatment in April, 1989. Now he admitted her. He was the admitting doctor.

THE COURT: I don't -- I haven't got any problem with that question. What are you going to after that? Where are you going after that?

MS. ISHEE: I basically was going to ask him, you know, what happened to her there at Jackson-Madison County. Did he see her in the hospital? Did she recover after that operation?



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THE COURT: Okay. Now is that line of questions, is that as far as you're going with it?

MS. ISHEE: Yes, sir.

THE COURT: Okay. That's not anything that's going to get me in trouble. Okay. You can ask those questions. Ask the jury to step back in.

MS. ISHEE: Thank you.

Of the questions that plaintiff's counsel desired to ask Dr. Hertz, only two had objections sustained to them by the trial court. The first of those dealt with whether Dr. Hertz had reviewed the treatment of Nannie Hopper in January - February, 1989, which would have been the earlier treatment and surgery by defendant. Any testimony by this witness based upon information and data obtained in this fashion would in our opinion clearly have placed Dr. Hertz in the category of an expert witness contemplated by Rule 26.05, T.R.C.P., which means that by a supplemental answer defendant should have been made aware of this impending testimony.

The second question objected to and sustained by the trial court requested Dr. Hertz to call on his experience as a gastroenterologist and state under what circumstances he would consider a patient to be too sick from a medical perspective to undergo anesthesia and surgery. We do not feel that there was error in sustaining defendant's objection or, if there was error, we hold it to be harmless error. The pivotal issue in this litigation is not whether defendant operated on plaintiff at a time when she was in a condition that she should not have undergone surgery, but whether he should have taken out her entire gallbladder at the time of the initial surgery rather than draining the abscess. Other than the above, the entire shopping list of questions submitted to the trial court by plaintiff's counsel at the jury out conference was approved by the trial court. This issue is without merit.

II. ATTEMPTED IMPEACHMENT OF DEFENDANT REGARDING PRIOR BAD ACTS

A. Alleged treatment of patients who developed similar complications.

Plaintiff's counsel sought to impeach defendant in several ways. One of these was an attempt to show other patients of defendant's who had been treated similarly and who had developed the same complications as plaintiff.

Defendant was asked and permitted to answer the following questions:

Q. Have any of the persons who you have done this partial gall bladder removal on had any of the problems that Mrs. Hopper has had?

A. Usually when they -- Well, I'll just answer it "No".



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Q. Okay. She is the only one that has had the problems that have developed that she has had that you know of?

A. Yes.

The court sustained defendant's objection to further questioning by plaintiff's counsel when he attempted to identify other patients by name and obviously reveal their complications. The trial court was correct in sustaining defendant's objection. Rule 404(b), T.R.E. states in pertinent part as follows:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait.

This aspect of this issue is without merit.

B. Attempted impeachment by an alleged investigation

On cross-examination by plaintiff counsel, after Dr. Schrader testified that he had never been disciplined or suspended by the Board of Medical Examiners, plaintiff's counsel inquired if he was then under an investigation by that board. Defense counsel's objection was sustained by the trial court. At an ensuing side bar conference, without setting forth what this information consisted of or stating any facts to the court, plaintiff's counsel stated "that he had information" that defendant had been investigated for over-prescription of narcotics and that he had lost his Medicare privileges at a local hospital. The trial court sustained the objection on the grounds that the answer called for was irrelevant. It is apparent to this court that any relevancy would be substantially overcome by the prejudicial effect on defendant. More importantly, in the case of *State v. Morgan*, 541 S.W.2d 385 (Tenn. 1976) our Supreme Court held that it is improper to cross-examine a witness about mere charges or accusations. As such, this issue is also without merit.

Accordingly, the judgment of the trial court is in all aspects affirmed. Costs in this cause on appeal are taxed to plaintiffs, for which execution may issue if necessary.

TOMLIN, P.J., W.S.

CRAWFORD, J. (CONCURS)

FARMER, J. (CONCURS)

