JANICE M. FRAKES, surviving spouse, of GARY D. FRAKES,

Plaintiff/Appellant,

VS.

CARDIOLOGY CONSULTANTS, P.C., and HARRY L. PAGE, JR., M.D.

Defendants/Appellees.

Appeal No.
01-A-01-9702-CV-00069

Davidson Circuit
No. 94C-2155

FILED

August 29, 1997

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CIRCUIT COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

THE HONORABLE WALTER C. KURTZ, JUDGE

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AFFIRMED AND REMANDED

BEN H. CANTRELL, JUDGE

NOT PARTICIPATING:
SAMUEL L. LEWIS

SEPARATE CONCURRING OPINION:
WILLIAM C. KOCH, JR.

O P I N I O N

The jury returned a verdict for the defendant doctor in this medical malpractice case. The sole issue on appeal concerns a printed table which the trial court permitted to be sent back to the jury during its deliberations, even though it was not formally admitted into evidence until after the jury retired. We find that it was not error to admit the table, and we affirm the jury verdict.

I.

In August of 1993, forty-four year old Gary Frakes, a resident of Dickson, Tennessee, began suffering from chest pain and dizziness while on the job at the Ford Glass Plant. He was given an EKG at the plant and the result was normal. His symptoms, which included left-sided shoulder and facial pain, persisted intermittently for about four days, and he went to his family doctor. Dr. Daniel Drinnen examined and tested Mr. Frakes on August 25, 1993. Though a resting EKG produced a normal result, Dr. Drinnen suspected a cardiac problem, and recommended that Mr. Frakes be admitted to Goodlark Hospital in Dickson for observation.

The patient preferred St. Thomas Hospital in Nashville, and Dr. Drinnen accordingly referred him to a cardiologist associated with that hospital, the defendant Dr. Harry Page. Mr. and Mrs. Frakes drove the same day to Nashville, where the defendant obtained a medical history, examined the patient, and ordered a chest x-ray, a resting EKG and an exercise (treadmill) EKG.

The x-ray and the resting EKG were normal but the treadmill test was stopped by the technician before it was completed because of the patient's complaints of severe chest pain. The defendant examined the EKG strips and concluded that there was not sufficient medical justification to admit Mr. Frakes to the hospital. He reassured the patient that he was not having a heart attack, and sent him home with instructions to return the next day for a thallium stress test.

After a stressful drive home through a rainstorm, Mr. Frakes began suffering chest pains again. About three hours after he arrived home, and as he was resting in a reclining chair, his heart stopped. He could not be resuscitated. The autopsy report listed the cause of death as cardiopulmonary arrest due to atherosclerotic coronary artery disease.

On July 6, 1994 Mr. Frakes' widow filed suit against Dr. Page and his professional association, Cardiology Consultants P.C. The complaint alleged that in light of the decedent's medical history, his obvious cardiac symptoms and the test results, the standard of care required Dr. Page to admit Mr. Frakes to the hospital, where timely intervention would have saved his life. The jury found that Dr. Page had not violated the relevant standard of care, and returned a verdict for the defense. This appeal followed.

II.

A physician treating a patient must possess and exercise the degree of skill and learning possessed and exercised under similar circumstances by other members of his profession. *Perkins v. Park View Hospital*, 61 Tenn. App. 458, 456 S.W.2d 276 (1970). In doing so, he is required to use his best judgment, or he may be held liable for failure to do so. *Wooten v. Curry,* 362 S.W.2d 820 (Tenn. 1961).

However the fact of injury does not raise a presumption that the defendant is guilty of malpractice. Tenn. Code Ann. § 29-26-115(d). *Johnson v. Lawrence*, 720 S.W.2d 50, 56 (Tenn. App. 1986). Such a presumption does not even arise where the injury occurs as the result of an error in judgment on the part of the physician, as long as the judgment was, though mistaken in the particular instance, consistent with the applicable standard of care. *Hurst v. Dougherty*, 800 S.W.2d 183 (Tenn. App. 1990).

How then may a plaintiff prevail in a medical malpractice action? The plaintiff must prove through expert testimony (1) the appropriate standard of acceptable professional practice (2) that the defendant's actions or omissions deviated from that standard, and (3) that as a result of this deviation, the plaintiff suffered an injury which would not otherwise have occurred. Tenn. Code Ann. § 29-26-115.

In the present case, the defendant does not seriously dispute that in hindsight his judgment of the significance of Mr. Frakes symptoms was incorrect. He even admits that if Mr. Frakes had been hospitalized at St. Thomas on August 25 instead of being told to return home, he would probably have lived through the night. However the question the jury was required to answer was whether in making his judgment (without the benefit of hindsight) Dr. Page deviated from the recognized standard of acceptable professional practice.

The jury found that he did not. On appeal, the plaintiff argues that the jury based its conclusion upon a piece of evidence that should not have been admitted, and should not have been present in the jury room during their deliberations. We overrule the plaintiff's contention, and we affirm the jury verdict because we believe the trial court did not abuse its discretion in admitting the table, and that even if it did, the error was harmless.

III.

Mrs. Frakes called Dr. Richard S. Crampton, a Virginia cardiologist, as her expert witness. Dr. Crampton testified that the standard of care required a patient showing the symptoms and test results demonstrated by Mr. Frakes to be hospitalized immediately. Emphasizing Mr. Frakes' failure to complete the exercise EKG, and the evidence on the test strip, Dr. Crampton stated, ". . . when you have the combination

of exercise-induced chest pain with ST-segment depression, it is virtually diagnostic. It means you have coronary artery disease, and it is symptomatic and dangerous. There's the risk of heart attack and the risk of sudden death."

On cross-examination, Dr. Page's attorney questioned Dr. Crampton extensively about the test strip from the exercise EKG. To do so, he had marked for identification as Exhibit 14 an enlarged copy of a table entitled "Exercise Test Parameters Associated With Poor Prognosis and/or Increased Severity of CAD" (CAD meaning coronary artery disease). Dr. Crampton acknowledged that he was familiar with the table; that it was included in a brochure produced by the American College of Cardiology and the American Heart Association, and that it represented a consensus statement on the interpretation of exercise treadmill tests.

The defendant's attorney asked Dr. Crampton about each of the parameters listed on the table, including the onset, magnitude and post-exercise duration of ST-segment depression, and got Dr. Crampton to acknowledge that the exercise test strip did not contain any results that could be considered abnormal by the standards found on the table. Dr. Crampton insisted that the early termination of the test prevented Mr. Frakes from reaching his maximum heart rate, and that this in turn prevented his ST-segment depression from reaching a diagnostic level. However, he conceded that before the test was terminated, Mr. Frakes had completed Stage 2 of the standard protocol for the conduct of exercise stress tests (the Bruce Protocol). He also acknowledged that Mr. Frakes died as a result of sudden cardiac arrest, not of heart attack. The plaintiff's attorney did not ask Dr. Crampton any questions on re-direct.

The plaintiff then called Dr. Page and questioned him about his treatment of Mr. Frakes. On cross-examination Dr. Page stated that the above-mentioned guidelines represented the accepted standard of professional practice for

cardiologists at the time of the testing on Mr. Frakes. The attorney led him through the same steps in the interpretation of the exercise EKG as he had with Dr. Crampton, with Dr. Page responding at each stage that the data on the test strip did not reach the diagnostic levels set out in the table.

The plaintiff also called a forensic pathologist, Dr. Gerald T. Gowitt, for questioning of his review of the autopsy report. On cross-examination, Dr. Gowitt testified that the autopsy showed that Mr. Frakes died from sudden cardiac arrest, a "heart rhythm disturbance precipitated by blockage in the coronary arteries." Mr. Frakes' heart was otherwise healthy, and there was no evidence that he had suffered a heart attack.

After completing his case-in-chief, Mrs. Frakes' attorney moved in limine that the defendant not be permitted to use the enlarged table in his questioning of his own expert. The basis of the motion was Rule 618 of the Tennessee Rules of Evidence, which states that learned treatises may be used for impeachment purposes, but not as substantive evidence. The court denied the motion.

During his portion of the proof, the defendant called another cardiologist, Dr. Phillip C. Watkins. Dr. Watkins also testified that the guidelines in Exhibit 14 represented the recognized standard of care for the interpretation of exercise stress tests. Like the other experts, he was questioned about the exercise test strips in light of those guidelines, and he too testified that none of the test results could be considered abnormal. He also stated that completion of Stage 2 of the Bruce Protocol meant that enough stress had been placed upon the patient's heart to make the test results reliable, and he concluded that Dr. Page had not violated the standard of care by choosing not to hospitalize Mr. Frakes.

At the conclusion of the defendant's proof, the plaintiff's attorney moved that Exhibit 14 not go back to the jury, on the basis that it was a hearsay document that had not been formally admitted. The court rejected the motion, stating that all the experts had adopted the document as a correct statement of the standard of care, and that it would serve as a useful tool for the jury. The defendant's attorney then moved for admission of the document, "if I forgot to do it," and his motion was granted.

IV.

The appellant presents three grounds for his challenge to the admission of Exhibit 14: that it is a hearsay document; that it was used for an impermissible purpose, and that the timing of the motion for admission unfairly prevented him from offering any meaningful counter-proof. We will examine each of these arguments in turn.

The appellant points out that the guidelines table was prepared by an unknown number of unknown doctors who were not present and were not subject to cross-examination at trial. As such, when presented to prove the truth of the matter it addresses, it constitutes hearsay. See Tennessee Rule of Evidence 801.

The appellant acknowledges that even though it is hearsay, the Rules of Evidence permit the use of the table for a limited purpose:

> **Rule 618. Impeachment of expert by learned treatises.** -- To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice, may be used to impeach the expert witness's credibility, but may not be received as substantive evidence.

There is no doubt that the appellee used the table very effectively to impeach Dr. Crampton, first through his own testimony, and then through the testimony of Dr. Page and Dr. Watkins. The table was also used to organize the expert testimony to assist the trier of fact to more easily understand a highly technical subject. See Tennessee Rules of Evidence 702 and 703.

Beyond that, the appellee argues that the document could no longer be considered hearsay after Dr. Page and Dr. Watkins had each adopted it by asserting in their respective testimony that it represented the standard of care for cardiologists. We hesitate to give an unqualified endorsement to the concept that a hearsay document can be transmuted into non-hearsay by virtue of its adoption by a witness. We note, however, that the table was used for a legitimate purpose, that its contents were extensively explored in the questioning of three witnesses, and that this is not a situation where a jury is improperly exposed to unexamined hearsay. As the trial judge pointed out in ruling on the motion to admit the document, the result was exactly the same as if one of the experts had been asked to go to the board and list the standards to be applied in interpreting the stress test. By the end of the trial the exhibit was simply a statement of what at least two experts testified was the standard of care with respect to reading the test results.

The appellee argues that the table was admissible as an exception to the hearsay rule under the Tennessee Rules of Evidence:

> **Rule 803. Hearsay exceptions. --** The following are not excluded by the hearsay rule:
>
> (1.1) . . .
> . . .
> (17) **Market Reports and Commercial Publications.--** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

The guidelines table is neither a market report nor a commercial publication, and despite the fact that all the expert witnesses agreed that cardiologists relied upon it we do not agree that it is the type of list that comes within paragraph 17 of Rule 803. We rely instead on the fact that two of the three experts testified that it represented the standard of care for the profession. The third (Dr. Crampton) implied that the table was neither totally accurate nor complete, but he acknowledged that it embodied the consensus standard among cardiologists.

The admissability of evidence is within the sound discretion of the trial court. *Inman v. Aluminum Co. Of America* 697 S.W. 2d 350 (Tenn. App 1985); *Austin v. City of Memphis*, 684 S.W.2d 624 (Tenn. App 1984). The colloquy between the trial court and counsel for both parties indicates that the table was admitted because the court believed that it had been thoroughly explored, that all the expert witnesses had conceded that it was relevant in determining the standard of care, and that it would aid the jury in understanding a difficult subject. After thoroughly reviewing the record in this case, we conclude that the trial court did not abuse its discretion in admitting Exhibit 14.

We agree with the appellant that the timing of the motion for admission of the table was unfortunate. It appears to us, however, that the appellant was not prejudiced by the fact that the exhibit was not admitted until after oral argument. For example, the appellant did not have to know that the table would be admitted in order to understand the need to repair the damage caused by the cross-examination of Dr. Crampton. The same could be said for the need to address the contents of the table in oral argument.

While we obviously cannot endorse the practice of admitting evidence after the proof has been closed, creating an absolute prohibition on such an action would limit the court's discretion to correct the oversight of an advocate who has had

an exhibit marked for identification, and inadvertently failed to take the next step. Whether the timing of the appellee's motion was due to inadvertence, or the result of a calculated "ambush" as the appellant claims, we still believe that the trial court acted within the bounds of its discretion in admitting the table.

V.

The judgment of the trial court is affirmed. Remand this cause to the Circuit Court of Davidson County for further proceedings consistent with this opinion. Tax the costs on appeal to the appellant.

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BEN H. CANTRELL, JUDGE