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Procedure Over Prejudice: Fourth District Affirms Trial Court's Judgment

The Illinois Appellate Court, Fourth District, recently affirmed a trial court's judgment in favor of defendants in a medical negligence action against a physician and a medical clinic. *Arkebauer v. Springfield Clinic*, 2021 IL App (4th) 190697, ¶ 1. The court held that plaintiff failed to preserve certain issues for appeal while waiving others, and as a whole, could not establish that the trial court had committed reversible error. *Arkebauer*, 2021 IL App (4th) 190697, ¶¶ 72, 80, 90-91. This decision is significant because it stresses the importance of proper trial practice in medical negligence cases against both physicians and the medical entity with which they are associated.

Background

On June 28, 2010, Rebecca Arkebauer (plaintiff), underwent a colonoscopy performed by Dr. Peter Karras at Springfield Clinic. *Id.* ¶ 3. She experienced progressively worsening symptoms after the procedure, including abdominal pain, back pain, and shoulder pain. *Id.* ¶¶ 3, 16. She sought additional emergency treatment on July 3, 2010, and it was determined that she suffered from a ruptured spleen and internal bleeding. *Id.* Plaintiff had emergency surgery to remove her spleen on July 4, 2010. *Id.*

Plaintiff filed suit against both Dr. Karras and Springfield Clinic alleging negligence. Specifically, she asserted that Dr. Karras breached his duty of care by: (1) using unnecessary force and/or making unnecessary contact with her spleen during the colonoscopy; (2) failing to provide notice of the risk of injury to her spleen; (3) failing to provide sufficient information about the use of anticoagulants, namely aspirin, before and after a colonoscopy; and (4) otherwise not maintaining the standard of care in surgical technique and/or use of instruments. *Id.* ¶ 4. Plaintiff also alleged negligence by Dr. Karras under a theory of *res ipsa loquitur* and Springfield Clinic under a theory of *respondeat superior*, though neither of these theories of liability were at issue on appeal. *Id.* ¶ 5.

In their Answer, the defendants admitted that plaintiff was not advised or warned about a possible or probable risk of splenic injury prior to the colonoscopy, rather, the defendants asserted they had no duty to disclose or warn of such a risk. *Id.* ¶ 6. They disputed the claims of negligence and raised no affirmative defenses. *Id.*

Before trial, and relevant to this appeal, plaintiff filed motions *in limine* to exclude any evidence or argument regarding plaintiff's contributory negligence, comparative fault, or failure to mitigate damages or injuries. *Id.* ¶ 7. Plaintiff argued that defendants' failure to plead these defenses estopped any argument at trial. *Id.* ¶¶ 7, 9. In response, defendants argued they were permitted to offer relevant proximate cause evidence without pleading it as an affirmative defense. *Id.* ¶ 11. Defendants further argued that a ruling otherwise would impede their ability to rebut plaintiff's allegations as to various post-discharge events. *Id.* Defendants asserted there was sufficient evidence supporting this "sole proximate cause" defense, but plaintiff remained in opposition. *Id.* ¶¶ 11-12. The court took the arguments under advisement and reviewed depositions to determine the sufficiency of the evidence. *Id.* ¶ 13. Later, it ruled that there

was sufficient evidence for the jury to hear the arguments and allowed the defendant to proceed, denying plaintiff's motions *in limine*. *Id.*

At trial, plaintiff offered evidence about her use of daily aspirin for maintaining her hypertension. *Id.* ¶ 15. She reportedly advised the anesthesiologist about her use of aspirin prior to the colonoscopy and claimed no one advised her against taking aspirin after the procedure. *Id.* ¶¶ 15-16. Dr. Fenster, one of plaintiff's medical experts, asserted that taking aspirin before or after a colonoscopy is a risk factor since it is an anticoagulant and prevents blood from clotting. *Id.* ¶ 26.

The defendants presented evidence by Dr. Karras, the two nurses who cared for plaintiff on the day of her procedure, and two medical experts, Dr. Rex and Dr. Smith. *Id.* ¶ 29. Dr. Rex opined that Dr. Karras acted within the standard of care on all fronts – the amount of force and technique used in performing the colonoscopy, not advising plaintiff to discontinue aspirin, and not disclosing the possibility of splenic injury. *Id.* ¶¶ 30-32. One of the nurses testified that plaintiff was asked about her use of aspirin, nonsteroidal anti-inflammatory drugs (NSAIDs), and/or other blood thinners before the procedure; plaintiff denied usage. *Id.* ¶ 35. Both nurses testified that they advised plaintiff to avoid NSAIDs after the procedure. *Id.* ¶¶ 35, 37.

