
IN THE SUPREME COURT OF MISSOURI

CORTEZ STRONG,
Respondent/Cross Appellant

v.

AMERICAN CYANAMID COMPANY, Appellant/Cross-Respondent, and
GEORGIA SANTOS-JAWAID, M.D., Respondent.

On Appeal from the Circuit Court of the 22nd Judicial Circuit, City of St. Louis
Hon. Michael B. Calvin, Circuit Judge
Cause No. 9920880

SUBSTITUTE BRIEF OF RESPONDENT GEORGIA SANTOS-JAWAID, M.D.

J. Thaddeus Eckenrode, #31080 MO
Lisa Hope Howe, #45072 MO

ECKENRODE-MAUPIN, ATTORNEYS AT LAW
Attorney for Respondent Georgia Santos-Jawaid, M.D.
8000 Maryland Ave., Ste. 1300
Clayton, MO 63105
Phone: 314/726-6670
Fax: 314/726-2106

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STATEMENT OF FACTS

Contrary to the assertion of Cross Appellant's Cortez Strong in his brief, Respondent Dr. Jawaid did not testify on direct examination (during Respondent/Defendant Jawaid's case-in-chief) that she did not advise Plaintiff's mother of the alternative vaccine, IPV. (Transcript 1961-1988). As the transcript reflects, she stated that she simply could not recall, since 18 years had passed before trial, whether she told Appellant/Plaintiff's mother about IPV, back at the child's immunizations in 1987, but very well might have mentioned IPV to the Appellant/Plaintiff's mother. (Transcript 1973, 1975, and 1976). She testified that she clearly would have mentioned IPV to Appellant/Plaintiff's mother, as part of her routine, if plaintiff's mother refused OPV for her child, or if she was "hesitant" about the use of OPV. (Transcript 1975-1976). She also testified that the subject of IPV also came up from time to time in general discussions with the parents of many of her infant patients. (Transcript 1976).

Dr. Jawaid continuously stated, even on cross-examination, that the "Red Book" served as her "guideline" with regard to the administration of vaccines and the information to furnish patients about them. (Transcript 1961-1988, 1988-2002, 2012-2014, and 2014-2018). She never used the words "standard of care" at any time in her testimony, and, in fact, Respondent/Defendant Jawaid offered no evidence in her case whatsoever on the issue of "standard of care" or whether Dr. Jawaid's conduct complied with the standard of care. (Transcript 1961-1988, 1988-2002, 2012-2014, and 2014-2018). The only time that phrase was used in

Respondent/Defendant Jawaid's case at all, was by Appellant/Plaintiff's counsel on cross-examination of Dr. Jawaid, in a hypothetical question, as he attempted to get Dr. Jawaid to state that the "Red Book" established the standard of care. (Transcript 1995). Even then, Dr. Jawaid never truly agreed to that suggestion or hypothetical. (Transcript 1995). There was no evidence elicited from Dr. Jawaid, or her witnesses, as to the issue of the standard of care, even on cross-examination by Appellant/Plaintiff's counsel. (Transcript 1995).

In addition, the plaintiff had already elicited testimony from his expert, Dr. Alan Shanske, regarding what the standard of care required with regard to "informed consent". (Transcript 1347-1351).

POINTS RESPONDED TO

I. THE TRIAL COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF DR. ELIZABETH DIEHL AS PURPORTED REBUTTAL EVIDENCE BECAUSE THE TESTIMONY WAS NOT PROPER REBUTTAL EVIDENCE AND WOULD NOT HAVE DIRECTLY REBUTTED ANY TESTIMONY OFFERED IN DEFENDANT JAWAID'S CASE.

STANDARD OF REVIEW

“Appellate review of error alleged in the admission or exclusion of evidence is limited to an abuse of discretion standard. The focus is not on whether the evidence was admissible but on whether the trial court abused its discretion in excluding the evidence”. Aliff v. Cody, 26 S.W.3d 309, 314 (Mo. App. W.D. 2000). A trial court has great discretion in deciding whether to exclude evidence. Id. “The trial court’s ruling is upheld when there exists any recognizable ground on which the trial judge could have rejected the evidence”. Id. at 315 and *quoting* State ex rel. Missouri Highway and Transp. Comm’n v. Buys, 909 S.W.2d 735, 738 (Mo. App. W.D. 1995). The trial court’s discretion has to be clearly against the logic of the circumstances and “arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration...” Aliff, 26 S.W.3d at 315.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN EXCLUDING THE TESTIMONY OF DR. ELIZABETH DIEHL AS PURPORTED REBUTTAL EVIDENCE BECAUSE THE TESTIMONY WAS NOT PROPER REBUTTAL EVIDENCE AND WOULD NOT HAVE DIRECTLY REBUTTED ANY TESTIMONY OFFERED IN DEFENDANT JAWAID'S CASE.

