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IN THE
COURT OF APPEALS OF INDIANA

PRISCILLA PERKINS, as Administratrix of the ESTATE OF ROSELLA PERKINS,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 45A04-0807-CV-425
SURENDRA SHAH, M.D. and ADEL SANDOUK, M.D.	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D10-0505-CT-99

April 7, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Priscilla Perkins, mother of Rosella and grandmother of Rosella's children, as Administratrix of the Estate of Rosella Perkins ("the Estate"), appeals the judgment in favor of Appellees-Defendants Surendra Shah, M.D., and Adel Sandouk, M.D. We affirm.

Issues

The Estate raises three issues on appeal, which we restate as:

I. Whether the trial court abused its discretion when it recalled a witness to the stand for juror questions;

II. Whether the trial court abused its discretion in permitting certain juror questions to be answered by a witness; and

III. Whether the trial court erred in instructing the jury on the elements for liability based on the decrease of Rosella's percentage of likelihood of survival.

Facts and Procedural History

As best can be discerned from the limited trial transcript provided, the facts are as follows. Rosella went to the Methodist Hospital Emergency Room by ambulance on December 5, 2001, complaining of shortness of breath and vomiting blood for four to five days. The EMS responders noted a wheezing sound when Rosella breathed. She was diagnosed with bronchitis and bronchospasm and released. The next day, experiencing similar symptoms, Rosella again called for an ambulance. She was treated at the Emergency Room and released.

Rosella returned to the Emergency Room on December 10, 2001. She continued to have issues with shortness of breath, had a high pulse and breathing rate, and had significant

pain on the right side of her body. Dr. Shah evaluated Rosella and after running diagnostic tests, concluded that Rosella had pneumonia and pulmonary emboli. Dr. Shah also requested a consult from pulmonologist, Dr. Sandouk. Dr. Sandouk ran additional diagnostic tests and ordered treatment consistent with a diagnosis of pulmonary emboli.

By the next day, Rosella was stable, but had developed a significant lung injury due to the pulmonary emboli. Dr. Sandouk evaluated Rosella around noon and ordered another diagnostic test to view the condition of her lungs. The results confirmed the diagnosis of pulmonary emboli in both lungs. Later that afternoon, Rosella's condition deteriorated, and she was transferred to the Intensive Care Unit. Drs. Sandouk and Shah called in to check on Rosella's condition and directed her treatment over the phone. That evening, Rosella went into cardiac arrest and eventually passed away.

On May 12, 2005, Priscilla Perkins, as the Administratrix of the Estate and as Guardian of Rosella's daughters, filed a medical negligence claim against Dr. Shah, Dr. Sandouk, and Methodist Hospital. The parties stipulated to the dismissal of Methodist Hospital as a defendant. After a jury trial ending June 18, 2008, a judgment was entered in favor of Drs. Shah and Sandouk. Additional facts will be provided as necessary.

This appeal ensued.

Discussion and Decision

I. Recall of Witness

Priscilla testified and at the conclusion of her testimony, the trial court took a break. Upon reconvening and before the next witness testified, a juror indicated that he or she had

questions to ask Priscilla. During a sidebar conference, the Estate objected to Priscilla being recalled to the stand. The trial court overruled the objection. After discussing the proposed questions with counsel, the trial court recalled Pricilla to the stand. The Estate argues that the trial court abused its discretion in recalling Priscilla to the stand. We disagree.

Regarding jury questions, Indiana Evidence Rule 614(d) provides:

> A juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties, which may be made at the time or at the next available opportunity when the jury is not present. Once the court has ruled upon the appropriateness of the written questions, it must then rule upon the objections, if any, of the parties prior to submission of the questions to the witness.

Accordingly, a trial court has the discretion to adopt various procedures for eliciting jury questions. Lemond v. State, 878 N.E.2d 384, 390 (Ind. Ct. App. 2007), trans. denied. While it may be customary for juror questions to be addressed to the relevant witness before he or she leaves the stand, Evidence Rule 614(d) does not necessitate that particular procedure.[1] In fact, this Court has upheld trial courts' decisions to permit a party to reopen its case to answer a juror's question to a witness. See Vinson v. State, 735 N.E.2d 828, 836 (Ind. Ct. App. 2000), trans. denied, disapproved on other grounds, Long v. State, 743 N.E.2d 253, 257 (Ind. 2001); and Matheis v. Farm Feed Const. Co., 553 N.E.2d 1241, 1243 (Ind. Ct. App.

[1] The Estate asserts that the trial court failed to provide preliminary instructions to the jury as to the procedure for submitting questions. However, the Estate failed to support this accusation by including the preliminary instructions that were given to the jury in the record. One of the strongest presumptions applicable to cases on appeal, we presume that the trial court knows and will follow the law. Major v. OEC-Diasonics, Inc., 743 N.E.2d 276, 284 (Ind. Ct. App. 2001), trans. denied. We therefore presume that, prior to trial, the trial court instructed the jurors that they could ask questions of witnesses by submitting them in writing. See Indiana Jury Rule 20(a)(7).

1990). We therefore review the trial court's decision to recall a witness to pose questions from the jury for an abuse of discretion.

Here, a juror indicated the desire to pose questions to Priscilla after she left the stand but before the next witness began to testify. Also, as discussed below, the questions submitted were relevant to the potential issue of damages. The purpose of juror questions is to allow a jury to better understand the evidence and discover the truth. Amos v. State, 896 N.E.2d 1163, 1170 (Ind. Ct. App. 2008), trans. denied. As its decision enabled the jury to this end, the trial court did not abuse its discretion in recalling Priscilla to the witness stand to answer relevant, proper questions from jurors.

II. Juror Questions

The Estate also claims that the trial court abused its discretion in propounding the late juror questions because the topics involved were highly prejudicial. We review the trial court's decision to submit a juror's question to a witness for an abuse of discretion. Id. at 1170-71. A proper juror question is one that allows the jury to understand the facts and discover the truth. Trotter v. State, 733 N.E.2d 527, 531 (Ind. Ct. App. 2000), trans. denied. "The determination of whether a question is offered for a proper purpose necessarily requires an examination of the substance of the question." Id. A trial court is afforded broad discretion in deciding whether a juror question is for the purpose of discovering the truth. Id.

The Estate challenges every juror question posed to Priscilla when she was recalled to the stand. However, other than objecting on the basis that Priscilla was being recalled to the stand, the Estate only objected to questions that elicited testimony regarding the fact that

Rosella and Priscilla did not know the identity of the father of Rosella's children. "As a general rule, a party may not present an argument or issue to an appellate court unless the party raised the same argument or issue to the trial court." GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC, 764 N.E.2d 647, 651 (Ind. Ct. App. 2002). Therefore, the Estate has waived its argument as to all of the juror questions, save one.

The Estate brought its lawsuit based in part on a wrongful death claim. If such a claim is successful, any damages beyond those for medical, hospital, funeral and burial expenses, and lost earnings of the deceased person resulting from the alleged wrongful act or omission would be for the exclusive benefit of the widow or widower and to the dependent children of the deceased. Ind. Code § 34-23-1-1. Thus as a part of their damages claim, the Estate was required to prove the dependency of Rosella's children ("the Children"). Priscilla's testimony directly addressed the issue of dependency. She testified about when the Children were born, times when the Children were in her care, and the degree to which Rosella was involved in taking care of the Children and how they were dependent on Rosella.

Three juror questions regarding the Children's father(s) were submitted: Where were the kids' fathers; Did the children spend any time with him/them; Why don't they mention the father in this? At the sidebar conference for the juror questions submitted after Priscilla stepped down from the stand, the Estate orally moved for a motion in limine as to the fact that Priscilla and Rosella were unaware of the identity of the Children's father(s). After discussion regarding the relevancy of the family setting to the issue of dependency, counsel for the Estate revised her motion in limine, requesting that the questions "not be able to elicit

testimony as to the fact [Rosella and Priscilla] did not know who the fathers are." Tr. at 115. The following exchange took place during the time Priscilla was recalled to the stand:

> Q: Where were your grandchildren's fathers?
> A: We don't know their fathers.
> Q: Did the fathers spend any time with the grandchildren?
> A: No.

Tr. at 118.

Neither of the questions posed was phrased to elicit testimony that identity of the Children's fathers was not known. In fact, counsel for the Estate admitted in the sidebar that she understood why the jurors were asking that question and that it could be answered by Priscilla saying that the fathers "weren't around." Thus, it was not the phrasing of the question that the Estate takes issue with but rather the answer that its witness provided. Furthermore, the Estate failed to preserve any possible error because it did not object that the testimony violated the motion in limine and failed to move to strike the testimony. See Plan-Tec, Inc. v. Wiggins, 443 N.E.2d 1212, 1230 (Ind. Ct. App. 1983). Therefore, the trial court did not abuse its discretion in propounding these juror questions.

III. Jury Instruction

Finally, the Estate contends that the trial court abused its discretion in its jury instruction on loss of chance of survival. We consider the following factors when reviewing a trial court's decision to give or refuse a tendered instruction: whether the instruction: (1) correctly states the law; (2) is supported by the evidence in the record; and (3) is covered in substance by other instructions. Sawlani v. Mills, 830 N.E.2d 932, 944 (Ind. Ct. App. 2005), trans. denied. As the trial court has discretion in instructing the jury, we will reverse on the

second and third consideration only when the instructions amount to an abuse of discretion. Id. However, when the issue is whether the instruction is a correct statement of the law, appellate review is de novo. Id. Here, the Estate claims that the challenged instruction does not correctly state the law.

In Mayhue v. Sparkman, our Supreme Court adopted Section 323 of the Restatement (Second) of Torts to permit recovery on a claim of medical malpractice against a defendant whose negligence significantly increases the probability of the ultimate harm. Mayhue v. Sparkman, 653 N.E.2d 1384, 1388-89 (Ind. 1995). That Section provides in its current version:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting in his failure to exercise reasonable care to perform his undertaking, if:
> (a) His failure to exercise such care increases the risk of such harm, or;
> (b) The harm is suffered because of the other's reliance upon the undertaking.

This doctrine permits recovery even if the likelihood of the ultimate harm was greater than fifty percent without the influence of the defendant's negligence. Id. Under this doctrine, once the plaintiff proves that the defendant was negligent and that negligence resulted in an increase in the risk of harm, the jury is then permitted to decide whether the medical malpractice was a substantial factor in causing the harm suffered by the plaintiff. Id. at 1388.

In Cahoon v. Cummings, our Supreme Court held that the relaxed causation standard of Mayhue is applicable in wrongful death cases. Cahoon v. Cummings, 734 N.E.2d 535, 539 (Ind. 2000). Thus, even if the decedent probably would not have survived the medical

malady if it had been properly diagnosed and treated, recovery is still possible if the defendant's negligence increased the likelihood of the ultimate injury, usually death. Cahoon involved a misdiagnosis of Cummings's condition, which was esophageal cancer. Id. at 538. Cummings ultimately died from the cancer. All the experts in the case agreed that Cummings would probably not have survived even if his cancer had been timely diagnosed and treated by the defendants, Cahoon and Kohne. Id. at 539. The Cahoon Court concluded that the trial court properly instructed the jury as to the Mayhue causation standard, using the following language: "In this case you must first determine if the Defendant's negligence increased the risk of harm to Ted Cummings, and whether the increased risk was a substantial factor in his death on August 15, 1993." Id. at 540.

The defendants in this case submitted the following instruction, including the Mayhue standard in relevant part:

> The likelihood that a person will recover or survive from a pre-existing condition may be reduced by a health care provider's negligence. Such person is entitled to receive damages for her lost chance of survival caused by the health care provider's negligence.
>
> If you find the plaintiff has proven by a preponderance of the evidence that:
>
> 1. one or both of the defendants was [sic] negligent,
> 2. one or both of the defendants' negligence reduced the decedent's chance of survival, and
> 3. one or both of the defendant's [sic] negligence was a substantial factor in causing the decedent's death,
>
> Then you must determine the amount of money that would fairly compensate the plaintiff for the lost chance of survival.

Appellant's Appendix at 70. While the third prong may be better stated as whether the

reduced chance of survival was a substantial factor in the decedent's death, this instruction is an accurate statement of the Mayhue standard. However, the Estate objected to this instruction, particularly the second prong, and the trial court obliged the Estate by rewriting it to read: One or both of the defendants' negligence was a substantial factor in reducing the decedent's chance of survival. Then the Estate objected to leaving the third prong in because it did not believe that the harm was death. The trial court's final instruction included the revised second prong as well as the original third prong, relying on the case proffered by the Estate, Wolfe v. Estate of Custer, 867 N.E.2d 589 (Ind. Ct. App. 2007), trans. denied. The final instruction provided to the jury included the three prongs as follows:

> If you find the plaintiff has proven by a preponderance of the evidence that:
>
> 1. one or both of the defendants was [sic] negligent,
> 2. one or both of the defendants' negligence was a substantial factor in reducing the decedent's chance of survival, and
> 3. one or both of the defendant's [sic] negligence was a substantial factor in causing the decedent's death,
>
> Then you must determine the amount of money that would fairly compensate the plaintiff for the lost chance of survival.

Appellant's App. at 67 (emphasis added).

As provided to the jury, the revised instruction, tendered by the defense and revised in part by the court at the behest of the Estate, is not a correct statement of law. Whether the source of this error is labeled as invited error or abuse of discretion on the part of the trial court, the erroneous jury instruction need not result in reversal of the judgment. See Kelly v. Levandoski, 825 N.E.2d 850, 866 (Ind. Ct. App. 2005), trans. denied. Only upon a showing that the instructional error prejudiced the party's substantial rights is reversal warranted. Id.

"If the verdict would not have been different, any error was harmless." Id.

The claim brought by the Estate was that of wrongful death. Another instruction that was tendered to the jury was as follows:

> This is a claim alleging wrongful death, which has statutorily proscribed [sic] elements of compensable damages. If you find the defendants were negligent and that such negligence was a substantial factor in causing an increased risk of death of Rosella Perkins, you may not consider as a part of your damages computation any evidence of Rosella Perkins' pain and suffering or any other personal injuries which occurred during her lifetime.

Appellant's App. at 65. Inherent in a claim of wrongful death is that the alleged negligence contributed to the decedent's demise. These three phrases, used between the two jury instructions, are essentially synonymous in their meaning. Each asks whether the defendants' alleged negligence was a substantial factor in bringing the decedent closer to the ultimate harm, death. Therefore, the Estate was not prejudiced by the instructional error because the second and third prongs, along with another instruction given to the jury, are synonymous. Therefore, any error was harmless.

Affirmed.

MATHIAS, J., and BARNES, J., concur.