Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00111-CV

Heramb K. **SINGH**, M.D.,
Appellant

v.

Kendra **PAYAN**, as Personal Representative of the Estate of Perla Montes,
Appellee

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2011CVT001181 D1
Honorable Joe Lopez, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: August 29, 2018

AFFIRMED

Heramb K. Singh, M.D. appeals the trial court's judgment against him for medical negligence, arguing the trial court abused its discretion by excluding portions of expert testimony and by submitting an erroneous instruction in the jury charge. We affirm the trial court's judgment.

BACKGROUND

Perla Montes suffered from end stage renal disease requiring hemodialysis. Montes's vascular surgeon placed an arteriovenous graft ("AV graft") in her left forearm. The AV graft became clogged and clotted less than a month after placement, requiring intervention to allow for

dialysis. When the vascular surgeon was not available, Singh, a board certified interventional radiologist, was contacted to render treatment. On December 19, 2009, Singh performed a left arm arterial venous declotting procedure using a pharmaco-mechanical "trellis" device and angioplasty. Complications arose later that day, and Montes's left hand and forearm were amputated on December 23, 2009. Montes sued Singh for medical negligence in 2011. Montes died on December 3, 2012. Her daughter, Kendra Payan, proceeded with the lawsuit as personal representative of Montes's estate.

Along with himself, Singh designated Carl Blond, M.D., a board certified nephrologist, and Michael Wholey, M.D., a board certified interventional radiologist, as testifying expert witnesses regarding the "medical standard of care and/or proximate cause." Prior to trial, Payan filed a motion to exclude the testimony of Dr. Wholey regarding proximate cause and standard of care. The trial court ruled that Dr. Wholey would be permitted to testify concerning standard of care, but excluded his testimony regarding proximate cause.

During trial, the trial court sustained a relevance objection and did not permit Singh to testify about his experience using the trellis procedure in past patients, particularly whether any of his past patients had undergone an amputation after receiving such treatment. Upon objection, the trial court also limited Dr. Blond's testimony to that which was addressed in his written expert report.

The jury returned a verdict in favor of Payan and awarded damages as follows: $100,000 for past pain and mental anguish; $100,000 for past disfigurement; and $50,000 for past physical impairment. The trial court rendered judgment in accordance with the jury's verdict. Singh appealed.

EXCLUSION OF EXPERT TESTIMONY

In his first three issues on appeal, Singh avers the trial court abused its discretion when it excluded a portion of his testimony and limited the testimony of Drs. Blond and Wholey. Specifically, Singh complains that the trial court allowed the experts to testify to their ultimate opinions, but excluded crucial testimony about the bases for their opinions.

Standard of Review and Applicable Law

We may not disturb the trial court's exclusion of expert testimony absent an abuse of discretion. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998). The test for abuse of discretion is whether the trial court acted without reference to guiding principles or rules. *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 262 (Tex. 2012). The trial court's ruling must be upheld if there is any legitimate basis in the record to support the ruling. *Holloway v. Dekkers*, 380 S.W.3d 315, 320 (Tex. App.—Dallas 2012, no pet.). To obtain a reversal of a judgment based on the erroneous exclusion of evidence, an appellant must show that (1) the trial court's ruling was in error, and (2) the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1); *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). To show harm, the excluded evidence must be controlling on a material issue and not cumulative of other evidence. *See Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex. 2000); *Cortez v. HCCI–San Antonio, Inc.*, 131 S.W.3d 113, 119 (Tex. App.—San Antonio 2004), *aff'd*, 159 S.W.3d 87 (Tex. 2005).

If, as here, the evidentiary ruling excludes evidence, preservation of error also entails presenting an offer of proof to the trial court. TEX. R. EVID. 103(a)(2) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context."). An offer of proof serves the dual

purpose of allowing the trial court to reconsider its ruling on the objection in light of the evidence and assisting the appellate court in reviewing the trial court's ruling. *Garden Ridge, L.P. v. Clear Lake Ctr., L.P.*, 504 S.W.3d 428, 439 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Testimony of Heramb K. Singh, M.D.

Singh argues the trial court abused its discretion in excluding a portion of his testimony that pertained to standard of care and foreseeability of injury/proximate cause. Specifically, Singh complains about the exclusion of his testimony regarding his prior experience using the trellis procedure and the frequency of positive outcomes with his other patients. Singh argues the trial court's ruling prevented him from presenting to the jury the basis for his belief that the trellis procedure would be successful on Montes.

