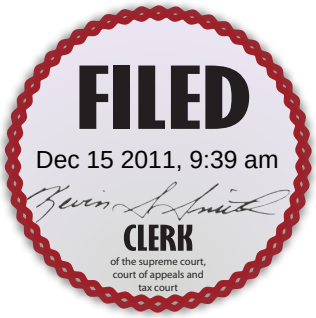

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IN THE COURT OF APPEALS OF INDIANA

P. BRYAN LILLY, D.O.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 19A04-1104-CT-193
	)	
TAMMY MESERVE, as Natural Guardian of Samantha Jo Aders, Darien Marie Aders and Mason James Aders, minors,	)	
	)	
Appellee.	)	

APPEAL FROM THE DUBOIS SUPERIOR COURT
The Honorable Mark R. McConnell, Judge
Cause No. 19D01-0810-CT-195

December 15, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

P. Bryan Lilly, D.O., appeals the judgment in favor of Tammy Meserve, as the guardian of her three minor children with Chad Aders, based on a complaint in which she alleged that Dr. Lilly's negligence resulted in Aders's death. We affirm in part, reverse in part, and remand.

Issues

Dr. Lilly raises two issues, which we consolidate and restate as whether any error in the admission of certain evidence was reversible error. On cross-appeal, Meserve raises one issue, which we restate as whether the trial court properly denied her request for attorney fees.

Facts

On July 30, 2004, Aders went to the emergency room at Memorial Hospital and Health Care Center in Jasper complaining of back pain. Dr. Lilly prescribed Aders a 75-microgram Duragesic patch, which is stuck on the body and allows for gradual and slow absorption of fentanyl through the skin. Fentanyl is an extremely potent narcotic and about a hundred times more potent than morphine. The recommend dosage for Aders was 12.5 micrograms because he was taking other prescription drugs that were central nervous system depressants. Aders had the prescription filled on August 3, 2004, and was found dead on August 4, 2004.

Meserve, as the guardian of her and Aders's three children, filed a complaint alleging that Dr. Lilly negligently caused Aders's death. A three-day jury trial began on January 18, 2011. The jury found in favor of Meserve and awarded each child $400,000

and awarded Meserve $6,394.72 in funeral and burial expenses, for a total verdict in the amount of $1,206,394.72 against Dr. Lilly.

On February 11, 2011, Meserve filed a petition for $165,094.49 in attorney fees, expenses, and costs. On February 22, 2011, Dr. Lilly filed a motion to correct error, arguing in part that the trial court improperly admitted Exhibit 4 into evidence. On April 1, 2011, after a hearing, the trial court denied Dr. Lilly's motion to correct error. On May 23, 2011, the trial court denied Meserve's request for attorney fees. Dr. Lilly and Meserve now appeal.

Analysis

I. Admission of Evidence

After Aders's death, the Spencer County Coroner's Office prepared an autopsy report.[1] Included in the autopsy report was an eight-page summary of a toxicology report prepared by AIT Laboratories. Neither the complete autopsy report nor the complete toxicology report were offered or admitted into evidence at trial. Instead, Meserve introduced the eight-page toxicology summary included in the autopsy report as Exhibit 4. Exhibit 4 was admitted into evidence over Dr. Lilly's hearsay objection pursuant to the business records and public records exception of Indiana Evidence Rule 803. In his motion to correct error, Dr. Lilly also argued that Exhibit 4 was not properly

[1] It is unclear whether there was a separate Spencer County Coroner's report or whether the parties used the terms "coroner's report" and "autopsy report" interchangeably. No separate coroner's report was included in the record as an exhibit or by way of an offer of proof. Regardless, it does not appear that the difference between the two reports as explained by Dr. Lilly on appeal is relevant to the issues raised on appeal. Accordingly, we refer to the autopsy report and the coroner's report collectively as the "autopsy report."

authenticated as a public record. On appeal, Dr. Lilly contends that Exhibit 4 was inadmissible because it was not properly authenticated and because it was inadmissible hearsay.

