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SECOND DIVISION
March 19, 2013

No. 1-11-1430
2013 IL App (1st) 111430-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RORY SMITH, Independent Administrator of the)	Appeal from the
Estate of Linda Smith,)	Circuit Court of
)	Cook County
Plaintiff-Appellant,)	
)	
v.)	No. 11 L 003259
)	
NIVA LUBIN, M.D., and HARVEY ECHOLS,)	Honorable
M.D.,)	Dennis J. Burke,
)	Judge Presiding.
Defendants-Appellees.)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

Held: Trial court did not abuse its discretion by precluding plaintiff from impeaching a defense expert witness by learned treatise because plaintiff failed to establish the foundation for the treatise. Plaintiff was not entitled to JNOV, and plaintiff was not prejudiced by evidence of decedent's history of noncompliance with her doctor's orders or by defendants' closing arguments.

¶1 Linda Smith died from a cerebral aneurysm, and her administrator, plaintiff Rory Smith, sued defendants Drs. Niva Lubin and Harvey Echols for medical malpractice. After a jury trial, the jury found in favor of defendants on all counts. The trial court denied plaintiff's posttrial motion for a new trial or judgment notwithstanding the verdict, and we affirm.

¶2

I. BACKGROUND

¶3 Decedent was a patient of Dr. Lubin's since about 1993, and Dr. Lubin treated her over the years for various ailments, one of which was hypertension. In February 1998, Dr. Lubin recommended that decedent start taking hypertension medication, and Dr. Lubin gave decedent a 30-day supply to start out with. Dr. Lubin asked decedent to return in a month for a follow up exam. Decedent returned about two months later for another exam, at which time her hypertension had improved somewhat. Dr. Lubin asked decedent to return again in late May for another follow up exam.

¶4 On May 13, 1998, however, decedent called Dr. Lubin to report that she was experiencing a headache and nausea, and that she had run out of hypertension medication a few days before. Dr. Lubin thought that the symptoms were likely due to elevated blood pressure, so she prescribed a new 30-day supply and advised decedent to call again if her symptoms continued. Dr. Lubin also asked decedent to call her office in the next week and schedule a follow-up appointment.

¶5 Dr. Lubin planned to be out of the office on vacation in late May, so she arranged for Dr. Echols to cover her practice for her. On May 16, 1998, decedent called Dr. Echols' office and reported worsening symptoms that included vomiting, headache, and nausea. Dr. Echols believed that decedent's symptoms were virus-related and advised her to take some pain reliever and drink fluids. Dr. Echols also scheduled decedent for a follow-up exam with Dr. Lubin on June 23, 1998.

¶6 Decedent never made it to the follow-up exam. Instead, on June 18, 1998, decedent collapsed in her home due to what was later determined to be a cerebral aneurysm that caused a subarachnoid hemorrhage. Decedent was taken to the emergency room, but she later died.

¶7 At trial, there were two key issues: whether the symptoms that decedent reported were in fact warnings sign of an impending cerebral aneurysm; and, if so, whether Drs. Lubin and Echols breached the standard of care by failing to recognize the warning signs and provide decedent immediate treatment. Both sides presented a significant amount of expert testimony on these issues, but the jury eventually found in favor of defendants on all counts. Following the trial court's denial of plaintiff's posttrial motion, plaintiff appealed.

¶8 II. ANALYSIS

¶9 Plaintiff raises four issues on appeal. First, plaintiff asserts that a new trial is warranted because the trial court erroneously precluded plaintiff from impeaching one of defendants' expert witnesses with a treatise on subarachnoid hemorrhages. Second, plaintiff asserts that the trial court should have granted plaintiff's motion for a directed verdict on the issue of liability. Third, plaintiff asserts that the trial court erred by allowing irrelevant and prejudicial evidence about decedent's history of noncompliance with Dr. Lubin's orders. Finally, plaintiff asserts that a new trial is warranted due to prejudicial statements by defense counsel during closing arguments.

¶10 A. Impeachment by Learned Treatise.

¶11 Plaintiff first argues that the trial court erred because it did not allow plaintiff to impeach defendants' expert witness Dr. Karasick with a medical treatise on subarachnoid hemorrhages. Plaintiff's theory at trial was that the headaches that decedent experienced in early May 1998 were what are known as "sentinel" headaches, which are an indication of cerebral aneurysm. If left untreated, such an aneurysm can lead to a subarachnoid hemorrhage of the kind that decedent died of. Plaintiff contended that defendants should have realized that decedent was at risk of an aneurysm and provided immediate treatment.

