IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 01/24/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

ALLEN BENKENDORF, surviving spouse of JUDITH BENKENDORF, deceased,	)	1 CA-CV 09-0697
	)	DEPARTMENT B
Plaintiff/Appellant,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules of
	)	Civil Appellate Procedure)
ADVANCED CARDIAC SPECIALISTS CHARTERED, an Arizona corporation,	)	
Defendant/Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-013558

The Honorable Edward O. Burke, Judge (Retired)

AFFIRMED

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B R O W N, Judge

¶1 Allen Benkendorf appeals from the judgment entered following a jury verdict in favor of Advanced Cardiac Specialists Chartered ("ACSC"). He asserts the trial court erred when it granted ACSC's motion to exclude certain expert testimony and refused a requested jury instruction. For reasons that follow, we affirm.[1]

BACKGROUND[2]

¶2 Benkendorf's wife, Judy, underwent surgery on January 12, 2003, to remove her cancerous left kidney. After the surgery, Judy developed a blood clot and was prescribed Coumadin, an anticoagulant medication that a patient takes orally.

¶3 Accordingly, on January 27, 2003, Judy began regularly visiting ACSC's Coumadin Clinic, where her blood was tested and Coumadin dosage changed if necessary to maintain her therapeutic

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[1] Pursuant to Arizona Rule of Civil Appellate Procedure 28(g), we address the trial court's decision to admit ACSC's expert opinion testimony on the possible causes of Judy's death by separate opinion filed herewith.

[2] On appeal from a jury verdict, "we view the evidence in the light most favorable to sustaining the verdict." *Gonzales v. City of Phoenix*, 203 Ariz. 152, 153, ¶ 2, 52 P.3d 184, 185 (2002).

level. Dr. Maheswar Rao, who worked at ACSC, established Judy's "therapeutic range" at the International Normalized Ratio ("INR") of 2.5 to 3.5, indicating that an appropriate dosage of Coumadin would cause her blood to clot at 2.5 to 3.5 times less than the natural rate. On February 25, 2003, Judy's blood test revealed an INR of 5.9. In response, her Coumadin dosage was ordered withheld for two days and reduced on Saturdays but was otherwise to remain the same.[3] Her INR subsequently dipped to below 2.5 before reaching the therapeutic range after further changes were made to her dosage. On Tuesday, June 10, 2003, Judy's INR level was 5.5, and her Coumadin dosage was ordered changed from 5 mg on Sunday and 7.5 mg all other days to 5 mg on Saturday and Sunday and 7.5 mg all other days. She was scheduled for a recheck on June 17, 2003.

¶4 On June 16, 2003, Judy suffered a large intracranial hemorrhage while at home. She was hospitalized in critical care, and died two days later. No autopsy was performed, but her death certificate listed a cause of death of intracranial hemorrhage "due to, or as a consequence of" hypertension.

[3] The trial evidence is not clear as to who ordered this (or any) change in Judy's Coumadin dosage. The evidence did establish that a nurse would normally conduct the blood test and order dosage changes if the INR was no more than .5 outside the therapeutic range. In cases where the INR level deviated more than .5, the nurse would orally consult with an on-site physician or nurse practitioner. These consultations typically were not documented.

Benkendorf filed a complaint alleging ACSC caused Judy's death by negligently monitoring and adjusting her Coumadin dosages.

¶5 At his deposition, Dr. Rao testified that had he been informed of Judy's high INR level on June 10, 2003, he "probably would have stopped Coumadin for one day." ACSC moved in limine to preclude this testimony, arguing it was duplicative of Benkendorf's other expert standard-of-care and causation testimony and therefore in violation of Arizona Rule of Civil Procedure ("Rule") 26(b)(4)(D). The trial court granted the motion.[4]

¶6 Near the end of trial, Benkendorf filed a request for supplemental jury instructions, arguing he was entitled to an "unusually susceptible claimant" instruction based on ACSC's expert testimony as to the possible causes of Judy's intracranial hemorrhage. After informing Benkendorf that his request was untimely, the trial court expressed concern as to the applicability of that type of instruction in a wrongful death case. The court later denied Benkendorf's request without further comment.

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[4] After the trial court precluded Dr. Rao's testimony pursuant to the one-expert-per-issue rule, Benkendorf designated portions of Dr. Rao's transcript to admit at trial on the basis his statements were "admissions against interest" because Dr. Rao was an employee of ACSC on June 10, 2003. The trial court denied the designations, and Benkendorf does not now challenge that ruling.

¶7 The jury returned a general verdict in favor of ACSC. After Benkendorf unsuccessfully moved for a new trial, the court entered judgment. This timely appeal followed.

DISCUSSION

A. Testimony of Dr. Rao

¶8 Benkendorf asserts that the trial court erred when it granted ACSC's motion in limine. More specifically, Benkendorf argues that the trial court should have allowed him to "present [Doctor] Rao's testimony that the medical staff members should have told him on June 10, 2003 that the Coumadin level was excessive—and that he would have probably stopped it." We review a trial court's grant or denial of motions in limine for an abuse of discretion. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008).

¶9 Pursuant to Rule 26(b)(4)(D), each side in a medical malpractice action is limited to one "independent expert" on an issue. An independent expert is defined as a "person who will offer opinion evidence who is retained for testimonial purposes and who is not a witness to the facts giving rise to the action." Ariz. R. Civ. P. 26(b) (Committee Comment to 1991 Amendment). An independent expert does not include an employee of a party who testifies about issues within the scope of his employment. *See Ariz. Dep't of Revenue v. Superior Court*, 189 Ariz. 49, 54, 938 P.2d 98, 103 (App. 1997) (finding an employee

not an independent expert when testifying to professional judgment and underlying opinions giving rise to valuation of a copper mine).

¶10 Benkendorf does not challenge the trial court's decision that Dr. Rao's testimony was precluded by the one-expert-per-issue rule. Instead, Benkendorf argues Dr. Rao should have been permitted to testify as a fact witness. Even assuming, however, that Dr. Rao could testify as a fact witness, his testimony would have been irrelevant to the standard of care or breach. To establish breach of duty in a malpractice action, a plaintiff must prove that the defendant has failed to exercise the same degree of skill as similarly situated physicians in the community. *Seisinger v. Siebel*, 220 Ariz. 85, 94, ¶ 33, 203 P.3d 483, 492 (2009). Dr. Rao's testimony as to what he would have done if he had been notified was irrelevant to duty of care because as a fact witness he could not address whether ACSC fell below the standard of care of medical providers in the community. *See id.* ("Arizona courts have long held that the standard of care normally must be established by expert medical testimony."); *cf. Smethers v. Campion*, 210 Ariz. 167, 177, ¶ 32, 108 P.3d 946, 956 (App. 2005) (concluding that an *expert's* testimony as to what he or she would have done may be admissible to bolster or impeach the credibility of that expert's testimony concerning the standard of care).

¶11 Moreover, Dr. Rao's account of what he would have done if he had been notified would have been irrelevant because Benkendorf did not present any evidence that the standard of care required notification of Dr. Rao. And Benkendorf's expert, Dr. Douglas Ragland, admitted at trial that consulting a nurse practitioner, rather than a doctor, would not breach the standard of care as long as the nurse practitioner followed required guidelines. Finally, even if consultation with a physician was necessary, according to Dr. Rao's testimony, he would not have been consulted because he was not present at the clinic on June 10, 2003.[5] Accordingly, the trial court did not abuse its discretion in precluding Dr. Rao's testimony.

B. Eggshell Instruction

¶12 Benkendorf asserts the trial court erred when it denied his request for a jury instruction based on his argument that Judy was unusually susceptible to injury.[6] We review a

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[5] To the extent Benkendorf argues the trial court should have allowed Dr. Rao to testify as a factual matter "that he would have expected the [ACSC] staff members to have contacted him about an INR reading of 5.5[,]" we note that the deposition testimony Benkendorf cites in his brief shows only that Dr. Rao expected the high INR reading to "have been brought to [his] attention . . . [or the attention of another physician.]" Furthermore, other portions of Dr. Rao's deposition reveal it was common practice for nurses to change Coumadin dosages either on their own or in consultation with a physician on-site who may not be the patient's treating physician.

[6] Benkendorf's requested instruction, commonly referred to as an "eggshell instruction," was taken from the second paragraph

trial court's denial of a requested jury instruction for an abuse of discretion. *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 409, ¶ 21, 207 P.3d 654, 662 (App. 2008). The trial court must give a requested instruction if: (1) the evidence presented supports the instruction, (2) the instruction is legally proper, (3) the instruction pertains to an important issue, and (4) the instruction's gist is not given in other instructions. *DeMontiney v. Desert Manor Convalescent Ctr.*, 144 Ariz. 6, 10, 695 P.2d 255, 259 (1985).

¶13 We conclude that Benkendorf's requested instruction was not legally proper. Although Benkendorf argues he was entitled to have the jury instructed about Judy's unusual susceptibility as a causation principle, his requested instruction relates only to damages. *Supra*, n.6. And, Benkendorf does not challenge the sufficiency of the causation instruction the court gave to the jury.

¶14 Additionally, this lawsuit stems from the heir's claim for wrongful death, not the decedent's claim for injuries caused by ACSC's alleged negligence. "In an action for wrongful death,

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of the Revised Arizona Jury Instructions ("RAJI") (Civil), Personal Injury Damages 2: Pre-Existing Condition, Unusually Susceptible Plaintiff (4th ed. 2005) at 109 ("You must decide the full amount of money that will reasonably and fairly compensate [plaintiff] for all damages caused by the fault of [defendant], even if [plaintiff] was more susceptible to injury than a normally healthy person would have been, and even if a normally healthy person would not have suffered similar injury.").

the jury shall give such damages as it deems fair and just with reference to the *injury* resulting from the death *to the surviving parties* who may be entitled to recover . . . ." Ariz. Rev. Stat. ("A.R.S.") § 12-613 (2003) (emphasis added). Thus, the jury may award damages for injuries suffered by the surviving parties—the injuries to the deceased are irrelevant to the determination of damages.[7] *See id.* ("injuries resulting *from the death*") (emphasis added); *Sedillo v. City of Flagstaff*, 153 Ariz. 478, 481-82, 737 P.2d 1377, 1380-81 (App. 1987) (allowable items of injury under the statute are loss of love, affection, companionship, consortium, personal anguish, and suffering). Consistent with A.R.S. § 12-613, the trial court properly instructed the jury on the type of damages recoverable by Benkendorf:

> If you find [ACSC] liable to [Benkendorf] you must then decide the full amount of money that will reasonably and fairly compensate [Benkendorf] for each of the following elements of damages proved by the evidence to have resulted from the death of [Judy].
>
> > 1. The loss of love, care, affection, companionship, . . . protection, and guidance since the death and in the future.

[7] We find support for this conclusion in the "use note" to the RAJI Benkendorf requested, which explains that the second paragraph is applicable "when there is an issue of *injury* to an unusually susceptible person." RAJI (Civil), at 109 (emphasis added).

> 2. The pain, grief, sorrow, anguish, stress, shock, and mental suffering already experienced and reasonably probable to be experienced in the future.

¶15 Accordingly, because the injuries suffered by Judy were irrelevant to a determination of damages, the trial court did not abuse its discretion when it denied Benkendorf's request for the eggshell instruction.[8]

CONCLUSION

¶16 For the foregoing reasons, and those discussed in the opinion filed herewith, we affirm the judgment.

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Presiding Judge

/s/
_____
JOHN C. GEMMILL, Judge

[8] We also agree with ACSC's argument that Benkendorf's request for the eggshell instruction was not filed within the timeframe established by the trial court prior to trial. This supports our conclusion that the court did not abuse its discretion in denying the request.