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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

EAST VALLEY FIDUCIARY SERVICES, INC., by James Clark, Fiduciary
#20060, President, as Temporary Conservator for KAREN S.
SAUVAGEAU, an incapacitated person, *Plaintiff/Appellant*,

v.

IASIS HEALTHCARE HOLDINGS, INC.; MOUNTAIN VISTA MEDICAL
CENTER; QUANTUM MEDICAL RADIOLOGY, P.C.; U.S.
TELERADIOLOGY, L.L.C., *Defendants/Appellees*.

No. 1 CA-CV12-0469
FILED 12-10-2013

Appeal from the Superior Court in Maricopa County
No. CV2008-004469
The Honorable Arthur T. Anderson, Judge

AFFIRMED

COUNSEL

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By B. Elliot Grysen

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By David L. Abney

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By John A. Klecan, Kevin R. Myer

Counsel for Defendants/Appellees Quantum Medical Radiology, P.C., and US
Teleradiology, L.L.C.

MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Jon W. Thompson and Judge Diane M. Johnsen joined.

WINTHROP, Presiding Judge:

¶1 Plaintiff/Appellant East Valley Fiduciary Services, Inc., by James Clark, Fiduciary #20060, President, as Temporary Conservator for Karen S. Sauvageau (“Sauvageau”) appeals a jury verdict in favor of defendants/appellees IASIS Healthcare Holdings, Inc., Mountain Vista Medical Center (collectively, “Hospital”), Quantum Medical Radiology, P.C., and U.S. Teleradiology, L.L.C. (collectively, “Radiologists”). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On the morning of August 12, 2007, Sauvageau arrived at Mountain Vista Medical Center complaining of back pain, shortness of breath, and abdominal pain. Dr. Jeffrey Proudfoot, the attending physician in the emergency department, ordered a magnetic resonance imaging (“MRI”) scan of Sauvageau’s lumbar and thoracic spine to rule out an epidural abscess. Dr. Ashford McAllister, a radiologist, issued a preliminary report finding no evidence of a gross epidural abscess, and Dr. Proudfoot discharged Sauvageau that evening. The following day, radiologist Dr. Frank Sabatelli performed an “over-read” of Sauvageau’s MRI scan and prepared a final report noting the presence of a spinal epidural abscess. Although there is conflicting evidence in the record

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regarding whether Dr. Sabatelli communicated his findings to Dr. Proudfoot, it is undisputed that nobody contacted Sauvageau to advise her of the new finding.

¶3 Sauvageau's condition deteriorated after she was discharged, and she was taken by ambulance to Chandler Regional Medical Center on August 14, 2007. Her physicians determined she had an epidural abscess at her lumbar spine and transferred her to St. Joseph's Hospital and Medical Center where she underwent an emergency laminectomy to remove the abscess on August 16, 2007. The following week, she underwent a second surgery to remove an epidural abscess located at her cervical spine. Sauvageau remained in the hospital for several weeks to recover from surgical complications and to receive intravenous antibiotics to treat her infection.

¶4 Sauvageau filed this action for medical malpractice, alleging she suffered permanent physical impairments and brain damage from the delay in diagnosis of the abscess that resulted from defendants' medical negligence.¹ After a sixteen-day trial, the jury returned a defense verdict. Sauvageau timely appealed.

¶5 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101 (West 2013).²

ISSUES

¶6 Sauvageau contends the superior court erred by: (1) admitting evidence that Sauvageau had a history of addiction to methamphetamine and had used other illegal drugs; (2) denying her motion for judgment as a matter of law on the issue of the Hospital's breach of the standard of care; (3) denying her motion for judgment as a matter of law on the issue of comparative fault; and (4) allowing the Hospital to question Sauvageau's nursing standard of care expert about an article concerning the effects of methamphetamine use.

¹ Sauvageau's complaint named Dr. Proudfoot as a defendant, but she settled her claim against him prior to trial.

² The judgment did not dispose of Sauvageau's claims against Dr. Proudfoot or defendants Mountain Vista Physicians, L.L.C. and Hospital Physician Partners, Inc., but the superior court certified it for immediate appeal pursuant to Arizona Rule of Civil Procedure 54(b).

DISCUSSION

I. Admission of Evidence Concerning Sauvageau's Use of Methamphetamine

¶7 Sauvageau argues the superior court denied her a fair trial by admitting evidence of her long history of methamphetamine use. We review the superior court's decision to admit or exclude evidence for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000).

¶8 Prior to trial, Sauvageau moved in limine to preclude the admission of evidence concerning her use or sale of illegal drugs, including cocaine, marijuana, and methamphetamine. Defendants opposed the motion, arguing that Sauvageau's thirty-year history of methamphetamine use was directly relevant to the issue of causation and her claim for future medical expenses. The court granted the motion with respect to evidence of the sale of illegal drugs and denied it as to evidence of the effect of Sauvageau's use of methamphetamine on her "medical history, condition, causation, and longevity."

¶9 Sauvageau later moved in limine to exclude evidence that she used methamphetamine in February 2011. Defendants responded that Sauvageau's continued methamphetamine use was relevant to the issue of causation and her claims for future medical expenses based on life expectancy. The superior court denied the motion, ruling that defendants' experts could testify regarding Sauvageau's life expectancy based on the evidence that her drug use was a life risk factor. The court stated that the information could be established objectively and without elaboration.

¶10 At trial, defendants offered evidence that Sauvageau's use of methamphetamine against Dr. Proudfoot's orders after her discharge from Mountain Vista's emergency department may have masked her symptoms, interfered with her judgment, further inhibited her immune response, and kept her from promptly returning for medical treatment. They also submitted evidence that Sauvageau's history of methamphetamine use, and her continued use after August 12, 2007, may have caused or contributed to her alleged brain damage and other physical impairments, and reduced her damages claim, which was based in part on the medical care she alleges she will need for the remainder of her life, because a long-term methamphetamine user typically has a reduced life expectancy.

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¶11 A trial judge has considerable discretion in determining the relevance and admissibility of evidence. *State v. Smith*, 136 Ariz. 273, 276, 665 P.2d 995, 998 (1983). “Relevant evidence” means evidence having any tendency to make a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ariz. R. Evid. 401. Sauvageau’s methamphetamine use prior to, and after, her treatment on August 12, 2007, was relevant because it tended to show that other factors may have caused the mental impairments she ascribed to defendants’ negligence. In addition, the evidence was relevant to the issue of damages because it tended to show that Sauvageau’s life expectancy was shorter than that of an average woman her age. Nevertheless, Sauvageau contends the court’s admission of this evidence denied her a fair trial because it allowed defendants to “repeatedly portray [her] as a decades-long user of a notorious illegal drug.”

¶12 While relevant evidence is generally admissible, Ariz. R. Evid. 402, a court may exclude it if “its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Ariz. R. Evid. 403. This analysis requires an assessment of the probative value of the evidence with respect to the issue for which it is offered, balanced against the potential prejudice to the opposing party, i.e., the extent to which it suggests improper bases for a decision, such as emotion, sympathy, or horror. *Shotwell v. Donahoe*, 207 Ariz. 287, 295, ¶ 34, 85 P.3d 1045, 1053 (2004). The balancing of factors under Rule 403 is peculiarly a function of trial courts. *Yauch*, 198 Ariz. at 403, ¶ 26, 10 P.3d at 1190.

¶13 The superior court considered and rejected Sauvageau’s claim that the prejudicial nature of evidence concerning her methamphetamine use outweighed its probative value, noting that it was relevant to causation and damages.³ However, it appropriately limited this evidence to avoid undue prejudice to Sauvageau by requiring defendants to establish Sauvageau’s drug use objectively and without

³ Although the court did not cite Rule 403, it is clear from the record that its decision was the result of a discretionary balancing process under that rule. *See Shotwell*, 207 Ariz. at 296, ¶ 33, 85 P.3d at 1053.

