

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

---

DIANA JUCKETT,

Plaintiff-Appellee,

V

RAGHU ELLURU, M.D., and GREAT LAKES  
PLASTIC RECONSTRUCTIVE & HAND  
SURGERY, P.C.,

Defendants-Appellants.

---

UNPUBLISHED

October 12, 2006

No. 260350

Calhoun Circuit Court

LC No. 02-004703-NH

Before: David H. Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendants appeal as of right the judgment for plaintiff following a jury trial, and the order denying defendants' motion for a new trial and/or for judgment notwithstanding the verdict, and/or for summary disposition. We affirm.

Plaintiff sought breast reduction surgery from defendants due to physical problems resulting from extreme hypertrophy of her breasts. According to defendant Raghu Elluru, M.D. (Dr. Elluru), he allegedly verbally informed plaintiff of the risks and complications of the proposed procedure, and plaintiff allegedly agreed to go forward with it, even though it would result in breast size disproportionately small compared to the rest of her body.<sup>1</sup> Plaintiff, however, denied that she ever agreed to a procedure that would result in disproportionately small breast size. Plaintiff also denied that it was ever her understanding that the procedure would result in removal of most of her breast tissue. Plaintiff underwent the surgery, performed by Dr. Elluru. Plaintiff subsequently filed a complaint, alleging that Dr. Elluru violated the standard of care by removing almost all of her breast tissue and positioning her nipples too high.

Before trial, plaintiff filed a motion in limine seeking to exclude testimony that Dr. Elluru told plaintiff before surgery that he would be removing most of her breast tissue, which

---

<sup>1</sup> Dr. Elluru admitted there was nothing in writing concerning the details of these conversations.

precluded the possibility of proportionate breasts post-surgery, and that plaintiff agreed. Plaintiff denied this conversation, and also asserted that in any event the alleged verbal agreement was void under the statute of frauds. The trial court agreed that any such agreement would be void under the statute of frauds, and therefore, granted the motion in limine to the extent that it precluded defendants from arguing that liability should be determined by reference to the alleged oral agreement.

At trial, the trial court did allow Dr. Elluru to testify about his preoperative discussions with plaintiff and his impression that plaintiff agreed to removal of most of her breast tissue. However, the trial court instructed the jury, that it should not determine liability based on compliance with an alleged agreement. The trial court also allowed the consent form signed by plaintiff to be presented to the jury, but instructed the jury that it should not be used to determine the standard of care.

Dr. Donald Levy, plaintiff's liability expert, testified that Dr. Elluru violated the standard of care by removing an excessive amount (almost all) of plaintiff's breast tissue, and by positioning her nipples excessively high on her breasts. In addition, evidence admitted at trial indicated that Dr. Elluru told plaintiff preoperatively that he would remove about three or four pounds per breast, but that in surgery he removed well over eight pounds per breast.

During trial, when asked what Dr. Elluru had "done wrong," Dr. Levy responded that the doctor removed too much breast tissue, placed plaintiff's nipples too high on her chest, and in addition, left "dog ears," or an excessive amount of tissue at the end of her incisions. Defendants objected to the expert's testimony on the basis that plaintiff's complaint and affidavit of merit did not mention the "dog ears" as part of the malpractice claim. The trial court allowed the testimony.

Defendants' first issue on appeal is that the trial court erred in granting plaintiff's motion in limine. We agree in part.

A trial court's ruling on an evidentiary issue is reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 204-206; 670 NW2d 675 (2003). The Michigan Supreme Court recently adopted a new definition for an abuse of discretion.

[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. . . . *When the trial court selects one of these principled outcomes, the trial court has not abused its discretion* and, thus, it is proper for the reviewing court to defer to the trial court's judgment. . . . [*Maldonado v Ford Motor Co*, 476 Mich 372, \_\_; 719 NW2d 809, 817 (2006) (internal quotation marks, brackets and citations omitted; emphasis added).]

This is the new "default" standard. *Id.* However, the trial court's underlying interpretation of the relevant law is reviewed de novo. *In re Blackshear*, 262 Mich App 101, 107; 686 NW2d 280 (2004).

Whether the statute of frauds, MCL 566.132, bars a medical malpractice defendant from arguing that the patient verbally agreed preoperatively to the type of outcome that later occurred, is a question of first impression in Michigan. We hold that the statute of frauds does not bar a medical malpractice defendant from arguing that the patient verbally agreed preoperatively to the type of outcome that later occurred.

Michigan's statute of frauds, MCL 566.132, provides, in pertinent part:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged . . . :

\*\*\*

(g) An agreement, promise, contract, or warranty of cure relating to medical care or treatment. This subdivision does not affect the right to sue for malpractice or negligence.

