RENDERED: APRIL 30, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000412-MR

EVA N. HOOFNEL — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 01-CI-006321

JAMES SEGAL, M.D.;
SUSAN GALANDIUK, M.D.[1] — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE AND JOHNSON, JUDGES; AND JOHN D. MILLER, SENIOR JUDGE.[2]

MILLER, SENIOR JUDGE: Eva N. Hoofnel has appealed from an order of the Jefferson Circuit Court entered on October 22, 2002, which granted the appellees', James Segal, M.D. and Susan Galandiuk, M.D., motions for summary judgment.[3] We agree with

[1] The notice of appeal filed in this case misspells this doctor's name as "Glandiuk".

[2] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[3] The order was made final by the trial court's order entered on January 28, 2003, which denied Hoofnel's motion to vacate the trial court's previous order.

the circuit court that this matter presented no genuine issues of material fact and that Drs. Segal and Galandiuk were entitled to judgment as a matter of law. CR[4] 56. We therefore affirm.

During the latter part of 2000, Hoofnel underwent a colonoscopy which revealed a lesion in her lower rectum. Out of concern that this lesion could become cancerous, Hoofnel consulted Dr. Susan Galandiuk, a colorectal surgeon in Louisville, Kentucky. On or around January 2, 2001, Hoofnel and her husband met with Dr. Galandiuk in her office to discuss the possibility of surgically removing the lesion. At this office visit, Dr. Galandiuk suggested that in addition to removing the lesion, Hoofnel should also undergo an oophorectomy to remove her ovaries and a hysterectomy to remove her uterus.[5]

Both Dr. Galandiuk and Hoofnel testified via deposition that Hoofnel initially told Dr. Galandiuk that she did not want her ovaries removed. As for the proposed hysterectomy, Hoofnel stated that she also informed Dr. Galandiuk that she did not want to undergo that procedure either. However, Dr. Galandiuk testified that after the January 2, 2001, meeting, it was her understanding that Hoofnel had

[4] Kentucky Rules of Civil Procedure.

[5] According to Dr. Galandiuk's deposition testimony, if cancer is detected in the colon, women face a higher risk of developing ovarian and/or uterine cancer.

consented to the removal of the lesion, a hysterectomy if necessary, and an appendectomy.[6]

On January 5, 2001, Hoofnel signed a standard surgical consent form at Norton Hospital in Louisville. The handwritten description of the planned procedures stated that Hoofnel was to undergo an "anterior resection colon with appendectomy and possible bilateral oophorectomy." The consent form also contained standard language authorizing "additional procedures" that may be "deemed necessary in [the attending physician's] professional judgment." In addition, Dr. Galandiuk testified that on January 17, 2001, the day of the surgery, Hoofnel told her that she wanted Dr. Galandiuk to perform an oophorectomy and a hysterectomy if she felt it was necessary.[7] Carolyn Gowan, a nurse anesthetist, also testified that when she asked Hoofnel to describe the procedures she was about to undergo, Hoofnel told her that she was having colon surgery, an appendectomy, and a hysterectomy.

Hence, according to Dr. Galandiuk, just prior to beginning surgery on Hoofnel, she believed that the signed consent form, coupled with her previous discussions with Hoofnel, authorized her to perform the colon surgery, an appendectomy, a hysterectomy if necessary, and an oophorectomy.

[6] Hoofnel does not dispute that she consented to the appendectomy.

[7] A handwritten note by Dr. Galandiuk on one of Hoofnel's medical charts states that Hoofnel changed her mind and wanted her ovaries removed.

However, Hoofnel denies that she ever consented to an oophorectomy or a hysterectomy.

Dr. Galandiuk further testified that during the surgery, she discovered that Hoofnel's uterus was abnormally large. Fearing that Hoofnel's enlarged uterus could be indicative of further problems, Dr. Galandiuk summoned Dr. James Segal, an obstetrician/gynecologist, to the operating room. According to Dr. Segal's deposition testimony, he examined Hoofnel's uterus and concurred with Dr. Galandiuk's opinion that it was abnormally large.

Dr. Segal testified that he read Hoofnel's consent form and noticed that the form did not contain Hoofnel's consent to have a hysterectomy performed. However, Dr. Segal stated that both Dr. Galandiuk and Nurse Gowan told him that Hoofnel had consented to a hysterectomy. After unsuccessfully attempting to locate a member of Hoofnel's family to confirm her alleged consent, Dr. Segal scrubbed-in and performed a hysterectomy and oophorectomy, removing Hoofnel's uterus and ovaries.[8] Following these procedures, the colon surgery and appendectomy were also successfully completed.[9]

[8] Dr. Segal testified that he relied upon the written consent form signed by Hoofnel as the basis for his belief that Hoofnel had consented to the oophorectomy.

[9] It was later determined that the organs that had been removed were non-cancerous.

After the completion of the procedures, Dr. Segal informed Hoofnel that her ovaries and uterus had been removed. Hoofnel stated that upon hearing this news she became scared and was in a state of disbelief.

Approximately nine months later, on September 14, 2001, Hoofnel filed a complaint in the Jefferson Circuit Court. Hoofnel claimed that the hysterectomy and oophorectomy were performed without her consent, and that as a result, Dr. Galandiuk and Dr. Segal committed a "malicious, and intentional assault, battery, and trespass upon her." Hoofnel sought damages for alleged permanent injuries, physical and mental pain, a diminished relationship with her husband, and medical expenses. In addition, Hoofnel sought punitive damages for the alleged "malicious" conduct of Dr. Galandiuk and Dr. Segal.

On August 30, 2002, both Dr. Galandiuk and Dr. Segal filed motions for summary judgment, arguing, inter alia, that Hoofnel's consent to the hysterectomy and oophorectomy constituted a complete defense to her battery claim. After concluding as a matter of law that Hoofnel's signed consent form authorized the procedures performed by Dr. Galandiuk and Dr. Segal, the trial court on October 22, 2002, granted the motions for summary judgment.[10]

[10] In addition, the trial court determined that Hoofnel's assault and trespass claims were essentially the same as a claim for battery under Kentucky law.

On November 1, 2002, Hoofnel filed a motion to vacate the trial court's order granting summary judgment in favor of Dr. Galandiuk and Dr. Segal. Hoofnel argued that the signed consent form did not, as a matter of law, constitute consent for Dr. Galandiuk and Dr. Segal to perform the procedures in question, and that the issue of consent was a factual question to be determined from all of the circumstances. According to Hoofnel, this factual question was an issue for a jury to decide, thereby precluding summary judgment in favor of Dr. Galandiuk and Dr. Segal.

On January 28, 2003, the trial court denied Hoofnel's motion to vacate its previous order. The trial court agreed with Hoofnel that "consent is a process and not just a document." However, the trial court found that the lack of consent issue was "inextricably woven together" with the concept of informed consent. After noting that expert testimony is generally required to negate informed consent, and that Hoofnel concededly did not offer any such testimony, the trial court ruled that summary judgment in favor of Dr. Galandiuk and Dr. Segal was proper. The trial court also found that the conduct of Dr. Galandiuk and Dr. Segal "was not reckless or oppressive,"

Hoofnel did not challenge this determination in her motion to vacate and has not raised this issue on appeal.

thereby precluding any possible punitive damages. This appeal followed.

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985)). The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, 807 S.W.2d at 480 (citing Dossett v. New York Mining & Manufacturing Co., Ky., 451 S.W.2d 843 (1970)). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992)(citing Steelvest, supra at 480). This Court has previously stated that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. There is no requirement that the appellate court defer to the trial court since factual findings are not at issue" [citations

omitted].[11] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

Hoofnel contends that summary judgment in favor of Dr. Galandiuk and Dr. Segal on her battery claim is not proper because there exist genuine issues of material fact as to whether she consented to the removal of her uterus and ovaries.

An action for battery may be pursued when a physician performs an operation without the patient's consent. Tabor v. Scobee, Ky., 254 S.W.2d 474 (1951). "The absence of consent must be proved as a necessary part of the plaintiff's case." Vitale v. Henchey, Ky., 24 S.W.3d 651, 658 (2000). Consent may be express, implied, or presumed. Pugsley v. Privette, 263 S.E.2d 69, 74 (Va. 1980).

Rather than risk being led astray by the subtleties and nuances urged by the parties, we are of the opinion that this case is best reviewed if our focus is limited to the undisputed facts. These facts, in our view, are dispositive.

Hoofnel is a 56 year-old post-menopausal patient who was diagnosed as having a lesion in her lower rectum called a giant rectal villous adenoma. The undisputed medical testimony is that this is a type of colon polyp which is very likely to

[11] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

turn into cancer.[12] Hoofnel's colon tumor was located on the front wall of her rectum directly adjacent to her uterus. Hoofnel's uterus was swollen to two times the size of a normal uterus for a 56 year-old woman and had multiple fibroid tumors visible on it. Upon viewing the swollen uterus, Dr. Galandiuk was concerned that the organ may be cancerous. Moreover, in order to remove the colon polyp without complications, it was necessary to remove the uterus. Under these circumstances, even without the explicit consent provided for in the consent form, it seems to us that no reasonable 56-year-old post-menopausal patient would have refused consent to removal of the badly swollen and potentially cancerous uterus, and that there was implied, or presumed, consent to undertake the removal.

Further, Dr. Galandiuk testified to the effect that the removal of the ovaries in a female patient with rectal cancer is important because there is a 25% greater likelihood of the patient dying from cancer if the ovaries are left in place. In addition, the uterus, which Dr. Galandiuk was concerned was infested with cancer, was in close proximity to the ovaries, leading to the further concern that cancer could spread to the ovaries. Again, in light of the suspected cancer, under these facts no reasonable patient would have refused consent to having

[12] Hoofnel is a long-time smoker who had previously been diagnosed with lung cancer. However, when the lung tumor was removed it was found to be nonmalignant.

her ovaries removed in consideration that such consent would have been in her overwhelming best interest. Again, under these circumstances we believe that there was implied or presumed consent to the removal of the ovaries.

Based upon the foregoing, under the circumstances of this case, in addition to giving express consent to "perform such additional procedures as are deemed necessary in their professional judgment," we also are of the opinion that Hoofnel gave her implied consent to remove the potentially deadly uterus and ovaries which were, it is conceded, of no utility and a danger or a potential danger. Our disposition is supported by the exception to actual consent identified in Tabor v. Scobee, Ky., 254 S.W.2d 474, 477 (1951).

In Tabor a surgeon was sued because in the course of performing an appendectomy on the plaintiff, a minor 20 years of age, he removed the patient's fallopian tubes because the tubes were in a diseased condition and, in the physician's judgment, if the tubes were not removed the patient's life and health would be endangered. The surgeon did not obtain the consent of the patient's stepmother even though she was available at the time. The Tabor opinion held that there was not implied consent to remove the plaintiff's fallopian tubes:

> The evidence offered does not justify the conclusion as a matter of law that there existed an emergency of such immediate

> urgency as to justify the removal of the tubes without the consent of the patient or her stepmother. The evidence indicated that removal of the tubes probably would be necessary soon, that their remaining in the body in their swollen and infected condition was dangerous, but it did not establish that their removal was an emergency in the sense that death would likely ensue immediately if the tubes were not removed. Moss v. Rishworth, Tex.Com.App., 222 S.W. 225. Although delay in their removal might have proved harmful, even fatal, there still was time to give the parent and the patient the opportunity to weigh the fateful question. Had she been operated upon originally for the removal of her Fallopian tubes and the surgeon also removed an inflamed appendix without her consent during the operation, we would be inclined to agree with the decision of the New Jersey Court in Barnett v. Bachrach, D.C.Mun.App., 34 A.2d 626, that consent to the removal of the appendix was implied, on the ground there given--that the appendix was generally considered by scientists to be of no utility and a danger or potential danger.

At the time of the operation in this case Hoofnel was 56 years-old, post-menopausal, and the mother of three grown children. She was suspected of having a cancerous polyp on her colon. The undisputed medical evidence is that Hoofnel's uterus and ovaries were of no further utility. It is apparent from the appellees' depositions that the presence and spread of cancer was the predominate concern. Let us suppose that the appellees acted not as they did, and that the cancer concerns identified by Drs. Galandiuk and Segal had reached fruition. Would we

instead now be reviewing the appellants' medical malpractice lawsuit against the appellees' for their failure to remove the seeds of cancer?

