

NOT DESIGNATED FOR PUBLICATION

No. 111,671

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STACI RUSSELL,
Appellant,

v.

LISA MAY, M.D., VICTORIA W. KINDEL, M.D., and TANA GOERING, M.D.,
Appellees.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; MARK A. VINING, judge. Opinion filed October 2, 2015.
Affirmed.

Craig Shultz, of Shultz Law Office, P.A., of Wichita, for appellant.

Lisa A. McPherson and *Marcia A. Wood*, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of
Wichita, for appellee Lisa May.

Mark R. Maloney and *G. Andrew Marino*, of Gilliland & Hayes, LLC, of Wichita, for appellee
Victoria Kindel.

Gregory S. Young and *Brian L. White*, of Hinkle Law Firm LLC, of Wichita, for appellee Tana
Goering.

Before MCANANY, P.J., GARDNER, J., and WALKER, S.J.

Per Curiam: Staci Russell brought this action against her various health care
providers alleging that their professional negligence resulted in a delayed diagnosis of her

breast cancer and a lessening of her chance for recovery and long-term survival. She sued Dr. Lisa May, the radiologist who conducted mammogram and ultrasound examinations; Dr. Tana Goering, Russell's primary care physician; and Dr. Victoria Kindel, Russell's obstetrician-gynecologist (OB-GYN) who provided follow-up care after the mammogram and ultrasound.

The case went to trial. The court granted Dr. Goering judgment as a matter of law at the close of Russell's case. At the close of all the evidence the jury determined that neither of the remaining defendants was at fault. Now, Russell appeals the dismissal of Dr. Goering, and she seeks to set aside the jury verdict based on the trial court's claimed erroneous evidentiary and jury instruction rulings.

We find no error and affirm. The district court did not err in dismissing Dr. Goering at the close of Russell's case because Russell had failed to provide evidence at trial from which a reasonable juror could conclude that Dr. Goering's conduct was the cause of any of Russell's claimed injuries and damages. As the case continued thereafter, the district court's refusal to strike a portion of the expert testimony of Dr. Smith was not an abuse of discretion and had no possible effect on the ultimate outcome of the case. Finally, the district court properly rejected a proposed jury instruction that gave undue emphasis to one particular category of evidence.

The parties are well acquainted with the facts and procedural history of the case, so we need not recount them all here. Pared down to the essentials, in August 2008 Russell visited her primary care physician, Dr. Goering, because of a lump she discovered in her breast the day before. Dr. Goering referred her to Dr. May at Cypress Women's Imaging for a mammogram. Dr. May interpreted the results of the mammogram and told Russell that the results were negative: "No significant masses, calcifications, or other findings are seen in either breast." Nevertheless, Dr. May ordered an ultrasound,

from which she concluded the lump Russell felt was a fatty lobule which was normal breast tissue and benign. Dr. May told Russell a biopsy was not necessary but that given her age she should get another mammogram in 5 years unless she experienced some change in the meantime. Dr. May told Russell that she should call Cypress Women's Imaging or Dr. Goering right away if she noticed any changes in her breasts.

Dr. May sent a copy of the imaging reports to Dr. Goering and informed Russell that she had done so. Dr. Goering received the report from Dr. May, but Dr. Goering did not arrange for a follow-up visit with Russell to discuss the results.

Russell was scheduled to see Dr. Kindel, her OB/GYN, for her routine well-woman exam about a month later in October 2008. Russell rescheduled this exam for February 11, 2009. At the February exam, about 5 months after her mammogram and ultrasound, Russell discussed her breast lump with Dr. Kindel. Russell had not noticed any changes in the lump. She told Dr. Kindel about the mammogram and sonogram and their results. Because Russell was still anxious about the lump, Dr. Kindel gave Russell the names and numbers of two surgeons to consult if she continued to feel anxious. Russell chose not to contact the surgeons and did not contact or follow up with Dr. Goering.

A year later, in February 2010, Russell again saw Dr. Kindel for her well-woman exam. Dr. Kindel performed a breast exam and noted there was no increase in the size of the lump, but she noted a "fullness" in the 10 o'clock position. Dr. Kindel encouraged Russell to visit Dr. Goering for a follow-up mammogram if she remained concerned. Russell did not follow up with Dr. Goering at that time.

In the summer of 2010, the lump started to grow. On August 19, 2010, Russell called Dr. Goering's office. Dr. Goering immediately ordered diagnostic testing at

Cypress Women's Imaging. The lump was biopsied and diagnosed as a malignant grade 3 invasive ductal carcinoma breast tumor. The cancer had spread to her lymph nodes. Russell sought treatment at MD Anderson in Houston where she received chemotherapy, a total mastectomy with auxiliary lymph node dissection, and post-mastectomy radiation. These treatments resulted in more than a 90% chance that the cancer was completely eradicated.

In March 2011, Russell brought this medical negligence action. She alleged that her physicians had provided substandard care which led to a delay in the diagnosis of her breast cancer, which caused her to undergo more invasive and disfiguring treatment than otherwise would have been necessary and caused her to lose the chance of a better recovery and a better survival prognosis.

At the time of trial, Russell had numerous contentions of negligence against Dr. May, the radiologist, relating to her examination, the reporting of her findings, and her recommendations or lack of recommendations to Russell.

Russell contended that Dr. Goering, the primary care physician, was negligent in failing to recommend a biopsy or an additional timely evaluation of the lump notwithstanding the normal imaging study reported by Dr. May.

Russell contended that Dr. Kindel, the OB/GYN, was negligent in the performance of Russell's well-woman exams for failing to recommend a biopsy or an additional evaluation of the persistent lump.

At trial, Russell called Dr. James Edney to opine about the care provided by Dr. Goering. He testified that Dr. Goering departed from the standard of care by failing to perform a biopsy or to follow up with Russell in a timely manner. He discussed the

density of Russell's breasts as affecting the potential inaccuracy of the mammogram. According to Dr. Edney, it was Dr. Goering's duty to affirmatively follow up with Russell during the 3 months following Russell's mammogram. He stated that a normal imaging study never precludes biopsy and the physician has a duty to either perform a biopsy on the spot or have the patient come back within 3 months for a reevaluation. Dr. Edney testified:

"Why do I say three months? Because in three months, an interval is short enough that if, in fact, it was a serious problem of breast cancer, the majority of people aren't going to up-stage or have a lost opportunity in that interval. That would be within the standard of care."

Dr. Edney was "almost certain" that the lump felt in 2008 was the same lump that was later diagnosed as cancerous in 2010.

At the close of Russell's case-in-chief, the court entered judgment in favor of Dr. Goering and dismissed her from the suit. Following the presentation of the evidence of the remaining defendants, the jury found no fault on the part of the remaining defendants, Dr. May and Dr. Kindel. Russell appeals.

Dr. Goering—Judgment as a Matter of Law

Russell forcefully argues that the court's dismissal of Dr. Goering from the suit flies in the face of the expert testimony provided by Dr. Edney.

Pursuant to K.S.A. 2014 Supp. 60-250(a)(1), if a party has been fully heard on an issue during a jury trial and there is no legally sufficient evidentiary basis for the jury to find for the party on the issue, the court may "[r]esolve the issue against the party" and

may "grant a motion for a judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." In ruling on a motion for judgment as a matter of law, what was formerly called a motion for a directed verdict, "[t]he question is not whether there is literally no evidence supporting the party against whom the motion is directed, but whether there is evidence upon which the jury could properly find a verdict for that party." *Sampson v. Hunt*, 233 Kan. 572, 578, 665 P.2d 743 (1983).

When ruling on a motion for judgment as a matter of law, the district court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. When reasonable minds could reach different conclusions based on the evidence, the motion must be denied. The same standard is applied by an appellate court when reviewing the district court's decision to grant or deny a motion for judgment as a matter of law. *Michaelis v. Farrell*, 48 Kan. App. 2d 624, 629, 296 P.3d 439 (2013). Because our review of Dr. Goering's motion is de novo, we need not concern ourselves with the reasoning behind the district court's ruling. We examine the issue anew.

