2018 IL App (1st) 171528-U

No. 1-17-1528

Third Division
June 13, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DONNA MALONEY, as Independent Executor of the Estate of Timothy Maloney, Deceased, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
	)	No. 13 L 11568
v.	)	
	)	Honorable
COMMUNITY PHYSICAL THERAPY & ASSOCIATES, LTD., an Illinois Corporation, Defendant-Appellant.	)	Kay M. Hanlon, Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court judgment entered on jury verdict in favor of plaintiff is affirmed: (1) the standard-of-care testimony of plaintiff's expert witness was sufficient; (2) defendant waived objection to the admission of post-occurrence event evidence; (3) the trial court's rejection of defendant's special interrogatory was not erroneous; and (4) the jury's award of damages for pain and suffering was not legally excessive.

¶ 2 Plaintiff, Donna Maloney, as independent executor of the estate of Timothy Maloney, brought a professional malpractice action against defendant, Community Physical Therapy & Associates, Ltd. (CPT), in the circuit court of Cook County. The trial court entered judgment

on a jury verdict in favor of plaintiff. On appeal, CPT contends that: (1) the testimony of plaintiff's expert witness was insufficient to establish the standard of care; the trial court committed reversible error by (2) admitting evidence of a post-occurrence event, or (3) refusing to submit CPT's special interrogatory to the jury; and (4) the jury's award of damages for pain and suffering was legally excessive. We affirm.

¶ 3 BACKGROUND

¶ 4 The record contains the following pertinent facts. In 2004, Timothy Maloney, age 58, was diagnosed with inclusion body myositis, a rare degenerative muscle disease, which causes progressive muscle weakness in the feet, ankles, legs, wrists, and hands. In the early years of the condition, Timothy was able to walk at home using a rolling walker with four wheels, hand brakes, and a seat. Following heart surgery in 2008, Timothy became progressively weaker and less active at home. In 2009, Timothy began using a motorized scooter, and had a few falls at home when his knees failed. By 2012, Timothy had experienced many other medical problems and procedures, including coronary artery disease, cardiac bypass surgery, hypertension, diabetic neuropathy, chronic renal disease, a previous left foot fracture, lipidemia, obesity, and osteoporosis.

¶ 5 In early August 2012, Timothy was hospitalized for congestive heart failure and pneumonia. At the conclusion of his stay, he was bedridden and too weak to go home. Consequently, upon his discharge from the hospital on August 12, 2012, Timothy was admitted to Alden Estates of Orland Park (Alden) for short-term rehabilitation.

¶ 6 CPT provided physical therapy services to residents of Alden. Edmar Ramirez and Dennis Miranda, CPT physical therapists, evaluated Timothy and created treatment plans. The treatment goal for Timothy, then 66 years old, approximately 5' 9" tall and 210 pounds, was

to become as independent as possible at home, including the ability to get in and out of bed, transfer from one place to another, and to walk with the assistance of a walker. Then, Timothy could be discharged to home.

¶ 7 Joseph Toth, a CPT physical therapy assistant, was Timothy's primary physical therapy provider. CPT provided physical therapy to Timothy six days per week in thirty to sixty minute sessions. Because of Timothy's fall risk, CPT required its therapists to use a gait belt. A gait belt is a safety device composed of a three to four inch wide belt, placed around the patient's trunk or abdomen to provide the therapist a hand-hold to assist patients when walking and to minimize the risk of falling. The gait belt was required by unwritten CPT policy to improve safety.

¶ 8 When Timothy began physical therapy, he was unable to walk, and required several persons to assist him to stand. By early September 2012, Toth provided moderate to maximal assistance, 50% to 75%, in Timothy's walking and bearing his weight. Toth would have a second therapist follow him with a wheelchair because Timothy was weaker and, consequently, could not walk far and required frequent breaks. However, Timothy demonstrated gradual and consistent progress. By late September 2012, he required only one therapist's minimal assistance, 25%, and he could walk farther with more consistency. Since Toth did not have to use as much effort in assisting Timothy with the gait belt while he was walking, Toth changed from having a second therapist follow him with a wheelchair to handling the wheelchair himself. Between October 8 and 14, 2012, Timothy was able to walk 120 feet twice and 180 feet once. Between August and October 2012, which spanned approximately 40 physical therapy sessions, Timothy kept improving and had no occasions of knee buckling.

¶ 9 On October 15, 2012, Toth began walking with Timothy. At that time, Timothy was wearing a gait belt and using a walker. Toth had his left hand on the gait belt and his right hand on a wheelchair. After walking only two feet, Timothy's left knee buckled without warning. Timothy fell forward and to the left, away from the wheelchair. Toth could not put Timothy in the wheelchair, but used both hands on the gait belt to lower Timothy to the ground.

¶ 10 Timothy was admitted to Palos Community Hospital that day complaining of ankle pain. He was diagnosed with a left trimalleolar fracture, which is a fracture on each of the three bones in the ankle. On October 23rd, Timothy underwent open reduction and internal fixation surgery. One of CPT's expert witnesses, George Holmes, M.D., opined that the fracture (1) could have been a spontaneous fracture from the acute increase of weight on the ankle occurring when the knee buckled, or (2) could have resulted from the twisting of the ankle while Timothy was being lowered to the ground. One of plaintiff's experts, Keith Alan Hollingsworth, M.D., opined that the ankle fracture was caused by the ankle twisting as Maloney fell to the ground, and was not a spontaneous fracture. On October 26th, Timothy returned to Alden for further rehabilitation, and was discharged from CPT in mid-January 2013.

¶ 11 In October 2013, Timothy originally filed a complaint against CPT, Alden, and several other defendants related to the Alden facility. In March 2014, Timothy died from causes unrelated to the ankle fracture. The complaint was amended to name Timothy's surviving spouse, Donna, as plaintiff. The Alden-related defendants were subsequently dismissed. In the instant third amended complaint, plaintiff brought a survival claim against CPT alleging professional malpractice. The complaint alleged that CPT was negligent as a result of various acts or omissions, including the failure to provide: (1) an individualized care plan that addressed

Timothy's fall risk and his need for extensive assistance during physical therapy; (2) appropriate and adequate monitoring and supervision; (3) adequate assistance to Timothy on October 15, 2012, to prevent him from falling or to break his fall. The complaint alleged damages for medical expenses, disability, and pain and suffering.

¶ 12 The cause was tried before a jury, which heard the above-recited evidence. At the close of plaintiff's case, CPT moved for a directed verdict, which the trial court denied. The jury returned a verdict in favor of plaintiff in the amount of $552,000. The trial court entered judgment on the verdict, and subsequently denied defendant's post trial motion. CPT timely appeals. Additional pertinent background will be discussed in the context of our analysis of the issues.

¶ 13 ANALYSIS

¶ 14 I. Standard of Care

¶ 15 CPT assigns error to the denial of its motion for a directed verdict at the close of plaintiff's case. CPT contends that plaintiff failed to present evidence of the applicable standard of care.

¶ 16 "[V]erdicts ought to be directed *** only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). If the plaintiff has not established a *prima facie* case, then no cause of action is presented for the jury's consideration, and the entry of a directed verdict in favor of the defendant is appropriate. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 123 (2004). In other words, when an essential element of plaintiff's cause of action is missing, even looking at the evidence in the light most favorable to the plaintiff, it is clear that no verdict in plaintiff's favor could ever stand. See *Walski v. Tiesenga*, 72 Ill. 2d 249,

262 (1978). A ruling on a motion for a directed verdict is reviewed *de novo*. *Sullivan*, 209 Ill. 2d at 112; see *Bowman v. The University of Chicago Hospitals*, 366 Ill. App. 3d 577, 586 (2006).

¶ 17 In a health professional malpractice action alleging negligence, the plaintiff bears the burden of proving the following elements: the proper standard of care against which the defendant health professional's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a resulting injury proximately caused by the health professional's lack of skill or care. Unless the health professional's negligence is so grossly apparent or the treatment so common as to be within the everyday knowledge of a layperson, expert testimony is required to establish the standard of care and the defendant's deviation from that standard. See *Sullivan*, 209 Ill. 2d at 112; *Purtil v. Hess*, 111 Ill. 2d 229, 241-42 (1986); *Walski*, 72 Ill. 2d at 255-56. Further, a plaintiff does not discharge this burden of proof by presenting expert testimony that merely offers an opinion as to correct procedure or which suggests, without more, that the witness would have conducted herself differently than the defendant. The expert must base her opinion on recognized standards of competency in her profession. A difference of opinion between acceptable but alternative courses of conduct is not inconsistent with the exercise of due care. *Advincula v. United Blood Services*, 176 Ill. 2d 1, 24 (1996); *Walski*, 72 Ill. 2d at 261.

¶ 18 At trial, plaintiff called Sarah Jameson, DPT, to testify to the applicable standard of care for physical therapists, and CPT's failure to meet that standard. Dr. Jameson testified that the standard of care was what a reasonable physical therapist would do under the same or similar circumstances. Dr. Jamison opined that every case is unique and, accordingly, the amount of assistance a patient needs is a clinical judgment call, and that there are no specific conditions

that require a certain number of therapists. However, Dr. Jameson opined that, given the nature of Timothy's inclusion body myositis and degree of weakness, the standard of care required that two therapists treat Timothy, so that, if knee buckling occurred: (1) one therapist standing on each side of Timothy could support him until someone brought a wheelchair, or (2) one therapist holding the gait belt with both hands could support him while the second therapist, following with a wheelchair, could bring it up so Timothy could be safely seated. Further, the treatment provided to Timothy on October 15, 2012, failed to comply with the standard of care because Toth, with one hand on the gait belt and one hand on a wheelchair, "wasn't in a position to be able to control [Timothy] when his knees buckled and he subsequently went to the floor."

¶ 19 Before this court, CPT contends that Dr. Jameson's testimony was insufficient to establish the applicable standard of care. CPT posits that the standard of care "is an objective standard of care within the community, not Dr. Jameson's opinion as to what was required to keep the decedent safe." CPT asserts that Dr. Jameson "could not articulate an objective standard of care requiring a certain number of therapists." CPT argues that Dr. Jameson asserted her own professional clinical judgment and personal preferences rather than a standard of care.

¶ 20 We disagree. "In Illinois, the established standard of care for all professionals is stated as the use of the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances." *Advincula*, 176 Ill. 2d at 23; see *Matarese v. Buka*, 386 Ill. App. 3d 176, 184-85 (2008) (collecting cases). CPT's argument misconceives the requirement of establishing the health professional standard of care. Because medicine is not an exact science, an acceptable health professional standard of care need not be precise, but may provide for the exercise of individual judgment as long as it is within the framework

of established procedures. To require that there always be a mathematical or quantifiable standard of medical-related care would create a nearly impossible burden for a plaintiff to meet. Medical-related treatment often requires the exercise of qualitative judgment that frequently varies from patient to patient, depending on such factors as the patient's physical structure and condition. See *Kemnitz v. Semrad*, 206 Ill. App. 3d 668, 673-74 (1990); *Chamness v. Odum*, 80 Ill. App. 3d 98, 107 (1979) (explaining all that is necessary for the expert to establish is that there was a generally accepted health professional standard of care, which entailed treatment or performance of a procedure in a manner different than that provided by the defendant).

¶ 21 Dr. Jameson testified to the physical therapy standard of care based on the circumstances presented in the case at bar. Accordingly, we conclude that plaintiff adequately established the standard of care against which to measure CPT's conduct. Viewing all of the evidence in the light most favorable to plaintiff, we cannot say that the evidence so overwhelmingly favored CPT that no contrary verdict based on that evidence could ever stand. Therefore, we uphold the trial court's denial of CPT's motion for a directed verdict at the close of plaintiff's case.

¶ 22 II. Post-Occurrence Knee Buckling

¶ 23 CPT next contends that it is entitled to a new trial due to the allegedly erroneous admission of prejudicial evidence. Plaintiff initially responds that CPT waived this contention.

¶ 24 On January 9, 2013, Timothy had a subsequent knee buckling incident while at physical therapy. This time, there was a second therapist following behind Timothy with a wheelchair because Timothy was weaker than before and was wearing a CAM (controlled ankle motion)

boot, a bulky shoe with a casing to protect the ankle. The two therapists were able to keep Timothy upright with a gait belt, and pivot him to sit on a nearby mat table.

¶ 25 The trial court granted CPT's motion *in limine* to bar evidence of the January 2013 knee buckling incident. See *Herzog v. Lexington Township*, 167 Ill. 2d 288, 300 (1995) (evidence of subsequent remedial measures is not admissible to prove prior negligence, but may be admissible for other purposes). The court subsequently ruled, prior to trial, that if the defense opened the door to testimony regarding the incident, then plaintiff could go through it to impeach defendant's theory of causation. During cross-examination of Dr. Holmes, defendant's medical expert, plaintiff's counsel was attempting to elicit testimony regarding the extent of Timothy's injury. Counsel asked Dr. Holmes whether it was significant that Timothy did not walk at all for two-and-a-half months after the fracture. Dr. Holmes disagreed with the characterization. So counsel then asked Dr. Holmes whether he recalled any specific instance in November and December 2010 where Timothy was walking for therapy. Dr. Holmes answered in the affirmative, stating: "There's [*sic*] therapy notes indicating he was up. In fact, there's one time he almost fell again in therapy in December."

¶ 26 The trial court immediately called a sidebar. Defense counsel objected, but the trial court explained that Dr. Holmes was a CPT witness under counsel's control, that it was up to defense counsel to instruct Dr. Holmes not to volunteer inadmissible testimony, and that CPT thereby opened the door to the January 2013 knee buckling incident. After the sidebar, Dr. Holmes testified that Timothy's knees did buckle after October 2012, and that two therapists were able to keep him upright. On redirect, CPT elicited additional testimony from Dr. Holmes regarding the January 2013 incident. Further, CPT elicited evidence of this incident in its direct examination of Toth, and its examination of Ramirez.

¶ 27 CPT argues that it "did not and could not have opened the door" to the January 2013 knee buckling incident during *plaintiff's* cross-examination of *its* witness. We nevertheless agree with plaintiff that CPT waived this contention for review. "One cannot complain of admission of evidence offered by one party where practically the same evidence is afterward introduced by the party so complaining." *Powell v. Weld*, 410 Ill. 198, 204 (1951); *Forest Preserve District of Cook County v. South Holland Trust & Savings Bank*, 38 Ill. App. 3d 873, 876 (1976); accord *Millette v. Radosta*, 84 Ill. App. 3d 5, 23 (1980) (reasoning that allegedly inadmissible testimony introduced by the opposing party could not have been prejudicial in light of the fact that the same evidence was discussed in detail by the complaining party). CPT argues that defense counsel attempted to mitigate the alleged damage caused by admission of the January 2013 knee buckling incident by introducing evidence of its own. Having opted to proceed in this way, CPT will not now be heard to complain that presentation of this incident to the jury rendered its verdict fatally infirm. See *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 163 Ill. 2d 498, 503 (1994); *Chubb/Home Insurance Companies v. Outboard Marine Corp.*, 238 Ill. App. 3d 558, 569 (1992) (concluding that while the complaining party "may have exercised sound trial strategy in attempting to blunt the impact of the evidence, such actions simply do not properly preserve the issue for review on appeal").

¶ 28 III. CPT's Special Interrogatory

¶ 29 CPT next assigns error to the trial court's rejection of its proffered special interrogatory: "Was Joseph Toth, PTA, negligent on October 15, 2012?" CPT contends that its special interrogatory was in proper form and, therefore, its submission to the jury was mandatory. CPT seeks reversal and a new trial.

¶ 30 Generally, section 2-1108 of the Code of Civil Procedure provides that on request of any party, the jury must be required to find specially upon any material question of fact submitted to the jury in writing; and if the answer to such special interrogatory is inconsistent with the general verdict, the former controls the latter. 735 ILCS 5/2-1108 (West 2016). The purpose of a special interrogatory is to test the general verdict against the jury's determination as to one or more specific issues of ultimate fact. *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002); *Northern Trust Co. v. University of Chicago Hospitals and Clinics*, 355 Ill. App. 3d 230, 251 (2004). The trial court *must* submit a requested special interrogatory to the jury, if the interrogatory is in proper form. *Northern Trust*, 355 Ill. App. 3d at 251. A special interrogatory is in proper form if: (1) it relates to an ultimate issue of fact upon which the rights of the parties depend; and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned. The required inconsistency arises when the special interrogatory is absolutely and clearly irreconcilable with the general verdict. *Simmons*, 198 Ill. 2d at 555-56. If a special interrogatory does not cover the issues upon which the jury is called to render a decision, and a reasonable hypothesis is left unaddressed that would allow the special interrogatory to be construed consistently with the general verdict, then the special interrogatory is not absolutely irreconcilable with the general verdict, is improper in form, and the trial court has the discretion not to submit it to the jury. *Northern Trust*, 355 Ill. App. 3d at 251; accord *Stach v. Sears, Roebuck & Co.*, 102 Ill. App. 3d 397, 411 (1981).

