2019 IL App (1st) 172437-U

No. 1-17-2437

Order filed June 21, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

GIOVANNI BENINCASA, Special Administrator and Independent Administrator of the Estate of MARIA ROSA BENINCASA, deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 13 L 8988
v.	)	Honorable Clare E. McWilliams,
BENSON P. YANG, M.D., NORTHWESTERN NEUROSURGICAL ASSOCIATES, S.C., SOMA SINHA ROY, M.D., VALERIE ROTH, M.D., DR. VINSON, LALITHA DARBHA, M.D., and PRESENCE RESURRECTION MEDICAL CENTER,	)	Judge, Presiding.
Defendants	)	
(Benson P. Yang, M.D., and Northwestern Neurosurgical Associates, S.C., Defendants-Appellees).	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly overruled plaintiff's objection and denied plaintiff's motion for a new trial where defense counsel's closing arguments were not misstatements of the law that prejudiced plaintiff.

¶ 2 On August 9, 2013, plaintiff Giovanni Benincasa (Giovanni), as Special Administrator and Independent Administrator of the Estate of Maria Rosa Benincasa (Maria), deceased, filed a two-count medical malpractice/wrongful death complaint against defendants Benson Yang, M.D. (Dr. Yang), Northwestern Neurosurgical Associates (Northwestern Neurosurgical), Soma Sinha Roy, M.D. (Dr. Roy), Valeria Roth, M.D.(Dr. Roth), Tina Vinson, M.D. (Dr. Vinson), Lalitha Darbha, M.D. (Dr. Darbha), and Presence Resurrection Medical Center (Presence) for Maria's death. Maria died on August 11, 2011, while she was hospitalized for a ruptured brain aneurysm. Count I was for wrongful death and Count II was a survival cause of action that was voluntarily dismissed by plaintiff during the trial. Prior to trial, plaintiff dismissed all physician defendants except Dr. Yang and Northwestern Neurosurgical, and settled with Presence for $2.5 million dollars. Following a jury trial, a verdict was entered in favor of defendants on plaintiff's wrongful death cause of action.

¶ 3 Plaintiff filed a posttrial motion challenging remarks related to causation during defense counsel's closing argument. The circuit court denied plaintiff's motion, and this timely appeal followed.

¶ 4 On appeal, plaintiff contends that defense counsel's misstatements of law during closing argument denied him a fair trial. For the reasons that follow, we affirm.

¶ 5 BACKGROUND

¶ 6 In his complaint, Giovanni contended that Dr. Yang failed to place an intracranial pressure monitoring device (ICP monitor) on Maria after 8 p.m. on August 9, 2011, failed to

come to the hospital to examine Maria shortly after 11 p.m. on August 9, 2011, and failed to insert an external ventricular drain (EVD) at 1 a.m. on August 10, 2011. The evidence presented at the jury trial was as follows.

¶ 7 On August 9, 2011, Maria was taken by ambulance to Our Lady of the Resurrection Medical Center (OLR) with a severe headache after being found unresponsive at home. A CT scan of her head was taken shortly after 9 a.m. and disclosed a subarachnoid hemorrhage. The emergency room physician contacted Dr. Yang, the on-call neurosurgeon, who ordered a CT angiogram. The CT angiogram was performed at 9:44 a.m. and indicated a ruptured aneurysm in the "distal left middle cerebral artery." After evaluating Maria in the emergency room at OLR and reviewing her test results, Dr. Yang transferred her to Resurrection Medical Center (Resurrection) where a diagnostic cerebral angiogram could be performed. Prior to transferring Maria, Dr. Yang explained the severity of the aneurysm to both Maria and Giovanni. Maria was transferred to Resurrection shortly after noon.

¶ 8 Dr. Roy was the on-call neuro-interventional radiologist at Resurrection when Maria arrived on August 9, 2011. She testified that a diagnostic cerebral angiogram would allow a doctor to evaluate the precise location, size and treatment options for a cerebral aneurysm. Dr. Roy performed the diagnostic cerebral angiogram at approximately 12:31 p.m., and spoke with Dr. Yang at 2:50 p.m. They discussed the available treatment options, "clipping" the aneurysm or "coiling" it. In a clipping procedure, the neurosurgeon must cut into the patient's skull and place a clip on the artery near the aneurysm. A coiling procedure is an endovascular procedure performed through the arterial system, which is less invasive and has better outcomes compared to clipping. Dr. Roy subsequently performed a coiling procedure on Maria, during which several

tiny coils were inserted through a micro-catheter to "fill the space within the aneurismal bubble." The coiling procedure was performed shortly after 3 p.m. and a second head CT scan was performed at 6:35 p.m. The CT scan showed new "subarachnoid" blood in the left parietal lobe of Maria's brain, which suggested that the aneurysm was bleeding again and that there was more cerebral swelling (edema). Both Dr. Roy and Dr. Yang were advised of the test findings, and Maria was placed in the intensive care unit (ICU).

¶ 9 Maria arrived in the ICU at approximately 7 p.m. on August 9, 2011, and Dr. Yang instructed the ICU staff to continue monitoring her throughout the evening. Pursuant to those instructions, the nursing staff performed hourly neurological assessments of Maria's motor responses, verbal responses and "papillary reaction." During her first hour in the ICU, Maria was alert and oriented "times four," meaning that she knew her name, the time, her location and her situation, and was able to converse. At that time, her pupils were "brisk, equal and reactive to light." Nurse Kathryn Monroe used the Glasgow Coma Scale (GCS) to assess Maria's level of consciousness several times between 7 and 8 p.m., and assigned Maria GCS scores of 15 on each assessment performed during that time. A GCS score of 15 is the highest a patient can receive, which is considered normal.

¶ 10 Dr. Roy evaluated Maria at approximately 8 p.m. on August 9, 2011, and spoke with her, noting only "subtle neurological deficits," namely slurred speech and right-sided weakness. Those were attributed to the "re-bleed" in the left side of Maria's brain.

¶ 11 Dr. Roth, an emergency medicine resident who was rotating through the ICU, also evaluated Maria at approximately 8 p.m. At that time, Dr. Roth noted that Maria was alert, able to answer questions and to follow commands. Following her evaluation, Dr. Roth contacted Dr.

Yang and advised him that Maria was stable. Dr. Roth testified that nothing about Maria's condition led her to believe that she should request that Dr. Yang come to the hospital to see Maria at that time.

¶ 12 ICU nurse Jelena Juguilon began working at 8 p.m. She performed a neurological assessment of Maria and noted that Maria had slurred speech, slightly assymetrical pupils, weak right hand grip strength and a GCS score of 12. A nurse contacted Dr. Yang at approximately 8:20 p.m. and advised him of those findings, which Dr. Yang attributed to the re-bleed. Dr. Yang ordered Nimodipine to prevent vasospasms (closure of the blood vessels that could cause a stroke).

¶ 13 No significant changes in Maria's clinical condition were noted between 8:20 p.m. and 11:00 p.m. on August 9, 2011, and no one contacted Dr. Roy or Dr. Yang regarding a deterioration in Maria's condition during that time.

¶ 14 At 11 p.m., Maria was found to have sluggish pupils, no right hand grip strength, left-sided weakness, and a GCS score of 8. Dr. Roth contacted Dr. Yang, Dr. Roy and an ICU "intensivist." Drs. Yang and Roy requested a "stat" repeat head CT scan on Maria which was performed at 12:11 a.m. on August 10, 2011. The scan showed "extensive bilateral subarchnoid blood, more on the left, and a four-millimeter midline shift to the right with increasing cerebral edema." The swelling was "diffuse," meaning throughout the entire brain but was more prevalent on the left side. Dr. Roth contacted Dr. Yang shortly after the CT scan was performed and informed him of the increased cerebral edema. Dr. Yang ordered Mannitol, Lasix, and Decadron, medications that may reduce swelling, but none of which necessarily addressed the underlying cause of the edema.

¶ 15 Maria was intubated shortly before 1 a.m. on August 10, 2011, after her breathing became labored. She was given Mannitol, a diuretic which can draw fluid from the brain. Dr. Yang explained that Mannitol requires six to eight hours to take effect, so he ordered continuous monitoring throughout the night. Between 1 and 6 a.m., Maria's condition did not improve. According to Dr. Yang, Maria essentially had no chance at a functional recovery as a result of the re-bleed and the aggressive, progressive edema.

¶ 16 Dr. Yang evaluated Maria at 6 a.m. on August 10, 2011, and she was unresponsive. At approximately 6:30 a.m., Dr. Yang placed an EVD in Maria's brain to withdraw cerebral spinal fluid. No fluid drained, indicating that the ventricles in Maria's brain that would normally be filled with cerebral spinal fluid were compressed by brain matter. Dr. Yang subsequently obtained consent from Giovanni to perform a decompressive craniectomy. When Dr. Yang removed a portion of Maria's skull, a large amount of brain tissue discharged from the opening, indicating the aggressive and severe nature of the cerebral edema. Dr. Yang removed blood from within the lining of Maria's brain, but it remained very swollen; Maria never regained consciousness. She was declared brain dead, placed on a ventilator, and died on August 11, 2011.

¶ 17 Dr. Yang explained that no treatment or intervention could have stopped the progressive edema. He further explained that an ICP monitor is simply a diagnostic tool that measures a patient's intracranial pressures; it does not treat bleeding or cerebral swelling.

¶ 18 Giovanni presented the testimony of Dr. Robert Cantu as his expert liability witness. Dr. Cantu was a board-certified neurosurgeon from Boston since 1970, but no longer performed inpatient neurosurgery procedures after 2007. Dr. Cantu testified that Dr. Yang deviated from the standard of care in the following ways: (1) failure to come to the hospital to see Maria at 8 p.m.

on August 9, 2011, if he was aware of the clinical changes documented in her chart; (2) failure to place an EVD after 8 p.m. if, after seeing Maria, Dr. Yang believed pressure monitoring was necessary; (3) failure to come to the hospital to see Maria after she became comatose at 12 a.m. on August 10, 2011; and (4) failure to perform a ventriculostomy and place a EVD after the 12:11 a.m. CT scan. He testified that, "to a reasonable degree of medical and scientific certainty," the breaches in the standard of care "lessened [Maria's] chances of survival or successful treatment."

¶ 19 On cross-examination, Dr. Cantu admitted that when he initially reviewed Maria's medical records and imaging studies, he found no deviation from the standard of care and no way to successfully treat her. At the time of his review, Dr. Cantu authored a memorandum in which he concluded that there was no basis for filing the lawsuit. Dr. Cantu changed his opinion after a discussion with plaintiff's attorneys. Dr. Cantu agreed that Dr. Yang initiated appropriate treatment in ordering medications for Maria after 11 p.m. on August 9, 2011, and conceded that he did not know whether Maria would have survived even if everything had been done correctly.

¶ 20 The defense presented the expert liability testimony of Dr. Lorenzo Munoz, who testified that no earlier intervention could have changed Maria's outcome. He explained that Dr. Yang could not have successfully treated or halted Maria's aggressive form of cerebral edema through any type of medication or invasive procedure. In his opinion, there was no way of addressing the root cause of the edema. Dr. Munoz explained to the jury why each deviation described by Dr. Cantu would not have helped Maria. According to Dr. Munoz, placement of an ICP monitor would only have provided Dr. Yang with "a number quantifying the intra-cranial pressure." The placement of an EVD prior to 6:30 a.m. on August 10, 2011, would not have provided Maria

with any benefit given her progressive edema. Additionally, her ventricles only contained a small amount of fluid so placing a drain earlier would not have reduced the edema. Dr. Munoz concluded there is no medication or intervention that treats the underlying causes of cerebral edema.

¶ 21 Giovanni also presented the testimony of David Gibson, a senior analyst at Vocational Economics, Inc., who testified that the value of Maria's loss of services totaled $329,000.

¶ 22 Prior to closing arguments, Giovanni voluntarily dismissed his survival claim. Defendants filed a motion for directed verdict, contending that Dr. Cantu did not explain how the outcome would have been different and that plaintiff did not meet his burden under the "lost chance" doctrine. The trial court denied the motion.

¶ 23 During closing arguments, defense counsel argued that plaintiff failed to prove causation, noting that Dr. Cantu, plaintiff's liability expert, did not explain how the interventions he alleged that Dr. Yang failed to provide proximately caused Maria's injuries, or how such interventions could have provided her with a chance for a better medical outcome. Giovanni's objection on the basis of a misstatement of the law was overruled.

¶ 24 The jury returned a verdict in favor of defendants, and the circuit court entered judgment on the jury's verdict. Giovanni filed a posttrial motion arguing error in defendants' closing arguments on causation, which was denied after a hearing on September 6, 2017. This timely appeal followed.

