STATE OF MICHIGAN

COURT OF APPEALS

OFELIA GREEN,

Plaintiff-Appellant,

v

HENRY FORD WYANDOTTE HOSPITAL AND MEDICAL CENTER, SUPERIOR AMBULANCE, and CANDICE WILLIAMS,

Defendants,

and

MICHAEL BAGHDOIAN, M.D.,

Defendant-Appellee.

UNPUBLISHED
February 11, 2014

No. 310768
Wayne Circuit Court
LC No. 10-014261-NH

Before: JANSEN, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Plaintiff, Ofelia Green, appeals as of right from an order directing a verdict in favor of defendant, Michael Baghdoian M.D., in this medical malpractice action. We affirm.

I. BASIC FACTS

Plaintiff underwent a knee replacement surgery at Henry Ford Wyandotte Hospital on August 4, 2008. Defendant was her orthopedic surgeon. Four days after her surgery, plaintiff was released from the hospital and transported to a health care center for rehabilitation. Transportation services were provided by Superior Ambulance and Candice Williams was her driver. Plaintiff alleged Williams improperly transported her, causing her surgical leg to drop from the leg rest. Williams then proceeded to run over plaintiff's leg with the wheelchair, tearing the sutures from the surgical site. Several months later, plaintiff underwent a second surgery for continued problems with her knee whereupon it was discovered that a device from her prior surgery was placed "180 degrees out of position." Although plaintiff alleged multiple claims against multiple defendants, for purposes of this particular appeal, the only relevant

defendant is defendant Baghdoian. Plaintiff alleged that defendant breached the standard of care in performing the knee replacement, which necessitated revision surgery.

On the first day of trial, plaintiff's expert witness, Dr. Mitchell Pollak, testified that he had reviewed the medical notes and prior deposition testimony of plaintiff's treating physician, Lawrence Morawa. Morawa performed revision surgery on plaintiff's knee several months after defendant performed the initial knee replacement. Pollak testified that Morawa's notes from the revision surgery indicated that "the polyethylene insert was rotated 180 degrees from the way it was supposed to be in. In other words, the back was in the front and the front was at the back." Pollak testified that it was not impossible to place the device backwards. He did not believe that the "wheelchair incident" could have caused the device to spin 180 degrees. He testified that:

> I have not heard of a rotating bearing prosthesis dislocating or rotating more than 90 degrees. The incidence of rotational problems occurring in these knees is relatively low, somewhere in the range of point eight to two percent in, in the literature, so it's my opinion that it's more likely that it was placed 180 degrees to the supposed position rather than that it happened subsequent to that.

The trial court allowed Pollak's testimony over defense counsel's continuing objection that the facts upon which Pollak relied were not in evidence, as required by MRE 703. In so doing, the trial court admonished plaintiff's counsel that Morawa's notes and records had to be admitted into evidence prior to the close of proofs.

On the second day of trial, plaintiff's counsel advised the trial court that Morawa would not be testifying because, as Morawa had indicated in a letter to plaintiff's counsel two weeks prior, Morawa had to perform numerous surgeries and would be unavailable. Defense counsel then moved to have Pollak's testimony stricken in its entirety because his testimony was based on records not admitted into evidence as required by MRE 703. The trial court granted the motion:

> All right. As indicated on the record yesterday, the Rules of Evidence, particularly as they relate to expert witness testimony in this particular case, it indicates that the facts or inference shall be in evidence. Obviously, the testimony of Dr. Morawa is, and any of his records are not in evidence. Dr. Morawa has refused to appear, and the rule does not restrict the discretion of the Court to receive expert opinion testimony, subject to the condition of the factual bases of the opinion be admitted into evidence thereafter.
>
> We adjourned early because plaintiff had no further witnesses yesterday after the testimony of Ms. Green and Dr. Pollak, who was their expert on the standard of care. The gravamen of Dr. Pollak's testimony that there had been a violation of the applicable standard of care was based upon the records of Dr. Morawa and Dr. Morawa's testimony that he found the plastic insert during the surgery in a 180 degree opposite position than it was to have been originally placed by Dr. Baghdoian . . . I permitted for purposes of time constraints Dr. Pollak to testify in advance of Dr. Morawa. Dr. Morawa wasn't listed as a witness by the plaintiff in the joint final pretrial order. Although subpoenaed, Dr.