“Well established principles guide this Court’s statutory construction efforts. We begin our analysis by consulting the specific statutory language at issue.” *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002) (citation omitted). This Court gives effect to the Legislature’s intent as expressed in the statute’s terms, giving the words of the statute their plain and ordinary meaning. *Willett v Charter Twp of Waterford*, 271 Mich App 38, 48; 718 NW2d 386 (2006) (citation omitted). Where the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 895 (2005). This Court does not interpret a statute in a way that renders any statutory language surplusage or nugatory. *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

The statute of frauds is unambiguous. By its express terms, it merely states that an agreement is void unless there is a memorandum. MCL 566.132(1). But the trial was not of a breach of contract claim, only of a professional negligence claim. Therefore introduction of verbal testimony regarding an agreement does not violate the statute of frauds. It is irrelevant that plaintiff argues there was no memorandum of the conversation. Defendant was not offering the testimony to show that he performed an agreement (or to show that plaintiff breached), but to show that he complied with a professional standard of care.

In addition, by its express terms, the statute of frauds only requires a writing where there is a “party to be charged” with performing an agreement. MCL 566.132. Here, defendants were not charging plaintiff with performing an agreement; rather, defendants were merely defending against a malpractice action. Therefore the statute of frauds did not apply.

Moreover, even if the statute of frauds applied, it is satisfied, because here there is a memorandum signed by plaintiff. Plaintiff does not challenge the sufficiency of the memorandum. To satisfy the statute of frauds, a memorandum need not contain all the terms of the alleged agreement. *Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc (On Remand)*, 265 Mich App 105, 110; 693 NW2d 394 (2005). By signing the surgical risks form,

plaintiff “*acknowledge[d] that the risks and complications of the surgery . . . have been explained and discussed with me in detail by Dr. Elluru and by the nursing staff.*” (Emphasis added.)

MRE 401 provides: “Relevant evidence means evidence having *any tendency* to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” (Emphasis added.) Here, the argument excluded by the trial court was relevant, because it tended to show that defendant complied with the standard of care.

A physician must obtain informed consent, i.e., must warn a patient of the risks and consequences of a medical procedure. *Wlosinski v Cohn*, 269 Mich App 303, 308; 713 NW2d 16 (2005). Patients have the right to make their own medical decisions. *In re AMB*, 248 Mich App 144, 199, 640 NW2d 262 (2001). In other words, the standard of care, as a matter of law, includes informed consent. Accordingly, Dr. Elluru’s testimony regarding his verbal warnings to plaintiff about the risks and complications of the procedure was relevant to an essential element of defendants’ defense, viz., that defendant complied with the standard of care.

Defendants are not liable merely because of an adverse result. E.g., *Heshelman v Lombardi*, 183 Mich App 72, 78, 454 N.W.2d 603 (1990). Moreover, here, the allegedly adverse result is subjective – plaintiff contends that her breasts are not proportional to the rest of her body and that her nipples are “too high.” Accordingly, by its nature, plaintiff’s malpractice theory was essentially one of warranty, i.e., that the appearance of her plastic surgery was not to her liking or consistent with her expectations. Defendant therefore logically sought to present evidence that plaintiff rejected the option of using a surgical technique that would have given her breasts a size proportional to the rest of her body (and that she agreed to the procedure actually performed).

Given the subjective nature of the allegedly adverse result, defendants’ defense was that the result (the removal of most of plaintiff’s breast tissue) was contemplated and discussed by the parties. In order to substantiate their defense, defendants could not but present the argument regarding alleged preoperative discussions, in which plaintiff allegedly agreed to the type of surgery that entailed removal of most of her breast tissue. Given plaintiff’s theory of liability, defendant’s proposed argument was relevant.

Plaintiff is required to establish the standard of care that she contends was breached. MCL 600.2912a(1). Plaintiff has the duty to establish that “in light of the state of the art existing at the time,” the physician “failed to provide the plaintiff the recognized standard of acceptable professional practice of care in the community.” MCL 600.2912a(1). But it is generally recognized that a defendant has a right to contest what the specific standard of care was. We find no authority clearly providing that the defendant may not use an informed consent form, or preoperative discussions with the patient, to contest the standard of care issue (whether it be establishing the standard or complying with it). Since the *jury* must decide the specific standard

of care,<sup>2</sup> we find no compelling reason why the jury should be shielded from the argument that the standard of care in the relevant profession is to comply with the patient's preoperative wishes.

Therefore, we find that the trial court erroneously interpreted the statute of frauds, and that the trial court's ruling on the motion in limine was not within the range of principled outcomes. *Maldonado, supra* at 817.

However, an evidentiary error does not require reversal unless it was prejudicial, i.e., affected a substantial right. MRE 103(a). In other words, harmless error analysis applies. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 469; 624 NW2d 427 (2000).

There was substantial support for the verdict. Plaintiff never admitted that she preoperatively agreed to the removal of most of her breast tissue. Plaintiff never agreed that she understood, preoperatively, that the procedure would result in disproportionately small breasts. There was expert testimony that it was a violation of the standard of care to remove almost all of plaintiff's breast tissue, and to position plaintiff's nipples excessively high. There was evidence that Dr. Elluru told plaintiff preoperatively that he would remove about three or four pounds of tissue per breast,<sup>3</sup> but that in surgery he removed well over eight pounds per breast. Accordingly, given the evidence in favor of plaintiff's claim, the jury could have disbelieved Dr. Elluru's contention that he told plaintiff that the procedure would result in disproportionately small breasts.