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“window dressing.” We find no abuse of discretion in the superior court’s admission of evidence concerning Sauvageau’s methamphetamine use.⁴

¶14 Sauvageau asserts the court did not sufficiently restrict argument and evidence about her methamphetamine use, thereby allowing the trial to become an indictment of her lifestyle choices and depriving her of a fair trial. She maintains that instead of limiting the prejudicial impact of the evidence, the superior court allowed an “extended drug denunciation” and “smear campaign” of Sauvageau, and that the trial became a “flood of [methamphetamine] and illegal drug questions and references made by the defense lawyers.” Calculating that defense lawyers referred to methamphetamine and illegal drug use more than 200 times and the jury heard at least 282 references to methamphetamine use during trial testimony, she contends defendants inflamed the jury and severely prejudiced her.

¶15 Although the superior court was in the best position to consider Sauvageau’s argument that the trial went awry and materially affected her rights, she did not file a motion for new trial. Ariz. R. Civ. P. 59(a)(1), (7) (allowing a party to move for a new trial on the grounds that she was deprived of a fair trial or that the verdict was the result of passion or prejudice); *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55, ¶ 23, 961 P.2d 449, 453 (1998) (“In ruling on a motion for new trial the judge sits as the ‘thirteenth juror’ (the ninth juror in a civil case).”); *Mammo v. State*, 138 Ariz. 528, 533-34, 675 P.2d 1347, 1352-53 (App. 1983) (noting an appellate court gives the greatest possible discretion to the trial court with respect to the alteration of the verdict and the granting or denial of a new trial, because, like the jury, it has had the opportunity to hear the evidence and observe the demeanor of witnesses). From our review of the record, we discern neither a denial of a fair trial nor a verdict influenced by passion or prejudice. Although methamphetamine was mentioned numerous times during the course of the sixteen-day trial, the evidence was not presented in an inflammatory or otherwise improper manner. Moreover, we cannot say that the sheer number of references, alone, compromised Sauvageau’s right to a fair trial, as the objectionable evidence was directly

⁴ We do not disagree with Sauvageau’s contention that drug-abuse evidence may be highly prejudicial and should be excluded “when it tends only remotely or to an insignificant degree to prove a material fact in a case.” However, we find no abuse of discretion in the superior court’s determination that the evidence was more probative than prejudicial in this case.

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relevant to two of the four elements of her claim and therefore could be expected to be prominently discussed at trial. Further, there is no indication in the record that the verdict was the result of the jury's passion or prejudice. *Hutcherson*, 192 Ariz. at 55, ¶ 23, 961 P.2d at 453 (citation omitted) (explaining that in considering whether a jury verdict resulted from passion or prejudice, the trial judge must ask whether the verdict is so "manifestly unfair, unreasonable and outrageous as to shock the conscience.").⁵

II. Motion for Judgment as a Matter of Law Regarding the Hospital's Breach of the Standard of Care

¶16 During trial, Sauvageau's expert witness, Dr. Leonard Berlin, described the standard of care applicable to hospital administration and opined that the Hospital failed to adhere to that standard, particularly as it related to "communication" and the alleged failure to document the communication between Hospital personnel, the Radiologists, and other treating physicians. After the Hospital concluded its presentation of evidence without offering expert testimony to rebut Dr. Berlin's opinions, Sauvageau moved for judgment as a matter of law on the issue of the Hospital's liability. The superior court denied the motion, noting that the Hospital, as a defendant, did not have the burden to disprove Sauvageau's claim and therefore was not required to present affirmative evidence to rebut Dr. Berlin's testimony. We review the court's ruling *de novo*. *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 302, ¶ 6, 995 P.2d 735, 738 (App. 1999).

¶17 The superior court may grant a motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis for a reasonable jury to find for" the party opposing the motion once that party has been fully heard at trial. Ariz. R. Civ. P. 50(a)(1). Sauvageau contends that because the Hospital did not present expert testimony to rebut Dr. Berlin's opinion or offer any other evidence concerning the standard of

⁵ Sauvageau also challenges the court's denial of her motion to exclude the opinions of defense expert Dr. Michael A. Sucher concerning the cause of her brain injuries, arguing he was not properly disclosed as a causation expert and his testimony was cumulative of the testimony of defendants' neurology expert. The court did not abuse its discretion in allowing Dr. Sucher, who is an addiction medicine specialist, to testify about the effects of methamphetamine on the brain, subject to cross examination to place his opinions in the appropriate context.

