DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2010

FRANK SPECIAL,
as Personal Representative of the Estate of Susan Special,
Appellant,

v.

IVO BAUX, M.D., IVO BAUX, M.D., P.A.;
PINNACLE ANESTHESIA, P.L.;
and **WEST BOCA MEDICAL CENTER, INC.**,
Appellees.

No. 4D08-2511

[June 23, 2010]

LEVENSON, JEFFREY, R., Associate Judge.

Frank Special, as the personal representative of his wife's estate, appeals a final judgment in favor of the defendants below, Dr. Ivo Baux, his related corporations, and West Boca Medical Center, Inc. Special raises three claims. We affirm on all three, but write to discuss Special's contention that the trial court erred in limiting his cross-examination of one of the defendants' witnesses.

Susan Special became pregnant at 38. Five weeks before her due date, Susan underwent a cesarean delivery because her fetus presented breech. She was wheeled into the operating room at the Center's labor and delivery suite. Dr. Baux, the anesthesiologist, applied spinal anesthesia. Another doctor delivered the baby. About a minute after the placenta was removed, Susan became unresponsive and her blood pressure dropped acutely. She had a cardiopulmonary arrest. Dr. Baux intubated her and called a code blue, and he and other hospital personnel attempted to revive Susan. Although they resuscitated her, Susan suffered another arrest in the Intensive Care Unit. She died approximately five hours after delivery.

On behalf of the estate, Special sued the defendants for negligence. Special alleged that Dr. Baux and the Center were negligent in administering anesthesia, in monitoring her system and controlling her fluids during surgery, and in responding to her cardiopulmonary arrests.

The defendants denied the allegations. They alleged instead that Susan's death was caused by amniotic fluid embolus (AFE), an allergic reaction from mother's blood mixing with amniotic fluid, sometimes causing heart-lung collapse. After a jury heard the matter, it found that Dr. Baux was not negligent. The trial court rendered final judgment in favor of the defendants.

At trial, the AFE diagnosis figured prominently. Most notably, Special called Dr. Barbara Wolf, the chief medical examiner of Palm Beach County at the time of Susan's death. Dr. Wolf testified that she had conducted the autopsy on Susan and concluded that there was no evidence of AFE. She explained that in a majority of cases where someone dies from AFE, the autopsy provides evidence of AFE. Special also called Dr. Mark Adelman, a treating physician at the hospital, to testify. Special asked him about the disproportionate number of cases of AFE at the Center as compared to the national average. He testified that he recalled personally seeing one or two cases per year at the Center.

Subsequently, the defendants called Dr. Gary Dildy, an obstetrician gynecologist and maternal-fetal medicine expert, to testify. Dr. Dildy also maintained that Susan died of AFE. On cross-examination, Special elicited from Dr. Dildy that the probability of AFE is approximately 1 in 20,000 births, but can range between 1 in 8,000 and 1 in 80,000. The defendants objected when Special began to ask Dr. Dildy to address Dr. Adelman's testimony that he saw between one and two cases of AFE annually at West Boca. Special responded that he sought this line of questioning to impeach Dr. Adelman's testimony. The trial court sustained the objection, noting that Special could inquire about numbers and make his argument about disproportionate diagnoses in closing, but Special was not permitted to have Dr. Dildy testify about the credibility of Dr. Adelman because it was impermissible collateral impeachment.

On appeal, Special argues that the trial court abused its discretion because his cross-examination of Dr. Dildy would have undermined Dr. Dildy's own conclusion that Susan died of AFE. We disagree, and hold that the court did not abuse its discretion in excluding the testimony. *See Nationwide Mut. Fire Ins. Co. v. Bruscarino*, 982 So. 2d 753, 754 (Fla. 4th DCA 2008).

