

STATE OF MICHIGAN
COURT OF APPEALS

KERI LEA CREMEANS,

Plaintiff-Appellant,

v

GLENN HOORNSTRA, Personal Representative
of the Estate of LILA MAE HUNTER,

Defendant-Appellee.

UNPUBLISHED

May 20, 2010

No. 289454

Chippewa Circuit Court

LC No. 04-007846-NI

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action entered after a jury trial. We affirm.

Plaintiff challenges the admission of defendant's trial exhibit 2—a single paper containing a copy of a phone message allegedly from plaintiff to Steven Vorenkamp, M.D., one of her treating physicians, at the top, with some treatment notes from an unidentified writer below. Plaintiff argues that the trial court abused its discretion in admitting the exhibit because defendant failed to lay a proper foundation for the exhibit, the exhibit was untrustworthy, and the exhibit constituted inadmissible double hearsay. We agree that the exhibit was improperly admitted. However, the error was harmless.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Plaintiff first argues that the trial court abused its discretion in admitting the exhibit because defendant failed to lay the proper foundation under MRE 803(6), the business records exception to the hearsay rule. Specifically, plaintiff asserts that because Vorenkamp had no personal knowledge of the exhibit, it should not have been admitted because there was no testimony to support that it had been kept in the ordinary course of regularly conducted business activity and that it was the regular practice of the office to do so. We disagree.

Hearsay is a statement (oral or written), other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801. Generally, hearsay is not admissible unless it falls within an exception. MRE 802; *Morrow v Bofferding*, 458 Mich 617, 626; 581 NW2d 696 (1998). “It is well established that the proponent of evidence ‘bears the burden of establishing [its] admissibility.’” *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004), quoting *People v Crawford*, 458 Mich 376, 388 n 6; 582 NW2d 785 (1998).

Under MRE 803(6) the following are not excluded by the hearsay rule, even if the declarant is available to testify:

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.

The evidentiary foundation required for admission of a document under MRE 803(6) is as follows:

For a proper foundation to be established for the admission of [a] document as a business record, a qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary. [*People v Vargo*, 139 Mich App 573, 580; 362 NW2d 840 (1984).]

However, these foundational requirements do not require presentation of either the actual author or someone else who can interpret the contents of the records. *People v Safiedine*, 152 Mich App 208, 217; 394 NW2d 22 (1986). Vorenkamp testified as to the office procedure regarding post-surgery patient calls. He further testified that defendant’s trial exhibit 2 was kept in the regular course of business at his office. This testimony satisfied the foundational requirements for admission under MRE 803(6).

Plaintiff further challenges the trustworthiness of the exhibit, referring this Court to the following factors that she asserts indicate a lack of trustworthiness: (1) two documents are copied onto one page; (2) there is no date or name on the second part of the exhibit (the office notes); and (3) there was another mistake in Vorenkamp’s records, i.e., an improper reference to a Workers’ Compensation claim, which plaintiff asserts calls into question Vorenkamp’s office’s record keeping practices. As explained by our Supreme Court in *Solomon v Shuell*, 435 Mich 104, 120; 457 NW2d 669 (1990),

the traditional business records hearsay exception is justified on grounds of trustworthiness: unintentional mistakes made in the preparation of a record would very likely be detected and corrected. Where, however, the source of information or the person preparing the report has a motivation to misrepresent, trustworthiness can no longer be presumed, and the justification for the business records exception no longer holds true.

Accordingly, under MRE 803(6), trustworthiness is a “threshold condition of admissibility.” *Solomon*, 435 Mich at 123. Thus, a trial court “may exclude evidence meeting the literal requirements of the business records exception where the underlying circumstances indicate a lack of trustworthiness business records are presumed to have.” *Id.* at 122.

None of these factors indicate a lack of trustworthiness in the exhibit that would warrant its exclusion. While two documents—a phone message and some office notes—were placed onto one page, this does not necessarily demonstrate a lack of trustworthiness. Indeed, the opposite is more likely. Here on one page is found both a copy of the message allegedly received from the patient and the purported response to it. Compiling these two components of the interaction onto one document links and clarifies both. Likewise, because there was a date on the phone message, the lack of a date on the notes portion of the document does not undermine its trustworthiness. Finally, the improper Workers’ Compensation reference does not call into question the office’s entire record keeping procedures. The mistake was minimal, and there is nothing to indicate that Vorenkamp or his nurse had any motivation to misrepresent. *Id.* at 120. Therefore, this document was admissible as a business record under MRE 803(6).