Dr. Lilly also argues that trial court erred in allowing experts to testify to information contained in the autopsy report. Specifically, Dr. Lilly points to expert testimony, including his own, stating that the autopsy report indicated that the patch was affixed to Aders's chest when he was found dead. See Tr. pp. 306, 664. Dr. Lilly also identifies expert testimony indicating that the autopsy report listed the cause of death as "respiratory failure as a result of Fentanyl toxicity." Id. at 257; see id. at 542. Dr. Lilly also directs us to expert testimony that the autopsy report concluded Aders's "death was secondary to narcotic excess." Id. at 350. Finally, Dr. Lilly points to the admission of expert testimony discussing the contents of Exhibit 4, which was part of the autopsy report.[2]

Dr. Lilly asserts that the experts should only have been permitted to state that they relied on these documents and should not have been permitted to testify as to the information and opinions contained in these documents. See Faulkner v. Markkay of Indiana, Inc., 663 N.E.2d 798, 801 (Ind. Ct. App. 1996) ("We cannot allow an expert's reliance on hearsay to be employed as a conduit for placing the physicians' statements before the jury. The expert witness must rely on his own expertise in reaching his

[2] In his appellate brief, Dr. Lilly directs us to two other colloquies. The first involved various objections by Dr. Lilly, but the actual testimony by the expert concerned only his opinion as to whether it was below the standard of care for Dr. Lilly to prescribe the 75 microgram patch. See Tr. p. 241. The second involved that same expert's opinion regarding whether Dr. Lilly's decision to prescribe the 75-microgram patch was the cause of Aders's death. See id. at 242. We do not agree with Dr. Lilly's assessment of this testimony as an expert witness improperly testifying to the content the autopsy report.

opinion and may not simply repeat opinions of others." (footnote omitted), trans. denied). Dr. Lilly contends that, without Exhibit 4 or this testimony, there is no evidence Aders used that patch or that fentanyl was in his blood at the time of his death.

Even if Exhibit 4 and the autopsy report were inadmissible, rendering expert testimony relating the contents of those documents improper, the erroneous admission of that evidence is harmless because it is cumulative of other properly admitted evidence from which the jury could have inferred that Aders used the patch and that the patch caused his death. The erroneous admission of evidence is disregarded as harmless error unless it affects the substantial rights of a party. Sibbing v. Cave, 922 N.E.2d 594, 598 (Ind. 2010). "Likewise, reversible error cannot be predicated upon the erroneous admission of evidence that is merely cumulative of other evidence that has already been properly admitted." Id. "To determine whether the admission of evidence affected a party's substantial rights, we assess the probable impact of the evidence upon the jury." Id.

Dr. Lilly does not argue that he did not owe Aders a duty or that his prescribing the patch did not fall below the standard of care. See Spar v. Cha, 907 N.E.2d 974, 979 (Ind. 2009) (observing that in a medical malpractice action, a plaintiff must establish: "(1) a duty on the part of the defendant physician in relation to the plaintiff, (2) failure of the physician to meet the requisite standard of care, and (3) an injury to the plaintiff resulting from that failure."). Dr. Lilly specifically argues, "Even if [Meserve] proved that it was below the standard of care for Dr. Lilly to prescribe the 75-microgram Duragesic patch to Mr. Aders, [she is] unable to prove the third element of the claim

without the erroneously admitted evidence." Appellant's Br. pp. 18-19. Accordingly, the basis for establishing that Dr. Lilly was harmed by the admission of this evidence is as it relates to the issue of causation. "A negligent act is the proximate cause of an injury if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated."[3] Bader v. Johnson, 732 N.E.2d 1212, 1218 (Ind. 2000).

Indiana Evidence Rule 703 provides in part, "Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field." Our supreme court has specifically concluded, both before and after the adoption of the Indiana Rules of Evidence, that it is proper "for an expert to give an opinion based upon an autopsy report prepared by another." Ealy v. State, 685 N.E.2d 1047, 1056 (Ind. 1997). Thus, even if the expert witnesses were not permitted to testify directly to the contents of the autopsy report, including Exhibit 4, they were permitted to give their own opinions based on the autopsy report.

