SUPREME COURT OF KENTUCKY
NO. 2013-SC-000111-D

LORETTA SARGENT — APPELLANT

APPEAL FROM THE
COURT OF APPEALS OF KENTUCKY
FILE NO. 2011-CA-001696
AND FAYETTE CIRCUIT COURT
NO. 10-CI-680

WILLIAM SHAFFER, M.D. — APPELLEE

REPLY BRIEF FOR APPELLANT

Submitted by:

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CERTIFICATE REQUIRED BY 76.12 (6)

It is hereby certified that a true and correct copy of the Brief for Appellant was served by mail on the 15 day of April, 2014 on the following: Hon. Pamela R. Goodwine, Fayette Circuit Court, 120 N. Limestone Street, Room 534, Lexington, KY 40507; Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 and Bradley A. Case, Esq. and Stephen Mattingtly, Esq., Dinsmore and Shohl, LLP, 101 S. Fifth Street, Suite 2500, Louisville, KY 40202, counsel for the Appellee.

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REPLY STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

Dr. Shaffer wants this Court to nullify KRS 304.40-320, Section (2). He suggests several ways to justify how this Court may do so, *i.e.*, the statute doesn't mean what it says, the statute should be a matter of evidence, the statute should be a matter of closing argument, the General Assembly did not mean to say what it did say and the statute is unconstitutional. He then argues that if Section (2) should have been in the informed consent instruction, Mrs. Sargent was not prejudiced by its absence and this "change in the law" should not apply to this case, but only prospectively. All of these arguments are without merit and will be addressed in this Appellant's Reply Brief.

ARGUMENT

I. The trial court did NOT give the correct instruction on a physician's duty in obtaining a patient's informed consent.

Dr. Shaffer argues no Kentucky case requires KRS 304.40-320 (2) to be in the informed consent instruction. True. But no case holds that it should not be.

There is one Court of Appeals Opinion that comes close. In Hawkins v. Rosenbloom, 17 S.W. 3d 116 (Ky. App. 1999), the Court of Appeals held that under the facts of that case an expert was required to prove what a reasonably prudent physician should tell a patient in compliance with KRS 304.40-320 (1). The Court of Appeals then added:

> Part (2) deals specifically with what a reasonable person should be told before deemed to have given informed consent. (Emphasis added.)

In 1975, in Holton v. Pfingst, 534 S.W. 2d 786 (Ky. 1975), the Kentucky Supreme Court held that informed consent falls into negligence. In 1976, KRS 304.40-320 (1) codified this holding and KRS 304.40-320 (2) was added. There has been no case in Kentucky since the passage of this statue discussing whether KRS 304.40-320 (2) should be in an informed consent instruction. This is a case of first impression. No argument by Dr. Shaffer and no case cited by Dr. Shaffer changes these facts.

There is no justification for the trial court not instructing on Section (2). It must be in the instruction or it has no effect and the General Assembly wasted its time in passing it.

II. Whether the instruction was proper requires a de novo review, not an abuse of discretion review.

The trial court gave one half of an informed consent instruction, ignored the duty imposed by KRS 304.40-320 (2), failed to instruct on this duty and therefore did not properly instruct the jury on the applicable Kentucky law. Instructions must properly and intelligibly state the law. Hamilton v. CSX Transportation, Inc., 208 S.W. 3d 272 (Ky. App. 2006).

Dr. Shafer cites Olfice v. Wilkey, 173 S.W. 3d 226, 230 (Ky. 2003), that failure to give a tendered instruction falls under an abuse of discretion standard for review. Here, however, the trial court did not just refuse to give a tendered instruction, it gave an erroneous instruction. This calls for a de novo review. See Gonzalves v. Commonwealth, 404 S.W. 3d 180 (Ky. 2013).

Even under an abuse of discretion standard the Supreme Court should reverse. The trial court ignored the statutory duty imposed by KRS 304.40-320 (2), a clear abuse of discretion.

Dr. Shaffer argues the trial court did not have to give even a separate instruction on informed consent since it also gave an instruction on negligence, citing Campanell v. Figert, No. 2008-CA-621-MR, 2009 Ky. App. Unpub. Lexis 145 (Ky. App. 2009). This argument begs the question. If KRS 304.40-320 (2) applies, then a separate instruction is obviously mandated.

Dr. Shaffer argues an instruction based on KRS 304.40-320 (2) would violate the "bare bones" principle, citing Palmore & Cetrulo, Kentucky Instructions to Juries, § 13.11 and § 23.10. While there is no doubt that Kentucky adheres to the "bare bones" approach, there is also no doubt that the General Assembly has the right to create legal duties and no doubt the trial courts are required to properly instruct on these duties. For example, see Palmore & Cetrulo, Instructions to Juries, §23.14, where the instruction includes the statutory duty of a hospital to test for PKU.

Dr. Shaffer argues that where expert testimony is offered on the subject, the statutory duty need not be in the instruction. Dr. Shaffer also comments at length that since the subject was covered by counsel in closing arguments, there was no need for the duty to be in the instruction. If opposing experts and opposing counsel arguing on a matter is sufficient, why have instructions? Everyone could tell the jury to just do the right thing and leave it at that. The trial court has an absolute duty to instruct on the applicable law.

Dr. Shaffer argues that negligence per se does not apply to KRS 304.40-320, citing Humana of Kentucky, Inc. v. McKee, 834 S.W. 2d 711 (Ky. App. 1992). That case involved the statutory duty of KRS 214.155 to administer a PKU test to newborns.

But KRS 304.40-320, both sections (1) and (2), create specific duties on health care providers, which creates negligence per se. That doctrine applies (1) when the offender violates a statute and (2) the plaintiff was in the class of persons the statute intended to protect.

There is no doubt KRS 304.40-320 creates duties in both sections (1) and (2). The statute is mandatory, i.e., "the claimant's informed consent shall be deemed to have been given where" (1) the action of the health care provider was in accordance with accepted standards "and" (2) a "reasonable individual" would have a "general understanding" of the risks (emphasis added). There was evidence Dr. Shaffer violated both sections (1) and (2).

The class of persons the statute intended to protect are all patients asked to consent to medical treatment. No doubt Mrs. Sargent was in this class.

Dr. Shaffer cites to what he refers to as legislative intent that Mrs. Sargent was not in the class of persons the statute was designed to protect. He argues the legislative intent was to protect only doctors, not patients, as part of a tort reform effort. He cites to a Committee Report of a majority of a Governor's Task Force on malpractice insurance.

First, a Committee Report of a majority of a task force is not legislative intent. Dr. Shaffer cites to no documents generated by the General Assembly.

Second, KRS 304.320-40 (2) does benefit doctors by requiring an objective standard on whether a patient would or would not have consented with a general understanding of the risks. But it is also true that Section (2) can only do so by requiring the doctors to give sufficient information so a reasonable individual would generally understand the risks. To put it another way, the only way the doctors could be protected by an objective test on what a patient would

do if given sufficient information is to create a duty on the doctors to give sufficient information.

Dr. Shaffer argues only automobile cases or similar cases fall into the doctrine of negligence per se. This is so, he argues, because these cases are simple and the statutes are specific. He tries to distinguish Humana of Kentucky, Inc. v. McKee because that case involved a hospital, not a doctor.

KRS 304.40-320 (2) is quite specific. It is not vague. A doctor must give information so a reasonable individual would have a general understanding of the risks. This is no less specific than a hospital must test newborns for PKU. A statute imposing a legal duty cannot be ignored.

III. The trial court's refusal to give the proper instruction was highly prejudicial to Mrs. Sargent.

The burden to prove non-prejudice rests on Dr. Shaffer. McKinney v. Heisel, 947 S.W. 2d 32 (Ky. 1997).

Mrs. Sargent's experts testified the standard of care required Dr. Shaffer to tell Mrs. Sargent she could be paralyzed. Dr. Shaffer's experts testified the standard of care only required Dr. Shaffer to tell Mrs. Sargent she could have nerve damage. The instruction given only spoke to what the standard of care required Dr. Shaffer to tell, not what Mrs. Sargent was supposed to know in order to give her informed consent. The jury was never required to consider under a proper instruction what Mrs. Sargent was supposed to know. Nothing could be more prejudicial than a jury not deliberating on a vitally important and legally recognized one-half of the case.

IV. The principle of constitutional avoidance is not applicable.

Dr. Shaffer argues that if KRS 304.40-320 (2) requires a jury instruction, that statute is unconstitutional. He cites a dissenting opinion in Keel v. St. Elizabeth Medical Center, 842 S.W. 2d 860 (Ky. 1992), to the effect that the General Assembly does not have the power to abolish liability for common law wrongs and therefore cannot define a common law duty. But KRS 304.40-320 (2) added a duty. It abolished nothing.

There are numerous instances, many referenced in Dr. Shaffer's Appellee Brief, where the General Assembly has created and defined duties in tort law. For example, see the numerous duties enumerated in KRS chapter 189 regarding duties of drivers of automobiles.

V. The opinion of this Court should apply to Mrs. Sargent.

Dr. Shaffer argues that if this Court "changes the law", the change should apply only prospectively and not to Mrs. Sargent.

First, this Court would not be changing any law. The statute has been on the books for a long time. There is no case law as to whether KRS 304.40-320 (2) should be incorporated into an instruction. This Court would only be holding in a case of first impression that the General Assembly's creation of this duty must be in the instructions.

Second, case law is clear that the Supreme Court's Opinion should apply only prospectively when the Court is overruling old precedent and to not do so "would be unconscionable". Branham v. Stewart, 307 S.W. 3d 94 (Ky. 2010).

Mrs. Sargent did not have her day in court. She never got the jury to focus not only on what a reasonably prudent doctor would tell but also what a reasonably prudent patient would understand. Only one half of her case was submitted to the jury.

CONCLUSION

The Supreme Court should reverse the Court of Appeals and send this case back to the Fayette Circuit Court for a new trial. Statutes creating duties must be in instructions or they have no effect and were a waste of time and energy to pass.

Respectfully submitted,

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