Russell relies on the testimony of Dr. Edney, a surgical oncologist, who was Russell's only expert to testify regarding Dr. Goering's standard of care. Dr. Edney testified that the standard of care did not require an immediate biopsy after Russell's negative mammogram and ultrasound findings in August 2008. His criticism of Dr. Goering was for not affirmatively following up with Russell because of the high rate of false negative findings, which could be as high as 25 to 30 percent in mammograms for persons of Russell's age. Dr. Edney testified that because the mammogram may not be accurate, Dr. Goering had a duty to affirmatively follow up with her patient by immediately ordering a biopsy or scheduling another office visit and examination within 3 months. According to Dr. Edney, either of these alternatives would have satisfied the

standard of care:

"Q. . . . Dr. Goering could have either ordered a biopsy right away, or she might have said come back in three months; right?

"A. Correct.

"Q. And I think you said either one of those would meet the standard of care correct?

"A. Correct."

In order for Russell to have a submissible case against Dr. Goering for the jury to resolve, Russell must have presented not only evidence of the standard of care and breach of that standard, but evidence from which the jury could conclude that Dr. Goering's breach caused or contributed to cause Russell's injuries and damages. See *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438 (2008); *Nold v. Binyon*, 272 Kan. 87, 104, 31 P.3d 274 (2001). This element of proximate cause is defined as

"the cause that in a natural and continuous sequence, unbroken by any superseding cause, both produced the injury and was necessary for the injury. The injury must be the natural and probable consequences of the wrongful act. [Citation omitted.] Individuals are not responsible for all *possible* consequences of their negligence, but only those consequences that are *probable* according to ordinary and usual experience. [Citation omitted.]" *Hale v. Brown*, 287 Kan. at 322.

Here, Dr. Goering did not arrange for Russell to return for another office visit immediately after Russell's diagnostic mammogram and ultrasound. But Russell on her own had scheduled a well-woman examination, which included a follow-up examination of her breasts about a month later. Russell cancelled this appointment and rescheduled it for February 2009. Dr. Kindel's examination of Russell's breasts in February 2009 was negative. Dr. Kindel examined Russell's breasts a second time a year later in February 2010. It was only in the late summer of 2010 that Russell contacted Dr. Goering.

Based on this fact scenario, no reasonable juror could have come to the conclusion that Dr. Goering's failure to instruct Russell to return for a follow-up office visit after the mammogram and ultrasound caused or contributed to cause any delay in the treatment of Russell's breast cancer. Had Dr. Goering insisted on seeing Russell within 3 months following these diagnostic tests, there is no evidence the outcome of Russell's care would have been any different. After the initial diagnostic tests, each time Dr. Kindel examined Russell's breasts, in February 2009 and again in February 2010, she found no cause for additional diagnostic testing. Even if Dr. Goering should have instructed Russell to seek follow-up care and failed to do so, Russell nevertheless did receive that follow-up care from Dr. Kindel, her OB/GYN.

We conclude that Russell failed to introduce evidence in her case-in-chief upon which a reasonable juror could have concluded that any of the claimed acts or omissions of Dr. Goering in any way caused or contributed to cause Russell's claimed injuries and damages. Thus, the district court did not err in granting Dr. Goering judgment as a matter of law at the close of Russell's case.

Dr. Smith's Expert Testimony

Dr. William Smith was timely disclosed in discovery as an expert witness for Dr. May, the radiologist. In his report, Dr. Smith stated that "it was within the standard of care to read both studies in 2008 [the mammogram and the ultrasound] as normal, and Dr. May's suggestion of clinical follow up was appropriate."

Dr. Smith's trial testimony was consistent with the pretrial disclosure requirements of K.S.A. 2010 Supp. 60-226(b)(6). In advance of trial he disclosed the subject matter of his anticipated testimony and the substance of the facts and opinions he expected to express, and provided the grounds for his opinions.

During Russell's cross-examination of Dr. Smith, the following exchange took place:

"Q. Now, the radiologist, I want to make clear, do you think a radiologist has responsibility to talk to her patient about the results of the imaging studies that she performs?"

