

[J-156-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

KEVIN TOOGOOD,	:	Nos. 11 & 12 EAP 2002
	:	
Appellee	:	Appeal from the Order of Superior Court
	:	entered at No. 1561 EDA 1999 on
	:	November 15, 2000 (reargument denied
v.	:	on January 18, 2001) affirming the
	:	Judgment of the Court of Common Pleas,
	:	Civil Division, of Philadelphia County,
OWEN J. ROGAL, D.D.S., P.C., AND	:	entered June 10, 1999 at No. 1776
OWEN J. ROGAL, D.D.S., INDIVIDUALLY:	:	November Term 1995.
AND D/B/A THE PAIN CENTER AND	:	
HRANT STONE, M.D., BY THOMAS	:	
STONE, EXECUTOR OF THE ESTATE	:	
OF HRANT STONE, M.D.,	:	ARGUED: October 22, 2002
	:	
Appellants	:	

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MADAME JUSTICE NEWMAN

DECIDED: May 29, 2003

In a medical malpractice action, a jury awarded Kevin Toogood (Appellee or Mr. Toogood) the sum of \$465,000.00. This Court granted allowance of appeal to decide whether the Court of Common Pleas of Philadelphia County (trial court) erred in failing to grant the Motions of Appellants¹ for nonsuit and/or directed verdict based upon the absence of expert liability evidence to establish medical malpractice.

¹ Appellants in this case are Owen J. Rogal, D.D.S. (Dr. Rogal), individually and doing business as The Pain Center, and Hrant Stone, M.D. (Dr. Stone), by Thomas Stone, Executor of the Estate of Hrant Stone, M.D. Dr. Rogal and The Pain Center are identified individually and collectively referred to as the "Rogal Defendants."

FACTS AND PROCEDURAL HISTORY

Mr. Toogood was involved in two automobile accidents. The first occurred in 1989 and the second in 1992. In the 1992 accident, he sustained injuries to his head, jaw, back, and shoulder. By August of 1993, the residual pain from his injuries was so severe he said that he "wanted to die." Despite the fact that he was treated by several physicians and prescribed strong medication, the pain continued. In August of 1993, upon referral by one of his physicians, Mr. Toogood began to visit Dr. Rogal, a dentist, for treatment of jaw pain. These visits occurred at The Pain Center, a multi-disciplinary medical center that is owned primarily by Dr. Rogal. While at The Pain Center for treatment of his jaw pain, Mr. Toogood also received paravertebral nerve block² injections from Dr. Stone, a consulting anesthesiologist at The Pain Center, for treatment of severe back, shoulder, and neck pain.

On December 13, 1993, Mr. Toogood received four paravertebral nerve block injections from Dr. Stone. After receiving the final injection, Mr. Toogood felt pain, experienced difficulty breathing, and remained at The Pain Center for a short time before driving himself home. While at home, he collapsed and was taken to The Chester County Hospital complaining of breathing difficulties. At the hospital, he was treated by William Dellevigne, M.D. (Dr. Dellevigne), who diagnosed and repaired a pneumothorax.³ Mr. Toogood fully recovered from the injury and, as Dr. Dellevigne recalled, he never returned for a follow-up visit. The hospital charges for his treatment totaled \$15,333.00, and,

² A paravertebral nerve block is an injection of a substance into a nerve along the vertebral column to arrest the passage of the nervous impulse. See Stedman's Medical Dictionary, 178, 1031 (26th ed. 1995).

³ A pneumothorax, commonly called a collapsed lung, involves the "presence of air or gas in the pleural cavity," which can impair respiratory function. Id. at 1111.

because Appellee had not worked since the 1992 car accident, the pneumothorax and his resulting hospitalization did not cause him to incur lost wages.

Mr. Toogood filed a complaint against Dr. Stone and the Rogal Defendants on February 21, 1996. The complaint alleged claims of negligence and battery against Dr. Stone and asserted direct and vicarious liability claims against the Rogal Defendants. Prior to trial, Mr. Toogood withdrew the claims of direct liability and proceeded against the Rogal Defendants solely on the basis of vicarious liability.

On February 23, 1996, two days after the filing of the instant action and before he could be deposed, Dr. Stone died and Appellant, Thomas Stone, the executor of Dr. Stone's estate, was substituted as a defendant. The only other person in the room at the time of the nerve block injection was Dr. Stone's son, Richard Stone, a nurse anesthetist. He also died before his deposition could be taken.

The trial judge precluded Appellee from presenting expert medical testimony at trial because he failed to submit the report of his medical expert in a timely manner. Appellants then verbally requested a grant of summary judgment due to the absence of expert medical testimony. However, because Appellee asserted that he could establish a *prima facie* case by application of the doctrine of *res ipsa loquitur*, he was allowed to proceed to trial only on that basis.