> Morawa has failed to appear. He's not beyond the – he is the treating physician in this particular case. He's not an expert. His failure to appear, obviously, and to introduce the records which potentially support Dr. Pollak's opinion have to be stricken because of their failure, the plaintiff's failure to comply with Michigan Rule of Evidence 703. The evidence, or the opinion is not based on items which are in evidence, and I gave plaintiff the opportunity to obtain a factual bases; that is, to have the factual bases and the opinion be admitted in evidence thereafter; adjourned early. . . . Dr. Morawa has failed to appear.
>
> The Court will grant the defendant's motion to strike Dr. Pollak's testimony as it relates to anything, any of the records of Dr. Morawa or any of the purported findings of Dr. Morawa for the failure to comply with Rule 703.
>
> Yesterday afternoon, Mr. French, you indicated that you had no further witnesses, but I did adjourn hoping that you would be able to secure the presence of Dr. Morawa. In the absence of that, as I indicated yesterday at the end of the day, we either have the next witness or we'd be moving to a motion for directed verdict stage.
>
> At this particular juncture, the Court will be granting the defendant's motion for directed verdict and discharging the jury.

The trial court entered an order directing a verdict for defendant on May 23, 2012. Plaintiff now appeals as of right.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in directing a verdict for defendant where the trial court effectively prevented plaintiff from introducing her evidence to the jury. We disagree.

"We review de novo a trial court's decision to direct a verdict. In doing so, we review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence, when viewed in this light, fails to establish a claim as a matter of law should a motion for a directed verdict be granted." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011) (internal quotation marks and footnotes omitted).

Here, the trial court granted defendant a directed verdict after striking Pollak's testimony in its entirety for failure to comply with MRE 703. Plaintiff's arguments on appeal focus on the trial court's alleged error in refusing to accept Morawa's records or prior testimony into evidence. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id*.

"When evaluating a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). "A

directed verdict is appropriate where reasonable minds could not differ on a factual question." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011).

Plaintiff's claims sounded in medical malpractice. As such, expert testimony was required to establish the standard of care, breach of that standard and causation. *Locke*, 446 Mich at 223; *Gay v Select Specialty Hosp*, 295 Mich App 284, 292; 813 NW2d 354 (2012). Pursuant to MRE 703, the facts of a particular case on which an expert bases his testimony must be in evidence:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

"It necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). However, "MRE 703 does not preclude an expert from basing an opinion on the expert's personal knowledge." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App. 720, 735; 761 NW2d 454 (2008).

The trial court struck Pollak's expert witness testimony because, by his own admission, Pollak's opinion was based *entirely* on Morawa's report, which indicated that he found the implant device turned at 180 degrees:

> *Q.* You didn't need to see any films, did you, Doctor, to formulate your opinion?
>
> *A.* No.
>
> *Q.* You totally relied on a report from Dr. Morawa, correct?
>
> *A.* That's correct.

Thus, contrary to plaintiff's assertions, no aspect of Pollak's testimony was based on "personal knowledge" of the case. While in her personal experience Pollak may never have seen a device turned at 180 degrees, he only discerned that the device was turned by examining Morawa's notes and records. Because Morawa's report was never received into evidence, Pollak's testimony was properly stricken.

Plaintiff cites to a number of evidentiary rules that she believes would have allowed the trial court to accept Morawa's records into evidence or allowed a reading of his deposition testimony into the record. Each of these arguments fails. We note that, although plaintiff cites to various rules, she does not provide an adequate explanation as to the applicability of each. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Nevertheless, we will review each of the referenced rules of evidence.

A. MRE 804

Plaintiff argues that the trial court should have allowed Morawa's deposition testimony to be read into the record at trial, citing MRE 804 (a) and (b)(1).

MRE 804 sets forth the hearsay exceptions for when a declarant is unavailable.

> (a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant –
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) has a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means . . .

Plaintiff does not adequately explain how Morawa was unavailable. Presumably, plaintiff would apply subsection (a)(5). Yet, although plaintiff knew well in advance of trial that Morawa would refuse to appear based on his surgery schedule, she did nothing to secure his presence. Plaintiff waited until the second day of trial to attempt to show cause Morawa. To the extent plaintiff argues that she was prejudiced by the trial court's previous order adjourning trial, she has waived the issue by failing to object to the adjournment and, in fact, specifically asking that the trial court grant defendant's request. "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Even if plaintiff could prove that Morawa was unavailable, his prior testimony was inadmissible. MRE 804(b)(1) provides:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Morawa's deposition was for discovery only. Deposition testimony taken solely for discovery purposes is not admissible at trial, ostensibly because there is neither the opportunity nor similar motive to develop the testimony. See *Petto v Raymond Corp*, 171 Mich App 688, 691-692; 431 NW2d 44 (1988). Here, defendant noticed Morawa's deposition because there had been some discussion that Morawa would testify as an expert. However, at his deposition, Morawa testified that he was unaware that plaintiff considered him to be an expert witness. "I am prepared to tell you what I found when I treated the patient" but he was not providing expert testimony to indicate whether or not Baghdoian conformed to the standards of practice. Therefore, the trial court did not abuse its discretion in disallowing plaintiff from introducing Morawa's deposition testimony into evidence at trial.

B. MRE 803(4)

In the trial court, plaintiff argued that Morawa's notes and records were non-hearsay under MRE 803(4), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ***
>
> (4) Statements Made for Purposes of Medical Treatment or Medical Diagnosis in Connection With Treatment. Statements made for purposes of medical treatment or medical diagnosis in connection or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

"Under MRE 803(4), the declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient." *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). MRE 803(4) has no applicability in this case because the statements that plaintiff sought to be admitted were those of her treating physician, not her own. Stated otherwise, Morawa's notes containing his own observations and diagnosis were not statements made for the purpose of medical treatment or diagnosis.

C. MRE 803(6)

Plaintiff also argues that the trial court erred in failing to admit Morawa's records and notes under MRE 803(6), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> ***
>
> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from

> information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Under the rule, it was not enough that Morawa's report may have fallen within the scope of the business records exception – the rule requires the testimony of the custodian or other qualified witness. *People v Fackelman*, 489 Mich 515, 536-537; 802 NW2d 552 (2011). The rule clearly requires that a "custodian or other qualified witness" testify. Plaintiff made no attempt to secure such a witness, even after numerous admonitions and warnings from the trial court. As such, Morawa's records were inadmissible under the rule.

D. MRE 803(18)

In the trial court, plaintiff referenced MRE 803(18), which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (18) Deposition Testimony of an Expert. Testimony given as a witness in a deposition taken in compliance with law in the course of the same proceeding if the court finds that the deponent is an expert witness and if the deponent is not a party to the proceeding.

MRE 803(18) has no applicability to this case. Morawa was plaintiff's treating physician and never testified as an expert. At his deposition, Morawa specifically testified that he was not providing expert testimony. The trial court also noted that Morawa was "the treating physician in this particular case. He's not an expert." As such, Morawa's prior testimony was inadmissible under the rule.

E. MRE 902

Plaintiff also argues that Morawa's notes and records were "self-authenticating." MRE 902 (8) and (11) provide:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> ***

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

***

(11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person certifying that –

(A) The record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) The record was kept in the course of the regularly conducted business activity; and

(C) It was the regular practice of the business activity to make the record.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Plaintiff cannot rely on either of these provisions. MRE 902(8) requires a certificate of acknowledgement and MRE 902(11) requires a written declaration. Plaintiff provided neither of these in the trial court.

F. CONCLUSION

In conclusion, the trial court properly struck Pollak's expert witness testimony because the facts upon which Pollak relied were never entered into evidence. Pollak had no personal knowledge of the facts or circumstances of the case and relied exclusively on Morawa's notes and deposition testimony that the implant device was rotated 180 degrees. The trial court did not abuse its discretion in rejecting plaintiff's various theories for admitting Morawa's records and prior deposition testimony into evidence. Absent Pollak's testimony, plaintiff was unable to set forth a prima facie case for medical malpractice and the trial court properly directed a verdict in defendant's favor.

Affirmed. Defendant may tax costs as the prevailing party. MCR 7.219.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto