DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2012

RUBY SAUNDERS, individually and as Personal Representative of the Estate of Walter Saunders,
Appellant,

v.

WILLIS DICKENS, M.D.,
Appellee.

Nos. 4D09-5302 and 4D10-2062

[June 27, 2012]

TAYLOR, J.

In this medical malpractice action, appellant Ruby Saunders, individually and as personal representative of the Estate of Walter Saunders, timely appeals a final judgment entered after a defense verdict in favor of the defendant, Willis Dickens, M.D. Appellant also appeals a final fee judgment entered in favor of Dr. Dickens. We affirm both judgments.

This case arises out of Dr. Dickens' alleged negligence in failing to diagnose and treat Walter Saunders' cervical cord compression, a condition which eventually caused Mr. Saunders to suffer from quadriplegia.

Mr. Saunders first presented to Dr. Dickens, a neurologist, on July 7, 2003, with symptoms that Dr. Dickens' physical examination showed were consistent with lumbar stenosis. Dr. Dickens ordered an MRI of Mr. Saunders' brain and lumbar spine. He did not order a cervical MRI.

The radiology report stated that the lumbar spine MRI showed severe stenosis (or narrowing) of the spinal canal in the lumbar region. According to Dr. Dickens, neurologists defer to neurosurgeons on the subject of whether surgery should be done and the type of surgery required. On July 9, 2003, Dr. Dickens requested a neurosurgical consultation with Dr. Guillermo Pasarin. Later that month, Dr. Pasarin examined Mr. Saunders and operated on his lumbar spine to relieve the lumbar stenosis.

On September 11, 2003, Dr. Pasarin reported that Mr. Saunders' condition had not significantly improved. Dr. Pasarin thus ordered an MRI of Mr. Saunders' lower back, mid-back, and neck. According to Dr. Pasarin, Mr. Saunders did not have any issues of upper extremity dysfunction, even at that time. The new MRIs showed an incomplete decompression and continuing pressure on the lowest level of the spine, which meant that the lumbar surgery had not been successful. These MRIs also showed that Mr. Saunders had pressure on the spinal cord in the neck, or cervical myelopathy. On October 3, 2003, Mr. Saunders reported to Dr. Pasarin that his arms and hands had progressively worsened since the July surgery. Dr. Pasarin determined that Mr. Saunders had cervical myelopathy.

Based on the new MRIs and the clinical findings, Dr. Pasarin recommended that Mr. Saunders have cervical decompression surgery. Dr. Pasarin felt that the surgery should be performed within the next thirty days. Although Mr. Saunders was cleared for the surgery on November 6, 2003, Dr. Pasarin failed to schedule him for surgery in the month of November. In December 2003, Mr. Saunders developed a deep venous thrombosis, which prevented him from undergoing surgery. He was thereafter never able to have the cervical surgery.

Mr. Saunders and his wife initially sued Dr. Pasarin, Broward Neurosurgeons, LLC, and Broward General Medical Center, alleging that their negligence combined to render Mr. Saunders paraplegic[1] as a result of their failure to properly diagnose and treat his cervical cord compression in July 2003. Later, plaintiffs added Dr. Dickens as a defendant in the lawsuit. Mrs. Saunders' claim was for loss of consortium.

The plaintiffs settled with all defendants except Dr. Dickens. The case proceeded to trial in late 2009. Plaintiffs presented the expert testimony of a spinal surgeon and a neurologist. They also introduced the deposition testimony of the defense experts.

The plaintiffs' neurologist testified that the standard of care required a neurologist diagnosing Mr. Saunders to cover all of the areas that could be responsible for the symptoms, including the brain, the neck, the

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[1] By the time of trial, Mr. Saunders' condition progressed to quadriplegia. Mr. Saunders later passed away during the pendency of this appeal. His estate was subsequently substituted as the proper party pursuant to the appellee's Suggestion of Death.

thoracic spine, and the lumbar spine. He further testified that Dr. Dickens breached the standard of care by failing to order an MRI of Mr. Saunders' neck after his initial evaluation in July 2003.

