

FIRST DIVISION
March 30, 2012

No. 1-10-1211

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY KAY TRINKA, as Special Administrator of)	Circuit Court of
the Estate of RONALD LEE, Deceased,)	Cook County.
)	
Plaintiff-Appellant,)	
)	07 L 13277
v.)	
)	
STEVEN STRYKER, M.D.,)	Honorable
)	James P. Flannery,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
JUSTICES Karnezis and Neville concurred in the judgment.

ORDER

Held: We find no reversible abuse of discretion in the trial court's evidentiary rulings on the issues properly preserved for review and no plain error in the issues not so preserved.

¶ 1 After Ronald Lee died in November 2000, his estate sued Dr. Steven Stryker, a surgeon who operated on Lee's colon in September 2000. A jury found Dr. Stryker not liable to the estate. On

appeal, the estate challenges several evidentiary rulings and rulings on objections to defense counsel's closing arguments. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 In 1998, doctors discovered that Lee had colon cancer. Dr. Stryker performed a resection of Lee's colon, cutting out a portion of the colon and joining together the ends of the remaining, shortened colon. Lee recovered well from the surgery. His doctors monitored his colon closely for signs of a recurrence of the cancer.

¶ 4 Cancer reappeared in the colon in 2000. In September 2000, Dr. Stryker performed another surgery on the colon, taking out another piece of the colon and stapling together the ends of the remaining colon.

¶ 5 Doctors refer to the area where the ends of the colon sections meet, where the surgeon puts in the staples, as the anastomosis. On October 12, 2000, a CT scan showed that fecal material had leaked through the anastomosis in Lee's colon into the area of his pelvis. The anastomotic leak caused pus to collect in the pelvis, forming an abscess. Doctors ordered antibiotics starting on October 13 to counteract infection from the loose fecal matter.

¶ 6 At the request of Lee's family, Dr. Stryker stopped treating Lee on October 30, 2000. On November 2, 2000, Dr. Raymond Joehl performed another surgery to drain pus from the abscess and resolve the problem of the anastomotic leak. Lee died on November 26, 2000. The doctor who filled out the death certificate listed biliary sepsis – an infection of the gall bladder – as the cause of death.

¶ 7 Lee's estate sued Dr. Stryker for medical malpractice. The estate alleged that Dr. Stryker

failed to diagnose and drain the anastomotic leak as soon as he should have, and those failures caused Lee's death. The estate found an expert on infectious diseases to testify that an infection related to the anastomotic leak caused Lee's death, and a colorectal surgeon who opined that Dr. Stryker deviated from the standard of care. Dr. Stryker also found an infectious disease specialist and a colorectal surgeon to testify that he met the standard of care, and that nothing he did had any causal relationship to Lee's death.

¶ 8 Dr. Arnold Tatar, one of Lee's treating physicians, said in his deposition that he and his colleagues were "very bad" at determining life expectancies. Nonetheless, he agreed with defense counsel that Lee would not likely live longer than two years from the date of surgery, even if he had never had colon cancer and its attendant operations. The estate moved to bar Dr. Tatar's opinion as speculative, but the court denied the motion.

¶ 9 Lee's treating doctors testified that Lee had survived two heart attacks which left his heart weak. The weakness of his heart increased the risk from any surgery. After the October 12, 2000, CT scan showed the abscess, the doctors regularly checked Lee to see how he responded to antibiotics and whether the infection spread. Blood tests showed that the infection had not reached the blood stream. Lee's abdomen responded normally to pressure, and his bowel sounds indicated he could digest food. The abscess did not grow, and the anastomotic leak remained unchanged from October 12 through October 29, 2000.

¶ 10 Over the estate's objection, Dr. Tatar, who had treated Lee since 1993, detailed Lee's medical history. Lee suffered from diabetes, an enlarged heart, hypertension and chronic obstructive pulmonary disease. Lee had pneumonia in 1953 and 1963. He smoked three packs of cigarettes a

day before quitting in 1963. He had bypass surgeries on both legs to alleviate blockage of his blood vessels. In 1996, Lee suffered an episode of septic shock that kept him hospitalized for two months. When Dr. Stryker's attorney asked Dr. Tatar whether the gall bladder caused that septic shock, Dr. Tatar answered, "I believe that it was not conclusively proven, but I think that's what was the consensus." Dr. Tatar told the jury his guess about Lee's life expectancy.