¶ 25 ANALYSIS

¶ 26 Plaintiff contends that several of defense counsel's statements during closing argument misstated the law on causation and the circuit court erred in overruling his objection to defense

counsel's statements. He asserts that the cumulative effect of defense counsel's misstatements of law were so prejudicial that he was denied a fair trial. Plaintiff further contends that the circuit court's failure to sustain his objection served to ratify the misstatement of law and undermined the completeness of the jury instructions. He contends that the circuit court erred in denying his posttrial motion for new trial based on defense counsel's misstatements of the law on causation during closing argument.

¶ 27 Plaintiff claims that defense counsel misstated the law with respect to causation and increased his burden of proof during his closing argument, noting six such instances during defense counsel's closing. However, the record reflects that plaintiff only made a contemporaneous objection to one of the six statements he identifies as misstatements of the law.

¶ 28 A party's failure to make a contemporaneous objection will generally result in forfeiture of the issue unless the prejudicial error involved flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion. *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 94. Only where arguments are so egregious that they deprived a litigant of a fair trial and substantially impaired the integrity of the judicial process will we review them in the absence of a preserving objection. *Vanderhoof*, 2015 IL App (1st) 132927, ¶ 94. Accordingly, we find that plaintiff has forfeited review of the five unobjected-to statements.

¶ 29 However, even if we considered the propriety of the forfeited statements along with the one statement that was properly preserved for review, we would find that the statements were not misstatements of the law related to causation, as detailed below.

¶ 30 As a general matter, a counsel is afforded wide latitude in closing argument (*Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 760 (2010)) and to draw reasonable inferences and

conclusions from the evidence (*Parsons v. Norfolk Southern Ry. Co.*, 2017 IL App (1st) 161384, ¶ 57). The scope of closing argument is within the trial judge's sound discretion. *Velarde v. Illinois Central R.R. Co.*, 354 Ill. App. 3d 523, 524 (2004).

¶ 31 However, improper closing argument can provide a basis for a new trial. *Lagoni v. Holiday Inn Midway*, 262 Ill. App. 3d 1020, 1034 (1994). Generally, the determination of whether comments of counsel have deprived a party of a fair trial is a matter resting in the first instance in the discretion of the trial court. *Lagoni*, 262 Ill. App. 3d at 1035. A closing argument must be clearly improper and prejudicial to warrant reversal of a judgment. *Lagoni*, 262 Ill. App. 3d at 1035. The trial court's determination as to such matters will not be reversed absent a clear abuse of the trial court's discretion. *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050, 1061 (1994).

¶ 32 A new trial is not warranted based on an improper closing argument unless, when the trial is viewed in its entirety, the argument resulted in substantial prejudice to the losing party or rose to the level of preventing a fair trial. *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 84. Errors in the closing argument must result in substantial prejudice such that the result would have been different absent the complained-of remark before a reversal is required. *Davis*, 2014 IL App (1st) 122427, ¶ 84.

¶ 33 During defense counsel's closing argument, the following complained-of comment, plaintiff's objection and the circuit court's ruling occurred:

> "MR. DONOHUE [(Defense Counsel)]: There's several things here. The judge is going to instruct you on the law that the plaintiff has to prove. The plaintiff can

throw out deviations from the standard of care. Dr. Cantu has offered them. The fact is plaintiff also must convince you.

You must be persuaded that it's more probably true than not true that these interventions, if done, would have altered the outcome.

MR. MUSLIN [(Plaintiff's Counsel)]: Objection, your Honor. That's a misstatement of the law.

THE COURT: Overruled.

¶ 34 Viewing the trial as a whole (*Tierney*, 268 Ill. App. 3d at 1061), we cannot say that the challenged comments, individually or cumulatively, constituted substantial prejudice to plaintiff such that he was entitled to a new trial.

¶ 35 A plaintiff in a medical malpractice case must prove (1) the standard of care against which the medical professional's conduct must be measured, (2) that the defendant was negligent by failing to comply with that standard, and (3) that the defendant's negligence proximately caused the injuries for which the plaintiff seeks damages. *Freeman v. Crays*, 2018 IL App (2d) 170169, ¶ 21. The proximate cause element must be established by expert testimony to a reasonable degree of medical certainty. *Freeman*, 2018 IL App (2d) 170169, ¶ 21.

