STATE OF MICHIGAN

COURT OF APPEALS

AURELIOUS ALSTON and JULIA ALSTON,

Plaintiffs-Appellees,

v

FLINT EMERGENCY PHYSICIANS, P.C., and DR. FEDEWA,

Defendants,

and

McLAREN GENERAL HOSPITAL,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 176065
LC No. 91-005873-NM

Before: Fitzgerald, P.J., and Corrigan and P.D. Houk,* JJ.

PER CURIAM.

In this medical malpractice action, defendant McLaren General Hospital appeals as of right from a jury verdict and monetary judgment in favor of plaintiffs. We affirm in part, reverse in part, and remand.

Plaintiff Aurelious Alston presented at McLaren General Hospital Emergency Room on March 18, 1990, with complaints of pain in his elbow. He was examined by Dr. Fedewa, the emergency physician on duty. Dr. Fedewa was a resident in training, in her third year of an emergency residency program. Dr. Fedewa sought a consultation with the hospital's orthopedic department. Dr. Keller, a first-year general surgical resident undertaking a rotation in the orthopedic department, examined Mr. Alston. Dr. Keller then discussed Mr. Alston's condition with the senior orthopedic resident and the orthopedic surgeon on call. The surgeon on call formulated a discharge plan for Mr. Alston, which was related by Dr. Keller to Dr. Fedewa.

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

Mr. Alston returned to the emergency room the next day and was admitted into the hospital's intensive care unit because of an infection in his right arm. The infection resulted in the amputation of Mr. Alston's right arm.

Plaintiffs filed this medical malpractice action against Flint Emergency Physicians, P.C., Dr. Fedewa, and McLaren Hospital. Following a hearing on defendant's motion for summary disposition, the trial court determined that Dr. Kwiatowski could not testify to the local standard of care of emergency room residents and, therefore, dismissed the action against Dr. Fedewa and her employer, Flint Emergency Physicians, P.C. The court held, however, that Dr. Kwiatowski's testimony as it related to the operation of an emergency room was admissible. The court's ruling limited Dr. Kwiatowski's testimony to the standard of care with respect to the operation of an emergency department.

Using a special verdict form, the jury found that the hospital was negligent in its treatment of Mr. Alston and that the hospital's negligence was the proximate cause of Mr. Alston's injuries. The jury awarded $1,500,000 to Mr. Alston, and $500,000 to Mrs. Alston on her claim of loss of consortium.

Defendants first claim that the trial court abused its discretion in permitting Dr. Kwiatowski, an emergency medicine specialist from New York, to offer expert testimony regarding the operation of an emergency room. We disagree. Dr. Kwiatowski testified to the judge's satisfaction regarding his qualifications and familiarity with the standard of care for emergency rooms. He testified that he was familiar with the standard of care applicable to emergency rooms on the basis of his own education, practice, and development and running of an emergency medicine residency program. Dr. Kwiatowski also testified that he visited many hospitals in Southeastern Michigan and has had numerous specific discussions with emergency room physicians in Michigan regarding standards of practice. He has also had ongoing exposure to the health care system in Michigan, and indicated that the standard of care in Flint is similar to the standard of care in New York City. Thus, the trial court did not abuse its discretion in finding that Dr. Kwiatowski was qualified to testify regarding the standard of care applicable to emergency rooms. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141-142; 528 NW2d 170 (1995); *Turbin v Graesser (On Remand)*, 214 Mich App 215; 542 NW2d 607 (1995).

Defendant contends, however, that because the trial court granted defendant's motion to limit the proofs to the allegations in the complaint, plaintiff should not have been allowed to argue that the hospital itself was negligent. Defendant also maintains that a hospital may be liable only if its agents are liable. We disagree.

The court instructed the jury on plaintiff's theory of recovery:

> When I use the words professional negligence or malpractice with respect to the Defendant's conduct, I mean the failure to do something which a hospital through its agents in an emergency room failed to do in this community, or a similar one would do,

> or the doing of something which a hospital or its agents would not do under the same or similar circumstances you would find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the ordinary hospital acting through its agents would do or would not do under the same or similar circumstances.

First, defendant acceded to the jury instructions, which allowed the finding of fault for the "doing of something which a hospital *or* its agents would not do." Dr. Kwiatowski's expert testimony helped define the hospital's duty. *Wilson v Stillwill*, 411 Mich 587, 610-611; 309 NW2d 898 (1981). Second, there is no indication in the record that defendant objected to the jury form, which allowed a finding of negligence against the hospital itself as a defendant. Finally, despite the court's ruling that plaintiffs could present evidence only on the allegations in the complaint, the proofs and instructions placed the question of the hospital's negligence before the jury. When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. MCR 2.118(C)(1).

Defendant next contends that the trial court abused its discretion in admitting Dr. Kwiatowski's testimony regarding Dr. Fedewa, who had been dismissed from the case. A review of Dr. Kwiatowski's testimony, however, reveals that Dr. Kwiatowski was not particularly critical of Dr. Fedewa, but rather of the chain of command which left the physicians without guidance. Dr. Kwiatowski's primary criticism of defendant's conduct was that Mr. Alston should have been admitted to the hospital, and no one knew who was accountable for the decision to discharge. The evidence was relevant in that it tended to show that the hospital did not have a clearly defined structure for final treatment and subsequent discharge or admission of a patient. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). Contrary to defendant's suggestion, the testimony did not attempt to show that the hospital was vicariously liable for Dr. Fedewa's actions. Rather, the evidence showed that Dr. Fedewa conducted herself as she believed she should have. Therefore, the evidence, which was relevant to a material issue of whether the hospital breached a duty of care in the way it organized and administered the emergency room, was properly admitted.

The trial court also properly denied defendant's motion for partial summary disposition with regard to the claim of vicarious liability for the participation of Dr. Fedewa. The issue was not the vicarious liability of defendant, but whether defendant itself breached a duty of care in the manner in which it operated the emergency room.

Next, defendant asserts that the trial court abused its discretion in allowing plaintiff to cross-examine defendant's expert, Dr. Mangell, about Dr. Keller's failure to wear gloves while drawing fluid from Mr. Alston because defendant was not on notice that such testimony might be elicited.[1] Again, we disagree. On direct examination, Dr. Mangell testified that Dr. Keller did not breach a standard of care. On cross-examination, Dr. Mangell testified that emergency room physicians may not always wear gloves when draining or dressing a wound, but that it would be his choice that gloves be worn by

attending physicians. This testimony related to emergency room procedures and was relevant to the allegation that defendant owed a duty to establish rules and procedures to be followed in rendering care in the emergency room.

Defendant next cites twelve illustrative instances in the transcript that allegedly show the misconduct of plaintiff's counsel. Of the twelve, defense objections were sustained seven times. One objection was overruled. One question was withdrawn, and one led to a withdrawal based on improper recollection of prior testimony. Two of the citations refer to plaintiff's objections to defense examination of the witness, and one citation is to a remark in closing argument that was not challenged. Nonetheless, we have reviewed the comments to which defendant objects and find that the comments were either proper or had no effect on the verdict. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).

Defendant also argues that the trial court erroneously instructed the jury on loss of consortium. However, defendant did not object to the instruction and, indeed, acceded to the instructions as given. An appellate court is obligated to review only issues that are properly raised and preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Generally, an issue is not properly preserved if it is not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A party waives review of jury instructions to which he accedes at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). We decline to disregard the issue preservation requirement because failure to review the issue would not result in manifest injustice. *Grant*, *supra* at 547.

Last, defendant maintains that the trial court erred in denying its motion for new trial or judgment notwithstanding the verdict or, in the alternative, motion for remittitur. The arguments raised by defendant with respect to the motion for new trial or JNOV have previously been addressed and do not warrant review.

In deciding a motion for remittitur, the "only consideration *expressly* authorized by [MCR] 2.611(E)(1)" is whether the award is supported by the evidence. *Palenkas v Beaumont Hospital*, 432 Mich 527, 532; 443 NW2d 354 (1989)(emphasis in original). A trial court should also examine a number of other factors, "such as whether the verdict was induced by bias or prejudice," but the inquiry should be limited to "*objective* considerations relating to the actual conduct of the trial or to the evidence adduced." *Id.* (emphasis in original).

Here, the judge considered the evidence and concluded that the "catastrophic event" suffered by Mr. Alston justified the award of damages to Mr. Alston. We agree. The trial court did not, however, specifically address the $500,000 award to Mrs. Alston for loss of consortium. Loss of consortium includes loss of conjugal fellowship, companionship, services, and all other incidents of the marriage relationship. *Berryman v K Mart*, 193 Mich App 88, 94; 483 NW2d 642 (1992). The only testimony regarding the damages suffered by Mrs. Alston was that of Mr. Alston, who testified that Mrs. Alston has to do all the cooking and vacuuming and has to bring him his clothes and assist him in

getting dressed. The testimony shows that Mr. Alston is distressed by having to be cared for by Mrs. Alston, but there is no evidence that Mrs. Alston has suffered. The record in this case simply does not support an award of $500.000 to Mrs. Alston. Thus, we conclude that the trial court abused its discretion in denying the motion. *Palenkas, supra*. The case is remanded to the trial court for a rehearing on defendant's motion for remittitur with respect to Mrs. Alston's claim of loss of consortium in light of the scant evidence presented.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Peter D. Houk

[1] Defendant also suggests that Mr. Alston's children and grandchildren were improperly allowed to testify because they were not listed on the witness list. However, plaintiff's witness list indicates "family and friends." Further, defendant failed to preserve this issue with regard to the family by raising an objection at trial. *People v Barclay*, 208 Mich App 670, 673-674; 528 W2d 842 (1995).