However, that is not the end of the inquiry because “not every statement contained within [a] document is admissible merely because the document as a whole is one kept in the regular course of business.” *Merrow*, 458 Mich at 627. Rather, where the document contains a hearsay statement, a separate exception must exist for its admission. *Id.* Plaintiff asserts that defendant’s exhibit 2 was not admissible under MRE 803(4) because no foundation was laid that it was a medical record and it is not self evident from the document. MRE 803(4) provides that the following is not hearsay, even if the declarant is available:

Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past 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.

This exception is premised in part on a patient’s interest in speaking truthfully to a treating doctor in the pursuit of medical care. *Merrow*, 458 Mich at 629. The test is two-pronged: (1) whether the statement is medically relevant and (2) whether the statement is considered trustworthy because it was made under circumstances giving rise to an intrinsic interest in telling the truth. *Id.*

While the statements contained in defendant’s trial exhibit 2 would ordinarily be admissible under the medical records exception as statements made for purposes of medical diagnosis and treatment, defendant failed to establish that the statements were actually made by plaintiff. Plaintiff testified that she did not recall making the phone call to Vorenkamp’s office,

nor did her mother, and Vorenkamp testified that he had no personal knowledge of whether plaintiff did, in fact, call his office. While Vorenkamp believed it probably was plaintiff or a family member that made the call, and while that fact could probably be presumed from plaintiff's name being on the message, as well as the timing of the message, which did correspond with plaintiff's surgery date, there was absolutely no testimony at trial to directly support that plaintiff was the source of the statements.

Additionally, Vorenkamp had no knowledge of passing on the medical advice documented at the bottom of the exhibit. In fact, he stated that typically someone else in his office "would make those kind of recommendations." He also noted that he had not signed the document, implying that he had not reviewed the recommendations given. Thus, defendant failed to establish that the document was admissible pursuant to MRE 803(4).

It was also not admissible under MRE 801(d)(2) as an admission by a party-opponent, because there was no foundation laid to show the source of the information contained in the exhibit. "A statement cannot be used as a party admission unless the party made the statement." *Merrow*, 458 Mich at 633. Therefore, the exhibit was not admissible under MRE 801(d)(2).

However, we further conclude that the error was harmless. Error in admitting evidence does not require reversal unless a party's substantial right is affected and "it affirmatively appears that failure to grant relief is inconsistent with substantial justice." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003), citing MRE 103(a)¹ and MCR 2.613(A).²

First, we don't see how plaintiff's assertion that defendant's trial exhibit 2 was the only evidence to support defendant's mitigation instruction has any bearing on whether the trial court's admission of the exhibit constituted harmless error. The no cause judgment had nothing to do with the mitigation instruction. Rather, it resulted from the jury's determination that plaintiff had not sustained a serious impairment of important body function, a conclusion supported by the record.

A serious impairment of body function is defined as "an objectively manifested impairment of an important body function that affects a person's general ability to lead his or her normal life." MCL 500.3135(7). To establish a serious impairment of body function, a plaintiff must show the following: (1) an important body function of plaintiff has been impaired; (2) the impairment is objectively manifested; and (3) the impairment affects the plaintiff's general

¹ MRE 103(a) states, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

² MCR 2.613(A) provides as follows:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

ability to lead his or her normal life. *Kreiner v Fischer*, 471 Mich 109, 132, 132-133; 683 NW2d 611 (2004). At trial, defendant conceded that plaintiff suffered an objectively manifested impairment of an important body function. Therefore, the only element at issue was whether plaintiff's injuries affected her general ability to lead a normal life. "[S]elf-imposed restrictions do not establish that an injury has affected a person's ability to lead her normal life." *Id.* at 133 n 17. And "[a] negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life." *Id.* at 137.

Here, while plaintiff and her family members testified that her general ability to lead a normal life was affected by her knee injuries, her treating physicians' testimony did not appear to support this contention. Richard Ganzhorn, M.D., who performed plaintiff's first knee surgery, opined that while plaintiff would need future treatment on her knee, post-surgery she was still capable of working and doing household chores. He further testified that she was on no restrictions at the time of trial and that he did not impose any restrictions on snowmobiling. Vorenkamp, who performed the second surgery, testified that plaintiff did not have a normal knee and that she would always have some degree of problems with it. He also opined that she would probably need future medical care. However, he also opined that she could work and take care of her household duties and her children. And he stated he would only restrict her from recreational activities, such as volleyball and snowmobiling, if her knee was bothering her.

Accordingly, because there was sufficient evidence, independent of defendant's trial exhibit 2, to support the jury's verdict that plaintiff had not sustained a serious impairment of important body function, the trial court's error in admitting the exhibit was harmless.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello