2014 IL App (1st) 131622-U

FIFTH DIVISION
January 31, 2014

No. 1-13-1622

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(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

BEATRIZ TASIOR, Individually and as Special Administrator of the Estate of Christopher Tasior, Sr., Deceased, Plaintiff-Appellant, v. DANIEL J. HURLEY, M.D., and CHICAGO INSTITUTE OF NEUROSURGERY AND NEURORESEARCH MEDICAL GROUP, S.C., an Illinois Corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 09 L 8980 Honorable Thomas Hogan Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶1 *Held*: The trial court's orders entering judgment on a jury verdict in favor of defendants and denying plaintiff's posttrial motion for a new trial is affirmed.

¶2 This appeal arises from a wrongful death claim and survival action brought by plaintiff, Beatriz Tasior, individually and as special administrator of the estate of her deceased husband, Christopher Tasior, Sr., against defendants Daniel Hurley, M.D. (Dr.

Hurley) and the Chicago Institute of Neurosurgery and Neuroresearch Medical Group, S.C. (collectively defendants) after Christopher died as a result of pain medication prescribed by Dr. Hurley. The jury found for defendants. The court entered judgment on the jury verdict and denied plaintiff's posttrial motion for a new trial. Plaintiff appeals, arguing that she was prejudiced and denied a fair trial by defense counsel's closing argument. We affirm.

¶3 BACKGROUND

¶4 Christopher died on March 19, 2006. After an autopsy determined that the cause of death was opiate and methadone intoxication, plaintiff filed a wrongful death and survival action against defendants.

¶5 During trial, the jury heard evidence that Christopher had undergone surgery to correct back pain. He continued to experience pain and began treatment with Dr. Hurley. Dr. Hurley testified that he was an interventional spine specialist with a subspecialty in pain management. On March 10, 2006, he prescribed Avinza, a long-acting morphine drug, to Christopher for pain control. He also prescribed short-acting morphine sulfate immediate release tablets (MSIR) for “breakthrough pain.” Dr. Hurley testified that Christopher suffered episodes of breakthrough pain despite the Avinza and he authorized Christopher to take up to three MSIR a day for that pain.

¶6 Dr. Hurley testified that he stopped the Avinza and MSIR prescriptions on March 14, 2006, and instead prescribed methadone for Christopher. The methadone prescription stated that Christopher should take four methadone tablets every 8 to 12 hours. Dr. Hurley testified that he also told Christopher that he could take one or two extra methadone tablets a day for withdrawal symptoms. Christopher still had

approximately 25 Avinza tablets remaining from his prior prescription when Dr. Hurley switched him to methadone. After Christopher's death, the medical examiner's office found the Avinza prescription bottle with only five capsules left, four of which were empty. The jury heard testimony from two plaintiff's experts that Dr. Hurley breached the standard of care by prescribing too much methadone. Two defense experts testified that Dr. Hurley's methadone prescription was within the standard of care.

¶7 The jury returned a verdict in favor of defendants and against plaintiff. The court entered judgment on the jury verdict. Plaintiff filed a posttrial motion, asserting that she should be granted a new trial because defense counsel made misstatements during closing arguments that prejudiced her case and denied her a fair trial. On May 10, 2013, the court denied the posttrial motion, noting that plaintiff had failed to object to the alleged misstatements at trial. On May 24, 2013, plaintiff filed her timely notice of appeal.

¶8 ANALYSIS

¶9 In her sole argument on appeal, plaintiff challenges the following statement defense counsel made in closing argument regarding Dr. Hurley's communications with Christopher:

> "And he [Dr. Hurley] also told him [Christopher] something else. He said, if you have any problem - and it's in that chart - he said, if you're getting drowsy, if there's any problem, you can take a little less. And he said, if you're having withdrawal, you can take a little more. Call me. If there are any problems, let me know. Let me know if you are having any problems at all."

¶10 Plaintiff argues that she is entitled to a new trial because defense counsel's

statement that the chart showed that Dr. Hurley had told Chris to call him with "any problems at all" when he started taking methadone was unsupported by the evidence, prejudicial and deprived her of a fair trial. She asserts that the medical chart only recorded that Christopher was to call the doctor if he experienced withdrawal symptoms, not if he had "any problems" at all. Plaintiff argues that, by showing the jury that Christopher did not call the doctor when he was told to call for “any problem,” defense counsel may have tipped the scales in favor of Dr. Hurley because the jury could have decided that Christopher did not listen to his doctors and was at fault for his own death.