The record shows that while Singh was testifying about the trellis procedure he performed on Montes to dissolve the blood clot, his counsel asked, "Have you seen clotting like you observed in Perla Montes in prior patients?" Payan's counsel objected on the basis of relevance. A bench conference was then conducted. Singh's counsel explained the question was intended to show that Singh's choice of treatment for Montes was reasonable based on his past successful experiences with that treatment. The trial court characterized its understanding of the relevance objection as "whatever he did before on other procedures and whether they were successful or not is irrelevant to whatever happened today." In sustaining the objection, the trial court explained that a proper question would be to ask Singh whether the procedure he used on Montes was reasonable, but that the question actually asked was, "how many other times have you made this procedure and you have been successful with it," which was improper. The trial court instructed defense counsel not to lead Singh to testify, for example, that he had performed the procedure 999 times and "it's always had a successful outcome."

Questioning resumed, and Singh was permitted to testify that he has performed the trellis procedure for more than twenty years, and that during that period of time he has treated incidental clots by giving TPA[1] in the same way he did with Montes. As a follow-up question to Singh's testimony about his successful experience using TPA, his counsel asked Singh, "Have you ever had another amputation?" Payan raised another relevance objection. The trial court sustained the objection, admonishing counsel, "[w]e talked about that." Singh went on to testify that he believed, given the high dosage of TPA he administered, Montes's clot should have dissolved completely.

Singh contends the trial court abused its discretion in barring him from testifying about the number and frequency of patients similar to Montes he had successfully treated over the more than twenty-year course of his career. In response, Payan asserts that: 1) Singh failed to make an offer of proof as to the number of times Singh had performed the procedure and obtained a positive result in similar patients; 2) even if he preserved error, the doctrine of "res inter alios acta" prohibits Singh from admitting evidence of prior positive outcomes without showing sufficient similarity between Montes's case and Singh's prior patients; and 3) in any event, no harm resulted from the limitation of Singh's testimony because the jury heard other evidence on the applicable standard of care from Singh.

We agree that no proffer by Singh of prior positive outcomes and showing of sufficient similarity between Singh's prior procedures and Montes's case was made. Singh, however, did testify that he had been performing the procedure for more than twenty years and that he had always treated an incidental clot by giving TPA, just like he did in Montes's case. When he was asked if he had ever had another amputation, Payan objected; the trial court sustained the objection.

[1] Tissue plasminogen activator.

Singh continued and did not make a proffer as to how many times he had performed the procedure and obtained a positive result in similar patients. "The failure to make an offer of proof containing a summary of the excluded witness's intended testimony waives any complaint about the excluded evidence on appeal." *Akin v. Santa Clara Land Co., Ltd.*, 34 S.W.3d 334, 339 (Tex. App.—San Antonio 2000, pet. denied).

Even if Singh had preserved his complaint for our review on appeal, we hold he was not harmed by the trial court's limitation, if any, of his testimony. Evidence that Singh had never had a trellis procedure patient suffer an amputation was cumulative of all the evidence introduced by Singh and his experts that he was experienced in performing the declotting procedure and followed the requisite standard of care. *See State v. Cent. Expressway Sign Associates*, 302 S.W.3d 866, 870 (Tex. 2009) (exclusion of cumulative evidence is harmless). Singh testified without limitation to his belief that his care and treatment would work on Montes, as well as to the experience upon which he based that belief. We thus conclude the trial court's limitation, if any, of Singh's testimony was not an abuse of discretion, and even if it was, there was no harm. Singh's first issue is overruled.

Testimony of Carl Blond, M.D.

Singh next argues the trial court abused its discretion in limiting the testimony of Carl Blond, M.D. to strictly that which was contained within his expert report, without allowance for further explanation of the basis and reasoning underlying his opinion. Specifically, Singh contends Dr. Blond was prohibited from testifying regarding attempts to provide vascular access to Montes to obtain dialysis during the time period following the amputation up until her death. Singh's counsel attempted to ask Dr. Blond about the condition of Montes's veins *after* her forearm was amputated. Payan objected, arguing that Montes's condition *after* the amputation was not relevant to what happened before the amputation, and that Singh was being sued for his actions (i.e.,

management of the clot) leading up to the amputation. Following a bench conference, the trial court sustained the objection, agreeing that Montes's condition after the amputation was irrelevant. On appeal, Singh complains he was harmed when Dr. Blond was prevented from explaining the medical basis for his opinion to the jury.

