

DISTRICT OF COLUMBIA COURT OF APPEALS

McPherson-Corder v. Chinkhota

835 A.2d 1081 (D.C. 2003) · No. No. 00-CV-910 · Decided November 20, 2003

SUMMARY

The District of Columbia Court of Appeals affirmed a \$200,000 judgment in a medical malpractice action arising from the loss of a patient's testicle after delayed treatment for testicular torsion. The court held that the trial court did not abuse its discretion by giving a missing-witness instruction because the defendant had peculiarly available access to a medical assistant student who could have provided material, noncumulative testimony about the examination and warnings given. The court also rejected challenges to the physician-duty-to-warn instruction and alleged judicial partiality.

CASE DETAILS

COURT	District of Columbia Court of Appeals
WRITING FOR THE COURT	Glickman, Associate Judge; Ruiz, Associate Judge; Pryor, Senior Judge
JURISDICTION	District of Columbia
DECIDED	November 20, 2003
DOCKET	No. 00-CV-910
DISPOSITION	affirmed
PROCEDURAL POSTURE	Medical-malpractice appeal from a judgment entered on a general jury verdict for the plaintiff in the amount of \$200,000. The defendant challenged the missing-witness instruction, a physician-duty-to-warn instruction, and alleged judicial bias.
STANDARD OF REVIEW	Abuse of discretion for the decision to give a missing-witness instruction, the formulation of jury instructions, and the trial judge's participation in questioning witnesses and making evidentiary rulings.
PRECEDENTIAL VALUE	Published precedential opinion of the District of Columbia Court of Appeals
PARTIES	Marilyn McPherson-Corder v. John Chinkhota

TOPICS

- medical malpractice
- professional negligence
- jury instructions
- evidence
- appellate procedure

PRACTICE AREAS

medical malpractice

professional negligence

evidence

civil procedure

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion by giving a missing-witness instruction permitting the jury to infer that an absent witness's testimony would have been unfavorable to Dr. Corder.
2. Whether the trial court abused its discretion by giving a separate instruction concerning a physician's duty to warn a patient of dangers to which the patient might be exposed.
3. Whether the trial judge's questioning of witnesses, prompting of foundation for the missing-witness instruction, and evidentiary rulings demonstrated impermissible partiality.

HOLDINGS

1. A missing-witness instruction may be given when the absent witness is peculiarly available to the opposing party and the witness's testimony is likely to elucidate the transaction; once those criteria are met, the trial court has discretion to give the instruction. The trial court properly instructed the jury in this case.
2. The trial court did not abuse its discretion by giving a separate instruction on a physician's duty to warn because the plaintiff's theory was supported by evidence, including expert testimony that Dr. Corder should have recognized the possibility of intermittent torsion.
3. The trial judge's questioning of witnesses, prompting of additional foundation, and evidentiary rulings did not demonstrate partiality warranting reversal.

KEY QUOTATIONS

"At a minimum, "[t]he two criteria that must be present before the jury may be invited to infer that the testimony of an absent witness would have been adverse to a party are (1) that the witness is peculiarly within the power of the party to produce, and (2) that the witness' testimony is likely to elucidate the transaction in issue." (1085)

"[F]rom the viewpoint of trial preparation," the testimony of the absent witness "must be both material and relevant to a disputed issue, must be noncumulative, and must constitute an important part of the case of the party against whom the inference is drawn." (1086)

"Where it reasonably appears that a missing witness was peculiarly available to a party and could have elucidated disputed issues at trial if the party had made contact with the witness in a timely manner, the party's unjustified dilatoriness should not be permitted to defeat the opposing party's entitlement to a missing witness instruction." (1091)

"The trial court did not err in giving a missing witness instruction or in any other respect that would call for reversal. We affirm the judgment on appeal." (1092)

FACTUAL BACKGROUND

Fourteen-year-old John Chinkhota developed groin pain after slipping on an icy sidewalk and was examined by Dr. Marilyn McPherson-Corder, who diagnosed a minor muscular strain. His pain worsened, and he was later diagnosed with testicular torsion; the testicle could not be saved and was surgically removed. At trial, Chinkhota and his mother disputed Dr. Corder's account of the examination and follow-up instructions, while Dr. Corder relied in part on the presence of an unidentified physician-assistant student who had observed the examination and discussions.

PROCEDURAL HISTORY

John Chinkhota sued Dr. Marilyn McPherson-Corder for professional negligence after his testicle was removed following delayed treatment for testicular torsion. The jury found Dr. Corder negligent and awarded Chinkhota \$200,000; the trial court entered judgment and denied post-trial motions. Dr. Corder appealed, and the District of Columbia Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Harris v. United States, 602 A.2d 154, 160 (D.C. 1992) (en banc)
- Graves v. United States, 150 U.S. 118, 121, 14 S. Ct. 40, 37 L. Ed. 1021 (1893)
- Thomas v. United States, 447 A.2d 52, 57-58, 60 (D.C. 1982)
- Dent v. United States, 404 A.2d 165, 169-171 (D.C. 1979)
- Katkish v. District of Columbia, 763 A.2d 703, 707 n. 2 (D.C. 2000)
- Cooper v. United States, 415 A.2d 528, 533 n. 11, 534 (D.C. 1980)
- Stager v. Schneider, 494 A.2d 1307, 1313 (D.C. 1985)
- Lawson v. United States, 514 A.2d 787, 790 (D.C. 1986)
- Canterbury v. Spence, 150 U.S. App. D.C. 263, 272, 464 F.2d 772, 781 (1972)
- Nelson v. McCreary, 694 A.2d 897, 901 (D.C. 1997)
- Talley v. Varma, 689 A.2d 547, 550 n. 1 (D.C. 1997)
- Womack v. United States, 350 A.2d 381, 383 (D.C. 1976)
- Perry v. United States, 364 A.2d 617, 620 n. 4 (D.C. 1976)

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