

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Shirley Elkins, Executor of the Estate
of Juanita English, Deceased,

Plaintiff-Appellant,

v.

Veolia Transportation, Inc.,

Defendant-Appellee,

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No. 10AP-203
(C.P.C. No. 08CVC07-10400)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on October 26, 2010

Wolske & Associates Co., LPA, Jason K. Wright, and Walter J. Wolske, Jr., for appellant.

Reminger Co. LPA, Amy S. Thomas, and Kevin P. Foley, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Shirley Elkins ("appellant"), Executor of the Estate of Juanita M. English ("decedent"), appeals from the judgment of the Franklin County Court of Common Pleas granting a directed verdict in favor of defendant-appellee, Veolia

Transportation, Inc. ("appellee"), on appellant's claims for wrongful death and survivorship arising from appellee's alleged negligence. For the following reasons, we affirm the trial court's judgment.

{¶2} On July 21, 2008, appellant filed a complaint alleging that on October 11, 2005, decedent, a passenger in a bus operated by appellee, sustained serious physical injuries, which ultimately resulted in her death, after appellee's employee negligently backed into a utility pole. Appellant asserted wrongful death and survivorship claims arising from appellee's alleged negligence.

{¶3} The matter proceeded to jury trial in February 2010. Appellant, Tina Early Lewis, and William F. Miser, M.D., testified during appellant's case-in-chief.

{¶4} Appellant testified that on October 11, 2005, decedent, appellant's 75-year-old mother, called her from a hospital emergency room and reported that she had been in two accidents while riding in a bus driven by appellee's employee. According to appellant, decedent stated that the first accident occurred when the bus driver drove through a construction zone and ran over something in the road, causing the bus to sustain a flat tire. At that point, decedent struck her head on the side of the bus. The driver continued to drive on the flat tire, causing decedent to be jerked around in her seat, aggravating her head injury. The second accident occurred moments later when the bus driver, attempting to park the bus, backed into a utility pole.

{¶5} Appellant averred that in the days and weeks following the accident, decedent often complained that she was tired and that her head continued to hurt from hitting it on the side of the bus and being pitched around as the bus continued traveling on the flat tire. Appellant testified that decedent was admitted to the hospital on

October 28, 2005 for a gastrointestinal bleeding problem. She was subsequently transferred to another hospital for heart problems. According to appellant, decedent believed these medical issues resulted from the bus accident. On July 22, 2006, decedent, suffering from abdominal pain, was admitted to the hospital where she died during surgery.

{¶6} Tina Early Lewis, decedent's daughter, testified that during decedent's hospitalization in October 2005 decedent reported that the physicians were running tests to determine if there was something "going on with her heart." (Tr. 30.) The bulk of Ms. Lewis's testimony concerned decedent's familial relationships. She did not offer any testimony regarding the bus accident or the injuries decedent allegedly sustained as a result of the accident.

{¶7} Decedent's physician, William F. Miser, M.D., testified that he began treating decedent in 1999. Prior to October 11, 2005, he last saw decedent on August 10, 2005, for routine care related to her various medical issues. Dr. Miser testified that he did not treat decedent following the October 11, 2005 accident; rather, decedent treated with Dr. Miser's colleague, Dr. Beskow, on October 13 and 21, 2005. Dr. Miser did not see decedent until January 12, 2006, at which time he conducted a routine physical examination related to decedent's various pre-existing medical issues.

{¶8} During Dr. Miser's testimony, appellant repeatedly inquired if he had an opinion as to whether decedent suffered any physical injuries in the October 11, 2005 bus accident, whether the bus accident was the proximate cause of a mild heart attack decedent sustained in late October 2005, and whether decedent's July 2006 death was

proximately caused by the bus accident. The trial court sustained appellee's objections to the questions and/or the testimony elicited in response to those questions.

{¶9} Appellee moved to strike Dr. Miser's testimony on grounds that he failed to provide any expert opinion relating any of decedent's alleged injuries to either of the October 11, 2005 accidents. The trial court sustained the motion and struck Dr. Miser's testimony. As appellant had no other witnesses to present, she rested her case. Thereafter, appellee moved the court for a directed verdict in its favor. The trial court orally granted the motion and directed a verdict for appellee. The trial court memorialized its ruling in a decision and entry filed February 3, 2010.

{¶10} Appellant timely appeals, advancing a single assignment of error:

The Trial Court abused its discretion and erred to the substantial prejudice of Plaintiff in refusing to admit the expert medical opinion testimony of the Plaintiff's expert witness.