¶ 31 In the case at bar, CPT contends that "[a]n interrogatory testing the jury's finding of the ultimate question of negligence would have contradicted its ultimate general verdict." We disagree.

¶ 32 Plaintiff's theory of the case was that CPT, and not only Toth, was negligent. The jury instructions set forth plaintiff's claim as follows. CPT was negligent in that it failed to: identify all of Timothy's risk factors for falls, develop an appropriate plan to address the risk, use proper safety precautions while walking with Timothy, and provide two-person assistance while walking with Timothy. Further, one or more of the foregoing was a proximate cause of Timothy's injuries. CPT's proffered special interrogatory, directed solely at Toth, did not specify any particular action taken by CPT, and would not have tested a general verdict as to the above-stated allegations of CPT's negligence. In other words, whether or not the jury found that Toth was negligent on October 15, 2012, would have no effect on the general verdict because plaintiff pled several alternative theories of negligence that could equally support a general verdict finding CPT liable. Any answer to CPT's proffered special interrogatory would not have been absolutely and clearly irreconcilable to a general verdict in plaintiff's favor and, therefore, the special interrogatory was not in proper form. See, *e.g.*, *Northern Trust*, 355 Ill. App. 3d at 242 (and cases cited therein). Accordingly, the trial court did not abuse its discretion in refusing to submit it to the jury.

¶ 33 IV. Pain and Suffering Damages

¶ 34 Lastly, CPT contends that the jury's award of damages for Timothy's pain and suffering was legally excessive. The jury itemized Timothy's damages as follows: $127,000 for reasonable medical-related expenses; $125,000 for disability, and $300,000 for pain and suffering. CPT argues that it "is apparent that the jury was moved by passion or prejudice to award such substantial damages for an ankle fracture" given the circumstances of this case. CPT requests a remittitur with respect to the pain and suffering award.

¶ 35 The inherent power of a court to order a remittitur of excessive damages, in appropriate and limited circumstances, is long recognized and accepted. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 411-12 (1997) (collecting cases). A remittitur should be employed only when a damages award falls outside the range of fair and reasonable compensation, appears to be the result of passion or prejudice, or is so large that it shocks the judicial conscience. Remittitur should not be employed when the award falls within the flexible range of conclusions which can be reasonably supported by the facts. *Epping v. Commonwealth Edison Co.*, 315 Ill. App. 3d 1069, 1072 (2000); *Riley v. Koneru*, 228 Ill. App. 3d 883, 887-88 (1992).

¶ 36 Whether remittitur should be granted is a question of law for the court. *Best*, 179 Ill. 2d at 412. However, the assessment of damages is primarily an issue of fact for jurors, who use their combined wisdom and experience to reach fair and reasonable judgments. A reviewing court is neither trained nor equipped to second-guess those judgments about pain and suffering. *Epping*, 315 Ill. App. 3d at 1073; *Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App. 3d 199, 207 (1996).

¶ 37 In the case at bar, the largest itemized amount of damages is for pain and suffering, which is more than double the other itemized amounts awarded. However, we cannot limit compensable damages for pain and suffering to a set percentage of medical-related expenses. See *Lau v. West Town Bus Co.*, 16 Ill. 2d 442, 452-53 (1959). The jury heard plaintiff and her medical expert, Dr. Hollingsworth, testify as to Timothy's ankle injury, surgery, and resulting pain, which required significant medication. Moreover, the jury was properly instructed not to base its verdict on speculation, prejudice, or sympathy. See *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 470 (1992) ("Where the jury is properly instructed and has

a reasonable basis for its award, a reviewing court will not disturb its verdict"); *Riley*, 228 Ill. App. 3d at 888 (same). On this record, there is no basis for disturbing the jury's award.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.