

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2006

JUDITH WAX,
Appellant,

v.

TENET HEALTH SYSTEM HOSPITALS, INC.;
ROBERT TOPPER, M.D.; and **ROBERT TOPPER, M.D., P.A.,**
Appellees.

No. 4D04-1673

[May 17, 2006]

FARMER, J.

In this medical malpractice case, the trial court stopped plaintiff's witnesses from testifying as to issues involving efforts to resuscitate the deceased and related matters involving the vagus nerve. The court held that such testimony would have been outside the designations of these expert witnesses in the pretrial disclosure, or it would have been cumulative. The record does not support the trial judge's decision in either regard. We reverse.

Gary Wax, a 37-year-old man, was admitted to the West Boca Medical Center, owned by Tenet Health System Hospitals, for outpatient, elective hernia surgery by Dr. Topper. Within 20 minutes of the onset of surgery, a "code" was called. Despite attempts at resuscitation, he died on the table. His family was told that he simply "stopped breathing." The condition immediately precipitating death may have been respiratory failure, but the reasons for the loss of respiration were at the center of the dispute at trial.

His wife's wrongful death, medical malpractice action alleged negligence in pre-surgical consultation and assessment, in the administration and management of anesthesia for the procedure, and in the attempts at resuscitation. Defendants¹ asserted that the basis for

¹ Only the hospital and the surgeon are involved in this appeal. They will be referred to throughout as *defendants*.

ultimate oxygen deprivation was an inadvertent stimulation of the vagus nerve by the surgeon during the procedure. This in turn would have relevance to the doctors' and staff perceptions as to whether and when Wax's life was in danger and the manner in which they undertook resuscitation.

The parties disputed the proper standard of care for the attempts at resuscitation—which, again, is said to have depended on the cause of the respiratory failure. Plaintiff sought to introduce testimony from an expert, Dr. Sterba, as to the probability that “manipulation of the hernia sac caused [a] vagus nerve response.” Defendants objected that this line of questioning would be outside the scope of this expert's expected testimony in plaintiff's pretrial disclosure of expert witnesses. Plaintiff's designation had specified that Dr. Sterba would testify to: “the negligent code resuscitation efforts” and “specifically that the [personnel involved] delayed in establishing a patent airway and adequate ventilation during the code and delayed in establishing adequate circulatory aids during the code.” Defendants argued that the designation did not specifically state that Dr. Sterba would give an opinion touching on the vagus nerve theory, and further that Dr. Sterba “did not express any opinions in deposition with regard to the vagus nerve, [and] whether it could have caused any of this.”²

Plaintiff relies on *Klose v. Coastal Emergency Services of Fort Lauderdale*, 673 So.2d 81, 83 (Fla. 4th DCA 1996), in support of her argument that this exclusion was prejudicial and reversible. In that case, at defendant's discovery deposition of plaintiff's expert, plaintiff's counsel said that the expert's trial testimony would be limited to pre- and post-operative breaches of the standard of care. We noted that the expert was plaintiff's only pulmonologist for the trial. The trial judge excluded testimony from the witness as to breaches during the bronchoscopy procedure. We reversed upon a holding that defendant would not have been prejudiced by the admission of the testimony because defendant had actually questioned the witness at the deposition about the procedure. We also held that any prejudice from defendant's confusion about the scope of the proposed trial testimony could have been alleviated by a brief adjournment of the trial for a further deposition on the matter.

² We note that defense counsel conducted the deposition examination and was not precluded or influenced away from the subject of the vagus nerve during the deposition. There is no reason appearing in the record as to why defense counsel did not explore the subject with the witness.

We note that it was the defendants who introduced the issue of the vagus nerve to refute the claim of negligence in resuscitating the patient. As a result, plaintiff had designated the expert to testify about the proper standard of care for resuscitation. Plaintiff contends that the standard of care for resuscitation depended on what had caused respiratory failure. She argues that designating the expert's subject as negligence in resuscitation served, by necessary implication, to inform defendants that the vagus nerve could be part of Dr. Sterba's testimony at trial. Our study of the record confirms that from the circumstances, testimony concerning the vagus nerve was arguably inferable by the designation that the substance of Dr. Sterba's testimony would deal with the standard of care on resuscitation.

As we did in *Klose*, we note that Dr. Sterba was plaintiff's only designated expert on the subject at issue, emergency resuscitation. Exclusion of his offered testimony was therefore especially prejudicial because of his unique expertise. *Klose* holds that in the absence—as here—of any misconduct or impropriety by the party seeking to admit the testimony, this kind of prejudice impels the trial judge first to exhaust other measures less drastic than outright exclusion. A brief adjournment for a deposition of the witness on the vagus nerve issue was clearly the first remedy if the trial judge thought the designation insufficient to apprise defendant of the vagus nerve issue.