Also, although the trial court granted plaintiff's motion in limine, the trial court still permitted Dr. Elluru to testify regarding preoperative discussions with plaintiff, and the surgical risks form was admitted into evidence. The only practical effect of the trial court's in limine ruling was that defendants could not characterize these discussions as "an agreement" that could be used to establish the standard of care. Thus, on the record before us, there is no basis to conclude that the trial's outcome more likely than not would have been different had the trial court ruled differently on the motion in limine. *Sitt, supra* at 469.

Defendants next argue that the trial court erred in its special instructions to the jury, indicating that the jury should not determine liability based on compliance with an alleged verbal agreement, and that the consent form was not admitted for the purpose of establishing the standard of care. An issue raised for the first time on appeal is generally unpreserved. *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005). This issue is not preserved for appellate review because it was not raised in the trial court. Unpreserved issues are

---

<sup>2</sup> See M Civ JI 30.01: "It is for you to decide . . . what the ordinary [physician] of ordinary learning, judgment or skill would do or not do under the same or similar circumstances."

<sup>3</sup> Dr. Elluru acknowledged in a preoperative letter that he would be removing about three or four pounds of tissue per breast.

generally reviewed for clear error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Under the statute of frauds analysis *supra*, the trial court's special instructions are erroneous, because a defendant may defend against a medical malpractice action by arguing that he complied with the standard of care by complying with a preoperative agreement with the patient. The hard and fast rule imposed by the trial court lacks authority. It was plain error for the trial court to instruct the jury otherwise.

"Instructional error is harmless unless a failure by the reviewing court to correct the error would be 'inconsistent with substantial justice.'" *Ward v Consolidated Rail Corp*, 472 Mich 77, 87; 693 NW2d 366 (2005), quoting MCR 2.613(A). Here, the instructional error was harmless, because it does not appear, more likely than not, that had the trial court not given the special instructions, the outcome of the trial would have been different, because, as outlined above, there was other support for the verdict.

Defendants next argue that the trial court erred by not precluding the testimony of Dr. Levy about the "dog ears" left after plaintiff's surgery. Defendants contend that plaintiff's affidavit of merit did not mention "dog ears" as part of the malpractice claim and thus, it was "grossly nonconforming," resulting in prejudice that requires reversal.

A plaintiff must file an affidavit of merit with a medical malpractice complaint. MCL 600.2912d. An affidavit that does not contain statements concerning a particular claim that a plaintiff wishes to assert at trial is "grossly nonconforming" with respect to that claim, and the claim cannot be asserted at trial. *Mouradian v Goldberg*, 256 Mich App 566, 573-574; 664 NW2d 805 (2003). However, again, error in the admission of evidence is not grounds for reversal unless it affects a substantial right of the party opposing admission. MRE 103; *Stitt, supra*, 243 Mich App 469. We find, on the record before us, that defendants' substantial rights were not affected in this case.

Defense counsel, plaintiff's counsel, and the expert witness all acknowledged that the "dog ears" were a minor point, and plaintiff did not request damages based on the existence of the "dog ears." Plaintiff made clear that there were two issues of malpractice, specifically the amount of breast tissue taken and the placement of her nipples. Further, the trial court instructed the jury that plaintiff's claim was that Dr. Elluru violated the standard of care for a plastic surgeon by removing far too much breast tissue and placing plaintiff's nipples too high on her chest. The trial court further instructed that plaintiff had the burden of proof that the defendant was professionally negligent "in *one or both* of the ways claimed by" plaintiff. There was no "dog ears" claim presented to the jury as part of plaintiff's claim for malpractice. The "dog ears" were clearly described as a minor point, were not presented to the jury as part of the malpractice claim, and were relevant to impeach Dr. Elluru's implied testimony that he was an outstanding surgeon. Therefore, defendants' substantial rights were not affected, and there is no error requiring reversal.

Defendants lastly argue that plaintiff's affidavit of merit, which was executed in Florida, was insufficient to commence the action pursuant to MCL 600.2102 and MCL 600.2912(d) because it was not certified by a Florida county court clerk. However, this issue has been

conclusively addressed by this Court in *Apsey v Memorial Hosp (On Reconsideration)*, 266 Mich App 666; 702 NW2d 870 (2005), reh gtd 474 Mich 1135 (2006). In *Apsey*, this Court held that an affidavit of merit signed by a foreign notary must be certified pursuant to MCL 600.2102 to commence a cause of action. *Id.* at 676. However, this Court ruled that its holding was only to be given prospective application. *Id.* at 682. As to pending malpractice cases, such as this, with a foreign notary and no certification, “on the basis of justice and equity, plaintiffs can come into compliance by filing the proper certification.” *Id.* Plaintiff has filed the proper certification of the affidavit of merit. Plaintiff’s claim is therefore not time-barred and need not be dismissed.

Affirmed.

/s/ David H. Sawyer  
/s/ Kurtis T. Wilder  
/s/ Deborah A. Servitto