{¶11} Resolution of appellant's assignment of error requires a thorough examination of Dr. Miser's testimony, the objections raised thereto, and the trial court's rulings on those objections. Dr. Miser testified that he both practices and teaches family medicine at The Ohio State University. He began treating decedent in 1999 for numerous medical conditions, including diabetes, chronic kidney disease, high blood pressure, osteoporosis, arthritis, and coronary artery disease. Dr. Miser identified a binder containing medical records kept in conjunction with his treatment of decedent. Referring to those records, Dr. Miser testified that prior to October 11, 2005 he last saw decedent on August 10, 2005 for routine care related to her pre-existing medical issues.

{¶12} Immediately following this testimony, appellant asked Dr. Miser if he had an opinion as to whether decedent suffered any physical injuries in the bus accident.

Appellee objected on grounds that appellant had not laid a proper foundation for the question. The trial court sustained the objection.

{¶13} Thereafter, Dr. Miser testified that his colleague, Dr. Beskow, saw decedent twice after the accident, on October 13 and 21, 2005, and that he (Dr. Miser) did not see her until January 12, 2006. At that appointment, Dr. Miser conducted a routine physical examination of decedent related to her pre-existing medical issues. He did not ask decedent about the accident for purposes of making a medical diagnosis; rather, decedent volunteered information about the accident and reported that she suffered head and neck pain and stress as a result. Dr. Miser testified that he had an independent recollection of this conversation.

{¶14} Immediately following this testimony, appellant again asked Dr. Miser if he had an opinion as to whether decedent suffered any physical injuries in the bus accident. The trial court sustained appellee's objection. Appellant inquired as to the basis of the objection, and the trial court responded, "[t]he basis is he didn't see her after the accident. Someone else saw her twice." (Tr. 43.)

{¶15} Appellant then asked Dr. Miser if he made any findings at the January 12, 2006 appointment regarding decedent's alleged injuries stemming from the bus accident. Dr. Miser testified that he did not write anything down; however, he averred that he remembered decedent discussing the accident's significance in her life.

{¶16} Thereafter, appellant asked Dr. Miser if he normally relies upon his colleagues' opinions and findings in making his own diagnoses. Dr. Miser averred that he initially relies on his colleagues' findings, but then later confirms them. He averred he was aware of Dr. Beskow's findings because they were recorded in decedent's medical chart.

Dr. Miser testified that Dr. Beskow's findings from October 13, 2005 indicated that decedent had a head injury accompanied by a persistent headache; Dr. Beskow's findings from October 21, 2005 indicated that decedent's headache persisted and she was also experiencing neck pain.

{¶17} Appellant then inquired if Dr. Beskow made a finding that decedent suffered a concussion from the bus accident. The trial court sustained appellee's objection to this question. Immediately thereafter, appellant asked if Dr. Beskow made a finding that decedent had a concussion. Dr. Miser replied, "[t]hat was his note. He said headache secondary to head concussion." (Tr. 45.) The trial court sustained appellee's objection to this testimony. Appellant then asked if Dr. Beskow noted that decedent seemed less steady than she was during her last visit. Dr. Miser responded in the affirmative. When appellant asked if Dr. Miser had an opinion as to the significance of that finding, appellee objected, and the trial court sustained the objection.

{¶18} Following this line of questioning, appellant asked Dr. Miser to identify a binder containing various documents, including the record of decedent's hospital admission on October 28, 2005. Dr. Miser indicated that he had reviewed the record prior to trial; it indicated that decedent went to the emergency room for rectal bleeding. After a somewhat confusing discussion concerning whether Dr. Miser had previously mistakenly testified that decedent's October 28, 2005 hospital admission was due to her exhibiting signs of a heart attack, appellant asked Dr. Miser if he had an opinion as to whether the bus accident was a proximate cause of her heart attack. The trial court sustained appellee's objection to this question. Appellant then inquired if Dr. Miser knew from a review of the records whether decedent had a heart attack after she was admitted to the

hospital on October 28, 2005. Dr. Miser confirmed that decedent suffered a mild heart attack during this hospitalization.

{¶19} Thereafter, counsel for appellant stated, "I will represent to you that Dr. Kolibash will testify that her heart attack was not related to the motor vehicle accident. Do you have an opinion to a reasonable degree of medical probability as to whether it was?" (Tr. 48-49.) The trial court sustained appellee's objection to this question. When appellant asked the trial court the basis for the objection, the trial court answered, "[b]asis is this man didn't perform the examination." (Tr. 49.) Appellant asserted that Dr. Miser did perform an examination and asked the court to which examination it was referring. The court responded, "[t]he objection is sustained. I am not going to argue with you. You don't have a sufficient basis for the question." (Tr. 49.)

{¶20} Following this colloquy, appellant asked Dr. Miser to explain what happened during his January 12, 2006 examination of decedent. Dr. Miser averred that decedent related what had happened to her "starting with the bus accident all of the way through her hospitalizations," including the stress and anxiety she experienced as a result. (Tr. 49.) The trial court sustained appellee's objection to this testimony, stating, "you don't have a proper foundation. He has testified to things about which he had no part in." (Tr. 50.) When appellant protested that Dr. Miser was testifying about his January 12, 2006 examination of decedent, the trial court reiterated that the objection had been sustained.

{¶21} Immediately thereafter, appellant asked Dr. Miser if he had an opinion as to whether the medical issues for which he examined decedent on January 12, 2006 were a direct and proximate result of the bus accident. The trial court sustained appellee's objection on grounds that Dr. Miser did not treat decedent immediately after the accident.

{¶22} Appellant then asked Dr. Miser to explain the immediate cause of decedent's death. Dr. Miser averred that decedent died from complications resulting from an abdominal hernia. (Tr. 51.) He further testified that decedent suffered from the abdominal hernia prior to the accident and when he discussed with her on June 1, 2006 the possibility of surgically repairing it, decedent indicated that she was reluctant to undergo surgery. Following this testimony, appellant asked Dr. Miser to opine as to whether her reluctance to have surgery, or her loss of will to live, was a direct and proximate result of the accident. The trial court sustained appellee's objection to this question.

{¶23} Appellant then asked Dr. Miser to opine as to what decedent's life expectancy would have been had the accident not occurred. Dr. Miser opined that decedent might have lived another 10 years, given that her medical problems were fairly stabilized. Finally, appellant asked Dr. Miser if he had an opinion as to whether or not decedent's death was a direct and proximate result of the bus accident. The trial court sustained appellee's objection to the question.

{¶24} At the conclusion of Dr. Miser's direct testimony, appellee requested that the trial court strike Dr. Miser's testimony on grounds that he did not provide any opinions relating any of decedent's medical conditions to either of the bus accidents occurring on October 11, 2005. In response, appellant argued that Dr. Miser had testified to his personal observations, findings, and diagnosis regarding decedent's medical condition made in connection with the January 12, 2006 examination, and that he should have been permitted to render an opinion that those medical problems were proximately

caused by the bus accident. The trial court sustained appellee's motion and struck Dr. Miser's testimony in its entirety.

{¶25} In urging a directed verdict, appellee argued that appellant had provided no evidence from any physician indicating that decedent sustained any injuries as a direct and proximate result of either of the accidents on October 11, 2005. In response, appellant argued that the trial court had excluded the evidence she attempted to admit on that issue. She further argued that Dr. Miser had already testified regarding his findings and diagnosis pertaining to decedent's injuries based upon his January 12, 2006 examination, and that as a qualified expert under Evid.R. 702, he should be permitted to render an opinion as to whether decedent's injuries were a direct and proximate result of the accident.

{¶26} In granting the directed verdict, the trial court found that appellant had presented no evidence of proximate cause or damages. The court averred that appellant had merely attempted to have Dr. Miser testify about another physician's findings. The court further found that appellant had presented no evidence relating decedent's death to the accident. More specifically, the court found that appellant had not presented expert testimony opining that decedent's death was caused by the bus accident.

{¶27} Appellant contends in her assignment of error that the trial court abused its discretion by sustaining appellee's repeated objections to Dr. Miser's testimony on grounds that appellant failed to lay a proper foundation for the questions asked or the testimony offered. Appellant asserts that the trial court based its "lack of foundation" rulings on the fact that Dr. Miser's January 12, 2006 examination of decedent was separated in time from the October 11, 2005 accident by her examination by Dr. Beskow.

Appellant argues that separation in time is not a valid basis upon which to exclude the expert opinion of a subsequent treating physician. Appellant maintains that Dr. Miser was properly qualified to provide an expert medical opinion regarding causation based upon his review of Dr. Beskow's October 13 and 21, 2005 findings and his personal examination of decedent on January 12, 2006.

