

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mary Johnson, etc.

Court of Appeals No. L-11-1290

Appellant/Cross-Appellee

Trial Court No. CI0200805902

v.

Emergency Physicians of Northwest
Ohio at Toledo, Inc., et al.

DECISION AND JUDGMENT

Appellees/Cross-Appellants

Decided: February 1, 2013

* * * * *

Todd E. Gurney, Brian N. Eisen, William M. Greene and Romney
Cullers, for appellant/cross-appellee.

John C. Barron and Stefanie E. Deller, for appellees Emergency
Physicians of Northwest Ohio at Toledo, Inc., Jaron Goldberg, M.D.
and Carlos Sotelo, D.O.

Peter R. Casey, III and Jeffrey M. Stopar, for appellees/cross-appellants.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This appeal arises in a medical malpractice/wrongful death action brought
by appellant, Mary Johnson, individually and as administrator of the estate of her

husband, Eugene Johnson, and as personal representative of his next of kin. Mr. Johnson died on February 28, 2007.

{¶ 2} Appellees are the defendants in the case and include urologists, emergency room physicians, and their employers. The urology appellees are Gregor K. Emmert, Jr., M.D., Richard I. Tapper, M.D., and Genito-Urinary Surgeons, Inc. The emergency room appellees are Jaron S. Goldberg, M.D., Carlos A. Sotelo, D.O. and Emergency Physicians of Northwest Ohio at Toledo, Inc.

{¶ 3} The case proceeded to trial before a jury in the Lucas County Court of Common Pleas in January 2011. The jury returned a verdict in favor of all defendants, and, pursuant to the verdict, the trial court entered judgment in favor of appellees and against appellant on February 1, 2011. Appellant appeals the February 1, 2011 judgment. The urology appellees also have cross-appealed.

{¶ 4} A series of medical experts testified at trial. Together they presented a basic framework to understand medical issues and testimony presented at trial. A deep vein thrombosis (DVT) is a blood clot that has formed in a vein located deep in the body. When a clot breaks off and moves through the bloodstream, it is an embolism. A pulmonary embolism is a blood clot that has moved from some other place in the body and into the lungs. The parties do not dispute that the cause of Mr. Johnson's death was an acute pulmonary embolism.

{¶ 5} Eugene Johnson suffered from prostate cancer and underwent prostate cancer surgery by Dr. Eric A. Pizza, M.D. in February 2007. Dr. Pizza is a urologist and

together with Drs. Emmert and Tapper has been employed by appellee Genito-Urinary Surgeons, Inc.

{¶ 6} At 12:54 a.m. on February 27, 2007 (twelve days after the prostate surgery), Mr. Johnson went to the emergency room department at Toledo Hospital because both his legs were swollen and tight. Dr. Jaron S. Goldberg, M.D. was the initial emergency room physician who treated Mr. Johnson at the emergency room. That night Dr. Emmert was the physician on call for the urology practice group.

{¶ 7} After examining Mr. Johnson, Dr. Goldberg ordered a D-dimer blood test to look for blood clots located anywhere in the body. (D-dimer is a substance released by the body in an effort to breakdown blood clots.) After receiving the D-dimer test results, Dr. Goldberg ordered a Venous Duplex Doppler ultrasound of the lower extremities to rule out possible blood clots. Dr. Goldberg requested emergency room staff to contact the physician on call for the urology practice group.

{¶ 8} Dr. Emmert and Dr. Goldberg spoke concerning Mr. Johnson's situation and Goldberg's evaluation and plan to secure the Venous Duplex Doppler ultrasound. Dr. Emmert has acknowledged that he agreed with the plan of care and that he requested that Dr. Goldberg advise him of the results of the ultrasound study.

{¶ 9} Dr. Goldberg's shift in the emergency room department ended before the Duplex Doppler ultrasound study was conducted. Dr. Sotelo took over for Dr. Goldberg and performed his own evaluation of Mr. Johnson. The study was reported negative for

blood clots in the legs. Dr. Sotelo contacted the urology practice group to provide the test results. During the course of the night, the swelling in Mr. Johnson's legs lessened.

{¶ 10} Dr. Sotelo reviewed Mr. Johnson's course while in the emergency room department including Duplex Doppler ultrasound test results with either Dr. Emmert or Dr. Tapper of the urology group. Dr. Sotelo also advised the urologist of his plan to discharge Mr. Johnson home with instructions.

{¶ 11} At approximately 9:38 a.m. on February 27, 2007, Mr. Johnson was discharged from the hospital to home with instructions. The instructions were that he was to follow up with his urologist, Dr. Pizza, at a scheduled appointment (scheduled for February 28, 2007) and to keep his legs elevated when at rest.

{¶ 12} Mr. Johnson collapsed at home on the morning of February 28, 2007, and was pronounced dead upon arrival at the hospital. An autopsy determined that the cause of death was an acute pulmonary embolism.

{¶ 13} Appellant asserts two assignments of error in her appeal:

Assignments of Error

1. The trial court committed reversible error when it refused to excuse a juror for cause where there was doubt as to the juror's being entirely unbiased; and

2. The trial court committed reversible error when it denied Mrs. Johnson the right to examine defendants' expert witness on opinions that were elicited after her initial cross-examination.

{¶ 14} We consider Assignment of Error No. 2 first.

Denial of Recross-Examination of Expert Witness

{¶ 15} Appellant argued at trial that appellees breached the standard of care owed Mr. Johnson by failing to secure additional testing to directly examine Mr. Johnson's pelvis for blood clots and upon discovery of a blood clot to treat the condition by either instituting heparin anticoagulant drug therapy or by placement of an IVC (inferior vena cava) filter. Appellant has contended that the additional testing would have disclosed the existence of a blood clot in veins of Mr. Johnson's pelvis and that the available treatment, if pursued, would have prevented Mr. Johnson's death. These contentions were highly disputed at trial.

{¶ 16} Appellant argues under Assignment of Error No. 2 that the trial court erred by denying appellant an opportunity to cross-examine Dr. Anthony J. Comerota, M.D., at trial, after the witness was questioned by the emergency room appellees. Dr. Comerota testified as an expert witness at trial on behalf of the urology appellees. Dr. Comerota is a vascular surgeon.

{¶ 17} The urology and emergency room appellees were co-defendants and the trial court permitted them to cross-examine each other's witnesses at trial. The order of evidence was that Dr. Comerota testified first on direct examination by the urology appellees, followed by appellant on cross-examination, and then by the emergency room appellees, also on cross-examination.

{¶ 18} On direct, the urology appellees limited their questioning of Dr. Comerota to liability issues concerning the care received by Mr. Johnson at The Toledo Hospital and expert opinion testimony with respect to compliance with the standard of care. The urology appellees did not question Dr. Comerota on direct about appellant's theory that if Mr. Johnson had been treated with heparin or with an IVC filter, he would have survived. Appellant limited her questioning to issues raised on direct.

{¶ 19} The emergency room appellees explored new matter and secured expert opinion testimony of the witness on issues not raised in prior questioning by either the urology appellees or appellant. In examination by the emergency room appellees, Dr. Comerota testified to his opinions that administration of the drug heparin would not have saved Mr. Johnson's life and that Mr. Johnson was not a candidate for treatment through placement of an IVC filter:

Mr. Barron: And if anti-coagulation therapy had been administered for a 24-hour period do you have an opinion to a reasonable degree of medical probability whether or not that heparin therapy over a 24-hour period would have prevented the death? Do you have such an opinion?

Dr. Comerota: It probably would not have.

* * *

Mr. Barron: Okay. Now, there has been some testimony in this case to this jury by other medical witnesses about the potential lifesaving

promise or ability or effect of an inferior vena cava filter. And I want to ask you some specific questions about that device.

Based upon again a hypothetical situation where this internal iliac vein clot was somehow diagnosed on February 27th, 2007 in Mr. Johnson, would Mr. Johnson have been an appropriate candidate for the placement of inferior vena cava filter?

First, do you have an opinion to a reasonable medical probability on that issue?

Dr. Comerota: The proper treatment of Mr. Johnson – if the internal iliac vein thrombosis was diagnosed the proper treatment would have been anti-coagulation not an IVC filter.

Q. And –

An IVC filter has complications in and of itself. It will go on to thrombose the vena cava in varying percentages of patients. And some of them as much as four to five percent over the next six months in some reports.

Additionally what has been unquestionably established is that there is a higher risk of deep vein thrombosis in patients who have an IVC filter placed. So I'm in favor of the proper use of IVC filters, but I'm not in favor of the improper use of these filters.

Q. And again, just to come back, based upon your knowledge, training, and expertise, if hypothetically this internal iliac clot had been diagnosed on February 27th, would Mr. Johnson have been a proper candidate for the placement of such a filter on that date?

A. No.

{¶ 20} After the emergency room appellees concluded questioning of Dr. Comerota, the urology appellees advised the court that they had no re-direct. Appellant requested an opportunity to recross-examine the witness, limited to new matters that were not raised on direct. The trial court denied the request on the basis that there had been no re-direct.

{¶ 21} Trial courts have broad discretion to admit or exclude evidence and a ruling on evidence will not be reversed on appeal absent a showing of an abuse of discretion that affects the substantial rights of a party or is inconsistent with substantial justice. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 20; *O'Brien v. Angley*, 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980). Although generally the opportunity to recross-examine a witness comes within a trial court's discretion, where new areas are inquired into on redirect, the trial court is to allow the opportunity to recross-examine. *State v. Faulkner*, 56 Ohio St.2d 42, 46, 381 N.E.2d 934 (1978).

{¶ 22} The Ohio Supreme Court defined new matter in *Faulkner* for purposes of the right to recross-examine a witness to concern whether the issue for which recross-

examination is sought had been raised in earlier questioning of the witness at trial. *Id.* We do not consider the fact of whether the issue had been addressed during a pretrial discovery deposition of the witness, as argued by appellees, to be relevant to the inquiry.

{¶ 23} In *Bernal v. Lindholm*, 133 Ohio App.3d 163, 727 N.E.2d 145 (6th Dist.1999), we considered objections to trial procedure in a medical malpractice action that permitted co-defendants to question each other's witnesses at trial. There and here, the plaintiffs-appellants argued that the procedure created tactical advantages for the co-defendants at trial. *Id.* at 177. In *Bernal*, we recognized that such a procedure requires a trial court to permit the plaintiff "a full opportunity for meaningful cross-examination of the witnesses." *Id.*

{¶ 24} The opinion testimony on new matter by Dr. Comerota, elicited through questioning by the emergency room appellees, presented key evidence in defense of claims against all defendants. The trial court's ruling acted to deny appellant any cross-examination of the witness on these opinions as against any defendant. We conclude that the trial court abused its discretion by denying cross-examination of Dr. Comerota on the new matter. We also conclude that the ruling was highly prejudicial in the case, involving key defense testimony on the issues of negligence and proximate cause at trial.

Two Issue Rule

{¶ 25} Appellees argue that the two issue rule bars consideration of Assignment of Error No. 1. In *H.E. Culbertson Co. v. Warden*, 123 Ohio St. 297, 303, 175 N.E. 205 (1931), the Ohio Supreme Court defined the rule:

This rule as generally applied is that, where there are two causes of action, or two defenses, thereby raising separate and distinct issues, and a general verdict has been returned, and the mental processes of the jury have not been tested by special interrogatories to indicate which of the issues was resolved in favor of the successful party, it will be presumed that all issues were so determined; and that, where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded.

{¶ 26} Appellees argue that the two issue rule applies because the defense verdict was supported by the evidence on two independent grounds, negligence and proximate cause. No special interrogatory was employed at trial to disclose on which issue the jury rendered its verdict. Appellees contend that the opinion testimony by Dr. Comerota upon questioning by the emergency room appellees was relevant to the issue of proximate cause alone. They contend that the issue of negligence was tried free of claimed error and that the jury could have reached its verdict based upon resolution of the negligence issue alone.

{¶ 27} Appellees cite a decision of the Seventh District Court of Appeals in *Parm v. Ramsey*, 7th Dist. No. 04 MA 258, 2005-Ohio-4505 in support of their argument. The *Parm* decision involved an action for personal injuries allegedly sustained in an automobile accident. The case was defended on claims that the defendant was not negligent and that the plaintiff was not injured in the accident. On appeal, the plaintiff

asserted trial court errors concerning the negligence alone. *Id.* at ¶ 6-10. Under the two issue rule, the court of appeals upheld the defense verdict because no special interrogatory at trial demonstrated whether the jury based its verdict on a finding of no negligence or a finding of no injury. *Id.* at ¶ 18.

{¶ 28} We agree with appellant that the *Parm* decision is distinguishable and that the two issue rule does not apply in this appeal. This case concerns an action for medical malpractice. In our view, the evidence of whether placement of an IVC filter or administration of heparin drug therapy were available effective treatments for Mr. Johnson's blood clot was relevant evidence with respect to both negligence and proximate cause. It was relevant on whether appellees were negligent in failing to pursue further testing for a blood clot in veins of the pelvis. It was also relevant on the issue of whether failure to pursue further testing proximately caused Mr. Johnson's death.

{¶ 29} We conclude that this case does not present an independent ground supporting the general verdict that was tried free from the claimed trial court error. Dr. Comerota's testimony concerning heparin and IVC filters related to both negligence and proximate cause. The two issue rule does not apply.

Proffer and Evid.R. 103(A)(2)

{¶ 30} The emergency room appellees also argue that appellant was required to make a proffer of expected testimony she intended to elicit from Dr. Comerota on recross-examination in order to preserve the issue for appeal. Under Evid.R. 103(A)(2),

however, a proffer is not required to preserve a claim that the trial court erred by excluding evidence sought through cross-examination. *State v. Scott*, 6th Dist. No. S-83-6, 1983 WL 6932, *1 (Aug. 26, 1983); *State v. Pierce*, 2011-Ohio-4873, 968 N.E.2d 1019, ¶ 3 (2d Dist.); *State v. Jackson*, 9th Dist. Nos. 22378 and 22394, 2005-Ohio-5184, ¶ 12.

{¶ 31} We find appellant's Assignment of Error No. 2 well-taken.

{¶ 32} Under Assignment of Error No. 1, appellant asserts that the trial court erred in overruling appellant's motion to excuse Juror 5 for cause. Juror 5 was subsequently excused from jury service through appellant's exercise of a peremptory challenge to the juror.

{¶ 33} In view of decision on the merits on Assignment of Error No. 2, we find Assignment of Error No. 1 is moot. See App.R. 12(A)(1)(c).

Cross-Appeal

{¶ 34} The urology appellees assert one assignment of error on cross-appeal:

Assignment of Error on Cross-Appeal: The trial court erred by overruling the motion for directed verdict of the Urology Defendants because there was no competent, credible evidence indicating that the Urology Defendants breached the standard of care.

{¶ 35} The Ohio Supreme Court identified the elements of an action for medical malpractice in *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), paragraph one of the syllabus:

In order to establish medical malpractice, it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things.

{¶ 36} The applicable standard of care and proximate cause of injury in medical malpractice actions are ordinarily established through use of expert opinion testimony. *Rogoff v. King*, 91 Ohio App.3d 438, 445, 632 N.E.2d 977 (8th Dist.1993); *Mielke v. Baibak*, 6th Dist. No. L-07-1356, 2009-Ohio-2598, ¶ 25.

In their cross-appeal, the urology appellees contend that competent, credible evidence was lacking at trial to support a claim that they breached the standard of care owed by them to the decedent and that the trial court erred in failing to grant their motion for a directed verdict on that ground. The urology appellees argue evidence of the applicable standard of care was lacking at trial because appellant did not call a urologist to testify.

{¶ 37} Ohio courts have recognized that there can be a standard of care with respect to communication between physicians. *See Fowerbaugh v. Univ. Hosps.*, 118

Ohio App.3d 402, 406-407, 692 N.E.2d 1091 (8th Dist.1997). The urology defendants do not dispute the existence of a standard with respect to communication between physicians. They dispute that Dr. Panacek is qualified to testify to establish the standard for urologists.

{¶ 38} Dr. Edward Allen Panacek, M.D., testified that in his practice he interacts with specialists every day in circumstances involving emergency room care and critical care. He testified that his education, training and experience made him knowledgeable about the quality of communications between specialists and emergency medicine physicians and the importance of clear and effective communication in both directions in arriving at a reasonable plan to safely evaluate and treat patients. Dr. Panacek is a physician and professor at the University of California Davis. He is board certified in emergency medicine, internal medicine, and critical care medicine.

{¶ 39} Over objection, Dr. Panacek testified at trial to the standard of care owed by specialists generally in their communications with emergency room physicians and that Dr. Emmert, in his communications with Dr. Goldberg, and the urologist who subsequently communicated with Dr. Sotelo (either Dr. Emmert or Dr. Tapper) both violated that standard of care to the injury of Mr. Johnson.

{¶ 40} Urology appellees argue that Dr. Panacek is not qualified to testify as to a urological standard of care. They argue that Dr. Panacek did not testify to any familiarity with the standard of care applicable to urologists and admittedly lacked a urologist's understanding of pelvic vein thrombosis. Appellant argues that under the Ohio Supreme

Court's decision in *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 383 N.E.2d 564 (1978), expert opinion testimony by a urologist was not required because specialties overlap on this issue.

{¶ 41} In *Alexander*, the trial court excluded the testimony of a podiatrist at trial as to the standard of care with respect to application and removal of a cast that is too tight in a medical malpractice action brought against an orthopedic surgeon. *Id.* at 159-160. The podiatrist testified “that there was a common way all surgeons applied casts and that the principles used in applying the plaintiff’s cast were the same as he had been taught.” *Id.* at 160.

{¶ 42} After reviewing testimony by the podiatrist, the Ohio Supreme Court concluded that the record in the case contained “probative evidence that there exists a minimum standard of care common to all specialties with regard to the application of casts.” *Id.* The *Alexander* court affirmed a judgment of the Tenth District Court of Appeals that ruled the testimony by the podiatrist was admissible as the testimony fell “within that area of medicine which he is authorized to and does practice.” *Id.*

{¶ 43} In *Smith v. Promedica Health System, Inc.*, 6th Dist. No. L-06-1333, 2007-Ohio-4189, ¶ 17, we considered the case-by-case analysis required under *Alexander* to determine admissibility of expert opinion testimony where fields of medicine overlap:

Where the fields of medicine overlap, a witness from a school or specialty other than that of the defendant physician may qualify as an expert witness if he demonstrates sufficient knowledge of the standards of

the defendant's school and specialty enabling him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards. *Alexander*, supra, at 158-159. The test of admissibility is whether a particular witness offered as an expert will aid the trier of fact in the search of the truth, not whether the expert witness is the best witness on the subject. *Id.* Thus, the admissibility of expert testimony must be made on a case-by-case basis, reviewing the medical expert's knowledge, skill, experience, training, and education. *Taulbee [v. Dunsky*, 12th Dist. No. CA2003-03-059, 2003-Ohio-5988] *supra*, at ¶ 21.

{¶ 44} Appellant did not seek to introduce expert opinion testimony from Dr. Panacek on whether the urology appellees were negligent in performing any urological procedure. Dr. Panacek's testimony with respect to the urology appellees at trial was limited to whether they were negligent in failing to communicate effectively with the emergency room appellees in a manner applicable to specialists generally.

{¶ 45} In our view, the trial court did not abuse its discretion in concluding that Dr. Panacek was qualified to testify as to the existence of a standard of care applying to communications between specialists and emergency room physicians generally and to an opinion on whether the urology appellees breached that standard of care to the injury of decedent.

{¶ 46} As the record includes expert testimony as to standard of care and breach of the standard to the injury of the decedent, we find no trial court error in its overruling the motion for a direct verdict at trial.

{¶ 47} We find the urology appellee’s assignment of error on cross-appeal is not well-taken.

{¶ 48} We conclude that appellant was denied a fair trial. We reverse the judgment of the Lucas County Court of Common Pleas and remand this cause for further proceedings including a new trial. Appellees are ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.