

STATE OF MICHIGAN
COURT OF APPEALS

MARY JOE GILPIN and JOHN C. GILPIN,

UNPUBLISHED

August 13, 1999

Plaintiffs-Appellants/Cross-Appellees,

v

No. 205792

Washtenaw Circuit Court

LC No. 93-000669 NH

MANFRED MARCUS, M.D., MANFRED
MARCUS, M.D., P.C., and HURON VALLEY
SURGERY ASSOCIATES, P.C.,

Defendants,

and

PATRICIA DEPOLI, M.D., and SISTERS OF
MERCY HEALTH CORPORATION d/b/a ST.
JOSEPH MERCY HOSPITAL,

Defendants-Appellees/Cross-
Appellants.

Before: Hood, P.J., and Fitzgerald and Collins, JJ.

PER CURIAM.

Plaintiffs Mary Joe Gilpin and John C. Gilpin appeal as of right a judgment of no cause of action against defendants Patricia DePoli, M.D. and St. Joseph Mercy Hospital in this medical malpractice suit.¹ We affirm.

Plaintiffs' claim arises from the performance of surgery to remove Mary Joe Gilpin's (hereinafter plaintiff) gallbladder in a procedure known as a laparoscopic cholecystectomy. The surgery was performed at St. Joseph Mercy Hospital on August 23, 1993. Plaintiff alleged in a September 27, 1993, complaint that the surgery was performed by former codefendant Manfred Marcus, M.D., a surgical specialist, "with the assistance of defendant DePoli, who was then a second-year surgical resident." Dr. DePoli was an employee of the hospital, and Dr. Marcus was an independent staff physician.

During a laparoscopic cholecystectomy to remove a gallbladder, the abdomen is elevated through the injection of carbon dioxide. A small incision is made in the abdomen through which an instrument known as a trocar is inserted. The trocar has four openings, through one of which a camera device is inserted which sends an image of the inside of the abdomen to an external TV monitor. The various surgical instruments are inserted and manipulated through the other three ports. To remove the gallbladder, the surgeon clips the cystic duct, which connects the gallbladder to the common bile duct, to seal the opening. The cystic duct is then severed.

In 1993, this procedure was performed by two physicians, with additional staff working the camera. According to Drs. Marcus and DePoli, as the procedure began, Dr. DePoli attempted to put a clip on to seal the cystic duct. She was unable to do so, and Dr. Marcus took over. Dr. Marcus applied the clips that served to seal the cystic duct. He then cut what both he and Dr. DePoli believed to be the cystic duct with scissors. Subsequent to surgery, however, plaintiff developed abdominal discomfort that was determined to have been caused by the severing of the common bile duct during surgery. The common bile duct was repaired in a subsequent surgery.

Plaintiffs commenced this medical malpractice action by complaint filed September 27, 1993, against Dr. Marcus, his professional corporations, Dr. DePoli, and St. Joseph Mercy Hospital. Plaintiffs alleged that malpractice occurred during the surgery when plaintiff's common bile duct, rather than the cystic duct, was severed. Plaintiffs also alleged malpractice in the delay in diagnosing and treating the problem after surgery. Plaintiffs sought to hold the hospital vicariously liable for Dr. DePoli's conduct. Plaintiffs also asserted a claim of "negligent credentialing," alleging that the hospital was negligent in granting Dr. Marcus staff privileges to perform laparoscopic cholecystectomies. Plaintiffs also alleged battery by all defendants.

Plaintiffs settled with and dismissed Dr. Marcus and his two professional corporations on November 15, 1995. In a second amended complaint filed November 28, 1995, plaintiffs eliminated Dr. Marcus as a defendant. Plaintiffs also withdrew their allegations of "battery by all defendants." Plaintiffs added a second count entitled "Violation of Michigan Consumer Protection Act by Defendant Hospital." This allegation was premised on alleged misrepresentations by the hospital in the consent form that "both Dr. Marcus and defendant DePoli were credentialed by defendant hospital to perform laparoscopic cholecystectomies and that defendant DePoli would have an 'important part' in plaintiff's surgery and care and 'would contribute to a high quality of patient care.'"

On March 8 and April 30, 1996, defendants filed motions for partial summary disposition of the claim under the Michigan Consumer Protection Act (MCPA) and the claim of negligent credentialing. In response, plaintiffs asserted that their MCPA claim was also premised on the theory that it was Dr. DePoli, not Dr. Marcus, who cut the common bile duct. Defendants' motions were initially granted by the trial court on January 2, 1997. In response to plaintiffs' motion for reconsideration, the court agreed to reconsider its ruling and directed the parties to file supplemental briefs.

Before the issuance of the opinion on rehearing, plaintiffs filed a motion on April 1, 1997, for leave to file a third amended complaint. Plaintiffs sought to add a new count of battery and additional factual allegations in support of the MCPA claim. In the proposed battery count, plaintiffs alleged that

Dr. DePoli committed a battery by acting as operating surgeon without permission or consent. The allegations of a violation of the MCPA were expanded to include Dr. DePoli's alleged misrepresentation that she had performed "numerous" laparoscopic cholecystectomies.

At a hearing on April 8, 1997, less than three weeks before trial, the trial court denied the motion to amend as untimely. In an opinion and order dated April 15, 1997, the court again granted summary disposition on the MCPA claims. However, the court reversed the prior dismissal of the credentialing claim and allowed that claim to go to trial.

At trial, plaintiffs claimed that it was Dr. DePoli who severed plaintiff's cystic duct. This claim was based on the testimony of plaintiffs' expert witnesses, who testified that Dr. DePoli stood where the operating surgeon usually stands. Defendants presented the testimony of Dr. DePoli, which echoed the testimony of Dr. Marcus that it was Dr. Marcus, and not Dr. DePoli, who inadvertently cut the common bile duct. In response to a special verdict form, the jury found that (1) Dr. DePoli was not negligent, (2) that none of the defendant hospital's other "employees or agents" were negligent, and (3) that St. Joseph Mercy Hospital was not negligent in credentialing Dr. Marcus.

I

A. Plaintiff's proposed special jury instruction

Plaintiffs contend that Michigan case law provides that every surgeon taking part in an operation is liable for his own conduct and also the wrongful acts of other surgeons observed by him without objection to the wrongful act. Thus, plaintiffs contend that the trial court abused its discretion by failing to give the following supplemental jury instruction:

The fact that Dr. Marcus bears ultimate responsibility for Mrs. Gilpin's care does not relieve Dr. DePoli of liability if you find that she was a member of the operating team. Each physician, operating jointly on a patient, is answerable as a joint tortfeasor for his or her own conduct as well as that of the other which he or she observed or in the exercise of reasonable vigilance, should have noticed.

Plaintiffs rely on three cases in support of their contention. However, none of the cases cited by plaintiffs involved a question of instructing a jury, as a matter of law, that a resident is responsible for any conduct by an attending surgeon that the resident sees or should have noticed.

In *Franklyn v Peabody*, 249 Mich 363, 368; 228 NW 681 (1930), Dr. Peabody and Dr. Johnston discussed a certain procedure, agreed it was necessary, and Dr. Peabody told Dr. Johnston to perform the procedure. In this context, the Court reversed a judgment notwithstanding the verdict for Dr. Peabody and remanded for a new trial. Under the evidence presented, the Court held that the physicians were jointly and severally liable: "Dr. Johnston for performing an unauthorized operation, and Dr. Peabody for counseling and advising him to perform the same." However, the Court specifically "confine[d] our opinion, relative to the rights of a patient and the duty and liability of the

surgeons, to the particular case before us.” Here, in contrast, there is no evidence that Dr. DePoli counseled or advised Dr. Marcus to do anything.

