

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF ISABELLA MARIE KOEHN,
through its personal representative GINA RAE
KOEHN, GINA RAE KOEHN a/k/a GINA RAE
MALLAY, individually, and FRANKLIN DAVID
KOEHN,

UNPUBLISHED
June 26, 2014

Plaintiffs-Appellants/Cross-
Appellees,

v

No. 309030
Isabella Circuit Court
LC No. 2009-007998-NH

CENTRAL MICHIGAN COMMUNITY
HOSPITAL, WOMEN’S MEDICAL CENTER,
P.C., JERRY B. ELLIOT, M.D., and MICHAEL
A. HENDERSON, D.O.,

Defendants-Appellees/Cross-
Appellants.

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Plaintiff, Gina Marie Koehn, as personal representative for the Estate of Isabella Marie Koehn, appeals as of right the entry of a judgment of no cause of action following a jury trial in this medical malpractice and wrongful death action.¹ Defendants, Central Michigan Community Hospital, Women’s Medical Center, P.C. and Jerry B. Elliot, M.D. conditionally filed a cross-appeal of the trial court’s declaration of their directed verdict motion as moot. Defendant, Dr. Henderson, also cross-appeals the trial court’s denial of his motion for summary disposition. We affirm the trial court’s evidentiary rulings and jury instructions and do not reach the issues on the cross-appeals as they are moot.

¹ The trial court entered a stipulated order of dismissal as to the claims of plaintiffs Gina Koehn and Franklin Koehn, individually, prior to trial. Thus, the singular “plaintiff” shall be used to refer to the Estate of Isabella Marie Koehn.

Gina Rae Koehn received care from the physicians and staff of Women's Medical Center P.C., including Dr. Jerry Elliot, an obstetrician, and Dr. Michael Henderson, a radiologist, for the care and delivery of her first child. Ms. Koehn suffered from diabetes for many years prior to becoming pregnant and managed her diabetes in various ways throughout her pregnancy, including changing her diabetes medication. Ms. Koehn's labor was induced at 37 weeks on September 30, 2007. Labor progressed and when the child's head delivered, her shoulder or shoulders caught behind Ms. Koehn's pubic bone ("shoulder dystocia"), requiring that several special maneuvers be performed for over ten minutes in order to fully deliver the child. The child, who was over nine pounds, was ultimately delivered stillborn due to complications from the shoulder dystocia on October 1, 2007.

Plaintiffs initiated the instant action against defendants asserting that Dr. Elliot engaged in medical malpractice by failing to obtain an ultrasound to adequately and accurately determine the fetal weight of the child, by inaccurately estimating the child's fetal weight, and by failing to utilize appropriate delivery techniques. Plaintiffs alleged that Dr. Henderson engaged in medical malpractice by, among other things, failing to perform an adequate and accurate ultrasound and failing to compare Ms. Koehn's prior ultrasounds to the final ultrasound performed prior to delivery. Plaintiffs further alleged that the hospital defendants were vicariously liable for the acts of their doctor employees/agents and that all parties were liable for the wrongful death of the infant. At the conclusion of a jury trial, the jury rendered a verdict of no cause of action in favor of all defendants.

On appeal, plaintiff first contends that the trial court erred in precluding plaintiffs from amending their complaint and from presenting testimony at trial regarding the issue of whether management of Ms. Koehn's diabetes was in conformity with the standard of care. We disagree.

We review a trial court's decision regarding a plaintiff's motion to amend the pleadings for an abuse of discretion. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). A trial court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). Ordinarily, a motion to amend a complaint should be granted unless the amendment would be futile. *Sanders v Perfecting Church*, 303 Mich App 1, 9; 840 NW2d 401 (2013).

We review the trial court's evidentiary decisions for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

MCR 2.118(C) provides, in relevant part:

(1) 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. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

(2) If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be

allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits

Our Supreme Court condemns the use of amendments at trial as a means of surprising defendants. *Dacon v Transue*, 441 Mich 315, 334; 490 NW2d 369 (1992). On the other hand, if a defendant has been given reasonable notice, from whatever source, that a plaintiff intended to assert the claim at trial, no prejudicial surprise within the meaning of MCR 2.118(C)(2) can occur. *Id.*

At trial, plaintiff sought to introduce the opinion of her expert, Dr. Dein, concerning whether Dr. Elliot violated the standard of care in the management of Ms. Koehn's blood sugar during the prenatal period. Dr. Elliot's counsel objected to the testimony on the grounds that the claim was not pleaded and therefore not at issue and the trial court sustained the objection. The trial court further denied plaintiff's request that Dr. Dein be allowed to make an offer of proof as to the extent the mismanagement of Ms. Koehn's diabetes during her pregnancy was a proximate cause of the child's death, finding that to allow the testimony would be prejudicial to defendants.

Plaintiff points out that the defendants had notice concerning a claim regarding the management of Ms. Koehn's diabetes. It is true that prior to trial, plaintiffs moved to amend their complaint to add allegations against Dr. Elliot that he failed to appropriately manage Ms. Koehn's diabetes during her pregnancy and that this constituted malpractice which proximately caused the death of the child. The proposed amended complaint was attached to the brief in support of plaintiffs' motion and defendants acknowledge receiving and reviewing the same. The trial court granted plaintiffs' motion and further ordered that plaintiffs must amend their notice of intent and affidavit of meritorious claim relative to the added allegations. For reasons unknown, however, the amended complaint was never filed, nor was an amended notice of intent or amended affidavit of meritorious claim, and thus none of these were served upon defendants.

Plaintiff contends that the issue of diabetes management nevertheless remained at issue throughout discovery such that defendants remained on notice that plaintiff intended to address the issue at trial. However, plaintiff moved to amend her complaint based primarily upon the deposition of one of its experts, Dr. Dein. After the trial court granted plaintiffs leave to amend, defendant's expert, Dr. Obron, testified at deposition that Dr. Elliot had handled Ms. Koehn's blood sugars in a manner consistent with an average ob-gyn. Thereafter, plaintiff and defendant deposed another expert named on plaintiff's witness list, Dr. Hazen. Dr. Hazen had no criticisms concerning the management of Ms. Koehn's diabetes. Plaintiff's other expert, Dr. Dein, having criticized the management of Ms. Koehn's diabetes, resulted in a conflict of opinions amongst plaintiff's own experts. It was thus reasonable for defendants to conclude, based on all of the above, that plaintiff had abandoned the claim based upon mismanagement of Ms. Koehn's diabetes.

The trial court found that plaintiff's failure to file a second amended complaint and the amended affidavit of meritorious claim containing allegations concerning the management of Ms. Koehn's diabetes, when allowed do so by the Court and when defendants were entitled to rely upon the same, was prejudicial to them at trial. In addition, plaintiff did not ask that Dr. Hazen be deleted from her witness list, but simply indicated that she would not be calling Dr.

Hazen as a witness. The trial court thus further found it prejudicial to defendants that when plaintiff's expert testimony conflicted, plaintiff simply decided at the last minute not to call one listed expert that defendant had a right to rely upon and to utilize. Based upon the trial court's ruling that defendants could utilize Dr. Hazen's testimony, plaintiff changed her mind and chose to produce Dr. Hazen's testimony.² We find no abuse of discretion in the court's ruling under the circumstances presented. The claim was not tried by express or implied consent of the parties. MCR 2.118(C)(1). And, on defendant's objection at trial, plaintiff failed to satisfy the court that the amendment and the admission of the evidence would not prejudice defendant. MCR 2.118(C)(2).

Plaintiff next contends that the trial court erred in denying her motion to strike the testimony of defense expert, Dr. Potchen, regarding the standard of care applicable to defendant Dr. Henderson, when Dr. Potchen does not meet the necessary criteria to testify under MCL 600.2169. We disagree.

This Court reviews a trial court's rulings regarding the qualifications of proposed expert witnesses to testify for an abuse of discretion. *Kiefer v Markley*, 283 Mich App 555, 556; 769 NW2d 271 (2009). "In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury." *Gonzalez v St. John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 294; 739 NW2d 392 (2007). "Expert testimony is required to establish the applicable standard of care and to demonstrate that the defendant breached that standard." *Id.*

MCL 600.2169, details the criteria and qualifications of an expert witness in a medical malpractice case, in relevant part, as follows:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

² Plaintiff's claim that it was prejudiced by the use of Dr. Hazen's testimony is without merit. Because there was no claim that Ms. Koehn's diabetes was mismanaged, testimony that the diabetes was properly managed was not damaging to plaintiff's case. And, because Dr. Hazen was listed on plaintiff's witness list and defendants reserved the right to call all witnesses listed on plaintiff's witness list at trial, plaintiff cannot object to the use of Dr. Hazen's testimony at trial.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

The party proposing to call an expert bears the burden to show that his or her expert meets these qualifications. *Gay v Select Specialty Hospital*, 295 Mich App 284, 293; 813 NW2d 354 (2012).

We first note that plaintiff did not object to Dr. Potchen as an expert witness prior to trial, nor did she object to his testimony as an expert witness during the course of trial. Rather, plaintiff first raised the qualifications of Dr. Potchen under MCL 600.2169 after trial had concluded and the jury had been instructed and excused to deliberate. While there is no specific “statutory or case law basis for ruling that a medical malpractice expert must be challenged within a ‘reasonable time’ ” (*Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001)), MRE 103(a)(1) nevertheless requires that a party opposing the admission of evidence timely object at trial and specify the same ground for objection that is asserted on appeal. See also *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). In order to properly preserve an issue for appeal, a defendant must “raise objections at a time when the trial court has an opportunity to correct the error. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Plaintiff did not object to the testimony now challenged on appeal at a time when the trial court had an opportunity to correct any error. Therefore, this issue has not been properly preserved. *Id.* Electing to address this issue in any event, we find no abuse of discretion in the trial court’s admission of Dr. Potchen’s testimony.

Dr. Henderson testified that he is board certified in diagnostic radiology. His alleged malpractice occurred in interpreting an obstetric ultrasound which, according to Dr. Henderson’s testimony, was part of his general activities as a diagnostic radiologist. Dr. Potchen testified at trial that he is a diagnostic radiologist at Michigan State University. He testified that he is board certified in diagnostic radiology and stated that obstetrical ultrasound is part of general diagnostic radiology. While plaintiff mentions that Dr. Potchen also had a certificate in neuroradiology, a sub-specialty of radiology, that does not exclude him as an expert in this matter.

MCL 600.2169(1)(a) provides that “if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.” In *Woodward v Custer*, 476 Mich 545; 719 NW2d 842 (2006), our Supreme Court thoroughly explained the definitions of specific terms in MCL 600.2169 and further addressed the nuances of the required expert qualifications under that

statute when specialties and subspecialties are at issue. The *Woodward* Court defined “specialty” for purposes of MCL 600.2169 as “a particular branch of medicine or surgery in which one can potentially become board certified.” *Id.* at 561. The Court thus concluded that “if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff’s expert must practice or teach the same particular branch of medicine or surgery.” (*Id.* at 561-562). And, that “if a defendant physician specializes in a subspecialty, the plaintiff’s expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action.” *Id.* at 562.

The defendant physician in this case, Dr. Henderson, did not identify a subspecialty. Thus, Dr. Potchen’s subspecialty certification is irrelevant and he was qualified to testify under the criteria of MCL 600.2169(1)(a).

Dr. Potchen also met the criteria set forth in MCL 600.2169(1)(b). The *Woodward* Court pointed out, at 476 Mich 559, “§ 2169(1)(b) requires the [] expert to have ‘during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a *majority* of his or her professional time to either’ the ‘active clinical practice’ or the ‘instruction of students’ in ‘the same specialty’ as the defendant physician. (Emphasis added.) Obviously, a specialist can only devote a *majority* of his professional time to *one* specialty.” Dr. Potchen testified that in 2006 and 2007 (the year immediately preceding Dr. Henderson’s alleged malpractice), more than 50% of his time, including his clinical practice, teaching practice and teaching residents in his clinical program, was spent in diagnostic radiology.³ “Majority” is defined as, “the greater part or larger number; more than half of a total.” *Kiefer*, 283 Mich App at 559, quoting, *Webster’s New World Dictionary*, 2d College Ed. (1980). “MCL 600.2169(1)(b) therefore, requires a proposed expert physician to spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice.” *Id.*

The trial court did not abuse its discretion in concluding that Dr. Potchen met the criteria set forth in MCL 600.2169(1)(b) and in admitting his standard of care testimony on behalf of Dr. Henderson.

Plaintiff next argues that the trial court erred in providing a special jury instruction regarding negligence at the close of trial that differed from the standard jury instruction regarding the same, provided to the jury during its preliminary instructions. We disagree.

Claims of instructional error are generally reviewed de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). If the standard jury instructions do not adequately cover an area and a party requests a supplemental or special instruction, the trial court is obligated to give the instruction if it properly informs the jury of the applicable law and is supported by the evidence. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 451; 750

³ Dr. Potchen acknowledged that in December 2006 he testified at deposition for another case that over 50% of his time was spent on neuroradiology, but clarified that he was not allowed to include his teaching time in that case.

NW2d 615 (2008). We review the determination of whether a supplemental instruction is applicable and accurate for an abuse of discretion. *Id.* Reversal is only appropriate based upon instructional error if the error “resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be ‘inconsistent with substantial justice.’ ” *Cox*, 467 Mich at 8 quoting *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985); MCR 2.613(A).

At the beginning of trial, the trial court instructed the jury regarding professional negligence employing the definition set forth in M Civ JI 30.01 as follows:

[W]hen I use the words professional negligence or malpractice with respect to the defendants’ conduct, I mean the failure to do something which an obstetrician, gynecologist, and radiologist would do or the doing of something which an obstetrician or gynecologist and radiologist would not do under the same circumstances you find exist in this case. It is for you to decide based upon the evidence what the ordinary obstetrician and gynecologist and radiologist of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances.

The trial court further instructed, “Because no one can predict the course of trial, these instructions may change at the end of trial. If so, you should follow the instructions given at the conclusion of the trial.”

At the conclusion of trial, defendants requested that a modified version of the professional negligence instruction be given to include part of the definition of malpractice used by the Legislature in MCL 600.2912a. The trial court agreed to give the modified instruction and thereafter instructed the jury, over plaintiff’s objection, as to professional negligence:

When I use the words professional negligence or malpractice with respect to the defendant, Jerry Elliot MD’s conduct, I mean the failure to do something which an obstetrician/gynecologist of . . . ordinary learning, judgment or skill in this country would do, or the doing of something an obstetrician/gynecologist of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case in light of the state of the art at the time of the alleged malpractice.

The same instruction was given with respect to defendant Henderson, with the words “diagnostic radiologist” substituted for “obstetrician/gynecologist.”

Plaintiff’s specific dispute with the modified jury instruction is with the added phrase “in light of the state of the art at the time of the alleged malpractice.” Notably, plaintiff does not contend that the modified instruction does not properly inform the jury of the applicable law or that the instruction is not supported by the evidence. See *Silberstein*, 278 Mich App at 451. Plaintiff contends that because this specific language was not included in the instructions at the beginning of trial, its experts did not address whether the standard of care they were addressing was “in light of the state of the art at the time of the alleged complaint” and that the modification not only changed one of the elements on which plaintiff bore the burden of proof, but also

suggested to the jury that the additional language was of significant importance. Plaintiff has provided no factual or legal support for its position.

As indicated by defendants, MCL 600.2912a(1) provides, in relevant part:

[I]n an action alleging malpractice, the plaintiff has 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 or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

(b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Thus, plaintiff's burden of proof in this medical malpractice action specifically included a requirement that she establish that defendants failed to provide the recognized standard of care, "in light of the state of art at existing at the time of the alleged malpractice." The inclusion of this language in the final jury instruction did not increase or change plaintiff's burden of proof in any way throughout trial-the burden remained the same. And, what evidence plaintiff sought to elicit from its experts to establish that defendants breached the appropriate standard of care was a matter of trial strategy left in the hands of counsel.

Additionally, as conceded by plaintiff, one expert's trial testimony was that the definition of fetal macrosomia (i.e., baby that is growing too large) differed depending on the time period one was referencing. Because one of the primary issues at trial was at what point the child could have been considered too large or at least large enough for Dr. Elliot to have urged or considered a cesarean section rather than inducing Ms. Koehn's labor, the jury could fairly have been instructed that plaintiff had the burden of establishing defendants' negligence "in light of the state of the art at the time of the alleged malpractice." Where the instruction properly informed the jury of the applicable law and was supported by the evidence (*Silberstein*, 278 Mich App at 451), the trial court did not abuse its discretion in providing the modified jury instruction.

Given our findings concerning plaintiff's appeal, defendants' cross-appeals are moot and need not be addressed.

Affirmed.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering