

NOTICE

Decision filed 01/17/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100112-U

NO. 5-10-0112

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

---

ELIZABETH EAGLE, Administrator of the Estate of Debra K. Walker, Deceased,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Williamson County.
	)	
v.	)	No. 08-L-73
	)	
ROBERT J. MICHAELSON, M.D., and	)	
BRIGHAM ANESTHESIA SOUTH, LLC,	)	Honorable
	)	Brad K. Bleyer,
Defendants-Appellees.	)	Judge, presiding.

---

JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Spomer and Stewart concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court exercised discretion and the jury verdict in favor of defendant anesthesiologists was supported by the record.
- ¶ 2 Plaintiff, Elizabeth Eagle, administrator of the estate of Debra K. Walker, deceased, filed suit against defendants, Robert J. Michaelson, M.D., and Brigham Anesthesia South, LLC (Brigham), alleging complications resulting from surgery. After jury trial, the circuit court of Williamson County entered judgment on the verdict in favor of defendants. On appeal, plaintiff raises numerous issues, including: (1) whether the trial court misapplied the rule barring evidence of subsequent remedial measures, (2) whether the trial court improperly excluded evidence from a treating physician, (3) whether the trial court erred in limiting examination of Dr. Michaelson's personal history, (4) whether the trial court erred in not finding judicial admissions, (5) whether the trial court erred by not granting plaintiff's

motions for directed verdict, (6) whether the trial court erred by not issuing a missing-witness instruction, and (7) whether the trial court erred in its ruling on setoff.

¶ 3 We affirm.

¶ 4 FACTS

¶ 5 On November 18, 2004, Debra Walker underwent elective arthroscopic surgery to repair her right rotator cuff. Defendants provided anesthesia for the surgery. The operation was performed by orthopedic surgeons at the Southern Illinois Orthopedic Center.

¶ 6 In an amended complaint, plaintiff alleged that Dr. Michaelson negligently cleared Walker for surgery, which was contraindicated by her uncontrolled diabetes and morbid obesity. Plaintiff alleged that as a direct and proximate result of the surgery, Walker developed adult respiratory distress syndrome. Walker died subsequent to the surgery and plaintiff brought suit on her behalf. Plaintiff did not attribute Walker's death to the surgery.

¶ 7 The parties agree that Walker was obese and had suffered from diabetes for several years. At trial, Dr. Michaelson testified that he evaluated Walker on November 11, 2004, in anticipation of surgery scheduled for November 18, 2004. Blood tests taken that date and received later in the week revealed a blood sugar of 493, and an Accu-Chek test on November 18 showed a level of 398. Dr. Michaelson testified that he told the orthopedic surgeons but did not notify Walker's family practitioners.

¶ 8 Dr. Michaelson testified that he told Walker not to take her regular insulin on the morning of the surgery, and instead gave her a slow-acting form of insulin. On November 18, Dr. Michaelson found out that Walker had received a dose of a steroid, Solu-Cortef. Dr. Michaelson testified that the steroid could increase blood sugar, but in this case "the blood sugar gradually fell." Dr. Michaelson testified:

"Q. [Attorney for plaintiff:] Do you know what happened to it if anything after the steroids were administered?

A. Throughout the course of the day the recorded blood sugars were 368, I believe, 338. And then when she got at Herrin Hospital that night she had two blood sugars under 200, actually high 200s, and the next morning at Herrin it was also just under 300."

¶ 9 Dr. Michaelson explained that the shoulder surgery made it difficult to reach Walker's head and that using a breathing tube gave better ventilation. This required muscle relaxants to paralyze her muscles so that the intubation could take over her breathing. He testified that this was particularly needed because Walker was morbidly obese. Dr. Michaelson testified that but for the surgery there would have been no need to intubate Walker.

¶ 10 Dr. Michaelson testified that after surgery when Walker was emerging from anesthesia, she was not taking adequate breaths:

"Q. [Attorney for plaintiff:] Okay. Well, did you find out?

A. Subsequently—I can't explain why. I know that what happened mechanically is that she wasn't taking deep enough breaths, and when I gave her a trial extubation, which is just taking off that breathing tube, she said to us 'I can't breathe.' "

Dr. Michaelson testified that Walker's oxygen saturation fell and she was not taking deep enough breaths, so he took over from the nurse and put an anesthesia mask on, which brought her oxygen level back up to 100%. He then gave Walker medicine to put her back to sleep "and muscle paralyzing drug so that [he] could put the breathing tube back in and breathe for her again."

¶ 11 Walker was transported by ambulance to a nearby hospital. She was hospitalized for nearly a month after the surgery. She was diagnosed with adult respiratory distress syndrome.

¶ 12 A jury returned a verdict in favor of defendants. The jury answered a special

interrogatory finding that Dr. Michaelson was not guilty of professional negligence by clearing Walker for elective surgery "when her blood sugar was very high and when she was morbidly obese." The circuit court entered judgment on the verdict.

¶ 13 Plaintiff appeals.

¶ 14 ANALYSIS

¶ 15 Plaintiff contends that the trial court abused its discretion by prohibiting testimony regarding postremedial measures by Southern Illinois Orthopedic Center prohibiting outpatient elective surgery when blood-sugar levels were above 300. Plaintiff correctly asserts that subsequent remedial measures by a nonparty are not generally barred. *Zavala v. St. Regis Paper Co.*, 256 Ill. App. 3d 736, 741, 628 N.E.2d 405, 408 (1993). Nonetheless, the record indicates that the trial court did not make a blanket prohibition of any subsequent measures by Southern Illinois Orthopedic Center.

¶ 16 Defendants filed a motion *in limine* to prohibit subsequent remedial measures, and the court did not enter a written order on the motion. The court clarified its ruling outside of the presence of the jury during plaintiff's examination of Dr. Majid of Brigham. First, plaintiff's counsel stated that he was going to inquire about postoccurrence remedial measures, and the court stated, "Well, just limit it to the Southern Illinois Orthopedic Center." Later, the court stated:

"I just want to make sure that the order *in limine* that I've entered is not violated so that we've wasted two days here. You've indicated, Mr. Womick, that you want to go into questioning with this witness about post-occurrence remedial measures on the part of Southern Illinois Orthopedic Center which I have ruled that you can do. I know we're—it's a fine line, I think, when we're limiting it to Southern Illinois Orthopedic Center and not to Brigham. \*\*\* I want to make sure you caution the witness about my order *in limine* and the fact that he cannot discuss any post-

occurrence remedial measures on the part of Brigham."

Plaintiff then made an offer of proof by questioning Dr. Majid about the policy and procedure of Brigham on November 18, 2004. Dr. Majid stated that there was no written policy but "verbally" a practice of not operating if blood sugar exceeded 250. The court then ruled that this was not a subsequent remedial measure and allowed the plaintiff to proceed.

¶ 17 The motion *in limine* was addressed again when the evidence deposition of Dr. Barr, an orthopedic surgeon from Southern Illinois Orthopedic Center, was presented. In describing the application of the court's ruling on the motion *in limine* to the later prohibition of elective surgery when blood-sugar levels were above 300, the court found: "Dr. Barr essentially said that it was a change based upon a request by the anesthesiologist." The trial court quoted Dr. Barr's attribution to the defendants that Southern Illinois Orthopedic Center "should pick a number so there would be some consistency." As such, the record supports the trial court's conclusion that defendants participated in and recommended the subsequent remedial measure. Defendants' role in developing the subsequent remedial measure meant that the trial court would have committed error by ruling otherwise. See, *cf.*, *Zavala*, 256 Ill. App. 3d at 741, 628 N.E.2d at 408.

¶ 18 Plaintiff contends that the trial court erred by barring Dr. Dave from offering an opinion as to whether Dr. Michaelson deviated from the standard of care when clearing Walker for surgery. As plaintiff points out, the fact that Dr. Dave, a pulmonologist, was not an anesthesiologist is not a bar to his qualification. In order to testify regarding standard of care, a plaintiff's expert need not specialize in the same area of medicine as a defendant physician. *Jones v. O'Young*, 154 Ill. 2d 39, 43, 607 N.E.2d 224, 225 (1992).

