

STATE OF MICHIGAN
COURT OF APPEALS

BERNADINE TONOWSKI, as Next Friend of
BERNARD TONOWSKI,

UNPUBLISHED
March 10, 2005

Plaintiff-Appellee/Cross-Appellant,

v

No. 249972
Macomb Circuit Court
LC No. 2001-001350-NH

MOUHAMAD RIHAWI, M.D., and W.
AGNELLO-DIMITRIJEVIC, M.D., SYED
ENAM, M.D., NEUROSURGERY ASSOCIATES
OF MACOMB, FAMILY PRACTICE
PHYSICIANS, P.C., and HENRY FORD
HEALTH SYSTEMS,

Defendants,

and

MERCY MOUNT CLEMENS CORPORATION,
d/b/a ST. JOSEPH MERCY HOSPITAL-
MACOMB,

Defendant-Appellant/Cross-
Appellee.

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Following a jury trial, plaintiff, as next friend for her brother, Bernard Tonowski, was awarded a judgment of \$1,905,961.47 against defendant, St. Joseph Mercy Hospital, in this medical malpractice action. The trial court denied defendant's¹ posttrial motions for judgment notwithstanding the verdict (JNOV) or a new trial. Defendant appeals as of right. Plaintiff cross

¹ Additional individual defendants were dismissed before trial. As used in this opinion, the singular term "defendant" is used to refer to St. Joseph Mercy Hospital.

appeals, challenging the trial court's denial of her requests for case evaluation sanctions and taxable costs. We affirm in part, reverse in part and remand. We affirm defendant's liability for attendant care services, vacate the award for attendant care services (both past and future), and remand for a new trial on the issue of damages for attendant care services.

I. FACTS

The basic issue at trial was whether defendant's² agents, Dr. Wilma Agnello-Dimitrijevic, a neurologist, and Dr. Mouhamad Rihawi, an internist, failed to properly diagnose a head injury suffered by Bernard Tonowski, and failed to provide appropriate follow-up.³ As a result of the alleged malpractice, blood accumulated inside Tonowski's skull, undetected, resulting in permanent brain damage. The jury found negligence on the part of Dr. Dimitrijevic, but not on the part of Dr. Rihawi.

II. EXPERT TESTIMONY

Defendant first argues that the trial court erred in allowing plaintiff's two experts, Dr. Jeffrey Gelblum and Dr. Barry Meyer, to testify regarding proximate cause. Defendant argues that plaintiff's experts were not qualified to testify regarding what a neurosurgeon would or should have done. Defendant objected to the challenged testimony at trial and also raised this issue in its motion for JNOV or a new trial, which the trial court denied.

A. Standard of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is also reviewed for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). A new trial may be granted for, among other things, "[i]rregularity in the proceedings of the court, . . . or an order of the court or abuse of discretion which denied the moving party a fair trial." MCR 2.611(A)(1)(a). In reviewing a trial court's decision on a motion for a directed verdict or JNOV, "[t]he appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party" to determine whether a question of fact exists. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted." *Id.* In other words, this Court is to

examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiff. If reasonable jurors could honestly have reached different conclusions, the motion should have been denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute

² As used in this report, the singular term "defendant" refers to St. Joseph Mercy Hospital.

³ All doctors who treated Tonowski were dismissed from the case before trial.

its judgment for that of the jury. [*Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).]

“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.” MRE 702; see also *Craig v Oakwood Hospital*, 471 Mich 67, 78-78; 684 NW2d 296 (2004).

B. Analysis

MCL 600.2169(1) requires that an expert in a medical malpractice case specialize in the same area as the defendant doctor. Additionally, MCL 600.2169(2) provides:

In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

- (a) The educational and professional training of the expert witness.
- (b) The area of specialization of the expert witness.
- (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
- (d) The relevancy of the expert witness’s testimony.

It is undisputed that Dr. Meyer was an internist, like Dr. Mouhamad Rihawi, and that Dr. Gelblum was a neurologist, like Dr. Wilma Agnello-Dimitrijevic. As argued by defendant, neither Dr. Gelblum nor Dr. Meyer were qualified to give expert testimony concerning whether a neurosurgeon would have performed surgery on Tonowski had the subdural hematoma been discovered during his February 1999, hospitalization. Defendant also correctly notes that Drs. Gelblum and Meyer both expressly declined to offer opinions concerning whether neurosurgery would have or should have been performed had Tonowski’s subdural hematoma been discovered sooner.

