

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

Jennifer Baker, Individually and
as Executrix of the of the Estate of
Janet Colston

Court of Appeals No. E-14-137

Trial Court No. 2011-CV-0302

Appellant

v.

Anthony DeRiso, II, M.D., et al.

DECISION AND JUDGMENT

Appellees

Decided: June 19, 2015

* * * * *

William J. Novak, Scott D. Perlmutter and Chelsea M. Shenton,
for appellant.

Donald J. Moracz, Taylor C. Knight, and Martin T. Galvin,
for appellees.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal in a medical malpractice action. Appellant, Jennifer Baker, individually and as executrix of the estate of Janet Colston, argues that the trial court

erred when it gave the specialist standard of care instruction to the jury as opposed to the nonspecialist standard of care instruction. For the reasons that follow, we affirm.

A. Facts and Procedural Background

{¶ 2} In late 2009, Colston was diagnosed with lung cancer and came under the care of appellees, Dr. Anthony DeRiso, II, and Lakeside Heart and Lung Center, Inc. DeRiso, a cardiothoracic surgeon, scheduled Colston for a lobectomy on December 7, 2009, to remove the cancerous portion of the lung. In November 2009, prior to the surgery, Colston presented to Dr. Jennifer Briede with pain in her left lower extremity. Testing revealed that Colston suffered from deep vein thrombosis (“DVT”). After consultation with DeRiso, Colston was placed on Lovenox, an anti-coagulant, to treat the DVT, but because of the bleeding risks associated with anti-coagulant medications, the treatment would need to be stopped prior to the lobectomy and resumed after the lobectomy.

{¶ 3} Colston followed the treatment plan, and stopped taking the Lovenox on December 5, 2009. Two days later, DeRiso performed the lobectomy on Colston without complication. Following the surgery, DeRiso placed Colston on heparin. Thereafter, on December 12, 2009, Colston collapsed while she was walking in the hallway of the hospital. Colston passed away a few hours later.

{¶ 4} On May 4, 2011, appellant filed a complaint against appellees in which she alleged that Colston died from a pulmonary embolism that occurred because of the

negligence of appellees in treating the DVT prior to and following the lobectomy. The matter proceeded to a jury trial.

{¶ 5} At trial, appellant's theory of the case was that DeRiso negligently performed the lobectomy without adequately accounting for the DVT.¹ Because the standard course of treatment for DVT requires three to six months of anti-coagulant medication, and because Colston had only been on the medication for one month at the time of the surgery, appellant contended that DeRiso should have placed an inferior vena cava filter prior to performing the lobectomy. As support for her position, appellant called Dr. Paul Collier, a general and vascular surgeon, as an expert witness to testify that Colston died from a pulmonary embolism that likely would have been prevented by the placement of the inferior vena cava filter.

{¶ 6} Appellees, on the other hand, believed that an inferior vena cava filter was not required in this case, and that the stopping and restarting of the anti-coagulation medication was within the standard of care. Furthermore, appellees believed that Colston died as a result of a myocardial infarction, not from a pulmonary embolism. Appellees called Dr. Mark Botham, a cardiothoracic surgeon, and Dr. Vanessa Gibson, a thoracic surgeon, to support their theory.

¹ On appeal, appellant has not provided a complete transcript from the trial. Thus, the parties' theories of the case are taken from their trial briefs.

{¶ 7} Following the presentation of evidence, the trial court instructed the jury. Relevant here, the trial court gave the following instruction, over appellant's objection, relative to the standard of care applicable to DeRiso's treatment:

A specialist is a physician who holds himself out or specially - and specially trained, skilled, and qualified in a particular branch of medicine. The standard of care for a physician in the practice of a specialty is that of a reasonable specialist practicing medicine exercising reasonable skill, care, and diligence under the like and similar circumstances, regardless of where he practices. A specialist in any branch has the same standard of care as all other specialists in that branch. If you find by the greater weight of the evidence the specialist Defendant failed to meet this standard of care, then you shall find that the individual was negligent.

{¶ 8} After deliberations, the jury returned a verdict in favor of appellees, finding that DeRiso did not deviate from the standard of care in the treatment of Colston.

B. Assignment of Error

{¶ 9} Appellant has timely appealed the judgment of the trial court entered in accordance with the jury's verdict. She now presents one assignment of error for our review:

Assignment of Error No. 1: It was reversible error for the Trial Court to give the jury instruction found at 1 CV Ohio Jury Instructions 417.01(3).

II. Analysis

{¶ 10} We begin our analysis by noting that “[t]he question of whether a jury instruction is legally correct and factually warranted is subject to de novo review.” *Cromer v. Children’s Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 22, citing *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St.3d 300, 2010-Ohio-1041, 927 N.E.2d 1112, ¶ 26. “A trial court must give jury instructions which are a correct and complete statement of the law.” *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312, 649 N.E.2d 1219 (1995). Further, “[a] trial court has broad discretion to decide how to fashion jury instructions, but it must ‘fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.’” *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, 29 N.E.3d 939, ¶ 46, quoting *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus.

{¶ 11} In support of her assignment of error, appellant argues that the trial court erred when it gave the “specialist” standard of care jury instruction as opposed to the “nonspecialist” standard of care. In *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), paragraphs one and two of the syllabus, the Ohio Supreme Court articulated separate standards of care for specialist and nonspecialist physicians. Those standards were incorporated into the Ohio Jury Instructions:

2. NONSPECIALIST. The existence of a physician-patient relationship places on the physician the duty to act as a physician of

reasonable skill, care, and diligence under like or similar conditions or circumstances. This is known as the standard of care. The standard of care is to do those things which a reasonably careful physician would do and to refrain from doing those things which a reasonably careful physician would not do. The required standard of care is the same throughout the United States. If you find by the greater weight of the evidence that the defendant failed to meet this standard of care, then you shall find that he/she was negligent.

3. SPECIALIST. A specialist is a physician who holds himself/herself out as specially trained, skilled, and qualified in a particular branch of medicine. The standard of care for a physician in the practice of a specialty is that of a reasonable specialist practicing medicine exercising reasonable skill, care, and diligence under like and similar circumstances, regardless of where he/she practices. A specialist in any branch has the same standard of care as all other specialists in that branch. If you find by the greater weight of the evidence that defendant failed to meet this standard of care, then you shall find that he/she was negligent. *Ohio Jury Instructions*, CV Section 417.01 (Rev. Aug. 11, 2010).

{¶ 12} Appellant contends that by giving the specialist instruction, the trial court confused the jury to her prejudice. In essence, appellant argues that it is the nature of the treatment that determines which instruction is to be given, not the specialty of the

defendant physician. Here, because the standard of care for treating DVT is the same across specialties, appellant asserts that the nonspecialist instruction should have been given. As support, appellant analogizes this situation to cases in which an expert witness not within the defendant's specialty is called to testify to the standard of care applicable to the defendant. In that context, the Ohio Supreme Court has held, "Where, as here, the fields of medicine overlap and more than one type of specialist may perform the treatment, a witness may qualify as an expert even though he does not practice the same specialty as the defendant." *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 158, 383 N.E.2d 564 (1978). Appellant stresses that although her expert witness, Dr. Collier, was a vascular surgeon, not a cardiothoracic surgeon, he appropriately testified as to the standard of care when treating DVT, and testified that the same standard of care applies to cardiothoracic surgeons. Therefore, she concludes that the specialist instruction gave the impression that DeRiso's specialty was critical to his decision making regarding the treatment, thus testimony from an expert witness not within DeRiso's specialty "is automatically less credible in the jurors' eyes."

{¶ 13} We disagree that the trial court erred when giving the specialist instruction. The Ohio Supreme Court has held, "The standard of care for a physician or surgeon in the practice of a boardcertified medical or surgical specialty should be that of a reasonable specialist practicing medicine or surgery in that same specialty in the light of present day scientific knowledge in that specialty field." *Bruni*, 46 Ohio St.2d 127, 346 N.E.2d 673, at paragraph two of the syllabus. This is a clear and easily applicable rule.

In contrast, appellant proposes a rule that would require the court to make a determination as to whether the procedure that was performed was mundane or within a particular specialty. The Twelfth District, in rejecting a similar argument, recognized this issue and noted,

Trial judges cannot be expected to know which medical problem, treatment, or procedure constitutes an “elementary” medical issue or “basic medicine 101” that requires a nonspecialist instruction to be given, and which medical problem, treatment, or procedure constitutes a more complicated or involved medical issue that requires a specialist instruction to be given. *Serge v. Reconstructive Orthopaedics & Sports Medicine, Inc.*, 12th Dist. Butler No. CA2006-04-081, 2007-Ohio-3354, ¶ 35.

Therefore, because the parties do not dispute that DeRiso was a specialist in cardiothoracic surgery, the trial court properly gave the specialist instruction.

{¶ 14} Moreover, the current regime accounts for those situations where the standard of care may overlap specialties. In terms of this case, it may be that a reasonable cardiothoracic surgeon is held to the same standard of care as a vascular surgeon in the perioperative treatment of a patient with DVT, and Collier’s testimony to that effect was permissible under *Alexander*. Thus, appellant was able to put forth admissible evidence as to the standard of care of a cardiothoracic surgeon in the treatment of DVT, and that DeRiso’s conduct fell below that standard.

{¶ 15} However, although Collier’s testimony was admissible, that fact does not necessitate that it be given equal weight to the testimony of an expert witness who shares the same specialty as the defendant. Indeed, “[d]ifferences in areas of specialization go to the weight evidence is to be given by a fact finder.” *Berlinger v. Mt. Sinai Med. Ctr.*, 68 Ohio App.3d 830, 835, 589 N.E.2d 1378 (8th Dist.1990). Therefore, even if the specialist instruction may have undermined the credibility of Collier’s testimony—an issue that we do not reach, and on which we express no opinion—it did not do so unfairly.

{¶ 16} Accordingly, we hold that the trial court’s instruction on the specialist standard of care was an accurate statement of the law and did not confuse the jury. Appellant’s assignment of error is not well-taken.

III. Conclusion

{¶ 17} For the foregoing reasons, the judgment of the Erie County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE

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