To be sufficient to preserve error, an offer of proof must describe or show the nature of the evidence specifically enough that the reviewing court can determine its admissibility. TEX. R. EVID. 103(a)(2); *Lone Starr Multi–Theatres, Ltd. v. Max Interests, Ltd.*, 365 S.W.3d 688, 703 (Tex. App.—Houston [1st Dist.] 2011, no pet.). While the offer of proof does not need to establish the specific facts the evidence would reveal, the offering party must reasonably summarize the offered evidence. *See PNS Stores, Inc. v. Munguia*, 484 S.W.3d 503, 511 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Here, Singh claims he made an offer of proof relating to the exclusion of evidence and testimony from Dr. Blond through Exhibits 5 and 6. The record reflects that those exhibits were admitted immediately before Singh rested; counsel stated they were "the chart and the medical records that related largely to [Montes's] care after - - these events." There was no further information provided to indicate the relevance of the documents, or what testimony Dr. Blond would have given explaining their content or how they were relevant to his trial testimony that Montes's arm was not salvageable. Thus, we conclude Singh's complaint has not been preserved for appeal. *See Akin*, 34 S.W.3d at 339; *Lone Starr Multi–Theatres, Ltd.*, 365 S.W.3d at 703. We therefore overrule Singh's complaint related to Dr. Blond's testimony.

Testimony of Michael Wholey, M.D.

With respect to Dr. Wholey, Singh argues the trial court abused its discretion in excluding Dr. Wholey's testimony on proximate cause. As noted, Payan filed a pretrial motion to exclude Dr. Wholey's expert testimony on both standard of care and proximate cause. With respect to

proximate cause, Payan's motion alleged that Dr. Wholey's proposed opinion on causation lacked a reliable foundation, i.e., it was "not based on sufficient underlying facts or data." At the hearing on the motion, Payan conceded that Singh designated Dr. Wholey as a testifying expert on both standard of care and proximate cause. However, Payan asserted that because Dr. Wholey did not provide an expert report, his trial testimony had to be limited to his testimony at his deposition. Payan argued that, at his deposition, Dr. Wholey admitted he had no basis for his opinion on causation, which was that "nothing the defendant [Singh] did or failed to do caused or contributed to the alleged injuries or damages."

The following exchange occurred at Dr. Wholey's deposition:

> Q: Do you have an opinion that you are going to tell the jury about how or why Ms. Montes lost her arm and hand?
>
> A: My opinion?
>
> Q: Yes.
>
> A: From based on these types of patients, they have bad protoplasms. It is just a cruel way of saying it. But they have been dealt a bad deck of cards, in terms of genetics, and her body habitus, and a perfunctory[2] disease.
>
> Q: Are you going to tell the jury that it was inevitable that Ms. Montes would have lost her hand and arm?
>
> A: Maybe not during that weekend. But at some point in time, she would have had it threated [sic].
>
> Q: And when would she have lost that hand?
>
> A: Don't know. It could be anywhere between one to five years. The mortality for these patients is just so bad, their life expectancy is limited.
>
> Q: So you believe that in one to five years, Ms. Montes would have lost her arm and her . . . hand?
>
> A: Or . . . or her life, mortality.

[2] Per the parties, the errata sheet shows "pre-existing" disease.

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Q: Do all of your end stage renal patients have amputated limbs?
A: Usually legs.

Q: All of them?

A: No. 10 percent. 20 percent.

Q: So 10 to 20 percent in your practice have had some sort of amputation?

A: Correct.

Q: 80 percent don't?

A: Correct.

Q: So it is not - - is it fair to say in your experience, it is not inevitable that a patient is going to ultimately undergo an amputation?

A: For the upper extremities.

Q: Is that correct?

A: Yes.

Q: It is not inevitable, is it?

A: Correct. Not on the hands.

Q: You are not going to tell the jury in this case, that Ms. Montes would have lost her left arm and hand, regardless of what Dr. Singh did, in the last two years of her life, correct?

A: Correct.

Q: Because you have no basis for that opinion?

A: No.

In addition, at his deposition, Dr. Wholey testified that he had no data or records to support his assumption that Ms. Montes's hand was damaged before Singh performed the trellis procedure to declot the AV graft. Dr. Wholey explained that his assumption was based on his knowledge of

Montes's past medical conditions. Dr. Wholey conceded he did not know what her hand was like before Singh performed the procedure on December 19, 2009.

Finally, at the end of Dr. Wholey's deposition, counsel for Payan confirmed that the doctor had no further opinions to be offered in the case, as shown below:

> Q: And, again, just so I'm clear, are there any other opinions that you are going to present to a jury, other than the ones we've talked about here today? Because I don't have a report from you. So this is really my only chance to make sure I understand all your opinions and the basis for your opinions?
>
> A: No. I think we covered everything.
>
> Q: So we covered all your opinions?
>
> A: Yes.
>
> Q: We covered the bases for all of your opinions in this case?
>
> A: Correct.[3]

At the conclusion of the hearing, the trial court ruled that Dr. Wholey's trial testimony would be limited to the matters he covered during his deposition; the court also noted that Singh had not filed any supplements to discovery since the deposition. *See* TEX. R. EVID. 193.6. The trial court ruled that Dr. Wholey was qualified, but could only testify at trial on the applicable standard of care because he had failed to provide any basis for his opinion on proximate cause.

At trial, Dr. Wholey testified that Singh was not negligent in his treatment of Montes between December 19 to December 22, 2009. Dr. Wholey testified that he does not personally use the trellis technique anymore because it "can dislodge a clot and move it into a branch," but stated it is an accepted standard of care. While Dr. Wholey disagreed with some of Singh's decisions, such as not calling a vascular surgeon on December 19th when Montes's hand began

[3] Dr. Wholey went on to offer a few additional comments about standard of care that are not relevant to the appeal.

showing signs of decreased blood flow and not taking film of the blood flow into her hand, he opined that Singh was "not negligent" in his treatment of Montes.

To prove that the exclusion of Dr. Wholey's opinion on proximate cause was an abuse of discretion, Singh must show that Dr. Wholey's opinion was relevant and based on a reliable foundation. *See* TEX. R. EVID. 702; *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). Based on Dr. Wholey's deposition testimony, as set forth above, the record shows that the doctor admitted he had "no basis" for his proffered opinion that "nothing the defendant [Singh] did or failed to do caused or contributed to the alleged injuries or damages" to Montes. To show an abuse of discretion, Singh would have to prove on appeal that Dr. Wholey's proposed opinion on causation was "based on sound reasoning and methodology" and was not merely conclusory or speculative, and Singh has failed to do so. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 815 (Tex. 2009); *Robinson*, 923 S.W.2d at 556. We therefore overrule this issue.

INCLUSION OF JURY INSTRUCTION

Finally, Singh asserts the trial court erroneously included an instruction on Montes's pre-existing condition, known as an "eggshell plaintiff instruction," in the jury charge over his objection. An eggshell plaintiff instruction addresses the situation where a plaintiff's pre-existing condition makes her "more susceptible" to the injury. As requested by Payan and included in the jury charge in this case, the eggshell plaintiff instruction stated:

> You are instructed that a condition, which merely makes a person more susceptible to injury, does not lessen that person's right to compensation for all of their damages resulting from an injury. In other words, if a dormant or latent condition itself does not cause pain, impairment, or other damages, but that condition plus an injury brings about such pain, impairment, or other damages, the injury, and not the dormant condition, is the proximate cause of the damages.

Singh's appellate complaint is that submission of the instruction in this case was error for two reasons: (1) it constituted a comment on the evidence and instructed the jury to consider the

evidence outside the context of the applicable principles of law; and (2) it conflicted with the legislatively mandated instruction on "bad result," thereby creating confusion for the jurors.[4]

During the charge conference, Singh's counsel agreed that Payan's proposed eggshell plaintiff instruction was a correct statement of the law, but argued that it was not proper to give the instruction in this case. Singh asserted that his proposed instruction on aggravation of injuries based on pre-existing conditions (which was given) sufficiently addressed the plaintiff's concerns and "subsumed" the eggshell plaintiff instruction, making it unnecessary. The instruction Singh was referring to stated:

> Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question.
>
> Do not include any amount for any condition that did not result from the occurrence in question.

