

90-LW-2790 (4th)

Clara FINNEGAN, et al., Plaintiff-Appellants,
v.
Adil YAMOUR, M.D., et al., Defendant-Appellees.

No. 715.
4th District Court of Appeals of Ohio, Highland County.
Decided on August 8, 1990.

Michael Allerding, Columbus, for appellant.

Porter, Wright, Morris & Arthur, Craig D. Barclay, Columbus, for appellee.

DECISION AND JUDGMENT ENTRY

HARSHA, Judge.

This matter is before us on appeal from a judgment rendered against appellants following a jury trial on a medical malpractice action. Appellants filed an action against appellee, Adil Yamour, M.D., alleging that on March 19, 1984, he negligently performed surgery on appellant Clara Finnegan's left thumb for removal of a ganglion cyst. Appellants asserted that Yamour committed malpractice when he severed appellant's radial digital nerve while performing surgery, and further Yamour failed to obtain appellant's "informed consent" to perform this surgery.

Appellants' first assignment of error states:

THE JUDGMENT OF THE TRIAL COURT IN STRIKING FROM THE RECORD A HYPOTHETICAL QUESTION AND ANSWER PROPOUNDED TO PLAINTIFFS' EXPERT WAS ERROR PREJUDICIAL TO PLAINTIFFS.

At trial, appellants presented the videotaped expert testimony of Dr. Nappi. Nappi testified that when he performed a corrective nerve graft on Clara Finnegan, he discovered a gap of two centimeters in her radial digital nerve in the area of the scar tissue resulting from Yamour's earlier surgery. By posturing the following hypothetical question, appellant's counsel attempted to elicit testimony from Nappi that the gap was caused by the negligence of Yamour:

Q.Doctor, assume that prior to March 11, 1984, Mrs. Finnegen had not had any prior hand surgery in this area which you've described to the jury with respect to the left thumb in a volar aspect. She had never had any prior surgery to that area; that she had never had any serious injury to that area; that she had never had any puncture wounds to that area; that she had merely worked as a trimmer and repairer or other manual labor in a factory doing her normal job without any symptoms until March 11 when she noticed this little lump on her hand, and when she did press on it there was a little pain there.

Now, assuming all those facts to be true do you have an opinion as to^and assume further that Dr. Yamour performed surgery on this lady, I think, on March 19, 1984, and removed a lump that he described as dense fibrous tissue from this area.

Now assuming all those facts to be true do you have an opinion as to why a section of this radial digital nerve was missing as you found when you did your surgery on April 24?

MR. BARCLAY: Object.

Q.Do you have an opinion?

A.Yes, I do.

Q.And what is the opinion?

MR. BARCLAY: Object. Move to strike.

A. My opinion would be that indeed with all those factors as present that a portion of this never was indeed transected or resected. Most likely based upon what I saw surgically I would say a portion of the nerve had even been resected rather than just transected or a portion removed rather than just cut.

Q. By the surgery of Dr. Yamour?

A. Yes.

Appellee's counsel made a timely general objection and motion to strike the question and answer at the time of deposition. When reviewing the deposition transcript prior to its submission at trial, the trial court inquired as to the basis of the objection. The following grounds were asserted: 1) the question gave no standard by which to test the opinion; 2) the opinion itself could not be tested as to whether it was expressed in terms of probability or possibility; and 3) the opinion embraced an ultimate issue to be determined by the trier of facts. The trial court sustained the objection and ordered the question and answer stricken.

The trial court has broad discretion in determining the admissibility of expert testimony and its decision must be affirmed unless manifestly erroneous. Salem v. United States Lines Co. (1962), 370 U.S. 31, 35-37. See Schaffter v. Ward (1985), 17 Ohio St.3d 79, 80 (the admissibility of evidence is a matter generally within the sound discretion of the trial court). With this standard in mind, we will address whether the trial court abused its discretion in striking the hypothetical question and answer based upon the first two grounds (for objection) set forth by appellee's counsel.

The cited passage clearly indicates that appellant's counsel merely inquired whether, based upon the proffered hypothetical question, Nappi had an opinion and if so, what that opinion was. Appellee argues that the trial court properly struck the question and the answer since the question did not ask Nappi to express his expert opinion in terms of reasonable medical certainty.