¶ 11 The Estate's Experts

¶ 12 Dr. Max Goldberg, a colorectal surgeon, testified that the standard of care required Dr. Stryker to drain or remove the abscess soon after the CT scan showed the abscess. Draining the abscess sooner would have decreased the risk to Lee. The delay proximately caused Lee to die.

¶ 13 Dr. Tracy Osborne, an infectious disease specialist, also found that the delay in draining the abscess increased the risk of harm, because the infection weakened Lee while he waited almost three weeks for the surgery. Dr. Osborne could not assign any percentage to the increased probability of harm due to the delay or the decreased probability of a better result if Dr. Stryker had drained the abscess sooner.

¶ 14 Dr. Stryker's Case

¶ 15 Dr. Stanley Goldberg, a colorectal surgeon, testified that Lee's medical condition justified the delay in performing the surgery to drain the abscess. The surgeon needed to let Lee recover from the surgery in September 2000 before attempting further surgery. The abscess did not grow, and Lee had stabilized, apparently with the abscess draining back into the bowel and out through the rectum. The antibiotics kept the infection in check, preventing it from reaching the blood stream. The expert admitted that Lee could not fully recover until doctors removed the pus.

¶ 16 Dr. Robert Citronberg, an infectious disease specialist, testified that Dr. Stryker treated Lee's infection appropriately. The court overruled the estate's objection to this testimony, but the court instructed the jurors that they should limit their consideration of Dr. Citronberg's opinions to the issue of whether Dr. Stryker's conduct proximately caused Lee's death. Dr. Citronberg testified that earlier surgery would have made no difference to Lee.

¶ 17 Dr. Citronberg said that in his opinion, Dr. Joehl's surgery on November 2, 2000, in which Dr. Joehl drained the abscess, completely resolved the infection due to the anastomotic leak, and Lee died as a result of an infection that arose following that surgery. The estate objected to the testimony as previously undisclosed in violation of Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. May 30, 2008)). The parties showed the trial court that in his disclosures, Dr. Stryker informed the estate that "It is Dr. Citronberg's opinion that Mr. Lee did not die from an anastomotic leak, but died from recognized complications arising from a major operation in the face of his underlying comorbidities." In his deposition, Dr. Citronberg said:

"[I]t is quite possible, in fact probable, that [Lee] developed intra-abdominal infection after the surgery as a complication of the surgery, not of the prior abdominal abscess."

The court overruled the objection.

¶ 18 Dr. Stryker offered into evidence the entire medical record, more than 1500 pages, from all of Lee's hospital admissions for the surgeries Dr. Stryker and Dr. Joehl performed. The estate objected to the records based on the need for testimony to explain the entries on many of the pages never discussed in court. The estate's attorney said,

"I have no objection to either side *** standing in front of the jury and making reference to a portion of the chart that has been referenced and has been talked about by a witness. I have objections to the defense talking about any portion of the chart that has not been talked about and referenced by a witness."

¶ 19 The court said, "the chart is admitted *** to the extent of any pages that anybody has referenced so far, any of the witnesses referenced or that the jury has seen." The estate did not object to the ruling.

¶ 20 Closing Argument

¶ 21 In closing argument, Dr. Stryker's attorney discussed the course of Lee's infection following the November 2000 surgery to remove the abscess. The attorney said that Lee had largely recovered following Joehl's surgery, but

"[a]s of the 22nd, he started to have difficulties again. ***

At that point in time there is a question about having sepsis and there is a question of what is the source of the sepsis. They don't know. It's something new."

¶ 22 The estate objected that no testimony supported defense counsel's assertion. The court admonished the jury to disregard any argument that misstated the evidence.

¶ 23 Dr. Stryker's attorney continued:

"In 1996, Mr. Lee was hospitalized for two months with septic shock.

At that point in time the consensus was that the cause of the septic

shock was his gall bladder.

Next with regard to the CT ultrasound. The ultrasound at that point in time showed a thickening of the gall bladder wall and showed stones and the notation is that acute cholecystitis is possible. What that means is you have an acute infectious process going on in the gall bladder at that point in time totally unrelated to the *** presence of the abscess."

¶ 24 The estate objected that "there is no such testimony in the record as to a lack of relationship." The court again admonished the jury to ignore arguments that misstate the evidence.

¶ 25 Dr. Stryker's attorney argued, without objection, that the death certificate recorded sepsis of the gall bladder as the cause of death. Later counsel added, again without objection, that Lee "had septic shock in 1996, the gall bladder was the cause. He had septic shock in 2000, gall bladder was the cause."

¶ 26 The jury returned a verdict in favor of Dr. Stryker. In its posttrial motion, the estate argued that the court should not have admitted the entire medical record into evidence, the court should not have permitted Dr. Tatar to express an opinion about Lee's life expectancy, the court should have stricken both Dr. Citronberg's opinion that Dr. Stryker handled the pelvic infection properly, and the undisclosed opinion that the infection from the pelvic abscess had cleared up before Lee died. The trial court denied the estate's posttrial motion and entered judgment on the verdict. The estate now appeals.

¶ 27

ANALYSIS

¶ 28 The issues on appeal are whether the trial court erred: (1) when it overruled the estate's objection to Dr. Citronberg's allegedly undisclosed opinion that the infection from the anastomotic leak cleared up before Lee died; (2) when it permitted Dr. Citronberg, an infectious disease specialist, to testify that Dr. Stryker, a surgeon, treated Lee's infection appropriately; (3) when it allowed the jury to hear Dr. Tatar's speculation about Lee's life expectancy; (4) when it allowed Dr. Tatar to detail Lee's medical history; (5) when it allowed into evidence all medical records about which any witness testified; and (6) when it overruled objections to Dr. Stryker's closing argument. Finally, we must determine whether the cumulative effect of the trial court's alleged errors deprived the estate of a fair trial.

¶ 29 The trial court has discretion to decide whether to allow testimony and exhibits into evidence. *Troyan v. Reyes*, 367 Ill. App. 3d 729, 732-33 (2006). We will not reverse the court's decision based on an evidentiary ruling unless the court abused its discretion and the error had prejudicial effect. *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415, 422 (2005). However, if the appellant has failed to preserve an issue for review, this court may consider the issue only "to the extent the parties cannot otherwise receive a fair trial or a deterioration of the judicial process occurs. Application of the plain error doctrine to civil cases should be exceedingly rare and limited to circumstances amounting to an affront to the judicial process." *Dowell v. Bitner*, 273 Ill. App. 3d 681, 693 (1995).

¶ 30

Rule 213

¶ 31 The estate contends that Dr. Stryker violated Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. May 30, 2008)), when he presented at trial Dr. Citronberg's previously undisclosed opinion that the

infection due to the anastomotic leak had resolved before Lee died. The trial court has discretion to decide whether evidence violates Rule 213, and we will not disturb the trial court's judgment unless the trial court abused that discretion. *Schultz v. Northeast Regional Illinois Commuter RR Corp.*, 201 Ill. 2d 260, 294 (2002).

¶ 32 In his deposition, Dr. Citronberg testified that "the abscess was adequately drained at surgery," so the infection that became apparent on November 22, 2000, arose "as a complication of the [November 2] surgery, not of the prior abdominal abscess." At trial, he explained his view that the November 2 surgery resolved the problem of the infection due to the anastomotic leak, and a subsequent infection caused the death. We find that the trial court did not abuse its discretion by allowing Dr. Citronberg to rephrase the testimony he gave at his deposition. See, e.g., *Schultz*, 201 Ill. 2d at 294.

¶ 33 Dr. Citronberg's Testimony about the Standard of Care

¶ 34 Dr. Citronberg testified, over objection, that Dr. Stryker appropriately treated Lee's infection from the anastomotic leak with antibiotics and without surgery. The estate argues that Dr. Citronberg, an infectious disease specialist, lacked the expertise needed for a comment on the standard of care for a colorectal surgeon.

¶ 35 When a party presents a doctor as an expert in a medical malpractice case, that party must show that the doctor's expertise extends to the patient's medical problem and its treatment. *Jones v. O'Young*, 154 Ill. 2d 39, 43 (1992). "Whether the expert is qualified to testify is not dependent on whether he is a member of the same specialty or subspecialty as the defendant but, rather, whether the allegations of negligence concern matters within his knowledge and observation." *Jones*, 154

Ill. 2d at 43.