{¶28} In response, appellee offers four arguments. Appellee first contends that appellant waived any objection to the exclusion of Dr. Miser's testimony, pursuant to Evid.R. 103(A)(2), by failing to demonstrate that: (1) the exclusion of Dr. Miser's testimony affected her substantial rights, and (2) the substance of Dr. Miser's testimony was made known to the court by proffer or was obvious from the context of the questions asked of Dr. Miser. Secondly, appellee contends that the trial court correctly precluded Dr. Miser from offering opinion testimony as to causation because Dr. Miser: (1) lacked personal knowledge of the injuries decedent allegedly sustained in the accident, as he did not treat her immediately afterward, and (2) did not qualify as an expert under Evid.R. 702 for purposes of rendering an opinion on causation. Appellee thirdly contends that Dr. Miser's testimony did not comply with Evid.R. 703 because the medical records upon which he allegedly based his expert opinion were never admitted into evidence. Lastly, appellee contends that exclusion of Dr. Miser's testimony regarding causation did not materially prejudice appellant because appellant failed to adduce any evidence to satisfy the duty and breach elements of her negligence claim.

{¶29} We agree with appellee's contention that appellant waived any objection to the exclusion of Dr. Miser's testimony. Pursuant to Evid.R. 103(A)(2), " '[a] party may not predicate error on the exclusion of evidence during the examination in chief unless *two*

conditions are met: (1) the exclusion of such evidence must affect a substantial right of the party *and* (2) the substance of the excluded evidence was made known to the court by proffer *or* was apparent from the context within which questions were asked.' " (Emphasis sic.) *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶113, quoting *State v. Gilmore* (1986), 28 Ohio St.3d 190, syllabus. If the complaining party does not proffer the excluded evidence or the substance of that evidence is not apparent from the questioning of the witness, any error arising from the exclusion of that evidence is waived. *Ellinger v. Ho*, 10th Dist. No. 08AP-1079, 2010-Ohio-553, ¶34, citing *Hilliard v. First Indus., L.P.*, 165 Ohio App.3d 335, 2005-Ohio-6469, ¶41.

{¶30} In *State v. Heinisch* (1990), 50 Ohio St.3d 231, 241, the Ohio Supreme Court set forth two different methods a party may use to proffer testimony. The first is a question-and-answer method whereby the sworn testimony of the excluded witness is taken outside the presence of the jury. *Id.* The second allows the proponent of the evidence to explain to the court what evidence would have been presented had such evidence been ruled admissible. *Id.*

{¶31} Regardless of the method chosen, the proffer must satisfy two elements. *Ross v. St. Elizabeth Health Ctr.*, 181 Ohio App.3d 710, 2009-Ohio-1506, ¶29. First, the offering party must explain the legal theory supporting admissibility of the testimony. *Id.* Second, the offering party must demonstrate what the witness was expected to testify to and what that evidence would have proven or tended to have proven. *Id.*

{¶32} A review of the transcript reveals that appellant made no proffer regarding Dr. Miser's testimony. Appellant did not take Dr. Miser's sworn testimony outside the presence of the jury, nor did appellant adequately explain to the court the substance of

Dr. Miser's testimony. As noted above, in response to appellee's motion to strike Dr. Miser's testimony, appellant argued that Dr. Miser had testified to his personal observations, findings, and diagnosis regarding decedent's medical condition made in connection with the January 12, 2006 examination, and that he should have been permitted to render an opinion that those medical problems were proximately caused by the bus accident. Appellant offered no additional comments regarding Dr. Miser's testimony.

{¶33} Appellant's statement fails to satisfy the requirements necessary to make an appropriate proffer, i.e., (1) to outline the legal theory supporting admissibility of the testimony, and (2) to detail what Dr. Miser was expected to testify to and what such testimony would have proven or tended to prove. Although appellant arguably outlined the purported legal basis for admissibility, i.e., proximate cause, appellant's statement failed to detail what testimony Dr. Miser was expected to have given and what such testimony would have proven or tended to prove. Rather, appellant expressly relied on the testimony Dr. Miser had already given. Indeed, appellant argued that Dr. Miser had already testified to his findings and diagnosis based upon the January 12, 2006 examination. Thus, by the plain language of appellant's own statement, she made no proffer of evidence.

{¶34} Further, a review of the transcript reveals that the substance of Dr. Miser's expected testimony was not apparent from the context within which the questions were asked. Although appellant's questioning of Dr. Miser appears to be aimed at eliciting from him an opinion that the bus accident caused decedent's alleged injuries and death, it is not clear from the context of the questions exactly how Dr. Miser would have answered

the questions posed by appellant. This lack of clarity is particularly troubling in this case, given the tenuous connection between the accident, decedent's alleged injuries, and her death. Because the substance of Dr. Miser's testimony was neither made known to the court by proffer nor was apparent from the context of the questions asked, appellant has waived any error arising from the exclusion of Dr. Miser's testimony.

{¶35} Moreover, even if appellant had not waived her objection to the exclusion of Dr. Miser's testimony, she has failed to demonstrate that the trial court abused its discretion in sustaining appellee's objections to Dr. Miser's testimony. " '[E]very opinion, whether by an expert or lay person, must have a proper foundation [the factual basis of the conclusion] to be admissible.' " *Shivers v. Univ. of Cincinnati*, 10th Dist. No. 02AP-395, 2002-Ohio-6633, ¶12, quoting *State v. President* (Apr. 21, 1993), 9th Dist. No. 92CA005408. Appellant must establish that the trial court abused its discretion in sustaining appellee's objections on grounds that appellant failed to lay the proper foundation for Dr. Miser's testimony. *Carter v. U-Haul Internatl.*, 10th Dist. No. 09AP-310, 2009-Ohio-5358, ¶9. The admission or exclusion of evidence "is subject to review under an abuse of discretion standard, and absent a clear showing that the court abused its discretion in a manner that materially prejudices a party, [an appellate court] will not disturb the trial court's ruling." *Id.* "An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶36} As noted above, appellant argues that the trial court abused its discretion in not allowing Dr. Miser to provide an expert opinion as to the causal connection between the accident and decedent's alleged injuries and death on grounds that appellant failed to

lay a proper foundation for that testimony. Initially, we note that, contrary to appellee's contention, Dr. Miser qualified as an expert under Evid.R. 702. " 'Evid.R. 702(B) provides that a witness may qualify as an expert by reason of his or her specialized knowledge, skill, experience, training, or education. * * * The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function.' " *Conway*, ¶116, quoting *State v. Hartman* (2001), 93 Ohio St.3d 274, 285. Dr. Miser testified that he is licensed to practice medicine in the state of Ohio and both practices and teaches family medicine at The Ohio State University. Dr. Miser was qualified as an expert in family medicine based upon his specialized knowledge, experience, training, and education. Dr. Miser further testified that he was decedent's treating physician for several years prior to the accident and was familiar with her medical history. Dr. Miser's qualifications as a family medicine practitioner, coupled with his knowledge of decedent's medical history, would certainly aid the jury in performing its fact-finding function as to the causal link between the accident and decedent's alleged injuries and her ultimate death.

{¶37} Although Dr. Miser qualified as an expert, his testimony did not comply with the requirements of Evid.R. 703, which provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing." " 'This evidentiary principle has been refined and interpreted by Ohio courts to mean that the requirements of Evid.R. 703 are met if an expert's opinion is based in whole, or *in major part*, upon data which he has perceived and which has been admitted into evidence in the case.' " (Emphasis sic.) *Shivers*, ¶14, quoting *Harmon v. Allen* (Aug. 23, 2001), 8th Dist. No. 78349.

{¶38} Appellant contends that Dr. Miser could render an expert opinion based upon his review of the medical records from Dr. Beskow's October 13 and 21, 2005 examinations of decedent and Dr. Miser's personal examination of decedent on January 12, 2006. We disagree.

{¶39} Although Dr. Miser indicated that he reviewed Dr. Beskow's medical findings, he did not testify that he utilized those findings in his medical diagnoses. Further, the medical records from Dr. Beskow's examinations of decedent were not admitted into evidence. Accordingly, Dr. Miser could not render an expert opinion based upon his review of Dr. Beskow's medical findings.

{¶40} Similarly, Dr. Miser could not render an expert opinion based upon his personal examination of decedent on January 12, 2006. Dr. Miser admitted that he did not examine decedent on January 12, 2006 for purposes of making a medical diagnosis related to any injuries she may have suffered in the bus accident. Rather, he conducted a routine physical examination related to decedent's various pre-existing medical issues. Moreover, Dr. Miser acknowledged that he made no findings at the January 12, 2006 appointment regarding appellant's alleged injuries stemming from the accident.

{¶41} Because Dr. Miser could not have rendered an opinion based upon either his review of Dr. Beskow's medical findings or his own personal examination of decedent, appellant failed to establish a proper foundation for admitting Dr. Miser's expert opinion pursuant to Evid.R. 703 and 705. *State v. Simpson* (Sept. 30, 1994), 11th Dist. No. 93-L-014 ("to be admissible as opinion testimony of an expert witness, Evid.R. 703 and 705 require that a proper foundation be laid and the opinion must have the proper evidentiary

basis"). Accordingly, the trial court did not abuse its discretion in excluding Dr. Miser's expert opinion testimony for lack of a proper foundation under Evid.R. 703.

{¶42} For the foregoing reasons, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
