

No. 1-11-2953

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CYNTHIA J. ELLIS and MAURICE ELLIS, JR., Special)	Appeal from the
Co-Administrators of the Estate of NICOLE S.)	Circuit Court of
ELLIS, Deceased,)	Cook County.
)	
Plaintiffs-Appellants,)	
)	
v.)	
)	
ADVOCATE HEALTH AND HOSPITALS CORP.,)	05 L 6097
d/b/a ADVOCATE SOUTH SUBURBAN HOSPITAL,)	
ADVOCATE SOUTH SUBURBAN HOSPITAL,)	
SHIBAN K. GANJU, M.D., GREGORY P. ADAMO,)	
M.D., RADIOLOGY CENTER, S.C., and SOUTH)	
SUBURBAN GASTROENTEROLOGY, S.C.,)	Honorable
)	John P. Kirby,
Defendants-Appellants.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it permitted a defendant in a medical malpractice case to compare his treatment of the decedent with the subsequent treatment she

received from other doctors. Because the plaintiff failed to object at trial to evidence allegedly undisclosed in discovery, the plaintiff forfeited appellate review of his claim that the admission of the evidence made his trial unfair. In this battle of the experts, we cannot say that the jury's verdict is contrary to the manifest weight of the evidence.

¶ 2 The estate of Nicole Ellis sued two of the doctors and one hospital that provided health care for Nicole during the weeks before she died. A jury found the defendants not liable. On appeal, the estate raises issues of the manifest weight of the evidence, violation of discovery rules, and improper comparison of one defendant's acts with the acts of other doctors.

¶ 3 We hold that this case presents a battle of the experts that does not provide grounds for this court to overturn the jury's assessment of the credibility and weight of the competing opinions. The estate forfeited its objection to the evidence allegedly undisclosed in discovery, as the estate failed to object to the evidence when the defendant introduced it. The trial court did not abuse its discretion when it permitted the parties to introduce evidence of Nicole's treatment by other doctors, and the court did not abuse its discretion when it permitted one defendant to compare his treatment of Nicole with the treatment other doctors provided. Accordingly, we affirm the trial court's judgment.

¶ 4 **BACKGROUND**

¶ 5 On June 12, 2003, Nicole had a painful and distended abdomen. Nicole's parents, Cynthia and Maurice Ellis, took Nicole to the emergency room at Advocate South Suburban Hospital. Doctors at the hospital ordered a CT scan of Nicole's abdomen. Dr. Gregory Adamo, a radiologist who read the scan, interpreted the image as showing a fatty infiltration of the liver with a large amount of ascites, which is fluid in the abdomen. He overlooked a part of the CT scan that showed

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a clot blocking the hepatic vein, the vein through which blood courses when it leaves the liver.

¶ 6 Dr. Shibani Ganju, a gastroenterologist, first saw Nicole on June 15, 2003. From her symptoms, he immediately guessed that she might have a clot blocking her hepatic vein. Doctors refer to that specific kind of blockage, and the accompanying illness, as Budd-Chiari Syndrome, or BCS. BCS occurs rarely, and even liver specialists may see only a dozen cases over the course of a career. Dr. Adamo's interpretation of the CT scan did not support Dr. Ganju's tentative diagnosis, so Dr. Ganju sought to run other tests to confirm the diagnosis. Blood tests showed that Nicole had a somewhat elevated International Normalized Ratio (INR). The INR measures the time it takes for a patient's blood to clot. Nicole's high INR indicated that her blood did not clot as quickly as it should. Because an invasive biopsy could lead to excessive blood loss in a patient with a high INR, Dr. Ganju decided not to request a biopsy at that time. He gave Nicole plasma in an effort to lower her INR.

¶ 7 Advocate Hospital had neither the resources to perform the kind of biopsy Nicole needed, nor the resources to treat BCS. Doctors can treat BCS with a shunt to get blood out of the liver around the blockage, with transjugular administration of thrombolytic therapy to break up the clot, or with a transjugular intrahepatic portosystemic shunt (TIPS) to decompress the vein. In extreme cases, when the patient suffers from cirrhosis, the patient may need a liver transplant. Advocate's doctors never confirmed a diagnosis for Nicole's illness. On June 22, 2003, Advocate released Nicole. Cynthia brought Nicole to the University of Chicago Hospital's emergency room the next day.