¶12 Defendants' position, however, was that sentinel headaches only occur at most two to four weeks before a subarachnoid hemorrhage. In this case, decedent's subarachnoid hemorrhage occurred five weeks after she initially reported her symptoms on May 18, 1998, which would indicate that the symptoms had nothing to do with the later subarachnoid hemorrhage. In support of this proposition, defendants relied on their expert witness Dr. Karasick, who testified that, even assuming that the May 18 symptoms were a sentinel headache, "based on the literature *** the major hemorrhage would have occurred within two weeks, maybe within four weeks, but not after that."

¶13 On cross-examination, plaintiff attempted to impeach Dr. Karasick with a book entitled "Subarachnoid Hemorrhage, Causes and Cures," by Bruce Weir. The treatise indicated that about one-third of patients with ruptured aneurysms had a medical history that included headaches in the past several months. During plaintiff's offer of proof, which was held outside the presence of the jury, Dr. Karasick conceded that this passage contradicted his testimony. But when plaintiff attempted to impeach Dr. Karasick with the book, defendants objected based on lack of foundation. The trial court sustained the objection, reasoning that Dr. Karasick had not identified the book or its author as authoritative on the subject of subarachnoid hemorrhages.

¶14 The issue of whether particular evidence should be admitted is within the sound discretion of the trial court, and we will not reverse a trial court's ruling absent abuse of discretion. See *Stapleton v. Moore*, 402 Ill. App. 3d 147, 156 (2010). Medical articles and treatises may be used in cross-examination, but there is "long-standing Illinois precedent requiring a proper foundation for impeachment of an opposing party's expert with medical articles and texts." *Id.* at 157. The foundational requirements are satisfied when the authority of

the treatise or its author is established either by judicial notice or by the testimony of an expert in the field. See *id.* at 157-58.

¶15 As the trial court recognized here, the problem with plaintiff's use of the treatise is that plaintiff never established that the treatise was authoritative on the subject of subarachnoid hemorrhages. Plaintiff never once asked Dr. Karasick during trial whether the text was authoritative, nor did he ask the court to take judicial notice that the text was recognized as an authority on the subject, nor did he offer any other expert witnesses to testify to the text's authority. Although plaintiff did establish that Dr. Karasick was familiar with the treatise, this is not enough to establish the required foundation and use the treatise's contents to impeach Dr. Karasick's testimony. Because plaintiff failed to establish the foundation, the trial court was correct to sustain defendant's objection.

¶16 In arguing for a contrary result, plaintiff relies on *Granberry v. Carbondale Clinic, S.C.*, 285 Ill. App. 3d 54 (1996). In *Granberry*, the plaintiff attempted to impeach the defendant's expert with medical articles that had been published after 1982. The trial court sustained the defendant's objection, reasoning that the articles were irrelevant because the alleged medical malpractice had been committed in 1982, before the articles were published. See *id.* at 65. We reversed in part, holding that while "postevent literature should not be used to show standard of care, it is proper to use postevent literature for other purposes such as showing the diagnostic capabilities of equipment. *** When [the expert] testified that the test was diagnostic and cited medical literature to support his testimony, it was essential to allow cross-examination to attempt to impeach the doctor with contrary literature, whether that literature was published during, before, or after 1982." *Id.* at 65-66.

¶17 For obvious reasons, *Granberry* is inapposite to this case. Unlike this case, the trial court in *Granberry* precluded the attempted impeachment on relevance grounds. The dispositive issue here is not relevance but foundation, and *Granberry* has no bearing on the resolution of that issue.

¶18 B. Judgment Notwithstanding the Verdict

¶19 Plaintiff next argues that the trial court should have granted plaintiff's motion for judgment notwithstanding the verdict on the issue of liability. Plaintiff contends that the undisputed evidence showed that the applicable standard of care required decedent to be evaluated in response to her May 1998 symptoms and that defendants breached that duty by failing to evaluate and treat her prior to the June 18, 1998 subarachnoid hemorrhage. Judgment notwithstanding the verdict "is properly granted only where all of the evidence, when viewed in the aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 21. We review the issue *de novo*. See *id.*

¶20 Defendants cite a litany of evidence in the record that they contend contradicts plaintiff's position, but let us assume for the sake of argument that plaintiff is correct and that the undisputed evidence favors plaintiff on the issues of duty and breach. The problem with plaintiff's argument is that it overlooks the element of causation. "To succeed in an action for negligence, the plaintiff must establish that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach proximately caused injury to the plaintiff." *Id.* ¶ 22. But even if the evidence in this case overwhelmingly favored plaintiff on the questions of duty and breach, the evidence on the question of causation does not. Indeed, as we noted above, the entire point of impeaching Dr. Karasick was that his testimony offered crucial support for

defendants' position that decedent's May 1998 symptoms were unrelated to the subarachnoid hemorrhage. Under this theory, even if defendants breached the standard of care by failing to diagnose and treat decedent's sentinel headache, the breach did not proximately cause decedent's death. Of course, plaintiff's experts provided contrary opinions, but the difference of opinion means that the issue of causation is an issue for the jury to decide. Consequently, even if we take plaintiff's argument at face value and assume that the evidence on duty and breach overwhelmingly favored plaintiff, he is still not entitled to judgment notwithstanding the verdict on the issue of liability because the evidence on causation was in dispute. The trial court was correct to deny the motion.

¶21 C. Improper Testimony

¶22 Plaintiff's next takes issue with some of the testimony by defendant's expert witnesses. First, plaintiff contends that defendants improperly introduced irrelevant and prejudicial testimony about the age of the case, which according to plaintiff was intended to imply that plaintiff was at fault for the delay. Plaintiff does not, however, provide us with a citation to the record for the allegedly improper testimony in his opening brief, so we must deem this particular issue forfeit. See Ill. S. Ct. R. 347(h)(7) (eff. July 1, 2008).

¶23 Second, plaintiff argues that it was error for the trial court to allow various defense witnesses to testify that decedent was a "noncompliant" patient due to her failure to regularly follow up with Dr. Lubin. Defendant claims that this issue is also forfeit for failure to object, but the record is clear that the trial court allowed plaintiff to register a continuing objection to this type of evidence.

¶24 Several of defendants' expert witnesses testified that decedent had a long history of failing to follow up with Dr. Lubin about her health issues. For example, in 1993, decedent did

not follow up with Dr. Lubin for cold-related symptoms. After a November 1994 visit during which Dr. Lubin diagnosed her with hypertension and asked her to follow up in one month, decedent did not return until over three years later. Similarly, decedent was a month late following up on her February 1998 appointment, and she did not schedule a follow up from her April 1998 appointment until late May. By the time decedent suffered the subarachnoid hemorrhage on June 18, 1998, she had not seen Dr. Lubin for nearly two months, contrary to Dr. Lubin's request.

¶25 Plaintiff contends that this testimony was irrelevant and prejudicial because it made decedent appear comparatively negligent, which was not an issue in the case. But recall that plaintiff's theory at trial was that defendants breached the standard of care because they did not bring decedent in for an immediate exam on May 14, 1998, when she developed the alleged sentinel headache. When plaintiff sought to exclude this evidence via a motion *in limine* before trial, defendant noted that its experts would testify that, given plaintiff's long history of untreated hypertension, it was reasonable for Drs. Lubin and Lubin to conclude that plaintiff's symptoms were related to decedent's hypertension rather than a warning sign of an aneurysm. The evidence about decedent's noncompliance was therefore relevant to the issue of whether defendants breached the standard of care.

¶26 The trial court agreed with defendants and overruled plaintiff's objections, and as with any other evidentiary ruling we review the trial court's ruling only for abuse of discretion. See *Stapleton*, 402 Ill. App. 3d at 156. The trial court abuses its discretion only when the ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). Evidence is relevant 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 (eff. Sep. 27, 2010). As the trial court noted, the evidence in this case supported defendants’ position on whether the standard of care was breached, which is an issue that was both material and disputed. The evidence was therefore relevant under Rule 401, so the trial court did not abuse its discretion by admitting it.

