

STATE OF MICHIGAN
COURT OF APPEALS

MARY JACKSON, Personal Representative for the
Estate of DEBRA L. PAGE, Deceased,

UNPUBLISHED
August 30, 1996

Plaintiff-Appellant,

v

No. 172127
LC No. 88-316844-NM

GEORGE A. ELLIS, M.D.

Defendant-Appellee.

Before: White, P.J., and Sawyer and R.M. Pajtas, *JJ.

PER CURIAM.

Plaintiff appeals a judgment in favor of defendant entered following a jury trial in this medical malpractice action. The trial court subsequently denied plaintiff's motion for new trial. We affirm.

I

On September 7, 1987, twenty-five year old Debra Page met with intake specialist John Espinoza of the Saginaw County substance abuse office. Page advised that she was seeking help to get off the streets, that she been hospitalized twenty-five times for asthma problems, that she had been using alcohol for eleven years and crack cocaine for three years, and that she had used crack six times in the previous thirty days, with the last use being six days earlier. Given Page's asthmatic condition, Espinoza felt a medical facility would be a proper placement. Espinoza contacted the Pathways unit of Saginaw Community Hospital and was advised Page could be accepted.

Page was admitted into Pathways at 7:00 p.m. on Tuesday, September 8, 1987, as a patient of Dr. George Ellis, the medical director of the program. Ellis was telephoned at 9:00 p.m. and told that Page was being admitted and had an inhaler and asthma medication. After being advised that Page's pulse was elevated, Ellis ordered that Page be medicated according to the usual protocol. One of the standing orders at Saginaw Community Hospital was to give a patient Inderal

* Circuit judge, sitting on the Court of Appeals by assignment.

(generically referred to as propanolol) twice a day for a pulse in excess of 100, until the pulse goes down to 90 or below.

Page was given serax, a mild tranquilizer, several times during her first 24 hours at Pathways for an elevated pulse. At 10:00 p.m. on September 8, 1987, registered nurse Mary Atchinson wrote an order to give Page Inderal if it was needed during the third shift. At the time the order for Inderal was written, Page's pulse was 120 and a shot of serax was given. Licensed practical nurse Eva O'Dell came on duty for the third shift on September 9, 1987 and was told that serax had not been effective in reducing Page's pulse and that an order to give Inderal had been written if Page's pulse remained elevated. At 11:40 p.m., Page's pulse was 112 so O'Dell gave Page forty milligrams of Inderal. At 12:10 a.m., September 10, O'Dell asked Page and her two roommates to quiet down as they had been talking and loudly laughing. Page told O'Dell that she thought the medicine she had been given was causing her to wheeze.

At 1:00 a.m., Page came to the nursing station complaining of wheezing and difficulty breathing, stating that she had used her inhaler without any relief. O'Dell and registered nurse Eugena Ciervo looked up Inderal in the Physician's desk reference (PDR) and found it was contraindicated for asthmatics, and its peak effect was one to 1-1/2 hours after administration. Ciervo called Dr. Ellis at home at 1:05 a.m. and advised him that Page was having difficulty breathing and that the PDR stated Inderal was contraindicated for asthmatics. Dr. Ellis told Ciervo to discontinue the medication, but ordered no other treatment.

Immediately after this call, Page's wheezing became more pronounced. Ciervo called the hospital nursing supervisor and told her of the problem and obtained permission to call Dr. Gage who was on call. Ciervo said she had called Gage rather than phoning Ellis again because Ellis had not ordered any medications and because Gage was on call. Gage ordered a shot of Benadryl, oxygen and an aminophylline suppository. Page advised the nurses she needed to go to the hospital, and 911 was called at 1:23 a.m., as Saginaw Community hospital is a non-acute care hospital that does not have doctors on duty at all times. Page went into full arrest at 1:25 a.m. and was taken in an ambulance to St. Luke's hospital at 1:40 a.m. She died a short time later.

Dr. Melvin Anderson testified that he was certified in cardiology and internal medicine. Anderson opined that Dr. Ellis failed to provide Page with the recognized standard of acceptable care. Anderson testified that Ellis should have examined Page within twenty four hours after her admission, but that he had not. Anderson testified that the standing order for Inderal had caused Page's death, and that Ellis should have changed his standing order for Inderal when he was informed the night Page was admitted that she was an asthmatic.

Anderson further testified that Ellis did not provide appropriate care in responding to the telephone call he received at 1:05 a.m., and should have ordered adrenaline to counteract Page's problem. Ellis should have immediately gone to the hospital and examined Page or gotten another

doctor to examine her upon being called at 1:05 a.m. Anderson opined that Ellis' failure to provide the standard of acceptable care was a proximate cause of Page's death.

Forensic toxicologist John Spikes testified that he tested Page's liver tissue for cocaine and that the test results did not reveal cocaine or its metabolites. Spikes testified that Inderal was contraindicated for asthmatics and that Inderal had contributed to Page's death. Spikes testified that he had come across six other instances in the medical and legal literature where administration of a beta blocker such as Inderal had caused death to an asthmatic.

Dr. John Way testified that he was board certified in internal medicine and opined that Dr. Ellis had not violated the standard of care. Way opined that Page had died from cocaine induced cardiac arrest and that the suddenness of Page's cardiac arrest favored a cocaine induced arrest and not an Inderal asthmatic death. Way testified that Inderal did not have anything to do with Page's cardiac arrest and that Inderal is on the standing orders of a lot of substance abuse centers.

Toxicologist James Garriott testified that he had received and tested a specimen of Page's liver tissue. The testing found 27.6 billionths of a gram of cocaine and small amounts of two metabolites of cocaine. Garriott testified that the presence of the cocaine and its metabolites showed that a dose of cocaine had been taken within two to four hours prior to death. Garriott stated that his findings could not have come from the cocaine that Page had taken six days before her hospital admission because cocaine disappears from the body quite fast. Garriott opined that cocaine ingestion was a direct cause of Page's death. Garriott testified that Spikes had not found cocaine in Page's liver because of the detection limits set on the testing instruments. Garriott also expressed the opinion that Page's death was due to cardiac arrest caused by cocaine ingestion and not by an acute asthma attack precipitated by Inderal.

Dr. Ellis testified that he felt Page did not die as a result of Inderal, but had died from cocaine use. Although patients are searched before admission, many patients have been successful in getting drugs into the hospital. Ellis testified that Inderal is a very safe drug and that the PDR says that it can be given to asthmatics with caution. Ellis testified that when he was called at 1:05 a.m. regarding Page having a breathing problem, he was not told it was an emergency and he believed he told the nurse to call him back if further problems occurred.

The jury found Dr. Ellis had been negligent but that his negligence was not a proximate cause of Page's death.

II

Plaintiff first argues that the results of scientific tests performed on liver tissue that showed the presence of 27 billionths of a gram of cocaine were improperly admitted into evidence where no foundation was laid as to absence of contamination of the liver tissue and no foundation was laid as to the chain of custody. Plaintiff also argues that the trial court should have required the foundational

criteria set forth in *Gard v Michigan Produce Haulers*, 20 Mich App 402; 174 NW2d 73 (1969).

We review a determination to admit evidence for abuse of discretion. *Price v Long Realty*, 199 Mich App 461, 466; 502 NW2d 337 (1993). A trial court has considerable discretion in determining if a proper foundation has been laid. *People v Lucas*, 188 Mich App 554, 580; 478 NW2d 165 (1991).

In opening statement, plaintiff's counsel stated that defendant might present evidence that a section of Page's liver was tested over a year after her death and that 27 billionths of a gram of cocaine was found in the frozen section of liver and that the defense may try to parlay the 27 billionths of a gram of cocaine into a scenario where Page somehow took cocaine in the hospital. Plaintiff's counsel stated that if such evidence is introduced by the defense, he would present testimony from a respected national laboratory that "also tested" Page's liver and found no cocaine, and would show that defendant's computer printouts that supposedly showed cocaine were wrong and why they were wrong.

Defense counsel in opening told the jury that part of Page's liver was sent for testing to a toxicologist and that testimony would show that the test found a small amount of cocaine, indicating Page had taken cocaine three or four hours before her death, while she was in the hospital, which had an adverse effect on Page's heart and caused cardiac arrest.

Plaintiff called Dr. Melvin Anderson who testified that he had read the depositions of Drs. Garriott and Spike. Anderson confirmed that Garriott claimed to find 27 billionths of a gram of cocaine in Page's liver, but Spikes said there was no cocaine. Anderson testified that 27 billionths of a gram is such a small amount that he considered it insignificant, and that if the cocaine was in Page's liver, it would not have any significance to Page's death, because the amount was too low to have caused the problem. Anderson further testified that the cocaine would have to have been taken within an hour of Page's death, which it was not. Anderson testified that medical science does not know how long cocaine stays in liver tissue. Anderson further testified that if one assumes cocaine was found in the liver, it could have come from Page's use of cocaine six days before admission to the hospital and prior to that time. Anderson said cocaine would stay in a person's liver longer than in their blood.

Dr. Garriott testified after plaintiff's counsel had mentioned Dr. Garriott's liver testing results in his opening statement, and after plaintiff's witness, Dr. Anderson, had been extensively questioned regarding Garriott's liver testing results. Dr. Garriott testified that he had tested a specimen of Page's liver tissue received from defense counsel, that he assumed the tissue had come from Page, and that it had been properly stored since removal at the autopsy and had not been contaminated.

Plaintiff objected to Garriott testifying regarding his testing of the liver sample, asserting that a proper foundation had not been laid. Plaintiff argued that a chain of custody had not been established, and cited the foundation required to admit blood sample analyses. Plaintiff noted that there had been no testimony from the autopsy pathologist. The trial court ruled that plaintiff's objections went more to the weight of the evidence than to its admissibility. The court allowed the opinion testimony, stating that plaintiff's counsel could bring his points out in cross-examination.

