

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-331

MARCH TERM, 2007

Joanne Foley	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
Mad River Internal Medicine, Occupational	}	
Health & Rehabilitation, Inc., Green Mountain	}	
Physical Sports Therapy & Dr. Karen Endacott	}	
		DOCKET NO. 487-8-04 Wncv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Plaintiff in this medical malpractice action appeals from a judgment, based upon a jury verdict, in favor of defendants Dr. Karen Endacott and Mad River Internal Medicine, Occupational Health & Rehabilitation, Inc. Plaintiff contends: (1) the trial court abused its discretion by precluding her from impeaching Dr. Endacott's credibility with evidence that her medical license had been suspended and restricted as the result of a DUI conviction; (2) the court erred in excluding counsel's PowerPoint presentation during his opening statement; and (3) defendants' attorney committed plain error during closing argument by referring to tort-reform legislation. We affirm.

The record evidence may be briefly summarized. In July 2002, plaintiff tripped and fell in her home, striking her shoulder against the arm of a chair. Although the shoulder was painful, plaintiff did not seek medical treatment for nearly two months. At the end of August 2002, plaintiff consulted her primary-care physician, Dr. Endacott, at the Mad River Internal Medicine clinic. At the conclusion of the examination, Dr. Endacott diagnosed the injury as adhesive capsulitis, or frozen shoulder, and prescribed a course of physical therapy to loosen the joint. Dr. Endacott did not order an x-ray to determine whether any bones were fractured or the joint was dislocated.

Plaintiff engaged in physical therapy for several months. To continue her therapy during a planned visit to New Jersey, plaintiff obtained a referral to a physical therapist there, who she visited in early November. Based on his observations of the injury, the New Jersey therapist referred plaintiff to a local physician. Plaintiff then consulted an orthopedic surgeon, who immediately ordered an x-ray. The x-ray revealed a fractured and severely dislocated shoulder. Plaintiff underwent surgery in New York to have a special prosthesis implanted into the humerus. Unfortunately, the prosthesis slipped out of the socket within two weeks, requiring a second surgery in an attempt to increase the range of motion for the joint in the dislocated position. After the surgeries, plaintiff was left with only twenty-five to thirty percent functioning in her arm. She continues to suffer pain, and has been forced to restrict her activities.

Plaintiff commenced this malpractice action against Dr. Endacott and the Mad River clinic in August 2004. The case was tried to a jury over the course of three days in May 2006. The parties

presented conflicting expert testimony. Plaintiff's expert testified that Dr. Endacott deviated from the standard of care by failing to order an x-ray of plaintiff's shoulder when she first presented at the clinic. Dr. Endacott's expert countered that, based on plaintiff's presentation at the examination and the fact that she had been able to function for two months after the injury, failure to order an x-ray was reasonable and within the standard of care. The experts also disagreed over the issue of causation. Plaintiff's surgeon stated that an operation at the time plaintiff first consulted Dr. Endacott would have returned seventy to eighty percent of the functioning of her arm. Dr. Endacott's expert testified, however, that because of the two-month interval between the injury and the initial consultation, there was no likelihood that plaintiff would have obtained more function from an earlier operation.

The jury returned a special verdict in favor of defendants, finding that Dr. Endacott had not violated the standard of care. Plaintiff's subsequent motion for new trial was denied. This appeal followed.

Plaintiff first contends that the court erred in excluding evidence that, in June 2005, nearly three years after plaintiff's examination by Dr. Endacott, the Vermont Board of Medical Practice suspended Dr. Endacott's medical license for six months and thereafter placed several restrictions on her license, including requirements of monitoring and substance-abuse counseling, based on a conviction for DUI in 2005. Plaintiff raised the issue initially in a motion in limine seeking to introduce the evidence. The court denied the motion, ruling that its probative value was low—there was no claim or evidence that Dr. Endacott had consumed alcohol during her treatment of any patients or that her treatment of plaintiff had been affected in any way by alcohol—and the potential prejudice from such “bad act” evidence was high. The court later issued a second ruling from the bench that the evidence was collateral with regard to Dr. Endacott's credibility and was much more prejudicial than probative.

The issue arose again during defendants' case-in-chief, when defense counsel asked Dr. Endacott where she was employed and Dr. Endacott responded that she was a physician at the Mad River clinic. Plaintiff claimed that Dr. Endacott had thereby implied that her license was unrestricted, and that she could, therefore, be impeached with evidence of the license restrictions. The court rejected the claim, ruling that counsel had not opened the door to such impeachment through general questions about Dr. Endacott's employment. Later, plaintiff again asserted that defense counsel had opened the door to impeachment, this time by asking Dr. Endacott whether, in her opinion, she had met the standard of care, to which Dr. Endacott responded in the affirmative. Plaintiff argued that Dr. Endacott had effectively offered expert testimony in her own behalf, and that her qualifications to do so should be subject to impeachment with evidence of her license restriction. The court again rejected the argument, finding that the evidence was not relevant to Dr. Endacott's credibility as an expert.

In subsequently denying plaintiff's motion for new trial, the court reiterated its previously expressed view that the prejudice flowing from the DUI conviction far outweighed any probative value “given that there was no connection established between any alcohol issues and any medical treatment of any patient.” As to impeachment of defendant as an expert witness, the court restated its view that the evidence had no “relevance to the doctor's ability to render a medical opinion: her license was not suspended for failure to obtain certification, or for any error of treatment or other issues related to her training or expertise as a doctor.”

On appeal, plaintiff renews her claim that, by rendering an expert opinion on standard of care,

Dr. Endacott placed her qualifications at issue, and was therefore subject to impeachment with evidence of her restricted medical license. We agree that, when a physician sued for malpractice testifies as an expert as to the standard of care, evidence concerning the physician's qualifications may be admissible for impeachment purposes. In each of the cases cited by plaintiff, however, the evidence in question involved the defendant's failure to pass a board certification examination, a subject plainly relevant to the physician's credibility as an expert. Gipson v. Younes, 724 So. 2d 530, 532 (Ala. Civ. App. 1998); McCray v. Shams, 587 N.E.2d 66, 69 (Ill. App. Ct. 1992); Ward v. Epting, 351 S.E.2d 867, 872 (S.C. Ct. App. 1986). This was not the situation here.

Plaintiff also cites several cases holding that an expert witness may be impeached on cross-examination with evidence that the expert's medical license or privilege to practice has been terminated or suspended. In each case, however, the license restriction was the result of the physician's negligent or inappropriate treatment of a patient, again a subject highly relevant to the physician's credibility as an expert. See Richmond v. Longo, 604 A.2d 374, 376-79 (Conn. App. Ct. 1992) (holding that party should have been allowed to cross-examine physician expert with evidence that his license had been terminated due to his "mishandling" of cases); Creighton v. Thompson, 639 N.E.2d 234, 237, 239 (Ill. App. Ct. 1994) (holding that restrictions on expert's license stemming from charges of "inappropriately treating two patients" were highly relevant); Cook v. Wiggins, 1998 WL 712832, *3-4 (Wash. Ct. App. 1998) (upholding cross-examination of expert witness with evidence that his privileges had been suspended based in part on incompetency). As the trial court here noted, there was no evidence that Dr. Endacott's license restriction was the result of her mistreatment of any patient.

We are not persuaded, however, that the trial court was correct in finding that Dr. Endacott's license suspension and probation were entirely irrelevant to her credibility as an expert. As a condition of her continued practice, Dr. Endacott was assigned a physician monitor with the responsibility to report to the Board "any deficiencies" in her practice. That the Board deemed it to be necessary not only to suspend Dr. Endacott's license, but to monitor her practice for "deficiencies" plainly reflects on her qualifications and certainly had some tendency to lessen her credibility as an expert. V.R.E. 401 (relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). While we understand the trial court's reasoning, and that of cases such as Noble v. Lansche, 735 S.W.2d 63 (Mo. Ct. App. 1987), which disallowed the impeachment of an expert with evidence that his privilege to dispense certain drugs had been suspended because of a substance-abuse problem, we do not agree that medical-license restrictions resulting from drug or alcohol abuse are necessarily irrelevant to a physician's credibility when testifying as an expert.

