CASES DETERMINED

IN THE

SUPREME COURT OF ARKANSAS

GRAY *v.* MCDERMOTT.

4-3116

Opinion delivered October 9, 1933.

1. PHYSICIANS AND SURGEONS—DEGREE OF SKILL.—A physician is required to possess and exercise the degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing in the neighborhood.
2. PHYSICIANS AND SURGEONS—MALPRACTICE.—Evidence *held* insufficient to make an issue for the jury whether a physician was negligent in treating deceased for a gunshot wound and performing an operation.
3. PHYSICIANS AND SURGEONS.—Where the uncontradicted testimony of medical experts was that a surgeon pursued the proper practice in attending a wounded patient, the jury should not be left to speculate whether the surgeon pursued the proper course of procedure.

Appeal from Pulaski Circuit Court, Second Division; *Richard M. Mann,* Judge; reversed.

STATEMENT BY THE COURT.

On August 24, 1930, Neil McDermott, the husband and father of appellees, was shot by a highwayman in the city of Little Rock. The bullet passed through the right axillary fold. Immediately after deceased was shot, he was taken to the General Hospital in Little Rock and about an hour later Dr. W. A. Lamb, the family physician of the deceased, was requested to attend him. Dr. Lamb, having information of the injury, called Dr. W. E. Gray, a surgeon, and together they visited the deceased. Upon arrival at the hospital, Dr. Lamb and Dr. Gray found that the patient had been bathed and redressed and the wound had been cleaned and gauze packs applied to

the front where the bullet entered and the back where the bullet passed out. Upon examination, the doctors determined and found that the patient's radial pulse was good; that the axillary nerve was not severed and there was no hemorrhage from either front or rear. After a careful examination, the doctors concluded that an expectant treatment should be followed; that the wound should not be probed at that time, but that the patient should be carefully watched and developments noted. After the first examination, Dr. Lamb, the family physician, visited the patient daily and Dr. Gray, only occasionally, and from these visits the two doctors agreed that the patient's progress toward recovery was sufficient until September 2, 1930. On the morning of September 2, 1930, Dr. Lamb again visited the patient and his condition was satisfactory. No clot had been formed, the patient's circulation was good and his nerves were not impaired. On the afternoon of September 3, Dr. Lamb again visited the patient and noted that a blood clot had formed; that his circulation was impaired and the nerves in the arm did not react properly to tests. Thereupon, the family of the deceased called in Dr. R. M. Eubanks, of Little Rock, who examined the patient. Dr. Eubanks decided that an operation was necessary and posted the operation for the following morning. The next morning Dr. Gray, Dr. Eubanks and Dr. Lamb performed the operation. When the blood clots, which had theretofore formed, had been removed, the vein or artery began bleeding profusely. Thereupon the doctors tied only one end of the bleeding vessel and the bleeding ceased. Thereafter a blood clot formed in the vein, passed into the heart, thence into the lung, thereby causing the death of McDermott.

Mrs. McDermott, the widow in her own right and as next friend for her children, instituted this suit against Dr. Lamb and Dr. Gray to compensate the injury and death of her husband and the children's father. The complaint filed was predicated upon two alleged negligent acts of the doctors, as follows:

First, that the axillary vein was severed by the bullet on August 24, 1930, and defendants negligently failed to ascertain this fact until the third day of September,

1930; second, that, while performing the operation on September 3, 1930, to remove the blood clot which had theretofore formed, the axillary vein began to bleed profusely, and defendants ligated one end of the severed vein, but negligently and carelessly failed to ligate the other end of the vein.

Defendants in the court below answered the complaint of appellees by denying generally the allegations of negligence and alleged affirmatively that they had examined the wound carefully on the deceased, exercised their best judgment and gave to Mr. McDermott the most efficient and careful treatment possible and rendered such treatment in the most modern and efficient and approved methods; that, if deceased's death was caused by a blood clot passing into the lungs, it was no fault of theirs, and that they were in no way liable therefor.

Before the final submission of the cause to the jury, appellees dismissed their complaint as to Dr. Lamb, but prosecuted the same against Dr. Gray, which finally resulted in a judgment for appellees in the sum of $20,000. During the progress of the suit, Dr. Gray died, and his widow, Mrs. Laura Beavis Gray, as executrix of the estate of Dr. Gray, was substituted as a party.

Other facts and circumstances will be referred to in the opinion.

John Sherrill, for appellant.

E. B. Dillon and *Sam Robinson,* for appellee.

JOHNSON, C. J., (after stating the facts). At the conclusion of the testimony on behalf of appellees in the circuit court, appellant requested the court to direct the jury to return a verdict in her behalf. This peremptory instruction was refused by the trial judge, and we think reversible error was committed in so doing.

The law in this State in reference to the liability of a physician or surgeon in the prosecution of his professional services is well settled by this court and may be restated as follows:

A physician is required to possess and exercise the degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing in the same neighborhood, and must use reasonable care

in the exercise of his skill and act on his best judgment. *Dunman* v. *Raney,* 118 Ark. 337, 176 S. W. 339.

In the instant case there are only two alleged grounds of negligence, namely, first, that appellant was negligent in failing to ascertain that the vein was severed by the bullet on August 24, 1930; second, that appellant was negligent in failing to ligate both ends of the vein in the operation on September 3. The first allegation of negligence is bottomed upon the fact that the doctors were negligent in failing to open up the wound to determine whether a vein or an artery had been severed by the bullet.

Appellee introduced no testimony on this point. Appellant introduced five or six physicians and surgeons who testified in the most positive terms that in their opinion it would be bad practice to go into a wound for the purpose of ascertaining whether a severance of a vein had taken place. All the physicians and surgeons who testified in the case agreed that this bullet wound was in a vital spot in the body, and any probing into the wound might cause a puncture of the axillary artery, axillary vein or the nerve controlling the arm, and that the severance of any or either of these would greatly endanger the life and chances of recovery of the patient. All the physicians further testified that the only purpose of entering the wound on August 24 would have been to stop the hemorrhage, and, since the hemorrhage had stopped prior to the visit of the doctors, it would have been an unreasonable procedure to have entered the wound. Furthermore, that the entrance to the wound at that time might carry therein an infection, and, since gunshot wounds frequently sterilize themselves, it was much better to await developments after giving antitoxin.

Furthermore, should a hemorrhage thereafter occur, it could later be discovered, either by the flow of blood or by a clot forming at or near the site of the injury and also from an examination of the pulse or his ability to manipulate his arm. Dr. Hoge, the only expert witness introduced on behalf of appellees, does not controvert this testimony. We conclude therefore that there was no testimony in support of appellee's allegation that ap-

pellant was negligent in failing to enter the wound on August 24, 1930, or subsequently.

On the second issue of negligence, namely, that appellant was negligent in failing to ligate both ends of the vein on September 3, the testimony is likewise uncontradicted. As we understand the record, all the expert witnesses testified and agreed that, where a vein is recently severed, both ends should be ligated, but there is no testimony in this record showing or tending to show that this procedure should be followed where a hole had sloughed off in the vein some days after the original injury, and which was not discovered until after sufficient internal bleeding had taken place to form two blood clots the size of a lemon. As we ascertain from the record, all the physicians agree that it would be the duty of the operating surgeon, under such circumstances, to tie off the bleeding end of the vein, and that it would not be his duty to tie off the end which was not bleeding. According to the physicians' testimony, this is so because after some length of time blood clots would necessarily form in the vein on the proximal end, and that to manipulate this end of the vein would very likely disturb the clot.

It is true Dr. Hoge testified that if a section of the axillary vein was taken out, both ends of the vein should be ligated, but this testimony in no wise conflicts with the testimony on behalf of appellant. No part of this vein was being removed. It was either severed by the bullet on August 24, 1930, or else sloughed off at some later date, thereby producing a hole in the vein and the hemorrhages which produced the blood clots. Therefore, since the uncontradicted testimony shows that this vein was severed at some date prior to September 3, 1930, and the operation on that date was made necessary by reason of such severance, it necessarily follows that the testimony of Dr. Hoge does not conflict with that of appellant's witnesses and made no issue for the jury to pass upon.

The question as to whether or not it was proper or improper for the physicians in charge to open up the wound or probe into it on August 24 or some subsequent

time thereto to determine whether or not a vein had been severed by the bullet; and also the question as to whether the physicians were negligent in failing to ligate both ends of the vein on September 3, when the operation was performed, were questions requiring scientific knowledge to determine. It cannot and should not be left to a jury to speculate whether or not the experts in the practice of their profession have pursued the proper course of procedure. *Davis* v. *Rodman,* 147 Ark. 385, 227 S. W. 612.

The uncontradicted testimony in this case shows that the deceased received from his attending physicians, including Dr. Gray, the degree of skill and learning ordinarily possessed and exercised by members of their profession in good standing in this neighborhood, and that they used reasonable care in the exercise of their skill while attending him after he was shot, and that they exercised their best judgment in administering their services. This is all that is required of physicians and surgeons in this State. It may be that some outstanding surgeon could have or would have done something for Mr. McDermott that was not done by these physicians, but this is purely speculative in so far as this record is concerned. Moreover, this is not the test to be applied in cases of this kind. Reasonable care, skill and learning is all that is required.

For the reasons aforesaid, there is no liability shown by the testimony, and the trial court erred in refusing to so direct the jury.

Since there is no testimony showing liability against the appellant and the cause of action seemingly having been fully developed, the cause of action is here dismissed.