

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FOURTH DIVISION
July 16, 2009

No. 1-07-3443

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KATHLEEN LIGON, Individually, and as)	Appeal from the
Mother and Next Friend of GRACE LIGON,)	Circuit Court of
a Minor,)	Cook County
)	
Plaintiffs-Appellants,)	
)	
v.)	00 L 14321
)	
NORTHWESTERN MEDICAL FACULTY)	
FOUNDATION, a Corporation, and CONNIE)	
MORELAND, M.D.,)	Honorable
)	John B. Grogan,
Defendants-Appellees.)	Judge Presiding.

ORDER

Kathleen Ligon (Kathleen) sued Dr. Connie Moreland (Moreland) and Moreland's employer, Northwestern Medical Faculty Foundation (the Foundation), for medical malpractice. Kathleen claimed that Moreland's negligence during Kathleen's labor caused Kathleen's baby, Grace Ligon (Grace), to have cerebral palsy. A jury returned a general verdict finding defendants not liable. At her deposition, Moreland admitted the residents and nurses who treated Kathleen did not act negligently. Kathleen argues on appeal that Moreland's statements constituted judicial admissions that precluded defendants from introducing evidence the residents and nurses acted negligently, and the court should not have instructed the jury on the defense that someone other than

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defendants was the sole proximate cause of Grace's cerebral palsy.

We find that Moreland's statements during depositions do not qualify as judicial admissions. The court did not abuse its discretion when it permitted defense counsel to elicit evidence, on cross-examination of Kathleen's expert, that the residents and nurses committed malpractice. Under the two-issue rule, we cannot determine whether the instruction on sole proximate cause had any prejudicial effect because plaintiffs did not request a special interrogatory to determine whether the jury decided in defendants' favor on the negligence issue. Therefore, we affirm the trial court's judgment.

BACKGROUND

Kathleen came to Northwestern Memorial Hospital (the Hospital) around noon on August 23, 1998. At 8:48 p.m. that evening, a surgeon performed a cesarean section operation on Kathleen to deliver Grace. Grace immediately showed signs that she had suffered oxygen deprivation during the birthing process. The resulting brain damage makes many simple activities, like walking, eating, and dressing, very difficult for Grace.

All of the doctors who reviewed Kathleen's medical records agree that Grace's cerebral palsy resulted from a complete blockage of the umbilical cord that occurred around 8:25 p.m. on August 23, 1998. Kathleen's attorney contacted an expert, who opined the doctors should have performed the cesarean section

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earlier, and if they had done so, the cord would never have become blocked, and Grace would not have cerebral palsy. Kathleen, on her own behalf and on behalf of Grace, sued the Hospital, the Foundation, and several residents, nurses, and doctors, including Kathleen's attending physician, Moreland. The trial court dismissed some claims and the Hospital settled other claims. By the time of trial, only the claim against Moreland and the Foundation remained unresolved.

Although Moreland was Kathleen's attending physician, Moreland did not see Kathleen prior to the delivery. By telephone, she supervised the work of the residents and nurses who tracked the course of Kathleen's labor. At her deposition, Moreland admitted that she was "responsible for managing" Kathleen's treatment on August 23, 1998, from noon until the surgery. Moreland had no criticism of the nurses, staff or residents who saw Kathleen during that time. Moreland's deposition includes the following testimony:

"Q. If *** you had ever been called during an earlier period of time during this labor, do you believe you would or even should have done anything different than what [the residents and nurses] were already doing?

A. I would not have done anything differently, and I don't believe that I should have done anything differently.

Q. And so you may have been aware of what was going on between 6:00 [p.m.] and 8:00 [p.m.]?

A. There is no doubt in my mind that I was aware, yes."

In his opening statement, Kathleen's attorney read excerpts from Moreland's deposition to the jury. Before calling the first witness, the attorney sought to reread the same passages as part of the evidence. Although the trial court accepted the proffered part of the deposition transcript into evidence, the court refused the attorney's request to reread the selected passages to the jury. The attorney called Moreland as Kathleen's first witness. Moreland again testified that the nurses and the residents kept her aware of Kathleen's condition and progress at all times. Moreland further testified she would have given Kathleen the exact same treatment as the residents gave Kathleen.

Kathleen's expert, Dr. John Elliott (Elliott), explained what he reviewed in the medical records. By 4:45 p.m. on August 23, 1998, Kathleen had dilated to almost five centimeters. The residents decided to give Kathleen Pitocin to speed up the labor. At 7 p.m., the residents found Kathleen had not yet dilated to six centimeters. According to Elliott, the failure to dilate further indicated arrested dilation. With increased Pitocin, Kathleen had more contractions. The fetal heartbeat underwent several periods of deceleration, but the pulse recovered to its

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baseline rate. By 7:40 p.m., the fetus suffered hyperstimulation due to the frequent contractions. The periodic decelerations continued, but the heartbeat failed to return to its baseline level. The periodic decelerations also reflected pressure on the umbilical cord. During the periods when the heart beat less frequently, less oxygen coursed through the fetal blood. The fetus used its oxygen reserves to maintain full functioning during the decelerations.

In Elliott's opinion, given the reports of Kathleen's condition, the standard of care required Moreland to come to the Hospital at 7:40 p.m. In light of the hyperstimulation, the arrested dilation, and the decelerations, the standard of care required Moreland to order a cesarean section at that time. If she had done so, Grace would not have suffered the severe oxygen deprivation that occurred when the cord became completely occluded, and therefore, Grace would not have suffered cerebral palsy. Moreland, through the residents, also used too much Pitocin and made other errors that led to the injury. If Moreland had treated the decelerations properly, the fetus would have had better oxygen reserves to use after the cord became completely blocked.

On cross-examination, Elliott admitted that, in his opinion, the residents also violated the standard of care, because they failed to recognize the hyperstimulation, and used excessive Pitocin. The nurses violated the standard of care because they

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failed to notify the residents of the number of contractions, and that number provided an important indication of hyperstimulation.

Dr. Timothy Garvey, one of the residents who worked with Moreland, explained his treatment of Kathleen. In his opinion, he and Moreland complied with the standard of care. The cord occlusion that occurred at 8:25 p.m. happened unpredictably. Moreland's expert, Dr. Thomas Goodwin, agreed that Moreland and the residents acted properly. The fetus responded well to all periods of deceleration prior to the catastrophic cord occlusion. None of the prior conditions presaged the cord occlusion.

The trial court's instructions to the jury included the following:

"Connie Moreland, M.D., and the Northwestern Medical Faculty Foundation, Inc., can only be found liable for the acts or omissions of Connie Moreland, M.D. Neither she, nor the Northwestern Medical Faculty Foundation, can be found liable for the independent acts or omissions of the residents and nurses at Northwestern Memorial Hospital.

* * *

More than one person may be to blame for causing an injury. If you decide that the defendant was negligent and that her negligence was a proximate cause of the injury to the plaintiff, it is not a defense that some third person who is not a party to this suit

may also have been to blame. However, if you decide that the sole proximate cause of the injury to the plaintiff was the conduct of some person other than the defendant, then your verdict should be for the defendant."

In closing argument, defense counsel twice read to the jury the last sentence from the instructions quoted above. Counsel said the instruction "relates to the 7:00 o'clock call on which [Elliott] thinks the information was not being correctly communicated to [Moreland]." Counsel explained: "[I]f [Elliott is] right, then this is the sole proximate cause because *** my client got misinformation, and he would agree that with that misinformation, she had no responsibility to come [to the hospital]." Throughout the rest of the argument, counsel stressed evidence that neither Moreland nor the residents nor the nurses breached their standards of care.

The parties did not request a special interrogatory. The jury returned a general verdict for defendants. The court entered judgment on the verdict. Kathleen now appeals.

DISCUSSION

Kathleen's arguments on appeal center on the negligence of the residents and the nurses. Kathleen contends that defendants judicially admitted that none of the residents or nurses acted negligently. The alleged judicial admission should have precluded defendants from introducing any contrary evidence and

from arguing that any negligence other than Moreland's caused the injury. Therefore, according to Kathleen, the trial court erred by: (1) permitting defendants to cross-examine Elliott about his opinions concerning deviations from the standard of care by treaters other than Moreland; (2) instructing the jury on sole proximate cause; (3) instructing the jury that defendants could not be liable for action of the residents and nurses; and (4) permitting defendants to argue sole proximate cause in closing, despite the lack of evidence that persons other than Moreland proximately caused the injury. Kathleen separately argues that the court committed prejudicial error by refusing to permit her counsel to read Moreland's admissions into evidence.

The Illinois Supreme Court has explained the difference between evidentiary and judicial admissions:

"An admission by a party is substantive evidence admissible as an exception to the rule excluding hearsay. Ordinary evidentiary admissions may be contradicted or explained. [Citations.] However, ordinary evidentiary admissions should be distinguished from judicial admissions, which conclusively bind a party.

Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.

[Citation.] Where made, a judicial admission may not be

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contradicted in a motion for summary judgment [citation] or at trial [citation]. The purpose of the rule is to remove the temptation to commit perjury." In re Estate of Rennick, 181 Ill. 2d 395, 406-407 (1998).

We review *de novo* the question of whether a statement counts as a judicial admission. Elliott v. Industrial Comm'n, 303 Ill. App. 3d 185, 187 (1999). Here, Moreland did not come to the Hospital to treat Kathleen. Moreland relied solely on the reports she received from treating residents and nurses, which she compared with the medical records. Like Elliott, Moreland offered her opinion, based on the record, as to whether the residents and nurses acted negligently. Her statements constituted evidentiary admissions, not judicial admissions concerning concrete facts within her personal knowledge. See Glassman v. St. Joseph Hospital, 259 Ill. App. 3d 730, 747 (1994).

We defer to the trial court's discretion concerning the conduct of trial and the manner in which the parties present their evidence. Eckley v. St. Therese Hospital, 62 Ill. App. 3d 299, 315 (1978); Gracia v. Lee, 976 F.2d 1344, 1345 (10th Cir. 1992). Here, Kathleen's attorney read excerpts from Moreland's deposition transcript during the opening statements. Immediately following the statements, the court admitted the transcript of that part of the deposition into evidence. The court did not permit counsel to overemphasize the evidence by rereading it to

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the jury. Moreover, counsel elicited from Moreland on direct examination her repeated testimony that the residents and nurses did not act negligently, and Moreland would have treated Kathleen just as the residents treated her if Moreland had seen Kathleen at the Hospital. We find that the trial court did not abuse its discretion by permitting Kathleen to present Moreland's evidentiary admissions in this manner.

The trial court permitted Moreland to rebut the evidentiary admission with evidence, elicited from Elliott, that the nurses failed to alert the residents to the evidence of hyperstimulation, the residents failed to recognize the hyperstimulation, and the residents negligently administered more Pitocin after the standard of care required them to stop giving that medicine. Kathleen contends that the court erred by admitting these opinions into evidence, because no expert said those acts proximately caused the cerebral palsy. See Susnis v. Radfar, 317 Ill. App. 3d 817, 826-27 (2000). Without that causal connection, the evidence lacked relevance to Moreland's negligence.

Elliott explained his view of the causal relationship between the failure to recognize hyperstimulation and the cerebral palsy. Kathleen's excessive contractions during hyperstimulation of the fetus led to fetal heart decelerations which depleted fetal oxygen reserves. Continued use of Pitocin (which makes contractions more frequent), despite evidence of

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hyperstimulation, worsened the effect on fetal oxygenation. When the cord occlusion occurred at 8:25 p.m. on August 23, 1998, the fetus lacked the oxygen reserves needed for the fetus to withstand the occlusion. A reasonable trier of fact could conclude from Elliott's testimony that the acts of the residents and nurses, without Moreland's intervention, proximately caused the injury.

Defense counsel never explicitly argued the causal connection in this manner. Instead, throughout trial and especially in closing argument, defense counsel stressed the evidence, from defense experts, that none of the nurses or residents acted negligently. Kathleen contends that defense counsel improperly argued that the residents and nurses, and not Moreland, proximately caused the injury, while also arguing that the residents and nurses met the standard of care.

Courts afford counsel wide latitude in closing argument.

"Counsel may comment on the evidence, as well as any reasonable inference that can be drawn from the evidence. [Citation.] Absent an abuse of discretion, the circuit court's determination as to the propriety of closing argument will not be disturbed."

Thornhill v. Midwest Physician Center, 337 Ill. App. 3d 1034, 1053 (2003).

To counter Elliott's opinion testimony against Moreland, defense counsel noted that in Elliott's opinion, the residents and nurses

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failed to inform Moreland completely about Kathleen's condition at 7 p.m. on August 23, 1998. Counsel then claimed that the lack of information absolved Moreland and left the residents and nurses solely responsible for the injury. The trial court did not abuse its discretion by permitting the argument as a reasonable inference from the evidence. Neither did the court abuse its discretion by allowing defendants to elicit Elliott's opinion that the residents acted negligently by failing to inform Moreland adequately about Kathleen's condition. See Bauer v. Memorial Hospital, 377 Ill. App. 3d 895, 915 (2007).

Kathleen separately argues that the trial court should not have permitted Elliott to criticize the conduct of the nurses because Elliott, a physician, lacked expertise on the standard of care for nurses. Kathleen bases this argument on Sullivan v. Edward Hospital, 209 Ill. 2d 100 (2004). In that case, our supreme court held that a physician who has no nursing license lacks competence to testify regarding the standard of care for nursing procedures. Sullivan, 209 Ill. 2d at 119. However, the court distinguished Wingo v. Rockford Memorial Hospital, 292 Ill. App. 3d 896 (1997), in which the trial court permitted three physicians to testify that a nurse violated the standard of care by failing to properly communicate the condition of a patient to the treating physician. See Sullivan, 209 Ill. 2d at 117. The appellate court approved the physicians' testimony on the nurses' standard of care:

"[T]he allegations of negligence were well within the testifying doctors' knowledge and experience. We believe that a physician should be entitled to testify about what he or she is entitled to rely upon in the area of communication from a nurse in the context of an obstetrical team rendering care to a patient in a hospital." Wingo, 292 Ill. App. 3d at 906.

This case closely parallels Wingo. Moreland and other doctors on the obstetric team relied on the nurses to keep the doctors apprised of Kathleen's health. The trial court did not abuse its discretion by allowing defendants to elicit Elliott's opinion that the nurses negligently failed to inform Moreland about some aspects of Kathleen's condition at the critical time.

Finally, Kathleen objects to the instructions related to sole proximate cause. "The trial court has discretion to decide which instructions to give the jury, and we will not reverse the court's judgment unless it abused its discretion and seriously prejudiced a party's right to a fair trial." Shaheen v. Advantage Moving & Storage, Inc., 369 Ill. App. 3d 535, 546 (2006). Defendants respond that under the two-issue rule, Kathleen cannot show the allegedly improper instructions had any prejudicial effect. We agree with defendants.

In many cases, a jury could base its verdict on any one of two or more separate issues. Without a special interrogatory, the appellate court cannot determine which issue the jury

