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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BOARD OF TRUSTEES OF THE)
UNIVERSITY OF SOUTH FLORIDA)
d/b/a UNIVERSITY OF SOUTH)
FLORIDA d/b/a UNIVERSITY OF)
SOUTH FLORIDA COLLEGE OF)
MEDICINE,)
)
Appellant,)
)
v.)
)
LISA-MARIA CARTER,)
)
Appellee.)
_____)

Case No. 2D18-1219

Opinion filed May 22, 2020.

Appeal from the Circuit Court for
Hillsborough County; Martha J. Cook,
Judge.

Hala Sandridge and Chance Lyman of
Buchanan Ingersoll & Rooney PC,
Tampa, for Appellant.

George A. Vaka and Nancy A. Lauten of
Vaka Law Group, Tampa, for Appellee.

KELLY, Judge.

The Board of Trustees of the University of South Florida d/b/a University
of South Florida d/b/a University of South Florida College of Medicine (USF) appeals

from the final judgment in favor of Lisa-Maria Carter in a medical malpractice action. Because errors by the trial court prevented USF from presenting its defense to Ms. Carter's claim, we must reverse and remand for a new trial.

Ms. Carter underwent outpatient laparoscopic abdominal surgery at Tampa General Hospital. Her surgeon, a gynecologist specializing in minimally invasive surgery, was employed by USF. When she did not recover as expected following the surgery, Ms. Carter's surgeon admitted her to the hospital for observation. Over the next several hours her condition continued to deteriorate, and she was transferred to the intensive care unit (ICU). In the ICU, her condition worsened to the point that she nearly died. Ms. Carter alleged that throughout this time, her surgeon and a team of critical care providers oversaw her care. Eventually, the critical care providers came to believe Ms. Carter's condition was probably the result of an abdominal infection. They began to administer antibiotics, and a second surgery was performed to determine the source of the infection.

The surgeon who performed the second surgery discovered a perforation in Ms. Carter's small bowel. He also found that Ms. Carter had developed necrotizing fasciitis which had destroyed a large portion of her abdominal tissue. Because of complications from the infection and from the treatment she received while in the ICU, Ms. Carter sustained catastrophic, life-altering injuries. She had to undergo multiple surgeries and was hospitalized for five months before she could be discharged to a rehabilitation facility.

Ms. Carter filed a medical malpractice claim against her surgeon, the hospital, and USF. The critical care team had settled with Ms. Carter before she filed

suit. Eventually, the case went to trial against the hospital and USF. At trial, Ms. Carter sought to prove that her surgeon had perforated her bowel during the surgery and that her injuries were caused by the failure of everyone involved in her care, including the critical care team, to timely diagnose her condition and begin administering antibiotics. Ms. Carter presented the testimony of an ICU expert who opined that had antibiotics been administered in a timely manner, she would not have sustained the injuries for which she sought to recover.

USF's defense was twofold: its surgeon did not depart from the standard of care when he performed the surgery, and even if he had, his alleged negligence did not cause Ms. Carter's injuries. Rather, the injuries were the result of the critical care team's failure to timely administer antibiotics. USF's surgeon denied that he had injured the bowel during the surgery, and USF presented expert testimony that the perforation had occurred postoperatively. Both parties' gynecological experts testified that even if the injury to the bowel had occurred during the surgery, that that in and of itself was not a departure from the standard of care. Rather, it was the alleged failure to discover the injury before concluding the surgery that Ms. Carter's gynecological expert said departed from the standard of care.

At the conclusion of the evidence, the trial court dismissed the hospital from the case because Ms. Carter had not established it could be held vicariously liable for any of the providers alleged to have been negligent, including the critical care team. As for its nurses, the trial court found that Ms. Carter had failed to prove their alleged negligence was a legal cause of Ms. Carter's damages. Because the hospital had been dismissed from the case, and thus could not be held vicariously liable for the alleged

negligence of the critical care team, USF sought to have the critical care team placed on the verdict form as Fabre¹ defendants. USF asserted that in the event the jury found its surgeon was liable to Ms. Carter, the jury should be allowed to apportion liability between it and the critical care team. The trial court denied the request. Thus, the case went to the jury with USF as the only defendant. The jury was unable to reach a verdict.

The case was again set for trial. USF renewed its request to have the critical care team added to the verdict form as Fabre defendants. The court granted the request over Ms. Carter's objections. Before the case could go to trial for the second time, however, a new judge was assigned to the case, and Ms. Carter again sought to prevent USF from adding the critical care providers to the verdict form. Ms. Carter filed a motion for summary judgment on liability and on USF's Fabre defense in which she argued that USF was an initial tortfeasor and, therefore, it was responsible for the subsequent negligence of the critical care providers. She also filed a motion in limine on the same grounds in which she sought to preclude USF from presenting evidence or arguing that any provider other than Ms. Carter's surgeon and his team were negligent.

The judge denied the motion for summary judgment but entered what she characterized as an order granting Ms. Carter's motion in limine. She ruled that USF could not place the critical care team on the verdict form, nor could it present to the jury any evidence or argument regarding their negligence. She went so far as to determine that, as a matter of law, "USF is the sole alleged tortfeasor." It appears from the order that she may have erroneously believed that the directed verdict in favor of the hospital

¹Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), receded from in part by Wells v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 659 So. 2d 249 (Fla. 1995).

had been based on a determination that the critical care team was not negligent, when in fact the directed verdict resulted from Ms. Carter's inability to prove the hospital was vicariously liable for their actions. While the order states it was denying the motion for summary judgment, in substance it granted the relief sought in the summary judgment motion—USF could not offer testimony or argument that it was not the legal cause of Ms. Carter's injuries because the injuries were caused by the negligence of the critical care team in failing to timely order antibiotics.

At the second trial, and notwithstanding the trial court's order, Ms. Carter presented the testimony of her ICU expert who again testified at length regarding the failure to timely administer antibiotics to Ms. Carter. He opined that the failure to timely order antibiotics and timely intervene surgically to diagnose Ms. Carter's condition were breaches of the standard of care. As to the cause of her injuries, he testified that by eleven o'clock in the evening, the critical care team had enough information to identify the source of Ms. Carter's infection, and that by failing to start antibiotics during the next three to four hours they breached the standard of care and that was the cause of her injuries. He opined that had this been done, "I actually wouldn't have thought any of this would have happened." He also testified that it was not clear who specifically was responsible for this failure and that he did "not know exactly where this lies" between the critical care team and Ms. Carter's surgeon. The second trial ended in a mistrial when the jury could not reach a verdict.

When the case was set for a third trial, the trial judge stated that all her rulings from the second trial would stand, that she would admit all exhibits and witness testimony from the second trial, and that any witness on the parties' witness list could be

called at trial. Ms. Carter again listed her expert on the critical care team, as did USF. USF again sought, unsuccessfully, to add the critical care team to the verdict form as Fabre defendants. Despite having announced his intention to call Ms. Carter's ICU expert, when the time came to call him, counsel for Ms. Carter announced he would not be calling the expert after all. Given this, USF sought to admit his testimony, but the trial judge refused to allow it. Thus, the jury in the third trial heard much the same evidence presented to the first two juries, but minus the testimony of the ICU expert regarding the critical care team's failure to timely diagnose and treat Ms. Carter's infection and his opinion that this was the cause of her injuries. The third jury returned a verdict against USF.

In this appeal, USF argues it was denied a fair trial because the trial court's pretrial ruling on Ms. Carter's "motion in limine" and its exclusion of the ICU expert's testimony prevented it from arguing its defense that its alleged negligence was not the legal cause of Ms. Carter's damages. Further, USF argues it was entitled to have the critical care providers listed on the verdict form as Fabre defendants so the jury could apportion fault among any parties it found caused Ms. Carter's damages. USF also challenges the trial court's use of Florida Standard Jury Instruction, Civil, 501.5(c), which required the jury to hold USF responsible for the negligence of any other tortfeasors. We agree the trial court erred and accordingly, we reverse.