The plaintiffs' surgical expert testified that had Mr. Saunders received a neck operation to remove the compression when Mr. Saunders first presented to Dr. Dickens in July 2003, Mr. Saunders would not have become quadriplegic. To have the best outcome, the cervical cord surgery should have been done as soon as possible after the diagnosis.

The defense, on the other hand, presented expert testimony that Dr. Dickens met the standard of care and that all of Mr. Saunders' gait problems in July 2003 were related to his lumbar disc disease. The defense also introduced the deposition testimony of Dr. Pasarin, which (unbeknownst to the jury) was given when Dr. Pasarin was still a defendant in the case. Dr. Pasarin believed that Mr. Saunders suffered from two problems occurring at two different times: in July 2003, Mr. Saunders was suffering from lumbar disc disease, and in September 2003, Mr. Saunders began suffering from cervical cord compression. Dr. Pasarin acknowledged that once the cervical compression condition was diagnosed on October 3, 2005, neck surgery needed to be done "in a timely fashion," meaning within a month.

Dr. Pasarin testified that the upper extremity findings in Dr. Dickens' July 7 note would not have prompted him to order an MRI of the neck. He also testified that had Dr. Dickens ordered a cervical MRI at that point, and the radiographic findings were identical to those ultimately seen in the September 27 films, Dr. Pasarin would still not have performed neck surgery if his exam did not find upper extremity dysfunction.

At the close of the evidence, Dr. Dickens moved for a directed verdict, arguing essentially that Dr. Pasarin's testimony made it impossible for the plaintiffs to prove that Dr. Dickens' negligence was a cause of harm to Mr. Saunders. The trial court denied the motion, reasoning that the issue was for the jury.

Before deliberations, the plaintiffs requested a special jury instruction based on this court's decision in *Letzter v. Cephas*, 792 So. 2d 481 (Fla. 4th DCA 2001). The trial court denied the request. The jury instructions included the standard instruction on apportionment of fault and the standard "concurring cause" instruction.

During closing argument, defense counsel argued that there was no

causation, relying on Dr. Pasarin's testimony that he would have done nothing different if he had seen an MRI of Mr. Saunders' cervical spine in July 2003. Defense counsel argued that the plaintiffs needed to prove that "[b]ut for Dr. Dickens not doing the MRI, the neck MRI, Dr. Pasarin would have operated on Mr. Saunders' neck in July. That is what the plaintiffs claim must be and it hasn't remotely come close." Counsel for the plaintiffs objected that this was not a correct statement of law and later argued that defense counsel was improperly shifting the burden of proof on the issue of Dr. Pasarin's negligence, which was an affirmative defense that Dr. Dickens had the burden to prove.

The jury returned a verdict finding no negligence on Dr. Dickens' part that was a legal cause of loss, injury, or damage to Mr. Saunders. The trial court entered a final judgment in accordance with the verdict and subsequently entered a final fee judgment against the plaintiffs.

On appeal, the plaintiffs raise four arguments: (1) the trial court should have struck Dr. Dickens' pleadings under section 766.206, Florida Statutes, which governs presuit investigation of medical negligence claims; (2) defense counsel's closing argument was improper and warrants a new trial; (3) the trial court erred in refusing to give a *Letzter* instruction; and (4) the trial court erred in entering a fee judgment jointly and severally against Mr. and Mrs. Saunders where Mrs. Saunders' claim was for loss of consortium.

As to the first issue, we find no abuse of discretion in the trial court's refusal to strike Dr. Dickens' responsive pleading under section 766.206, Florida Statutes (2005). The trial court correctly found that Dr. Dickens complied with all presuit requirements within the required timeframes. For reasons stated below, we also find no error in the trial court's refusal to grant a mistrial because of several allegedly improper comments by defense counsel in closing argument.

"A trial court has broad discretion in ruling on motions for new trial and mistrial, and its denial of such motions is reviewed under an abuse of discretion standard." *Philippon v. Shreffler*, 33 So. 3d 704, 709 (Fla. 4th DCA 2010). "Generally, a mistrial or new trial should be granted only when counsel's arguments are so inflammatory and prejudicial that they deny the opposing party a fair trial." *Maksad v. Kaskel*, 832 So. 2d 788, 793 (Fla. 4th DCA 2002).

