

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

ESTATE OF LURENE N. HALL, BY
APRIL E. COUCH, ADMRX., et al.

C.A. No. 24066

Appellants

v.

AKRON GENERAL MEDICAL CENTER,
et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV-2006-02-0983

Appellees

DECISION AND JOURNAL ENTRY

Dated: January 12, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Lurene N. Hall died shortly after a doctor inserted a dialysis catheter into her jugular vein. Her daughter, April E. Couch, sued various health care providers in her capacity as administratrix of her mother's estate. This Court previously sustained the estate's second assignment of error and determined that the other issues were moot. The Ohio Supreme Court, however, reversed this Court's decision on the second assignment of error. *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St. 3d 300, 2010-Ohio-1041, at ¶2. The Ohio Supreme Court has remanded this case for consideration of the estate's first and third assignments of error. *Id.* at ¶36. In its first assignment of error, the estate has argued that the trial court should have permitted it to call the county medical examiner as a rebuttal witness following the defense case-in-chief. The third assignment of error is that the trial court should have granted the estate's new

trial motion based on the cumulative effect of the errors complained of in the other two assignments of error. This Court affirms because the trial court properly excluded the medical examiner's testimony because it did not qualify as rebuttal evidence under the circumstances and there is no cumulative error.

BACKGROUND

{¶2} Ms. Hall had a catheter implanted in the right side of her neck to accommodate frequent kidney dialysis treatments. After a few months, the catheter had to be removed because it had become infected. On September 10, 2003, Ms. Hall submitted to an outpatient procedure at Akron General Medical Center to replace the catheter. Dr. Richard Patterson, an interventional radiologist, performed the procedure by placing a catheter into the jugular vein on the left side of Ms. Hall's neck. Shortly after the procedure was finished, Ms. Hall died of pericardial tamponade, a condition in which the heart stops under the pressure of blood filling the sac that surrounds the heart. Dorland's Illustrated Medical Dictionary 1853 (30th ed. 2003). Experts on both sides agreed that Ms. Hall died of pericardial tamponade caused by internal bleeding that began during the catheter placement procedure, but they disagreed regarding what caused the bleeding. The estate submitted the autopsy report as an exhibit at trial. The report revealed a four-centimeter laceration of the wall of the superior vena cava, a major blood vessel that carries blood from the upper body to the heart. *Id.* at 2021. The estate's experts testified that Dr. Patterson negligently performed the procedure, perforating the wall of the superior vena cava, causing blood to flow into the sac around the heart. Dr. Patterson's experts testified that Ms. Hall's injury was caused by some unknown abnormality in the blood vessel or a flesh-eating form of staph aureus.

REBUTTAL EVIDENCE

{¶3} The estate’s first assignment of error is that the trial court incorrectly failed to permit it to call the Summit County Medical Examiner, Dr. Lisa Kohler, as a rebuttal witness. The estate has argued that Dr. Kohler was a proper rebuttal witness because, during the defense case-in-chief, Dr. Mark Dean theorized that the medical examiner’s reference to a “bluish discoloration” on the wall of the superior vena cava was evidence of a flesh-eating bacteria that caused the vein to “unravel[]” when the catheter was inserted. Dr. Patterson and his employer have argued that Dr. Kohler was not a proper rebuttal witness because the estate addressed the topic of her proposed testimony during its case-in-chief.

{¶4} “Rebutting evidence is that given to explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence.” *State v. McNeill*, 83 Ohio St. 3d 438, 446 (1998). “A party has an unconditional right to present rebuttal testimony on matters which are first addressed in an opponent’s case-in-chief and [is not testimony that should have been presented] in the rebutting party’s case-in-chief.” *Phung v. Waste Mgmt. Inc.*, 71 Ohio St. 3d 408, 410 (1994). The trial court has discretion to determine which proper rebuttal evidence may be admitted. *State v. Carrasquillo*, 9th Dist. No. 09CA009639, 2010-Ohio-5063, at ¶16.

{¶5} During Dr. Patterson’s case-in-chief, one of his experts, Dr. Dean, testified that the autopsy report indicated there was a bluish discoloration along the wall of the superior vena cava that indicated that “something [was] eating away the lining of the blood vessel.” He went on to explain that he believed infection had weakened the vessel wall so that it “unraveled”

during the normal course of the procedure. On cross-examination, Dr. Dean clarified that he believed Ms. Hall's injury was caused by "the flesh-eating form of staph aureus."

{¶6} After Dr. Patterson and his employer rested their case, the estate requested an opportunity to call the Summit County Medical Examiner, Dr. Kohler, in rebuttal. According to their proffer, Dr. Kohler would have testified that the "bluish discoloration toward the medial aspect of the superior vena cava" "indicate[s] bleeding into the tissue or a bruise." She would also have testified that infection would have been indicated by pus. Dr. Patterson's lawyer objected to the proposed testimony, arguing that Dr. Kohler was not a proper rebuttal witness because, among other reasons, the estate had elicited testimony from both of its experts during its case-in-chief regarding Dr. Dean's infection theory.

{¶7} The first mention of the issue appears to have been elicited by the estate's lawyer during the direct examination of its interventional radiology expert, Dr. Michael Foley. The estate's lawyer directed Dr. Foley's attention to the autopsy report and the mention of a bluish discoloration in the superior vena cava and asked if that was evidence of an infectious process. Dr. Foley responded that it was not evidence of infection, but trauma. The estate's lawyer again addressed the topic with his vascular surgery expert, Dr. Jeffrey Kremen. On direct examination, Dr. Kremen testified that he saw no evidence of a weakening of the superior vena cava due to infection. Dr. Kremen specifically mentioned that Dr. Dean had commented in his deposition testimony that the bluish discoloration noted by the medical examiner was evidence of infection, but Dr. Kremen disagreed with that opinion. Dr. Kremen testified that he believed the discoloration was evidence of trauma, specifically a bruise at the site of the perforation of the blood vessel.

{¶8} Thus, the estate twice raised the topic of Dr. Kohler’s proposed testimony during its case-in-chief and had every opportunity to more fully develop the issue at that time, including calling Dr. Kohler as a witness. During the defense case-in-chief, when Dr. Dean testified about his infection theory and referred to the medical examiner’s finding of “bluish discoloration” in the superior vena cava, it was no longer a new matter. Because the topic was not first addressed during the defense case-in-chief, the medical examiner’s testimony was not proper rebuttal evidence for the plaintiff. See *Phung v. Waste Mgmt. Inc.*, 71 Ohio St. 3d 408, 410 (1994). Therefore, the estate’s first assignment of error is overruled.

CUMULATIVE ERROR

{¶9} The estate’s third assignment of error is that the trial court should have granted its motion for a new trial based on the cumulative effect of the “procedural irregularities and errors,” that is, failure to allow the estate to call Dr. Kohler in rebuttal and failure to instruct the jury regarding *res ipsa loquitur*. This Court has determined that it was not error for the trial court to refuse to allow the estate to call Dr. Kohler in rebuttal and the Ohio Supreme Court has held that it was not error for the trial court to refuse to instruct the jury regarding *res ipsa loquitur*. *Estate of Hall v. Akron Gen. Med. Ctr.*, 125 Ohio St. 3d 300, 2010-Ohio-1041, at ¶2. Therefore, there is no cumulative error and the estate’s third assignment of error is overruled.

CONCLUSION

{¶10} The estate’s first and third assignments of error are overruled because the medical examiner’s testimony was not proper rebuttal evidence under the circumstances and there was no cumulative error. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

CLAIR E. DICKINSON
FOR THE COURT

MOORE, J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

STAN B. SCHNEIDERMAN, attorney at law, for appellants.

GARY T. MANTKOWSKI and ELLIS B. BRANNON, attorneys at law, for appellants.

PAUL W. FLOWERS, attorney at law, for appellants.

STACY A. RAGON, and MICHAEL J. FUCHS, attorneys at law, for appellees.