

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STEPHANIE LOKKEN,

Plaintiff-Appellee,

v

ABD A. ALGHANEM, M.D.,

Defendant-Appellant.

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UNPUBLISHED

February 27, 1998

No. 197475

Genesee Circuit Court

LC No. 93-022105-NH

Before: Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Judgment was entered in favor of defendant in this medical malpractice action following a jury trial. Plaintiff thereafter filed a motion for new trial or to set aside the judgment of no cause of action. The trial court granted plaintiff's motion for new trial, and defendant appeals by leave granted. We affirm.

Defendant performed breast reduction surgery on plaintiff two times. During the first operation, defendant removed 90 grams more tissue from plaintiff's left breast than from her right breast. Defendant admitted that prior to the operation, plaintiff's left breast was smaller than her right. At trial, defendant defended his decision to remove more tissue from the smaller breast by explaining that the volume or size of tissue removed is different from the weight of material removed because breast tissue has different densities. Therefore, he argued that the removal of more weight from the smaller breast did not indicate malpractice. Plaintiff's expert testified, however, that it was inappropriate to remove more tissue from the smaller breast. Despite defendant's claim that it was appropriate to remove more tissue from the smaller, left breast, plaintiff's breasts were not symmetrical after the operation. Her right breast was significantly larger than her left breast, which according to all of the testifying physicians, including defendant, was not an acceptable result. Plaintiff and another witness testified that the size discrepancy was noticeable immediately after the operation. Plaintiff further testified that defendant originally informed her that the discrepancy in size was due to swelling from the surgery. Defendant, however, testified that the asymmetry between the breasts was not apparent immediately after the surgery but was caused by plaintiff's right breast gradually growing after the surgery. Defendant conceded that two

months after the surgery, the asymmetry was gross and was a "big problem". The discrepancy in size between the breasts resulted in the need for a second surgery.

Defendant testified that his goal for the second surgery was to achieve breast symmetry. During the second surgery, defendant operated only on the right breast. He placed plaintiff's right nipple higher than her left nipple believing that symmetry would be achieved if the right breast descended and pulled the nipple downward. Ten days after the second surgery, defendant believed that the nipple was even higher than where he had placed it. Despite this, he advised plaintiff that she looked fine. The end result was that plaintiff's right nipple was approximately four centimeters higher than her left. Plaintiff testified that this four centimeter difference was apparent immediately following the surgery. Defendant denied this, claiming that the nipple, in fact, rode up some time after the surgery. Defendant's expert testified that following breast surgery, nipples can move upward, rather than downward, if the breast tissue dislocates. He testified that this phenomenon does not indicate that malpractice has been committed. He acknowledged, however, that although a one and a half to two centimeter differential can happen, a four centimeter discrepancy is not acceptable. Because of the continuing gross asymmetry between the breasts, plaintiff underwent a third surgery by different physicians. The third surgery resulted in substantial similarity in the breasts. However, plaintiff was left with significant scarring of the right breast.

Plaintiff filed a complaint against defendant claiming that he was negligent in the performance of both the first and second surgeries. She alleged that his removal of more tissue from the smaller breast was malpractice during the first surgery and that his positioning of the nipple in the second surgery was similarly malpractice. The jury rendered its verdict in favor of defendant, but the trial court granted a new trial, finding that the verdict was against the great weight of the evidence.

## I.

Defendant first argues that the trial court should not have awarded plaintiff a new trial when the jury's verdict was not against the great weight of the evidence. A decision on a motion for new trial is committed to the trial court's discretion. *Arrington v Detroit Osteopathic Hospital (On Remand)*, 196 Mich App 544, 550; 493 NW2d 492 (1992).

A trial court's determination that a verdict is not against the great weight of the evidence will be given substantial deference by the appellate court. A trial court's determination that a verdict is against the great weight of the evidence will be given somewhat less deference to insure that the trial court has not invaded the province of the jury. In either situation, however, "it is incumbent upon a reviewing court to engage in an in-depth analysis of the record on appeal." [*Id.* at 560.]