Dr. Karras asserted that he acted within the applicable standard of care. *Id.* ¶ 38. He was questioned about a consent form that discusses "unforeseen conditions" that may arise. *Id.* ¶ 39. Plaintiff objected and argued that permitting this line of questioning would negate defendants' judicial admission regarding the risk of splenic injury never being disclosed to plaintiff. *Id.* The trial court sustained the objection and prohibited further questions about the consent form, but permitted defense counsel to question Dr. Karras about the probability of splenic injuries. *Id.* In a later but similar line of questioning, Dr. Karras was asked about whether the consent form addressed different or additional procedures that may arise, and specifically asked whether a splenectomy would be considered a different or additional procedure. *Id.* ¶ 40. Dr. Karras responded affirmatively to both questions, and plaintiff's counsel objected arguing that the defendants were, again, attempting to sidestep their judicial admission. *Id.* At this time, plaintiff also moved for a mistrial. *Id.* The court sustained plaintiff's objection but permitted defense counsel to argue on this point in closing. *Id.*

After the close of evidence, the trial court noted the evidence presented to the jury deviated from the depositions provided to the court pre-trial, and the deviation was enough for defendant's sole proximate cause instruction to be refused. *Id.* ¶ 45. The trial court offered plaintiff a limiting instruction to which plaintiff agreed stating that the testimony had been highly prejudicial to plaintiff's case in that it blamed her for the ultimate splenectomy. *Id.* ¶ 46. The trial court allowed the instruction over defendants' objection. *Id.* ¶ 47.

The jury ruled in favor of the defendants. *Id.* ¶ 48. In a post-trial motion, plaintiff argued the defendants were permitted to offer evidence under the guise of a sole proximate cause defense, which defendants were unable to successfully assert, and this evidence was highly prejudicial and denied her right to a fair trial. *Id.* ¶ 49. Along with this motion, plaintiff's counsel submitted a "bystander's affidavit" in accordance with Illinois Supreme Court Rule 323(c) to document the sequence of events that occurred during portions of the trial where a court reporter was not present. *Id.* ¶ 50. Plaintiff argued, in support of her motion, that defendant put on substantial evidence that blamed her for contributing to her injury. *Id.* ¶ 51. The trial court denied plaintiff's motion, reasoning that it did not appear that the defendant overly blamed the plaintiff and there was sufficient evidence to support the jury's verdict. *Id.* ¶ 52.

Analysis

Plaintiff's first argument on appeal was that the trial court erred in denying her motions *in limine*. *Id.* ¶ 56. She asserted two arguments in support: (1) the evidence sought to be excluded was only relevant to issues of contributory fault and/or a failure to mitigate damages, both of which are affirmative defenses that defendant failed to plead in their answer; and (2) a sole proximate cause defense (as argued by the defendant) is limited to conduct of non-party individuals or other factors that show sole proximate cause, meaning it does not include the plaintiff's conduct. *Id.* Defendants argued that plaintiff forfeited her right to challenge the trial court's rulings because she failed to raise contemporaneous objections at trial. *Id.* ¶ 59. In response, plaintiff argued that an exception applies when "a trial court's ruling on a motion *in limine* is so definite and unconditional that the parties may treat it as controlling." *Id.* ¶ 62 (quoting *Cunningham v. Millers General Insurance Co.*, 227 Ill. App. 3d 201, 207 (4th Dist. 1992)). The Fourth District revisited the *Cunningham* decision and found it did not provide any exception to the forfeiture rule as interpreted and argued by plaintiff. *Arkebauer*, 2021 IL App (4th) 190697, ¶ 62-68. Even more, the court noted that plaintiff offered much of the evidence at issue in her case-in-chief. *Id.* ¶ 69. It also discussed plaintiff's second argument, that plaintiff's conduct is irrelevant to a sole proximate cause defense, and stated that not only was this argument not presented to the trial court, but it actually contradicted statements made by plaintiff at trial. *Id.* ¶ 71. In sum, the Fourth District held that plaintiff forfeited her ability to challenge the trial court's denial of her motions *in limine* due to her failure to raise contemporaneous objections, her admission of like-evidence in her case-in-chief, and her failure to present an issue to the trial court before raising it on appeal. *Id.* ¶ 72.

Plaintiff next argued that the trial court erred in denying her motion for a mistrial. *Id.* ¶ 74. She argued the evidence presented by defendants on the sole proximate cause issue was prejudicial and not cured by the jury instruction. *Id.* Defendant tried to argue that the record was insufficient, thereby precluding plaintiff's challenge, but the court disagreed and found the record to be sufficient even though plaintiff's counsel's "bystander's affidavit" did not fully comply with Illinois Supreme Court Rule 323(c). *Id.* ¶ 76-78. Even so, the court still found plaintiff's claim to be without merit. *Id.* ¶ 79. It stated that plaintiff failed to identify or cite to the prejudicial testimony, even though she claimed the prejudice was integral to the defendants' case. *Id.* ¶ 79. The court also noted that plaintiff, again, offered much of the testimony in her case-in-chief, which is not a circumstance that permits reversible error. *Id.* Finally, it affirmed the trial court's determination that defendants did not overly blame the plaintiff for what occurred, and that regardless of the defendants' proffered evidence, the jury was instructed, on plaintiff's behalf, to disregard the evidence at issue. *Id.* ¶ 80. The Fourth District ultimately found the record to be sufficient in showing the plaintiff was not prejudiced; thus, a mistrial was not warranted. *Id.*

In her final argument, plaintiff argued that the trial court erred in allowing the defendants to argue in closing that they obtained informed consent on the risk of splenic injury because of the "unforeseen conditions" language in the consent form. *Id.* ¶ 82. Plaintiff asserted that defendants' argument was (1) inconsistent with their judicial admissions and (2) not supported by the evidence at trial because her objection to the consent form was sustained during Dr. Karras' testimony. *Id.* Defendants initially tried to argue that plaintiff forfeited her right to challenge this issue because she failed to raise contemporaneous objections during closing arguments, but the court found the record sufficient, noting that there was discussion during Dr. Karras' testimony on related issues; an objection to the trial court's statement that it would permit argument by the defendants on the consent form; and it was raised by plaintiff in her post-trial motion. *Id.* ¶ 83. In considering the merits of plaintiff's claim, the court stated that while a judicial admission is binding on the party making it, a party waives the right to rely on the admission when it introduces evidence on the

issue after the fact. *Id.* ¶ 86 (citing *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557, 559 (1st Dist. 2005); *People ex rel. Reynolds v. Aldridge*, 107 Ill. App. 3d 679, 685 (4th Dist. 1982)).

Defendants argued that the statements made during closing argument were permissible because plaintiff offered evidence during her case-in-chief on issues related to the admission; therefore, the judicial admission was no longer controlling. *Arkebauer*, 2021 IL App (4th) 190697, ¶ 90. The Fourth District agreed and found that plaintiff waived her right to rely on defendant's judicial admission at trial. *Id.* The court went on to say that even if the argument was improper, plaintiff's claim was still without merit. *Id.* ¶ 91. Specifically, the court noted that the statements at issue were only a small part of defendants' overall informed consent argument. *Id.* The greater weight of their argument relied on the assertion that the standard of care did not require a specific warning about splenic injury. *Id.* Thus, the court found that plaintiff was not entitled to a new trial on these grounds. *Id.*

Conclusion

The Fourth District held that there was no error by the trial court as to its decision to deny plaintiff's motions *in limine* or motion for mistrial, or its decision to allow defendant's closing argument about informed consent. A party forfeits the right to challenge trial court decisions when it fails to raise contemporaneous objections at trial or when it self-introduces the challenged evidence in its case-in-chief. Similarly, a party waives the right to rely on a judicial admission when it introduces evidence on that issue. A party is not prejudiced enough to warrant a new trial when it alleges the opposing party's case relied on the disputed evidence, without specific evidence or citations to the record, but the record reveals only a small portion of the opposing party's argument relied on the disputed evidence.

In *Arkebauer*, the defendants avoided a mistrial by not overly blaming the plaintiff for her contributory negligence, which was deemed not to be prejudicial. In other cases, asserting a timely affirmative defense may be necessary. Such assertions should be timely or could otherwise be deemed waived. This case further serves as an important reminder that objections should be timely made as to preserve issues for appeal.

About the Authors*

Mark D. Hansen is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* He has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. Mr. Hansen has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He received his undergraduate degree from Northern Illinois University and law degree from University of Illinois College of Law. Mr. Hansen is a member of the Illinois Association of Defense Trial Counsel and is a former co-chair of the Young Lawyers Committee, former *ex officio* member of the Board of Directors, and has served as chair for various seminars hosted by the IDC. He is also a member of the Illinois Society of Healthcare Risk Management, the Abraham Lincoln American Inn of Court, and the Defense Research Institute.

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