

STATE OF MICHIGAN
COURT OF APPEALS

HAROLD RODGERS,

Plaintiff-Appellant/Cross Appellee,

v

RICHARD J. TARAS, D.O., P.C. d/b/a
CONTEMPORARY IMAGING ASSOCIATES,
P.C., and KRISTIN KAMIENECKI, D.O.,

Defendants-Appellees/Cross
Appellants.

UNPUBLISHED
September 15, 2015

No. 321730
Oakland Circuit Court
LC No. 2012-127450-NH

Before: K. F. KELLY, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In this medical malpractice action tried before a jury, plaintiff, Harold Rodgers, appeals as of right from a judgment for no cause of action against defendants, Richard J. Taras, D.O., P.C. d/b/a Contemporary Imaging Associates, P.C. (Contemporary Imaging), and Kristin Kamienecki, D.O. (Kamienecki).

Plaintiff's kidney was removed after Kamienecki, a radiologist, reported that a lesion on plaintiff's right kidney was compatible with renal cell carcinoma. The growth was actually a non-cancerous hemorrhagic cyst. At trial, plaintiff argued that Kamienecki's negligence in reading plaintiff's images resulted in the unnecessary removal of his kidney and placed him at risk for future kidney disease. Plaintiff alleged that Contemporary Imaging was vicariously liable for Kamienecki's negligence.¹ The jury concluded that Kamienecki did not commit professional malpractice and, therefore, never reached the issues of proximate causation or damages.

On appeal, plaintiff alleges a variety of procedural errors and also argues that the verdict was against the great weight of the evidence. On cross appeal, defendants argue that there is an alternative basis for affirming, maintaining that the trial court erred in failing to grant

¹ Defendants stipulated to the liability of Contemporary Imaging if there was a verdict against Kamienecki.

defendants' motion for summary disposition on causation. In that prior motion, defendants had argued that the urologist who actually removed plaintiff's kidney, Dr. Darryl Reaume, independently undertook an examination of plaintiff's imaging to conclude that a total nephrectomy was indicated and that this independent examination of plaintiff's records severed any alleged malpractice on Kamienecki's part. Defendants further argue that the trial court abused its discretion and demonstrated bias when it failed to award defendants their requested costs.

We find no merit to plaintiff's issues on appeal and, therefore, affirm the jury's verdict in defendants' favor. We, therefore, decline to address the alternative bases for affirming the judgment raised in defendants' cross appeal. We also affirm the trial court's award of costs.

I. BASIC FACTS

Plaintiff had an x-ray taken while at the chiropractor. After viewing the image, the chiropractor notified plaintiff's primary care physician of a possible abnormality and plaintiff went to Contemporary Imaging for an abdominal ultrasound with Kamienecki. As a result of the ultrasound, Kamienecki recommended further testing and plaintiff underwent a CT scan with and without contrast dye. Kamienecki identified a 6.3 x 5.5 x 5.6 centimeter peripherally calcified, low-attenuation lesion projecting from the posterior lower pole of the right kidney. She also identified a coarse calcification in the inferior medial aspect of the lesion and an underlying, partially enhancing, mural nodule. Kamienecki's impression was of a cystic renal cell carcinoma, until proven otherwise. The experts agreed that a biopsy of the lesion was not practical and, because kidney cancer was not generally responsive to chemotherapy and radiation, partial or total nephrectomy was the standard of care. Reaume met with plaintiff and recommended a hand-assisted laparoscopic nephrectomy of the right kidney. Following the surgery, Dr. Gilbert Herman performed the pathological review of the kidney and concluded that it was negative for renal cell carcinoma.

Plaintiff filed suit against Kamienecki and Contemporary Imaging, arguing that Kamienecki committed professional malpractice in reporting an enhancing mural nodule compatible with cystic renal cell carcinoma and that her malpractice resulted in the unnecessary removal of his right kidney. What took place at trial was essentially a battle of the experts over whether Kamienecki was negligent in reporting that the growth on plaintiff's kidney was compatible with renal cell carcinoma when it was, in fact, a hemorrhagic cyst.

The experts explained that the primary way kidney tumors were found was by CT scan and a key factor in determining if a lesion is malignant is whether there is "enhancement" of the tumor post-contrast. Enhancement (or increased density) is measured by Hounsfield units. To measure Hounsfield units, a radiologist utilizes "work stations" which are essentially computers. A radiologist can click on a function called the density measurement over a "region of interest." Everything in that area will be averaged to a number and that is the area's Hounsfield density. Fluid, water, or liquid will generally be in the Hounsfield range of 0-20. Soft tissue will measure 20-80. Blood, not being a pure fluid, can measure anywhere from 20 to the 80's, depending on the age of the blood. In order to demonstrate an increase in density, a CT scan is taken before the contrast and then it is compared to the same area after the contrast is given. Sometimes if a tumor is highly vascular, the change can be seen with the naked eye. But sometimes the

differences are subtle and have to be measured. If the Hounsfield units increase by at least 20 units, then there is enhancement and highly suspicious for cancer.