As observed by the trial court when addressing this issue in the context of defendant’s motion for a directed verdict, however, defendant’s argument misstates plaintiff’s theory of the case. At the time of trial, Dr. Syed Enam, the neurosurgeon, was no longer a party. Plaintiff was not attempting to show a breach of the standard of care applicable to neurosurgeons. Rather, she was attempting to show a breach of the standard of care applicable to the neurologist, Dr. Dimitrijevic, and the internist, Dr. Rihawi. Dr. Meyer, an internist, and Dr. Gelblum, a neurologist, were qualified to offer expert opinions in these areas. They did not have to be qualified to offer expert opinions concerning neurosurgery and did not do so.

Thus, the trial court did not err in allowing Dr. Meyer and Dr. Gelblum to testify in the areas of their specialty, nor did it err in denying defendant’s motions for JNOV or a new trial on this issue.

III. PROXIMATE CAUSE

Next, defendant argues that, even if Dr. Gelblum's and Dr. Meyer's opinions were admissible, they were insufficient to show that Dr. Dimitrijevic's breach of the applicable standard of care was a proximate cause of Tonowski's injuries. We disagree. "In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); see also *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). The common-law elements of a malpractice action have been codified into MCL 600.2912a(1)(b), which, in pertinent part, requires the plaintiff to prove that

[t]he 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.

Additionally, MCL 600.2912a(2) states:

[T]he plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.

Thus, in a malpractice action, a plaintiff must show both that, "but for" the defendant's breach of the standard of care, the "injury would not have occurred," and that the resulting injury was a foreseeable result of the defendant's breach. *Craig, supra* at 86-87, quoting *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). "While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig, supra* at 87 (emphasis original). Further, the plaintiff must prove "specific facts that w[ill] support a reasonable inference of a logical sequence of cause and effect." *Id.*, quoting *Skinner, supra* at 174. The plaintiff "need not negate all other possible causes," but must "exclude other reasonable hypotheses with a fair amount of certainty." *Craig, supra* at 87-88, quoting *Skinner, supra* at 166. "Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a *prima facie* case of negligence." *Craig, supra* at 93.

At trial, Dr. Gelblum testified that Dr. Dimitrijevic breached the standard of care applicable to neurologists by failing to order more tests, failing to monitor the use of aspirin, and failing to consult a neurosurgeon. He testified that Dr. Dimitrijevic's breach of the standard of care was a cause of Tonowski's injuries. Similarly, Dr. Meyer testified that Dr. Rihawi breached the standard of care applicable to internists and that his breach was a contributing cause of Tonowski's injuries.

Concerning the use of aspirin, there was evidence that Tonowski's blood-clotting factors were tested and found to be normal. But Dr. Gelblum believed that closer monitoring was

necessary because there was bleeding inside Tonowski's head. Concerning Dr. Dimitrijevic's alleged failure to consult a neurosurgeon, Dr. Gelblum apparently abandoned that claim when he was informed of Dr. Enam's continued involvement.

Concerning Dr. Dimitrijevic's failure to order more tests, there was substantial evidence suggesting that Dr. Dimitrijevic acted reasonably, given the nature of Tonowski's symptoms and his preexisting diagnosis of Pick's disease. Contrary to what defendant argues, Dr. Meyer and Dr. Gelblum were both aware that Tonowski had been diagnosed with dementia. Nevertheless, their theory remained that Tonowski's symptoms, including his confusion and disorientation, were indicative of a subdural hematoma, and that Dr. Dimitrijevic (and Dr. Rihawi) erred in attributing these symptoms to Tonowski's dementia and in failing to perform further diagnostic tests. In light of the conflicting evidence, the question whether Dr. Dimitrijevic breached the standard of care was properly submitted to the jury.

As previously discussed, Dr. Gelblum and Dr. Meyer both explicitly declined to offer an opinion concerning whether surgery would have been performed had Tonowski's subdural hematoma been discovered sooner. However, both doctors testified that, if the subdural hematoma had been detected sooner, Tonowski could have received appropriate treatment sooner, as determined by a neurosurgeon, and that his injuries, more probably than not, would have been avoided.

Dr. Gelblum's and Dr. Meyer's refusal to testify concerning whether surgery would have been performed was not improper, and their opinions were based on the evidence, not conjecture and speculation. The trial court did not err in denying defendant's motion for JNOV or a new trial on this issue.

We also reject defendant's argument that plaintiff was not entitled to damages for medical expenses related to the neurosurgeries because the surgeries that were ultimately performed would have been performed even if Tonowski's subdural hematoma had been diagnosed sooner. It is undisputed that, given the severity of Tonowski's condition on March 17, 1999, surgery was required. It is also undisputed that further surgeries were needed, given the reaccumulation of fluid after the first surgery, and various other complications.

Contrary to defendant's argument, plaintiff need not show that, but for Dr. Dimitrijevic's breach of the standard of care, the subsequent surgeries would not have taken place. Rather, to recover medical expenses, plaintiff was required to show that the surgeries were "reasonably necessary," given Dr. Dimitrijevic's breach of the standard of care. We conclude that plaintiff did so. Therefore, the trial court did not err in denying defendant's motion for JNOV or a new trial on this basis.

IV. LETTER

Next, defendant argues that the trial court erred in allowing plaintiff to introduce a letter from the Visiting Nurse Association, setting out its hourly rates. MRE 803(6) allows the admission of records kept in the regular course of business so long as a foundation for the document's accuracy is set by a qualified person. Plaintiff was required to show that the letter was written by someone with knowledge, during the course of regularly conducted business

activity. See *Merrow v Bofferding*, 458 Mich 617, 627-628 n 8; 581 NW2d 696 (1998). The trial court allowed plaintiff to testify to the letter's accuracy, even though the letter was written by someone from the Visiting Nurses Association and sent to plaintiff. We find that the letter was not properly admitted under MRE 803(6).

The record lacks any indication that plaintiff is a nurse who is qualified to work for this nursing association for \$17.50 per hour. Nor was defendant in any position to challenge the letter, because the apparent expert who wrote it was not in court and was never cross-examined. Therefore, the entire award was based on a letter that stood before the jury as an unimpeachable expert on the costs of nursing care. Plaintiff plainly presented the letter for the truth of the opinions it expressed, but the letter does not fit within any of the exceptions to the general rule that excludes hearsay. MRE 801(c), MRE 802. Plaintiff has not demonstrated that it is any kind of public record, or a document the nursing association made in the ordinary course of its business. MRE 803(6). Without an opportunity to examine the source behind the letter, it must be excluded as an irrelevant and inadmissible hearsay document. Therefore, we do not disturb the jury's determination that liability for attendant care services has been established, but we remand solely for a determination of damages.

V. DAMAGES

Defendant next argues that plaintiff was not entitled to recover damages for attendant care services that she provided to Tonowski, where there was no evidence that she charged Tonowski for her services. We affirm liability for attendant care services, but remand for a new trial on the limited issue of damages for attendant care service. In *Styles v Village of Decatur*, 131 Mich 443, 448; 91 NW 622 (1902), on which the trial court relied, our Supreme Court stated:

We think it was competent for the jury to award damages for plaintiff's expenditures in and about her sickness, and she was under no obligation to this defendant *not to compensate her nurse merely because she had made no charge, and she is not compelled to lose her damages of any kind merely because she does not prove the amount with mathematical precision and certainty.* The circumstances being laid before the jury, they ascertain the amount that it is reasonable to believe will be compensatory. [Emphasis added.]

A right to recovery is recognized in other similar contexts. Under the worker's compensation act, a claimant is generally entitled to be compensated for the value of services provided by a family member, beyond ordinary household chores, up to fifty-six hours a week. See MCL 418.315. Under the no-fault act, which allows recovery of "all reasonable charges incurred for reasonably necessary . . . services . . . for an injured person's care," MCL 500.3107(1)(a), this Court has repeatedly permitted recovery of damages for attendant care services provided, at no actual charge, by family members. See *Booth v Auto-Owners Ins Co*, 224 Mich App 724, 727-730; 569 NW2d 903 (1997). In *Booth*, this Court noted that whether such services are compensable is a question for the jury, and that the defendant was not entitled to summary disposition on that issue. *Id.* at 729-730.

In the present case, plaintiff testified that defendant's insurance company stopped paying for nursing home rehabilitation. She advertised for an aide to care for Tonowski at home, which was all the insurance company would pay for, but received no responses. Accordingly, she had to care for Tonowski herself. Although defendant cross-examined plaintiff concerning whether she was aware of various programs that could have helped care for Tonowski, defendant did not introduce evidence concerning these programs.

We conclude that damages for attendant care services provided by plaintiff was a jury question upon which reasonable minds could differ. Defendant has failed to show that this claim could not be established as a matter of law. Therefore, the trial court did not err in denying defendant's motion for a directed verdict on this issue.

VI. CASE EVALUATION SANCTIONS

On cross appeal, plaintiff first argues that the trial court erred in denying her request for case evaluation sanctions. We disagree.

A. Standard of Review

Whether a party is entitled to case evaluation sanctions is a question of law to be reviewed de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

B. Analysis

A case evaluation "must include a separate award as to the plaintiff's claim against each defendant as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." MCR 2.403(K)(2). "For the purpose of this subrule, all such claims filed by any one party against another party shall be treated as a single claim." MCR 2.403(K)(2). However, "[i]f one *claim is derivative* of another (e.g., husband-wife, parent-child) *they must be treated as a single claim*, with one fee to be paid *and a single award made by the case evaluators.*" MCR 2.403(H)(3) (emphasis added).

"Even if there are separate awards on multiple claims, the party must either accept or reject the evaluation in its entirety *as to a particular opposing party.*" MCR 2.403(L)(1) (emphasis added). In case evaluations involving multiple parties,

each party has the option of accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others. However, *as to any particular opposing party, the party must either accept or reject the evaluation in its entirety.* [MCR 2.403(L)(3)(a) (emphasis added).]

"[A] party who rejects a case-evaluation award is generally subject to sanctions if he fails to improve his position at trial." *Campbell v Sullins*, 257 Mich App 179, 198; 667 NW2d 887 (2003). However, in cases involving multiple parties, MCR 2.403(O)(4) provides:

(a) Except as provided in subrule (O)(4)(b), in determining whether the verdict is more favorable to a party than the case evaluation, *the court shall*

consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties. However, costs may not be imposed on a plaintiff who obtains an aggregate verdict more favorable to the plaintiff than the aggregate evaluation.

(b) If the verdict against more than one defendant is based on their joint and several liability, the plaintiff may not recover costs unless the verdict is more favorable to the plaintiff than the total case evaluation as to those defendants, and a defendant may not recover costs unless the verdict is more favorable to that defendant than the case evaluation as to that defendant. [Emphasis added.]

In the present case, plaintiff's complaint asserted that defendant was vicariously liable for Dr. Rihawi's conduct *and* Dr. Dimitrijevic's conduct. Although defendant initially denied that Dr. Dimitrijevic was its agent, it eventually admitted that she was and the parties stipulated to dismiss Dr. Dimitrijevic from the case without prejudice. Nevertheless, at the time of the case evaluation, both doctors and defendant were parties.

The panel issued a case evaluation award of \$75,000 for plaintiff against Dr. Rihawi *and* defendant, jointly, and \$25,000 against Dr. Dimitrijevic, individually. Plaintiff accepted both awards, while both doctors rejected them. Defendant failed to respond, which is deemed a rejection. See MCR 2.403(L)(1).

Because plaintiff was asserting a derivative claim against defendant based on Dr. Dimitrijevic's conduct, her claim was considered a single claim. MCR 2.403(H)(3). Therefore, the case evaluation against Dr. Dimitrijevic should have included defendant, as was done with Dr. Rihawi. If that had been done, defendant could have accepted or rejected the award independently of Dr. Dimitrijevic, and its failure to answer would have constituted a rejection of the panel's evaluation of both derivative claims. However, that is not what happened. In effect, no case evaluation award was rendered concerning plaintiff's claim against defendant based on Dr. Dimitrijevic's conduct.

Given plaintiff's complaint, the case evaluation panel erroneously rendered its award against Dr. Dimitrijevic individually, rather than against Dr. Dimitrijevic and defendant, jointly. However, the parties failed to object, and the error was not corrected. No evaluation was rendered against defendant based on Dr. Dimitrijevic's conduct; therefore, defendant was not on notice that it needed to respond to that award. Therefore, it cannot be deemed to have rejected that award. Accordingly, the trial court did not err in denying plaintiff's motion for case evaluation sanctions.

VII. COSTS

Lastly, plaintiff argues that the trial court erred in denying her motion to tax costs. We agree.

A. Standard of Review

"Taxation of costs under MCR 2.625(A) is within the discretion of the trial court." *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hospital*, 221 Mich App 301, 308,

314-315; 561 NW2d 488 (1997). But questions concerning the interpretation of the court rules, including “[t]he determination whether a party is a ‘prevailing party’ under MCR 2.625 is a question of law” and, therefore, is reviewed de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996), aff’d 458 Mich 582; see also *Blue Cross*, *supra* at 314.

B. Analysis

“A trial court is not required to justify awarding costs to a prevailing party; rather, the court must justify the failure to award costs.” *Id.* at 308; see also *Klinke*, *supra* at 521. Whether a party is considered a “prevailing party” for purposes of MCR 2.625(A)(1) is determined separately concerning each count and each defendant. See MCR 2.625(B)(2) and (3). “In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count.” MCR 2.625(B)(2). However, “[i]f there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.” MCR 2.625(B)(2).

In *Klinke*, *supra* at 519, this Court, quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice, pp 723-724, recognized that MCR 2.625(B)(2) and (3) “involve a problem of interpretation, depending upon the definition used for ‘cause of action.’” The Court stated:

For example, if a plaintiff joins together claims for negligence and breach of warranty, relating to a single injury, is there only a single cause of action, or has the plaintiff stated different causes of action? If there is only a single cause of action, plaintiff can prevail on one theory, lose on the other, and still be the prevailing party on the entire record. But if these are different causes of action, within the meaning of MCR 2.625(B)(2), the plaintiff will be allowed costs only as to the cause upon which he prevailed, and the defendant will recover costs upon the other cause of action. [*Klinke*, *supra* at 519-520, quoting Martin, Dean Webster, *supra*, at 723-724.]

Because the definition of cause of action traditionally used in Michigan is a broad functional one, encompassing “alternative theories or claims . . . aris[ing] out of the same transaction or occurrence, . . . only a single cause of action” would be found in the example above “even though each alternative claim or theory might involve technically different liabilities and duties and slightly different factual elements.” *Id.* at 520, quoting Martin, Dean & Webster, *supra* at 723-724. In other words, “[i]f recovery by the plaintiff on any one of the claims would bar recovery on all of the other claims, it should be concluded that there was only a single cause of action for purposes of allowing costs,” but, if not, “costs should be allowed to the prevailing party on each issue.” *Id.* at 520, quoting Martin, Dean & Webster, *supra* at 723-724.

In the present case, plaintiff’s second amended complaint asserts a cause of action against defendant for vicarious liability arising from medical malpractice, but based on two separate theories, i.e., that Dr. Dimitrijevic committed malpractice, and that Dr. Rihawi committed malpractice. Because it is possible that both doctors were negligent and contributed to plaintiff’s single injury, it is possible that plaintiff could have prevailed on both theories. In other words, while plaintiff could not recover duplicate damages, prevailing on the basis of one doctor’s

malpractice would not bar recovery on the basis of the other doctor's malpractice. Thus, we conclude that plaintiff stated two different causes of action against defendant.

At trial, plaintiff prevailed against defendant on her claim that Dr. Dimitrijevic committed malpractice, but *defendant* prevailed on the claim that Dr. Rihawi committed malpractice. The trial court's only reason for denying plaintiff's motion to tax costs was that plaintiff failed to prevail on the entire action. Because that is the standard for denying costs where a single cause of action is asserted, MCR 2.625(B)(2), and because we conclude here that plaintiff stated two different causes of action against defendant, we conclude that the trial court erred in denying plaintiff's motion for taxable costs based on an erroneous interpretation of the court rule. As previously discussed, under *Klinke*, plaintiff actually asserted separate causes of action within the meaning of MCR 2.625(B)(2).

Accordingly, we vacate the portion of the trial court's decision denying plaintiff's motion for costs and remand for a determination of whether plaintiff is entitled to tax costs in connection with Dr. Dimitrijevic's malpractice. Under MCR 2.625(B)(2), costs are to be apportioned. We affirm defendant's liability for attendant care services, vacate the award for attendant care services (both past and future), and remand for a new trial on the issue of damages for attendant care services.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette

/s/ David H. Sawyer