As noted in Giannelli, Ohio Evidence Manual (1982), Evid.R. 702, 702.05, in cases involving expert opinion testimony on issues of causation, courts have required the expert to express his opinion in terms of "reasonable medical (scientific) probability or certainty." In the seminal case of Shepard v. Midland Mutual Life Ins. Co. (1949), 152 Ohio St. 6, the supreme court stated that:

[W]here an ultimate fact to be determined by the jury is one depending upon the interpretation of certain scientific facts which are beyond the experience, knowledge or comprehension of the jury, a witness qualified to speak as to the subject matter involved may express an opinion as to the probability or actuality of a fact pertinent to an issue in the case * * *. (Emphasis added.)

In State v. Holt (1969), 17 Ohio St.2d 81, the supreme court again reiterated that an expert opinion is competent only if it is held to a reasonable degree of scientific certainty. In Holt, the court determined that "reasonable certainty" means "probability." Id. In a more recent case, the court equated "extremely likely" to the word "probable." State v. Buell (1986), 22 Ohio St.3d 124, 134. In State v. Benner (1988), 40 Ohio St.3d 301, 313-314, the supreme court indicates that the phrase "more than likely" meets the threshold standard for expressing "probability."

In this case, counsel asks for the expert's opinion, but does not ask him to give that opinion based upon a reasonable degree of scientific certainty. In other words, counsel did not ask the expert to express his opinion based upon probability, not possibility. In answering the question, Nappi testified that:

A. * * * Most likely based upon what I saw surgically I would say a portion of the nerve had been resected rather than just cut.

Q. By the surgery of Dr. Yamour?

A. Yes.

Therefore, while the question did not ask Nappi to give his opinion based on probability as opposed to possibility,

Nappi's answer that the nerve "most likely" had been resected by Yamour's surgery assigned a sufficient probability factor to his opinion. See State v. Buell, supra; State v. Benner, supra.

The question now is whether a proper answer cures any defect in a hypothetical question. This issue was addressed by the supreme court in Fox v. Ind. Com. (1955), 162 Ohio St. 569, 579. In Fox, a medical expert was called by the claimant to testify as to causation. A hypothetical question was submitted to the witness asking whether there was any causal connection between the incident and the alleged subsequent disability. An objection was made on the ground that the question did not inquire of the witness whether the incident was a "direct" or "proximate" cause of the disability. The following proffer was made: "It is my opinion that there was a direct causal relationship between [the incident] and [the disability]." Id. at 579 (emphasis in original). The supreme court held that the trial court erred in striking the question and the answer because while the question itself was deficient, it was cured by an answer meeting the foundational requirements, "especially where the evidence in the instant case was necessarily submitted on a transcript to the trial court and plaintiff's counsel had no opportunity to reframe the hypothetical question to conform with the content of the competent answer." Id.

Based upon the rationale of Schiele, we find that the trial court erred in refusing to admit the above referenced expert testimony where such testimony contained expert testimony on causation and expressed an opinion as to the probability of a fact pertinent to an issue in the case, even if the question submitted to the witness was not complete in that respect. This case also parallels the Schiele case in that the contested evidence was submitted on a transcript at trial. Since the basis of the objection made at the deposition was ruled on at trial by the court, appellants' counsel had no opportunity to rephrase the question to conform with the content of the competent answer.

Appellee also argues in the alternative, that the trial court properly sustained his objection and struck the hypothetical question and answer since it embraces an ultimate issue to be decided by the jury. Pursuant to Evid.R. 704, testimony is not made inadmissible solely because it embraces an ultimate issue. State v. Rohdes (1986), 23 Ohio St.3d 225. While this testimony is not per se inadmissible, it is within the sound discretion of a trial court to refuse to admit the testimony of an expert witness on an ultimate issue where such testimony is not essential to the jury's understanding of the issue and the jury is capable of coming to a correct conclusion without it. Bostic v. Connor (1988), 37 Ohio St.3d 144.

The case at hand is a medical malpractice case involving the issue of whether Yamour's conduct during surgery fell below the accepted standard of care and proximately caused permanent nerve damage to appellant's left thumb. In reviewing the entire transcript of Nappi's expert testimony, it is evident that the trial court did not strike the question and testimony on the basis that it embraced an ultimate question of fact to be decided by the jury. Further, appellee was permitted to introduce expert witness testimony on the same questions of fact. Therefore, we hold that it is an abuse of discretion for the trial court to limit Nappi's testimony pursuant to the objection that it embraced an ultimate issue of fact to be determined by the jury.

Upon review of the record, we hold that even if the trial court erred and abused its discretion by striking testimony on the basis that the answer embraces an ultimate issue to be decided by the jury, and/or that the question was not properly phrased, any error was harmless error. Civ.R. 61 provides in part that "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." The test that should be used to determine if error is prejudicial is "whether the jury, if the proffered testimony had been admitted, would have rendered a different verdict so that [the offering party] was prejudiced by its exclusion." Ferrebee v. Boggs (1970), 24 Ohio App.2d 18.

The proffered testimony was offered to prove that Yamour's surgery caused the gap in appellant's left radial digital nerve. Appellants argue that they were prejudiced by the exclusion of this testimony since that was the only testimony directly linking the gap with Yamour's surgery. Appellant's argument is unpersuasive.

The following testimony was elicited at trial. Appellant testified that the first time she had surgery on her left thumb was on March 19, 1984, when Yamour performed surgery to remove what he had diagnosed as a ganglion cyst. Prior to March 11, 1984, appellant testified that she had never had any serious injury to that portion of her hand and that she had never incurred a puncture wound either. Immediately after the March 19 surgery, appellant experienced pain and discomfort. Yamour referred her to a hand specialist, Dr. Nappi. Dr. Nappi diagnosed a neuroma and conducted exploratory surgery in the area of the scar which resulted from Yamour's surgery. Nappi testified that "[t]he nerve was found then to blind end or just taper off into no nerve fibers anymore into an area of scar. That area of scar was somewhere in the neighborhood of about a centimeter, I believe, gap." (Depo. tr. 17). Nappi further testified that "[t]o a

hand surgeon or a peripheral neurosurgeon that would indicate a portion of nerve missing." (Depo. tr. 18). In describing the area more thoroughly, Nappi testified that:

A. What we found would have been consistent with an end neuroma. In other words, a nerve which had been either crushed or totally broken or indeed transected or cut and lost its continuity; no longer was together, had been cut. That is the type of neuroma pattern that this represented.

Nappi also testified as to his opinion of Yamour's surgical performance:

Q. * * * Assume that on March 11, 1984, Mrs. Finnegan was approximately 50 years of age and that prior to that time that she had worked as a trimmer and repairer of car seats in a company called Hoover Industrial or Hoover Company there in Greenfield, Ohio. And assume further that she had never injured the volar aspect where this lump was, had no prior injury to that, no prior surgery, no prior significant trauma; that it was symptom free. That she used her hands in a normal job at Hoover in the picking up and holding and grasping of these light to medium objects.

And assume that on March 11, 1984, she noticed a lump in this area of the first volar aspect^or the volar aspect of the first phalanx in her left thumb when cleaning her hands. That upon pressing it she did notice a little pain and that as a result of that she goes to the dispensary and then she went to^they suggested she go to see a physician, which she did, being Dr. Yamour, on March 12, 1984.

And assume at that time she gave a history to Dr. Yamour that she might have bumped her hand or something at work and that Dr. Yamour looked at it and advised her that the lump had to be removed or that it would cause her problems in the future. And further assume that he described the situation or the procedure as basically a simple or minor procedure and that he could go in and just flip out this object and that she would be able to return to work within a day or so or almost immediately.

Further assume that when she left Dr. Yamour's office on the 12th that she went back to work and worked for a complete week symptom free until she presented to Dr. Yamour's office on^or at the Greenfield Medical Center on March 19, again, symptom free during this period of time. Assume that the lump was not causing her difficulty in her tasks at Greenfield Medical Center.

Assume further that Dr. Yamour did not discuss with her any significant risks of this type of hand surgery.

