Summary of SC98327, *John Henry Rhoden and Dorothy Jean Winfield v. Missouri Delta Medical Center*

Proceeding originating in the Scott County circuit court, Judge David A. Dolan
Argued and submitted September 2, 2020; opinion issued March 2, 2021

Attorneys: The medical center was represented by Joseph C. Blanton Jr. and Shaun D. Hanschen of Blanton, Nickell, Collins, Douglas & Hanschen LLC in Sikeston, (573) 471-1000. The family members were represented by Paul G. Lane, Douglas P. Dowd and Kevin D. Lane of Dowd & Dowd PC in St. Louis, (314) 621-2500.

The Missouri Organization of Defense Lawyers and Missouri Hospital Association, which submitted a brief as friends of the Court, were represented by Timothy C. Sansone of Sandberg Phoenix & von Gontard PC in St. Louis, (314) 231-3332, and Brett M. Simon of Sandberg Phoenix & von Gontard PC in Kansas City, (816) 627-5332.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A medical center appeals from a judgment entered against it in a wrongful death action in which aggravating circumstances damages were awarded. In a decision written by Chief Justice George W. Draper III and joined by two judges, the Supreme Court of Missouri affirms the circuit court's judgment. The family presented sufficient evidence to support the jury's award of aggravating circumstances damages; the aggravating circumstances damages instruction submitted to the jury did not misstate the law; the family presented sufficient evidence for the jury to find "but for" causation; the circuit court did not err or abuse its discretion regarding certain evidentiary challenges and statements made by counsel; and the medical center failed to preserve other challenges for appeal.

In an opinion joined by one judge, Judge W. Brent Powell concurs in the result reached by the principal opinion but writes separately to underscore that punitive damages are rarely recoverable in negligence actions.

Judge Paul C. Wilson dissents. He would hold punitive damages should be limited to cases involving intentional wrongdoing or conduct so egregious that it is tantamount to intentional wrongdoing.

Judge Zel M. Fischer also dissents. He would hold that, when the legislature enacted the standard for punitive damages in negligence actions against healthcare providers, it intended to supplant the common law standard for punitive damages of complete indifference or conscious disregard.

Facts: Dr. Linza Killion, a urological surgeon, was treating Roosevelt Rhoden for an enlarged prostate, ultimately recommending he either undergo prostate surgery (a transurethral prostatectomy, or TURP) to lessen restrictions on his urethra or rely on a catheter. Rhoden chose the surgery, which Killion performed in October 2012 at Missouri Delta Medical Center in Sikeston along with a transurethral incision of the bladder neck (TUIBN) procedure to allow

easier placement of a catheter. Shortly after surgery, Rhoden began complaining of abdominal pain, then experienced renal failure and difficulty breathing. He also pulled on his catheter, requiring a nurse to reinsert it. Killion ordered imaging studies, which showed free air in Rhoden's abdomen and retroperitoneal area, which usually indicates a perforation of the gastrointestinal tract. Killion requested a surgical consultation. Dr. Kevin Rankin, a general surgeon, performed an exploratory laparotomy, examining Rhoden's entire gastrointestinal tract. He identified what he described as fatty tissue in the sigmoid colon but did not observe a perforation, a misplaced catheter or any irrigation fluid in Rhoden's abdomen, concluding a ruptured diverticulum had caused the free air but sealed before the laparotomy. Rhoden then developed sepsis as well as respiratory and kidney complications. Two weeks after the prostate surgery, medical center nurses removed and replaced the original catheter. Rhoden improved after being transferred to another hospital but subsequently suffered a stroke and was placed in a skilled nursing facility. Rhoden died in October 2013, approximately a year after the prostate surgery. Rhoden's surviving family members filed a wrongful death lawsuit against Missouri Delta Medical Center, alleging its employees, Killion and Rankin, negligently cared for Rhoden, causing his death. After a trial at which medical experts testified on behalf of both parties, the jury found in the family's favor, awarding nearly $270,000 in past medical damages, $300,000 in past noneconomic damages and $300,000 in additional damages for aggravating circumstances. The circuit court entered judgment accordingly and overruled the center's motion for judgment notwithstanding the verdict or new trial. The medical center appeals.

AFFIRMED.

Court en banc holds: (1) The medical center properly preserved its claim that there was insubstantial evidence to support the award of aggravating circumstances damages. The medical center filed a written motion for directed verdict at the close of evidence, and the record reflects counsel and the circuit court engaged in a discussion such that the circuit court and parties were apprised fully of the medical center's basis for challenging submissibility. Accordingly, the medical center satisfied the undemanding specificity requirement of Rule 72.01 and preserved its submissibility claim for appellate review.

(2) The family made a submissible case for aggravating circumstances damages because there was sufficient evidence of the medical center's complete indifference to or conscious disregard for Rhoden's safety. The evidence, viewed in the light most favorable to the jury's verdict, showed Killion incorrectly informed Rhoden there were only two options available to correct his enlarged bladder when there were less invasive treatment options available. Killion further resected too much prostate during the procedure and had to conduct a subsequent surgery to correct the error, increasing the risk of bladder perforation. The doctors' post-operative care of Rhoden establish the medical center ignored warning signs that the catheter was misplaced and the bladder perforated. Accordingly, there was sufficient evidence to support an award of aggravating circumstances damages.

(3) The aggravating circumstances damages instruction submitted to the jury did not misstate the law. The instruction submitted was patterned upon the approved instruction for aggravating circumstances damages. Section 538.210, RSMo, provides that punitive damages are available in a medical negligence case when there is proof of willful, wanton or malicious conduct. The

dictionary definitions of "wanton" are consistent with this Court's interpretation that the culpable mental state of "wanton" encompasses complete indifference or conscious disregard. Accordingly, section 538.210 and the instruction given do not conflict.

(4) The family presented sufficient evidence to establish "but for" causation. Two expert witnesses testified, with reasonable medical certainty, that the doctors' negligence caused or contributed to cause Rhoden's death. The jury, therefore, could have concluded reasonably that, but for the doctors' negligent acts, Rhoden would not have undergone the subsequent extensive medical procedures and ultimately died.

(5) The medical center failed to preserve its claim that the family's expert, Dr. Thomas Vitale, was not a qualified expert. To properly preserve a challenge to the admission of evidence, the objecting party must make a specific objection to the evidence at the time of its attempted admission. Although the medical center objected before and during Vitale's testimony, its objection was vague, referencing only a previously filed pretrial motion.

(6) The circuit court did not abuse its discretion in excluding expert Dr. Bruce Garber's statements that he could not predict when Rhoden would have died. There is no requirement that a plaintiff must present evidence predicting how long a patient would have lived but for the defendant's negligence.

(7) The circuit court did not err in permitting the family's counsel to comment during jury selection about the medical center's retained expert being paid despite the fact that the expert ultimately did not testify at trial. The family never made any sort of comment about the expert's failure to testify; therefore, no prejudice was established.

(8) The medical center failed to preserve its objection to the admission of Dr. Mark Schoenberg's deposition testimony at trial. When the family moved to read a portion of Schoenberg's deposition into evidence, the medical center objected but stated only that it was renewing its objection. Such an objection is not specific enough to preserve for appellate review a challenge to the admission of evidence.

Concurring opinion by Judge Powell: The author concurs in the result reached by the principal opinion. He writes separately, however, to underscore that punitive damages are rarely recoverable in negligence actions and litigants should proceed cautiously when considering submitting punitive damages in future negligence actions, as such submissions should be reserved only for the truly extraordinary cases.

Dissenting opinion by Judge Wilson: The author would hold that punitive damages should be limited to cases involving intentional wrongdoing or conduct so egregious that it is tantamount to intentional wrongdoing. The author would not find that the medical center's negligent conduct rose to such a level so as to permit recovery of punitive damages.

Dissenting opinion by Judge Fischer: The author disagrees with the principal opinion's holding that the "complete indifference or conscious disregard" standard for punitive damages is equivalent to the statutory standard for "willful, wanton or malicious conduct." The author would

find that, when the legislature enacted section 538.210, RSMo, in 1986, it intended to supplant the common law standard of complete indifference or conscious disregard for punitive damages claims against healthcare providers. The author also would find the 2020 amendment to section 538.210 was to clarify and make clear its original intent in enacting chapter 538 in 1986, not to otherwise change existing statutory law.