In *Rodgers v Canfield*, 272 Mich 562; 262 NW 409 (1935), from which plaintiffs excerpted the language for their instruction, defendant Canfield was the plaintiff’s family physician called to repair a fracture. Defendant Dr. VanArk assisted. Dr. Canfield was the physician in attendance, but on two occasions subsequent to the injury Dr. VanArk was called into consultation by Dr. Canfield. At trial, evidence was introduced tending to show acts of malpractice on the part of Dr. Canfield in the absence of Dr. VanArk.

The Supreme Court held that separate verdicts had to be returned because Dr. VanArk could not be held liable for damages for the malpractice of Dr. Canfield in which he was not a participant. It was in this context that the Supreme Court in *Rodgers* noted that for their joint acts of commission or omission both defendants were liable, but any such act by one, in the absence of the other, unless concerted, could not be attributed to the nonparticipant. *Id.* at 564.

There is no suggestion in *Rodgers* that the Court was dealing with the situation of a supervising surgeon and a resident, or with very differing standards of practice. The Court’s statements that plaintiffs sought to use here as an instruction to the jury were not made in the course of addressing appropriate jury instruction. Rather, the statement plaintiffs sought to excerpt were made in the course of holding that a single sum verdict against the two defendants was infirm.

In *Barnes v Mitchell*, 341 Mich 7; 67 NW2d 208 (1954), a verdict was returned against the defendant physician for negligence by an employee in x-raying the plaintiff’s hand. The Court reversed a judgment notwithstanding the verdict, holding that there was sufficient evidence that the nurse was acting within the scope of her employment such that the surgeon would be vicariously liable. Here, in contrast, plaintiffs seek to hold the subordinate vicariously liable for the conduct of the supervising surgeon as a matter of law.

Our research has revealed no authority to support plaintiffs’ contention that a resident surgeon taking part in an operation under the supervision of an attending surgeon is liable as a matter of law for the wrongful acts or omissions of the attending surgeon observed by him without objection. Plaintiffs’ proposed supplemental jury instruction would essentially impose strict liability on the resident without a factual finding that the resident breached a standard of practice as statutorily required by Michigan law.

B. The standard jury instruction

A plaintiff in a medical malpractice action must prove a breach of the standard of practice by the physician before liability may be imposed. MCL 600.2912a; MSA 27A.2912(1); *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Section 2912a provides that:

In an action involving malpractice the plaintiff shall have the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

(a) the defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice in the community in which the defendant practices or in a similar community, and that as a proximate result of defendant failing to provide that standard, the plaintiff suffered an injury.

Residents, as students in training to become specialists, are judged by the local, same, or similar community standard of practice applicable to general practitioners. See *Bahr v Harper Grace Hosp*, 198 Mich App 31, 35; 497 NW2d 526 (1993), rev'd in part on other grounds 448 Mich 135, 141; 528 NW2d 170 (1995).

Consistent with the directive of the statute, the standard jury instruction defining malpractice of a general practitioner, SJI2d 30.01, was given to the jury:

When I use the words “professional negligence” or “malpractice” with respect to the conduct of Dr. DePoli and the other hospital employees, I mean the failure to do something which a doctor of ordinary learning, judgment, or skill in this community or a similar one would do. Or doing something which a doctor of ordinary learning, skill or judgment would not do under the circumstances – under the same or similar circumstances that you find to exist in this case.

Clearly, under § 2912a, as implemented by SJI2d 30.01, a physician cannot be held liable for malpractice absent a breach of the standard of practice.