Although attorneys are afforded wide latitude in presenting closing argument, they must "confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and

evidence." *Knoizen v. Bruegger*, 713 So. 2d 1071, 1072 (Fla. 5th DCA 1998). When arguing to the jury, a party may not make comments that mislead the jury as to the burden of proof. *Cf. Paul v. State*, 980 So. 2d 1282, 1283 (Fla. 4th DCA 2008). It is also improper for counsel to misstate the law during closing argument. *See City Provisioners, Inc. v. Anderson*, 578 So. 2d 855 (Fla. 5th DCA 1991) (misstatement of Florida law on remittitur and additur constituted improper closing argument).

Contrary to plaintiffs' contention, Dr. Dickens did not make an impermissible burden-shifting argument on the issue of Dr. Pasarin's negligence when Dr. Dickens argued that the plaintiffs failed to present testimony from any neurosurgeon that he would have done anything different than Dr. Pasarin. Rather, Dr. Dickens appeared to argue that the plaintiffs failed to present evidence of causation, in light of Dr. Pasarin's testimony that if Dr. Dickens had ordered a cervical MRI in July 2003 and the radiographic findings were identical to those seen in the September 2003 films, Dr. Pasarin still would not have conducted the cervical decompression surgery at that time, given that Dr. Pasarin's exam did not find any upper extremity dysfunction.

The cases that plaintiffs rely upon are easily distinguishable, as those cases involved situations where either (1) counsel made comments attacking opposing counsel or accusing opposing counsel of "hiding something," or (2) counsel had commented in closing argument on the failure of the other side to offer evidence that counsel had successfully excluded at trial. *See, e.g.*, *Chin v. Caiaffa*, 42 So. 3d 300, 309 (Fla. 2d DCA 2010) (improper for counsel to comment to the jury that opposing counsel was "try[ing] to fool you"); *Sanchez v. Nerys*, 954 So. 2d 630, 632 (Fla. 3d DCA 2007) (argument that defense counsel was "pulling a fast one" and "hiding something" was improper argument requiring a new trial); *Carnival Corp. v. Pajares*, 972 So. 2d 973, 975-76 (Fla. 3d DCA 2007) (improper for counsel, who has successfully excluded evidence, to seek an advantage before the jury because the evidence was not presented). Neither situation occurred in this case.

The question thus becomes whether defense counsel's causation argument was improper. We find that under current law in our district, defense counsel's causation argument was permissible. *See Ewing v. Sellinger*, 758 So. 2d 1196 (Fla. 4th DCA 2000). In *Ewing*, we affirmed a directed verdict in favor of an obstetrician, concluding that the plaintiffs failed to prove causation where the obstetrician's alleged negligence would not have affected the treatment decision of a subsequent physician and thus would not have affected the patient's outcome. We explained: "Thus, what Dr. Sellinger failed to do, i.e., continue Ewing's supervision

under the care of a physician, would not have affected the outcome in the instant case because the physician who was available to intervene and perform a c-section testified that he would not have done so." *Id.* at 1198.

Two of our sister courts have, however, rejected the reasoning of *Ewing*. *See Goolsby v. Qazi*, 847 So. 2d 1001, 1003 (Fla. 5th DCA 2003) ("We disagree with *Ewing* if it means that the negligent failure to diagnose a condition cannot be the cause of damages if a subsequent treater testifies that he would have shrugged off the correct diagnosis."); *Munoz v. S. Miami Hosp., Inc.*, 764 So. 2d 854, 857 (Fla. 3d DCA 2000) ("What the [non-party] doctor might or might not have done had he been adequately warned is not an element plaintiff must prove as a part of her case." (internal quotation marks omitted)).

In *McKeithan v. HCA Health Services of Florida*, 879 So. 2d 47 (Fla. 4th DCA 2004), we affirmed a directed verdict in a medical malpractice case, relying on *Ewing* as one of two grounds for affirming. However, in a concurring opinion, Judge Klein acknowledged: "I am not sure we were correct in *Ewing*." *Id.* at 49 (Klein, J., concurring).

In any event, based on *Ewing,* counsel's closing argument on causation in this case was proper. Moreover, unlike in *Ewing*, here the trial court declined to grant the defendant's motion for directed verdict, and, instead, submitted the case to the jury, thus allowing the plaintiffs to argue to the jury in closing why they should reject Dr. Dickens' causation argument.

As to the plaintiffs' third argument, we find that the trial court properly denied the request for a *Letzter* instruction.[2] In general, the standard of review for jury instructions is abuse of discretion. However, a party is entitled to have the jury instructed upon his theory of the case

[2] However, we note that the plaintiffs' agreement to a general verdict form would not, in itself, bar relief on this issue, as Dr. Dickens has suggested. Dr. Dickens' argument is premised on the "two-issue" rule, which states that "where there is no proper objection to the use of a general verdict, reversal is improper where no error is found as to one of two issues submitted to the jury on the basis that the appellant is unable to establish that he has been prejudiced." *Whitman v. Castlewood Int'l Corp.*, 383 So. 2d 618, 619 (Fla. 1980). But "the two-issue rule does not apply where, as here, the two 'defenses' involved comprised separate elements of proof (breach of duty and proximate cause) necessary for the plaintiffs to prevail on a single cause of action (negligence)." *Grenitz v. Tomlian*, 858 So. 2d 999, 1006 (Fla. 2003).

when there is evidence to support the theory. *Pollock v. CCC Invs. I, LLC*, 933 So. 2d 572, 574 (Fla. 4th DCA 2006); *Seaboard Coastline R. Co. v. Addison*, 502 So. 2d 1241, 1242 (Fla. 1987). Because a trial court's discretion in this area is limited by case law, *see Pollock*, "[i]t would seem that a more accurate statement of the standard of review may well be that giving or refusing jury instructions is reviewed under a mixed standard of de novo and abuse of discretion." *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 153 (Fla. 4th DCA 2006).

The party who asserts instructional error of this kind must show the following three elements: "(1) the requested instruction accurately states the law applicable to the facts of the case; (2) the testimony and other evidence presented support the giving of the instruction; and (3) the instruction was necessary to resolve the issues in the case properly." *Force v. Ford Motor Co.*, 879 So. 2d 103, 106 (Fla. 5th DCA 2004).

It is well-established that "a wrongdoer is liable for the ultimate result, although the mistake or even negligence of the physician who treated the injury may have increased the damage which would otherwise have followed from the original wrong." *Stuart v. Hertz Corp.*, 351 So. 2d 703, 707 (Fla. 1977) (quoting 57 Am.Jur.2d *Negligence* s. 149, at 507). Stated another way, an initial tortfeasor may be held responsible for all subsequent injuries, including those caused by medical negligence. *Caccavella v. Silverman*, 814 So. 2d 1145, 1146 (Fla. 4th DCA 2002).

The rule of *Stuart v. Hertz* applies "even when the initial tortfeasor is a physician as well." *Letzter v. Cephas*, 792 So. 2d 481, 485 (Fla. 4th DCA 2001). In *Letzter*, we held that if at least one view of the evidence supports the suggestion that the two physicians were *not* joint tortfeasors, but rather were initial and subsequent tortfeasors, then a *Stuart v. Hertz* instruction is proper. *See id.* at 486-88; *see also Barrios v. Darrach*, 629 So. 2d 211, 213 (Fla. 3d DCA 1993) (*Stuart v. Hertz* instruction should be given where inconsistent theories of causation exist). We defined "joint tortfeasors" as those who act together in committing wrong or whose acts, if independent of each other, unite in causing a single injury. *Letzter*, 792 So. 2d at 486. Whether or not defendants are joint tortfeasors is a question of fact determined by the circumstances of the particular case. *Id.*

In *Letzter* we acknowledged that a *Stuart v. Hertz* instruction would be "awkward when the plaintiff chooses to sue both tortfeasors in the same lawsuit and is particularly problematic when both tortfeasors are physicians." *Id.* at 488. We further noted that the instruction seemed

"at odds with the legislative purposes of chapter 768 which show a preference for making each tortfeasor liable only for his own negligence." *Id.* For that reason, we certified to the Florida Supreme Court the question of whether *Stuart v. Hertz* is still good law since the passage of the Tort Reform and Insurance Act of 1986, and whether *Stuart v. Hertz* applies when the initial cause of action is one in medical malpractice. *Id.* However, the Florida Supreme Court has declined to answer these certified questions.

