

2014 IL App (1st) 122669-U
No. 1-12-2669
Order Filed June 30, 2014

SIXTH DIVISION

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ROBERTO CRUZ,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 08 L 2647
)	
ROBERT R. SCHENCK, M.D., and)	
HAND SURGERY, LTD., S.C.,)	Honorable
)	Gregory J. Wojkowski,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 **HELD:** The jury verdict for the defendants was affirmed: by failing to submit a written response to the jury's questions, the plaintiff forfeited his claim that the trial court's response

to the jury was error; since the trial court's response to the jury's questions was correct, there was no merit to the plaintiff's plain error argument.

¶ 2 The plaintiff, Roberto Cruz, filed a medical malpractice complaint against the defendants, Robert R. Schenk, M.D. and Hand Surgery, Ltd. S.C. Following the trial, the jury returned a verdict for the defendants. The trial court denied the plaintiff's posttrial motion, and the plaintiff appealed. On appeal, the plaintiff contends that: (1) the trial court erred in its response to questions posed by the jury; and (2) the plaintiff did not forfeit the error by failing to submit his proposed answer to the jury's questions in writing. For the reasons stated below, we affirm the judgment of the trial court.

¶ 3 The facts pertinent to the issues raised on appeal are contained in the bystander's report, certified by the trial court in accordance with Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005). During deliberations, the jury sent the trial court two questions: (1) "Is the jury making a decision on how Mr. Cruz got originally hurt *or* Are we making a decision on the quality of care that Dr. Scank [*sic*] provided?" (emphasis in original), and (2) "After reading the 'proximate cause' statement, is the jury correct to assume to interpret it in the following way: That if we, the jury, believe that Dr. Schank [*sic*] is *not* the only cause for Mr. Cruz's injury, then we side with the defense?" (Emphasis in original.) The jury's questions were accompanied by a copy of Illinois Pattern Jury Instructions, Civil, No. 12.05 (2011) (hereinafter, IPI Civil (2011) No. 12.05).

¶ 4 Upon receiving the jury's questions, the trial court met with the parties' attorneys to discuss the court's response to the jury. The plaintiff's attorney maintained that the jury should have their questions answered and requested that the court "specifically and accurately" answer the jury's questions. The plaintiff's attorney did not provide a written

response for the court to give to the jury. The defendants' attorney requested that the trial court direct the jury to the instructions they had been given. The trial court disagreed with the plaintiff's request to specifically answer the jury's questions. In response to the jury's questions, the trial court directed the jury to refer back to the instructions, the evidence and the testimony it had heard. The trial court's response was sent to the jury at 3:19 p.m. The jury returned a verdict for the defendants at 3:30 p.m. Judgment was then entered on the verdict.

¶ 5 The plaintiff filed a posttrial motion in which he alleged that the verdict was against the manifest weight of the evidence and that the trial court erred in its response to the jury's questions.¹ The trial court denied the posttrial motion, and the plaintiff filed a notice of appeal. Thereafter, the plaintiff filed an amended notice of appeal.

¶ 6

ANALYSIS

¶ 7

I. Standards of Review

¶ 8

The court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 36 (2003). A trial court's decision in regard to the appropriate response to questions by the jury during deliberations is also reviewed for an abuse of discretion. *Hojek v. Harkness*, 314 Ill. App. 3d 831, 834 (2000). An abuse of discretion will be found only if the trial court's ruling was arbitrary, unreasonable, ignored recognized principles of existing law, or if no reasonable person would take the position adopted by the trial court. *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006).

¶ 9

II. Discussion

¹On appeal, the plaintiff does not raise an issue as to the jury's verdict.

¶ 10 The plaintiff contends that he is entitled to a new trial because the trial court erred in its response to the two questions from the jury. The defendants respond that the plaintiff waived the error when he failed to provide the trial court with a written response to the jury's questions. Both parties rely on *Van Winkle v. Owens-Corning Fiberglas Corp.*, 291 Ill. App. 3d 165 (1997).

¶ 11 In *Van Winkle*, the jury sent two questions to the trial court asking for clarification as to the law. The defendant's attorney requested that the court answer "yes" to both questions. The plaintiff's attorney objected and requested that the court respond that the instructions contained the applicable law. The trial court informed the jury that it should refer to the instructions it had been given. On appeal, the reviewing court reversed the verdict for the plaintiff and remanded for a new trial. The court found that the jury asked an explicit question that involved a substantive legal issue, and determined that the trial court abused its discretion in its response to the jury's questions. Because the jury's question of law concerned a potentially dispositive issue, the trial court's response caused substantial prejudice to the defendant and required a new trial. *Van Winkle*, 291 Ill. App. 3d at 172-73.

¶ 12 The plaintiff maintains that the court in *Van Winkle* did not require a written response because the jury's questions were simply stated and the trial court understood counsel's suggestions to provide an appropriate response. The plaintiff's argument overlooks the court's observation that the better practice would have been for the parties to submit written drafts of the responses they wanted the trial court to give the jury, similar to the practice in submitting jury instructions during a conference on jury instructions. *Van Winkle*, 291 Ill. App. 3d at 173. The court stated further as follows:

"Supreme Court Rule 239(c) requires parties to submit proposed jury instructions in writing so that the record shows exactly the parties' respective positions on how the jury should be instructed. [Citation.] We should require nothing less when the jury raises a question during deliberations, requiring the court to decide how to respond to – that is, to instruct – the jury. Indeed, in the midst of jury deliberations after a vigorously contested trial, a question from the jury deserves as much – if not more – thoughtful consideration as did the original instructions. Accordingly, we hold that when jurors raise a question during deliberations, counsel must submit - in writing – the specific response counsel wants the court to give the jury. Because we are announcing a new rule, we believe it is only equitable that we apply it prospectively." *Van Winkle*, 291 Ill. App. 3d at 173-74.

¶ 13 According to the certified bystander's report, the plaintiff did not provide the trial court with a written draft of the response to the jury's questions. In addition, the plaintiff's request that the trial court "accurately and specifically" answer the questions did not indicate what the "accurate and specific" answer to the jury should be. In his reply brief, the plaintiff states that "A simple 'yes' to question 1 and 'no' to question 2 would have been useful to the jury and would have provided an accurate answer to the questions." According to the bystander's report, the plaintiff did not suggest those answers to the trial court. In accordance with *Van Winkle*, we hold that the plaintiff forfeited the alleged error in the trial court's response to the jury's questions.

¶ 14 In his reply brief, the plaintiff claims that the error was so prejudicial that this court should consider it "plain error." Under the plain error doctrine, a court may address a forfeited error when either the evidence is close, regardless of the seriousness of the error, or

when the error is serious, regardless of the closeness of the evidence. *People v. Span*, 2011 IL App (1st) 083037 ¶ 73. While the plain error doctrine is set forth in the supreme court rules governing criminal appeals, this district has applied it in civil cases " 'where the act complained of was a prejudicial error so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process.' " *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 856 (2010) (quoting *In re Marriage of Saheb*, 377 Ill. App. 3d 615, 627 (2007)). In order to determine the existence of plain error, we must first determine if error occurred. *Span*, 2011 IL App (1st) 083037 ¶ 73.

¶ 15 "The general rule is that, when a trial court receives a question from the jury during deliberations, the court has a duty to instruct the jury further or clarify the point of law that has caused doubt or confusion." *Hojek*, 314 Ill. App. 3d at 834. Our supreme court has not mandated that a trial court must answer all questions a jury submits to it. *Hojek*, 314 Ill. App. 3d at 836. A trial court may exercise its discretion and decline to respond to a jury's question,

" 'when the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or where the giving of an answer would cause the court to express an opinion that would likely direct a verdict one way or another.' " *Hojek*, 314 Ill. App. 3d at 836 (quoting *People v. Millsap*, 189 Ill. 2d 155, 161 (2000).

¶ 16 In *People v. Reid*, 136 Ill. 2d 27 (1990), the jury asked the trial court if it could find the defendant guilty of one charge and not the other. The trial court responded that the jury should review the original instructions and continue deliberating. On review, the supreme

court found no abuse of discretion. The court noted that in an exercise of its discretion, the trial court could have answered the jury's question, but the court had no duty to do so. The court further noted that while the jury had not received an instruction directly answering its question, the jury had received different verdict forms, and a direct answer from the trial court to the question might have indicated a specific verdict to the jury, which could have been detrimental to either party. *Reid*, 136 Ill. 2d at 42-43.

¶ 17 In the instant case, the jury received IPI Civil (2011) No. 20.01 setting forth the issues in the case and providing as follows:

"The plaintiff claims that he was injured and sustained damage, and that the defendant was negligent in one or more of the following respects:

Administered an unreasonable number of injections to Robert [*sic*] Cruz;

Failed to adequately explore the superficial right radial nerve of Roberto Cruz;

Failed to timely treat injury to the superficial right radial nerve of Roberto Cruz;

The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

The defendant, Dr. Robert Schenck denies that he did any of the things claimed by the plaintiff, denies that he was negligent in doing any of the things claimed by the plaintiff and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries." ²

¶ 18 Attached to the jury's questions was a copy of IPI Civil (2011) No. 12.05, which provided as follows:

²The record on appeal does not contain a complete set of the instructions given to the jury. IPI Civil (2011) No. 20.01 was taken from an exhibit to the defendants' response to the plaintiff's posttrial motion. IPI Civil (2011) No. 12.05 was taken from the trial court's written order denying the plaintiff's posttrial motion.

"If you decide that the defendants were negligent and that their negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may also have been a cause of the injury.

However, if you decide that the sole proximate cause of injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant."

¶ 19 In denying the plaintiff's posttrial motion, the trial court found that IPI Civil (2011) No. 20.01 and IPI Civil (2011) No. 12.05 "were complete and readily understandable and sufficiently explained the relevant law *** There was no need for this Court to draft further instructions which would have been redundant or improperly highlighted a party's position or issue or could have misled the jury."

¶ 20 Our own review reveals nothing confusing or misleading in the language of either instruction. We agree with the trial court that additional instructions to the jury were unnecessary as the answers to the jury's questions were clearly discernible in the instructions it had already received. The plaintiff maintains that the jury's swift return of a verdict after it received the trial court's response to its questions established that the court's response amounted to no response at all. We disagree. Having had their questions answered, the jury was then able to reach a verdict. The plaintiff's argument offers nothing more than speculation that because the jury had questions about proximate cause, it must have been confused or misled by the instructions.

¶ 21 The plaintiff's reliance on *Baraniak v. Kurby*, 371 Ill. App. 3d 310 (2007), and *Hojek* is misplaced. In *Baraniak*, the jury asked two questions regarding who paid the plaintiff's medical bills, the plaintiff or the insurance company. There had been no testimony other

than that the bills were paid. Defense counsel suggested that IPI Civil (2005) No. 30.22 be given to the jury. However, to each question, the trial court responded to the jury that it had received all of the evidence and the instructions, and that it should continue to deliberate. On review, the court found that the trial court erred when it failed to give them IPI Civil (2005) No. 30.22. The instruction would have addressed the jury's questions by instructing the jury not to infer, speculate or discuss whether the medical expenses were covered by insurance. See *Baraniak*, 371 Ill. App. 3d at 315-16. Unlike *Baraniak*, here the jury's questions concerned issues raised during the trial, and it had received all of the necessary instructions prior to deliberations. In *Hojek*, this court found reversible error where the trial court failed to give any answer to the jury's question about insurance, even though IPI Civil 3d No. 2.13 would have answered the jury's question accurately. *Hojek*, 314 Ill. App. 3d 839. In the present case, the trial court responded to the jury's questions, and the jury had all the necessary instructions for it to decide the issues in this case.

¶ 22 We conclude that the trial court's response to the two questions posed by the jury during deliberations was correct and not an abuse of discretion. In the absence of error, there can be no plain error. *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 32.

¶ 23 CONCLUSION

¶ 24 By failing to submit a written response to the jury's questions, the plaintiff forfeited his claim that the trial court's response to the jury was error. Since the trial court's response to the jury's questions was correct, the plaintiff cannot establish plain error to evade the consequences of his forfeiture. We conclude that the trial court's denial of the plaintiff's posttrial motion was not an abuse of discretion and affirm the judgment of the circuit court.

¶ 25 Affirmed.