

User Name: DOREEN LUNDRIGAN
Date and Time: 11/11/2013 2:02 PM EST
Job Number: 6148476

Document(1)

1. Kapsch v. Stowers, 209 Ga. App. 767

Client/matter: -None-



Caution

As of: November 11, 2013 2:02 PM EST

Kapsch v. Stowers

Court of Appeals of Georgia

July 13, 1993, Decided

No. A93A0827

Reporter: 209 Ga. App. 767; 434 S.E.2d 539; 1993 Ga. App. LEXIS 994; 93 Fulton County D. Rep. 2757

KAPSCH et al. v. STOWERS et al.

Subsequent History: [***1] Reconsideration Denied July 29, 1993.

Prior History: Medical malpractice. Cobb State Court. Before Judge Ingram.

Disposition: *Judgment affirmed.*

Core Terms

trial court, brachial, plexus, medical malpractice case, standard of care, nerve, medical malpractice, expert testimony, defense counsel, deviation, retractor

Case Summary

Procedural Posture

Defendants, doctor and surgical group, appealed a judgment, after a jury trial, of the Cobb State Court (Georgia), which awarded damages to plaintiffs, patient and husband, in a medical malpractice case and denied defendants' motion for a new trial.

Overview

The day after the doctor performed surgery on the patient to relieve blockages in two of her arteries, the patient reported pain, loss of sensation and loss of use in her left neck, shoulder and arm. Subsequent exploratory surgery was performed by a neurological surgeon which revealed scarring in the patient's left brachial plexus. At trial, the neurological expert testified that the failure of the doctor to protect the patient's left brachial plexus was a deviation from the proper standard of care. Another expert physician testified that the type of injury sustained by the patient was avoidable and never should have occurred. A jury awarded damages to plaintiffs and the trial court denied defendants' motion for a new trial and entered a judgment in accordance with the jury's verdict. On appeal, the court affirmed the judgment of the trial court. The court ruled that the trial court properly denied defendants' motions for a directed verdict as well as judgment notwithstanding the verdict because

the expert testimony and circumstantial evidence presented by plaintiffs defeated defendants' claim that the evidence demanded a verdict in their favor.

Outcome

The court affirmed the judgment of the trial court awarding damages in favor of the patient and her husband against defendants. The court ruled that the trial court did not err in denying defendant's motion for a new trial.

LexisNexis® Headnotes

Evidence > ... > Testimony > Expert Witnesses > General Overview
Torts > Malpractice & Professional Liability > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > ... > Proof > Res Ipsa Loquitur > General Overview
Torts > ... > Standards of Care > Special Care > Highly Skilled Professionals

HN1 Res ipsa loquitur is not applicable in medical malpractice cases in Georgia. In a medical malpractice case, the general rule is that medical testimony must be introduced to inform the jurors what is a proper method of treating the particular case. The jury must have a standard measure which they are to use in measuring the acts of the doctor in determining whether he exercised a reasonable degree of care and skill. Expert testimony must also set forth how or in what way the defendant deviated from the parameters of the acceptable professional conduct.

Evidence > Types of Evidence > Circumstantial Evidence
Evidence > Admissibility > Circumstantial & Direct Evidence
Evidence > Types of Evidence > Testimony > General Overview
Evidence > Admissibility > Expert Witnesses > Ultimate Issue
Torts > Malpractice & Professional Liability > General Overview
Torts > Malpractice & Professional Liability > Healthcare Providers
Torts > Negligence > Proof > General Overview
Torts > ... > Proof > Evidence > Province of Court & Jury

HN2 Negligence, like any other fact, may be proved by circumstantial evidence as well as by direct testimony. Although expert opinion testimony may be required in a medical malpractice case to prove the applicable standard of care and a breach thereof, the court is aware of no rule which prevents circumstantial evidence from be-

ing used to prove those facts upon which the expert relies in formulating his opinion that such negligence occurred. It is for the jury to determine whether the facts upon which the expert bases his opinion do exist and, if so, whether the expert's opinion that those facts constituted medical malpractice should be accepted. In determining medical malpractice, the jury may consider all the attendant facts or circumstances which may throw light on the ultimate question. And where, measured by the method shown by medical witnesses to be negligence, the evidence shows a bad result, it is the province of the jury to say whether the result was caused by negligence.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

HN3 A motion for judgment notwithstanding the verdict may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. Where there is conflicting evidence, or there is insufficient evidence to make a "one-way" verdict proper, a judgment notwithstanding the verdict should not be awarded. In considering the motion, the court must view the evidence in the light most favorable to the party who secured the jury verdict. And this approach governs the actions of appellate courts as well as trial courts.

Civil Procedure > Judgments > Relief From Judgments > New Trials

HN4 When the latitude allowed by the trial court is such that no harmful effect results to either party, a new trial will not be granted.

Counsel: Downey, Cleveland, Parker, Williams & Davis, Russell B. Davis, W. Curtis Anderson, for appellants.

Jean E. Johnson, Jr., Lance A. Cooper, for appellees.

Judges: Pope, Chief Judge. Birdsong, P. J., and Andrews, J., concur.

Opinion by: POPE

Opinion

[*767] [540]** Plaintiffs/appellees Marjorie and Thomas Stowers filed a medical malpractice and loss of consortium action against defendants Donald M. Kapsch, M. D. and Peachtree General & Vascular Surgical Group, P. C., after Marjorie Stowers was allegedly injured during an operation performed by Dr. Kapsch. The jury returned a verdict for plaintiffs, and defendants filed a motion for j.n.o.v., or in the alternative, for new trial. The trial court denied defendants' motions and they filed the present appeal to this court.

1. Defendants first contend the trial court erred in denying their motions for directed verdict and for j.n.o.v. because the record shows that plaintiffs improperly relied on the doctrine of *res ipsa loquitur* to prove their medical malpractice claim and because plaintiffs' [***2] expert witnesses failed to state with particularity how Marjorie Stowers' (hereafter plaintiff) injury occurred.

HNI "*Res ipsa loquitur* is not applicable in medical malpractice cases in Georgia. 'In a medical malpractice case, "the general rule is that medical testimony must be introduced to inform the jurors what is a proper method of treating the particular case. 'The . . . jury must have a *standard* measure which they are to use in measuring the acts of the doctor in determining whether he exercised a reasonable degree of care and skill.'" (Cits.)' *Horney v. Lawrence*, 189 Ga. App. 376, 377 (2) (375 S.E.2d 629) (1988). Expert testimony must also set forth how or in what way the defendant deviated from the parameters of the acceptable professional conduct. *Loving v. Nash*, 182 Ga. App. 253 (1) (355 S.E.2d 448) (1987)." *Austin v. Kaufman*, 203 Ga. App. 704, 705 (1) (417 S.E.2d 660) (1992).

[541]** The record in this case shows that Dr. Kapsch performed a left subclavian bypass and left carotid endarterectomy on plaintiff in order to relieve blockages in her subclavian artery and left internal carotid artery. The day following the surgery plaintiff reported pain, [***3] [**768] loss of sensation and loss of use in her left neck, shoulder and arm. Dr. Kapsch referred plaintiff to Dr. Joseph Barnett, a neurological surgeon, for diagnosis and treatment. After plaintiff's symptoms did not abate over time, Dr. Barnett performed an exploratory operation which, according to Dr. Barnett's deposition testimony at trial, revealed scarring and a "kink" in the upper trunk of plaintiff's left brachial plexus, a network of nerves running out of the spinal column to the arm.

Defendants do not dispute the evidence shows plaintiff suffered an injury to the left brachial plexus, but argue that plaintiffs' experts relied on the fact of the injury alone to establish defendants' negligence. Plaintiffs presented expert testimony from three doctors as to defendants' negligence in this case. Dr. Barnett testified on direct examination that although the procedures performed by Dr. Kapsch were successful, the failure to protect the brachial plexus from injury was a deviation from the standard of care. Dr. Barnett opined that the "kink" he observed in the trunk of the brachial plexus "was most likely due to instrumentation in that area and most likely due to retraction [***4] as may have been necessary to expose other structures." Dr. McKoy Rose testified that it is "unacceptable" for an injury to occur to the brachial plexus during the type of surgery performed here, and that the injury plaintiff suffered in this case is not a "risk" of the procedure. Dr. Rose also testified that based on the type of kink observed in the nerve it was his opinion that pressure, most likely from a retractor, had

been placed on the nerve during the operation and that there had been a deviation from the standard of care in this case. Dr. Sheldon Burman gave similar testimony. He testified that this type of injury was "an avoidable complication" which should never occur. Dr. Burman further testified that the injury was due to direct trauma, probably from a retractor, which occurred while the patient was on the operating table.

We find no error in the denial of defendants' motions for directed verdict and j.n.o.v. Plaintiffs presented expert testimony that the scarring and "kink" in the brachial plexus was not a usual or accepted risk of the type of procedure performed here, that such an injury was the result of some sort of trauma to the nerve during the operation, and [***5] that the surgeon's failure to protect the nerve from injury during the procedure constitutes a deviation from the applicable standard of care. Moreover, although it is true, as defendants contend, that plaintiffs' experts could not be certain that the injury was caused by the improper placement of a retractor during the procedure, and that Dr. Kapsch and the assisting surgeon testified and denied that a retractor was placed on the nerve during the operation, the expert testimony was clear that a "direct trauma" to plaintiff's brachial plexus had occurred while plaintiff was on the operating table, and that based on [*769] the type of injury observed, it was most likely caused by the improper placement of a retractor during the operation. Cf. [Loving v. Nash, supra](#).

HN2 "Negligence, like any other fact, may be proved by circumstantial evidence as well as by direct testimony. Although expert opinion testimony may be required in a medical malpractice case to prove the applicable standard of care and a breach thereof, we are aware of no rule which prevents circumstantial evidence from being used to prove those facts upon which the expert relies in formulating his opinion that [***6] such negligence occurred. It is for the jury to determine whether the facts upon which the expert bases his opinion do exist and, if so, whether the expert's opinion that those facts constituted medical malpractice should be accepted. In determining medical malpractice, the jury may consider *all* the attendant facts or circumstances which may throw light on the ultimate question. . . . And where, measured by the method shown by medical witnesses [**542] to be negligence, the evidence shows a bad result, it is the province of the jury to say whether the result was caused by negligence." [Austin v. Kaufman, 203 Ga. App. at 706](#).

HN3 "[A] motion for judgment n. o. v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. Where there is conflicting evidence, or there is insufficient evidence to make a "one-way" verdict proper, judgment n. o. v. should not be awarded. In considering the motion, the court must view the evidence in the light most favorable to the party who se-

cured the jury verdict. And this approach governs the actions of appellate courts as well as trial courts."

[***7] (Citations and punctuation omitted.) [Famiglietti v. Brevard Medical &c., 197 Ga. App. 164 \(1\) \(397 S.E.2d 720\) \(1990\)](#). We cannot say that the evidence demanded a verdict for defendants in this case. It follows that the trial court did not err in denying defendants' motion for j.n.o.v. [Austin v. Kaufman, 203 Ga. App. at 707](#).

2. Defendants also argue that the trial court erred in denying their motion in limine which would have prevented plaintiffs' attorney from arguing to the jury that, at the time Dr. Barnett gave his deposition which was introduced into evidence at trial, he was represented by defense counsel in connection with another matter. The transcript shows that counsel for both parties mentioned during their opening statements to the jury that Dr. Barnett was represented by defense counsel at the time his deposition was taken, and that defense counsel admitted he represented Dr. Barnett at that time. However, plaintiffs did not introduce any evidence proving the representation during trial, and prior to closing arguments defendants moved to exclude any reference to defense counsel's representation of Dr. Barnett during closing argument. See [O.C.G.A. § 9-10-185](#). Plaintiffs' [***8] counsel [***770] informed the court that it had been prepared to introduce evidence on this issue, but did not because defense counsel had admitted the representation during his opening remarks to the jury. The trial court ruled that it would give plaintiffs' counsel "a little leeway" and that counsel could mention the fact of representation to the jury but that any argument beyond that would be unfair to the defendants because no evidence had been presented. Plaintiffs' counsel mentioned the representation during his closing remarks, and attempted also to argue what effect the representation might have had on the witness' testimony. Defense counsel objected at this point and the court responded "All right. Go ahead." Plaintiffs' counsel then resumed his argument, but made no further mention of opposing counsel's representation of the witness.

Based on the foregoing, we conclude the trial court properly exercised its discretion in this case to ensure the proceedings were fairly conducted to both sides.

HN4 "[T]he latitude allowed . . . was such that no harmful effect resulted to either [party]. Accordingly, a [new trial] will not be granted on this ground." [Ga. Northern \[***9\] R. Co. v. Hathcock, 93 Ga. App. 72, 75 \(3\) \(91 S.E.2d 145\) \(1955\)](#).

3. Contrary to defendants' contention otherwise, the trial court did not err by combining defendants' request to charge numbers 11 through 14 on unfavorable results. See [Smoky, Inc. v. McCray, 196 Ga. App. 650 \(5\) \(396 S.E.2d 794\) \(1990\)](#). Moreover, we agree that a charge on hindsight was not authorized by the evidence in this case and thus the trial court did not err by refusing to give defendants' request to charge on hindsight as they con-

209 Ga. App. 767, *770; 434 S.E.2d 539, **542; 1993 Ga. App. LEXIS 994, ***9

tend. [McCoy v. Alvista Care Home](#), 194 Ga. App. 599 (391 S.E.2d 419) (1990).

4. (a) The trial court did not err in qualifying the jury as to defendants' liability insurance carrier. [Weatherbee v. Hutcheson](#), 114 Ga. App. 761 (1) (152 S.E.2d 715) (1966).

(b) Defendants also urge as error the denial of their motion for mistrial after one of plaintiffs' experts made reference to malpractice insurance rates. The record shows,

however, that the complained of [**543] testimony was elicited on cross-examination by defendants and that, contrary to defendants' assertions on appeal, the witness' answer was responsive to the question asked. This enumeration is, therefore, [***10] without merit.

5. Based on the foregoing, the trial court did not err in denying defendants' motion for new trial.

Judgment affirmed.