

STATE OF MICHIGAN
COURT OF APPEALS

DENISE ASHTON,

Plaintiff-Appellant,

v

ST. JOSEPH MERCY HOSPITAL, RICHARD
POMERANTZ, M.D., and HURON VALLEY
SURGERY ASSOCIATES,

Defendants-Appellees.

UNPUBLISHED
February 17, 2004

No. 242917
Washtenaw Circuit Court
LC No. 99-004993-NM

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendants' motion in limine limiting the testimony of plaintiff's medical expert in this medical malpractice action. We reverse.

Plaintiff filed this medical malpractice action arising from defendant, Dr. Richard Pomerantz's, alleged failure to diagnose or properly treat chronic diverticulitis which resulted in damages that included the total loss of plaintiff's reproductive organs. Prior to trial, defendants brought a motion in limine to limit the testimony of plaintiff's general surgeon expert witness, Dr. Chester Semel, to opinions that did not include reference to the removal of plaintiff's reproductive organs since Dr. Semel was not a gynecologist and a gynecologist removed these organs. Plaintiff responded, arguing that Dr. Semel's testimony with regard to the removal of plaintiff's reproductive organs was permitted under MRE 702 and was relevant to the issues of proximate cause and damages. Plaintiff argued that MCL 600.2169 was not implicated because Dr. Semel was not offering testimony on the standard of care of a gynecologist, but of a general surgeon – defendant Dr. Pomerantz – and that his failure to diagnose or treat perforated diverticulitis caused damage to plaintiff's reproductive organs which resulted in their removal. After hearing oral argument, the trial court agreed with defendants and granted the motion. Plaintiff filed an application for leave to appeal, which was granted.

The issue on appeal is whether the trial court erred in limiting the testimony of Dr. Semel by prohibiting him from "offering opinions regarding gynecological issues," including the removal of plaintiff's reproductive organs. We conclude that such limitation was erroneous.

The qualification of a witness as an expert, and the admissibility of his testimony, are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989); *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). Similarly, a trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Generally, pursuant to MCL 600.2912a, in medical malpractice actions, the plaintiff must prove that the defendant failed to provide the recognized standard of care and, as a proximate result, the plaintiff suffered an injury. Expert testimony is mandatory, with few exceptions. *Locke v Pachtman*, 446 Mich 216, 223-224, 230; 521 NW2d 786 (1994); *Carlton v St John Hosp*, 182 Mich App 166, 171; 451 NW2d 543 (1989). Such expert witness testimony must meet the requirements of MCL 600.2169 and MRE 702. *McDougall v Schanz*, 461 Mich 15, 24-25; 597 NW2d 148 (1999).

MCL 600.2169 mandates that the expert witness possess particular qualifications before being allowed to render "expert testimony on the appropriate standard of practice or care" MCL 600.2169(1). MRE 702 mandates that the proposed testimony meet certain requirements, and provides: "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." In other words, testimony is admissible under MRE 702 if (1) the witness is qualified as an expert in a pertinent field, (2) the testimony is relevant in that it "will assist the trier of fact to understand the evidence or to determine a fact in issue," and (3) the testimony is derived from "recognized scientific, technical, or other specialized knowledge" MRE 702; *People v Beckley*, 434 Mich 691, 710-719; 456 NW2d 391 (1990).

Here, it is undisputed that Dr. Semel, a board certified general surgeon, was qualified under MCL 600.2169 to render testimony "on the appropriate standard of practice or care" against defendant Dr. Pomerantz, a board certified general surgeon. Instead, defendants argue that Dr. Semel may not testify that Dr. Pomerantz's alleged breach of the standard of practice, i.e., failure to properly diagnose and treat plaintiff's chronic diverticulitis, proximately caused her to suffer injuries that involved, and included the loss of, her reproductive organs. We disagree.

Pursuant to MRE 702, Dr. Semel is permitted to testify with regard to the proximate cause and damage elements of plaintiff's case. Dr. Semel (1) was qualified to render testimony about diverticulitis, its symptoms and associated problems, (2) the testimony was offered to assist the trier of fact in understanding the evidence and to determine facts in issue, particularly why Dr. Pomerantz should have detected this disease process and the associated sequela that resulted from his failure to do so, including widespread inflammation involving and allegedly damaging plaintiff's reproductive organs, and (3) the testimony was derived from specialized knowledge—medical knowledge. Defendants contention that only a gynecologist could testify regarding the injury or lack of injury to plaintiff's reproductive organs as a consequence of Dr. Pomerantz's alleged negligence is untenable and unsupported by applicable law. Defendants may offer expert testimony to rebut plaintiff's proximate cause theory and damage claims but

plaintiff is entitled to present her case to the trier of fact for determination of liability. See *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

In sum, the trial court's order granting defendants' motion in limine to preclude testimony from plaintiff's expert, Dr. Semel, regarding "gynecological issues" is reversed. Dr. Semel may offer causation and damage testimony with regard to the effect defendant Dr. Pomerantz's alleged negligence had on plaintiff's reproductive organs, if any.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jessica R. Cooper