Plaintiff's radiology expert, Dr. Seth Glick, testified that an enhanced scan can be broken down into an early phase, which is called the arterial phase when the arteries show the maximum density. But if a tumor is solid, it will enhance during the next phase – the nephrographic (or venous) phase – because that is when all the dye that will be absorbed and the kidney will have its maximum density. Glick was dismissive of any measurements taken during the final delay (or excretory) phase. He did not believe that such measurements were part of the standard protocol in a renal mass evaluation. In Glick's opinion, the most "foolproof" time to measure for enhancement is during the nephrographic phase because if it does not enhance during that phase, "it's not cancer. It can't be." Glick took measurements of density in the "area of concern," which initially showed a greater density, and did not find a difference greater than 20 Hounsfield after contrast. Additionally, images from the excretory phase demonstrated a lack of blood flow and, therefore, there was no enhancement and no tumor. Glick believed that Kamienecki and her expert had flawed methodology in their measurements. He opined:

My opinion is that Dr. Kamienecki breached the standard of care by describing an enhancement--an enhancing mural nodule on this particular study because there is no enhancing mural nodule and there's--there's no evidence either visually or measurably that there was enhancement of this mural nodule by the criteria that the standard of care utilizes to measure enhancement on what we call renal mass protocol.

And--and then her conclusion, based on this determination of the presence of an enhancing mural nodule, is that this was a renal cell carcinoma. My findings were there that--basically reviewed this study, that the findings were incompatible with a renal cell carcinoma because there is no evidence of enhancement on this study.

Glick found support in the pathology report, which concluded that plaintiff had a hemorrhagic cyst and a hemorrhagic cyst cannot enhance. He rejected defendants' expert's statement that some hemorrhagic cysts might contain vascularized tissue that enhances because hemorrhagic cyst cannot contain vascularized tissue. While there was some blood clotting and fiber, there was no solid tissue within the lesion.

Dr. Katherine Maturen testified as defendants' radiology expert. Maturen explained that some benign growths will demonstrate enhancement. Fibrotic tissue (tissue that forms in response to healing) can show enhancement even though there is no cancer. "Granulation tissue" was similar to fibrosis noted in the pathology report and was the first step in part of the body's healing response. Similarly, infection or inflammation may increase the amount of blood supply and make a lesion enhance. It was possible to have a cyst that contains fibrotic tissue, infected tissue, inflamed tissue, or granulation tissue that will show enhancement even if it is not malignant.

Maturen believed that a radiologist could pick *any* post-contrast phase to measure for enhancement (arterial, nephrographic, or excretory) as long as it was at least 60 seconds after

contrast was given. Unlike Glick, Maturen testified that it was within the standard of care for a radiologist to measure for enhancement during the delayed stage. She explained that different tumors demonstrate different peak enhancements, depending on blood supply and some cell types absorbed more contrast than others. Maturen found enhancement of plaintiff's lesion during the nephrographic and excretory phases. Maturen had no doubt that nodule enhanced and she agreed completely with Kamienecki's interpretation.

Kamienecki testified that there was always variability, which was one of the reasons Kamienecki did not put the exact Hounsfield measurements in her report; she would simply indicate that there was enhancement. She rejected Glick's accusation that the Hounsfield measurements were falsely elevated as a result of misplaced areas of interest. And, while Kamienecki generally agreed with Glick that "peak enhancement" post-contrast is expected in the venous phase, that rule did not always apply to tumors or reparative tissue because those tissues did not behave normally. For example, some renal cancers have fewer and smaller vessels, so they enhance "less and later than some of the more typical cancers." If a radiologist ignored the delayed phase, Kamienecki believed that there was the potential of missing a cancer diagnosis.

Kamienecki testified that complicated cysts and renal cell carcinoma had some overlap. She explained:

So if you initially have a simple cyst that has somehow been injured, whether or not it was through trauma and there's been bleeding into it, whether or not it's been infected or whether or not it's had some sort of inflammatory process, the body's reparative response then can create debris within the cyst. It can recruit blood vessels, again, for repair, for healing.

So then we're left with potentially a nodule that enhances, that for the benefit of the patients or the risk benefit ratio, you need to consider as potentially that the most progressive thing it could be and it could--even though it could be a benign process.

Where there was overlap, there was no way to distinguish a complex enhancing lesion from renal cell carcinoma; that is why her report only referenced compatibility and did not make a diagnosis.

Kamienecki found partial enhancement during the nephrographic phase, which trended and continued on the delayed or excretory phase. Kamienecki testified that additional imaging through a MRI would be unnecessary – "once you've demonstrated enhancement on a definitive exam, you can be done. Essentially if I did have an MRI, even if it came back normal, I'm still left with this--with this feature, this aggressive feature." Having sat through trial, it was still Kamienecki's opinion that plaintiff had a cystic lesion with peripheral calcification with an enhancing mural nodule compatible with cystic renal cell carcinoma.

The jury returned its verdict after less than half an hour of deliberation, finding by a vote of seven to one that Kamienecki was not professionally negligent. Because the jury determined that there was no professional negligence, there was no need for it to address the issues of

proximate causation or damages. The trial court entered a judgment in favor of defendants for no cause of action. Plaintiff now appeals as of right, arguing procedural and evidentiary irregularities and also arguing that the verdict was against the great weight of the evidence. Defendants cross appeal, raising alternative bases for affirming judgment in their favor. They also argue that the trial court abused its discretion in failing to order reasonable costs to defendants as the prevailing party.

II. DR. HERMAN'S TESTIMONY

Plaintiff argues that Herman should not have been permitted to testify as an expert in pathology and that plaintiff should have been afforded an opportunity to call a rebuttal witness. We disagree.

“This Court reviews for an abuse of discretion the decision whether to admit expert witness testimony.” *Lenawee Co v Wagley*, 301 Mich App 134, 161, 836 NW 2d 193 (2013). “The decision to admit evidence is within the trial court’s discretion and will not be disturbed on appeal absent an abuse of discretion.” *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 676; 816 NW2d 464 (2012).

Plaintiff objected to defendants using Herman as a pathology expert because he was not identified as an expert until the Friday before trial. At a minimum, plaintiff argued that Herman should be limited to testifying on the pathology report. Specifically, plaintiff objected to Herman testifying about “vascularization.” Defendants countered that they had not originally intended to use Herman as an expert, but that changed when plaintiff’s experts testified that there was nothing in the pathology report that would enhance. The trial court indicated that Herman would be permitted to testify as a fact witness, but the trial court added that “I would literally *limit you to what he’s reporting and that’s it. He cannot testify outside his factual activities in this case.* I will not let him go off--he cannot--he cannot have any expert testimony. He’s not listed as an expert.” The court noted that Herman was “here as a fact [witness] and he can talk about *what he found in his pathologies.*” Because he was not testifying as an expert, the trial court saw no need for plaintiff to have a rebuttal expert. The trial court noted that if Herman went beyond the scope of his report: “it’s not my job to stop it, it’s your job to object to it. Because--because he’s not here as an expert and you’re not getting--and you’re not going to get a rebuttal expert. He’s only here as a fact witness and can only *testify to what he saw* in this case on that pathology report.”

A review of Herman’s testimony reveals that he did not offer expert witness opinion. Instead, as admonished by the trial court, Herman testified as to his own findings.

In preparing the pathological review of plaintiff’s tumor, Herman was presented with prepared slides and compared them to the original specimen. The report included a final surgical pathology as well as clinical data, including the gross description (apparent to the naked eye) prepared by his partner. Herman testified that the fact that the tumor was yellow and friable (falling apart) “to a pathologist, I know it’s jargon to the world, but to us this sounds like this should be a cystic renal carcinoma.” Herman did not find cancer in his initial review of the slides. Because the burden was on him to show that it was not cancer in light of the fact that it “grossly looks like cancer” he did additional sectioning and, again, did not find cancer with his

histologic examination of the slides. He testified that “what we saw were some of the things that we, we described in the microscopic. I mean, we have a, a fibrous capsule with vessels in it. We have septations with, with bone in it and vessels around the bone. . . . We have necrotic material which we don’t know what it is.” Plaintiff’s counsel objected and a bench conference was held, but not transcribed. Plaintiff’s counsel specifically disliked the mention of septation and necrosis. The trial court admonished Herman to testify to what was in the report. Herman testified that he found calcification and metaplastic bone. There was necrotic breakdown debris and scarring. But ultimately, “[t]his lesion, after looking at it grossly, microscopically, my opinion is, is a hematoma. I can’t call it cancer. All I can do is call it what it is. And it looks like it’s a--I mean, I have to call it a hematoma.”

During cross examination, Herman acknowledged that although he testified that it was an organizing hemorrhagic cyst, the word “organizing” was not found in his report. He also admitted that the report did not describe vascularity within the cyst or solid live tissue within the cyst. On re-direct, the issue of vascularization was brought up again. Defense counsel asked Herman whether he saw evidence of vascularization. Herman testified that he had and explained what he meant by an organizing hematoma:

Well, a fresh hematoma is just pure blood clot. You know, so like if you cut yourself and you swell up your leg, because you get hit with a baseball, you know, you get a, a big--I guess people call them bruises or, you know, the hematomas. They’re kind of like a bruise. And if we immediately opened up that area, you would just get a blood clot. You know, blood that’s clotting.

But over time the body does stuff with it. It resorbs it. It, it tries to shrink it. If you will, like the healing of a bruise, which would be like a smaller bleed. And one of the ways the body gets rid of things is to put a capsule around it, wall it off and just grow into it over time.