USF's Causation Defense

In addition to asserting that its surgeon did not deviate from the standard of care, USF asserted that the surgeon's alleged negligence, if any, was not the legal cause of Ms. Carter's injuries. Instead, the negligence of the critical care team was the

sole legal cause. Sometimes referred to as an "empty chair" defense, it allows a defendant to " 'point to an empty chair' by arguing that 'a non-party is responsible for the plaintiff's injuries.' " Vila v. Philip Morris USA Inc., 215 So. 3d 82, 85 (Fla. 3d DCA 2016) (quoting Black v. Montgomery Elevator Co., 581 So. 2d 624, 625 (Fla. 5th DCA 1991)). "To present an 'empty chair' defense, the defendant need only answer the complaint with a general denial and argue to the jury that the injury was due to the negligence of a non-party to the suit." Id. "[U]nlike a Fabre defendant, this non-party is not placed on the verdict form and there is no apportionment of fault." Vucinich v. Ross, 893 So. 2d 690, 694 (Fla. 5th DCA 2005) (quoting Phillips v. Guarneri, 785 So. 2d 705, 707 n.4 (Fla. 4th DCA 2001)); see also Loureiro v. Pools By Greg, Inc., 698 So. 2d 1262, 1264 (Fla. 4th DCA 1997) ("Even had the issue of non-party liability been omitted from the instructions and the verdict form, Pools could still have contended at trial that it was not negligent and that the negligence of others was the sole legal cause of injury.").

By granting the "motion in limine" and refusing to allow USF to present the testimony of Ms. Carter's ICU expert who had opined that the failure to timely start antibiotics caused Ms. Carter's injuries, the trial court deprived USF of its causation defense, the denial of which is a violation of due process. See State Farm Mut. Auto. Ins. Co. v. Bowling, 81 So. 3d 538, 541-42 (Fla. 2d DCA 2012) (stating that a trial court should exclude a witness only "under the most compelling of circumstances," especially where excluding the witness will leave a party unable to present evidence supporting her theory of the case). Because the successor judge erroneously concluded that the jury could not hear USF's empty chair argument, a new trial is warranted. See Phillips,

785 So. 2d at 709 (granting a new trial when the order in limine precluded an empty chair argument).

Apportionment of Fault

In support of her argument that USF could not add the primary care team as Fabre defendants, or argue that their negligence caused her damages, Ms. Carter argued that USF's surgeon was the initial tortfeasor and therefore, under Stuart v. Hertz Corp., 351 So. 2d 703 (Fla. 1977), USF was liable for all subsequent negligence by other treating doctors. Under Stuart,

"[w]here one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor."

Id. at 707 (quoting J. Ray Arnold Corp. v. Richardson, 141 So. 133, 135 (Fla. 1932)).

Stuart does not apply in cases involving joint tortfeasors. See Leesburg Hosp. Ass'n v. Carter, 321 So. 2d 433, 434 (Fla. 2d DCA 1975). In concluding that Stuart applied, the trial court made two errors.

First, the court determined as a matter of law that USF's surgeon and the critical care team were not joint tortfeasors. Whether two physicians are joint tortfeasors is a question of fact that should be submitted to a jury. Letzter v. Cephas, 792 So. 2d 481, 486 (Fla. 4th DCA 2001); see also Caccavella v. Silverman, 814 So. 2d 1145, 1148 (Fla. 4th DCA 2002). Second, the court erred in concluding that USF's surgeon was an initial tortfeasor under Stuart. The court based its conclusion on the

belief that the initial injury was the perforation of Ms. Carter's bowel and that it was undisputed that the perforation occurred during the surgery. Not only was this disputed, but under Stuart, the initial injury must be the result of negligence. Even Ms. Carter's gynecological expert—who believed USF's surgeon perforated the bowel—did not testify that in doing so, his conduct fell below the standard of care. Rather, he testified that it was the failure to realize there had been an injury that fell below the standard of care. Thus, regardless of when the bowel was perforated, the injury cannot constitute the "initial injury" under Stuart, and the trial court erred in its application of Stuart.

Jury Instructions

USF next argues that it was error for the trial court to give standard jury instruction 501.5(c). This instruction would apply, if at all, in a case where Stuart was applicable. While USF invites us to decide whether this instruction is appropriate even where Stuart applies, we decline to do so. The trial court gave this instruction here because it believed Stuart was applicable. As we have explained, it is not. Thus, we need not decide whether jury instruction 501.5(c) is *ever* appropriate.

Conclusion

The trial court's erroneous conclusion that USF was the sole and the initial tortfeasor in this case prevented USF from presenting its causation defense to the jury. It also prevented USF from asking the jury to apportion damages among all responsible parties if the jury found USF liable. These errors deprived USF of a fair trial and require that we reverse the judgment against it and remand for yet another trial.

Reversed and remanded.

LaROSE and SALARIO, JJ., Concur.