Contrary to plaintiffs’ argument, the standard jury instruction given did not suggest to the jury that Dr. DePoli could not be liable for Dr. Marcus’ negligence. Rather, the instruction properly advised the jury that Dr. DePoli could not be liable for anyone’s conduct unless she herself were found to breach the applicable standard of practice. Here, expert testimony unequivocally established that residents are students in training and are not expected to have the same skills or responsibilities as the surgeon, who acts as the “captain of the ship.” The defense witnesses all agreed that a resident with Dr. DePoli’s training and in Dr. DePoli’s position during this surgery would not be required by the standard of practice to second-guess or interfere with the surgeon. Plaintiffs’ experts were equivocal as to whether Dr. DePoli was required by the standard of practice to recognize a problem and tell the surgeon to act differently. Clearly, a question of fact was presented regarding whether Dr. DePoli breached the standard of practice. If the jury believed that the applicable standard of practice required Dr. DePoli to interfere with Dr. Marcus’ treatment of the patient if Dr. DePoli observed a wrongful act or omission, the jury could have found that Dr. DePoli breached the standard of practice. By finding that Dr. DePoli did not breach the standard of practice, the jury obviously gave credibility to those witnesses who testified that the applicable standard of practice did not require Dr. DePoli to interfere with Dr. Marcus’ treatment of the patient. Plaintiffs’ proposed supplemental jury instruction would have resolved this question of fact and imposed strict liability without a finding that Dr. DePoli breached the standard of practice. Because plaintiffs’ proposed supplemental jury instruction did not properly inform on the applicable law, and because the instructions as given were appropriate, the trial court did not abuse its discretion in denying plaintiffs’ request for the supplemental instruction. *Stoddard v Manufacturer’s Nat’l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999).

II

Plaintiffs contend that the trial court erred by granting summary disposition of their claim under the Michigan Consumer Protection Act, MCL 445.901, *et seq.*; MSA 19.418(1), *et seq.*, because questions of fact existed that precluded summary disposition.²

According to plaintiff, as she was being wheeled into surgery, Dr. DePoli made the following representation:

She [Dr. DePoli] introduced herself as Dr. Marcus's assistant. And I immediately said, well, Dr. Marcus is going to be doing the surgery. And she replied, so am I. And I said, how many have you done, and she stated numerous.

Plaintiff alleged that this statement was a misrepresentation under the act because Dr. DePoli, in her deposition, estimated that she had been first assistant on between ten and fifteen laparoscopic cholecystectomies.

Plaintiffs have not identified on appeal what provision of the act is claimed to have been violated. However, in the trial court plaintiffs claimed that the misrepresentation fell under MCL 445.903(1)(e); MSA 19.418(3)(1)(e). That subsection provides:

(1) Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows.

* * *

(e) Representing that goods or services are of a particular standard, quality or grade or that goods of a particular style or model if they are of another.

Plaintiffs argued that the jury should have been permitted to determine whether participation as first assistant in ten to fifteen laparoscopic cholecystectomies was doing "numerous surgeries" and whether this representation was deceptive. The trial court disagreed, and reasoned that:

In response to Mary Joe Gilpin's statement "Dr. Marcus is going to do the surgery," DePoli said, "Yes, and I am too". This statement was accurate since DePoli assisted Dr. Marcus in performing the surgery. In response to plaintiff's inquiry about how many surgeries she had performed, DePoli replied "numerous." DePoli's deposition testimony indicates that she acted as first assistant on "probably between 10 and 15" laparoscopic cholecystectomies. The undisputed facts are that DePoli assisted in surgeries just as she had told plaintiff she had. There are no genuine issues of material fact that could form the basis of Michigan Consumer Protection Act claims.

We agree with the reasoning of the trial court. Dr. DePoli indicated to plaintiffs that she had performed numerous surgeries. The fact that Dr. DePoli later assigned a numerical figure of "10 to 15" to the approximate number of laparoscopic cholecystectomies she had performed neither indicates that Dr.

DePoli misrepresented the quality of her services nor creates a genuine issue of material fact whether Dr. DePoli misrepresented the quality of her services. Plaintiffs failed to establish a genuine issue of material fact regarding whether Dr. DePoli's alleged representations regarding her participation in "numerous" surgeries was "unfair, unconscionable," or "deceptive" within the meaning of the MCPA.

III

Plaintiffs argue that the trial court abused its discretion by denying plaintiffs' motion to file a third amended complaint to add a count of battery and additional theories under the MCPA.

A court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2); *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); see also MCL 600.2301; MSA 27A.2301. The rules pertaining to amendment of pleadings are designed to facilitate amendment except when prejudice to the opposing party would result. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973).

Reasons that justify denial of leave to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility. *Weymers, supra* at 658. Although delay can cause circumstances that result in prejudice justifying denial of leave to amend, mere delay alone is an insufficient reason to deny leave. *Fyke, supra* at 663-664.

The trial court must specify its reasons for denying leave to amend, and the failure to do so requires reversal unless the amendment would be futile. *Dowerk v Oxford Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). The addition of allegations which merely restate those already made is futile, as are the addition of allegations which still fail to state a claim. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App; 689, 697; 588 NW2d 715 (1998).

Prejudice to a defendant that will justify denial of leave to amend is the prejudice that arises when the amendment would prevent the defendant from having a fair trial and stems from the fact that the new allegations are offered late. *Weymers, supra* at 659. Prejudice may result when the moving party seeks to add a new claim or theory of recover on the basis of the same set of facts, after discovery is closed and just before trial, and the opposing party shows that he did not have reasonable notice from any source that the moving party would rely on the new claim or theory at trial. *Id.* at 659-660.

The grant or denial of leave to amend is within the trial court's discretion. *Id.* at 654. This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion that resulted in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

A. The battery count

The motion to amend the complaint to add a battery count was brought and heard by the trial court three weeks before trial. However, in November 1995 plaintiffs had withdrawn a battery count.

Thus, discovery proceeded and defenses had been developed with the knowledge that any battery claim had been withdrawn. Under these circumstances, plaintiffs' delay in seeking to reinstate a battery count warranted denial of the motion. See, e.g., *Taylor v Detroit*, 182 Mich App 583; 452 NW2d 826 (1989) (affirming denial of request to amend less than a month before a scheduled final settlement conference and nearly twenty-nine months after the initial complaint was filed).

Further, amendment of the complaint would have been futile. Plaintiff consented in writing to participation by any residents in the surgery. Before surgery, plaintiff signed a "Consent to Operation, Anesthetics, and Related Procedures." Through this, plaintiff

consent[ed] to and authorized Dr. Marcus, his/her associates, residents, consultants and such other assistants as may be assigned to perform the operation/procedure described in this paragraph.

By signing the consent form, plaintiff further acknowledged:

I understand that St. Joseph Mercy Hospital is a teaching hospital, and that the use of resident physicians and surgeons contribute to a high quality of patient care. I understand that resident physicians and surgeons have an important part in the overall management of patient care, under the supervision and responsibility of my physician.

In an analogous context, the Michigan Supreme Court has held that a plaintiff's signature on a consent form precludes a claim premised on an assertion that the plaintiff did not receive the information in that form. See *Paul v Lee*, 455 Mich 204, 216; 568 NW2d 510 (1997). In addition, plaintiff conceded that she never communicated to either the hospital or Dr. DePoli any intent or desire that a resident, or a resident with Dr. DePoli's years of training, not participate in the surgery. Because plaintiff never communicated any limitation on her written consent, the factual predicate for her battery claim is absent. Hence, the motion to amend to add the battery count was properly denied as it was futile.

B. The Michigan Consumer Protection Act count

The claims under the MCPA in plaintiffs' third amended complaint were premised on (1) alleged misrepresentations regarding the competency of Dr. Marcus, which were alleged to be misrepresentations because of negligent credentialing, (2) forcing plaintiff to sign the consent form without reading it, and (3) misrepresenting that Dr. Marcus, not DePoli, would perform the surgery.

With regard to the first claim, the jury determined that there was no negligence by the hospital in credentialing Dr. Marcus. If the credentialing of Dr. Marcus was proper, the hospital made no unfair or deceptive misrepresentation that could form the premise of a claim under the act. Because Dr. DePoli was found to be competent in rendering services to plaintiff, and because the hospital was found not to have been negligent in ensuring Dr. Marcus' competency, the addition of a claim regarding misrepresentations regarding the quality of the services would have been an exercise in futility.

With regard to the second claim regarding Dr. DePoli's alleged role in obtaining plaintiff's signature on the consent form, plaintiff herself testified at trial that the consent form was offered by Dr. Marcus and that only Dr. Marcus made representations regarding the form. Because Dr. DePoli had no role regarding the form, no claim against her or the hospital exists, and addition of the claim would have been futile.

With regard to the third claim that plaintiff was wrongfully informed that Dr. Marcus would perform the surgery, plaintiffs' own proofs at trial negated any claim that Dr. DePoli misrepresented the role she would play in the surgery. In the brief conversation Dr. DePoli had with plaintiff as described by plaintiff herself, Dr. DePoli made no representation that she would or would not do the actual cutting. Further, the consent form signed by plaintiff clearly advised of the participation by residents with no such limitation. Under these circumstances, it would have been futile to add a claim regarding the representations made by Dr. DePoli.³ Accordingly, the trial court did not abuse its discretion in denying plaintiffs' motion to file third amended complaint.

IV

Plaintiffs have alleged numerous acts of misconduct by defense counsel that they contend prejudiced the jury and deprived them of their right to a fair trial. The majority of the assertions concern statements made by defense counsel during opening statement and during the direct examination of Dr. DePoli.

Only where counsel has engaged in egregious and repetitive conduct designed with the studied purpose of prejudicing the jury is a new trial required. *Wilson v Stilwill*, 411 Mich 587, 605; 309 NW2d 898 (1981). Isolated instances of misconduct do not require reversal, and the entire course of counsel's conduct must be examined before a new trial on the basis of misconduct will be granted. *Kewin v Massachusetts Life Ins.*, 79 Mich App 639, 658; 263 NW2d 258 (1977), modified on other grounds 409 Mich 401; 295 NW2d 50 (1980). When reviewing an appeal asserting improper conduct of an attorney, the court must first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for an instruction or motion for mistrial.

Here, the alleged improper remarks of defense counsel concerning defendant hospital's religious beginnings, background, and good deeds, were all made within the confines of the parameters set by the trial court's rulings on motions in limine, wherein it was held defense counsel could discuss those things that establish the identity of the defendants. Acting within those parameters, defense counsel's remarks were not improper.

Additionally, plaintiffs fail to address why each of the unobjected-to allegedly improper acts was improper and fails to cite applicable legal authority to support the bare assertion that the acts were improper. Rather, plaintiffs focus their argument on plaintiffs' assumption that a no-cause verdict would not have been possible in the absence of prejudicial comments by defense counsel that created sympathy for Dr. DePoli and the hospital. However, plaintiffs' unfounded belief that defense counsel's conduct was improper cannot sustain a motion for new trial.

Plaintiffs also contend that defense counsel engaged in misconduct by using peremptory challenges to strike two African American jurors during the jury selection process in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). If a party opposes a jury strike on the basis of discrimination, it is imperative that at the time of the strike they object on the record and make a prima facie showing of discrimination before the burden shifts to the other party to provide a race-neutral rationale for striking the juror. *Clarke v K Mart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996). Plaintiffs' counsel did not utilize the proper objection procedure, and indeed affirmatively indicated that defense counsel was satisfied with the jury. Under these circumstances, and in light of the fact that a review of the record does not reveal the racial makeup of the potential jurors, a new trial is not warranted on this ground. Consequently, the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial.

Affirmed.

/s/ Harold Hood

/s/ E. Thomas Fitzgerald

/s/ Jeffrey G. Collins

¹ Defendants DePoli and St. Joseph Mercy Hospital filed a claim of cross-appeal. However, defendants have failed to properly present their cross-appeal as required by MCR 7.207(C).

² Defendants contend that the act does not apply to representations made by physicians. In the context of the issues raised by plaintiffs, we need not decide this issue.

³ Further, the proofs at trial demonstrated that there was not a genuine issue of material fact as to who performed the cutting of the duct.