¶ 19 Instead, a medical expert must meet two foundational requirements. First, the expert must be a licensed member of the school about which he is offered to opine, and second, the expert must be familiar with the methods, procedures, and treatments ordinarily followed by

providers in either the defendant's community or a similar community. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 114, 806 N.E.2d 645, 655 (2004).

¶ 20 An expert that fails to meet either of these foundational requirements must be disqualified. *Sullivan*, 209 Ill. 2d at 114, 806 N.E.2d at 655. Passing this threshold is the first part of the evaluation by the trial court. Once these foundational requirements are met, the trial court must exercise its discretion to determine whether the physician is qualified and competent to testify regarding standard of care. *Sullivan*, 209 Ill. 2d at 114, 806 N.E.2d at 655. In this case, exclusion was within the trial court's discretion and plaintiff was not prejudiced by the failure to admit the testimony.

¶ 21 The proffered testimony was cumulative. Plaintiff retained an expert, Dr. Segal, who testified regarding standard of care. As such, the trial court acted within its discretion by not admitting what would have been cumulative evidence. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495, 771 N.E.2d 357, 365 (2002). Furthermore, plaintiff's failure to list Dr. Dave as an expert on standard of care in disclosures would have justified exclusion of his testimony on the subject. *Kotvan v. Kirk*, 321 Ill. App. 3d 733, 748, 747 N.E.2d 1045, 1058 (2001); *Knight v. Haydary*, 223 Ill. App. 3d 564, 575, 585 N.E.2d 243, 251 (1992). The trial court acted within its discretion by not admitting testimony from Dr. Dave regarding standard of care.

¶ 22 Plaintiff also contends that after the trial court granted a motion *in limine* regarding the personal history of Dr. Michaelson, defendants opened the door. Plaintiff contends that Dr. Michaelson opened the door by testifying about his employment history, including why he practiced in the region and his reasons for taking certification examinations. Plaintiff contends that, despite this opening, the trial court improperly restricted cross-examination and closing argument. The trial court ruled that defendants did not open the door regarding admission to a rehabilitation center, commenting that it would be extremely prejudicial.

Nonetheless, over defendants' objection, the trial court allowed plaintiff to cross-examine Dr. Michaelson about his loss of status as an owner of the practice. Dr. Michaelson admitted that he received three months of treatment for severe depression and drug dependence. As the allegations of negligence do not stem from Dr. Michaelson's personal history, the specifics of his drug dependence or rehabilitation are of minimal relevance. On the other hand, the risk of undue prejudice is high. The trial court did not abuse its discretion by limiting the scope of examination and closing argument.

¶ 23 Plaintiff contends that the Dr. Michaelson made a judicial admission when he testified that but for the surgery, Walker would not have sustained her injury. Plaintiff contends that this was an admission and took the issue of causation out of the case. As such, the trial court erred by not striking the testimony of defendants' expert, Dr. Tuman, regarding causation.

¶ 24 Plaintiff points to two sections of questioning of Dr. Michaelson. In the first section, Dr. Michaelson testified that but for the surgery and anesthesia there would have been no need to intubate Walker. Plaintiff also concluded questioning of Dr. Michaelson with the following:

"Q. [Attorney for plaintiff:] \*\*\* Now, the--would you agree that the--that the problems that [Walker] developed were in any way related to the surgery itself?

A. I don't know.

Q. Do you believe in your opinion to a reasonable degree of certainty that [Walker] would have had all of these complications if on the morning of the 18th you had said 'Let's not do surgery today'?

A. I don't believe [Walker] would have had these complications if she hadn't had the surgery."

¶ 25 The statements do not constitute judicial admissions. These portions of Dr. Michaelson's testimony could be seen as conclusory statements of belief or opinion and not

"deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *In re Estate of Rennick*, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998); *Gvillo v. DeCamp Junction, Inc.*, 2011 IL App (5th) 100262, ¶ 20.