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care, she was entitled to a ruling as a matter of law on that issue. However, a defendant's failure to offer opposing evidence does not compel judgment for a plaintiff when the plaintiff's evidence is "susceptible to different assessments by a reasonable finder of fact." *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292-93, ¶ 20, 229 P.3d 1031, 1034-35 (App. 2010).⁶

¶18 Sauvageau had the burden of proof on her medical malpractice claim and was required to show that the Hospital violated the applicable standard of care and caused her damages. See A.R.S. §§ 12-561, -563; *Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶ 32, 203 P.3d 483, 492 (2009). The Hospital had no such burden and was free to simply rebut Sauvageau's evidence, as it did through cross-examination of Dr. Berlin. See *Benkendorf v. Advanced Cardiac Specialists Chartered*, 228 Ariz. 528, 530-31, ¶¶ 9-10, 269 P.3d 704, 706-07 (App. 2012). Dr. Berlin admitted he was not familiar with the Hospital's training methods, back-up systems, or specific process for sending imaging scans off-site, but opined that the Hospital must have done something wrong because the result was wrong. Nevertheless, he acknowledged that the Hospital employed the correct staff and provided the appropriate equipment, and, upon the parties' stipulation that the Radiologists received all of the images contained in Sauvageau's MRI scan, opined that the Hospital's method for sending imaging scans to the Radiologists was reasonable. Given Dr. Berlin's testimony on cross-examination, a reasonable jury could reject his opinion that the Hospital violated the applicable standard of care. We therefore find no error in the superior court's denial of Sauvageau's motion for judgment as a matter of law.

⁶ In fact, the jury was explicitly instructed by the trial court that:

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

III. Motion for Judgment as a Matter of Law Regarding Comparative Fault

¶19 Sauvageau contends the superior court erred by denying her motion for judgment as a matter of law and allowing defendants to argue that she contributed to her damages by becoming sick and arriving at Mountain Vista to receive emergency care. We review the court's ruling *de novo*. *Monaco*, 196 Ariz. at 302, ¶ 6, 995 P.2d at 738.

¶20 During trial, Sauvageau asked the court to rule as a matter of law that the jury could not find her comparatively at fault for any pre-treatment conduct that caused her need for medical treatment on August 12, 2007. Defendants conceded that the jury could not assign comparative fault to Sauvageau for her role in creating the condition that led to her medical treatment, and the court prohibited defendants from arguing that Sauvageau was comparatively at fault based upon her conduct prior to August 12, 2007. Contrary to Sauvageau's assertion on appeal, defendants did not argue that Sauvageau contributed to her damages because she became sick and needed medical care. Indeed, the court instructed the jury – without objection from Sauvageau – that it was not to excuse or reduce defendants' liability simply because it was Sauvageau's fault that she required medical care.⁷

¶21 Further, even assuming the superior court erred by denying Sauvageau's motion for judgment as a matter of law on this issue, the error was harmless and did not affect the verdict. The court instructed the jury, in relevant part:

If you find that Defendants were *not at fault*, then your verdict must be for Defendants.

If you find that one or more of the Defendants *were at fault*, then those entities are liable to Plaintiff and your verdict must be for Plaintiff. You should then determine the full amount of Plaintiff's damages and enter that amount on the verdict form.

(Emphasis in original).

⁷ Specifically, the court directed the jury as follows: "You are instructed not to excuse or reduce a healthcare providers' liability, if any, simply because it was the Plaintiff's own fault that she required care in the first place."

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¶22 We presume the jury followed the court's instructions, *Perkins v. Komarnyckyj*, 172 Ariz. 115, 119, 834 P.2d 1260, 1264 (1992), and nothing appears in the record to suggest it did otherwise in this case. The jurors determined defendants were not at fault and completed the defense verdict form, not the form that allowed them to allocate fault to Sauvageau. The jury therefore did not reach the issue of whether Sauvageau's damages should be reduced by any fault on her part. The defense verdict rendered any error by the court harmless. *See Gibson v. Boyle*, 139 Ariz. 512, 518, 679 P.2d 535, 541 (App. 1983) (holding court's error in instructing jury on imputed spousal negligence on claim by estate of wife-passenger against third-party driver in accident harmless in light of defense verdict by same jury on child-passenger's claim against driver, which demonstrated jury entered defense verdict on estate's claim regardless of instruction); *see also Spiller v. Brady*, 169 F.3d 1064, 1067 (7th Cir. 1999) (holding erroneous contributory negligence instruction harmless error when jury returns a general defense verdict).