We do not think that these designations of the substance of testimony in pretrial notices of experts should be subjected to literalistic, mechanical or crabbed readings. If a disclosed witness's trial testimony is even arguably within the designation, exclusion of the testimony by the witness should not be employed. In the instances where a good faith misimpression occurs, the trial judge has other remedies to correct any injustice. These would include a delay in the testimony of that witness to allow additional discovery testimony of the proposed witness or, even in an extreme case perhaps, giving the party claiming to have been aggrieved by the designation the right to call additional experts. Hence, we do not agree that the record supports the trial judge's reasoning that this testimony should have been excluded in its entirety because of defendants' contention that they were not given proper notice of the expert's planned testimony.

The trial judge also excluded plaintiff's rebuttal testimony from Dr. Ernst. Just before the close of the defense, the court asked plaintiff's counsel if he anticipated any rebuttal. He responded that he intended to

call Dr. Ernst. Defendants objected, claiming that plaintiff was making an “attempt, under the guise of rebuttal, to have cumulative testimony from a second anesthesiology expert.” Plaintiff proffered that Dr. Ernst would testify regarding defendants’ vagus nerve theory, opining that it would be a “physiologic impossibility” for “a message [to] reach the brain through the sympathetic nervous system” after anesthesia below the T5 level in the spine. The court responded: “that [has] already been testified to” and that introduction of another expert addressing the issue was “getting a little cumulative.”

In *Griefer v. DiPietro*, 708 So.2d 666 (Fla. 4th DCA 1998), Judge Warner explained that:

“[a] trial court clearly may exercise its discretion in imposing sanctions. In this case, however, the trial court, by excluding the foregoing testimony, engaged in judicial overkill. ...A trial court should only exclude witnesses under the most compelling of circumstances. This is particularly so when the exclusion would be of a party’s most important witness.”

708 So.2d at 671. More specifically with regard to rebuttal witnesses she said: “Although a trial court has broad discretion regarding the admissibility of rebuttal testimony, it abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense.” 708 So.2d at 672; *see also Castillo v. Bush*, 902 So.2d 317, 324 (Fla. 5th DCA 2005) (same).

Plaintiff argues that Dr. Ernst’s exclusion was prejudicial because it rendered her unable to present evidence from any anesthesiologist to rebut defendants’ vagus nerve theory. It is true that in her case-in-chief, plaintiff had presented testimony from a cardiologist and a surgeon relating to the cause of death. But, she argues, Dr. Ernst’s testimony would not have been cumulative and would have been her only specific attempt to address the vagus nerve theory from the perspective of anesthesiology. Defendants respond, again, that the substance of Dr. Ernst’s testimony would have been repetitive and that the only difference would be his expertise.

The record does not support the trial court’s exclusion as cumulative. Plaintiff had not previously presented evidence from an anesthesiologist on the vagus nerve theory, and the earlier evidence cited by defendants was more generally directed to resuscitation rather than the specific details of the vagus nerve defense. To be cumulative the substance,

function and effect of the previous evidence should be the same. Here, as proffered, it would not have repetitive. Again, because this proposed evidence went to the heart of the theory of defense, it was prejudicial error to exclude it entirely without giving plaintiff an opportunity to present it without engaging in an unreasonable duplication of previous evidence. As Judge Warner made clear in *Griefer*:

“To strike all of the testimony was too extreme[;] ... the trial court should have barred only the new opinions, not those opinions to which the expert had testified in deposition and were known to the appellees.”

708 So.2d at 671.

Reversed for New Trial.

STONE and POLEN, JJ., concur.

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Appeal and cross-appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Karen M. Miller, Judge; L.T. Case No. CL 00-9780 AA.

Philip M. Burlington of Burlington & Rockenbach, P.A., West Palm Beach, and Jack Scarola, Darryl L. Lewis, and Rosalyn Sia Baker-Barnes of Searcy Denney Scarola Barnhart & Shipley, P.A., West Palm Beach, for appellants.

Robert Weill, Louise H. McMurray, James C. Sawran and Jason A. McGrath of McIntosh, Sawran, Peltz & Cartaya, P.A., Miami, for appellee Tenet Health System Hospitals, Inc.

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Not final until disposition of timely filed motion for rehearing.