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COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2005-SC-000414-D

CARROLL L. WITTEN, JR., M.D., and
WITTEN, SHERMAN & CATALANO, PLLC — APPELLANTS

VS.

ON DISCRETIONARY REVIEW
FROM COURT OF APPEALS CASE NO. 2004-CA-000551
JEFFERSON CIRCUIT COURT NO. 02-CI-02802

BONNIE PACK, ADMINISTRATRIX FOR
THE ESTATE OF JAMES PACK — APPELLEE

BRIEF FOR APPELLEE

GARY R. HILLERICH
1800 Kentucky Home Life Building
239 South Fifth Street
Louisville, Kentucky 40202
(502) 736-8100

AND

IRWIN M. ELLERIN
ELLERIN & ASSOCIATES
Suite 910, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 239-9100

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

This is to certify that on the 27TH day of Sept, 2006, the undersigned mailed a true and correct copy of this Brief for Appellee, postage prepaid, to the following: Hon. James M. Shake, Judge, Jefferson Circuit Court, Division Two, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; Hon. James P. Grohmann, O'BRYAN, BROWN & TONER, 1500 Starks Building, Louisville, KY 40202. It is further certified that the record on appeal has not been removed by the undersigned.

GARY R. HILLERICH

I. INTRODUCTION

Dr. Witten, an orthopaedic surgeon, slipped in the operating room [while holding Mr. Pack's leg] and dislocated the hip upon which he had just operated. This initial dislocation substantially contributed to subsequent dislocations and eventual death.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellee, by Counsel, respectfully requests the opportunity to present oral argument so that the issues may be clearly explained.

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IV. COUNTERSTATEMENT OF THE CASE

Dr. Carroll Witten [hereinafter referred to as "Dr. Witten"], an orthopaedic surgeon, performed hip replacement surgery on James Pack [hereinafter referred to as "Mr. Pack"] on July 25, 2001, at Baptist Hospital East in Louisville.

Immediately after the first of three hip replacement surgeries, Dr. Witten, while holding Mr. Pack's leg, slipped in the operating room and jerked the leg of Mr. Pack upon which he had just operated [Tape 2, 12/16/03, 11:52:35]. It is uncontroverted that Mr. Pack's hip became dislocated immediately after the initial surgery.

Dr. Witten knew shortly after the initial surgery that Mr. Pack's hip was dislocated. In that regard, Dr. Witten received a call from the recovery room informing him that the post-operative x-ray revealed that Mr. Pack's hip was indeed dislocated [Tape 2, 12/16/03, 12:00:20]. Dr. Witten and his partner, Dr. Catalano, accordingly returned to the recovery room to place the newly implanted prosthetic hip back in proper location.

Mr. Pack remained in pain but was nonetheless discharged from the hospital on July 29, 2001 [Tape 1, 12/16/03, 9:48:45]. After this initial discharge from the hospital, Mr. Pack discussed by telephone his continued pain

with Dr. Witten [Tape 1, 12/16/03, 9:53:00]. Dr. Witten scheduled an office appointment with Mr. Pack for August 13, 2001— approximately two weeks post-op [Tape 1, 12/16/03, 9:54:00]. During this first post-operative appointment, and after an x-ray of the hip was again taken, Dr. Witten discovered that Mr. Pack's hip was again dislocated [Tape 1, 12/16/03, 9:57:00 - 9:57:30]. According to Mrs. Pack, Dr. Witten then apologized and said it was "all my fault" [Tape 1, 12/16/03, 9:57:30 - 9:57:50]. Mr. Pack was again admitted to Baptist Hospital East where Dr. Witten performed a second surgical procedure to stabilize the hip. The hip again dislocated after Dr. Witten's second surgery. Mr. Pack requested and obtained a consultation from another orthopaedic surgeon, Dr. Ernest Eggers. A third surgery was performed by Dr. Catalano [Dr. Witten's partner] [Tape 1, 12/16/03, 10:10:00 - 10:12:00] and the third surgery was successful in stabilizing Mr. Pack's hip. However, due to the multiple surgeries, Mr. Pack remained in significant pain and on significant pain medication. To cope with this severe pain, he sought treatment from a pain management clinic and was prescribed Methadone [Tape 1, 12/16/03, 10:17:00].

Mr. Pack died at age 42 on the day he first commenced taking Methadone [Tape 1, 12/16/03, 10:17:45]. One of Plaintiff's experts opined that interaction

between Methadone and other prescribed medication caused Mr. Pack's death. [Tape 2, 12/16/03, 15:31:00 - 15:32:00].

At trial, Dr. Witten admitted slipping in the operating room [in the immediate post-operative period] and jerking Mr. Pack's leg upon which he had just operated. Dr. Witten admitted that Mr. Pack was paralyzed, asleep, and had no control over his own body. [Tape 2, 12/16/03, 11:51]. Dr. Witten admitted that it was his policy to hold the leg [upon which he had just operated] and it was his "...call as captain of the ship..." to do so [Tape 2, 12/16/03, 11:52]. Dr. Witten admitted that at the time he slipped, he did not believe he had dislocated the hip [Tape 2, 12/16/03, 11:52:38]. In fact, Dr. Witten's reasoning for not placing the slip and jerk in the hospital record was because he believed it to be a "trivial matter" [Tape 2, 12/16/03, 11:53:30]. However, Dr. Witten later admitted that at the time he dictated the discharge summary, he knew that the slip and jerk was no longer a trivial matter [Tape 2, 12/16/03, 11:54 - 11:54:10].

> "Hillerich: Now, after you slipped and I need to ask you, I notice that it's not in the hospital chart.
>
> Witten: No, it isn't because at the time it was -- it didn't -- it seemed like a trivial matter.

Hillerich:	Did you ever go back after you realized that the hip was out and you recognized that it was no longer a trivial matter and put it in the hospital record?
Witten:	I did not.
Hillerich:	You dictated the discharge summary after that?
Witten:	I did.
Hillerich:	And at the time you dictated the discharge summary you were aware that what occurred in the operating room was no longer a trivial matter?
Witten:	That's correct." [Emphasis ours. Tape 2, 12/16/03, 11:53:30 - 11:54:10]

It was clearly established that the initial hip dislocation was a direct result of Dr. Witten slipping and jerking Mr. Pack's leg. Appellee's counsel moved the trial court for, in part, a directed verdict in behalf of Mr. Pack on the limited issue of liability while reserving for jury determination the appropriate measure of damage [Tape 3, 12/19/03, 16:41:50 - 17:01:30]. The trial court denied the motion and a defense jury verdict followed. Appellee perfected an appeal to the Kentucky Court of Appeals. The Court of Appeals held, in relevant part, as follows:

> "We cannot speculate as to whether the act of jerking the leg ultimately caused Pack's death. Many other possible causes were presented into evidence at trial. However, three surgical procedures— one closed reduction and two open reductions— were required following the operating room accident. These procedures resulted in significant pain for Pack. While reasonable minds could disagree concerning Dr. Witten's selection and positioning of the prosthesis implanted, the jury should have been instructed that the doctor was negligent as a matter of law with respect to the initial accident of the jerking of his patient's leg in the operating room. Because we are unable to determine the possible impact on the jury caused by the trial court's failure to direct a verdict on this issue, the entire verdict is tainted." [Emphasis ours. Appendix A, Court of Appeals Opinion, p. 9]

V. ARGUMENT

AN ORTHOPAEDIC SURGEON WHO ADMITTEDLY SLIPS IN THE OPERATING ROOM AND JERKS THE LEG OF HIS ANESTHETIZED PATIENT [UPON WHOM HE HAD JUST PERFORMED HIP REPLACEMENT SURGERY] IS NEGLIGENT AS A MATTER OF LAW.

Certain actions of a physician are obviously negligent: amputating the wrong arm; fracturing a bone during an examination; carelessly dropping a knife or scalpel upon a patient, or leaving a sponge in a patient's body. A key element of the physician's liability in such circumstances is his or her scope of control.

Mr. Pack was totally under the sole control and management of Dr. Witten when the initial injury occurred which started the "snowball rolling down the hill".

Clearly, physicians are under a duty to safeguard and manage their patient under anesthesia so as to prevent injury. In Quillen v. Skaggs, Ky.App., 25 S.W.2d 33 (1930), a patient was burned while under anesthesia. The Court of Appeals recognized the physician's duty where the instrumentality of injury is under the management of the physician.

