STATE OF MICHIGAN

COURT OF APPEALS

THEODORE A. HENDON, Personal Representative of the ESTATE OF CHRISTOPHER M. HENDON, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL, KENNETH WOLOK, M.D., and TRI COUNTY MEDICAL CLINIC,

Defendants-Appellees.

UNPUBLISHED
May 28, 1996

No. 176168
LC No. 91-415840 NH

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

This is a medical malpractice action arising from the death of plaintiff's thirteen-year-old son. Plaintiff appeals as of right from a jury verdict in defendants' favor. We affirm.

The decedent, who suffered from advanced Duchenne's muscular dystrophy, was diagnosed with bronchitis by his family physician, Dr. Wolok, at the Tri County Medical Clinic. When his condition worsened, decedent was taken to Beaumont Hospital's emergency room, seen by Dr. Baubie, and admitted to the hospital with a respiratory infection and complicating metabolic acidosis and sepsis. A "do not resuscitate" (DNR) order was placed on his chart by Dr. Baubie with Dr. Wolok's approval. There was conflicting evidence regarding whether plaintiff orally consented to the DNR order. Thus, when the decedent went into respiratory arrest later that night, he was allowed to die.

Plaintiff first argues that the trial court erred in admitting evidence that plaintiff had suffered a gunshot injury to the head which caused him seizures. Plaintiff argues that the evidence was more

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

prejudicial than probative because there was no evidence to support defendants' theory that the seizures affected plaintiff's ability to remember having consented to the DNR order. We disagree.

The evidence showed that plaintiff had been having grand mal seizures, which were controlled with medication, since he was shot in 1980. Within a couple of months after his son's death, plaintiff was diagnosed as also suffering from petit mal seizures. Plaintiff described petit mal seizures as being "like a daydream" during which he suddenly blanked out and could not recall what he had just heard. The evidence showed that plaintiff had not been aware that he was having the seizures and that sometimes even his wife could not tell that he had just had one. We find that the trial court did not abuse its discretion in admitting this evidence because it was relevant to the issue of whether plaintiff had forgotten that he consented to the DNR order. Further, its probative value was not substantially outweighed by the danger of unfair prejudice. *MRE* 403.

Plaintiff next argues that the trial court erred in excluding evidence of Beaumont Hospital's policies regarding how to obtain consent to a DNR order. We disagree.

Hospital policies do not establish the standard of care applicable in medical malpractice cases. *Gallagher v Detroit-Macomb Hospital Ass'n*, 171 Mich App 761, 765-766; 431 NW2d 90 (1988). Rather, the standard of care must be established by expert testimony. *Id.* Thus, the trial court did not abuse its discretion in ruling that the policies were not relevant. *MRE* 401, 402.

Plaintiff also argues that the trial court used the wrong standard in determining whether plaintiff's proffered expert family practitioner could testify against defendants. We again disagree.

Under the Tort Reform Act of 1986, a person may not give expert testimony against a specialist regarding the standard of care unless the witness specializes in and devotes a substantial portion of his clinical practice to "the same specialty or a related, relevant area of medicine." *MCL* 600.2169(1); *MSA* 27A.2169(1).[1] Because plaintiff's expert did not devote a substantial portion of his practice to emergency medicine, the trial court did not abuse its discretion in finding that he could not testify against defendant Beaumont Hospital concerning emergency room care provided by Dr. Baubie, a specialist.

Next, plaintiff claims that the trial court erred in allowing defendants to read into the record portions of Dr. Nigro's deposition because, plaintiff claims, Dr. Nigro had not been shown to be familiar with the applicable standard of care. We disagree.

Dr. Nigro was a pediatric neurologist specializing in muscular dystrophy who had treated plaintiff's son. Plaintiff read parts of Dr. Nigro's deposition to the jury during his case-in-chief and therefore arguably opened the door to the reading of defendants' cross-examination. Further, Dr. Nigro testified in deposition that he was an expert in emergency medicine as it affected the neurological and neuromuscular systems which are afflicted by muscular dystrophy. Thus, under the Tort Reform Act of 1986, his testimony regarding emergency care was properly admitted. *MCL* 600.2169(1); *MSA* 27A.2169(1).

Plaintiff next argues that the trial court erred in refusing to allow him to read Dr. Wolok's deposition into evidence or to use it to impeach him. We disagree.

Deposition testimony is generally inadmissible at trial if, as here, the witness is available to testify. *MRE* 804(b)(5). However, the testimony was arguably admissible as an admission of a party, even though Dr. Wolok was not a party at the time of the deposition. *MRE* 801(d)(2)(A); see also *MRE* 613(b). Thus, we examine the record to determine whether the alleged error was prejudicial. *MRE* 103(a).

In deposition, Dr. Wolok said that:

> My recollection of the events are that I told him [Dr. Baubie] that the child sounds like he's very ill. And I believe it's in the best interest that you discuss with Mr. Hendon a code status, or do-not-resuscitate status, and find out what should be done in case something catastrophic happens to this child in the middle of the night we would like to know what the family['s] wishes are as far as a resuscitation issue is concerned.

At trial, Dr. Wolok indicated that "It was not my impression after speaking with Dr. Baubie that Christopher was going to die within a matter of hours" and "that it was my impression that Chris was stable on admission to the hospital." After carefully reviewing the record, we find that there was no conflict between the trial and deposition testimonies which could have affected the outcome, and therefore conclude that the error, if any, was harmless.

Next, plaintiff argues that the trial court erred in instructing the jury that consent to a DNR order could be implied. We disagree.

Plaintiff cites no authority for the proposition that consent to a DNR order may not be implied. This Court will not search for authority to sustain or reject a party's position; the issue is therefore deemed abandoned. *Mallard v Hoffinger Indus, Inc*, 210 Mich App 282, 286; 533 NW2d 1 (1995). Further, Michigan law holds that consent to a medical procedure may be implied under certain circumstances, such as when the patient is unconscious and an emergency procedure is necessary, or when the patient manifests a willingness to submit to the procedure. *Wert v Taylor*, 190 Mich App 141, 146; 475 NW2d 426 (1991). Thus, the trial court did not err in instructing the jury that consent could be implied from plaintiff's conduct.

Plaintiff argues that a patient's interest in dying outweighs the state's interest in life only when the patient is in a persistent vegetative state or in a prolonged process of dying. Because his son was neither, plaintiff argues, the trial court erred in denying his motion for a directed verdict and in refusing to instruct the jury that it was negligent to write a DNR order under the circumstances of this case. We again disagree.

Plaintiff again fails to provide any authority for the specific proposition that a DNR order is only appropriate when the patient is in a persistent vegetative state or in a prolonged process of dying.

Therefore, the issue may be deemed abandoned. *Mallard*, 210 Mich App at 286. Further, parents have a right to refuse medical treatment on behalf of their children. *In Re Rosebush*, 195 Mich App 675, 682-683; 491 NW2d 633 (1992). A decision to discontinue life support should follow the patient's wishes, if known, or the patient's best interests. *Id* at 683. Thus, plaintiff was not entitled to a directed verdict or to a jury instruction on this issue.

Plaintiff also argues, again without supporting authority, that the consent of both parents should be required for a DNR order. Plaintiff concedes that this is not the law. Therefore, his argument concerns a policy decision which is best left to the Legislature.

Next, plaintiff argues that the statute of frauds requires that consent to a DNR order be in writing and that the trial court therefore erred in refusing to so instruct the jury and in denying plaintiff's motion for a directed verdict. We disagree.

The statute of frauds provides that a promise relating to medical care is void unless made in writing and signed by the party to be charged. *MCL* 566.132(1)(g); *MSA* 26.922(1)(g). However, when plaintiff's son died, the statute also provided that "[n]othing in this paragraph shall affect the right to sue for malpractice or negligence." *Id.* Accordingly, cases have held that a writing is required only in breach of contract cases when the patient sues to enforce an alleged promise to provide specific care or to achieve specific results. See, e.g., *Powers v Peoples Comm Hosp Authority*, 183 Mich App 550, 553-554; 455 NW2d 371 (1990); *Malik v William Beaumont Hosp*, 168 Mich App 159, 170-171; 423 NW2d 920 (1988). No such promise was at issue here. Further, consent to treatment may be written, oral, or implied. See *Wert*, 190 Mich App at 146; see also *MCL* 700.496(9)(b); *MSA* 27.5496(9)(b). Thus, there was no error in this regard.

Plaintiff next argues that the trial court erred in giving the standard jury instruction on informed consent and in refusing to give the special instruction on consent to a DNR order which plaintiff had created. However, plaintiff again fails to cite any authority showing that the standard instruction was in error or that the proposed instruction was an accurate statement of the law. Thus, the issue is deemed abandoned and we find no error. *Mallard*, 210 Mich App at 286.

Lastly, plaintiff claims that defendants had the burden of proving informed consent by clear and convincing evidence and that the trial court therefore erred in its description of the burden and quantum of proof. We disagree.

Contrary to plaintiff's argument, the burden of proof has been imposed upon plaintiff by statute and this Court has no power to modify it. *MCL* 600.2912a(1)(b); *MSA* 27A.2912(1)(1)(b); see also *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Further, plaintiff has again failed to provide supporting authority for the proposition that the quantum of proof should be clear and convincing evidence in cases involving consent to a DNR order. Thus, we deemed the issue abandoned and find no error. *Mallard*, 210 Mich App at 286. This case does not involve a petition to disconnect life support. *In Re Martin*, 450 Mich 204, 226-227; 538 NW2d 399 (1995) ("clear and convincing

evidence is required to determine whether a patient's statements, made while competent, indicate a desire to have treatment withheld").

Rather, a parent's decision to refuse treatment on behalf of a child should usually be made without judicial intervention. *In Re Rosebush*, 195 Mich App at 683.

Affirmed.

/s/ Maura D. Corrigan
/s/ Chad C. Schmucker

[1] The section was again amended in 1993 to further tighten the standard for qualifying expert witnesses in malpractice cases. See *MCL* 600.2169(1); *MSA* 27A.2169(1). However, that amendment does not apply to cases which, like this one, were filed after October 1, 1986, but before October 1, 1993. *Id.* (historical notes); see also *Kelley v Murray*, 176 Mich App 74, 78; 438 NW2d 882 (1989).