2011 IL App (1st) 092939-U

No. 1-09-2939

SIXTH DIVISION
November 23, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SARAH JEAN DRNEK, a Minor, By Her Parents and Next Friends, Donna Drnek and Andrew Drnek, and By Guardian of Her Estate, Northern Trust Company; DONNA DRNEK, Individually; and ANDREW DRNEK, Individually, Plaintiffs-Appellants, v. ALAN R. LUKE, M.D., Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 02 L 004247 The Honorable Thomas L. Hogan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Cahill and Garcia concurred in the judgment.

O R D E R

¶ 1 *HELD*: The jury's verdict in support of defendant was not against the manifest weight of the evidence. The trial court did not abuse its discretion in issuing the sole proximate cause instruction.

¶ 2 This is a medical negligence case following the birth of minor plaintiff, Sarah Drnek. Plaintiffs, Donna Drnek and Andrew Drnek, individually and as next friends of Sarah, alleged defendant, Doctor Alan Luke, was responsible for Sarah's injury. The jury found in favor of defendant. On appeal, plaintiffs contend the jury's verdict was against the manifest weight of the evidence and that the trial court improperly issued a sole proximate cause instruction. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 Sarah was born on December 6, 2000, and was later diagnosed with hypoxic ischemic encephalopathy, meaning highly abnormal brain function caused by a combination of severe oxygen deprivation and restriction of the blood supply. Sarah continues to suffer severe mental and physical disabilities. Defendant performed Sarah's delivery.

¶ 5 We summarize only those facts necessary for the disposition of this appeal.

¶ 6 Donna went into labor and was admitted to the hospital at 4:17 a.m. on December 6, 2000. Donna was administered the contraction-inducing drug pitocin at 7:36 a.m. and was seen by defendant at approximately 7:45 a.m. Donna's pitocin dosage was increased per standard protocol. At 10:55 a.m., an intrauterine pressure catheter was placed to measure the strength of Donna's contractions. At 12:45 p.m., a scalp electrode was placed to provide defendant continuous information regarding Sarah's heart rate. Around 1 p.m., nurses administered oxygen in an attempt to assist Sarah, who was showing signs of decreased variability and decelerations in her heart pattern. At approximately 1:40 p.m., Donna's contractions became inadequate for labor despite the pitocin. Around 2:10 p.m., defendant ordered that the pitocin be stopped and

recommended a cesarean section (c-section). The pitocin was discontinued at 2:15 p.m. Defendant observed Sarah's response and determined that an emergency c-section was not necessary. Donna and Andrew signed the c-section consent form at 2:30 p.m.

¶ 7 Preparations were then made for the c-section, including notifying the anesthesiologist. At defendant's discovery deposition, defendant recalled that the anesthesiologist was busy with a different c-section and they had to wait to proceed with Donna's surgery. However, at trial, defendant agreed that he was wrong in his recollection at the deposition because the anesthesiologist was available and, even if the maternity anesthesiologist had been busy and the situation presented as an emergency, another anesthesiologist would be used. Defendant maintained that Donna's surgery had not been delayed.

¶ 8 Defendant removed the fetal scalp electrode at 2:57 p.m. Surgery began at 3:08 p.m., and Sarah was born at 3:13 p.m. The surgery was technically challenging, where Sarah was in the occiput posterior position, or facing up, and her head was entrapped in Donna's pelvis. Defendant lengthened Donna's incision and required the assistance of a nurse to push Sarah's head up so that he could lift her out. In addition, Sarah's umbilical cord was wrapped twice around her neck. When born, Sarah had no heart beat and was not breathing. After approximately 20 to 22 minutes of resuscitation, Sarah's heart rate and respiration were restored.

¶ 9 Plaintiffs alleged defendant deviated from the standard of care by failing to reduce or discontinue the use of pitocin during Donna’s labor and failed to timely order and perform a c-section when Donna’s labor failed to progress. Plaintiffs’ expert, Doctor Michael Cardwell, an obstetrician/gynecologist board certified in maternal fetal medicine, testified that defendant

prematurely removed the scalp electrode, during which time Sarah suffered severe asphyxia, or oxygen deprivation, leading to brain damage. Dr. Cardwell added that the administration of pitocin caused Donna to have forceful contractions which then drove Sarah's head into Donna's pelvis causing Sarah's scalp to compress. Dr. Cardwell, however, acknowledged that he would defer the causation of Sarah's injury to specialists such as a pediatric neurologist or neonatologist. Plaintiff's other expert, Doctor Carl Hunt, a pediatric neonatologist, testified that Sarah's brain damage was caused by severe intrapartum asphyxia, occurring 5 to 10 minutes prior to Sarah's delivery. Plaintiffs' third expert, Doctor Robert Vannucci, a pediatric neurologist, disagreed. Dr. Vannucci opined that Sarah suffered only mild asphyxia and her brain injury was caused by strokes on both sides of her brain. According to Dr. Vannucci, the position and forceful compression of Sarah's head during the contractions led to blood backing up in Sarah's brain, ultimately causing the strokes. Dr. Vannucci added that Sarah's cord blood gas values measured after birth supported the finding of mild asphyxia where only her brain suffered injury. Sarah's kidney function and liver and muscle enzymes were normal.

¶ 10 Defendant rebutted plaintiffs' theory of the case with expert Doctor Michael Socol, an obstetrician/gynecologist board certified in maternal fetal medicine, who testified that, based on review of the fetal monitoring strips, defendant complied with the standard of care for Donna's labor and Sarah's delivery. According to Dr. Socol, both Donna and Sarah positively tolerated labor until the time when defendant ordered the discontinuation of pitocin and recommended a c-section. Dr. Socol added, however, that the fetal monitoring strips showed Sarah remained well-oxygenated despite the indication that a c-section was necessary. Dr. Socol further opined that

Sarah's injury was not caused by asphyxia. Defendant's other expert, Doctor William Meadow, a neonatologist, agreed with plaintiffs' expert, Dr. Vannucci, that a blood clot in the largest vein of the brain, known as venous sinus thrombosis, caused Sarah's injury. Dr. Meadow added that Sarah's cord blood gas values demonstrated that her heart, blood pressure, kidney and liver were all functioning well, which indicated that she was well oxygenated. The fact that the pupils of Sarah's eyes remained dilated for four to five hours after delivery further supported a finding that Sarah's injury was caused by a blood clot in the brain. Dr. Meadow opined that if Sarah had suffered from lack of oxygen her body would have moved blood toward her brain and away from the other organs, which did not occur in this case. Dr. Meadow further concluded that Sarah's brain trauma did not occur during birth.

¶ 11 The jury returned a verdict in favor of defendant. The trial court denied plaintiffs' motion for a new trial.

¶ 12 DECISION

¶ 13 I. Jury's Verdict

¶ 14 Plaintiffs contend the jury's verdict is against the manifest weight of the evidence where the evidence demonstrated that defendant breached the standard of care and Sarah sustained injury as a result.

¶ 15 The standards upon which we review this case are firmly established. On review, we will not reverse a trial court's decision regarding a motion for a new trial unless the court abused its discretion. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179, 854 N.E.2d 635 (2006). In reviewing whether the trial court abused its discretion, we consider

whether the evidence supported the jury's verdict and the losing party received a fair trial. *Maple v. Gustafson*, 151 Ill. 2d 445, 455, 603 N.E.2d 508 (1992). A new trial is appropriate only when the verdict is contrary to the manifest weight of the evidence, which occurs "when the opposite conclusion is clearly evident or when the jury's findings prove to be unreasonable, arbitrary and not based upon any of the evidence." *York* 222 Ill. 2d at 178-79. In determining whether a new trial is warranted, the trial judge has "the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." (Internal quotation marks omitted.) *Maple*, 151 Ill. 2d at 456.

¶ 16 We find the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial where the jury's verdict was supported by the evidence. The jury heard competing expert testimony regarding whether defendant breached the standard of care and the causation of Sarah's injury. Plaintiffs' theory of the case was contradicted by defendant's experts, who testified that he provided the proper standard of care and that Sarah's injury was caused by venous sinus thrombosis and not asphyxia. Importantly, plaintiffs' expert, Dr. Vannucci, agreed on the issue of causation to the extent that asphyxia was not the sole cause of Sarah's injury. "It was within the province of the jury, as finder of fact, to listen to the competing expert testimony, weigh the evidence presented, determine the credibility of all the witnesses, and determine whose testimony to accept or reject." *Bosco v. Janowitz*, 388 Ill. App. 3d 450, 461, 903 N.E.2d 756 (2009). It is not the function of this court to reweigh the evidence, and we refuse to do so here. We further conclude plaintiffs were afforded a fair trial in which they presented experts to support their position.

¶ 17 Plaintiffs argue that defendant deliberately provided false testimony and manipulated the evidence such that his testimony regarding the availability of an anesthesiologist should be disregarded and considered an admission in support of plaintiffs' case.

¶ 18 During plaintiffs' adverse examination of defendant, the following ensued:

"Q. Now, Doctor, you were informed at the time you ordered the c-section that they were finishing surgery in another c-section and you were under the impression that it would be done soon; is that true?

A. That was mistaken. When we were – at my deposition, I was – I thought that I remembered the nurse saying to me, but that was not true.

Q. Okay. So, Doctor, what you're saying is in your deposition, you told us – you told my associate that you thought there was another c-section going on, and you thought you had to wait for an anesthesiologist; is that true?

A. That's the impression that I had. I did think that. I didn't say that it increased any delay or anything like that, absolutely not.

Q. Okay.

A. I just said off of recollection, I thought there was another c-section going on.

Q. Okay. Your recollection in 2003 was that there was some issue about the anesthesiologist being available; is that true?

A. That is correct.

Q. All right. And today you would tell us that that is not true; you know that there was an anesthesiologist available?

A. That is correct.

* * *

Q. As far as timing of when the c-section started, it was entirely within your control in terms of how fast you told them you wanted it done; is that true?

A. I would agree with that."

Plaintiffs raised the inconsistent testimony during closing argument, as well. Accordingly, the jury learned of the inconsistencies on two occasions and was free to assess defendant's credibility and assign its chosen weight to the testimony. *Bosco*, 388 Ill. App. 3d at 461. There is absolutely no evidence to support plaintiffs' argument that defendant intentionally falsified his testimony or suppressed evidence. See *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 128-29, 679 N.E.2d 1202 (1997) ("[i]f a witness' trial testimony significantly differs from his or her deposition testimony, opposing counsel may exploit such change by traditional means of impeachment. However, modifications or additions to a witness' trial testimony which were not expressly stated in that witness' pretrial deposition do not, in and of themselves, suggest deliberate distortion of evidence by the witness or fraudulent coaching by lawyers."). We find the cases cited by plaintiffs are inapposite and belied by the record before us. We, therefore, decline plaintiffs' request to disregard defendant's testimony and do not consider the inconsistencies an admission in support of plaintiffs' case.

¶ 19 We conclude that the jury's verdict was based on the evidence and not unreasonable or arbitrary.

¶ 20 II. Sole Proximate Cause Jury Instruction

¶ 21 Plaintiffs next contend the trial court erred in giving the long form of Illinois Pattern Jury Instruction, Civil, No. 12.05 (2000) (IPI, Civil, No. 12.05) on sole proximate cause. Plaintiffs argue that the instruction confused the jury and they are entitled to a new trial as a result.

¶ 22 In *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 658 N.E.2d 450 (1995), the supreme court succinctly provided the applicable law:

> "A litigant has the right to have the jury clearly and fairly instructed upon each theory which was supported by the evidence. [Citation.] However, it is error to give an instruction not based on the evidence. [Citations.] The question of what issues have been raised by the evidence is within the discretion of the trial court. The evidence may be slight; a reviewing court may not reweigh it or determine if it should lead to a particular conclusion. [Citation.] The test in determining the propriety of tendered instructions is whether the jury was fairly, fully, and comprehensively informed as to the relevant principles, considering the instructions in their entirety. [Citation.]" *Id*. at 100.

¶ 23 We find the trial court did not abuse its discretion in giving the long form IPI, Civil, No. 12.05 on sole proximate cause. The jury heard evidence that allowed it to conclude Sarah suffered thrombosis unrelated to defendant's conduct and the thrombosis was the sole proximate cause of Sarah's injury. Dr. Meadow testified that a blood clot and subsequent stroke, and not

intrapartum asphyxia, caused Sarah's brain damage. Plaintiffs' expert, Dr. Vannucci, agreed. Dr. Meadow elaborated that Sarah's injury was not related to the fact that her umbilical cord was wrapped around her neck and that the thrombosis was not caused by the compression of Sarah's head. Contrary to plaintiffs' argument that the jury was confused by the instruction, failing to provide the instruction could have caused the jury to believe defendant should still be found liable even if the jury determined that another factor caused Sarah's injury. See *Ellig v. Delnor Community Hospital*, 237 Ill. App. 3d 396, 408-09, 603 N.E.2d 1203 (1992). We, therefore, conclude a new trial is not warranted where the instruction was properly given.

¶ 24 CONCLUSION

¶ 25 We find the jury's verdict in favor of defendant was not against the manifest weight of the evidence and the trial court's decision to give the long form of IPI, Civil, No. 12.05 on sole proximate cause was not an abuse of discretion.

¶ 26 Affirmed.