

NOTICE

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2013 IL App (5th) 120344-U

NO. 5-12-0344

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).

ANITA FLANAGAN, Individually, and as Special Administratrix of the Estate of Darren Flanagan, Deceased,)	Appeal from the Circuit Court of Clinton County.
Plaintiff-Appellant,)	
v.)	No. 07-L-30
AGNES BOEHNING, DEAN H. MATSUURA, ST. MARY'S GOOD SAMARITAN, INC., SSM HEALTHCARE OF ST. LOUIS, INC., d/b/a ST. MARY'S GOOD SAMARITAN, INC., and PHYSICIAN SERVICES CORPORATION OF SOUTHERN ILLINOIS, SC, d/b/a ST. MARY'S GOOD SAMARITAN MEDICAL GROUP,)	
Defendants-Appellees.)	Honorable William J. Becker, Judge, presiding.

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justice Welch concurred in the judgment.
Justice Goldenhersh dissented.

ORDER

¶ 1 *Held:* The circuit court did not err in denying the plaintiff's motion for directed verdict as to the defendants' contributory negligence defense where there was evidence from which a reasonable jury could conclude that the decedent's failure to attend appointments contributed to cause the failure to diagnose his stomach cancer until it was at Stage IV. The circuit court did not err in allowing deceased's medical provider to testify as to conversations she had with the deceased when the plaintiff's strategy at trial was to stress that any conversations with the deceased did not take place unless they were included in the medical records.

¶ 2 The plaintiff, Anita Flanagan, individually and as special administratrix of the estate of Darren Flanagan, deceased, appeals the July 18, 2012, order of the circuit court of Clinton

County, which denied her motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial, following a jury verdict in favor of the defendants, Agnes Boehning, ANP, FNP, Dean H. Matsuura, M.D., St. Mary's Good Samaritan, Inc., SSM Healthcare of St. Louis, Inc., doing business as St. Mary's Good Samaritan, Inc., and Physicians Services Corporation of Southern Illinois, doing business as St. Mary's Good Samaritan Medical Group, on the plaintiff's complaint for medical malpractice. On appeal, the plaintiff argues that the circuit court erred in denying her motion for a directed verdict on the issue of the decedent's contributory negligence and in allowing Agnes Boehning to testify about matters that related to conversations that she had with the decedent, in violation of the Dead-Man's Act (735 ILCS 5/8-201 (West 2012)). For the following reasons, we affirm.

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. On November 5, 2007, the plaintiff filed a medical malpractice complaint in the circuit court of Clinton County against the defendants. The plaintiff alleged that Agnes Boehning, a nurse practitioner, and her collaborating or supervising physician, Dr. Dean Matsuura, negligently failed to diagnose the decedent's stomach cancer during their care and treatment of the decedent at the Family Health Center in Centralia. The complaint alleges, *inter alia*, that nurse Boehning and Dr. Matsuura failed to timely and/or properly refer the decedent to a specialist and follow up with the decedent concerning the consultation with a specialist, failed to properly inform the decedent of the risks inherent in not following up with a specialist, and failed to timely or properly diagnose the decedent's stomach cancer. The complaint included counts for wrongful death, survival, and loss of consortium against nurse Boehning and Dr. Matsuura, and vicarious liability counts against the remaining defendants.

¶ 5 A jury trial commenced on February 6, 2012. The evidence, as set forth through the

testimony of the various witnesses with reference to the medical records, revealed the following timeline for the defendants' treatment of the decedent. In April 2004, the decedent presented to nurse Boehning at the Family Health Center complaining of low back pain. Upon examination, nurse Boehning noted high blood pressure and wheezing. The decedent also complained of some heartburn. Upon prescribing medication for these acute complaints, the decedent was instructed to follow up in two weeks. The decedent missed the follow-up appointment, as well as an appointment scheduled in May 2004. On August 4, 2004, the decedent returned for a refill of his blood pressure medication. Upon examination, nurse Boehning noted some epigastral tenderness. The decedent also complained of tarry stools. Nurse Boehning referred the decedent to a gastroenterologist with an appointment set for August 9, 2004. The decedent was also given a follow-up appointment with nurse Boehning for August 30, 2004. The decedent did not attend either appointment.

¶ 6 On February 28, 2005, the decedent returned to the Family Health Center after a communication was made to him through a local pharmacy when he attempted to refill his blood pressure medication. At that time, he presented with high blood pressure, cold symptoms without a fever, low back pain, and shortness of breath. Nurse Boehning treated the decedent for these acute problems by prescribing medications and ordering physical therapy, but did not revisit his previous gastric complaints at that time. The decedent was instructed to follow up with nurse Boehning and was given an appointment for March 5, 2005. The decedent did not return for this follow-up visit. The decedent did not return to the Family Health Center until October 3, 2005, at which time he presented with complaints of trouble swallowing. Nurse Boehning made another referral to the gastroenterologist, and the decedent had an appointment on October 11, 2005, which he rescheduled for October 19, 2005. The decedent consulted with the gastroenterologist on October 19, 2005, and an endoscopy was scheduled for October 24, 2005. For reasons not stated in the record, the

decedent presented for the endoscopy but was unable to complete the procedure. The endoscopy was rescheduled for October 28, 2005, but the decedent missed the appointment. The gastroenterologist sent the decedent a letter stressing that he needed to complete the endoscopy in order to rule out a malignancy, and the endoscopy was completed shortly thereafter. The diagnosis of Stage IV stomach cancer resulted, and the cancer ultimately led to the decedent's death.

¶ 7 Each side presented conflicting expert testimony on whether nurse Boehning and Dr. Matsuura breached the standard of care in treating the decedent. The plaintiff's experts testified that nurse Boehning, and Dr. Matsuura as collaborating physician, had a duty to follow up with the decedent immediately after he missed the first gastroenterologist appointment and to re-refer him. In addition, the plaintiff's experts testified that in February of 2005, when the decedent presented with several acute complaints, nurse Boehning and Dr. Matsuura had a duty to revisit his prior referral and make a new referral. The defense experts testified that there was no such duty and that it was reasonable to triage the decedent's acute complaints on the February 2005 visit, with the prior complaints to be revisited at the follow-up appointment that the decedent subsequently missed.

¶ 8 The experts also disagreed as to the progression of stomach cancer and whether an endoscopy in August 2004 or February 2005 would have revealed stomach cancer at a curable stage. The plaintiff's expert testified that stomach cancer is a highly aggressive cancer and in August of 2004 and February 2005, had the decedent had an endoscopy, it would have been discovered and would have been at Stage I or II, which would have been curable. The defendants' expert testified that stomach cancer is usually discovered at its advanced stages because there are very few symptoms until the cancer progresses to Stage IV. The defendants' expert testified that if the decedent had undergone an endoscopy in August 2004, it likely would have revealed no more than gastritis.

¶ 9 The plaintiff elicited testimony from other nurses at Family Health Center of the importance of charting all communications with the patient into the medical records. In addition, the plaintiff elicited testimony from her own expert nurse practitioner, that "if it's not charted, it's not done." All experts agreed that stomach cancer would be within the differential diagnosis for the decedent's tarry stool complaints, but that a stomach ulcer or gastritis would be much more likely based on the complaints. During examination and cross-examination of the expert witnesses, the plaintiff repeatedly pointed to the fact that there was nothing in the medical records that reflected that nurse Boehning ever discussed her differential diagnosis related to the decedent's tarry stool complaints with the decedent or the importance of his consulting with the gastroenterologist, and returned to the "if it's not charted, it's not done" concept. On cross-examination of the plaintiff's expert nurse practitioner, the defendants elicited her testimony that she relied on statements in the decedent's deposition that he was not told about the referral appointment in formulating her opinion that nurse Boehning did not educate the decedent about the referral and its importance. The plaintiff then played the video evidence deposition of the decedent to the jury. Over the plaintiff's objection based on the Dead-Man's Act (735 ILCS 5/8-201 (West 2012)), nurse Boehning was permitted to testify that she would have explained her concerns and reason for the appointment with the decedent.

¶ 10 At the close of the evidence, the plaintiff moved for a directed verdict as to the decedent's contributory negligence, arguing that there was no expert testimony that the decedent's failure to keep appointments was a proximate cause of the decedent's death. The circuit court denied the motion. The jury returned a verdict in favor of the defendants, and on March 12, 2012, the plaintiff filed a motion for a judgment notwithstanding the verdict, or, in the alternative, for a new trial, raising the issues which she raises on appeal. On July 18, 2012, the circuit court denied the motion. The plaintiff filed a timely notice of appeal on

August 14, 2012.

¶ 11

ANALYSIS

¶ 12 The first issue on appeal is whether the circuit court erred in denying the plaintiff's motion for a directed verdict and, subsequently, her motion for a judgment notwithstanding the verdict, on the issue of the decedent's contributory negligence. We apply a *de novo* standard of review to the trial court's denial of a motion for directed verdict as well as its denial of a motion for judgment notwithstanding the verdict. *Buckholtz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 167 (2003) (citing *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 89 (2002)). It is proper to direct a verdict or enter a judgment notwithstanding the verdict only where all of the evidence, when viewed in a light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand. *Id.* (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494 (1967)). In reviewing the circuit court's ruling on a motion for directed verdict or judgment notwithstanding the verdict, we must not substitute our judgment for that of the jury, reweigh evidence, or determine the credibility of witnesses. *Id.* (citing *Donaldson*, 199 Ill. 2d at 89).

¶ 13 Here, the plaintiff argues that there was no evidence in the record that the decedent's failure to keep appointments was a proximate cause of his death. Specifically, the plaintiff notes the absence of expert testimony on this point. However, the plaintiff's own theory of the case was that nurse Boehning and Dr. Matsuura breached their duty to the decedent because they failed to follow up to ensure that the decedent attended his appointment with the gastroenterologist and to impress upon him the importance of keeping the appointment. There was expert testimony that had the plaintiff had an endoscopy in August 2004 or February of 2005, the cancer would have been found and would have been curable, and there was expert testimony to the contrary. It is well within the province of the jury to determine whether the decedent was responsible for keeping his own appointments, and whether his

failure to do so was a substantial factor in the failure to diagnose stomach cancer before it reached Stage IV. Our colleagues in the First District have held that, in a medical malpractice action, a contributory negligence instruction is appropriate if a party presents a theory of the case in which the plaintiff's negligence is contemporaneous with the physician's malpractice; for example, when a patient delays in seeking treatment for his or her medical condition. *Malanowski v. Jabamoni*, 332 Ill. App. 3d 8, 15 (2002). For these reasons, the circuit court did not err in denying the plaintiff's motion for a directed verdict and denying the motion for a judgment notwithstanding the verdict.

¶ 14 The second issue on appeal is whether the circuit court erred in permitting nurse Boehning to testify about matters that related to conversations that took place with the decedent, and its subsequent denial of the plaintiff's motion for a new trial based on this claimed error. The plaintiff argues that allowing such testimony amounted to a violation of the Dead-Man's Act (735 ILCS 5/8-201 (West 2012)). This issue presents a question of law, which we review *de novo*. *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002). In addition, a motion for a new trial will only be granted where the complaining party was deprived of a fair trial. *Buckholtz*, 337 Ill. App. 3d at 168.

¶ 15 The Dead-Man's Act provides, in pertinent part, as follows:

"In the trial of any action in which any party sues or defends as the representative of a deceased person ***, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased *** or to any event which took place in the presence of the deceased person ***, except in the following instances:

(a) If any person testifies on behalf of the representative to any conversation with the deceased *** or to any event which took place in the presence of the deceased ***, any adverse party or interested person, if otherwise competent, may

testify concerning the same conversation or event." 735 ILCS 5/8-201 (West 2012).

¶ 16 We find that the exception to the Dead-Man's Act set forth in subsection (a) is applicable here. 735 ILCS 5/8-201 (West 2012). Throughout the course of the trial, the plaintiff examined and cross-examined all of the witnesses regarding the decedent's visits to nurse Boehning and the absence of an indication in the medical records that nurse Boehning educated the decedent on the importance of attending his appointment with the gastroenterologist based on his presenting symptoms. Repeatedly, the plaintiff returned to the adage, "if it's not charted, it's not done," clearly indicating to the jury the plaintiff's version of the events which took place in the presence of the decedent. Accordingly, the defendants had a right to counter the plaintiff's version of events. See *Hoem v. Zia*, 159 Ill. 2d 193, 201 (1994) (holding that plaintiff opened the door within the meaning of subsection (a) of the Dead-Man's Act by insinuating a certain version of events through testimony interpreting medical records); see also *Malanowski*, 332 Ill. App. 3d at 13 (finding it fundamentally unfair and in opposition to the policy behind the Dead-Man's Act to allow a decedent's expert witnesses to introduce a version of events through medical records without giving an opportunity to the defense to present its side of the story). Additionally, the plaintiff ultimately chose to introduce the decedent's video evidence deposition into evidence, thereby equalizing the position of the parties with respect to the events and conversations at issue, and allowing the jury to make a credibility determination about what actually occurred. For these reasons, we find that the circuit court did not err in allowing nurse Boehning's testimony or denying the plaintiff's motion for a new trial.

¶ 17

CONCLUSION

¶ 18 For the foregoing reasons, the order of the circuit court of Clinton County, which denied the plaintiff's motion for a judgment notwithstanding the verdict, or in the alternative, for a new trial, is affirmed.

¶ 19 Affirmed.

¶ 20 JUSTICE GOLDENHERSH, dissenting:

¶ 21 I respectfully dissent. The majority, in dealing with the issue of contributory negligence, notes the clash of both parties' experts as to the progression of decedent's cancer and whether or not an endoscopy in 2004 or 2005 would have revealed stomach cancer, or merely one of the diseases it mimics, and whether, if revealed, the cancer would be at a curable stage. As the record reflects, no expert stated that decedent's failure to keep enumerated medical appointments was a proximate cause of death. As our supreme court has noted in *Owens v. Stokoe*, 115 Ill. 2d 177, 503 N.E.2d 251 (1986), proximate cause is an element of contributory negligence and, upon a failure to meet this or any other element of contributory negligence, it is error to submit it to the jury. In the instant case, the circuit court submitted the issue of contributory negligence to the jury despite the absence of expert testimony as to proximate cause and, thus, committed error. In light of the clash of the parties' experts and the question of their and other witnesses' credibility which permeates the record in this case, the submission of contributory negligence to the jury was, in my opinion, prejudicial error and warrants reversal of the judgment of the circuit court and remand for new trial. As this error in and of itself is prejudicial in this case, we need not reach the question of any violation of the Dead-Man's Act (735 ILCS 5/8-201 (West 2012)). Accordingly, I would reverse the judgment of the circuit court of Clinton County and remand this cause for a new trial.