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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000097-MR

CHARLENE PRICE, Individually,
and as Administratrix of the Estate of
David Wayne Price, Deceased, and
JEREMY WAYNE PRICE — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 97-CI-02904

JAMES E. PEZZI, M.D., and
M. WILSON EASTLAND, III, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON, JUDGES.

BAKER, JUDGE. Charlene Price, Individually, and as Administratrix of the Estate of David Wayne Price, Deceased, and Jeremy Wayne Price (collectively referred to as “the Prices”) bring this appeal from a December 14, 2001, judgment of the Fayette Circuit Court. We affirm.

On August 19, 1997, the Prices filed a medical negligence action against Drs. James S. Pezzi and M. Wilson Eastland, III, appellees, in the Fayette Circuit Court. Therein, the Prices alleged that Dr. Pezzi and Dr. Eastland were negligent in their failure to properly diagnose and treat David Wayne Price. David suffered from mesentery artery disease, also known as mesenteric ischemia. David was admitted to St. Joseph Hospital, Lexington, Kentucky, on August 22, 1996, and died there on September 15, 1996.

A jury trial ensued, and the jury ultimately returned a verdict in favor of Dr. Pezzi and Dr. Eastland. By judgment entered December 14, 2001, the trial court dismissed all claims against Dr. Pezzi and Dr. Eastland. This appeal follows.

The Prices contend that the trial court committed reversible error by excluding certain "rebuttal" testimony. Specifically, the Prices sought to introduce the expert testimony of Dr. Laura Reed, a board certified cardiothoracic surgeon.[1] The Prices argue that Dr. Reed's testimony was admissible to rebut the testimony of Dr. John Sloan Warner. Dr. Warner testified that certain tests he ordered for David were routine and did not indicate imminent surgery.

The Prices particularly argue:

[1] Dr. Laura Reed's testimony was preserved for our review by avowal. Kentucky Rules of Evidence 103(a)(2).

> [D]r. Warner testified that on August 31, 1996, he made a "standard" pre-operative order relating to David's care, calling for various pre-operative measures such as a typing screen, EKG, chest X-ray, CBC, PT and PTT. Dr. Warner testified that these orders were only made as "preparations for possibly going to the operating room" and that the next day he "saw the patient and . . . did not think he had an acute abdomen or any of the findings that would go along with or be associated with air in the bowel." Based on this assessment, Dr. Warner concluded that David did not need immediate emergency surgery. In essence, Dr. Warner testified that it is standard practice to make these types of pre-operative orders when surgery is merely being considered and that such orders are not indicative of imminent surgery.
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> As discussed, infra, Dr. Laura Reed, a board certified cardiothoracic surgeon, testified as a rebuttal witness that Dr. Warner's description of these tests as "standard" tests was not consistent with her understanding of their use. Instead, Dr. Reed testified that such tests are a clear indication that surgery is imminent and that they are not ordered unless surgery is expected to take place. This important and contradictory testimony was excluded by the Trial Court. (citations omitted).

Price Brief at 2-3. In essence, the Prices sought to rebut Dr. Warner's characterization of the tests as standard and not indicative of imminent surgery with Dr. Reed's testimony to the contrary.

It is well-established that "rebuttal testimony offered by the plaintiff should rebut the testimony brought out by the defendant and should consist of nothing which could have

been offered in chief." Commonwealth, Department of Highways v. Ochsner, Ky., 392 S.W.2d 446, 448 (1965)(quoting 53 Am. Jur. Trial § 121 at 107). The law is clear that rebuttal testimony may be excluded "if the testimony could have been presented during the offering party's case in chief. . . ." 75 Am. Jur. 2d Trial § 373 (1991) at 572. We further recognize that the proper scope of rebuttal and the determination of what constitutes proper rebuttal are matters within the trial court's sound discretion. 75 Am. Jur. 2d Trial § 372 (1991).

In the case at hand, it is undisputed that the Prices were aware of Dr. Warren's test orders prior to trial and could have offered evidence surrounding the issuance of such orders during their case in chief. As the Prices could have offered Dr. Reed's testimony in their case in chief, we think the trial court properly exercised its discretion by excluding same during rebuttal. Even if exclusion was improper, we think it constituted harmless error. Ky. R. Civ. P. (CR) 61.01.

Kentucky Rule of Evidence (KRE) 103 provides that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Considering the volume of evidence amassed at trial, we do not think there exists a reasonable prospect that the jury's verdict would have been different with the admission of

Dr. Reed's testimony. See Riteze v. Williams, Ky., 458 S.W.2d 613 (1970).

The Prices also claim that the trial court erred by excluding rebuttal testimony of Dr. Reed upon the significance of an August 31, 1996, X-ray, which showed air in David's bowel. The Prices specifically argue:

> Dr. Warner testified that there are non-significant reasons (reasons other than an ischemic or arterial problem) that could cause air in the bowel, such that air in the bowel is not necessarily indicative of "dead bowel" or an immediate need for surgery. He stated that air in the bowel could be the result of certain non-emergent reasons such as pseudomembrous colitis or Chrohn's disease. . . .
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> . . . .
>
> . . . . Dr. Reed's rebuttal testimony went to the point that evidence of air in the bowel is an indication of an necrotic or dying tissue and that this is a clear warning sign. Indeed, a warning sign with "bells and whistles" telling the physician that the patient has dying tissue in the bowel which can cause gangrene and ultimately sepsis and the death of the patient. . . . Once again, the Prices were deprived of the opportunity to place the different, more expanded and unanticipated trial testimony of Dr. Warner in the proper context. (citations omitted).

Price Brief at 3 & 9.

In essence, the Prices sought to rebut Dr. Warren's testimony that air in the bowel could be caused by "non-significant reasons" with the testimony of Dr. Reed to the

contrary. Here, the significance of the X-ray was a matter of concern at trial. During the Prices' case in chief, Dr. Luis A. Queral testified that air in the wall of the bowel "means it's dying" and surgery should be performed within twelve to eighteen hours.

We believe that Dr. Reed's testimony upon the significance of air in the bowel could have been offered in the Prices' case in chief. We observe that the significance of air in the bowel was, in fact, addressed in the case in chief by the Prices' expert, Dr. Queral. As such, we must conclude that the trial court properly exercised its discretion by excluding Dr. Reed's testimony during rebuttal. See Ochsner, 392 S.W.2d 446. Considering Dr. Queral's testimony, we further believe Dr. Reed's testimony may be properly excluded as cumulative. See Chism v. Lampach, Ky. App., 352 S.W.2d 191 (1961). In sum, we hold that the trial court did not commit reversible error by excluding Dr. Reed's "rebuttal testimony."

The Prices next contend that the trial court committed reversible error by admitting into evidence David and his wife, Charlene's, failure to report income for tax purposes. During her deposition, Charlene testified that she and David would do odd jobs to raise additional money and that the money from these odd jobs was not reported for income tax purposes. The trial court granted a motion *in limine* to exclude any reference to

David and Charlene's unreported income. During trial, the Prices entered into evidence past tax returns, and upon direct examination, the following colloquy took place between Charlene and her trial counsel:

> Q: Can you tell the jury some of the things you did together?
>
> A: We took care of the farm together, worked side by side, *did any odd jobs together*, hunted together, fished, made all decisions together, it was just everything together.

Eastland Brief at 14.

The trial court ultimately admitted into evidence David and Charlene's failure to report income from odd jobs. The Prices argue that such evidence constituted "prior bad acts" and was inadmissible under KRE 404(b). Conversely, Pezzi and Eastland argue that the Prices "opened the door" and made the unreported income relevant. Pezzi and Eastland also assert that Charlene's failure to report income affected her credibility as a witness and, thus, was admissible under KRE 611(b).

We harbor grave doubt as to whether evidence surrounding David and Charlene's unreported income from odd jobs was properly admissible; nevertheless, we are unable to say that the admission of such evidence affected a substantial right of the Prices. KRE 103. Simply put, we believe it harmless error.

KRE 103 provides that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." The Prices fail to demonstrate that their substantial rights were affected by the introduction of the unreported income. The material issue in this case revolved around whether David received the proper standard of care. We view evidence of unreported income as bearing upon collateral issues that did not affect the jury's ultimate verdict. See Riteze, 458 S.W.2d 613; Colston's Administrator v. Cincinnati, N.O. & T.P. Railroad Company, 253 Ky. 512, 69 S.W.2d 1072 (1934); Delong v. Cline, 302 Ky. 358, 194 S.W.2d 631 (1946). As such, we are of the opinion that the trial court's admission of unreported income constituted harmless error. CR 61.01.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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