¶ 8 Doctors at the University of Chicago confirmed the diagnosis of BCS that day. They

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scheduled a biopsy for June 27, 2003, and that biopsy showed that necrosis had overtaken 30% of Nicole's liver. A liver can continue to function reasonably well even with as little as 20% of the liver's cells healthy. The doctors decided to perform a TIPS procedure, which they scheduled for June 30, 2003. The TIPS procedure did not succeed in opening the blockage. Nicole's condition deteriorated quickly after the TIPS procedure. She died on July 2, 2003. An autopsy showed that she had many blood clots in her major organs. The pathologist found that she died from necrosis of the bowel.

¶ 9 Pretrial Proceedings

¶ 10 The court appointed Cynthia as a special administrator of Nicole's estate. The estate sued Advocate Hospital, Dr. Adamo, and Dr. Ganju for medical malpractice. In his deposition, Dr. Ganju testified that he recommended to the Ellis family that they should transfer Nicole to Ingalls Memorial Hospital, where Dr. Ganju had staff privileges. He explained:

"[M]y recommendation was Ingalls Hospital is close by. I know the people personally. It would have been a fast *** transfer. I would have got the people involved right away. It would have benefited them as events unfolded. ***

* * *

*** I know the people. We've done a lot of TIPS at the Ingalls Hospital. And that's what my plan was. I'm mentioning even the transjugular route and the biopsy procedure, so it would have been the whole package there."

¶ 11 Trial

¶ 12 In his opening statement, Dr. Ganju's attorney stressed that Dr. Ganju recommended transferring Nicole to Ingalls, which had

"[an] interventional radiologist, his name is Dr. Perry Gilbert *** who specializes in *** interventional treatments for potential Budd-Chiari liver disease ***. *** Dr. Gilbert *** is arch expert in performing TIPS procedures and it can be done right there, the same day or the next day."

¶ 13 Dr. Mitchell Shiffman, a liver specialist, explained that coagulation problems cause BCS. He did not suggest an original source for the coagulation problems that led Nicole to have a clot in her hepatic vein. In BCS, when a clot blocks the hepatic vein, blood continues to enter the liver, and the liver enlarges with the blood flowing in at a rate that far exceeds the rate of outflow. The increased pressure on the liver causes fluid to leak out into the abdomen. Thus, BCS caused doctors to find ascites in Nicole's abdomen. Eventually, the pressure on the liver cells and congestion in the liver start killing the liver cells.

¶ 14 In Dr. Shiffman's opinion, Dr. Ganju did not meet the standard of care. Once Dr. Ganju astutely recognized signs of BCS, he needed to transfer Nicole to a hospital that could treat the disease. Dr. Shiffman testified that a shunt, or the TIPS procedure, would have worked well if Dr. Ganju had transferred Nicole to the University of Chicago Hospital on June 17, 2003. The delay in treatment contributed to Nicole's death. In Dr. Shiffman's opinion, Nicole died of liver failure.

¶ 15 Dr. Clark Bonham, a transplant surgeon, also opined that Dr. Ganju breached the standard

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of care when he failed to transfer Nicole to a hospital equipped to treat BCS. Like Dr. Shiffman, Dr. Bonham had no guess as to the cause of the clot in Nicole's hepatic vein. The delay in diagnosing Nicole's condition, and the delay in treatment, led to Nicole's death. If Dr. Ganju had transferred Nicole a few days earlier, she would have had a better chance of survival. She died from the combined effects of liver failure and sepsis from exposure to bacteria in the unsuccessful TIPS procedure.

¶ 16 Dr. Harry Jacob, a hematologist, testified that in his opinion, Nicole likely had polycythemia vera, which can lead to excessive clot formation. Doctors can treat polycythemia vera with aspirin. Once the clot formed in the hepatic vein, doctors needed to move fast. If Dr. Ganju had transferred Nicole sooner to a better-equipped hospital, she would likely have survived. Dr. Jacob admitted that none of the doctors who treated Nicole found polycythemia vera.

¶ 17 Dr. Ganju testified that the standard of care required him to confirm the BCS diagnosis before transferring Nicole to another hospital. He suggested Ingalls Hospital to the Ellises, especially because that hospital could perform a biopsy that might confirm the BCS diagnosis. But they had already researched Chicago hospitals and preferred to take Nicole to the University of Chicago Hospital. Dr. Ganju did not tell them they needed to transfer Nicole immediately, because she had stabilized and her liver continued to function. Dr. Ganju testified that he treated Nicole just as University of Chicago Hospital treated her. Over the estate's objection, the court permitted Dr. Ganju to explain that doctors at the University of Chicago Hospital did not rush treatment for Nicole, as they performed the TIPS procedure one week after Nicole came to the hospital and one week after the doctors confirmed the diagnosis of BCS.

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¶ 18 Dr. Ganju's attorney asked him what he would do if one of his patients needed a TIPS procedure. Dr. Ganju answered, without objection:

"Almost all the time I transfer or tell them come as outpatient to Ingalls Memorial Hospital[. We]e have an excellent trained physician there called Dr. Perry Gilbert who does [a] lot of these procedures for me and they've been mostly successful."

If the Ellises had accepted the transfer to Ingalls for a TIPS procedure, Dr. Ganju "would have got it [done] faster, maybe on the same day, 19th or 20th with Perry Gilbert."

¶ 19 Later, Dr. Ganju's attorney asked Dr. Ganju which specialists he would contact for specified problems. Dr. Ganju identified a pediatric gastroenterologist and two surgeons he trusted. The attorney then asked about interventional radiologists who can perform TIPS procedures. Without objection, Dr. Ganju identified "Dr. Perry Gilbert at Ingalls Memorial Hospital" as "one of the best interventional radiologists, at least in *** the Chicago area."

¶ 20 Dr. Steven Flamm, a gastroenterologist, opined that Dr. Ganju met the applicable standard of care. Doctors cannot transfer all potential cases of BCS to the hospitals that have facilities for liver transplants, because those hospitals do not have enough beds for all the patients they would take in with those standards. Dr. Ganju correctly tried to confirm the diagnosis before transferring Nicole. Nicole stabilized at Advocate Hospital, and she did not suffer liver failure there. In Dr. Flamm's opinion, an unnamed coagulation disorder that caused excessive clotting led to Nicole's death. The multiple clots found in Nicole's corpse resulted from the excessive clotting disorder that also caused her BCS. Dr. Flamm agreed with the University of Chicago doctors who found that

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sepsis arising during the TIPS procedure killed Nicole. The timing of the TIPS procedure made no difference for its result. On cross-examination, Dr. Flamm agreed that Nicole would have had a good prognosis if the TIPS procedure had succeeded.

¶ 21 Dr. Leonard Valentino, a hematologist, agreed with Dr. Flamm that Nicole died from sepsis that arose when bacteria entered Nicole's blood during the TIPS procedure. Nicole's hypercoagulable state caused the many clots found in her corpse, as well as the BCS. Timing of the TIPS procedure made no difference for its result.

¶ 22 Dr. Bruce Bacon, a hepatologist, testified that BCS results from coagulation disorders. Neither BCS nor the condition of Nicole's liver caused her death. Instead, she died of sepsis. Nicole did not require emergency treatment at University of Chicago Hospital until the failed TIPS procedure led to the fatal sepsis. In Dr. Bacon's opinion, Dr. Ganju complied with the standard of care.

¶ 23 Dr. Robert Halvorsen, a radiologist, testified for the estate that Dr. Adamo breached the standard of care when he failed to mention the hepatic vein in his report on the CT scan, when he failed to see the clot blocking the vein, when he failed to note the specially enlarged caudate lobe of the liver (a symptom of BCS, amongst other diseases), and when he diagnosed Nicole's condition as fatty liver without mentioning the possibility of BCS. In Dr. Halvorsen's opinion, Dr. Adamo's failings caused a delay in diagnosing and treating Nicole's BCS.

¶ 24 Dr. Robert Vogelzang, also a radiologist, testified that Dr. Adamo met the standard of care. Reasonably careful and competent radiologists could miss the subtle vein abnormality shown on the CT scan, and one should not expect Dr. Adamo to notice the signs of the rare disease of BCS.

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Moreover, in Dr. Vogelzang's opinion, the delay in diagnosis made no difference for Nicole. She would likely have died regardless of her treatment. She needed to have the TIPS procedure, and a bile leak during the procedure likely caused the sepsis that led to her death.

