2012 IL App (2d) 111047
No. 2-11-1047
Order filed November 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re Estate of Rosalie A. Hill	)	Appeal from the Circuit Court
	)	of Winnebago County.
	)	
	)	No. 09-L-0002
	)	
	)	Honorable
(Robert Losh, Plaintiff-Appellant, v. Thornton	)	J. Edward Prochaska,
C. Klein, M.D., Defendant-Appellee).	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff failed to establish that prejudice resulted from the exclusion of a tumor board's finding regarding the stage of decedent's cancerous tumor, and therefore, plaintiff was not entitled to a new trial. We affirmed the trial court's judgment.

¶ 2 In June 1993, Rosalie Hill was diagnosed with having a cancerous anal nodule. Hill received radiation treatments under the supervision of defendant, Dr. Thornton C. Klein. Following her treatments, Hill experienced a number of symptoms, including developing fistulas to her bowel and bladder. In 2005, Hill died from sepsis. Thereafter, plaintiff and administrator of decedent's estate, Robert Losh, brought a wrongful death suit against defendant, alleging that the radiation treatments Hill received proximately caused her death. Plaintiff alleged that defendant improperly staged

decedent's tumor, and as a result, treated decedent's tumor as a stage three tumor as opposed to a stage one tumor, which unnecessarily caused radiation damage.

¶ 3 After a jury returned a verdict in defendant's favor, plaintiff filed a postjudgment motion arguing that the trial court erred in excluding a report from the Saint Anthony Medical Center Tumor Board (the tumor board) confirming that decedent's cancerous tumor was stage one. The trial court denied the postjudgment motion and plaintiff now appeals, contending that the trial court committed reversible error by excluding the tumor board's report. We affirm.

¶ 4 I. Background

¶ 5 The record reflects that, on June 29, 1993, decedent underwent surgery for the removal of hemorrhoids at Saint Anthony Medical Center. During surgery, doctors discovered and removed an anal nodule, which a later biopsy proved to be cancerous. Decedent was referred to Dr. Donald F. Hajek, who practiced hematology, oncology, and internal medicine. Dr. Hajek consulted with decedent regarding treatment options, which potentially included more surgery, radiation, and chemotherapy, or a combination thereof. Decedent decided to pursue a treatment of chemotherapy and radiation, and Dr. Hajek referred decedent to defendant, a radiation oncologist. Under defendant's supervision, decedent received radiation treatments from August 16, 1993 through October 12, 1993. Decedent received a total of 5,400 rads of radiation over 30 treatments.

¶ 6 Following her treatments, decedent complained of pain during bowel movements. Approximately one year after decedent's radiation treatments ended, the Mayo Clinic diagnosed her with insufficiency fractures of her pelvis. Decedent eventually relocated to Las Vegas, but continued to see doctors for the next 12 years for chronic abdominal pain following her radiation treatments. Decedent's symptoms included chronic diarrhea, "bilateral pelvic fractures involving the bilateral

superior pubic rami and tuberosity," and a "fracture of the superior pubic ring and compensatory fracture of the inferior pubic ramus." Decedent died from sepsis on June 8, 2005.

¶ 7 As amended, count I of plaintiff's complaint alleged a wrongful death in that defendant's negligent administration of decedent's radiation treatments proximately caused pain, disability, disfigurement, and damage that resulted in decedent's death. Count II alleged a survival action and count III alleged family expenses against defendant.

¶ 8 Prior to trial, defendant filed his fourteenth motion *in limine* seeking to exclude "any contents of medical records admitted as business records in this cause unless there is testimony as to those records." Defendant's sixteenth motion *in limine* sought to exclude as hearsay any testimony citing verbatim any statements made by decedent or her physicians regarding any issue, including decedent's condition and treatment. The trial court granted defendant's motions, although we note that a transcript of the hearing on those motions and the trial court's oral ruling were not included in the record on appeal filed with this court.

¶ 9 The record contains a report of proceedings for testimony from two witnesses. Plaintiff called Dr. Hajek. Regarding cancer staging, Dr. Hajek testified:

> "[T]here are four stages, stages one through four, and one means it's limited to the primary tumor and not invading anything else in the area. Stage two is invading in the area outside of the primary tumor and outside the organ of involvement. Stage three is involvement of lymph nodes. Stage four is distant metastasis."

Dr. Hajek testified that cancer staging is identified by a "T" followed by the numerical one, two, three, or four to indicate the tumor's stage. Dr. Hajek testified that defendant considered decedent's cancerous tumor to be stage two. Dr. Hajek testified that he believed defendant's staging "was

correct" even though there was no radiological imaging reflecting a metastasis or lymph node involvement. On cross-examination, Dr. Hajek testified that decedent's pathology report indicated that the cancerous tumor "was right up to the surgical margin," and therefore, even if it was a "T1" tumor, it still needed to be treated as a T2 or T3 "because there could be more tumor left *** that wasn't removed" during the local excision.

¶ 10 Defendant's expert, Dr. Martin J. Boyer, testified that he was a board certified radiation oncologist. Dr. Boyer testified that, based on his review of decedent's medical records, the pathologist diagnosed decedent's cancerous tumor as a basaloid cloacogenic carcinoma, high grade, and submucosal that went to the surgical margin, *i.e.*, the tumor went to "the edge of what was removed." Dr. Boyer testified regarding the difference between grading and staging a cancer. Grading involved a pathologist evaluating the tissue removed from the patient and evaluating the amount of cell division taking place. Grading helps to determine whether the cancer was slow growing and non-aggressive, or faster growing and potentially more aggressive. The higher the grade, the more aggressive the cancer was likely to be. Staging, on the other hand, involved determining how localized or advanced the tumor was within the patient's body. Tumors that were less than two centimeters in size were categorized as T1. Dr. Boyer testified that decedent's tumor was 3 centimeters, which was "well within the confines of a T2 tumor." Dr. Boyer testified that there was no indication of any lymph involvement or metastasis.

¶ 11 Dr. Boyer testified that radiation attempts to treat not only the part of the body from where a tumor or cancerous tumor had been removed, but also areas to where the tumor could potentially spread. Dr. Boyer testified that radiation treatment to the anus was "among the most difficult treatments" that patients could tolerate for cancer treatment, and that side effects included pain with

bowel movements, pain with urination, and very strong fatigue. Dr. Boyer testified that defendant treated decedent within the standard of care. Dr. Boyer testified that he thought decedent should have received regional radiation as opposed to local radiation because staging "is only part of the picture." Dr. Boyer testified:

> "[W]hat it all comes down to is I believe that this patient had a high grade aggressive cancer that was incompletely removed and needed to be treated aggressively regardless that it was labeled clinically [as a stage two tumor]."

¶ 12 On May 23, 2011, the jury returned a verdict in defendant's favor. Plaintiff filed a postjudment motion on June 6, 2011, arguing in part that the trial court erred by preventing him from introducing the findings of the tumor board, which plaintiff maintained confirmed the staging of the cancerous tumor. At the oral argument on his motion, plaintiff's counsel argued:

> "[I]f defendant had gone to the pathology department at the time a radiation plan was in the process of being formulated and would have learned that the same cancer that was staged by the tumor board as a T1, [defendant] would have pathologically staged that [tumor] himself as a T1 to create the appropriate radiation plan that would have been used within the standard of care."

The trial court denied plaintiff's motion and opined, "I have to admit that I don't specifically recall the basis of my ruling at the time of trial. I believe it was a lack of foundation. But I do not know this." The trial court emphasized that it gave full and complete consideration before granting the motions *in limine*, and that it "was not going to reverse myself at this time because I continue to think that ruling was correct on the issue of the tumor board." This timely appeal follows.

¶ 13 II. Discussion

¶ 14 The only issue in this appeal is whether the trial court erred in preventing plaintiff from introducing the findings of the tumor board. Plaintiff contends that the trial court abused its discretion when it barred the tumor board's finding, stressing that the tumor board's finding was a matter of public record and was based on the original pathology removed from decedent's body. Plaintiff further contends that he was denied a fair trial because he was not able "to adequately present crucial evidence on tumor staging to the jury." Defendant counters that plaintiff failed to provide an adequate record for this court to assess whether the trial court abused its discretion in granting the motions *in limine*. Specifically, defendant notes that the tumor board's report and a transcript detailing defendant's specific objection, plaintiff's response, and the trial court's explanation of its ruling were not part of the record. Defendant further argues that plaintiff waived this issue by failing to make an offer of proof at trial with respect to the tumor board's report.

¶ 15 Decisions to admit or exclude evidence are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *DiCosolo v. Janssen Pharmaceuticals, Inc.*, 2011 IL App (1st) 93562, ¶ 32. A trial court abuses its discretion when its decision is arbitrary or fanciful, or where no reasonable person would adopt the trial court's position. *Napcor Corp. v. JP Morgan Chase Bank, NA*, 406 Ill. App. 3d 146, 155 (2010). Moreover, "it is 'axiomatic that error in the exclusion or admission of evidence does not require reversal unless one party has been prejudiced or the result of the trial has been materially affected.' " *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 814 (2009) (quoting *Stricklin v. Chapman*, 197 Ill. App. 3d 385, 388 (1990)). The party seeking reversal bears the burden of establishing prejudice and showing that the trial court's ruling materially affected the outcome of the trial. *DiCosolo*, 2011 IL App (1st) 93562, ¶ 41.

¶ 16 Initially, we express our concern regrading the completeness of the record. Plaintiff, as appellant, had the burden to present a sufficiently complete record to support a claim of error. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 114, 156 (2005). In the absence of such a record, it will be presumed that the trial court's order conformed with the law and had a sufficient factual basis; and further, any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984).

¶ 17 In this case, plaintiff failed to provide a transcript of the hearing on defendant's motions *in limine* being challenged or of the trial court's oral ruling. Instead, plaintiff provided the motions, the trial court's written order granting defendant's fourteenth and sixteenth motions *in limine*, and a transcript of the trial court's hearing on plaintiff's postjudgment motion. During that hearing, the trial court noted that it could not specifically recall the basis for its ruling when it granted defendant's motions, but believed that the basis was a lack of foundation. The trial court further expressed that, although it could not remember the specifics, it gave the motions full and complete consideration. We share defendant's concern that the record on appeal is insufficient to enable us to assess whether the trial court's reasoning in granting the motions *in limine* constituted an abuse of discretion.

¶ 18 Nonetheless, based on the record before us, plaintiff has failed to establish that prejudice resulted from the exclusion of the tumor board's finding. We find support for our determination in *DiCosolo*. In that case, the decedent died while using a Duragesic skin patch to treat chronic pain. *DiCosolo*, 2011 IL App (1st) 093562, ¶¶ 3-4. An autopsy revealed that the decedent's blood contained a fentanyl level of 28.2 nanograms per milliliter, and a properly functioning Duragesic skin patch should have delivered a fentanyl level of approximately 1.7 nanograms per milliliter. *Id.* ¶ 5.

The decedent's estate filed a wrongful death lawsuit against the defendants, a pharmaceutical company and distributor, and the jury returned a verdict in the estate's favor. *Id.* ¶ 10. On appeal, the defendants argued that the trial court erred in excluding evidence of drugs that were not found in the decedent's system, which prevented the defendants from introducing evidence that the decedent "picked up a prescription for a discontinued drug [clonazepam] three days before [the decedent] died." *Id.* ¶ 34. According to the defendants, that evidence would have created "major inferences" that the decedent took clonazepam shortly before her death and that drug was a "substantial factor" in her death. *Id.* ¶ 38.

¶ 19 The reviewing court rejected the defendants' argument. The court in *DiCosolo* noted that, although evidence relating to clonazepam may have rendered the issue of whether another drug was a factor in the decedent's death more or less probable, it concluded "we do not believe that it would have affected the outcome of the trial." *Id.* ¶ 41. The reviewing court noted that there was "overwhelming evidence" regarding the defective Duragesic skin patch causing the decedent's death. The defendants' expert conceded that he did not know whether clonazepam was in the decedent's system and could not state with certainty that it contributed to the decedent's death. *Id.* The reviewing court further noted that "[m]ore importantly, even if the jurors could have inferred that [the decedent] ingested the clonazepam, it would have not changed the undisputed fact that no clonazepam was found in her system." *Id.*

¶ 20 Similarly, here, we do not believe that the tumor board's finding would have materially affected the outcome of the trial. The record contains overwhelming evidence that defendant's decision to treat decedent's tumor aggressively fell within the standard of care. Dr. Hajek testified that, even if he believed decedent's tumor was a clinical stage T1, the pathology report indicated that

the cancerous tumor was at the surgical margin. Dr. Hajek believed that the cancerous tumor needed to be treated as a clinical T2 or T3 because the tumor went up to the surgical margin and that the possibility existed that the tumor was incompletely removed. Dr. Boyer testified that, because decedent had a high grade and aggressive cancer, which was incompletely removed, she needed to be treated aggressively regardless of the tumor's clinical stage. In rendering his opinion, Dr. Boyer clarified a cancer's stage was "only part of the equation," and defendant needed to take into consideration the high grade and potentially aggressive nature of decedent's cancerous tumor. Therefore, as in *DiCosolo*, even if the jury was presented with the tumor board's finding that decedent's cancerous tumor was a clinical stage one, it would not have changed the undisputed testimony that a radiation oncologist should take into consideration factors other than a tumor's clinical stage, including its grade and whether the cancer was rare. Thus, even if defendant's fourteenth and sixteenth motions *in limine* encompassed the tumor board's report, the trial court's exclusion of that evidence does not entitle plaintiff to a new trial. See *id.* ¶ 42.

¶ 21 III. Conclusion

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 23 Affirmed.