In his reply brief Dr. Lilly acknowledges that Dr. Rodgers, one of Meserve's experts who specializes in medical toxicology, testified that the cause of death was the

[3] Dr. Lilly does not make any argument regarding foreseeability. At trial, Dr. Lilly agreed that, even assuming Aders was an appropriate candidate for the Duragesic patch, the manufacturer's recommended dose for Aders was 25 micrograms and that, because of Aders' other prescription medications, it was recommended that that dose be reduced by fifty percent. See Tr. pp. 658-59. Dr. Lilly acknowledged the manufacturer warned that improper dosing could result in hypoventilation, profound sedation, and coma, and that these effects could lead to death. See id. at 660-61. Dr. Lilly also testified that he was unaware and should have been aware of the manufacture's warnings regarding patients taking other central nervous system depressants when he prescribed the patch. Id.

fentanyl prescription without referring to Exhibit 4 or the autopsy report. Specifically, the following exchange took place between Dr. Rodgers and Meserve's counsel:

> Q. . . . . Do you have an opinion as to whether Dr. Lilly's decision to prescribe this patch was the cause of Mr. Aders' death?
>
> A. Yes.
>
> Q. And what is your conclusion in that regard?
>
> A. I think Mr. Aders' death was caused by narcotic excess, probably in conjunction with the other medications he was taking, and I think that had that patch not been prescribed, he would still be alive.
>
> Q. And when you say narcotic excess, what particular drug are you talking about?
>
> A. I'm talking about the Fentanyl in the patch.

Tr. pp. 329-30.

Dr. Lilly compares this testimony to his experts' testimony that Dr. Lilly complied with the standard of care[4] and asserts that, without the improper evidence, the jurors might have given more weight to his experts' testimony and found he was not liable. The testimony that Dr. Lilly relies on in making this argument, however, relates to whether he breached the standard of care by prescribing the patch, not to the issue of causation. Dr. Lilly does not direct us to any evidence indicating that the patch did not cause Aders's death. In light of Dr. Rodgers's uncontested and unequivocal opinion regarding

[4] It is notable that Dr. Lilly testified that, in the exercise of reasonable care, he should have followed the manufacturer's warnings. See Tr. p. 661.

causation and the lack of evidence to contrary, any error in the admission of Exhibit 4 or the content of the autopsy report did not impact Dr. Lilly's substantial rights.

This conclusion is further confirmed by our review of the record, which includes other expert opinion testimony regarding the cause of Aders's death. For example, Meserve's other expert, Dr. Serra, who specializes in emergency medicine, testified that it was his opinion that Aders "would not have died if he hadn't had the Duragesic patch." Tr. pp. 281-82. Although Dr. Lilly objected to scope of Dr. Serra's expertise during his earlier testimony, Dr. Lilly did not renew this objection and does not raise this issue on appeal.

Further, the following exchange took place on cross examination between Meserve's counsel and one of Dr. Lilly's experts:

> Q. And you agree, Doctor, that Mr. Aders probably wouldn't have died but for Dr. Lilly's decision to prescribe the 75 microgram patch, don't you?
>
> A. Again, I've gone back and forth on that. At one time I thought possibly yes, but again, I can't say exactly why he died. So I have hard time saying that, but I know I've gone back and forth on that and it's been a tough decision for me.

Id. at 505. This doctor was then questioned about his deposition testimony in which he agreed with the statement that Aders probably would not have died on August 4, 2004, if Dr. Lilly had not prescribed the 75-microgram patch. See id.

Finally, although Dr. Lilly elicited testimony from Dr. Rodgers indicating that Elavil, another prescription drug Aders was taking, can cause death, Dr. Rodgers testified:

> my conclusion is that Fentanyl was the primary cause of death. Now, to the extent that his other [central nervous system] depressant drugs, Xanax, Flexeril and his Elavil contributed, I think they contributed. I can't tell you how much. I think he'd been on Elavil and the Xanax for years, getting his prescriptions filled pretty regularly. The Flexeril had been added three days before. I think those three in combination he had done okay with. Uh, I think when you add the patch that's when he got in trouble and I think that's what killed him.

Id. at 361-62. Dr. Rodgers then stated that he did not think Aders would have died but for Dr. Lilly's decision to prescribe the 75-microgram patch. See id. at 362. Finally, Dr. Rodgers concluded his testimony by stating, "I'm pretty certain that this was caused by Fentanyl. I mean nothing is a hundred percent . . . , I can't put a number on it but ninety, ninety-five plus percent." Id. at 394.