In this case, the record evidence arguably supports the theory that Dr. Dickens and Dr. Pasarin were *joint* tortfeasors whose negligence united in causing a single injury to the plaintiff. But the evidence does not support the conclusion that Dr. Dickens and Dr. Pasarin were "initial and subsequent" tortfeasors within the meaning of *Letzter*. Although there was evidence at trial regarding Dr. Pasarin's negligence in failing to completely decompress Mr. Saunders' lumbar spine, the plaintiffs were not seeking damages for Dr. Pasarin's negligence in this regard, and it was undisputed that Mr. Saunders needed the lumbar surgery *regardless* of whether Dr. Dickens failed to diagnose the additional problem in Mr. Saunders' neck. We thus conclude that the trial court properly denied the plaintiffs' request for a *Letzter* instruction.

On the fourth and final issue, Mrs. Saunders, whose sole claim was for loss of consortium, argues that the trial court erred when it entered a final fee judgment[3] jointly and severally against both plaintiffs.[4]

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[3] After the plaintiffs filed a notice of appeal as to the final judgment of attorney's fees, the trial court entered an amended final judgment of attorneys' fees *nunc pro tunc* to the date of entry of the final judgment of attorney's fees. We find that this amended final judgment of attorneys' fees was a nullity. *See Schultz v. Schickedanz*, 884 So. 2d 422, 424 (Fla. 4th DCA 2004) ("'[A] trial court is divested of jurisdiction upon notice of appeal *except* with regard to those matters which do not interfere with the power and authority of the appellate court *or with the rights of a party to the appeal which are under consideration by the appellate court.*'") (citation omitted; emphasis added). When the plaintiffs filed a notice of appeal of the final judgment of attorney's fees, this divested the trial court of jurisdiction because the amended fee judgment interfered with the authority of the appellate court with regard to the matters under consideration in the appeal of the original final judgment of attorney's fees. Once the notice of appeal was filed, the trial court lacked jurisdiction to enter the amended final fee judgment *nunc pro tunc* to the date of the first final fee judgment. *Cf. Jesus v. State*, 31 So. 3d 309, 310 (Fla. 4th DCA 2010) ("Once the notice of appeal was filed, the trial court lacked jurisdiction to enter the corrected judgment nunc pro tunc to the date of the first judgment.").

However, there is no indication in the record that the plaintiffs raised this issue before the trial court. Accordingly, the issue was not preserved. *See Precision Tune Auto Care, Inc. v. Radcliffe,* 804 So. 2d 1287, 1291 n.2 (Fla. 4th DCA 2002) (arguments not preserved because, without transcript of hearing, there is no record they were made to the trial court); *Reis v. Reis*, 739 So. 2d 704, 706 (Fla. 3d DCA 1999) ("We see no indication that this point was called to the attention of the trial judge. The point is therefore not preserved for appellate review.").

For the foregoing reasons, we affirm both the final judgment entered in favor of the defendant, Willis Dickens, M.D., and the final judgment on attorneys' fees.

Affirmed.

CIKLIN and GERBER, JJ., concur.

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Consolidated appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Victor Tobin and Peter M. Weinstein, Judges; L.T. Case No. 05-10124 CACE (12).

Douglas F. Eaton of Eaton & Wolk, PL, Miami, for appellant.

Nancy W. Gregoire of Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale, and Richard T. Woulfe of Bunnell and Woulfe, P.A., Fort Lauderdale, for appellee.

Not final until disposition of timely filed motion for rehearing.

[4] The trial court found that Dr. Dickens was entitled to attorney's fees because Mr. and Mrs. Saunders rejected proposals for settlement in the respective amounts of $140,000 and $10,000, with entitlement to the fees running from the date of those proposals.