Further, as a result of the deaths of Dr. Stone and his son, Dr. Stone's estate filed a motion for summary judgment asserting that, pursuant to the Dead Man's Act, 42 Pa.C.S. § 5930, no adverse testimony could be offered against Dr. Stone and that, because Appellee failed to provide expert testimony necessary to establish a *prima facie* case of medical negligence, Appellee would be unable to succeed. This motion was uncontested and, by Order dated September 2, 1997, the trial judge granted the motion and dismissed all claims against Dr. Stone, except the cross-claim of the Rogal Defendants against Dr. Stone for contribution.

At trial, testimony was received from Appellee and Dr. Rogal, and video deposition testimony from Dr. Dellevigne was presented. The trial court then allowed the case to go to the jury with a *res ipsa loquitur* instruction without expert testimony as to the standard of care, over the objection of the Rogal Defendants.

On October 23, 1998, the jury rendered a verdict in favor of Mr. Toogood and against the Rogal Defendants in the amount of \$465,000.00. Appellants filed timely post trial motions for a new trial, remittitur, and judgment *non obstante veredicto*, which the trial judge denied.

The Superior Court affirmed the decision of the trial court in a published opinion. Toogood v. Rogal, 764 A.2d 552 (Pa. Super. 2000), petition for allowance of appeal granted in part, 791 A.2d 1154 (Pa. 2002). The Rogal Defendants asserted on appeal to the Superior Court that Appellee's case of medical malpractice should not have been permitted to proceed to the jury without expert testimony on negligence, particularly the standard of care. They also argued that, because Dr. Stone had been dismissed from the case, they should have been granted a dismissal, remittitur, or a new trial.

The Superior Court found that the trial judge properly granted summary judgment in favor of Dr. Stone based on the Dead Man's Act. The court outlined the elements of a *prima facie* case of medical malpractice, but concluded that the doctrine of *res ipsa loquitur* permits a jury to infer the existence of negligence and causation where the injury at issue is one that does not ordinarily occur in the absence of negligence. Citing to this Court's recent decision in Hightower-Warren v. Silk, 698 A.2d 52 (Pa. 1997),⁴ as well as decisions from other jurisdictions that the panel considered to be analogous,⁵ the Superior Court determined that

⁴ In Hightower-Warren, a plaintiff who suffered injury to his vocal cords during thyroid surgery was deemed to have properly invoked the doctrine of *res ipsa loquitur*.

⁵ See Bardessono v. Michels, 478 P.2d 480, 487 (Cal. 1970) (observing that "the giving and receiving of injections and the lack of nerve injury therefrom ordinarily has become a matter (continued...)

Appellee met the elements essential to his burden of proof. The court also cited the opinion in Hightower-Warren to support its determination that, when a patient receives an injection, it is within the common knowledge of laypersons to know that a collapsed lung happens only because of negligence.

Finally, the Superior Court rejected the claim of the Rogal Defendants that they should have been dismissed from the case upon Dr. Stone's dismissal and concluded that the Rogal Defendants had confused a valid defense of immunity with the defense of release and satisfaction and "evidence[d] a profound misapprehension of the nature of the vicarious liability of a principal for the tortious acts of his agent." Toogood, 764 A.2d at 559.

(...continued)

of common knowledge"); Killingsworth v. Poon, 307 S.E.2d 123, 126 (Ga. Ct. App. 1983) ("it is widely known . . . that subcutaneous injections ostensibly given only for the relief of muscular pain should not, if administered correctly, result in the puncture of internal organs"); Baker v. Chastain, 389 So.2d 932, 934 (Ala. 1980) (a scintilla of evidence to support a theory of negligence can get a case to the jury); Stumph v. Foster, 524 N.E.2d 812, 815 (Ind. Ct. App. 1988) (concluding that expert testimony is not required to establish the requisite standard of care to survive summary judgment because laypersons are competent to infer a doctor's negligence where he broke the patient's rib in rendering chiropractic care). But see Cherokee County Hosp. Auth. v. Beaver, 345 S.E.2d 904, 906 (Ga. Ct. App. 1986) (holding that evidence that the patient developed pain radiating down her leg following an injection was insufficient, without expert medical testimony, to find that the injection was negligently given); 45 A.L.R. 731, 739 (1972) (noting that "in situations where a patient sustained an injury after an injection[,] the courts have usually refused to apply the doctrine of res ipsa loquitur [because] the full spectrum of possible consequences from the giving of a shot were not within the layman's common knowledge . . . the courts thus holding that at least a minimum showing by expert testimony was generally required that there had been some variance from recognized standards of care . . .").

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