Based on our review of the record, we conclude that any error in the admission of Exhibit 4 or the testimony relating the contents of autopsy report was harmless in light of the other expert opinion testimony concerning the cause of Aders's death. Dr. Lilly has not established that the admission of this evidence amounts to reversible error.

II. Attorney Fees

Meserve argues that the denial of her petition for attorney fees was improper in light of our supreme court's June 29, 2011 decision in McCabe v. Commissioner, Indiana Dept. of Ins., 949 N.E.2d 816, 821 (Ind. 2011). In rendering its decision, the McCabe court observed that the General Wrongful Death Statute, Indiana Code Section 34-23-1-1, expressly permits "recovery of specified types of pecuniary damages including attorney fees and costs and expenses of administration and prosecution of the action." McCabe,

949 N.E.2d at 818. Accordingly, Meserve argues that she is statutorily entitled to attorney fees, and Dr. Lilly does not dispute this point.

Dr. Lilly argues, however, that his maximum liability as a provider under the Medical Malpractice Act is $250,000 and that if we uphold the verdict against him, "he will already be liable for the maximum of $250,000, and any excess attorney's fees will not increase the judgment against Dr. Lilly beyond the statutory cap." Appellant's Reply Br. p. 15. Meserve agrees that Dr. Lilly's liability is capped at $250,000 but argues that a judgment can be entered against Dr. Lilly in the amount of $1,250,000, with the remainder to be paid by the Indiana Patient's Compensation Fund ("the Fund").

Indiana Code Section 34-18-14-3 provides in part:

> (a) The total amount recoverable for an injury or death of a patient may not exceed the following:
>
> * * * * *
>
> (3) One million two hundred fifty thousand dollars ($1,250,000) for an act of malpractice that occurs after June 30, 1999.
>
> (b) A health care provider qualified under this article (or IC 27-12 before its repeal) is not liable for an amount in excess of two hundred fifty thousand dollars ($250,000) for an occurrence of malpractice.
>
> (c) Any amount due from a judgment or settlement that is in excess of the total liability of all liable health care providers, subject to subsections (a), (b), and (d), shall be paid from the patient's compensation fund under IC 34-18-15.

(Emphasis added).

In Hematology-Oncology of Indiana, P.C. v. Fruits, 950 N.E.2d 294, 297 (Ind. 2011), also decided on June 29, 2011, our supreme court found "the parties are correct in their agreement that the total judgment against the provider cannot exceed $250,000, which includes both the jury's damage verdict of $229,148 and $20,852 of the attorney fees and expenses." Although the Fruits court used the term judgment, it acknowledged earlier that the plaintiff did "not dispute the provider's aggregate liability is limited to $250,000." Fruits, 950 N.E.2d at 296 (emphasis added). Moreover, the Fruits court specifically declined to consider the provider's argument regarding the Fund's liability on the remaining $87,657.95 of attorney fees and expenses. For these reasons, Fruits is not directly on point for the issue of determining whether a judgment exceeding $250,000 may be entered against Dr. Lilly.

Instead, we are guided by Indiana Patient's Compensation Fund v. Brown, 949 N.E.2d 822, 823 (Ind. 2011), decided the same day as McCabe and Fruits, in which our supreme court held the Fund was liable for expenses, including contingent attorney fees, under the Adult Wrongful Death Statute. The Brown court observed, "the Court of Appeals correctly noted that damages in actions under Indiana's wrongful death statutes must be compensatory in nature." Brown, 949 N.E.2d at 824. The Brown court reiterated our conclusion that attorney fees, probate administration costs, and litigation costs are compensatory damages that remedy actual pecuniary losses and that there is no compelling reason why these damages should not be allowed. Id. Based on this language in Brown and the specific reference to "judgment" in Indiana Code Section 34-18-14-3(c), we believe that on remand the trial court may impose a judgment against Dr.

Lilly exceeding $250,000 but that his liability will be capped at $250,000. And, as Meserve concedes, she may not recover more than the statutory cap of $1,250,000 from Dr. Lilly and the Fund collectively.

Conclusion

Any error in the admission of Exhibit 4 or the expert testimony relating the content of the autopsy report did not affect Dr. Lilly's substantial rights and was harmless. The trial court improperly denied Meserve's request for attorney fees, and we remand for the calculation of such. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

ROBB, C.J., and BRADFORD, J., concur.