2015 IL App (1st) 142657-U

No. 1-14-2657

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FIFTH DIVISION
September 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALFRED PURCHASE and DIANE MASON, as Special Co-Administrators of the Estate of Margaret Purchase, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 10 L 3581
EDWARD BOONE BRACKETT, M.D., ALLAN O. MUEHRCKE, M.D., and ALLAN O. MUEHRCKE, M.D., S.C.,	)	Honorable Lynn M. Egan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court properly exercised its discretion in giving the jury the missing witness instruction when plaintiffs failed to call their medical expert witness, over whom they had control and who had information relevant to the case, and no reasonable excuse for the failure was shown.

¶ 2 Plaintiffs sued defendants for medical negligence for the death of Margaret Purchase, who suffered a cardiac arrest and died after undergoing knee replacement surgery. The jury rendered a verdict in favor of defendants, and plaintiffs appealed. Plaintiffs argue the trial court improperly instructed the jury that, based on plaintiffs' failure to produce a previously disclosed medical expert witness, the jury could infer that the missing witness's testimony would have been adverse to plaintiffs if the jury believed the witness was under plaintiffs' control and not equally available to defendants, a reasonably prudent person would have produced the witness if he believed the testimony would have been favorable to him, and there was no reasonable excuse for the failure to produce the witness. For the reasons that follow, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs Alfred Purchase and Diane Mason are the special administrators of the Estate of Margaret Purchase, who suffered a cardiac arrest and died on March 23, 2008, several days after undergoing total left knee replacement surgery on March 19, 2008. Plaintiffs filed a medical malpractice complaint against the hospital, Edward Boone Brackett, M.D., Allan O. Muehrcke, M.D., Allan O. Muehrcke, M.D., S.C., and others. Dr. Brackett performed the knee replacement surgery on Mrs. Purchase, and Dr. Muehrcke is an internist who cared for her after the surgery.

¶ 5 Plaintiffs' malpractice complaint alleged, *inter alia*, that Dr. Brackett should have prescribed Mrs. Purchase with a different post-operative, prophylactic anticoagulant. Plaintiffs also alleged that Dr. Muehrcke failed to order the implantation of a vena cava filter to prevent a pulmonary embolism, failed to manage Mrs. Purchase's anticoagulant therapy, and failed to timely transfer her to the intensive care unit. Prior to trial, a settlement was reached with the hospital and the case proceeded against Drs. Brackett and Muehrcke.

¶ 6 Also prior to trial, plaintiffs disclosed two medical experts in support of their case: Ian Newmark, M.D., an internist who specialized in pulmonary diseases, and Jeffrey Harkey, M.D., a pathologist. When the trial started, plaintiffs' counsel informed the jury that, among other witnesses, Dr. Harkey, an expert pathologist, would testify about where the blood clot came from and when it developed. However, after plaintiffs' expert Dr. Newmark testified, plaintiffs informed the defense, seven days after the trial had begun, that plaintiffs were no longer going to call Dr. Harkey as a witness. This occurred the evening before Dr. Harkey was expected to testify about Mrs. Purchase's cause of death and the effectiveness of her anticoagulation treatment. The trial court warned plaintiffs' counsel that the strategic decision not to call Dr. Harkey could result in the trial court giving the jury the missing witness instruction. Despite the warning, plaintiffs maintained their decision not to call Dr. Harkey, and the trial court ultimately gave the jury the missing witness instruction.

¶ 7 The jury subsequently returned its verdict for defendants. Plaintiffs filed a posttrial motion seeking a new trial based, in part, on the trial court's decision to give the jury the missing witness instruction. The trial court denied the motion, and plaintiffs appealed, arguing they are entitled to a new trial because the trial court erroneously gave the jury the missing witness instruction.

¶ 8 II. ANALYSIS

¶ 9 Plaintiffs challenge the trial court's decision to instruct the jury on the adverse inference that may be drawn from a party's failure to produce a witness within its control. See Illinois Pattern Jury Instructions, Civil, No. 5.01 (2006 ed.). In general, the missing witness instruction is available when: (1) the witness was under the control of the party adversely affected by the instruction and could have been produced through the use of reasonable diligence; (2) the witness was not equally available to the party who requested the instruction; (3) a reasonably prudent person would have

produced the witness if he believed the testimony would be favorable; and (4) no reasonable excuse for failing to produce the witness is shown. *Schaffner v. Chicago & Northwestern Transportation Co.*, 129 Ill. 2d 1, 22 (1989). The instruction, however, is not warranted if the witness's testimony is merely cumulative of testimony already elicited. *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 916 (2007).

¶ 10 The decision whether to give the missing-witness jury instruction is reserved to the sound discretion of the trial court. *Schaffner*, 129 Ill. 2d at 22. In reviewing the trial court's decision for an abuse of discretion, this court considers whether the jury instructions as a whole were clear enough so as not to mislead the jury and whether the instructions fairly and accurately stated the applicable law. *Dabros v. Wang*, 243 Ill. App. 3d 259, 267 (1993). Moreover, a reviewing court will not reverse and grant a new trial based on a trial court's erroneous jury instructions unless the error resulted in prejudice to the appealing party. *Wilkerson v. Pittsburgh Corning Corp.*, 276 Ill. App. 3d 1023, 1030 (1995).

¶ 11 Plaintiffs do not dispute that Dr. Harkey was under their control and could have been produced by the exercise of reasonable diligence and, thus, concede the first two foundational requirements for the missing witness instruction. With respect to the third factor, plaintiffs argue that the trial court erroneously concluded plaintiffs would have called Dr. Harkey but for his alleged unfavorable testimony. Specifically, plaintiffs contend Dr. Harkey's anticipated testimony would not have been adverse to plaintiffs' case because both Drs. Harkey and Newmark testified that Mrs. Purchase's death was caused by an acute pulmonary embolism. According to plaintiffs, the only distinction between Dr. Newmark and the other experts was that, in addition to the pulmonary embolism, Dr. Newmark identified the continuous bleeding and clot development in Mrs. Purchase's airways as a contributing factor in her ultimate cardiac arrest and death. Plaintiffs

contend that, absent a showing that Dr. Harkey's anticipated testimony would have been unfavorable to plaintiffs' case, the trial court's decision to instruct the jury regarding the missing witness was erroneous.

¶ 12 Concerning the fourth factor, plaintiffs contend that their failure to produce Dr. Harkey was reasonably excusable because his testimony would have been merely cumulative of testimony already admitted at trial and would have unnecessarily prolonged the trial at unwarranted expense. Plaintiffs argue that any opinions the defense could have expected to elicit from Dr. Harkey on the issue of cause of death would only have been cumulative of either the exhaustive testimony on the subject provided by defense experts, Dr. Sean Forsythe and Dr. Richard Krouse, who testified that the sole cause of Mrs. Purchase's death was an acute pulmonary embolism, or the readily available testimony of Dr. Michael Kaufman, the pathologist who performed the autopsy. Plaintiffs state that Drs. Forsythe and Krouse strenuously argued that the bleeding suffered by Mrs. Purchase had no impact on her ultimate death, and based on their reading of Dr. Kaufman's autopsy report, Drs. Forsythe and Krouse testified that there was no evidence of asphyxiation, blood in the airways, or aspiration of blood into the lungs. Plaintiffs argue that, even assuming *arguendo* that Dr. Harkey was prepared to contradict Dr. Newmark on the effect of Mrs. Purchase's bleeding, any adverse testimony that could reasonably have been anticipated from Dr. Harkey on that issue would only have been cumulative of evidence otherwise admitted at trial and, thus, plaintiffs were reasonably excused from producing him at trial.

¶ 13 After reviewing the record, we find that the circumstances of plaintiffs' announcement that Dr. Harkey would not be called in their case supports the notion that his testimony would likely have been adverse to their case. Plaintiffs' counsel waited until midway through the trial and after the testimony of the first expert, Dr. Newmark, before announcing that Dr. Harkey would not be

called. Furthermore, plaintiffs still failed to call Dr. Harkey despite the trial court's warning that the decision not to call him would likely result in the missing witness instruction.

¶ 14 We disagree with plaintiffs' assertion that Dr. Harkey's deposition testimony was not adverse to the trial testimony of their other expert, Dr. Newmark, concerning Mrs. Purchase's cause of death and defendants' use of anticoagulants. According to the record, Dr. Harkey, a pathologist board certified in clinical, anatomic and forensic pathology, testified in his discovery deposition that Mrs. Purchase's cause of death was a pulmonary embolism and that there was no evidence of aspiration of blood. Further, Dr. Harkey testified that the clot dissolving therapy administered during Mrs. Purchase's hospitalization was successful in dissolving the clots seen on the CT scan. In contrast, Dr. Newmark testified at trial that Mrs. Purchase was over-anticoagulated, defendants failed to discontinue the Lovenox and aspirin, and Mrs. Purchase continued bleeding, asphyxiated from the blood and clots in her airway, and had trouble breathing, which was a contributory factor to her ultimate death. Dr. Newmark also testified that the failure to reverse the anticoagulation when Mrs. Purchase was over-anticoagulated led to continued bleeding, continued blood in the airway, led to the oxygen level dropping and contributed to the cardiac arrest that led to her death. The record establishes that Dr. Harkey's expected testimony would have undermined Dr. Newmark's testimony and, thus, would have been unfavorable to plaintiffs' case.

¶ 15 All the experts but Dr. Newmark agreed that the sole cause of death was pulmonary embolism. Dr. Newmark, however, added the theory that continuous bleeding and clot development in Mrs. Purchase's airways was a contributing factor in her ultimate cardiac arrest and death. This added theory was central to plaintiffs' case against Dr. Muehrcke, and plaintiffs' counsel focused extensively on the bleeding issue at the trial, particularly during Dr. Newmark's

criticisms of Dr. Muehrcke's alleged excessive anticoagulation and plaintiffs' cross-examination of Dr. Muehrcke. Contrary to plaintiffs' arguments on appeal, Dr. Harkey's expected testimony contradicted Dr. Newmark's contributing factor theory.

¶ 16 Dr. Harkey opined in his deposition testimony that the sole cause of death was pulmonary embolism, not pulmonary embolism and continuous bleeding and clot development in Mrs. Purchase's airways. Whereas Dr. Harkey found a singular cause of death, Dr. Newmark found the death to have been multi-factorial. Dr. Harkey was asked directly at his discovery deposition his opinion of the cause of death, and he responded pulmonary embolism. He noted that Dr. Kaufman's autopsy report, under the gross description of the respiratory tract, did not mention blood in the airways or lungs. He specifically agreed that the blood clots found in the stomach and small intestine did not cause or contribute to the cause of Mrs. Purchase's death. If Dr. Harkey had been called to testify, he would have been forced to concede, based upon his deposition testimony, that the bleeding issue simply was not a cause of Mrs. Purchase's death. The contradictions between Dr. Harkey's and Dr. Newmark's opinions—plaintiffs' two retained experts—would have been adverse to plaintiffs' case.

¶ 17 We also reject plaintiffs' assertion that their failure to call Dr. Harkey was excusable because his testimony would have been cumulative or would have unnecessarily prolonged the trial. Plaintiffs argue that Dr. Harkey's expected testimony was cumulative because it would have been the same as the testimony provided by the defense experts. This argument lacks merit. Dr. Harkey's expected testimony would have corroborated the testimony of defense experts Drs. Forsyth and Krouse, which was adverse to Dr. Newmark's testimony. However, whereas plaintiffs could attack the credibility of the retained defense experts on the basis of bias, Dr. Harkey's testimony could not have been similarly discredited, and it would have been far more damaging to

plaintiffs' case for the jury to have heard the testimony of one of plaintiffs' own experts undermine the testimony of plaintiffs' other expert. Moreover, as discussed above, the contradictions between the testimony of Dr. Harkey and Dr. Newmark render the testimony non-cumulative. Furthermore, Drs. Harkey and Newmark had different areas of expertise; the former was a pathologist and the latter was board certified in internal medicine, pulmonary medicine and critical care medicine. Although they both offered opinions on causation, that did not make their testimony cumulative. In addition, plaintiffs offer nothing to support their assertion that Dr. Harkey's testimony would have unnecessarily lengthened the trial and increased expenses; there was no offer of proof made at trial as to how long his testimony would have taken.

¶ 18 Finally, plaintiffs argue that the missing-witness instruction was improper because the defense did not call Dr. Kaufman, the pathologist who performed the autopsy, to testify in their case. This argument lacks merit. Dr. Kaufman was not a retained expert of defendants and, thus, the decision not to call him was in no way analogous to plaintiffs' decision not to call Dr. Harkey. See *Van Steemburg v. General Aviation, Inc.*, 243 Ill. App. 3d 299, 319 (1993) (where the court held it was reversible error to have denied the plaintiffs' request for the missing-witness instruction when defendants failed to call two disclosed expert witnesses, the relevant issue was not whether the plaintiffs failed to call certain witnesses but, rather, whether the defendants offered a reasonable explanation for failing to call their experts). Moreover, the defense decision on whether or not to call Dr. Kaufman could not have influenced plaintiffs' decision on whether to call Dr. Harkey because the defense decision had not yet been made. In addition, plaintiffs have not shown that Dr. Kaufman was a witness within the exclusive control of defendants.

¶ 19 By failing to establish that the missing witness instruction was improper, plaintiffs have failed to establish any prejudice caused by the trial court giving the missing witness instruction.

Accordingly, we need not address plaintiffs' assertion that certain comments by defense counsel in closing argument compounded the alleged prejudice created by the missing witness instruction. Furthermore, plaintiffs have forfeited this argument by failing to timely object to defense counsel's comments at the time they were made. See *York v. El-Ganzouri*, 353 Ill. App. 3d 1, 17-18 (2004) ("To be effective in preserving an error, an objection must be timely, meaning contemporaneous with the objectionable conduct.").

¶ 20 We find no abuse of discretion in the trial court's determination to give the jury the missing witness instruction because Dr. Harkey's expected testimony would have been adverse to plaintiffs' case and there was no reasonable excuse shown for failing to produce Dr. Harkey. Accordingly, we affirm the judgment of the circuit court.

¶ 21 Affirmed.