¶11 The scope of closing arguments is within the trial court's discretion, and "an argument must be prejudicial before a reviewing court will reverse on this basis." *Velarde v. Illinois Central RR Co*., 354 Ill. App. 3d 523, 543 (2004). Moreover, attorneys are allowed broad latitude in drawing reasonable inferences and conclusions from the evidence. *Id.* at 544. The failure to object to allegedly improper comments during closing argument operates as a forfeiture of the objection. *Babikian v. Mruz,* 2011 IL. App. (1st) 102579, ¶ 13 (citing *Velarde*, 354 Ill. App. 3d at 544).

¶12 We strictly apply the forfeiture doctrine " 'unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence.' " *Velarde*, 354 Ill. App. 3d at 544 (quoting *Gillespie v. Chrysler Motors Corp*., 135 Ill. 2d 363, 375-76 (1990)). "If arguments were so egregious that they deprived a litigant of a fair trial and substantially impaired the integrity of the judicial process itself, they may be reviewed even though no objection was made." *Id*. at 544. "This standard has been applied in

cases involving 'blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice.' " *Id*. at 544 (quoting *Gillespie*, 135 Ill. 2d at 377).

¶13 Plaintiff raised no objections at trial during the portion of defense counsel's closing argument that she challenges here. Her argument is, therefore, arguably forfeit.

¶14 In a single sentence citation to *City of Quincy v. V.E. Best Plumbing & Heating Supply Co.,* 17 Ill. 2d 570, 577 (1959), plaintiff contends that her lack of objection at trial was not a proper basis for denying her posttrial motion. She presumably intends that the same applies to her forfeit argument on appeal.

¶15 In *City of Quincy*, our supreme court held:

> "if prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process cannot stand without deterioration, then upon review this court may consider assignments of error although no objection was made and no ruling was made or preserved thereon." *City of Quincy*, 17 Ill. 2d at 577.

Here, notwithstanding plaintiff's assertion to the contrary, the closing argument to which she failed to object neither prejudiced her nor denied her a fair trial.

¶16 It is uncontested that Dr. Hurley did not write anything in Christopher's chart to the effect that he told Christopher to call him if he had "any problems." With regard to the medication switch, Dr. Hurley made the following chart note:

> "The plan is to switch him to methadone. I explained that methadone has a longer lasting effect than Avinza, so we will adjust the dosage until he is getting an equal amount of pain relief that Avinza was providing. I will start him on methadone 30 mg q. 8 hours for two days, then 40 mg q. 12 hours after that. I

> explained that if he starts to feel drowsy, he may take a little less. If he feels he is going into withdrawals with irritability, sweating, pain, cramping, or diarrhea, he may take one or two extra tablets in the course of the day. If he has more withdrawal symptoms, we will call in a TTS-1 Clonidine patch to help with that.
>
> I will see him again in recheck in about two weeks. I prescribed # 100 methadone tablets. We will assess his tolerance to this, then adjust the dose when he returns for recheck."

It is a logical inference that, in order to prescribe a Clonidine patch before the recheck, Dr. Hurley would have to hear from Christopher, that Christopher would have to call him and describe his problems.

¶17 Further, Dr. Hurley testified that his note in the chart was "moderately detailed, *** but not a transcription of what went on." He stated that the note was to himself, "mostly me for my next visit" and it "in no way conveys what [Christopher] and I fully talked about." Dr. Hurley testified that he, in fact, told Christopher to call him if he had problems. Specifically, during plaintiff's crossexamination of Dr. Hurley, the following colloquy occurred in the context of Dr. Hurley's telling Christopher he could take one or two extra methadone tablets a day for withdrawal symptoms:

> "[Plaintiff's Counsel]: Well, if you gave him the instructions that he could take one or two tablets for breakthrough pain [counsel subsequently clarified he meant withdrawal pain] while he was on the methadone, correct?
>
> [Dr. Hurley]: Well, the first couple of days.
>
> [Plaintiff's Counsel]: Did you specify just the first couple of days?
>
> [Dr. Hurley: Right. And then I said for withdrawal symptoms, *and if he*

was having problems at that point he should call me." (Emphasis added.) Plaintiff argues that Dr. Hurley's statement regarding "having problems" refers to withdrawal problems in particular and not to "any problems" in general. Taken in context with the rest of Dr. Hurley's testimony, we do not find his statement to be so limited.

¶18 Dr. Hurley testified in direct examination that he had discussed with Christopher during the March 14, 2006, consultation, as he had every time that he had previously switched Christopher's medications, why he was prescribing the new medication (methadone) and possible concerns with the new medication. He stated that he explained to Christopher that methadone was a different medicine, which starts more slowly than other medicines. Dr. Hurley testified that he told Christopher:

> "[I]t's going to start slow. I'm going to back you off a little bit, even though I'm trying to raise your dose and still going to go a little bit low on you, and my concern is that he was going to have to ride out some possible withdrawal symptoms. *But I wanted, you know, obviously, I wanted to hear about it*, but that was my concern." (Emphasis added.)

¶19 Dr. Hurley then explained his note in the chart that "If he has more withdrawal symptoms, we will call in a TTS-1 Clonidine patch to help with that." He stated that, because he was concerned about Christopher suffering withdrawal symptoms, he would try to alleviate some of those symptoms by prescribing a Clonidine patch as mentioned in the chart. Dr. Hurley testified:

> "And *so I would always say*, look, if you're going to go into anything, I can give you a medicine if you have a problem with withdrawal, *I just need to hear that*

> *you've got that problem*, and we'll call in – there is an option. It's not like we were going to automatically. *I just wanted to let myself know in my note, *** that I have discussed with him* that we've got something to kind of soften the landing if you need to." (Emphasis added.)

He explained that his chart note that he would "assess [Christopher's] tolerance to this and adjust the dose when he returns for a recheck" meant "does [Christopher] have *any problems* with it, *does he call back and say I can't even think straight on this stuff or I'm nauseous or it's not working, whatever,* and then that would be an indication of his tolerance." (Emphasis added.)

¶20 Defense counsel then asked Dr. Hurley whether he "instruct[ed] [Christopher] to call [him] before the next appointment if there were *any problems* with either area, either that he was sluggish or he couldn't tolerate it or if he was having a lot of withdrawal symptoms." Dr. Hurley responded: "*Yes. I mean you would do that every time, but yes, in this particular here, that was specifically the point of, you know, if I were going to call him in a Clonidine patch, I'd obviously have to hear from him that we would need to*."

¶21 Overall, Dr. Hurley's testimony supports defense counsel's argument that Dr. Hurley told Christopher to call if he was having any problems.

¶22 Moreover, we do not read the challenged closing argument as referring solely to the contents of Christopher's chart. Counsel's closing argument was as follows:

> "And [Dr. Hurley] also *told* [Christopher] something else. He *said*, if you have any problem - and it's in that chart - he *said*, if you're getting drowsy, if there's any problem, you can take a little less. And he *said*, if you're having withdrawal, you can take a little more. Call me. If there are any problems, let me know. Let me

know if you are having any problems at all." (Emphasis added.)

The upshot of these statements is that Dr. Hurley *told* Christopher to call him with any problems, that he *said* this to Christopher. Dr. Hurley testified as much. Defense counsel's comment that what Dr. Hurley told/said to Christopher was reflected "in that chart" was merely further support for Dr. Hurley's testimony regarding what he told Christopher.

¶23 Further, counsel's statements regarding what was in the chart were technically correct. The chart does state that Dr. Hurley told Christopher, as paraphrased by counsel, that if he was getting drowsy, if there was any problem, he could take a little less methadone and, if he was having withdrawal, he could take a little more methadone. Counsel's next statements, that Dr. Hurley told Christopher to call him, to let him know if there were any problems at all, are not in the chart. They are, however, a logical inference from the chart notation that a Clonidine patch would be prescribed if necessary. As Dr. Hurley testified, he would not be able to prescribe the patch unless he heard from Christopher. Defense counsel never stated that he was quoting the chart and his statements paraphrasing the chart and testimony together are supported by the evidence.

¶24 Lastly, any minor discrepancies in defense counsel's closing argument were cured by the court's admonishment to the jury that closing arguments are not evidence and should not be considered as such. See *People v. Simms,* 192 Ill. 2d 348, 398 (2000). The court instructed the jury that, in the opening statements and closing arguments, "when the lawyers are speaking with you, they are not giving you evidence. The lawyers are telling you *** in closing argument their view of what the evidence has

shown." It told the jury that "[e]vidence consists of the testimony of the witnesses and of the exhibits admitted by the court" and "[a] closing argument is given at the conclusion of the case and is a summary of what the attorneys contend the evidence has shown. If any statement or argument made by an attorney has not been supported by the law or the evidence, you should disregard that statement or argument." Given these instructions, the jury clearly knew that it should rely on the evidence, not on what defense counsel argued in closing.

¶25 In sum, given Dr. Hurley's testimony and the reasonable inferences to be made from Christopher's patient chart, defense counsel did not testify or supply new facts during closing argument as plaintiff asserts. Defense counsel's deviation from the facts that were admitted into evidence was minor and the jury had been instructed to rely on the evidence, not counsels' argument. Accordingly, the challenged closing argument did not prejudice plaintiff and did not prevent her from receiving a fair trial. Plaintiff's objection to defense counsel's closing argument is, therefore, forfeit.

¶26 CONCLUSION

¶27 For the reasons stated above, we affirm the judgment of the circuit court.

¶28 Affirmed.