"The law should encourage self-reliant surgeons to whom patients may safely entrust their bodies, and not men who may be tempted to shirk from duty for fear of a law suit. The law does not insist that a surgeon shall perform every operation according to plans and specifications approved in advance by the patient, and carefully tucked away in his office-safe for courtroom purposes." Barnett v. Bacharch, supra, 34 A.2d at 629. This is especially true when the issue is cancer.

Cancer, of course, is a most dreaded disease. It is beyond cavil that proper treatment admits of no delay.

Under the "Catch-22" circumstances of this case, the appellees were entitled to summary judgment.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS IN RESULT.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE DISSENTING: Since I believe that there exists a genuine issue as to a material fact regarding whether Hoofnel consented in fact to undergoing a hysterectomy and/or an oophorectomy, I must respectfully dissent.

The Majority Opinion states that "in light of the suspected cancer" on and around the area of Hoofnel's uterus and ovaries, "no reasonable patient would have refused consent to having her ovaries removed in consideration that such consent would have been in her overwhelming best interest."[13] However, as I will explain, whether or not a reasonable person would have consented to the procedures and whether or not the procedures were in Hoofnel's best interest are not the proper inquiries. Rather, the appropriate standard is whether or not Hoofnel consented in fact to undergoing the procedures at issue. This, in my opinion, involved questions of fact which necessarily precluded the entry of summary judgment in favor of Dr. Galandiuk and Dr. Segal.[14]

In Kovacs v. Freeman,[15] our Supreme Court explained that "valid consent to medical treatment is to be gleaned from evidence of the circumstances and discussions surrounding the consent process." The Court went on to discuss some basic principles regarding consent to medical treatment:

> Fay A. Rozovsky's legal treatise on consent in medical settings provides a starting point for discussion. Consent to Treatment (2d ed. 1990). Rozovsky explains the legal premise that consent depends not only on the written consent document, but

[13] Slip op. at 9-10.

[14] Steelvest, 807 S.W.2d at 481.

[15] Ky., 957 S.W.2d 251, 255 (1997).

also on the actual discussion between physician and patient:

> Many people think of consent to treatment as a form. Consent is equated in their minds with the document through which patients agree to procedures their physician believes are advisable or necessary. Such a definition is incorrect and misleading, and in some instances can be dangerous [citation omitted].
>
> . . .
>
> Consent is a process, not a document. Authorization for treatment is the culmination of a discussion between a patient and a health care provider, the disclosure of risk and benefit information, the disclosure of reasonable alternative forms of care, and the posing of questions and answers by both the patient and the provider. Once the patient has agreed to a specific course of treatment, the process is over. . . . The documentation, the so-called consent form, is not the consent, for that lies instead in the conclusion of the discussion between the patient and the physician.[16]

Furthermore, in Lewis v. Kenady,[17] the Supreme Court stated that even though the patient in Lewis had signed a

[16] Id. at 254.

[17] Ky., 894 S.W.2d 619, 620-22 (1994).

written consent form authorizing a mastectomy, she was nonetheless entitled to introduce evidence of an alleged oral agreement which purportedly conditioned the performance of the mastectomy upon a positive biopsy result.

Hence, in cases where actual consent is at issue,[18] the question is whether, under the totality of the circumstances, that particular patient consented in fact to undergoing a particular procedure. Whether or not the so-called "reasonable person" in Hoofnel's position would have consented is not the relevant inquiry, since "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body[.]"[19]

In the case at bar, as the Majority Opinion has noted, there was conflicting evidence with respect to whether Hoofnel consented in fact to undergoing a hysterectomy and/or an oophorectomy. For example, Dr. Galandiuk testified that prior to beginning Hoofnel's surgery, she believed that Hoofnel had

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[18] This should not be confused with cases where the issue is whether or not a patient has given her informed consent to having a particular procedure performed. In informed consent cases, the question is whether or not a physician has adequately disclosed the risks and/or hazards associated with undergoing a certain procedure. An action brought on lack of informed consent grounds brings negligence principles into play, which requires expert testimony. However, an action for battery which alleges that a patient never in fact consented to undergoing a particular procedure involves a question of fact, i.e., did the patient in fact consent to the procedure? Expert testimony is therefore not required when pursuing a battery claim. For a discussion of these principles, see Vitale v. Henchey, Ky., 24 S.W.3d 651 (2000).

[19] Tabor, 254 S.W.2d at 475.

consented to undergoing colon surgery, an appendectomy, a hysterectomy if necessary, and an oophorectomy. However, Hoofnel has steadfastly denied that she ever consented to undergoing either a hysterectomy or an oophorectomy. Therefore, since there is conflicting evidence in the record regarding whether Hoofnel consented in fact to the procedures in question, summary judgment in favor of Dr. Galandiuk and Dr. Segal was improper.

In addition, the Majority's conclusion that the removal of Hoofnel's uterus and ovaries "would have been in her overwhelming best interest" does not preclude Hoofnel from bringing a claim for battery. Absent an emergency situation in which a patient's consent to medical treatment may be implied,[20] if the patient has not consented in fact to the procedure at issue, she may pursue a claim for battery even though the procedure proved to be beneficial to her health.[21] In the instant case, Dr. Segal testified that the oophorectomy and hysterectomy were not emergency procedures necessary to save Hoofnel's life, and there was no evidence presented to the contrary. Thus, since the doctrine of implied consent is not

[20] Id. at 477 (1951)(stating the general rule that consent to medical treatment must be obtained absent an emergency situation).

[21] Vitale, 24 S.W.3d at 658, n.28 (citing Restatement (Second) of Torts § 15, comment a, ill. 1 (1965)(stating that a physician's removal of a wart, although beneficial to the patient, constitutes a battery if it is done without the consent of the patient).

applicable, the factual question of whether Hoofnel consented to undergoing a hysterectomy and/or an oophorectomy remains. Accordingly, summary judgment in favor of Dr. Segal and Dr. Galandiuk was improper.

Finally, the Majority relies upon the following language from Tabor:

> The evidence offered does not justify the conclusion as a matter of law that there existed an emergency of such immediate urgency as to justify the removal of the tubes without the consent of the patient or her stepmother. The evidence indicated that removal of the tubes probably would be necessary soon, that their remaining in the body in their swollen and infected condition was dangerous, but it did not establish that their removal was an emergency in the sense that death would likely ensue immediately if the tubes were not removed. Although delay in their removal might have proved harmful, even fatal, there still was time to give the parent and the patient the opportunity to weigh the fateful question. Had she been operated upon originally for the removal of her Fallopian tubes and the surgeon also removed an inflamed appendix without her consent during the operation, we would be inclined to agree with the decision of the New Jersey Court in Barnett v. Bachrach, D.C.Mun.App., 34 A.2d 626, that consent to the removal of the appendix was implied, on the ground there given--that the appendix was generally considered by scientists to be of no utility and a danger or potential danger [citation omitted].[22]

The Majority states that since "[t]he undisputed medical evidence is that Hoofnel's uterus and ovaries were of no

[22] Tabor, 254 S.W.2d at 476-77.

further utility[,]"[23] Dr. Galandiuk and Dr. Segal were justified in using their best medical judgment to make the decision to remove Hoofnel's uterus and ovaries. I disagree.

Dr. Segal testified that when post-menopausal women undergo hysterectomies, some experience an increase in their sex drive, some experience no change, and some experience a decrease in sex drive. In addition, when asked whether an oophorectomy would have an impact upon a post-menopausal woman's sex drive, Dr. Segal stated "nobody knows." Further, Hoofnel testified that after her surgery, sex with her husband was "painful," and that she had lost some physical sensation in the area of her genitals. Obviously, both of these factors had a negative impact on Hoofnel's sex life.

Hence, the overall utility of Hoofnel's uterus and ovaries was, in my opinion, a disputed question of fact. Therefore, as was stated in Tabor, while the removal of Hoofnel's uterus and ovaries was probably inevitable, Dr. Galandiuk and Dr. Segal were not faced with an emergency situation in which the need to remove those organs was immediate. Accordingly, "[a]lthough delay in their removal might have proved harmful, even fatal, there still was time to give [Hoofnel] the opportunity to weigh the fateful question."[24]

[23] Slip Op. at 11.
[24] Id. at 477.

I would therefore reverse the trial court's granting of summary judgment in favor of Dr. Galandiuk and Dr. Segal, and remand this matter for a jury trial on the issue of consent.

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