> "This young woman submitted to the doctor's care, hospitalization, and anaesthetization with her integument entire; when she recovered consciousness, a portion of it had by needless burning been destroyed, and she was still in the doctor's hospital and under his care. In such a situation she does not have to offer further evidence to show who burned her. The reasonable inference from all this is that this hot-water bottle was placed under her by the doctor or some of his employees. Remember the doctor here did both the surgery and the hospitalization. We are not required here to say where his duty as a surgeon ceased and his duty as a proprietor of the hospital began. It was his duty, since he was both, to exercise ordinary care to see she was not needlessly burned." Id. at p. 34.

* * *

> "Where the thing which caused the injury complained

of is shown to be under the management of defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation of defendant, that the accident arose from want of care." Id. at p. 34.

More recent cases from jurisdictions outside the Commonwealth of Kentucky are in accord with Quillen v. Skaggs, supra. For example, in Schallert v. Mercy Hospital of Buffalo, 281 A.D.2d 983 (2001), the Supreme Court, Appellate Division, New York, held the surgeon and nurses negligent as a matter of law for failing to adequately secure an unconscious patient from falling from the operating table.

> "As a matter of law, the surgeon and nurses were negligent in failing to secure the unconscious patient adequately in order to prevent her from falling from the operating table." Id. [Appendix B]

As mentioned, Dr. Witten was admittedly in sole control of Mr. Pack's leg when he slipped and jerked the leg upon which he had just operated.

This case is analogous to those medical negligence cases in which a foreign object is left in the body of a patient during surgery. The patient is anesthetized. The patient has no control and the patient's safety is totally within

the control or management of the surgeon. In such situations, Kentucky has recognized negligence as a matter of law:

> "We conclude that appellee, Harter, was negligent as a matter of law. It may be true, as he claims, that when it was discovered that a sponge was missing, he exercised to the highest degree all of the skills known to the medical profession in his attempt to locate the missing sponge, and having failed to locate it, the condition of the patient at that time may have been such that any reasonably prudent surgeon would have closed the patient." Id. at p. 450.
>
> * * *
>
> "However exemplary the care given to appellant after discovering that a sponge was missing, the fact remains that when the incision through the diaphragm was closed a sponge was left in the abdomen. The sponge count at that time failed to show any sponge missing but in truth one of the sponges was missing and the count was inaccurate. The failure to correctly account for the sponges under the circumstances constituted negligence as a matter of law" (Emphasis added). Laws v. Harter, Ky.App., 534 S.W.2d 449, 450-451 (1975).

More recently, the Court of Appeals of Louisiana, in citing its Supreme Court, recognized obvious negligence in a retained sponge and related cases.

> "Even without expert testimony establishing the standard of care, we know that some person or persons must have been negligent in this case. Under the

doctrine of *res ipsa loquitur*, we may infer negligence from the mere fact that a surgical sponge does not ordinarily remain in the patient's body without the commission of medical negligence. See Hastings v. Baton Rouge General Hospital, 498 So.2d 713 (La. 1986). Regarding a surgeon's negligence, the supreme court gave the following explanation: When a physician does an obviously negligent act, such as fracturing a leg during an examination; amputating the wrong arm; carelessly dropping a knife, scalpel, or acid on the patient; or leaving a sponge in a patient's body, lay persons can infer negligence. Id. at 719.

* * *

Dr. Vines argument is also contrary to the prevailing case law that establishes the surgeon's nondelegable duty to remove all sponges placed in a patient's body and holds that the surgeon's violation of this duty is negligence *per se*. Grant v. Touro Infirmary, 254 La. 204, 223 So. 2d 148 (1969); Guilbeau v. St. Paul Fire & Marine Insurance Co., 325 So.2d 395 (La.App. 3 Cir.1975), *writ denied*, 329 So.2d 454 (La.1976). In Grant, 223 So.2d at 154-155, the supreme court considered facts similar to our present case and concluded that the operating surgeon was personally negligent:

The general rule, as stated in 70 C.J.S. Physicians and Surgeons § 48, p. 969, is that a surgeon's failure to remove a sponge or pad before closing an incision may be regarded as negligence per se, and some authorities hold that the surgeon cannot relieve himself from liability for injury to a patient caused by leaving sponges or pads by reliance on a custom or rule

> requiring the attending nurse to count sponges or pads used and removed, and on the nurse's statement as to the count. Albeit there is authority to the contrary, we are convinced that the general rule is sound." Johnston v. Southwest Louisiana Association, 693 So.2d 1195 (1997)[Appendix C].