¶ 36 The court in *Silverstein v. Brander*, 317 Ill. App. 3d 1000, 1007 (2000), reviewed the relevant case law and concluded:

"The cases instruct us to look to the expert's precise testimony and determine whether he qualifies as an expert in the kind of treatment criticized. *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148 (1997), provides a guiding example. There the court precluded the expert, who was not a surgeon, from criticizing the timing of presurgical tests and the surgery because he had not performed any such surgeries. But the court permitted the expert to criticize postsurgical care and the prescription of drugs during the initial emergency room visit. The appellate court affirmed, noting the appropriate restriction of the criticisms to matters within the witness' expertise."

¶ 37 Here, Dr. Citronberg testified as an expert on infectious diseases that sometimes doctors could appropriately treat an abscess with antibiotics and without surgery. We agree with the trial court that Dr. Citronberg had sufficient expertise to offer this opinion. Dr. Citronberg lacked the expertise needed to comment on when Dr. Stryker should have performed surgery to drain the abscess (see *Hubbard*). But Dr. Citronberg offered no such opinion. Dr. Citronberg could comment on whether the use of antibiotics to treat the infection comported with the standard of care. The case of *Rock v. Pickelman*, 214 Ill. App. 3d 368 (1991), also involved expert testimony from a

nonsurgeon concerning the treatment of an infection. The court there said, "[b]ecause the care of an infection, like plaintiff's, is not exclusively within the domain of surgery, a pathologist or internist may be sufficiently qualified to testify on the issue [of whether a surgeon has correctly treated an infection]." *Rock*, 214 Ill. App. 3d at 374.

¶ 38 Accordingly, we find that the trial court did not abuse its discretion when it allowed Dr. Citronberg to offer testimony concerning the standard of care for treating an infection, even though a surgeon provided the care. The fact that the estate did not elicit such an opinion from Dr. Osborne, because of the understanding of the estate's attorney about expert testimony on the standard of care, does not alter the admissibility of Dr. Citronberg's testimony here.

¶ 39 Life Expectancy

¶ 40 Dr. Tatar testified that he and his colleagues do a "very bad" job of determining life expectancies, but the court allowed him to offer his opinion that Lee probably would not have survived two more years, even if he had no colon cancer or any of the problems he experienced in the course of treatment of the colon cancer. The life expectancy testimony had no bearing on the issue of whether Dr. Stryker committed malpractice; the evidence affected only the damages the court could award for wrongfully shortening Lee's life. Where the trier of fact finds a defendant not liable, errors that affect only damages do not warrant reversal. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 531 (2000). Therefore, we will not reverse the judgment due to the trial court's decision to permit Dr. Tatar to testify as to his opinion of Lee's life expectancy.

¶ 41 Medical History

¶ 42 The estate, in its posttrial motion and the supporting memorandum, did not mention Dr.

Tatar's detailed testimony about Lee's medical history. Accordingly, we review the issue only for plain error. See *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 348-49 (1980). The estate now objects to the extensive medical history on grounds of relevance. But the doctors agreed that Lee's complete medical condition influenced the decision as to when and whether to operate on him, as the condition of his heart, his lungs, his blood vessels, and his body generally all affect the risk due to surgery. As the estate claimed primarily that Dr. Stryker committed malpractice by delaying too long the surgery to drain the abscess, all of the evidence concerning Lee's complete medical condition bore some relevance to the issue of when and whether Dr. Stryker should have operated on Lee. We cannot say that the admission of testimony describing Lee's complete medical history affronts the judicial process. See *Stovall v. Clarke*, 113 S.W.3d 715, 724 (Tenn. 2003) (plaintiff stated a viable malpractice claim when he alleged that the defendant medically treated the plaintiff based on an incomplete medical history).

¶ 43

Medical Records

¶ 44 Lee's hospitalizations for cancer treatment and his subsequent infection generated extensive medical records, and several witnesses referred to specific pages of those medical records in their testimonies. The trial court admitted into evidence all of the pages to which any witness referred. At trial, the estate's attorney agreed to this limitation on the admission of records into evidence. Therefore, he waived any objection to the records so admitted. See *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 10 (2004). The estate now claims that the trial court committed reversible error when it allowed into evidence some records to which witnesses referred, but which no expert explained. We review this issue only for plain error.

