

IN THE COURT OF APPEALS OF TENNESSEE  
EASTERN SECTION AT KNOXVILLE

**FILED**

October 23, 1996

**Cecil Crowson, Jr.**  
Appellate Court Clerk

MICHELLE COURTEMANCHE and )  
JOHN COURTEMANCHE, )

SEVIER CIRCUIT

Plaintiffs/Appellees )

No. 03A01-9603-CV-00110

v. )

DR. PAUL RIVARD and KNOXVILLE )  
PODIATRY GROUP, )

AFFIRMED AND REMANDED

Defendants/Appellants )

Martin L. Ellis and Vonda M. Laughlin, Knoxville, For the Appellants

James H. Ripley, Sevierville, and John K. Harber, Knoxville, For the Appellees

**OPINION**

INMAN, Senior Judge

This is a Rule 9 appeal from a judgment denying a motion for summary judgment.

The plaintiffs allege that the defendant, a podiatrist, performed an unauthorized, unnecessary operation on the great toe of the left foot of Mrs. Courtemanche, thus committing an assault and battery upon her.

In their amended complaint, the plaintiffs alleged various acts of negligence by the defendant. As the case developed, they abandoned all allegations of negligence and, as stated, now claim only that the defendant fabricated a diagnosis and committed an assault and battery upon Ms. Courtemanche in performing an unnecessary operation without her informed consent.

The alleged fabricated diagnosis was the presence of a bone spur under the toenail secondary to an ingrown toenail, as allegedly revealed by x-ray examination.

The defendant denied that he failed to obtain the informed consent of Mrs. Courtemanche or that he committed an assault and battery on her. He moved for summary judgment, contending that his diagnosis and treatment of Mrs. Courtemanche did not fall below the acceptable standard of care exercised by podiatrists practicing in Sevier County and filed his affidavit accordingly.

The plaintiffs relied upon the testimony of Dr. Steven Smith, orthopedic surgeon, and Dr. Monte Broom, radiologist, to countervail the affidavit of the defendant. They also filed the discovery depositions of the defendant, who testified that Mrs. Courtemanche signed a consent to surgery form, but he was unable to produce this form.

Dr. Smith testified that Mrs. Courtemanche did not suffer from the condition diagnosed by the defendant and that the pre-operative x-rays taken by the defendant reveal nothing more than normal anatomy, with no justification for surgery. Dr. Broom reviewed the x-rays and testified that Mrs. Courtemanche did not suffer from the condition diagnosed by the defendant and that surgery was unjustified.

Neither Dr. Smith nor Dr. Broom professed knowledge of the standard of care to be exercised by podiatrists generally. The defendant admitted that there is no difference in the standard of radiographic interpretation between podiatrists and medical doctors.

The trial judge overruled the motion for summary judgment, and we accepted the defendant's interlocutory appeal. The appellant contends that both of the plaintiffs' experts conceded that they were not familiar with the acceptable standard of care to be exercised by podiatrists and, therefore, his supported motion is well-taken. The plaintiffs contend that the issue is lack of informed consent, hence, an assault and battery, determinable, in material part, by x-ray examination and since their experts, as well as the defendant, testified that the principles of radiographic

interpretation is the same as between podiatrists and medical doctors, the requirements of T.C.A. § 29-26-115 are satisfied.

A plaintiff in a medical malpractice case has the burden of proving by expert testimony the recognized standard of acceptable professional practice in the specialty in which the defendant practices. T.C.A. § 29-26-115(a). The expert witness must be familiar with the standard of care of the specialist and be able to give relevant testimony on that subject. *Goodman v. Phytheon*, 803 S.W.2d 697 (Tenn. Ct. App. 1990).<sup>1</sup>

Whether Mrs. Courtemanche gave her informed consent to the surgery is seriously contested. The defendant says that she consented, but on two occasions he was unable to produce any written consent to surgery. If she did not consent or if her consent was fraudulently obtained, the defendant perpetrated an assault and battery upon her. This is familiar law. To support her assertion of lack of informed consent, she offered the testimony of an orthopedic specialist and a radiologist that the pre-operative x-rays revealed no pathology in her toe, and the admission of the defendant that there is no difference in the standard of radiographic interpretation between podiatrists and medical doctors.

Whether the pre-operative x-rays revealed bone-spurring or not is at the core of this case. If the x-rays revealed no spurring, and this fact was not revealed to the plaintiff, Mrs. Courtemanche, her consent, oral or written, was not of an informed nature. Since the defendant admitted that there is no difference in radiographic interpretation between podiatrists or medical doctors, we hold that the plaintiff's experts are entitled to express their opinions of what the x-rays reveal, because there is no dispute as to the applicable standard of care. If the negligence of the defendant was at issue, his insistence that the plaintiff's experts must establish their

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<sup>1</sup>In *Goodman*, it was not established that an anesthesiologist was qualified to testify against an ophthalmologist because he was not familiar with the ophthalmologist's area of practice or the appropriate standard of care. In *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn. 1982), an orthopedic surgeon and a neurologist were held disqualified to testify against osteopaths for the same reason.

familiarity and knowledge of podiatry and the appropriate standard of care in its practice would clearly be well-taken. But the issue is alleged lack of informed consent; and whether an assault and battery occurred. If the x-rays revealed no spurring, thus making surgery unnecessary, this fact is admissible on the issue for trial.

T.C.A. § 29-26-118 provides:

In a malpractice action, the plaintiff shall prove by evidence as required to § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining the informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which he practices and in similar communities.

T.C.A. § 29-26-115(b) provides:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case .

In *German v. Nichopoulos*, 577 S.W.2d 197 (Tenn. Ct. App. 1978), this Court held that in matters of informed consent, the plaintiff has the burden of proving by expert medical evidence what a reasonable medical practitioner would have disclosed to the patient about *attendant risks incident to a proposed diagnosis or treatment* and that the defendant departed from the norm.

. . . whenever a physician performs surgery upon a person, not being authorized by consent and not being protected by the exception made in cases of emergency, the physician is liable to such person for consequent injuries, regardless of whether such injuries resulted from negligence or otherwise.

*Ray v. Scheibert*, 484 S.W.2d 63, 71 (Tenn. Ct. App. 1972).

While the determination of the effectiveness of consent cannot be made without expert testimony on the standard of care concerning what information is usually supplied to enable a patient to give informed consent, considering both the seriousness of the treatment and any expression of concern by the patient, failure to give such information is not the type of omission that results

in negligence, but rather it negates consent for the treatment. Without consent, the treatment constitutes a battery.

*Cardwell v. Bechtol*, 724 S.W.2d 739, 750-51 (Tenn. 1987).

In light of the fact that the defendant once admitted that principles of radiographic interpretation are the same between podiatrists and medical doctors, there is no dispute concerning the applicable standard of care. Negligent practice of podiatry is not involved and it naturally follows that the plaintiffs' experts are not required to be cognizant of the standard of care in podiatry generally. Since Drs. Smith and Broom are licensed in professions that make their testimony relevant to the issue of whether the defendant fabricated a diagnosis, we hold the trial court properly denied the motion for summary judgment.

The judgment is affirmed, and the case is remanded for trial. Costs are assessed to the appellants.

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William H. Inman, Senior Judge

Concur:

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Herschel P. Franks, Judge

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Charles D. Susano, Jr., Judge