"A. No.

"Q. You don't think she has any duty there at all?"

"A. No. Standard of care says it goes to the primary care doctor.

"Q. Does she have a duty to say, [b]e sure and go back to your primary care doctor?"

"A. Depending on the nature of the findings."

Russell's counsel continued:

"Q. Do you agree, Doctor, that mammography and ultrasound . . . are not by themselves capable of eliminating the possibility that cancer exists in a breast lump?"

"A. True.

"Q. And therefore if one has the duty to rule out cancer, and those two tests don't do it, there needs to be some other testing or follow up done?"

"A. No.

"Q. We'll talk about the details of that.

"A. No, I don't agree with that.

"Q. Okay. Then, Doctor, you just say, well, one or two, five, ten percent, whatever percentage you want to say is false negatives, they're just out walking in the wind.

"And if they get cancer, too bad. Is that what your position is?"

"A. No.

"Q. Well, then how, if you can't rule out cancer, what do you say to the patient who says, I want to know if my breast lump is cancerous?"

"A. At that point, once the imaging studies are normal, the burden then falls normally on the primary care doctor that communicates with the patient."

Russell complains that in this exchange Dr. Smith attempted to shift responsibility for properly informing Russell about the imaging results from Dr. May to Dr. Goering at a time when Dr. Goering already had been dismissed from the case. He moved to strike the offending statements. The court denied his motion.

In our review of this issue we examine the admission or exclusion of opinion testimony under K.S.A. 60-456 for any abuse of discretion. *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 444, 228 P.3d 1048 (2010).

"If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness." K.S.A. 60-456(b).

We do not view Dr. Smith's testimony as an attempt to shift liability from Dr. May to Dr. Goering. Dr. Goering was the referring physician who sent her patient to Dr. May for breast studies. As a consulting radiologist, Dr. May has duties to the patient separate and apart from those of the referring treating doctor, Dr. Goering. Russell saw Dr. May for a diagnosis, not for radiological treatment for the purpose of shrinking a known tumor. In his testimony, Dr. Smith delineated the boundaries of the standard of care for a radiologist doing a diagnostic procedure. According to Dr. Smith, that boundary is reached when it comes to discussing the results of the radiology tests and whether further follow up is required and, if so, when. That Dr. Smith would leave to the referring doctor.

Dr. May's test results were all negative. These results were communicated to Dr. Goering. Dr. Smith did not testify that Dr. Goering, who had previously been dismissed from the suit, should have followed up with Russell or that Dr. Goering's performance

fell below the standard of professional care that applied to her. We find no reasonable basis upon which any reasonable juror hearing this testimony would have concluded that Dr. Goering must have been to some degree at fault in causing Russell's delayed diagnosis. Indeed, when the jurors were asked to make determinations of fault on the verdict form, the only parties to whom they could assign fault were Dr. May and Dr. Kindel. There was no vehicle by which an errant juror could have sought to assign fault to Dr. Goering after she had been dismissed from the trial.

Here, the jurors did not reach the issue of apportionment of fault in their deliberations. The initial special question to them on the verdict form was: "Do you find Staci Russell was denied a substantial chance for better recovery or for long term survival due to the fault of either Defendant?" The jurors answered, "No." This absolved Dr. Kindel of any liability for her conduct in the course of her examinations and treatment recommendations to Russell *after* Dr. Goering's examinations and treatment recommendations. It would have been logically and factually inconsistent for the jurors to have found Dr. Goering at fault but not Dr. Kindel.

We find no error in the district court refusing to strike the requested portion of Dr. Smith's testimony.

Jury Instructions

Russell contends the district court erred in refusing to give her requested jury instruction regarding the use of medical texts, articles, and treatises introduced into evidence.

Because we are considering a jury instruction that was offered and denied, we exercise unlimited review in determining whether the proffered instruction was legally

appropriate. In doing so, we must determine whether there was sufficient evidence, viewed in the light favoring the requesting party, to support giving the instruction. If the instruction would have been appropriate, we then consider whether the error in not giving it was harmless, utilizing the test set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). See *Foster v. Klaumann*, 296 Kan. 295, 301-02, 294 P.3d 223 (2013).