Payan's counsel argued that the above-quoted instruction and the eggshell plaintiff instruction were both necessary in this case and the trial court ultimately agreed. After some discussion about whether the eggshell plaintiff instruction was a "damages" instruction or a "proximate cause" instruction, it was submitted as an instruction on the damages question.[5] Singh's counsel again objected to inclusion of the eggshell plaintiff instruction because "it assumes a verdict. It directs proximate cause" and "tells the jury how to view the evidence." Singh did not, however, object that the eggshell plaintiff instruction conflicted with the "bad result" instruction included in the general instructions section of the charge.

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[4] The "bad result" instruction, which was included in the jury charge, is mandated by Chapter 74 in healthcare liability cases and states, "[a] finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence." TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(e)(2) (West 2017).

[5] Singh agreed that, if given, the eggshell plaintiff instruction was a damages instruction.

Both Payan's and Singh's requested instructions were included in the jury charge under Question #2 on damages. Specifically, the instructions were set forth right after the charge instructed the jury to, "Answer Question 2 if you answered 'Yes' . . . to Question 1, otherwise, do not answer Question 2." Question #1 asked, "Did the negligence, if any, of Heramb K. Singh, M.D., proximately cause the injury in question to Perla Montes?" After the quoted instructions on pre-existing conditions, Question #2 asked, "What sum of money would have fairly and reasonably compensated Perla Montes for … pain and mental anguish . . .[;] disfigurement sustained in the past . . .[;] physical impairment sustained in the past . . .[; and] medical expenses . . . ?"

Standard of Review and Applicable Law

A jury instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. TEX. R. CIV. P. 277, 278; *Louisiana Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998); *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied). Singh concedes the eggshell plaintiff instruction is a correct statement of the law, but argues it was improper in this case because it did not assist the jury and was not supported by the evidence. We review a trial court's submission of a jury instruction for an abuse of discretion. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006). We will reverse for an erroneous instruction only if it probably caused the rendition of an improper verdict or judgment. TEX. R. APP. P. 44.1(a).

Analysis

As noted, Singh did not object to the eggshell plaintiff instruction as conflicting with the "bad result" instruction at the charge conference or otherwise raise the issue in the trial court. Thus, that argument was not preserved for appellate review. TEX. R. APP. P. 33.1; TEX. R. CIV. P. 274. Therefore, Singh's sole preserved complaints are (1) that the eggshell plaintiff instruction was a comment on the evidence in that it "told the jury how to view the evidence" on liability,

"directed proximate cause," and "assumed a verdict;" (2) that the instruction improperly directed the jury to consider the evidence "out of the context of the 'same or similar circumstances' with which Dr. Singh was confronted;" and (3) that the instruction was not based on the evidence.

However, Singh's first complaint is negated by the instruction's plain language (quoted above) and its placement within the charge as a whole. The jury charge conditioned the application of the eggshell plaintiff instruction under the damages question on an answer of "Yes" to Question #1 on liability, i.e., on an affirmative jury finding that Singh's negligence proximately caused Montes's injury. Thus, the jury would have already made the proximate cause finding within the negligence, or liability, part of the charge before proceeding to Question #2 on damages and considering its eggshell plaintiff instruction. Question #2 dealt solely with the dollar amounts of damages proximately caused by the injury, i.e., the amputation.

The placement of the instruction within Question #2 also resolves Singh's second argument that the instruction improperly directed the jury to consider the evidence "out of the context of the 'same or similar circumstances' with which Dr. Singh was confronted." The "same or similar circumstances" statement of the law comes from the charge's definition of "negligence" and "ordinary care" which pertained to liability under Question #1, not to damages under Question #2.

Finally, Singh's argument that the eggshell plaintiff instruction was "not based on the evidence" is similarly without merit. The record contains substantial evidence regarding Montes's pre-existing vascular condition and its severity. As the trial court noted at the charge conference, based on the way the trial went and the way the evidence was presented, "the theory was, by the defense, was trying to at all times make sure that the jury knew the limitations that she already had prior to the injury for damage purposes, right? That the questions that were very pointing to the doctors, the experts, which were: Did her condition, you know, her morbidities, did they contribute to the amputation?"

We conclude, based on the above reasons, that the trial court did not abuse its discretion in this case by submitting the eggshell plaintiff instruction in the damages portion of the jury charge over Singh's particular objections.[6] We therefore overrule this issue.

CONCLUSION

Based on the foregoing reasons, we affirm the trial court's judgment.

Rebeca C. Martinez, Justice

[6] We do not address whether it is generally proper to include the eggshell plaintiff instruction in other medical malpractice cases.