Dr. Witten admitted that it was his policy to hold the leg upon which he had just operated and it was his "call as captain of the ship..." to do so. [Tape 2, 12/16/03, 11:52]. Dr. Witten's standard of care expert, Dr. McTigue, admitted that Dr. Witten had a duty to safeguard Mr. Pack and that slipping and jerking Mr. Pack's leg was "at the footsteps of the captain". [Tape 3, 12/18/03, 11:44:40]

Slipping and jerking a patient's leg is even more "at the footsteps of the captain" than leaving a foreign object in the patient during surgery. That is to say, in many retained foreign object cases, the surgeon attempts to delegate the sponge or instrument count to nurses. In this case, Mr. Pack was admittedly wholly within the control of Dr. Witten.

An anesthetized patient is virtually helpless and within total control of the surgeon. Any patient has the right to expect that his or her body will be safely managed. Any argument to the contrary runs afoul of even the primary tenet of

medicine: "first do no harm". The type of error which caused Mr. Pack's initial hip dislocation should simply never occur.

In support of his position, Appellant cites several slip and fall cases: Wal-mart Stores, Inc. v. Lawson, Ky.App., 984 S.W.2d 485 (1988); Jones v. Winn-Dixie of Louisville, Inc., Ky., 458 S.W.2d 767 (1970); Hornbeck v. Food Basket No. 1, Ky., 494 S.W.2d 87 (1973); Downing v. Drybrough, Ky., 249 S.W.2d 711 (1952); Kroger Grocery & Baking Co. v. Monroe, 237 Ky. 60, 34 S.W.2d 929 (1931). Simply put, these cases have no relevancy. Each involves slips and falls at grocery stores or parking lots. In those cases, the plaintiff was not anesthetized. In those cases the plaintiff was not within the total control of the defendant. Appellant is asking this Court to create new public policy holding that a physician owes no greater duty to an anesthetized patient than a grocer owes to a customer walking down an aisle way of his store. It is respectfully submitted that patients of Kentucky physicians deserve more.

Finally, Appellant attempts to create a jury issue by arguing that Appellee admitted a jury issue as to the cause of the hip dislocation. Such is not the case. Mr. Pack's motion for a directed verdict at the conclusion of all of the evidence requested that judgment as to liability be entered in behalf of Mr. Pack reserving

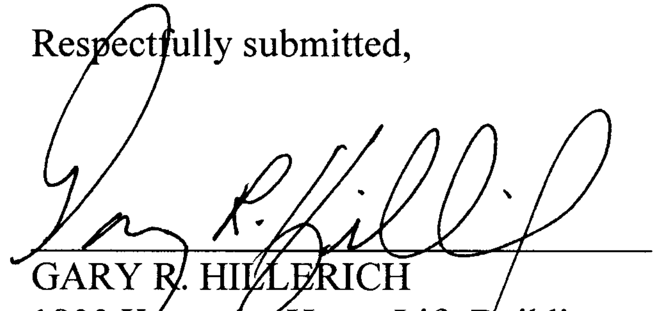
the measure of damages for the jury. The entire colloquy between the court and counsel regarding both Appellant and Appellee's motions for a directed verdict [at the conclusion of all of the evidence] can be found at Tape 3, 12/19/03, 16:41:50 - 17:01:30. The issue as to causation in this case did not involve the slip and jerk causing the initial dislocation, but involved the ultimate cause of Mr. Pack's death. The cause of Mr. Pack's death was contested and the jury was confronted with conflicting testimony in that regard. Contrary to his present position, the Appellant only moved for a directed verdict relating to the cause of Mr. Pack's death. Mr. Pack counsel's argued that Pack was entitled to a directed verdict on liability based upon Dr. Witten's slip and jerk of Mr. Pack's leg and Dr. Witten's admission that it was "all his fault".

VI. CONCLUSION

Dr. Witten was negligent as a matter of law. An anesthesized patient is defenseless and is entitled to expect that his or her body will be properly managed and supervised by the surgeon performing the operation. In this case, Dr. Witten admitted that he was in sole control of Mr. Pack's leg at the time of the slip and jerk.

For the above mentioned reasons, it is respectfully submitted that this court should affirm the Opinion of the Kentucky Court of Appeals.

Respectfully submitted,



GARY R. HILLERICH
1800 Kentucky Home Life Building
239 S. Fifth Street
Louisville, KY 40202-3213
(502) 736-8100

AND

IRWIN M. ELLERIN
ELLERIN & ASSOCIATES
Suite 910, The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 239-9100

COUNSEL FOR APPELLEE