"'Impeachment on collateral issues is clearly impermissible.'" *Id.* (quoting *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1095 (Fla. 4th DCA 2001)). "When evidence 'neither (1) is relevant to prove an independent fact or issue nor (2) would discredit a witness by establishing bias, corruption, or lack of competency on the part of the witness,' it

constitutes collateral, impermissible evidence." *Id.* (quoting *Strasser*). "The test for determining whether a matter is collateral or irrelevant is whether the proposed testimony can be admitted for any purpose independent of the contradictions." *Foster v. State*, 869 So. 2d 743, 745 (Fla. 2d DCA 2004) (quoting *Lawson v. State*, 651 So. 2d 713, 715 (Fla. 2d DCA 1995)). *See also* § 90.608(5), Fla. Stat. (2003) (providing that any party may attack the credibility of a witness by contradictory testimony given by another witness as long as facts testified to are not collateral to the issue).

The trial court properly found that the issue of over-diagnosis of AFE at the Center was a collateral issue. A general claim of over-diagnosis of AFE at the Center does not affect whether, in this case, Dr. Baux negligently attended to Susan during her C-section or negligently attempted to resuscitate her, as alleged in Special's complaint. In other words, whether AFE was over-diagnosed at the Center had no bearing on the issue of Dr. Baux's alleged negligence. Because over-diagnosis was an immaterial fact, evidence on it would have been irrelevant. *See* § 90.401, Fla. Stat. (2003) ("Relevant evidence is evidence tending to prove or disprove a material fact."). Thus, the testimony was otherwise inadmissible and the trial court did not abuse its discretion in preventing Special from eliciting such testimony from Dr. Dildy to impeach Dr. Adelman.

Assuming *arguendo* that the evidence in question was not collateral, and the court abused its discretion, such error would have been harmless. Clearly, the issue of over-diagnosis was sufficiently presented in Dr. Adelman's testimony, through the Center's interrogatory answers, and—most prominently—in Special's closing argument. In particular, Special argued with vigor that the Center either had an epidemic of AFE or was over-diagnosing it:

> [Dr. Adelman] said, I see one to two a year at West Boca Medical Center. I didn't put the words in his mouth. He said, I see one to two a year at West Boca Medical Center.
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> . . . .
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> [I]f you take his numbers, and you believe they have this many amniotic fluid emboluses at West Boca Medical Center every year, it is somewhere between 15 and 80 times the national average they're diagnosing amniotic fluid embolus at West Boca Medical Center, between 15 and 80 times the national average.
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> So, it was either an epidemic, which there isn't, at West Boca Medical Center, or they're overdiagnosing amniotic

> fluid embolus. They're calling things that aren't amniotic fluid embolus, like he did in this case, . . . because they're not bothering to look at autopsies, they're not bothering to look at other records, they're not bothering to investigate why. . . .
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> It's not the epidemic, it's that he's overstating the diagnosis, and that's wrong, ladies and gentlemen, that is flat out wrong to do, and that's what they did in this case.

As such, the jury was well aware of the AFE over-diagnosis allegation both through evidence and through argument, rendering any error clearly harmless. *See Pascale v. Fed. Express Corp.*, 656 So. 2d 1351, 1353-54 (Fla. 4th DCA 1995) ("Generally, an error is harmless if it does not injuriously affect the substantial rights of the complaining party. The test is whether, but for the error, a different result would have been reached." (citation omitted)).

Accordingly, we affirm the judgment entered below.

TAYLOR, J., concurs specially with opinion.
FARMER, J., dissents with opinion.

TAYLOR, J., concurring specially.

I concur with the majority that the judgment in this case should be affirmed. I disagree that the trial court properly limited plaintiff's cross-examination of the defendants' AFE expert on the high rate of AFE diagnoses at West Boca Medical Center. In my view, the hospital's alleged propensity for over-diagnosing or misdiagnosing AFE was not a collateral matter, but rather an issue that related directly to the cause of Mrs. Special's death after delivery. The jury was asked to decide whether she died as a result of AFE, as defendants contended, or from anesthetic complications, as plaintiff claimed. Testimony from the defendants' own expert regarding the hospital's unusually high incidence of this rare condition tended to support the plaintiff's theory that the defendants rushed to judgment in reaching their AFE diagnosis in this case.