¶27 Of course, otherwise relevant evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Ill. R. Evid. 403 (eff. Sep. 27, 2010). Plaintiff contends that the evidence was unduly prejudicial, but his argument is tangled and is devoid of citation to legal authority. The gist of plaintiff’s argument is that the evidence was prejudicial because it was irrelevant, but this argument conflates the Rule 401 analysis with the Rule 403 analysis. See Pl.’s Br. at 19 (“The highly prejudicial nature of arguing that Plaintiff was a non-compliant patient who did not make appointments unduly prejudiced Plaintiff’s case when none of that testimony was relevant to the events of May 13, 1998 through June, 1998.”). The evidence could only have been excluded under Rule 403 if the danger of prejudice *substantially* outweighed its probative value. Even if we were to assume that there was some prejudice to plaintiff by introducing evidence of decedent’s noncompliance with her doctor’s orders, plaintiff has not explained why this relevant evidence was so prejudicial that it had to be excluded under Rule 403. We therefore cannot say that the trial court abused its discretion by declining to bar it under Rule 403.

¶28 D. Closing Arguments

¶29 Plaintiff's final argument is that a new trial is warranted because of two allegedly improper and inflammatory comments by Dr. Lubin's counsel during closing argument.

¶30 First, at one point Dr. Lubin's counsel began an argument that was based on a hospital intake form that had previously been introduced into evidence. The specific contents of the record, however, had not been expressly discussed by any witness during the trial. Second, when discussing the testimony of Dr. Avery Evans, who was one of plaintiff's expert witnesses, defense counsel alleged that Dr. Evans had formed an expert opinion about the case a week before he had actually reviewed it.

¶31 Plaintiff argues that these incidents were so prejudicial that a new trial is warranted. Even if we assume that the comments were improper, "improper comments at closing do not constitute reversible error unless the defendant is shown to have been substantially prejudiced thereby." *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1061 (1994). Moreover, "when an improper statement is made, if the trial court sustains a timely objection and instructs the jury to disregard the improper comment, the court sufficiently cures any prejudice." (Internal quotation marks omitted.) *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430, ¶ 75.

¶32 The record shows, however, that not only did plaintiff object to the comments, but that the trial court sustained the objections and instructed the jury to disregard the comments. Under these circumstances, plaintiff suffered no prejudice from the comments that would warrant a new trial.

¶33 III. CONCLUSION

¶34 There were no errors in this case that warrant a new trial, and plaintiff was not entitled to judgment notwithstanding the verdict.

¶35 Affirmed.

¶36 PRESIDING JUSTICE HARRIS, specially concurring:

¶37 I fully concur with the majority's order. Had plaintiff been permitted to impeach Dr.

Karasick as occurred during the offer of proof, it is likely that the jury would not have returned a verdict for defendant. Therefore, I write separately to express my understanding of the use of medical texts for impeachment as presented in this case.

¶38 The trial court was correct in not allowing the impeachment of Dr. Karasick with the text because the book had not been established as authoritative or reliable on the subject matter at issue. None of the expert witnesses, including Dr. Karasick, was asked about the authoritativeness of the text, and the court did not take judicial notice that the text was recognized as authoritative on the subject matter. The "cross-examination of an expert witness with material from 'a recognized text or treatise is proper where either the court has taken judicial notice of the author's competence [citation] or, absent concession by the witness, the cross-examiner proves the text or treatise is authoritative.'" *Stapleton v. Moore*, 403 Ill. App. 3d 147, 158 (2010).

¶39 It appears no proper foundation was set at trial for use of the text as an authority on the subject matter. If that is the case, then the trial court properly sustained defendant's objections to the impeachment. The case relied upon by appellant, *Granberry v. Carbondale Clinic*, 285 Ill. App. 3d 54 (1996), is inapposite because the authoritativeness of the text used for impeachment in that case was not an issue. The issue there concerned use of authoritative texts published after the date the injury occurred, for purposes of impeachment. The *Granberry* court held that postevent literature may be used to impeach an expert on the issue of the diagnostic capabilities of equipment, and the trial court abused its discretion in refusing to allow plaintiff to cross-

examine defendant's expert with the postevent articles. *Id.* at 65-66. The *Granberry* court added, however, that postevent literature could not be used to impeach an expert regarding standard of care. *Id.*

¶40 Therefore, I believe the trial court did not abuse its discretion in refusing plaintiff the opportunity to impeach Dr. Karasick with the text.