Our conclusion does not, however, require reversal of the judgment. As noted, the trial court ruled several times, both before trial and later in denying plaintiff's motion for new trial, that any probative value from the evidence of Dr. Endacott's license restriction based on a later-occurring DUI conviction was "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" that could result from the evidence. V.R.E. 403. Trial court rulings under V.R.E. 403 are "highly discretionary" and we will not reverse such rulings absent a patent abuse of discretion. State v. Jackowski, 2006 VT 119, ¶ 13; see also Pirdair v. Med. Ctr. Hosp. of Vt., 173 Vt. 411, 418 (2002) (court's discretionary ruling under V.R.E. 403 is "given considerable latitude on appeal" and burden to show abuse of discretion "is heavy"). Whether or not we agree with the court's balancing here, we discern no abuse of discretion in its conclusion that the potential for unfair prejudice from the license restrictions—based on a DUI conviction that occurred years after

plaintiff's injury and had no apparent influence on Dr. Endacott's diagnosis and treatment of plaintiff—significantly outweighed any probative value. The court could reasonably conclude that admission of the DUI evidence was likely to introduce an element that could confuse the jury or divert them from the issues in the case. See State v. Griswold, 172 Vt. 443, 448 (2001) (evidence properly excluded under V.R.E. 403 where it would confuse or mislead the jury). Accordingly, we find no basis to disturb the judgment.

Plaintiff's two remaining claims require little extended discussion. Plaintiff contends that the court erred by excluding a planned PowerPoint presentation during her counsel's opening statement. Counsel had written a letter to the clerk of the court shortly before trial expressing a desire to make a limited PowerPoint presentation during opening statement and asking whether the court had any objection. On the first morning of the trial, the court indicated that it had not seen the letter, and defense counsel objected that his request to see the slides in advance had not been honored. After reviewing a number of the slides, the court decided to exclude the presentation in its entirety, citing the lack of advance review by court and counsel and the difficulty of raising effective objections to slides that had already been viewed by the jury.

Plaintiff claims that the court abused its discretion in excluding the presentation, but apart from plausibly asserting that the ruling compelled counsel to alter his opening statement, plaintiff has not argued or shown that the ruling—even if erroneous—was so prejudicial as to compel reversal of the judgment. It is axiomatic that, to warrant reversal of a judgment on appeal, the party claiming error “must show how the error genuinely harmed the prosecution of its case.” Progressive Ins. Co. v. Wasoka, 2005 VT 76, ¶ 20, 178 Vt. 337. We thus find no basis to disturb the judgment.

Finally, plaintiff contends that defense counsel committed plain error by referring, during closing argument, to concerns expressed by a defense witness about pain and suffering damages, “concerns that [were] shared,” according to counsel, “by the legislatures of several states who have enacted caps on noneconomic damages.” Plaintiff asserts that the remarks were unsupported by any evidence in the record, and were highly prejudicial. As plaintiff acknowledges, however, no objection was interposed to the remarks, and it is well settled that a failure to do so waives any subsequent claim of error on appeal. Imported Car Ctr., Inc. v. Billings, 163 Vt. 76, 78 (1994). Even if we recognized plain error in the civil context, furthermore, it would require a showing of error that affected “substantial rights of the parties.” Deyo v. Kinley, 152 Vt. 196, 201 (1989). The jury's verdict here, finding that defendant had not violated the standard of care, indicates that any error concerning the measure of damages had no impact on the verdict. Accordingly, we find no error warranting reversal of the judgment.

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