Appellant Cortez Strong contends that the trial court erred in barring Appellant Strong's attempt to offer the deposition testimony of Elizabeth Diehl, M.D. as "rebuttal" evidence after the close of the defense case. The court's ruling in excluding that testimony was a proper exercise of the court's discretion, and well supported under Missouri law. The trial court carefully considered the arguments of Appellant and appropriately rejected Plaintiff's request to offer "rebuttal" evidence for numerous reasons. (Transcript 2019-2023). Thereafter, the Court of Appeals affirmed the trial court's ruling on this issue, and appellant did not pursue further relief or review on this issue.

Dr. Jawaid had testified in her case that she did not recall if, back in 1987, 18 years before trial, she told Appellant Cortez Strong's mother about IPV, but very well might have mentioned IPV to her. (Transcript 1973, 1975, and 1976). Moreover, Dr. Jawaid stated that she would have mentioned IPV to the Plaintiff's mother if she either refused OPV or was hesitant about the use of OPV. Further, discussion about IPV also came up from time to time just in the context of Dr.

Jawaid's general discussions with the parents of her patients as a matter of course. (Transcript 1975-1976).

No evidence was offered during defendant Jawaid's case regarding the applicable "standard of care" or whether Dr. Jawaid had complied with the standard of care. (Transcript 1961-2018). No new issue was raised at all by Dr. Jawaid's testimony in her case-in-chief, since no evidence was offered as to the standard of care. The only evidence offered in the trial at all regarding whether Dr. Jawaid met or failed to meet the standard of care came during Appellant/Plaintiff's case-in-chief, through Appellant/Plaintiff's expert, Dr. Alan Shanske. (Transcript 1329-1359, 1368-1422).

At most, Defendant Jawaid stated that she utilized the "Red Book" as a guideline on the issue of vaccine dosing and administration. Judge Romines, in his dissent on this case at the Court of Appeals (Strong v. American Cyanamid, et al., 2007 WL 2445938, 35 (Mo. App. E.D. 2007)) suggested that the definition of the "standard of care" includes following a "guideline". However, the definition of standard of care has been established via case law. To prove a deviation from the standard of care, the plaintiff must prove that Dr. Jawaid "failed to exercise the degree of skill and care ordinarily used under the same or similar circumstances by members of his or her profession". Boehm v. Pernoud, 24 S.W.3d 759 (Mo. App. E.D. 2000). Nowhere in Missouri case law is the "standard of care" defined as a physician following a "guideline".

Dr. Diehl, whose deposition Appellant/Plaintiff hoped to utilize as “rebuttal” evidence, had been cross-endorsed as an expert by Appellant/Plaintiff, and could have been called during Appellant/Plaintiff’s case-in-chief. Dr. Diehl is a St. Louis area resident and was therefore subject to subpoena to appear at trial and was available to testify live. She had also been deposed by Appellant/Plaintiff, and as such, her deposition could have been read into evidence, pursuant to Missouri Rules of Civil Procedure 57.07, during Appellant/Plaintiff’s case, as they intended to do during “rebuttal”.

Appellant/Plaintiff argues that Dr. Diehl would state that the standard of care required a pediatrician to advise parents of both the IPV and OPV vaccines, and they contend that this evidence was directly contrary to the evidence that Dr. Jawaid offered in her defense. However, Appellant Strong is incorrect. At no point in Dr. Jawaid’s defense was any evidence offered of what the standard of care was, what it required, or whether Dr. Jawaid did or did not comply therewith. (Transcript 1961-2019). The deposition of Dr. Diehl would not serve, therefore, to repel, counteract, or disprove the testimony of Respondent Jawaid or her evidence, as the testimony of Dr. Diehl on those points could not possibly contradict that which was never introduced or offered as evidence. (Transcript 1961-1988).

The Missouri Supreme Court in Bean v. Riddle, 423 S.W.2d 709, 719 (Mo. 1968) held that the admissibility of rebuttal evidence is within the discretion of the trial court, and further held that “one cannot, as a matter of right, offer in rebuttal evidence which was proper or should have been introduced in chief, even though it

tends to contradict the adverse party's evidence." The court further stated that while the trial court has discretion to allow rebuttal evidence, it "may...and generally should, *decline* to permit either party to introduce evidence in support of his case in chief on rebuttal". Id. (emphasis added). *See also* Brav v. Bi-State Dev. Corp., 949 S.W.2d 93, 100-01 (Mo. App. E.D. 1997); Aliff, 26 S.W.3d at 316 (Mo. App. W.D. 2000); Gassen v. Woy, 785 S.W.2d 601 (Mo. App. W.D. 1990).

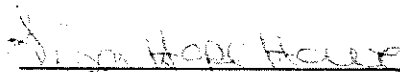
The Missouri Court of Appeals, in Aliff, *supra*, further held, "Rebuttal evidence is evidence tending to disprove 'new points first opened by' the opposing party." Id. *See also* Edley v. O'Brien, 918 S.W.2d 898, 907 (Mo. App. S.D. 1996). Here, Dr. Jawaid did *not* raise any new issue with regard to the "standard of care", and, in fact, offered *no* evidence on that topic. Dr. Jawaid did not raise or open any new issue. Evidence that is merely cumulative to that offered in a party's case in chief is not generally admissible in rebuttal. Id. at 907. Plaintiff's expert, Dr. Shanske, already testified that the Red Book was the standard of care for a physician and that it would be below the standard of care for a physician not to mention the alternative inactivated polio vaccine, which does not carry a risk of causing polio. (Transcript 1347-1351). Therefore, reading the deposition of Dr. Diehl would simply have been cumulative evidence, at best, to what was already established in plaintiff's case-in-chief by Dr. Shanske, and was therefore improper rebuttal evidence.

Furthermore, the Plaintiff could not have made a prima facie case against Dr. Jawaid and gotten past a directed verdict motion without having demonstrated that her “act or omission failed to meet the requisite standard of care.” Ploch v. Hamai, 213 S.W.3d 135, 140 (Mo. App. E.D. 2006). Plaintiff’s responsibility in his case-in-chief was to show that Dr. Jawaid’s failure to advise was below the standard of care. That is not rebuttal evidence.

The trial court ruled appropriately in denying the plaintiff’s use of Dr. Elizabeth Diehl’s deposition as rebuttal testimony when such testimony would not have truly or directly rebutted any evidence first offered by Dr. Jawaid, was otherwise cumulative in nature, could have been offered in Appellant/Plaintiff’s case-in-chief, and was otherwise fully available to the Appellant/Plaintiff. (Transcript 2019-2025). Appellant Strong has failed to establish an abuse of discretion by the trial court in this case as is required under Missouri law. Klinckman v. Pharris, 969 S.W.2d 769, 771 (Mo. App. 1998). “Failure to admit evidence does not mandate a reversal of a judgment unless the error materially affected the merits of the action”. Aliff, 26 S.W.3d at 315 (Mo. App. W.D. 2000) *citing* Environmental Waste Management, Inc. v. Industrial Excavating, Inc., 981 S.W.2d 607, 613 (Mo. App. W.D. 1998). The Supreme Court of Missouri should not reverse on grounds that there was a failure to admit evidence unless there is a “substantial or glaring injustice”. Aliff, *supra.* *citing* State ex rel. Missouri Highway and Transp. Comm’n v. Pracht, 801 S.W.2d 90, 93 (Mo. App. E.D. 1990).

CONCLUSION

The trial court did not commit a “substantial or glaring injustice”. The court’s ruling was a proper exercise of the court’s discretion, was clearly not an abuse of discretion, and was well supported under Missouri law. The trial court appropriately rejected Appellant/Plaintiff’s request to offer the testimony of Dr. Diehl as “rebuttal” evidence. For all the foregoing reasons, Respondent Jawaid prays this Honorable Court deny Appellant Strong’s appeal against Respondent Jawaid, affirm the portion of the jury verdict and judgment in this matter in favor of Respondent Jawaid, and grant Respondent Jawaid further relief as justice so requires.



J. Thaddeus Eckenrode MoBar #31080

Lisa Hope Howe MoBar #45072

ECKENRODE-MAUPIN, Attorneys at Law

8000 Maryland Ave., Ste. 1300

Clayton, MO 63105

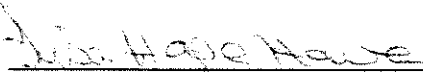
314/726-6670

314/726-2106 (fax)

Attorney for Respondent/Defendant Georgia
Santos-Jawaid, M.D.

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), the undersigned certifies that this Respondent's Brief complies with the limitations of Rule 84.06(b) in that the number of words is **2,495** which is less than the 13,950 word limit. In lieu of a floppy disk, a CD-ROM is hereby filed with this Court and the undersigned does hereby certify that the CD-ROM provided with this notification has been scanned for viruses and is virus-free.



J. Thaddeus Eckenrode MoBar #31080

Lisa Hope Chazen MoBar #45072

ECKENRODE-MAUPIN, Attorneys at Law

8000 Maryland Ave., Ste. 1300

Clayton, MO 63105

314/726-6670

314/726-2106 (fax)

Attorney for Respondent/Defendant Georgia Santos-Jawaid, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was mailed, postage prepaid, U.S. Mail, this 2nd day of July, 2008, to the following parties: **Ann K. Covington**, Bryan Cave, L.L.P., Riverview Office Center, 221 Bolivar Street, Jefferson City, MO 65101, **Stephen R. Woodley**, Gray, Ritter & Graham, 701 Market Street., Ste. 800, St. Louis, MO 63101, **Thomas P. Germeroth**, Kolker & Germeroth, 101 South Hanley Road, Suite 1320, St. Louis, MO 63105, **Edward Robertson, Jr., Mary Winter, and Anthony Dewitt**, Bartimus, Frickleton Robertson, 715 Swifts Highway, Jefferson City, MO 65109; **Stanley P. Kops**, Law Offices of Stanley P. Kops, 102 Bala Ave., Bala Cynwyd, PA 19004, **Michael O'Keefe, James Erwin, and Dale Joerling**, Thompson Coburn, L.L.P., One US Bank Plaza, St. Louis, MO 63101, **Roger Yoerges and Stephanie Litos**, Wilmer, Cutler, Pickering, Hale, & Dorr, L.L.P., 2445 M. Street, N.W., Washington, DC 20037-1420.