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2021 IL App (3d) 190266-U

Order filed March 4, 2021

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2021

DAVID A. DIEKEN, SR., as Independent)	Appeal from the Circuit Court
Administrator of the Estate of DEBRA L.)	of the Twelfth Judicial Circuit,
DIEKEN, Deceased)	Will County, Illinois.
)	
Plaintiff-Appellant,)	
)	Appeal No. 3-19-0266
v.)	Circuit No. 14-L-1012
)	
DANIEL CLARK, M.D.,)	
)	The Honorable
Defendant-Appellee.)	Bobbi N. Petrungaro,
)	Judge, presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices SCHMIDT and LYTTON concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in allowing the defense to present evidence and testimony on decedent’s possible drug overdose as an alternative cause of death in this medical malpractice case.

¶ 2 Plaintiff, David Dieken, Sr., filed this medical malpractice claim against defendant, Daniel Clark, M.D. Plaintiff alleged that defendant failed to identify or properly diagnosed the medical conditions of his late wife Debra (“decedent”). He contended that because of

defendant's failure, decedent's conditions worsened and led to her death. The case proceeded to trial where defendant argued, with testimony from medical professionals, that decedent died from an overdose of prescription drugs. The jury returned a verdict in favor of defendant.

¶ 3 Plaintiff filed a post-trial motion requesting that the trial court vacate the judgment and order a new trial. He argued that the court erred in allowing defendant to present testimony relating to the presence of an empty prescription drug bottle, statements made to medical professionals at the time of death, and medical opinions on the cause of death. The court denied the motion. Plaintiff now appeals and we affirm the trial court's order.

¶ 4 **FACTS**

¶ 5 Defendant is a board-certified family medicine practitioner in the Orland Park area. On the morning of May 6, 2013, he examined decedent who complained of upper back pain. She was fifty-three years old, approximately five feet five inches tall. She weighed about 230 pounds and had been a smoker for about twenty years. After evaluating her, defendant ordered follow-up care, including blood work and X-rays. He prescribed her Vicoprofen, a combined anti-inflammatory and opiate, for pain. On the evening of the same day, decedent passed away.

¶ 6 In his complaint, plaintiff alleged that defendant negligently failed to diagnose acute coronary syndrome and unstable angina as the cause of decedent's pain. He also alleged that defendant negligently failed to transfer decedent to the emergency room for immediate care. Prior to trial, before which plaintiff filed a motion in *limine* requesting the trial court to prohibit any testimony or suggestion that the death was related to the ingestion of Flexeril—a muscle relaxant. The circuit court denied the motion.

¶ 7 The parties and decedent's sons, David, Jr. and Daniel Dieken, testified to their knowledge of the events. There was also testimony from the lead paramedic who responded at

the time of death, a member of the Will County Coroner's Office, and the emergency room physician who treated decedent when she arrived at Silver Cross Hospital. Finally, each side presented testimony from medical expert regarding the cause of death; in total, six medical experts testified on this issue. The trial testimony disclosed the following information.

¶ 8 When defendant examined decedent, he considered her medical history and risk factors for heart issues or stroke, including: her weight, smoking habit, high blood pressure, and high cholesterol. Decedent reported a sharp pain in her back radiating to her sternum that had awakened her at night for the previous two weeks. She also described numbness in both arms and some shortness of breath. Her neurological examination was normal, and decedent did not complain about any chest or cardiac pain.

¶ 9 Based on her descriptions and the result of his examination, defendant concluded that decedent's pain was musculoskeletal, not cardiac related. He explained that her complaints did not indicate acute coronary syndrome. Arm pain associated with acute coronary syndrome is usually in the left arm and radiates to the jaw. Numbness in both arms, in contrast, usually indicates a musculoskeletal issue. Defendant concluded that decedent likely had an inflammatory condition such as pleurisy or costochondritis—an inflammation of the nerve that runs from the back to the front of the sternum.