Garriott testified that he received a styrofoam container with a plastic ziplock bag containing twenty-five grams of liver tissue surrounded by dry ice, which was the standard way of transporting tissue specimens. The tissue was tested on three occasions. One test was for alcohol, the second test was a basic drug screen, and the third was a specific test for narcotics and cocaine. The testing was performed using gas chromatography and mass spectrometry equipment. The alcohol test came back negative. The basic drug screen was positive for: (1) benadryl; (2) nicotine; (3) Inderal; and (4) cocaine.

The specific narcotics drug screen found 27.6 billionths of a gram of cocaine and small amounts of two major metabolites of cocaine. Garriott testified that the medical records showed that Page had received Inderal and Benadryl while in the hospital. Page smoked a cigarette while at the hospital and told a nurse she smoked. Garriott testified that they found the majority of the medications Page had been given while at the hospital, that this was very good presumptive evidence that it was Page's liver that had been tested, and that it would be highly unlikely to find this in another random sample. Garriott said that it would be "extremely inexplicable" for contamination of the tissue to account for the drug metabolites.

Garriott testified that the presence of the cocaine and its metabolites showed the person who the liver belonged to had taken a dose of cocaine within two to four hours prior to death, as cocaine metabolizes quite fast in the body, especially in moderate doses. However, on cross-examination, Garriott said his estimation was based on cocaine's half life in blood and he was not aware of any studies showing the half-life of cocaine in liver tissue. Garriott indicated that his findings could not have come from the cocaine that Page had taken six days before her admission to the hospital, as cocaine disappears from the body quite fast. Garriott testified that he believed that cocaine ingestion was a direct cause of Page's death and that Dr. Spikes had not found cocaine in the liver sample because of the detection limits set on the testing instruments.

Plaintiff called forensic toxicologist Dr. John Spikes, who testified that he had tested Page's liver tissue. Spikes' test found Inderal, but did not find the presence of cocaine or any metabolites of cocaine.

In denying plaintiff's motion for new trial, the court ruled that Garriott's testimony had been properly admitted. The court ruled that any break in the chain of custody went to the weight of the testimony and not its admissibility. The Court distinguished Gard stating that Gard did not hold that

the same or similar criteria applicable to a blood-alcohol test are required when a tissue test is performed.

We conclude that there was adequate foundation for the admission of Dr. Garriott's liver tissue analysis. Garriott testified that he received the liver sample from defense counsel and in a plastic ziplock bag surrounded by dry ice in a styrofoam container, which is the standard way to transport tissue samples. Garriott testified that the medications Page had been given matched those found in the liver sample and that it would be highly unlikely to find these same drugs by coincidence in another sample. While plaintiff argues that some of the drugs Page had been given were not found in the tested sample, there is no evidence that Garriott tested the sample for those drugs. Garriott testified that the presence of cocaine metabolites in the liver tissue made it very unlikely that the cocaine found in Page's liver tissue was there as a result of contamination.

Plaintiff's reliance upon *Gard* is misplaced. *Gard* involved the chemical analysis of blood to determine alcoholic content. The issue was whether the trial court erred in ruling that evidence of tests conducted on a blood sample withdrawn by a mortician were inadmissible. The *Gard* Court held that a proper foundation must be laid for admission into evidence of the results of a blood sample analysis and that under MCL 257.625a, a blood sample taken by a mortician does not have the inherent reliability essential for this purpose, given morticians' lack of training and experience in properly taking and preserving blood components. *Id.*, 20 Mich App at 406.

Finally, we observe that plaintiff, herself, placed Dr. Garriott's testing and results in issue in opening statement, and in questioning Dr. Anderson, and that plaintiff was permitted to call an expert witness, Dr. Spikes, who testified, based on a similar foundation, that he also tested Page's liver tissue but did not find cocaine or its metabolites.

III

Plaintiff next argues that Dr. Garriott was improperly allowed to bolster his direct testimony by the use of "abstracts" or articles from medical journals. Plaintiff moved to prevent Garriott from mentioning five articles/abstracts prior to Garriott testifying. The court indicated that experts can rely on what they have learned as hearsay, as it goes to the basis of their expert opinions. Defendant argued that reference to the articles was allowed by MRE 703, while plaintiff argued that it was barred by MRE 707. The court concluded that Garriott could refer to the studies, but that they would not be admitted as exhibits.

Garriott was asked:

Q. Now Dr. Anderson said that Inderal is totally contra-indicated in giving, as far as giving it to asthmatics.

Have you found any literature that indicates to the contrary?

A. Well, I think in general practice that it certainly is, it's contra-indicated unless there are certain – there are certain circumstances.

Garriott continued, explaining that there were several studies in the literature where Inderal was recommended in diagnostic procedures for asthma: Because Inderal does not change the lung capacity in normal people, but does change it in asthmatics, it has been used to diagnose asthma. While defense counsel brought out that none of the subjects in the three studies died, Garriott testified that Inderal was used with “proper precautions,” and “the dose has to be carefully adjusted.” Under the circumstances, we conclude that given Garriott’s concession that Inderal is contra-indicated in asthmatics unless there are certain circumstances, and his testimony that all three studies used Inderal as a diagnostic tool in a controlled setting precisely because it has a negative effect on asthmatics, the admission of the evidence did not deprive plaintiff of substantial justice. MCR 2.613(A).

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas