

STATE OF MICHIGAN
COURT OF APPEALS

DEBBIE LASHER, Personal Representative of the
Estate of BERNICE BURNS, Deceased,

Plaintiff-Appellant,

v

ROD WRIGHT, DPM,

Defendant-Appellee.

UNPUBLISHED
May 17, 2005

No. 250954
Iosco Circuit Court
LC No. 00-002622-NH

Before: Saad, P.J., and Smolenski and Cooper, JJ.

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

I respectfully dissent.

I.

In this medical malpractice matter, the jury returned a verdict in favor of defendant, but Judge Ernst took the unusual step of overturning the jury based on Judge Ernst's faulty memory of defendant's expert testimony. What makes Judge Ernst's unusual ruling even more troubling is that he did so without first consulting the record as to the precise testimony he used as the basis to overrule the jury. Compounding this disturbing ruling and procedure, is the fact that Judge Ernst made his erroneous ruling only after making a totally inappropriate comment on the record that our appellate courts disfavor medical malpractice cases.¹ Judge Ernst retired and Judge Ernst's successor, Judge Myles, was asked to review this ruling and accordingly, Judge Myles reviewed the very testimony that Judge Ernst failed to review but used to overturn the jury verdict. As Judge Myles made clear in his ruling, Judge Ernst was simply wrong when he said that defendant's expert "sunk" defendant's case. Judge Ernst had, in fact, incorrectly recalled the expert's testimony. Accordingly, Judge Myles quite properly reinstated the jury verdict. The majority reverses Judge Myles' ruling because it says that Judge Myles did not review the entire record and because Judge Ernst not only relied on defendant's expert testimony to overturn the

¹ Though the trial judge's statement is incorrect, this is not the point and even if the trial judge was sincere in his view, such statements on the record, in court, in this context, clearly send a disturbing message to litigants and other counsel.

jury verdict, but also relied on plaintiff's expert's testimony. The trouble with this ruling is twofold: (1) Judge Ernst overturned the jury verdict based on his incorrect recollection of Dr. Woodham's testimony, nothing more and nothing less. The conflicting expert testimony is, of course, something for the jury to consider and to determine who to believe (which the jury already decided) -- it is not for the judge to make credibility determinations; (2) because it is clear that Judge Ernst's erroneous ruling was based solely on his faulty recollection of Dr. Woodham's testimony, it was not necessary for Judge Myles to review the entire trial transcript. Accordingly, I dissent.

II.

In this medical malpractice, negligence action, the jury returned a verdict of no cause of action in favor of Dr. Wright. Judge Ernst reversed the jury determination and granted a new trial to plaintiff on the specific ground that defendant's own expert testimony "sunk defendant's ship as far as professional negligence is concerned,":

I recall the trial, and although I don't recall the specific wording of the - of the question and Doctor Woodhams' specific language in his response, at the moment of Doctor Woodhams' testimony I was struck by the impression that . . . the defendant's own witness has sunk the defendant's ship as far as professional negligence is concerned, and it was my - is my recollection that Doctor Woodhams testified that with a patient of this sort with the circulation problem that she had that the toe should have been removed and not simply a part of the toe[,] to prevent the possibility of some residual infection that would not be amenable to treatment by antibiotic, because the antibiotic wouldn't reach that infected area. So, you take the whole toe to avoid that problem.

Based on the testimony of the Defendant's expert here, I do find that as to the issue of standard of care and breach of standard of care that there was such evidence that the verdict of the Jury on that issue was contrary to the great weight of the evidence. [M Tr, 6-7.]

After Judge Ernst retired, Judge Myles, as Judge Ernst's successor, reviewed defendant's motion for rehearing that pointed out that the precise basis for Judge Ernst's ruling was plainly contradicted by the record evidence. Judge Myles said in an order vacating the order for a new trial::

The Court previously entered an order dated January 10, 2003, granting Plaintiff a new trial based upon findings of fact of Judge Richard J. Ernst, who is now retired. Defendant filed a Motion for Reconsider[ation] of said order claiming that the Judge was erroneous in his findings of fact. I have reviewed the trial transcript of Dr. Lawrence E. Woodhams [sic] as well as the transcript of the motion hearing wherein Judge Ernst set forth his findings of fact based on his recollection, and I find that the findings of fact made by Judge Ernst are clearly erroneous and must be set aside.

Indeed, contrary to Judge Ernst's recollection, Dr. Woodham testified consistently and repeatedly at trial that the defendant met the applicable standard of care.

Yet, Judge Ernst, based on his faulty recollection, ruled specifically that:

Based on the testimony of the Defendant's expert here, I do find that as to the issue of standard of care and breach of standard of care that there was such evidence that the verdict of the Jury on that issue was contrary to the great weight of the evidence. [M Tr, 6-7.]

Because Judge Myles quite simply corrected an obvious error made by his predecessor, we should affirm, let the jury verdict stand and refrain from imposing further costs of litigation on the parties and our judicial system, which under these precise circumstances, appears to be, at best, an exercise in futility.

/s/ Henry William Saad