IV. Zimmerman Cross-Examination

¶23 Finally, Sauvageau argues the court erred by allowing defendants to question her nursing standard of care expert, Polly Zimmerman, RN, about an article regarding the physiological effects of methamphetamine on the brain. We review the court's ruling for an abuse of discretion. *State v. Smith*, 138 Ariz. 79, 81, 673 P.2d 17, 19 (1984) ("The control of cross-examination is left to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing from the record of an abuse of discretion.").

¶24 Zimmerman testified the Hospital violated the standard of care by failing to establish appropriate procedures for key communications, and because its nursing staff did not properly monitor Sauvageau's condition. On cross-examination, the Hospital's counsel questioned Zimmerman about an article from the American Journal of Nursing concerning methamphetamine abuse that she had identified at her deposition as a document that she relied on in arriving at her conclusions. Zimmerman testified she edited the article prior to its publication, but ultimately stated she did not have an opinion regarding its content because she was not an expert on studies of methamphetamine. We reject Sauvageau's argument that the questioning was improper and

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prejudicial because it concerned the issue of causation, whereas Zimmerman had been disclosed solely as a standard of care expert.⁸

¶25 An expert witness may be cross-examined about the facts and data underlying her opinions, Ariz. R. Evid. 705, including documents in her file that she identifies as forming the basis for her opinions. *State v. Swafford*, 21 Ariz. App. 474, 485-86, 520 P.2d 1151, 1162-63 (1974). Zimmerman testified at her deposition that the article, along with all of the other papers in her file, formed her opinions and were part of her “background, training, and experience.” The article was therefore an appropriate subject for cross-examination at trial. *See Swafford*, 21 Ariz. App. at 486, 520 P.2d at 1163.

¶26 Sauvageau protests that the questioning was inappropriate because the subject of the article – the effect of methamphetamine on the brain – was outside Zimmerman’s expertise and she had not authored the article. Zimmerman initially answered counsel’s questions as if she possessed knowledge of the article’s subject matter. Once she stated that she did not have an opinion concerning the content of the article because she was not an expert on studies of methamphetamine, the questioning ended. The superior court did not abuse its discretion by allowing the Hospital’s counsel to question Zimmerman concerning the article. *See Smith*, 138 Ariz. at 81, 673 P.2d at 19.⁹

¶27 In any event, we reverse only when the record shows that error was prejudicial to the substantial rights of a party. Ariz. R. Civ. P. 61; *Creach v. Angulo*, 189 Ariz. 212, 214-15, 941 P.2d 224, 226-27 (1997). Sauvageau has not demonstrated that to be the case. The parties presented conflicting evidence as to whether Sauvageau suffered

⁸ Although Sauvageau complains about the entire line of questioning, she did not object at trial until after the Hospital’s counsel had already asked Zimmerman numerous questions about the article. *See Goldthorpe v. Farmers Ins. Exchange*, 19 Ariz. App. 366, 368, 507 P.2d 978, 980 (1973) (plaintiff failed to object to or move to strike inadmissible evidence as soon as grounds appeared; subsequent objection related only to the immediately-preceding question and not the testimony about which plaintiff complained on appeal).

⁹ We decline to consider Sauvageau’s argument that the superior court improperly allowed the Hospital to publish the article to the jury because she did not raise that objection at trial.

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permanent injury as a result of the delay in treatment of her epidural abscess or whether her claimed brain injury could be attributed to her use of methamphetamine; it was for the fact-finder to weigh the evidence and resolve the conflicts. *Aranda v. Cardenas*, 215 Ariz. 210, 218, ¶ 30, 159 P.3d 76, 84 (App. 2007) (recognizing that “the fact-finder determines credibility, weighs the evidence, and draws appropriate inferences from the evidence”).

CONCLUSION

¶28 For the foregoing reasons, we affirm.



Ruth A. Willingham · Clerk of the Court
FILED: mjt