¶ 45 The witnesses referred to the exhibits in their testimony, and the exhibits constitute admissible business records. See *Troyan*, 367 Ill. App. 3d at 734. We find no plain error in the decision to admit into evidence certain limited medical records relevant to the testimony of the witnesses.

¶ 46 Closing Argument

¶ 47 During Dr. Stryker's closing argument, the estate objected to assertions that the sepsis discovered on November 22, 2000, came from "something new," and that the new infection in the gall bladder was "totally unrelated to the *** abscess." In his posttrial motion, the estate argued that the court erred when it permitted Dr. Stryker to argue that biliary sepsis caused Lee's death. We find the objection at trial and in the posttrial motion sufficient to preserve for review the issue of whether the court erred when it did not strike the parts of closing argument to which the estate objected. See *Wilson v. Clark*, 84 Ill. 2d 186, 189 (1981).

¶ 48 The trial court has discretion to decide the proper scope of closing argument. *Lewis v. Cotton Belt Route – St. Louis Southwestern Ry. Co.*, 217 Ill. App. 3d 94, 110-11 (1991). Courts permit attorneys wide latitude in closing argument, as long as reasonable inferences from the evidence support the argument. *Tonarelli v. Gibbons*, 121 Ill. App. 3d 1042, 1049 (1984). We will not reverse a decision based on an improper closing argument unless the trial court abused its discretion and the comments prevented the opposing party from receiving a fair trial. *Weisman v. Schiller, DuCanto & Fleck, Ltd.* 368 Ill. App. 3d 41, 62 (2006).

¶ 49 Here, Dr. Osbourne admitted that the doctor who filled out the death certificate listed biliary sepsis – infection of the gall bladder – as the cause of death. Dr. Citronberg testified that an

infection that arose after the November 2000 surgery caused the death, and by that time the infection due to the anastomotic leak no longer remained. Some evidence supports the inference that a new infection, unrelated to the anastomotic leak and the abscess, caused Lee's death. Accordingly, we find that the trial court did not abuse its discretion by refusing to strike the remarks of Dr. Stryker's counsel, and reminding jurors instead that they should ignore any arguments unsupported by the evidence. See, *e.g.*, *Lewis*, 217 Ill. App. 3d 120-21.

¶ 50 The estate also asks us to review the propriety of a comment to which it did not object at trial. Dr. Stryker's counsel said, Lee "had septic shock in 1996, the gall bladder was the cause. He had septic shock in 2000, gall bladder was the cause." The estate claims that the remark misstated the evidence and deprived it of a fair trial by suggesting that a longstanding bladder problem caused Lee's death. We review the issue only for plain error.

¶ 51 Dr. Tatar said that in 1996, when Lee suffered from an infection of unknown etiology, the doctors reached a consensus that the infection probably involved the gall bladder. The comment in closing argument that restated this testimony did not misstate the evidence. We find that the remark juxtaposing that evidence with the evidence that an infection of the gall bladder led to the death did not rise to the level of plain error that affronts the judicial process.

¶ 52 Cumulative Error

¶ 53 Finally, the estate asks us to consider the cumulative prejudicial effect of all the alleged errors. We found no plain error in the issues the estate failed to preserve for review, and even considering those issues cumulatively, we still find no affront to the judicial process. We found no abuse of discretion in the evidentiary rulings or in the rulings on objections to Dr. Stryker's closing

argument. Considering all of the estate's issues cumulatively, we find no grounds to reverse the judgment entered on the jury's verdict.

¶ 54

CONCLUSION

¶ 55 The trial court did not commit plain error by admitting into evidence all documents in the medical record to which any witness referred or by permitting Dr. Tatar to delineate Lee's complete medical history. The comment in closing argument juxtaposing the 1996 septic shock with the fatal sepsis here also did not amount to plain error. The trial court did not abuse its discretion by refusing to strike defense counsel's reasonable inferences from the evidence in closing argument. Dr. Stryker's infectious disease specialist had sufficient expertise to testify that Dr. Stryker treated Lee's infection appropriately. Dr. Tatar's opinion on Lee's life expectancy had no bearing on whether Dr. Stryker committed malpractice, so any error in admitting the opinion had no prejudicial effect. Accordingly, we affirm the trial court's judgment.

¶ 56 Affirmed.