However, I agree with the majority that the error was harmless. During the plaintiff's proffer, Dr. Dildy testified that, assuming Dr. Adelman's recollection of the incidence of AFE at West Boca Medical Center was accurate, he would be concerned that AFE was being over-diagnosed. Yet, even when confronted with statistics documenting this possibility, he persisted in his opinion that Mrs. Special presented a case of AFE. He testified, "But this case here, we're talking about, it doesn't

matter what all these other cases are, this case is this case, and this case is an amniotic fluid embolism."

Under the harmless error standard of review, the test is whether, but for the error, a different result would have been reached. *Dessanti v. Conteras*, 695 So. 2d 845 (Fla. 4th DCA 1997); *Pascale v. Federal Express Corp.,* 656 So. 2d 1351 (Fla. 4th DCA 1995); *Aristek Communities, Inc. v. Fuller,* 453 So. 2d 547 (Fla. 4th DCA 1984); *Anthony v. Douglas,* 201 So. 2d 917 (Fla. 4th DCA 1967). Here, plaintiff's counsel was unable to establish during its proffer that evidence of the hospital's over-diagnosis of AFE in other cases would have affected Dr. Dildy's opinion that Mrs. Special died as a result of AFE. Further, as the majority points out, plaintiff's counsel strenuously argued during his closing remarks that the hospital continued its practice of misdiagnosing AFE when determining the decedent's cause of death. Thus, it is difficult to say that, but for the exclusion of Dr. Dildy's testimony regarding this matter, a different result would have been reached. I would, therefore, affirm the judgment for defendants.

FARMER, J., dissenting.

Susan Special became pregnant as she was nearing her fortieth year. The fetus presented breech, and her doctors proceeded with a caesarian section at 35 weeks. Dr. Baux applied spinal anesthesia. A moment after they removed the placenta, she became unresponsive. Her blood pressure fell precipitately as she went into cardiopulmonary arrest. Calling a code blue, Dr. Baux and hospital staff attempted to revive her. She was temporarily resuscitated and transferred to ICU where another arrest occurred. Susan died five hours after the delivery.

Her Estate sued Dr. Baux[1] and West Boca Hospital for negligence. The claim is that Dr. Baux and the Hospital were negligent in administering anesthesia, in monitoring her system and controlling her fluids during surgery, and in responding to her cardiopulmonary arrests. Defendants denied the allegations, alleging instead that Susan's death was caused by amniotic fluid embolus (AFE), an allergic reaction from mother's blood intermingling with amniotic fluid, sometimes causing heart-lung collapse.

At trial the AFE diagnosis figured prominently. Plaintiff called the Chief Medical Examiner performing the autopsy, who testified she found

[1] Along with his related corporate entities.

no evidence of AFE in Susan's body. Plaintiff's expert testified that Susan died because of the above alleged departures from the standard of care. Plaintiff later questioned a West Boca staff physician, Dr. Adelman, as to the facts leading to the AFE diagnosis of Susan, the number of AFE cases seen at that Hospital, and to contrast the prevailing statistics about the incidence of AFE. He testified to figures suggesting the diagnosis of AFE at this Hospital was about 15 times the rate elsewhere.

The defense called Dr. Dildy as their expert. He opined that Susan died from AFE. On cross examination, plaintiff elicited from him that that the probability of AFE is usually 1/20,000, but ranges from 1/8,000 to 1/80,000. Plaintiff then tried to begin a line of cross examination of Dr. Dildy about the reliability of the Adelman diagnosis that AFE had actually occurred in Susan and the unusually high incidence of it in West Boca Hospital.

Defendants' objection on relevancy grounds was sustained. The court held that plaintiff could inquire only about the statistical occurrence of AFE and could not question Dr. Dildy using the substance of Dr. Adelman's testimony and its reliability to explore the trustworthiness of defendants' diagnosis of AFE. The court concluded that doing so would amount to improper collateral impeachment.

Again, the principal dispute at trial was the cause of Susan's death. In response to plaintiff's claims of negligence, defendants alleged that regardless of their handling of the emergency from cardiopulmonary arrest, it was AFE that caused her death. The presence of AFE was thus the essential issue.

Our Evidence Code requires the admission of relevant evidence except when explicitly excluded by law.[2] The Code defines relevant evidence as "evidence tending to prove or disprove a material fact."[3] The Code also provides that expert witnesses shall be required to disclose facts or data underlying their opinions.[4] A party may attack the credibility of any witness by testimony from another witness that material facts are not as professed by the witness being impeached.[5]

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[2] § 90.402, Fla. Stat. (2009) ("All relevant evidence is admissible, except as provided by law").

[3] § 90.401, Fla. Stat. (2009).

[4] § 90.705(1), Fla. Stat. (2009) ("On cross-examination the expert shall be required to specify the facts or data").

[5] § 90.608(5), Fla. Stat. (2009) ("Any party … may attack the credibility of a witness by … proof by other witnesses that material facts are not as testified to

In this case, the trial judge accepted defendants' contention that this entire field of proposed cross examination would have been collateral to the issue on trial. Characterizing evidence as *collateral* is simply another way of saying it is not pertinent, hence irrelevant. The primary test as to whether evidence would be collateral is to consider whether the same evidence could be admitted for another purpose than the inconsistency.[6] If it could be thus admitted, it is obviously relevant and not collateral.

The object of the proposed cross examination of the defense expert was to elicit answers leading to proof of the cause of death, the crux of the lawsuit. Had plaintiff called Dr. Dildy as his own witness, doubtlessly he could have questioned him directly on the same line of inquiry to which defendants objected on cross examination. The results of an exploration of his knowledge and related opinions as to any medically reliable evidence of AFE in Susan, the frequency of AFE elsewhere and its claimed presence more frequently at this Hospital, surely could have led directly to proof illuminating the cause of the death of Susan in childbirth.

Barring an entire line of cross examination of one's expert witness about facts and opinions directly relating to the vital issue in the trial requires on review that we indulge the possibility that, if allowed, answers and concessions could have yielded impeachment of all or part of opinions expressed by opposing witnesses. Achieving recognition from Dr. Dildy as to anomalies or errors in Dr. Adelman's diagnosis by a probing line of inquiry could have a significant effect on the jury — namely, that the believable facts about the cause of death may not have been those opined or relied upon by Dr. Adelman and Dr. Dildy.

Because the subject is as relevant and probative as evidence can be on the fundamental dispute between the parties, the Evidence Code afforded the trial judge no discretion to bar it *ab initio* on the basis it involved collateral matters.[7] At the very outset of the inquiry it is simply not possible to hold this entire line of cross examination collateral or prejudicial. And the conceivable probative force of this subject of inquiry

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by the witness being impeached").

[6] *Dempsey v. Shell Oil Co.*, 589 So.2d 373, 377 (Fla. 4th DCA 1991) (relying on C. Ehrhardt, FLORIDA EVIDENCE 294-5 (2d ed. 1984)).

[7] *Johnston v. State*, 863 So.2d 271, 278 (Fla. 2003) (trial court's discretion on admissibility of evidence is limited by the rules of evidence); *Reed v. State*, 883 So.2d 387 (Fla. 4th DCA 2004) (trial court's discretion in determining admissibility of evidence is limited by rules of evidence).

makes it very unlikely that the exclusion of the entire area of cross examination was harmless.