Russell requested the following instruction: "Medical articles and textbooks are learned treatises and when admitted into evidence after expert testimony, are relevant and may be used to establish a physician's standard of care." Russell complains that the court gave only the PIK Civ. 4th 123.10 instruction and that the plaintiff "was entitled to have the jury know that the learned treatises, properly admitted, were a means by which it could determine" the standard of care.

The jury was instructed:

"In determining whether a physician used the learning, skill, and conduct required, you are not permitted to arbitrarily set a standard of your own or determine this question from your personal knowledge. On questions of medical or scientific nature concerning the standard of care of a physician only those qualified as experts are permitted to testify. The standard of care is established by members of the same profession in the same or similar communities under like circumstances. It follows, therefore, that the only way you may properly find that standard is through evidence presented by physician expert witnesses." See PIK Civ. 4th 123.10.

This instruction informed the jury that it could consider the "evidence presented by" Dr. Edney, which included his opinions on the standards of care and their breach, and the medical literature admitted into evidence during his testimony that supported his opinions.

Dr. Edney identified a number of treatises as being authoritative and reliable. Chapters from various medical texts were admitted into evidence. These exhibits included a chart for evaluating breast masses and a table showing approximate survival rates by staging. They also included a recommendation for when a biopsy should be performed. One of the admitted texts, *CANCER, Principles & Practice of Oncology*, stated: "Any area of the breast that appears suspicious by being palpably abnormal or is suspicious by radiologic criteria deserves a biopsy-based diagnosis." Another text, *Clinical Oncology*, stated: "While mammography is the best screening tool, it detects only 85% to 90% of biopsy-proven cancers. As a result, mammography is not a substitute for tissue sampling and histologic evaluation of any palpable abnormality, nor is it a substitute for careful physical examination." These treatises were consistent with Dr. Edney's testimony and were evidence for the jury to consider under the court's jury instruction.

The jury also was instructed that it "must consider and weigh only evidence which was admitted during the trial, including exhibits, admissions, stipulations, and witness testimony either in person or by deposition."

When reviewing jury instructions for error, we consider the instructions as a whole, rather than isolating any one instruction. The medical texts and treatises were admitted into evidence in this case, and there is nothing indicating that the jury disregarded them in reaching a verdict. Rather, we presume the jury followed the jury instructions and considered all of the evidence admitted during trial. *State v. Llamas*, 298 Kan. 246, 261, 311 P.3d 399 (2013). Here, the jury was instructed to "consider and weigh" the admitted evidence, which in this case included medical treatises. The jury was properly instructed on the law. Russell has failed to establish that the jury disregarded the court's instructions. See *Puckett*, 290 Kan. at 438 (jury is presumed to have followed instructions).

Russell relies on *Wilson v. Knight*, 26 Kan. App. 2d 226, 229-30, 982 P.2d 400 (1999), for the proposition that medical treatises may be admitted as independent substantive evidence after the predicate expert testimony established its reliability and relevancy. But there is no issue here about the various medical treatises being admitted at trial. The issue is whether referring to them in the jury instructions gives undue weight to one particular group of exhibits admitted at trial. When instructing a jury, a trial judge may not single out and give undue emphasis to particular evidence, even though the instruction states the correct principle of law. *State v. Coburn*, 32 Kan. App. 2d 657, 661, 87 P.3d 348, *rev. denied* 278 Kan. 848 (2004). "A court should not by its instructions unduly emphasize one aspect of a case. [Citation omitted.]" *Guillan v. Watts*, 249 Kan. 606, 617, 822 P.2d 582 (1991).

Russell was entitled to an instruction explaining her theories of the case to the extent there was evidence to support such theories. The substance of Russell's proposed instruction was adequately covered in the district court's instructions, and the district court properly declined to give Russell's proposed instruction which unduly emphasized the medical treatise evidence. We find no error in the jury instructions.

Affirmed.