¶ 36 Here, plaintiff proceeded under the lost chance theory of causation. In Illinois, a plaintiff in a medical malpractice action may proceed under the lost chance theory of recovery to satisfy the proximate cause element. *Freeman*, 2018 IL App (2d) 170169, ¶ 22. The "lost chance doctrine in medical malpractice cases refers to two types of situations: (1) where a plaintiff was deprived of a chance to survive or recover from a health problem due to the medical provider's negligence, or (2) where the medical provider's negligence either lessened the effectiveness of

plaintiff's treatment or increased plaintiff's risk of an unfavorable outcome." *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 464 (2001). Proximate cause under the lost chance theory is established when the evidence presented shows to a reasonable certainty that defendant's negligent delay in diagnosis or treatment lessened the effectiveness of the treatment. *Sinclair*, 325 Ill. App. 3d at 464-65. However, the lost-chance theory of recovery does not relax or lower a plaintiff's burden of proving causation. *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 120 (1997). To the extent that a plaintiff's chance of survival or recovery is lessened by the malpractice, he or she should be able to present evidence to the jury that the defendant's malpractice, to a reasonable certainty, proximately caused the increased risk of harm or lost chance of recovery. *Holton*, 176 Ill. 2d at 119.

¶ 37 In this case, plaintiff presented evidence of the events of August 9, 2011, when Maria was transported to OLR by ambulance, her initial consultation with Dr. Yang, who made the decision to have her transferred to Resurrection for further treatment. Plaintiff also presented detailed evidence of Maria's care on August 9, 2011, her decline on August 10, 2011, and her subsequent death on August 11, 2011. Contrary to plaintiff's assertion on appeal, the evidence was not equally balanced. The testimony of plaintiff's expert, Dr. Cantu, was contradictory at best; having stated on direct examination that Dr. Yang's purported breaches in the standard of care lessened Maria's chances of survival or successful treatment, but then stated on cross-examination that Dr. Yang initiated appropriate treatment in ordering medications for Maria after 11 p.m. Additionally, his testimony was contradicted by defense expert, Dr. Munoz, who testified that no medication or intervention treats the underlying causes of Maria's medical condition. Dr. Yang's testimony indicated that the purported breaches noted by Dr. Cantu were

simply diagnostic tools and were not treatment methods for Maria's bleeding or swelling. Plaintiff presented no evidence to dispute Dr. Munoz's or Dr. Yang's testimony.

¶ 38 We conclude that defense counsel's remarks during closing argument were not a misstatement on the law of causation that substantially prejudiced plaintiff. The complained-of statements were made in the context of comparing and contrasting the evidence presented on causation. Defense counsel's comments that plaintiff's evidence failed to establish that the outcome would have been any different, that Dr. Yang's failure to put in a drain at any time earlier would have altered the outcome, that Maria was left with a lost chance, and that whether the interventions, if done, would have altered the outcome of the case, were all proper statements of the lost chance theory of proximate cause. Defense counsel could properly argue that plaintiff's evidence did not establish a "lost chance," namely that Dr. Yang's alleged deviations in care caused an increased risk of harm or a lost chance of recovery, without misstating the law of causation as the argument was a fair comment on the evidence.

¶ 39 Accordingly, the trial court did not abuse its discretion in overruling plaintiff's objection because defense counsel did not misstate the law on causation. See *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 484 (1985).

¶ 40 It follows then that plaintiff's posttrial motion for a new trial based on the prejudicial effect of defense counsel's alleged misstatements of the law was properly denied. Errors in the closing argument must result in substantial prejudice such that the result would have been different absent the complained-of remark before a reversal is required. *Davis*, 2014 IL App (1st) 122427, ¶ 84.

¶ 41 We have already determined that defense counsel's statements were a proper comment on the evidence presented at trial and did not misstate the law of causation. Thus plaintiff cannot establish that he was substantially prejudiced because the result of the trial would not have been different. See *Maple v. Gustafson*, 151 Ill. 2d 445, 456 (1992) (where there is sufficient evidence to support the verdict of the jury, it constitutes an abuse of discretion for the trial court to grant a motion for new trial).

¶ 42 CONCLUSION

¶ 43 For the foregoing reason, we affirm the decision of the trial court.

¶ 44 Affirmed.