Assume that the patient's condition following the surgery by Dr. Yamour when he did go in and take this lump out did not seem to improve. That she developed significant pain. She couldn't return to work. She had to hold her hand up. It was painful and she had extreme difficulty and this continued for a number of days and finally she went to see Dr. Yamour and simply said to him that she had to do something^he had to do something about this pain that she was experiencing.

Assume further that Dr. Yamour finally referred her to you, I think around April 13.

And assuming all that to be the case, do you have an opinion based upon your file and your examination of Mrs. Finnegan, your surgery, your findings of that, your subsequent treatment, the review of the records, and I think you have Dr. Yamour's surgical procedure, do you have an opinion based upon reasonable medical certainty whether or not Dr. Yamour met the accepted standard of care of a general physician in removing or excising the fibrous tissue from the volar aspect of this first phalanx of Mrs. Finnegan's left thumb on April 19, 1984?

A. I do.

Q. And what is your opinion?

A. My opinion would be that it is a substandard level of care to not visualize a radial digital nerve and to indeed have a portion of that nerve either transected, cut, or removed.

In the instant case, appellant was permitted to offer into evidence the expert opinion of Nappi that Yamour performed at a substandard level of care in not visualizing the radial digital nerve and by either cutting or removing a

portion of that nerve. Therefore, even though the first hypothetical was struck, the essence of the answer was set forth in prior and subsequent testimony, being that the radial digital nerve had been cut or removed and that the cut or removal was caused by Yamour's surgery.

Appellant's first assignment of error is overruled.

In appellant's second assignment of error, they assert:

THE DECISION OF THE JURY THAT DEFENDANT, ADIL YAMOUR, M.D., WAS NOT NEGLIGENT IN HIS TREATMENT OF PLAINTIFF WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Appellants argue that their medical expert, "a noted hand surgeon," testified to several violations of the accepted standard of care and that these violations proximately caused the damages complained of. Appellants, then, attacked the credentials and testimony of appellees' medical expert, Dr. Rooney. Rooney testified to a defense hypothetical that Yamour did not commit malpractice because there was no evidence in the pathology report of the presence of the digital nerve trunk. Appellants claim that this statement is contrary to the evidence.

Judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by the reviewing court as being against the manifest weight of the evidence. C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279. Deference will be given to the findings of the trier of fact who is in the best position to view the witnesses and observe their demeanor, gestures and voice inflections to weigh the credibility of the proffered testimony. Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 79.

Any licensed medical doctor is competent to testify on medical questions. The fact that the doctor has a different specialty does not bear on the admissibility of the evidence, but only on the weight to be given to it. Rouse v. Riverside Methodist Hospital (1983), 9 Ohio App.3d 206. A witness need not be the best witness on a subject to qualify as an expert. Comparison of the expert witness' professional stature is a question of weight of evidence. McQueen v. Goldey (1984), 20 Ohio App.3d 41. The qualifications of Nappi and Rooney were to be weighed by the trier of facts. The fact that Rooney is a general surgeon rather than a hand surgeon was left to the jury to consider and assess his testimony accordingly. The jury is in the best position to evaluate the witnesses.

Appellants argue that Rooney misstated the facts of the case when answering his hypothetical question. The facts upon which a hypothetical question to an expert witness is premised must be established by the party calling the witness by a preponderance of the evidence. It is up to the jury to determine whether the preponderance test has been met. Camden v. Miller (1986), 34 Ohio App.3d 86. Where there is conflict in the evidence concerning the existence of a fact which is material to the expert's forming an opinion, counsel propounding the hypothetical question is entitled to include as an assumed fact his version of the evidence on the disputed fact. It is then for the trier of facts to resolve the factual dispute and to determine what weight it will give to the opinion-answer. Mayhorn v. Pavay (1982), 8 Ohio App.3d 189, 191-192 (citing to Haas v. Kundtz (1916), 94 Ohio St. 238).

Here, Rooney testified that "in the absence of any evidence or the absence of the presence of the digital nerve trunk, I consider that absolute proof that he [Yamour] did not damage, cut, or remove part of the digital nerve." (Tr. 262-263). The record does not reflect that there was any direct, conclusive testimony that a portion of digital nerve trunk was found in the specimen removed from appellant by Yamour. Dr. Murphy who prepared the pathology report and analyzed the specimen testified that a 1.5 millimeter section of nerve was contained in the specimen removed by Yamour. Dr. Nappi then testified that the size of a radial digital nerve is between 1 and 2 millimeters. The issue of whether the nerve located by Murphy was the radial digital nerve is a question of fact for the jury to resolve. In propounding his hypothetical question, appellee did not err in assuming that the radial digital nerve was not in the removed specimen.

Appellant's second assignment of error is overruled.

Appellant's third assignment of error asserts:

THE DECISION OF THE JURY THAT DEFENDANT, ADIL YAMOUR, M.D., HAD THE INFORMED CONSENT OF PLAINTIFF WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The test to determine whether informed consent has been given is whether under the total circumstances of the patient's treatment, a reasonably prudent patient would have withheld consent had the patient been informed of all the material risks and dangers involved with the medical procedure. Siegel v. Mt. Sinai Hospital (1978), 62 Ohio App.2d 12. In conjunction with this standard, the trial court properly charged the jury on the issue of informed consent, as follows:

The consent must be an informed consent. The standard is that of a reasonable surgeon advising a reasonable patient in like or similar circumstances about risk likely to be significant to the decision to consent.

This matter must, if Plaintiff proves it to your satisfaction, must be done to show that the lack of informed consent was a proximate cause of her injuries and damages.

You will return or may return^I don't direct you to^but you have the ability to return a verdict for the Plaintiff if you find by the greater weight of the evidence, that is the preponderance of all the evidence, interchangeable terms, that:

(A) Defendant failed to disclose to and discuss with the Plaintiff the material risk and dangers inherently and potentially involved with respect to the proposed surgery;

AND

(B) The undisclosed risk and dangers that should have been disclosed by the Doctor did in fact happen and are the proximate cause of the injury to Plaintiff;

AND

(C) A reasonable person in the Plaintiff's position would have decided against surgery if the material risk and dangers inherent and incidental to it had been disclosed to her prior to the surgery.

(Tr. 370-371.)

The jury, after being so instructed, returned a verdict for appellee finding that appellant gave informed consent. There is ample evidence in the record to support this finding. Yamour testified as to the risks appellant would encounter with this type of surgery. Specifically, he told her that there could be complications such as infection and swelling. At trial, an informed consent form sign by appellant was admitted into evidence. Dr. Rooney, testifying on the issue of informed consent, stated that in an operation of this nature that the patient should be informed of "common sense risks," (i.e., hemorrhage, wound infection, difficulty to heal and damage to the tissues being operated on.

There is testimony which supports the verdict. The jury received competent, credible evidence and were in the best position to evaluate the credibility of the witnesses. Proper instructions were issued. Therefore, we find appellant's third assignment of error to be not well-taken.

Appellant assert in their fourth assignment of error that:

THE TRIAL COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR NEW TRIAL.

Appellants filed a motion for new trial for the reason that the judgment is not sustained by the weight of the evidence.

The granting of a motion for new trial rests largely in the sound discretion of the trial court, and the granting or refusal of such motion will not be disturbed upon review unless there is an abuse of judicial discretion. * * * A trial court abuses its discretion in granting a motion for new trial after a jury verdict where substantial evidence supports its verdict. (Citation omitted).

Verbon v. Pennese (1982), 7 Ohio App.3d 182, 184. A court may not set aside a verdict based upon a mere difference of opinion. Poske v. Mergl (1959), 169 Ohio St. 70, 73-74.

The trial court in its decision overruling the motion for new trial noted the diversity of the experts' opinions and stated that it was the jury's duty to evaluate those opinions. The trial court found that credible evidence is contained in the record to support the jury's finding. Appellants' appeal this trial court's overruling the motion for new trial and realleges the first three assignments of error. We have passed on these assignments and sustained appellee's arguments on each.

Accordingly, we find that the trial court did not abuse its discretion when it overruled appellant's motion for a new trial. The fourth assignment of error is overruled. The judgment of the trial court is sustained.

STEPHENSON and GREY, JJ., concur in judgment and opinion.