Our in-depth analysis of the record reveals that the trial court did not abuse its discretion when it found that the verdict was against the great weight of the evidence and granted a new trial.

At trial, defendant conceded that plaintiff's right breast was larger than the left prior to the first surgery and that, nevertheless, he removed more tissue from the left breast at the time of that surgery.

He also acknowledged that plaintiff's breasts were grossly asymmetrical after the first surgery, prior to the second surgery. Moreover, there was ample testimony that the breasts were not symmetrical after the second surgery, either. All three testifying physicians agreed that, in plastic surgery, end result is highly important. Both plaintiff's and defendant's experts testified that the surgery is judged on the end result. Defendant's expert testified that the standard of care required the surgeon to "attempt to achieve symmetry". In fact, defendant even testified that significant asymmetry after breast surgery could indicate negligence on the part of the plastic surgeon.

Given that the standard of care required defendant to attempt to achieve symmetry and given that the end result is to be judged when determining if there was negligence, the verdict was clearly against the great weight of the evidence. There was no dispute that the end result of both of plaintiff's surgeries was gross asymmetry. Moreover, the finding that the asymmetry was caused by factors other than defendant's malpractice was against the great weight of the evidence.

With regard to the first surgery, defendant's theories that the right breast grew after the first surgery and that the tissue was more dense in one breast, which would account for the discrepancy in the weight removed, were not supported by any competent testimony. These claims were based on speculation. Although there was testimony that breast tissue can vary in weight and density, the pathologist called by defendant testified that he did not know what the density of plaintiff's breast tissue was or how much fatty tissue, as opposed to fibrous tissue, was in each breast at the time of the first surgery. He also testified that the tissue in her breasts was basically similar, although he found that the left breast cells had acute inflammation. Further, defendant never checked the density of the tissue in the operating room at the time of the first surgery. Thus, there was no testimony or evidence from which to conclude that the left breast tissue was denser at the time of the first surgery. The fact that no one could testify that the tissue in the left breast was more dense during the first surgery belies defendant's theory that he removed more tissue from the smaller breast because of the difference in density between the breasts. In addition, the pathologist never compared the tissue between the breasts after the second surgery because the left breast was not operated on at that time. Therefore, there was no evidence to support any testimony that the right breast was somehow pathologically different from the left, which would support a theory that it grew, unlike the left breast, because of the development of fibrocystic disease or some other factor. There was simply nothing, other than speculation, that would support that the right breast grew after the first surgery and that the left one did not. We also note that defendant's expert testified that the breasts were asymmetrical immediately following the first surgery. This testimony refutes defendant's theory that the right breast grew.

With regard to the second surgery, defendant's theory was also not supported by the evidence. Defendant conceded that right after the surgery he noticed that the nipples were not asymmetrical. Defendant's expert testified that in rare circumstances a nipple will migrate upwards after surgery because the breast tissue dislocates downward, but he did not testify that plaintiff's nipple migrated upward for this reason. In fact, the only testimony on this issue was defendant's speculation that plaintiff's nipple must have risen as the breast tissue sagged. There was no evidence or testimony to support this speculation. Further, the experts agreed that the discrepancy, approximately 4 centimeters or an inch and a half, in the nipples was not acceptable.

Based on our review of the record, we will not disturb the trial court's order awarding plaintiff a new trial.

## II.

Defendant also argues that the trial court abused its discretion by granting a new trial based on the fact that it had precluded plaintiff from presenting testimony from an expert pathologist.

Plaintiff was precluded from calling Dr. Werner Spitz as an expert. She claims that Spitz was going to refute defendant's theory that more tissue was appropriately removed from the left breast even though it was smaller. Originally, Spitz was not on plaintiff's witness list. Six days after the completion of defendant's deposition, which was after the deadline for filing witness lists, plaintiff filed an amended witness list, naming Spitz. Shortly thereafter, plaintiff filed a motion to allow the amendment to her list. Plaintiff claimed that until the conclusion of defendant's deposition, it was not apparent that the density of the tissue removed would be an issue. The trial court denied plaintiff's motion to add Spitz, essentially finding that it was too late for an addition to the list. The scheduled trial date was September 27, 1994, only two weeks from the date of the hearing on the motion to amend the witness list. The trial date was subsequently adjourned more than once and did not actually begin until late May, 1995. However, plaintiff never renewed her request to add Spitz.

At the outset we are compelled to note that we are not reviewing the propriety of the trial court's order denying plaintiff's motion to amend her witness list. Neither party appealed from that order and this appeal is not taken from a final judgment or order. Rather, on leave granted, we are reviewing whether the trial court erred in granting a new trial based on the fact that Spitz was precluded from testifying. With regard to that issue, we believe that the question, as presented by defendant, is not viable. Our reading of the trial court transcript on the motion for new trial does not convince us that the trial court granted a new trial because Spitz was not allowed to testify.

In her motion for new trial, plaintiff argued that the exclusion of Spitz as an expert by the trial court was error, which prejudiced plaintiff and warranted a new trial. After hearing oral argument on the motion for new trial, wherein plaintiff spent much time on the issue of the preclusion of Spitz, the trial court stated:

I think in all reality that if the matter had been called to my attention about Spitz at a time that I felt there was an opportunity for the other side to take a deposition on him, to have proper discover, I probably would have allowed Spitz into the case.

As I review this now, considering the comment made by Plaintiff's counsel as to information provided by Spitz on the issue of density of the breast, I think it could have been a compelling factor in the trial.

This statement by the trial court is merely an observation that if something had been brought to the attention of the court, a different outcome may have been reached. It is not a conclusion that the trial court erred by denying plaintiff's motion to amend her witness list and that this error warranted a new

trial. Moreover, it is clear from the rest of the court's comments that a new trial was granted based on plaintiff's argument that the verdict was against the great weight of the evidence and not because Spitz was precluded from testifying:

Its not an easy thing for a Judge to say that the jury's verdict was against the great weight of evidence or contrary to law. Well, we're not talking about the law, as such, but the great weight of evidence. I think it was, I think it was against the great weight of the evidence.

I, in reviewing all the information and reviewing the briefs and the other material that you gentlemen have provided, its hard to explain why the jury came to this verdict but I think it was clearly against the evidence, no question in my mind at all. Not against the evidence along, but the great weight of the evidence.

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Now, I'm not going to return a decision which indicates that I'm making a contrary finding than the jury, I don't think that that's appropriate. But I think that this is one of those dramatic circumstances that when I review all the evidence that I clearly recall - - and I do have a vivid recollection of much of the testimony - - and the positions recited here by Counsel today, I agree with the plaintiff.

I think they're entitled to a new trial and I'm going to grant that motion.

On reconsideration, the trial court confirmed that the reason for his decision was that the verdict was against the great weight of the evidence.

Well, it appears to me that we've discussed this at such great lengths before and I made a determination that it was against the great weight of evidence. We discussed that. I gave details as to why I felt that the jury verdict was improper and set it aside.

\* \* \*

Well, I heard the case. I remember the case vividly because it was a traumatic situation. I remember that we had all the photos and testimony at great lengths from the plaintiff as well as the defendant and the experts. I know the jury - - We had a good jury and I had them listen to it and then made a determination. But when I reviewed all the factors together, I said the jury judgment was not consistent with what the law requires.

On appeal, defendant interprets the trial court's opinion as granting the new trial, in part, because the exclusion of Spitz's testimony denied plaintiff a fair trial. This is an inaccurate interpretation. Because the trial court did not grant the motion for new trial based on the fact that Spitz did not testify, we find it unnecessary to engage in a discussion as to whether the failure of the trial court to allow Spitz to testify denied plaintiff a fair trial or whether Spitz would have offered any testimony that would have

changed the outcome of the trial. If, on retrial, plaintiff wants to attempt to call Spitz as a witness, the appropriate motions and objections should be made to the trial court, which can rule on those motions.

Affirmed.

/s/ Harold Hood

/s/ Michael J. Kelly

/s/ Roman S. Gibbs