

STATE OF MICHIGAN
COURT OF APPEALS

JOY A. JILEK, personal representative of the
ESTATE OF DANIEL D. JILEK,

Plaintiff-Appellant,

v

CARLIN C. STOCKSON, M.D., and EPMG OF
MICHIGAN, P.C.

Defendants-Appellees,

and

MAPLE URGENT CARE, d/b/a MAPLE HEALTH
BUILDING, TRINITY HEALTH-MICHIGAN,
CATHERINE MCAULEY HEALTH CENTER,
IRWIN M. LUTWIN, CARPENTER HEALTH
CARE, d/b/a CARPENTER HEALTH CENTER,
and ROBERT E. ANDERSON,

Defendants.

FOR PUBLICATION
July 29, 2010

No. 289488
Washtenaw Circuit Court
LC No. 05-000268-NH

Advance Sheets Version

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

BANDSTRA, P.J. (*dissenting*).

I adamantly disagree with my colleagues' conclusion that a jury verdict in favor of defendants, rendered after a lengthy trial during which the jurors were presented with comprehensive testimony regarding the applicable standard of care and whether defendants violated it, should be thrown out. I disagree with the majority's conclusion that the trial court erred in its determination of the issues about which plaintiff complains on appeal and, further, to the extent there were any errors, I do not think that they warrant reversal.

The majority initially agrees with plaintiff's argument that the trial court erred by concluding that the applicable standard of care here was family medicine, under MCL 600.2169. That statute specifically states 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." MCL 600.2169(1)(a). Dr. Carlin Stockson is a specialist board-certified in family medicine, not emergency medicine. Thus, defendants were properly

allowed to present expert testimony in defense of the claims against Dr. Stockson by board-certified family-medicine specialists. Similarly, the trial court did not err by instructing the jury that the applicable standard of care was that of “a physician specializing in family practice”¹

Further, the trial court went on to specify for the jury that the applicable standard of care was that of a family-practice physician who was “working in an urgent care center” The jury had heard testimony from experts presented by both sides regarding the differences between an urgent-care facility and an emergency room, as well as the standards Dr. Stockson should have complied with as a family-medicine physician working in an urgent-care setting. To the extent that Dr. Stockson was thus held to a higher standard of care because of the place in which she practiced her family medicine and to the extent that plaintiff was allowed to present testimony from emergency-medicine experts against Stockson, plaintiff’s case was strengthened, not weakened. In any event, the bottom line here is that the jurors were presented with comprehensive arguments and jury instructions that fairly presented the standard-of-care question for their resolution. They properly determined, after brief deliberations, that Dr. Stockson had not been negligent in her care of her patient.

The trial court also concluded that all of plaintiff’s nine proposed documentary exhibits relating to guidelines and policies for the care of persons allegedly like the deceased were to be excluded from consideration by the jury. The majority finds fault with the trial court with respect to only three of those documents, and it does so only after concluding that it is either “not bound to follow” the only Michigan precedent directly on point, *Gallagher v Detroit-Macomb Hosp Ass’n*, 171 Mich App 761; 431 NW2d 90 (1988), or that the holding of *Gallagher* should be ignored while dictum within that precedent should be followed. I disagree with the majority and conclude that binding precedent that applied and reiterated the *Gallagher* holding cannot be distinguished away. See *Buczowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992), and *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). But, apart from all of that, even if I were to agree with the majority’s conclusion that the three documents were improperly excluded, I would not conclude that it would have made any difference in the outcome of the trial.

¹ I disagree with the majority in its conclusion that “Dr. Stockson’s . . . board certification as a family practitioner would not be relevant to the standard of care” because it is directly contrary to the clear statutory directive that board certification is of paramount concern. *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622, 630; 736 NW2d 284 (2007), on which the majority relies, did not consider the statute in this regard. Instead *Reeves* merely assumed, without any discussion whatsoever, that a board-certified family-medicine specialist working in the emergency room of a hospital could be held to an emergency-medicine standard of care. Moreover, common sense suggests there are large differences between an urgent-care (or, as some call it, “doc in a box”) facility such as that at issue here and a hospital emergency room such as that in *Reeves*. See, e.g., *Lutz v Mercy Mt Clemens Corp*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2005 (Docket No. 261465), p 3 (stating that “clearly it is unreasonable to equate urgent care with emergency medicine”).

And that brings me to my chief concern. Perhaps not surprisingly, the majority makes no mention of the standard of review we must apply on this appeal of a jury verdict:

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, [or] for setting aside a verdict, . . . unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

The majority makes no attempt to explain how the errors it discerns from this record resulted in a jury verdict that was “inconsistent with substantial justice.”

A fair reading of the lengthy record in this case demonstrates the exact opposite. The decedent presented to Dr. Stockson complaining only of the kind of respiratory problems that are commonplace during Michigan winters, for which he had received partially successful treatment from other caregivers over the preceding months. His chief complaint was not chest pain. In response, Dr. Stockson took some action, but she failed to take other actions that plaintiff’s experts later contended should have been taken. The jurors heard lengthy testimony and argument from both sides about whether Dr. Stockson acted appropriately as a family-medicine specialist practicing in an urgent-care setting. The jury determined, in response to the first question presented on the verdict form, that Dr. Stockson was simply not negligent, and it rendered a verdict in favor of defendants accordingly.

The rule governing our review recognizes that no trial is perfect and allows us to disturb such a jury verdict only if it is “inconsistent with substantial justice.” This is far from that kind of a case, and we should affirm.

/s/ Richard A. Bandstra