¶ 10 Plaintiff testified that, on May 6, 2013, he woke before 2:00 A.M and noticed decedent sitting at the side of the bed. She said her back hurt. He rubbed it and gave her Vicodin pain pills—not Flexeril. He recalled decedent remained restless throughout the night. Later that morning, they visited defendant's office and then went to a CVS drugstore drive-thru to get a prescription refill for Vicoprofen, which decedent took in the car. At approximately 5:30 P.M., decedent invited plaintiff to have a cigarette with her. While they were smoking, decedent

collapsed. Plaintiff called 911 and assisted the paramedics when they arrived. When the paramedics asked him if decedent had taken anything, plaintiff ran in the house and grabbed a bottle off the nightstand, believing it to be the bottle they had gotten from CVS earlier. He handed the bottle to the paramedics but began suspecting that something was wrong. He then told them that he had gotten “the wrong bottle.” The empty bottle he gave them had his name on it and identified the contents as prescription Flexeril. He stated that the bottle was on the nightstand because decedent had refilled it for him two days earlier. When newly refilled, the bottle would have contained twenty-one Flexeril pills. Plaintiff stated that he went back to retrieve the correct bottle, but he could not find it.

¶ 11 Robert Bebar testified that he was the lead paramedic responding to the Diekens’s home on the day in question. He directed his partner Officer Denis Workuka to speak with the “male family member” they met at the scene. Bebar testified that the information Workuka obtained led him to believe that decedent had taken “cyclobenzaprine,” also known as Flexeril. He recorded the information as “possible OD, Flexeril, 21 pills filled at noon today.” Based on that information, the paramedics administered Narcan to decedent. Bebar explained that paramedics only administer Narcan to patients if they suspect overdoses. The paramedics told Dr. George Filiadis, the emergency room physician on duty when decedent arrived at the hospital, that decedent had overdosed on “cyclobenzaprine.” Dr. Filiadis testified that decedent was in cardiac arrest when he examined her. She had no heart activity nor a pulse. He explained that an overdose of Flexeril can cause arrhythmia—irregularity of the heartbeat—leading to cardiac arrest. Dr. Filiadis also stated that he had never seen anyone overdose on Flexeril, but added that Flexeril can suppress oxygenation, causing inadequate oxygenation (or hypoxia) and death.

¶ 12 Kevin Stevenson of the Will County Coroner’s Office testified that his office was concerned about a possible issue related to Flexeril but did not find anything about the death suspicious. His office offered to proceed with an autopsy, but plaintiff requested that no autopsy be performed on the decedent.

¶ 13 Dr. Emily Duncanson, a board certified forensic and cardiovascular pathologist, testified that she had examined decedent’s heart for the sole purpose of assessing whether the valves would support a transplant. She did not offer any opinions related to the cause of death. Duncanson noted that decedent’s heart was enlarged, weighing more than her normal reference range and that both anterior descending coronary arteries were narrowed by 70 to 75 percent. She also found two infarcts, one recent and the other older and healing. The recent infarct was significantly larger and had occurred between four to six hours and 24 hours before decedent’s death. On cross-examination, Duncanson agreed that having an enlarged heart, an infarct, or an overdose can all cause arrhythmia leading to death. She was troubled that no toxicology study was conducted because without it an overdose could not be confirmed.

¶ 14 Dr. Scott Kaiser and Dr. Steven Eisenstein offered competing testimony on the standard of care in this case. Kaiser, a board-certified family medicine physician, testified that decedent came to defendant’s practice with “a serious medical problem.” He also stated that defendant “did not create a proper differential diagnosis of that problem and from that did not provide appropriate medical care and recommendations to [decedent] as a patient.” Kaiser believed that, although her symptoms were not typical, decedent was likely experiencing myocardial infarction or acute coronary syndrome—an insufficient blood flow to the heart—shortly before visiting defendant. However, Kaiser conceded (1) that decedent’s back pain could have been from a musculoskeletal source; (2) that it is possible to overdose on Flexeril; and (3) that the medical

records indicated that decedent took Flexeril and the paramedics suspected an overdose. He also conceded that a Flexeril overdose can cause cardiac arrhythmia which, in turn, could cause cardiac arrest.

¶ 15 Dr. Eisenstein, also a board-certified family medicine physician, opined that decedent was not suffering from acute coronary syndrome when she met with defendant. He stated that acute coronary syndrome is “a picture that doctors and even laypeople recognize,” and that decedent’s symptoms did not present that picture. In this case, Eisenstein explained, defendant reasonably considered decedent’s history and his own physical examination of her conditions to appropriately work through a differential diagnosis which ultimately pointed to a musculoskeletal or respiratory issue. He concluded that defendant had no obligation to initiate a cardiac workup.

¶ 16 Dr. Michael Sweeney, a board-certified interventional cardiologist, also testified that both of decedent’s anterior descending coronary arteries were narrowed by 70 to 75 percent. He could not state to a reasonable degree of medical certainty that decedent was having a myocardial infarction while she was in defendant’s office. However, he believed that decedent would have survived if defendant had sent her to the emergency department, where she could have undergone an EKG, potentially identifying an ongoing myocardial infarction and possibly had an angiogram (imaging of the inside of the blood vessels) and, if needed, placement of a stent in her clogged arteries. Stent placement is a medical procedure where a patient’s blood vessels are opened and kept open with a metal tube to facilitate blood flow. On cross-examination, Sweeney could not say to a reasonable degree of medical certainty that decedent would have been stented. He opined that he might not have stented her left anterior descending coronary—the branch artery might have been too narrow to be stented. Moreover, it was unclear whether he would

have stented decedent's right anterior descending coronary. Without a toxicology report, it was unclear how much Flexeril and Vicoprofen decedent took before her death. Sweeney noted that an overuse or overdose on either Flexeril or Vicoprofen can cause cardiac arrhythmia or respiratory insufficiency.

¶ 17 Dr. Jeffrey Shanes, a board-certified internal medicine physician and cardiologist concluded that, even had defendant sent decedent to the emergency department, no reasonable cardiologist would have believed her to be suffering from acute coronary syndrome, ordered an angiogram, or proceeded with an angioplasty—a surgical unblocking of a blood vessel. Shanes also explained that a reasonable cardiologist would not have stented the smaller branch arteries discussed by Sweeney. He explained that a blockage identified by a pathologist as approximately 75 percent would appear as a 50 percent blockage to a clinical cardiologist. He believed that no reasonable cardiologist would stent a vessel that appears to have only a 50 percent blockage. Shanes believed that decedent's death did not result from acute coronary syndrome; but, rather, was caused by ventricular fibrillation—a cardiac dysrhythmia caused by multiple factors including her enlarged heart (which required increased blood supply), smoking (which can cause the muscle to spasm and oxygen levels to drop), Vicoprofen (which can cause depression of breathing), and Flexeril.

¶ 18 Dr. J. Scott Denton, a member of the McLean County Coroner's Office, testified that he is board certified in anatomic, clinical, and forensic pathology. He believed that multiple heart diseases combined to cause decedent's sudden death. First, he concluded that the myocardial infarcts identified by Dr. Duncanson were not recent or fatal. He also agreed that a blockage appearing as 75 percent to a pathologist would be treated clinically by a cardiologist as a 50 percent blockage. He then noted that decedent's death could have resulted from possible

medication use. However, without a toxicology report, there was no way to be certain. Finally, Denton believed that decedent had hypertensive heart disease, ischemic heart disease (including blockages of her coronary arteries), and took Flexeril and Vicoprofen, all of which could have caused a sudden cardiac arrhythmia resulting in death.

¶ 19 After the close of evidence and closing arguments, the trial court instructed the jury. Among other things, the court reminded the jury that it was not to do any independent investigation or research on anything discussed at trial; and that jurors must be mindful of unconscious biases and not allow “bias, prejudice, or public opinion” to influence their decisions. The jury was tasked with evaluating a single issue: determining whether defendant “[f]ailed to diagnose acute coronary syndrome in the office on May 6, 2013 and call 9-1-1.” The jury returned its general verdict in favor of defendant. Plaintiff filed his post-trial motion, arguing that the jury’s verdict resulted from prejudice caused by “speculative” and “highly prejudicial” evidence related to Flexeril. After briefing and argument, the trial court denied the motion.

¶ 20 This appeal now follows.

¶ 21 ANALYSIS

¶ 22 A court’s ruling on a motion for new trial will not be reversed absent an abuse of discretion. *Dayton v. Pledge*, 2019 IL App (3d) 170698, ¶ 50. In determining whether a trial court abused its discretion, the reviewing court should consider whether the jury’s verdict was supported by the evidence and whether the losing party was denied a fair trial. *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). However, the underlying issue in this case is whether the trial court properly admitted evidence on an alternative cause of death advanced by defendant.

¶ 23 In short, plaintiff argues that the trial court erred in denying his motion in *Limine* to bar testimony of decedent’s use of Flexeril. He contends that the testimony was speculative,

advanced with unrealizable evidence, and caused him prejudice. He also contends that absent the testimony on Flexeril, the jury's verdict is against the manifest weight of the evidence.

¶ 24 A determination of the admissibility of evidence, including a ruling on a motion in *limine*, rests in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *In re Leona W.*, 228 Ill.2d 439, 460 (2008). Evidence is admissible if it is relevant; that is to say, if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ILL. R. EVID. 401, 402. Under Illinois Rule of Evidence 403, a court may exclude relevant evidence “if its probative value is substantially outweighed by,” among other things, “the danger of unfair prejudice.” ILL. R. EVID. 403. Prejudice occurs when there is “an undue tendency to suggest a decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror.” *Arient v. Alhaj-Hussein*, 2017 IL App (1st) 162369, ¶ 39 (quoting *People v. Eyles*, 133 Ill. 2d 173, 218 (1989)).

¶ 25 The first step in our inquiry is to determine whether the testimony on Flexeril ingestion was relevant evidence. In the underlying issue presented at trial, plaintiff argued that defendant failed to meet a reasonable standard of care because he failed to determine that decedent was suffering from acute coronary syndrome caused by a blockage preventing blood from flowing through the heart. He contends that had defendant properly diagnosed the problem decedent would not have died. In defense, defendant raises two arguments: (1) that decedent's medical problem was musculoskeletal in nature was consistent with her history, her reported symptoms, and the results of his examination, and (2) that decedent had actually died of a cardiac arrhythmia caused by Flexeril ingestion. In light of the second defense, testimony related to Flexeril ingestion and its possible effects on decedent's heart rhythm was relevant evidence

because it tended to make it less likely that she died as a result of acute coronary syndrome and more likely that she died of a cardiac arrhythmia.

¶ 26 The second step in our inquiry is to determine whether the testimony should have been excluded under Ill. R. Evid. 403 because of the danger of undue prejudice to plaintiff's case. On appeal, plaintiff contends that the evidence was highly speculative, unreliable, and inflammatory. We do not agree that the evidence was speculative, unreliable, or inflammatory. Bebar, the lead paramedic, testified that decedent's family member informed them that she had taken Flexeril that day. Based on that information, the paramedics were concerned about an overdose and administered Narcan to decedent, which is only administered if paramedics suspect an overdose. Dr. Shane and Dr. Sweeney, both cardiologists, opined that a cardiac arrhythmia could result from an overdose of Flexeril. Without the evidence on Flexeril, the information on decedent's medical condition at the time of her death would have been incomplete.

¶ 27 Plaintiff suggests that, despite the testimony from Bebar and the expert cardiologists, the testimony on Flexeril is speculative because it stems from his own incorrect reporting to the paramedics that decedent had ingested the pills in his Flexeril prescription bottle—21 pills in total. He retracted that statement at trial and said that he handed the paramedics his bottle of Flexeril in error. He now argues that the expert opinions relied on his statement which was inadmissible hearsay. Plaintiff's hearsay argument is incorrect.

¶ 28 The statement was made to the paramedics in the process of rendering care to Debra while she was in apparent need of such care. *See Herron v. Anderson*, 254 Ill. App. 3d 365, 377 (1993) ("Statements made to a person rendering medical care describing an individual's medical condition are admissible as an exception to the hearsay rule."). Moreover, a medical expert can rely on the testimony of a field technician to form the basis of his expert opinion. *See People v.*

Klein, 2015 IL App (3d) 130053, ¶ 68. While she was in a state of emergency, plaintiff led the paramedics to believe that decedent had ingested his Flexeril prescription. Although plaintiff testified that he told the paramedics that he had given them “the wrong bottle,” he did not give them the “right” bottle or any information that would have assisted them in administering care to decedent. Additionally, Bebar did not testify to any contemporaneous correction that may have altered his belief regarding the cause of decedent’s condition. Finally, Bebar recorded the information obtained at the scene as “possible OD, Flexeril, 21 pills filled at noon today.” Relying on that information, the paramedics gave decedent Narcan—a drug usually administered to prevent overdoses. The cardiologists faced with the possibility of Flexeril ingestion concluded that cardiac arrhythmia induced by Flexeril was a possible cause of decedent’s death. These facts and opinions presented an alternative theory of decedent’s cause of death. This theory was relevant to the defense and thus the evidence and testimony was admissible.

¶ 29

CONCLUSION

¶ 30

The judgment of the circuit court of Will County is affirmed.

¶ 31

Affirmed.