¶26 Plaintiff follows by arguing that the trial court erred by not granting a directed verdict. In addition to the testimony by Dr. Michaelson, in arguing that a directed verdict was improperly denied, plaintiff points to testimony from Dr. Majid regarding the standard of care. In response, defendants point to both the testimony of their own expert, Dr. Tuman, and that of plaintiff's expert, Dr. Segal. Dr. Tuman testified that Dr. Michaelson did not deviate from the standard of care. Furthermore, defendants point to portions of Dr. Segal's testimony indicating that he had no criticism of Dr. Michaelson's evaluation of Walker's lung and respiratory status and that no abnormalities began to appear until the surgery was completed and Walker was in recovery.

¶27 Defendants argue that plaintiff's claim of judicial admission is an attempt to mask the lack of evidence of proximate cause. Plaintiff's expert, Dr. Segal, was far from definitive on the subject. Dr. Segal opined that the surgery should have been postponed and criticized defendants for lack of communication with the orthopedic surgeons. Plaintiff then concluded the direct examination:

"Q. [Attorney for plaintiff:] Doctor [Segal], in your opinion, to a reasonable degree of medical certainty, did the surgery, the anesthesia, with those risk factors, cause the problem that she sustained that day during the surgery and thereafter?

A. Well, the diabetes—her blood sugar did not cause the problem itself, but at—at—at some degree her elevated blood sugar was contributory to worsening her outcome from her events that happened after the surgery.

Q. The concept we use of either caused or aggravated, what is your opinion about the connection between the problems that she had and proceeding with the



surgery and the anesthesia.

A. Well, of course, what I said, the—the risk factors involved, and—and the studies that have been done would preclude [Walker] from having the surgery. It would—it's—would be negligent to proceed with a patient, would have an excessive blood sugar of this level in this type of surgery that's a—that's elective surgery.

Q. In your opinion, but for the surgery and the anesthesia on that day, would these problems have happened on that day?

A. I can't say whether they would have happened or not happened. It's—it's one of those rare events that we don't know what the cause was of her pulmonary complications. So I can't say one way or the other if she would have had these or not.

Q. You say you can't say absolute cause.

A. Correct.

Q. But in your opinion, [Walker] all—she had all these risk factors, and then the surgery and the anesthesia occurred and these things occurred, correct?

A. Correct."

On cross-examination, Dr. Segal testified that Walker's lung problem could have been caused by an occult infectious process or pulmonary embolus and again admitted that he did not have an opinion to a reasonable degree of medical certainty as to what caused Walker's lung problem.

¶ 28 Plaintiff next contends that the trial court erred by not issuing a missing-witness instruction. In particular, plaintiff contends that Dr. Kenny, one of the owners of Brigham, was a missing witness.

¶ 29 The missing-witness instruction is available when: "(1) the witness was under the control of the party against whom the instruction is offered and could have been produced by reasonable diligence; (2) the witness was not equally available to the adverse party; (3)

a reasonably prudent person would have produced the witness if she believed the testimony would be favorable to her; and (4) no reasonable excuse for the failure to produce the witness has been shown." *Adami v. Belmonte*, 302 Ill. App. 3d 17, 25, 704 N.E.2d 708, 714 (1998). As the notes on use to the instruction make clear, a court must first inquire whether a party in all likelihood would have produced the witness under facts and circumstances of the case unless it was unfavorable. Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011); *Brown v. Moawad*, 211 Ill. App. 3d 516, 531, 570 N.E.2d 490, 500 (1991); *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill. App. 3d 835, 843, 462 N.E.2d 645, 652 (1984).

¶ 30 The trial court ruled that it did not find that in all likelihood defendants would have produced Dr. Kenny except for the fact that the testimony would have been unfavorable to them. Dr. Kenny was not present at the time of the occurrence, nor was Walker under his direct care. The trial court did not abuse its discretion by denying this instruction.

¶ 31 Plaintiff also argues that the trial court errantly ruled regarding the potential for setoff. As the judgment for defendants stands on appeal, this court need not address this issue.

¶ 32 For the reasons stated above, the judgment of the trial court is hereby affirmed.

¶ 33 Affirmed.