Herman testified that “[t]his is a reparative process.” On re-cross-examination, the following exchange took place:

Q. In your report, just so the jury is clear, you do not use the word organized and hematoma; isn’t that true?

A. I did not say it. I said it’s a hematoma.

Q. In the report you do not use the word vascularizing tissue. Yes or no?

A. Did not.

Q. In the report you do not use the words reparative response?

A. That’s what I’m describing. A pathologist would know that.

Q. Okay. And it’s been four years since you looked at this, correct?

A. Correct.

MR. JENKINS: Thank you.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. MCGRAW:

Q. Why wouldn't you put in the report reparative response?

A. It doesn't matter. It's a--it's a hematoma.

Q. Why wouldn't you describe vasculature?

A. It doesn't matter. It's a--it's a hematoma. It's not cancer. That's the most important thing in the whole case.

Contrary to plaintiff's contention, the trial court did not limit Herman's testimony to the specific four corners of the pathology report. Instead, the trial court limited Herman's testimony to his own observations. This included impressions included in the report and impressions observed, but not necessarily included in the report. Herman testified that his gross observations appeared consistent with renal cell carcinoma, but that the ultimate conclusion was that the lesion was a cyst. Because Kamienecki's radiology report and his own observations were consistent with cancer, Herman testified that it was his burden to prove that it was not. It was only upon his microscopic investigation that he concluded that the cyst was not cancerous. All of his observations in preparing the report were properly admitted and did not touch upon expert testimony.

III. PLAINTIFF'S MOTION TO ADJOURN

Plaintiff argues that the trial court abused its discretion in denying plaintiff a one-week adjournment in order to secure live witness testimony from Glick. We disagree.

"The ruling on a motion for a continuance is discretionary and is reviewed for an abuse of discretion." *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996). An abuse of discretion occurs when a trial court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 525; 751 NW2d 472 (2008).

On February 18, 2014, plaintiff filed a motion to adjourn the trial date pursuant to MCR 2.503(B) and (D), which was scheduled for March 31, 2014. Plaintiff explained that his expert, Glick, was unavailable to provide live testimony that week because he had to manage the radiology department in Pennsylvania while his partner was off. Plaintiff indicated that the case was complicated, involving radiology studies and measurements and that live expert testimony would accurately convey and demonstrate to the jury how defendants breached the standard of care. Plaintiff requested that the trial be adjourned for one week or, alternatively, that Glick be allowed to complete his testimony in its entirety on April 7, 2014. Defendants did not object to adjourning the trial by a week and agreed that live testimony would be best. The trial court nevertheless denied the motion:

This matter, having come before the Court on Plaintiffs Motion to Adjourn Trial, is denied for the following reasons:

This matter was commenced on June 11, 2012 upon the filing of Plaintiffs Complaint. On August 18, 2012, this Court issued an Order to Show Cause to Plaintiff for failure to serve Defendant in the required amount of time. On August 20, 2012, the matter was scheduled for trial on November 26, 2013. On August 21, 2013, upon stipulation of the counsel for the parties, the trial was adjourned to January 6, 2014. On September 25, 2013, upon Plaintiffs Motion to Adjourn, the trial was adjourned to March 31, 2013 [sic—2014].

Therefore, counsel and their clients and, presumably their witnesses, had six months to prepare and schedule this matter accordingly. In addition, court hours are from 8:30 am to 4:30 pm Monday through Friday. The Court will abide by those hours.

Defendants had a similar problem securing the live testimony of their own expert. They filed a motion to schedule Maturen out of order because she was due to be out of town. Defendants wrote: “In this case, which involves complicated radiology matters, dealing with multiple series of CT images of an abdominal CT, live testimony is imperative in order to aid in the jurors’ understanding of the issues, and to hopefully arrive at a clear, rather than a confused understanding of the scientific evidence, which is largely visual.” Plaintiff opposed the motion because he was denied similar accommodations for Glick. The trial court denied defendants’ motion as well.

During trial it was revealed that Maturen would be able to testify live after all. Plaintiff objected because Glick was not able to similarly testify live. Plaintiff further argued that allowing Maturen to testify live would essentially provide a “third bite at the apple.” The following exchange took place:

THE COURT: I’m sorry. So what do you want me to do about it?

MS. LAPIN: Prevent Dr. Maturen from testifying live.

THE COURT: Name a rule for me that prevents--that because you took a trial dep, put it in the can, and now their witness is available, that says that I cannot allow it.

MS. LAPIN: I’m not aware of a rule.

THE COURT: Okay. I mean, if you want your money back, if you want sanctions because you think there’s game playing, that’s a whole other issue. But I really don’t think I can say well, since you’ve got the trial dep in the can--which, quite frankly, if I was going to try to do things for my benefit, I’d say let’s do the trial dep because I know that’s going to go in faster than the shuffling of papers and the pauses and the objections. That’s a lot cleaner.

So I will tell you, if I was here for my own selfish benefit, I would absolutely side with you on that one. But I can't. Unless--unless you find a rule that says when--or a case that says—

MS. LAPIN: Okay.

THE COURT: --when this kind of thing is going on, that it's--it is prejudicial somehow and then just let them read the dep.

MR. MCGRAW: This—

THE COURT: But you've got a couple days to find that one out.

MS. LAPIN: Okay.

Just prior to taking Maturen's testimony on the sixth day of trial, plaintiff's counsel once again argued that it was prejudicial to allow Maturen's live testimony when Glick was not afforded that same opportunity. Once again, the trial court stated: "I just want a case" to support plaintiff's position. Plaintiff could cite only MCR 2.513(G), which affords a trial court to craft its own procedure regarding the presentation of expert testimony. The court noted that "while I appreciate the live versus video, to me, I think that is--you have an equal balance of well, then, she better stick awfully close to what she said twice before. Because then that's going to be impeachment."

Neither the trial court's decision to deny the adjournment nor its decision to allow Maturen to proceed with her testimony was outside the range of reasonable and principled outcomes. Plaintiff could not cite any authority for his position that Maturen's videotaped testimony should have been played in lieu of live testimony. Moreover, plaintiff's claim that the jury did not regard the videotaped testimony in the same way as live testimony is mere speculation. Finally, the trial court treated the parties similarly regarding their requests for accommodations for their "hired guns." As the trial court noted, both parties were equally "jammed" when it came to their requests for adjournments and accommodations. The trial court also expressed the opinion that the advocacy on the case was "very strong" to "the point of perhaps zealotry," but that there had not been "any game playing."

IV. RECONSTRUCTIVE VISUAL IMAGERY

Plaintiff argues that the trial court abused its discretion when it permitted Maturen to use reconstructed coronal and sagittal images of plaintiff's CT scan because the reconstructed images were colored and enlarged, rendering them dissimilar to the original images and consequently irrelevant. We disagree.

"The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion." *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 676; 816 NW2d 464 (2012). A trial court's decision to allow demonstrative evidence is reviewed for an abuse of discretion. *People v Castillo*, 230 Mich App 442, 445; 584 NW2d 606 (1998).

Maturen testified that there are various views for CT scans: “It could be axially, like through the patient from front to back, or it could be coronally, from top to bottom. Or sagittally, if you were looking at the patient from the side. And those three are equally valid ways of reconstructing the volume of data that’s obtained during CT.” She was careful to note that “reconstruction” simply meant an alternate way of displaying the same data – “It’s just a matter of how you choose to display it. It’s not manipulating the data or changing it.”

Plaintiff’s counsel objected to Maturen’s use of blown-up and colored images. The following exchange took place:

MR. JENKINS: . . . And so she--and so she blows this up and she shows a white area enlarged with color coordination in a coronal and sagittal image. It doesn’t do anything with respect to measuring--measurements. It’s simply prejudicial because it’s like, oh, see, this is a blood vessel. But it’s just white that’s blown up.

And--and so when you look at the image that we looked at, you see a small speck and it’s only like, maybe five—

THE COURT: Well, I don’t understand. You’re saying that this is a different image? Are you saying that she’s done something to the image that Dr. Kamienecki didn’t do?

MR. JENKINS: Correct. And that’s--and that’s what was done at the trial deposition, that’s why I objected. It’s—

MR. MCGRAW: And Judge, that’s just not true. You can look at the report. [Kamienecki] dictates in her report that sections were obtained, with additional sagittal and coronal reformatted images were evaluated. She dictates it right in her report.

MR. JENKINS: She testified on direct examination that coronal and sagittal is reconstructive imaging.

THE COURT: But I don’t understand, because I’m hearing the same words from Dr. Kamienecki’s report. I don’t understand what it is that you’re objecting to.

MR. JENKINS: I’m objecting to—

THE COURT: Her technique?

MR. JENKINS: No, no. The--that what she’s using is images to blow up and say this is enhancement of a tiny speck.

THE COURT: Well, then that’s an argument that you make and you cross--and cross-examine her on it and you make that argument. I mean, it’s not prejudicial. This is why she’s paid as an expert, because she needs to back up the

person that she's being paid for. Just like you--your expert needs to back up the people that you're paying for. And that's why, you know, it's a battle of the experts. Argue that in front of the jury.

MR. JENKINS: Okay.

THE COURT: But if she's using the same images and she's--and if you believe that she's manipulating the images, then show the jury that she's manipulating.

MR. JENKINS: Okay.

THE COURT: But I don't believe it's an objection.

Using the visual aid, Maturen testified:

So this is actually a--this is a reconstruction of the same data. So this is where the enhancing kidney is actually shown as if you're looking at it from the outside. It's called volume rendered imaging, so it creates like a surface on the image. Instead of slicing through it, it takes that same data and makes it into more of a 3D-looking object.

And if we just actually play this, I'm going to show you the kidney is pink. The cyst is yellow. And then the part of the cyst that has soft tissue and that has enhancement is colored white.

And what I want to try to demonstrate to you is that this nodule is always inside the cyst and it's never inside the kidney. And this is the kind of thinking that we do in three dimensions to try to figure out whether something is truly--is it just normal renal parenchyma or is it something that's abnormal.

And so I'm going to just show you this because I think it illustrates the margins. As we turn it around, we're going to see that there's always a clear plane of distinction between that yellow tissue and that pink tissue. So the yellow stuff is the cyst and the pink stuff is the kidney.

And there's a clear coronal distinction there. And we can see the same thing if we look--sorry, this thing skipped on me. But if you can go to the end here, it's going to rotate it the other way. And this is if you were turning it (inaudible) instead.

And again, just showing that this nodule is always projecting outside of the pink kidney and inside of the yellow cyst.

This case was about whether Kamienecki breached the standard of care in reporting that the radiographic features of plaintiff's lesion were compatible with renal cell carcinoma. In order to make that determination, Maturen looked at all of the images that Kamienecki considered. Maturen's testimony was in keeping with Kamienecki, who testified that she looked

predominantly at the axial images but that also reviewed sagittal and coronal images in a 3D reformation performed at a separate work station, which provided one more layer of reliability. The reconstructed images properly assisted the jury with this determination. See *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). The images illustrated Maturen's testimony and were relevant and probative in supporting Maturen's opinion that Kamienecki did not breach the standard of care in reporting that the lesion was compatible with renal cell carcinoma. To the extent plaintiff argues that the images are imprecise, this Court has noted that "when evidence is offered not in an effort to recreate an event, but as an aid to illustrate an expert's testimony regarding issues related to the event, there need not be an exact replication of the circumstances of the event." *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

V. SEIFMAN AND REAUME'S COMMENT ON ENHANCEMENT

Plaintiff argues that the trial court abused its discretion when it permitted Seifman and Reaume to offer opinions on enhancement even though they were not qualified to offer such opinions under MCL 600.2169(1)(a). We disagree.

Urologist Brian Seifman testified that urologists are trained in interpreting and a urologist should be able to appreciate a visual enhancement and enhancement could be measured by Hounsfield units. Defense counsel questioned Seifman about when it was important to see an enhancement. Plaintiff objected and the trial court admonished Seifman that he needed "to be careful not to step to[o] far afield that you're actually not here to testify about." Seifman then explained that he looked at a late phase to get a better overall image.

Regarding the standard of care for a urologist, Seifman testified that a "urologist needs to review the images himself, look at the images and I think they need to do their own interpretation before they do any kind of surgical intervention." Upon plaintiff's objection, the trial court warned: "with all due respect to Dr. Seifman for being here, is not here to testify as to the standard of care as radiology. And I think that you are very carefully and smartly tiptoeing into that area. I am warning you now. Or he's going to be done for the day."

Reaume was the urologist who removed plaintiff's kidney. He testified that there was a relationship between inflammation and vascularity (which would explain enhancement) because part of the healing process is new blood vessels growing and bringing nutrients to get rid of degenerative tissues. It was possible for a complex cyst with hemorrhage within it to enhance. In discussing the delayed phase reading, Reaume noted that normally the contrast would wash out or de-enhance in healthy tissue, but vessels in malignancy did not act normally and did not fill and empty as normal vessels, sometimes retaining the contrast.

On appeal, plaintiff claims that the urologists testified as experts in radiology. However, the primary reason these witnesses testified was because defendants were trying to show a lack of causation in plaintiff's claim against Kamienecki. Essentially, defendants attempted to show that, even if Kamienecki was negligent in reporting that plaintiff's lesion was consistent with renal cell carcinoma, she was not the proximate cause of plaintiff's injuries because Reaume undertook an independent examination of plaintiff's CT scan and determined that a nephrectomy was needed. One of the issues at trial was whether such an independent evaluation of plaintiff's records comported with a *urologist's* standard of care. Plaintiff's urology expert, Dr. Dudley

Danoff, testified that a reasonably prudent urologist would have relied on the radiologist's interpretation of the CT scan as to whether the suspected renal mass was consistent with cystic renal cell carcinoma. In contrast, as explained above, both Reaume and Seifman testified they did not simply rely on a radiology report and would examine the images for themselves. Their impressions regarding enhancement were relevant to, not Kamienecki's standard of care as a radiologist, but to their own standard of care as urologists.

Had the jury determined that Kamienecki committed professional malpractice in reporting that plaintiff's lesion was consistent with renal cell carcinoma, the jury would have had to determine whether Kamienecki's report was the proximate cause of plaintiff's injuries or whether Reaume's actions effectively broke the causation chain. However, the jury was never called upon to do so, having answered "no" to question one on the verdict form – "Was the defendant, Dr. Kamienecki, professionally negligent?" Thus, to the extent Reaume and Seifman may have offered generalized expert testimony on an area that was not their specialty, such error was harmless.

VI. CANADIAN STUDY

Plaintiff argues that the trial court erred when it permitted Dr. Francis Dumler to offer calculations to support his opinion regarding plaintiff's long-term prognosis where the calculations were based on a Canadian study that did not include individuals with only one kidney. We decline to address this particular issue. Having found that Kamienecki was not professionally negligent, the jury never reached the issue of damages; any alleged error was harmless.

VII. GREAT WEIGHT OF THE EVIDENCE

Plaintiff argues that the jury's verdict was against the great weight of the evidence because the evidence showed that Kamienecki committed professional malpractice when she reported an enhancing nodule consistent with renal cell carcinoma.

Plaintiff has waived the issue for appeal.

MCR 2.611(A)(1)(e) provides that "[a] new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected" because "[a] verdict is against the great weight of the evidence or contrary to law." A motion for new trial must be filed within 21 days of the judgment. MCR 2.611(B). In criminal cases, a defendant's unreserved claim that a verdict was against the great weight of the evidence is reviewed for plain error. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). This is not true in civil cases where failure to raise the issue by the appropriate motion forfeits the issue on appeal. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 464; 633 NW2d 418 (2001).

Plaintiff acknowledges that it failed to file a timely motion for new trial, but cites MCR 7.216(A)(7), for the notion that this Court has the inherent authority to review issues not properly raised in the trial court. MCR 7.216(A)(7) provides that "[t]he Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . enter any judgment or order or grant further or different relief as the case may require" However,

the inherent power to review unpreserved error should be “exercised quite sparingly.” *Napier v Jacobs*, 429 Mich 222, 233; 414 NW2d 862 (1987). The *Napier* Court rejected a civil defendant’s attempt to challenge the sufficiency of a jury’s verdict without first moving for a directed verdict or judgment notwithstanding the verdict. Unlike a criminal defendant facing imprisonment:

Defendant raises no injustice other than the loss of a favorable jury verdict. While defendant asserts that manifest injustice and a miscarriage of justice would occur if appellate review of the sufficiency of the evidence were denied in the instant case, defendant fails to describe the nature of that injustice. More than the fact of the loss of the money judgment of \$60,000 in this civil case is needed to show a miscarriage of justice or manifest injustice. A contrary ruling in the instant case would, in effect, impose a duty in every civil case on the trial judge to review sua sponte the sufficiency of the evidence and to grant unrequested verdicts. Such a rule would be in patent conflict with our adversary system of civil justice. [*Id.* at 233-234 (footnote omitted).]

Absent a ruling on a motion for new trial based on the fact that the jury’s verdict was against the great weight of the evidence, there is nothing for this Court to review because the trial court was never asked to exercise its discretion. *Kelly v Builders Square, Inc.*, 465 Mich 29, 40; 632 NW2d 912 (2001). Because plaintiff failed to timely move for a new trial on the basis that the verdict was against the great weight of the evidence, the issue has been waived.

Although plaintiff attempts to argue that allowing the jury’s verdict to stand would result in a miscarriage of justice, plaintiff’s primary claim is simply that the jury got it wrong and that plaintiff’s expert was more qualified and, therefore, more believable than either Kamienecki or Maturen. Thus, plaintiff’s arguments concern the weight of the evidence and credibility of the witnesses – both of which are for the trier of fact to resolve:

This Court may overturn a jury verdict that is against the great weight of the evidence. But a jury’s verdict should not be set aside if there is competent evidence to support it. Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. The issue usually involves matters of credibility or circumstantial evidence, but if there is conflicting evidence, the question of credibility ordinarily should be left for the fact-finder. Similarly, the weight to be given to expert testimony is for the jury to decide. [*Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010) (internal footnotes omitted).]

These three highly qualified experts debated about issues such as whether enhancement could be demonstrated during the excretory phase and whether measurements were properly taken. Plaintiff does not argue that defendants’ experts were unqualified; he simply argues that his expert was *more* qualified. Plaintiff’s counsel said it best during closing argument – “when we’re talking about this issue of enhancement and measurements, credibility is an issue. It’s a big issue.” As noted, the weight and credibility of evidence is for a jury to decide.

VIII. THE AWARD OF COSTS

In their cross appeal, defendants argue that the trial court abused its discretion when it awarded only a fraction of defendants' requested costs as the prevailing party. We disagree.

"This Court reviews for an abuse of discretion a trial court's ruling on a motion for costs pursuant to MCR 2.625." *Van Elslander v Thomas Sebold & Assoc, Inc*, 297 Mich App 204, 211; 823 NW2d 843 (2012).

Following the verdict in their favor, defendants moved for costs. They requested: \$7,600 for Maturen (radiology expert); \$5,000 for Seifman (urology expert); and \$6,900 for Dumler (nephrology expert), attaching the invoices of each. Maturen spent 10 hours preparing for trial at a rate of \$400 an hour. She also appeared live at trial at a cost of \$3,600. Seifman appeared for a full day of trial at a cost of \$5,000. Dumler spent four hours preparing his testimony at a cost of \$375 an hour and also appeared for two days of trial at a cost of \$5,400.

In his response, plaintiff reminded the trial court of the discretionary nature of assessing costs. Plaintiff denied that the requested fees were reasonable or necessary and requested an evidentiary hearing on the matter.

At the hearing on defendants' motion, defense counsel indicated that it had eliminated any fees incurred as a result of Maturen's video trial deposition, which was never used. Counsel also pointed out that plaintiff's expert, Dr. Danoff, had more expensive hourly rates. When defense counsel began to address Seifman's fees, the trial court interrupted:

THE COURT: I thought Dr. Seifman was offensive. First of all, for him to say you only gave me two days' notice to show up and therefore I'm going to charge you for a whole day, I testify for a whopping one hour and I'm not even going to tell you what my rate is, you're just going to owe me \$5,000.^[2] That's some mighty good work and I would like to have \$5,000 to sit around and do nothing.

So his whole bill is unreasonable as it stands and therefore that's denied.

Dr. Dumler is kind of close to that. I mean, what I did is I pulled up the videos, I looked at how long everyone took to testify. Dr. Dumler was two hours on the stand, and that's being generous. So where he's coming up with--what was his number?

MS. LAPIN: I was going to say that, your Honor, I think it was six hours for trial.

² Seifman's letter explained "Full day trial fee applied as I was not notified of 11 a.m. arrival time [for April 4th testimony] until 4/2/14. I was needed at the courthouse until approximately 3:30 pm, therefore there was an inadequate amount of time in the day to afford an office schedule." The \$4,650 was his full-day trial fee of \$5,000 minus \$350 for a previous over-payment.

MS. EDWARDS: Dr. Dumler was over the course of two days.

THE COURT: Yeah. One hour one day and the other hour the other day. And he's got \$375 to sit around at his house an hour, but to be sitting in my courtroom it's \$900 an hour. And I don't understand that.

So what I find reasonable would be \$1,500 total for Dr. Dumler.

Now, Dr. Maturen is the biggest issue, obviously. Especially because this was essentially heard and I think the plaintiff's made an excellent argument, that this is her third time giving a deposition--giving deposition. Video deposition is--you've got the video deposition that you're charging for. Then you've got—

MS. EDWARDS: No. We eliminated--we eliminated the \$1,600 on 3/29/14 and we eliminated the 400 on 3/25/14. We tried to cut her prep time, indicating that she had to prepare regardless for video or trial. And of course under Hartland versus Kachovic (phonetic) and, and I believe plaintiffs don't dispute, preparation time is also includable as an allowable cost.

THE COURT: Well, why don't we just bring her here, since you're insisting on, you know, you have a no cause--let's make it clear. You have a no cause on a case where a healthy kidney is removed. So if you're all trying to pile on to a plaintiff, who most likely is going to end up filing bankruptcy over this whole thing, that's fine.

Well, let's have Dr. Maturen travel down here and tell us, you know, the kind of time she put in and how her hourly rate works out and so we'll, we'll take that one under advisement.

MS. EDWARDS: Well, we would have addressed the fees of Dr. Maturen but a number was not recommended by plaintiff's counsel in the brief, so I--we tried to cut it in half, as I said, for prep time and trial time, your Honor. And—

THE COURT: And I think the rest of the costs and taxables are just statutory. Correct?

MS. LAPIN: Okay.

MS. EDWARDS: So reduce Dumler to \$1,500. Seifman is eliminated. And—

THE COURT: And Maturen you can bring him--you can bring him down here and have another hearing on it.

MS. EDWARDS: If we eliminate the preparation fees, could we—

THE COURT: I'm not going--I'm not playing Carol Merrill now [model from Let's Make a Deal].

Thereafter, the trial court entered an order awarding \$1,500 for Dumler, denying fees for Seifman, and providing that “fees for Dr. Maturen would require an evidentiary hearing in order to be awarded as taxed costs.” Defendants were granted statutory costs of \$291.72 for a total of \$1,813.44.

MCR 2.625(A)(1) provides: “Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.” MCL 600.2405(1) similarly provides that costs for witnesses may be taxed. “Costs and fees” include “the reasonable and necessary expenses of expert witnesses as determined by the court.” MCL 600.2421b(1)(a). Costs in cases such as the one at bar, therefore, are discretionary. The trial court did not abuse this discretion.

While an expert may be compensated for time spent in trial preparation, including time spent learning about the case, time spent “educating counsel” may not be taxed as costs. *Van Elslander*, 297 Mich App at 218-221. Where a bill does not specifically attribute how time is spent, an evidentiary hearing is needed to distinguish and recalculate hours spent on taxable and nontaxable costs. *Id.* at 219. Therefore, the trial court’s determination that an evidentiary hearing was necessary was well supported. Defendant undertook no effort to schedule such a hearing. We cannot conclude that the trial court’s consideration of the facts of this particular case and of the actual time defendants’ experts spent testifying was an abuse of discretion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Henry William Saad