¶ 25 Dr. Ganju's attorney, in closing argument, emphasized the evidence that Nicole, at the University of Chicago Hospital, did not need emergency procedures to circumvent the blockage in her hepatic vein. Dr. Ganju's experts all agreed that timing made no difference to the outcome, and the University's doctors waited a week from the time they diagnosed BCS to the TIPS procedure. Nicole's health, and her liver function, did not deteriorate sharply over that week. Instead, her condition deteriorated very rapidly after the unsuccessful TIPS procedure.

¶ 26 The attorney added, without objection:

"[Dr. Ganju is] trying to get her transferred over to Ingalls ten minutes down the road so that Dr. Perry Gilbert can do this transjugular biopsy.

* * *

So I guess the question is, what's wrong with going ten minutes down the road to Ingalls Memorial Hospital for the transjugular biopsy? What is the basis for this apparent presumption that the care that could be given by Dr. Gilbert, the interventional radiologist at Ingalls, is substandard***?

Dr. Gilbert trained at Northwestern under Dr. Vogelzang in the late 1980s. And for 20 years, he's been at Ingalls Hospital doing

exactly that, transjugular biopsies, TIPS procedures, et cetera. Everything that was available at the University of Chicago was available at Ingalls with the exception of a liver transplant, and we know she was never a transplant candidate.

So what is the relevance? You know what else they had at Ingalls that they didn't have at the University of Chicago? Available beds. ***

*** [N]o one is criticizing the Ellis family for taking some time to consider where they wanted their daughter to go. If they weren't comfortable with Ingalls, that's fine. You don't have to go to Ingalls. You can take your time, research the issue and decide where you're more comfortable having her go. That's fine, because she was stable ***. She wasn't in liver failure. ***

But what's not fine is to decline the transfer to Ingalls and then sue Dr. Ganju and criticize him for negligently delaying transfer when he tried to transfer her to Ingalls, but was told we don't want to go there."

¶ 27 The jury returned a verdict in favor of all defendants. The court entered judgment on the verdict. In a posttrial motion, the estate argued that Dr. Ganju violated Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. January 1, 2007)) when he testified about Dr. Gilbert's availability and

qualifications to perform a biopsy and the TIPS procedure. A new judge, who did not preside at the trial, heard the posttrial motion. The judge held that Dr. Ganju violated Rule 213, but the violation had no significant prejudicial effect. The court denied the posttrial motion. The estate now appeals.

¶ 28

ANALYSIS

¶ 29 The estate raises four issues on appeal: (1) whether the verdict is against the manifest weight of the evidence; (2) whether Dr. Ganju's testimony about Dr. Gilbert made the trial unfair; (3) whether the comparison of the treatment provided at Advocate Hospital with the treatment provided at University of Chicago Hospital made the trial unfair; and (4) whether this court should reverse the judgment in favor of Advocate Hospital if it reverses the judgment in favor of either of the doctors, as its apparent agents.

¶ 30

Weight of the Evidence

¶ 31 This court defers to the findings of the trier of fact. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). The *Snelson* court explained:

"[A] reviewing court may not simply reweigh the evidence and substitute its judgment for that of the jury. [Citations.] Indeed, a reviewing court may reverse a jury verdict only if it is against the manifest weight of the evidence. [Citation.] A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence." *Snelson*, 204 Ill. 2d at 35.

¶ 32 In *Snelson*, the plaintiff's medical expert testified that timely surgery would have saved the plaintiff from the bad result reached, and the defendant's experts testified that an earlier surgery would have led to the same unfortunate result. Our supreme court held:

" This case involved a classic battle of the experts. Witnesses qualified in their fields stated their opinions and gave their reasons for those opinions. Not surprisingly, the plaintiff's experts did not agree with the defense experts. The jury needed to listen to the conflicting evidence and use its best judgment to determine where the truth could be found. The jury found in favor of *Snelson* and against *Kamm*, and this court "should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple [v. Gustafson]*, 151 Ill. 2d [445,] 452-53 [(1992)]. " *Snelson*, 204 Ill. 2d at 36, quoting *Snelson v. Kamm*, 319 Ill. App. 3d 116, 145 (2001).

¶ 33 We adopt the reasoning of *Snelson* here. We cannot say that the jury's verdict shows that the jury acted unreasonably or arbitrarily, or that the jurors failed to heed the evidence. Experts credibly testified that even though Dr. Adamo erred, he met the standard of care, and that Dr. Ganju met the standard of care when he tried to confirm his diagnosis before transferring Nicole to another hospital. Moreover, experts credibly testified that the delay in diagnosis did not affect the unfortunate outcome of the TIPS procedure, and the sepsis that occurred during that procedure, rather than any problem

arising from Nicole's liver, caused her death. Accordingly, we find that the verdict is not contrary to the manifest weight of the evidence.

¶ 34

Rule 213

¶ 35 Next, the estate argues that Dr. Ganju violated Rule 213 (Ill. S. Ct. R. 213 (eff. January 1, 2007)) when he testified about Dr. Gilbert's experience and credentials, and his availability to perform a TIPS procedure on June 19 or 20, 2003. However, we find that the estate forfeited this issue by failing to object to the testimony at trial. See *Guski v. Raja*, 409 Ill. App. 3d 686, 695 (2011).

¶ 36 The estate points out that the trial court did not treat the issue as forfeited. The estate first raised the issue in its posttrial motion, and the trial court addressed the issue on its merits. The court held that the estate suffered no prejudice due to the violation. The court made no finding concerning forfeiture. The trial court's decision to address the issue on its merits does not require a reviewing court to overlook the forfeiture. See *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751, 757-58 (2010) (Rule 213 issue held forfeited although trial court addressed the issue on the merits when it denied the posttrial motion).

¶ 37 While we have the authority to address the issue despite the forfeiture (see *Michigan Avenue National Bank v. County of Cook*, 191 Ill. 2d 493, 518 (2000)), we do not see this case as the kind of case where the need to maintain a sound body of precedent, or some other exceptional circumstance, compels us to address the forfeited issue. See *Michigan Avenue*, 191 Ill. 2d at 518; *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 855-56 (2010). Dr. Ganju, in his deposition, testified that he knew doctors at Ingalls Memorial Hospital who could perform the needed procedures. The

further elaboration of this disclosure did not egregiously violate Rule 213. See *Foley v. Fletcher*, 361 Ill. App. 3d 39, 48-49 (2005). Moreover, Dr. Ganju's attorney relied primarily on his defenses that Dr. Ganju complied with the standard of care, and the timing of treatment for the blockage made no difference to the result of the procedure. The attorney did not focus his argument on the availability and credentials of Dr. Gilbert. Accordingly, we will not address this forfeited issue on its merits.

¶ 38 Treatment at University of Chicago

¶ 39 The estate raises as its third issue the argument that the trial court should not have permitted Dr. Ganju to compare the treatment he provided for Nicole with the treatment she received at the University of Chicago Hospital. We use the abuse of discretion standard to review decisions on evidentiary issues and on the permissible scope of argument. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001); *Simmons v. Garces*, 198 Ill. 2d 541, 568 (2002). Both parties introduced evidence of occurrences at the University of Chicago Hospital, as those occurrences had considerable relevance to the issue of what caused Nicole's death. See *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 384-85 (2004). Dr. Ganju and Dr. Adamo used evidence concerning the treatment at the University of Chicago to rebut the testimony from the estate's experts that Nicole needed immediate intervention by June 17, 2003, to save her from the consequences of her liver's deterioration. The nine-day delay between the diagnosis and the TIPS procedure at the University of Chicago effectively supports the argument that Nicole's condition did not warrant urgent intervention, and the Ellis family could take a few days to choose the facility at which they wanted Nicole to receive treatment. The trial court correctly overruled objections to the relevant evidence and permissible

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argument based on that evidence. Because we affirm the judgments entered in favor of both doctors, we need not address the estate's final claim that we should hold Advocate Hospital liable for Dr. Ganju's and Dr. Adamo's negligence.

¶ 40

CONCLUSION

¶ 41 In this battle of experts, we cannot say that the jury's finding in favor of the defendants is contrary to the manifest weight of the evidence. The estate forfeited any objection to evidence concerning Dr. Gilbert and his qualifications by failing to object to the evidence at trial. The trial court correctly allowed the parties to introduce evidence of the treatment Nicole received and the sequence of events that occurred at the University of Chicago Hospital. The trial court did not abuse its discretion when it permitted Dr. Ganju to use evidence of the treatment at the University of Chicago to support his claim that he met the appropriate standard of care, and the delay in diagnosis did not harm Nicole. We affirm the trial court's judgment.

¶ 42 Affirmed.