Neither can the objection be justified by the rationale (as the trial judge later posited when he revisited the issue) that answers yielded by such a cross examination would inevitably result in unfair prejudice outweighing any probative value.[8] Evidence that in reality is misleading, confusing, duplicative or unfairly prejudicial, though having some relevancy, is deemed unreliable by § 90.403 as a matter of law.[9] But this provision is not a general grant of authority to trial judges to bar evidence adversely affecting a party's position at trial; it bars evidence only when it genuinely has the statute's elements of legal unreliability. It is thus critical to grasp the sort of unfair prejudice required by § 90.403.[10]

For some issues, as here, an application of widely accepted scientific principles to a particular set of facts can be fairly debated by even those most knowledgeable on the subject. It is the very purpose of inquiry of scientists to have them explain the analysis underlying their opinions in the case, i.e. their scientific methodology.[11] Of necessity this includes an exploration and application of scientific principles to the pertinent facts and theories on which each relied to reach an opinion.[12]

The purpose here was to provide expert testimony to "assist the trier of fact in understanding the evidence in determining" the scientific reliability of an AFE diagnosis.[13] This was the core relevant evidence in this trial. Answers relating to the cause of death simply cannot be legally

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[8] *See* § 90.403, Fla. Stat. (2009) ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice").

[9] *See Ramirez v. State*, 810 So.2d 836, 843 (Fla. 2001) ("In applying [§ 90.403], the court bars … evidence that is unduly prejudicial, misleading, or confusing — i.e., evidence that is 'legally' unreliable").

[10] *See Brown v. State*, 719 So.2d 882, 885 (Fla. 1998) (term *unfair prejudice* in § 90.403 means undue tendency to suggest decision on an improper basis (relying on *Old Chief v. United States*, 519 U.S. 172, 180 (1998)).

[11] Dr. Jacob Bronowski explained the essence of the scientific method in this way: "ask an impertinent question and you are on the way to a pertinent answer." *The Ascent of Man* (episode 4, Fires, Metals and Alchemy).

[12] § 90.705(1), Fla. Stat. (2009).

[13] § 90.702, Fla. Stat. (2009) ("If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial").

brushed aside as unfairly prejudicial to the defendants or their expert witness. Nothing in the record presents any basis to conclude that the proposed line of inquiry would have categorically produced only inflammatory, bewildering or unreasonably duplicative evidence, the only grounds authorized by § 90.403.

In our adversary system of civil litigation, the clash of experts is as much a part of trials as the very conflict of the parties themselves. But there can be no "battle of the experts" on an obscure scientific subject if the trial judge bars the parties from ever testing the other's opinions by the traditional forensic methodology of pertinent questioning. In fact the nature of scientific inquiry itself is rooted in attempting to disprove theories by incisive questions.[14] Asking an expert on a scientific subject questions designed to disprove a theory is only duplicating what the expert was required by scientific custom to do in forming the opinion. An inquiry revealing contrary opinions between qualified experts relevant to the dispute simply does not lead to *unfair* prejudice within the meaning of § 90.403.

Moreover, any prospect of *unfair* prejudice actually resulting from such a relevant inquiry of a science expert could no more be ascertained at the outset than could the actual answers produced by the inquiry. A line of inquiry may yield impeachment; or it may only support the opinion of an opposing expert; it may even involve some objectionable questions, which the judge can then bar individually; but no judge can foresee at the outset what will ultimately emerge. The outcome of a lawyer's examination of experts on highly technical relevant scientific subjects — such as the cause of death in this case — is therefore incapable of being labeled *unfairly prejudicial* before the first question is even answered.

Here the trial court improperly used a provision meant to eliminate only legally unreliable evidence to bar what could have been the most relevant and reliable evidence in the case — evidence that lacked any of the factors on which a § 90.403 exclusion could be premised. Ironically the application of § 90.403 in this case had the perverse result of inflicting *unfair* prejudice on the proponent of the evidence, the plaintiff.

I therefore conclude that this exclusion of a proper line of inquiry in cross examination of defendants' expert witness requires a new trial. As

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[14] "It is often said in science that theories can never be proved, only disproved." Frank Wolfs, Introduction to the Scientific Method, University of Rochester, teacher.pas.rochester.edu/PHY_LABS/AppendixE/AppendixE.html.

to the other issues raised on this appeal I would not foreclose the trial judge from revisiting them in a new trial.

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Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502005CA00 2533XXXXMB.

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Not final until disposition of timely filed motion for rehearing.