STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA MILLER, as Next Friend For CAITLYN MILLER, a Minor,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
August 28, 1998

No. 192167
Oakland Circuit Court
LC No. 92-438459 NH

Before: Sawyer, P.J., and Bandstra and J.B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right the jury's verdict of no cause of action in this medical malpractice case. We affirm.

Plaintiff's daughter, Caitlyn, was born prematurely on March 28, 1990, at twenty-five weeks gestation. Plaintiff claims that Caitlyn was paralyzed as a result of an improperly performed lumbar puncture, which was performed approximately two weeks after Caitlyn's birth. Defendant asserts that Caitlyn's paralysis was a complication from the necessary use of an umbilical artery catheter.

Plaintiff raises many evidentiary issues. She first argues that the trial court abused its discretion in allowing defendant to cross-examine a witness using a learned treatise without first establishing that the treatise was a reliable authority. We disagree. This Court reviews the admission of evidence for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). MRE 707 limits the use of learned treatises to impeachment and requires that the learned treatise be established as reliable authority. On cross-examination, plaintiff's witness admitted that the *Journal of Pediatrics* was a peer-reviewed journal. This admission was sufficient to establish that the treatise was reliable authority. See *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593, 598-600; 440 NW2d 417 (1989).

---

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

We also find no abuse of discretion in defendant's expert's reference to the fact that her resident could not find any medical literature indicating that lumbar puncture in premature infants can cause paralysis. An expert may testify as to her opinion and give her reasons for the opinion, whether based on hearsay information or the findings and opinions of other experts. MRE 703, 705; *Koenig*, *supra*; *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995). The expert was allowed to rely on her resident's information, and she could testify that she relied on the results of the literature search in forming her opinion. Further, although plaintiff asserts that the expert's reference constituted inadmissible substantive evidence proving that malpractice was not committed, this is not the case. The reference was admitted to show the basis of the expert's opinion, and was not more prejudicial than probative.

Next, plaintiff argues that the trial court abused its discretion in allowing defendant to refer to heroic measures undertaken to keep Caitlyn alive. We disagree. The statements challenged by plaintiff do not use the term "heroic" or any similar term to describe the acts of defendant and its agents. Evidence regarding Caitlyn's physical condition and the acts performed by defendant and its agents were relevant to defendant's theory of the case and therefore admissible. MRE 401, 402. Its probative value was not outweighed by the danger of unfair prejudice. MRE 403. The trial court did not abuse its discretion in admitting the evidence. *Koenig, supra*.

Next, plaintiff argues that the trial court abused its discretion in denying plaintiff's challenge of a juror for cause. We disagree. A juror may be challenged for cause for any of the reasons enumerated in MCR 2.511(D), and if one of the enumerated reasons exists, the trial court must excuse the juror. *Poet v Traverse City Osteopathic Hospital*, 433 Mich 228, 236; 445 NW2d 115 (1989). A demonstration that a prospective juror fits one of the categories is "equivalent to proving a biased or prejudicial state of mind." *Id*. The decision to grant or deny a challenge for cause is within the sound discretion of the trial court. Id. In *Poet*, our Supreme Court set forth the following test to determine whether a party is entitled to relief where the trial court denies a challenge for cause:

> [T]here must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable. [*Poet*, *supra* at 241.]

The Court in *Poet* described the trial court's task of exercising its discretion on challenges for cause:

> When balancing discretionary power with a litigant's right to a fair trial, a trial judge should, in cases where apprehension is reasonable, err on the side of the moving party. For our purposes, apprehension is "reasonable" when a venire person, either in answer to a question posed on voir dire or upon his own initiative, affirmatively articulates a particularly biased opinion which may have a direct effect upon the person's ability to render an unaffected decision. [*Poet*, *supra* at 238.]

In this case, Stokes, the juror whom plaintiff challenged for cause, did not articulate a biased opinion. He affirmatively indicated that he would be able to make an unbiased decision based on the facts presented. Merely because he sold catheters to defendant and had some knowledge as to how they were used should not be equated with creating bias. Plaintiff has failed to demonstrate that the trial court abused its discretion in denying her challenge for cause. Further, plaintiff has failed to demonstrate, as required by the four-part test in *Poet*, that juror Amy Jarchow was "objectionable."

Plaintiff's argument that the trial court erred in refusing to take judicial notice of MCL 600.2146; MSA 27A.2146 and 1979 AC, R 325.1028 is not supported by the record. The record reveals that, prior to trial, the trial court granted plaintiff's motion to take judicial notice of the requested statute and regulation. However, the record suggests that the trial court wanted the issue to be raised later during jury instructions. Although plaintiff now states on appeal that the trial court refused to take judicial notice of the statute and administrative rule at the time of jury instructions, there is no indication of this on the record. After the jury was initially instructed, the trial court asked the parties if they had any objections. Plaintiff's only objection was regarding a different matter. Plaintiff did not revisit the issue of judicial notice or request an instruction in conformity with the statute and administrative rule.

Next, plaintiff argues that the trial court abused its discretion in admitting defendant's procedure notes as exhibits because the notes were irrelevant and constituted hearsay. We disagree. The notes were not hearsay because they were not admitted "to prove the truth of the matter asserted." MRE 801(c). They were admitted for the limited purpose of demonstrating how persons working at defendant hospital recorded the lumbar puncture procedure on patients' records. The notes were relevant to defendant's theory that the requisite standard of care did not require detailed documentation regarding the performance of lumbar punctures. The trial court did not abuse its discretion in admitting the evidence. *Koenig, supra*.

Plaintiff next argues that the trial court abused is discretion in allowing defendant to admit a learned treatise as substantive evidence. While we agree that the trial court abused its discretion in admitting the evidence, we find any error to be harmless. MRE 707 allows use of learned treatises for impeachment only. However, if the probative value of such evidence is not substantially outweighed by its prejudicial effect, it is admissible for nonhearsay purposes. *Stachowiak v Subczynski*, 411 Mich 459, 463-466; 307 NW2d 677 (1981). Defendant's expert read from the *Atlas of Procedures in Neonatology*. The reference to the treatise was not for impeachment purposes and was used to prove the truth of the matter asserted, i.e., that a lumbar puncture may be performed at the L3/L4 interspace. Thus, the evidence was hearsay, and the trial court abused its discretion in admitting it.

However, error of a nonconstitutional dimension is reviewed to determine "whether there is 'a reasonable probability that the error affected the outcome of the trial.'" *In re Hamlet (After Remand)*, 225 Mich App 505, 518; 571 NW2d 750 (1997), quoting *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995). The expert testified that, to his knowledge, lumbar punctures in premature infants were sometimes performed at the L3/L4 interspace and that he had no knowledge of paralysis caused by lumbar punctures performed in that manner or at the L4/L5 level. The expert also stated and explained his opinion that Caitlyn's paralysis was not caused by the lumbar puncture. Defendant also presented substantial evidence refuting plaintiff's theory. Based on all the evidence

presented, we conclude that there was not a reasonable probability that the improper admission of the learned treatise affected the jury's verdict. *In re Hamlet, supra*.

Next, plaintiff asserts that the trial court erred in allowing improper comments by defendant during closing arguments. We disagree. Plaintiff failed to preserve this issue by objecting to the alleged improper comments and requesting a curative instruction or a mistrial. *Szymanski v Brown*, 221 Mich App 423, 427; 562 NW2d 212 (1997), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982). This Court reviews an argument that a party's counsel made improper comments during closing arguments first to determine whether the comments were in fact error, then to determine whether any error was harmless. *Szymanski, supra*. Because this issue is not preserved, if the claimed error was not harmless, this Court must decide whether a new trial is necessary because the error "may have caused the result or played too large a part and may have denied [plaintiff] a fair trial." *Id.*

Where there is conflicting or contradicting testimony, the parties are permitted to try to persuade the jury to believe their witnesses and disbelieve the other party's witnesses. *Wheeler v Grand Trunk W R Co*, 161 Mich App 759, 765; 411 NW2d 853 (1987), citing *Reetz, supra* at 109. It is proper for counsel to "discuss the character of witnesses, the probability of the truth of testimony given on the stand, and . . . when there is any reasonable basis for it, characterize testimony." *Kern v St Luke's Hosp Ass'n*, 404 Mich 339, 353-354; 273 NW2d 75 (1978), quoting *Firchau v Foster*, 371 Mich 75, 78; 123 NW2d 151 (1963) (emphasis deleted). Reversal may be required, however, where the language used reveals "a studied purpose to inflame or prejudice the jury, based upon facts not in the case . . . ." *Kern, supra* at 354 (emphasis deleted).

Defense counsel's comments regarding one of its witnesses can be characterized as proper comments regarding her credibility, which was contested in this case. Defense counsel was trying to persuade the jury to believe the witness. There is nothing in the comments to suggest that defense counsel was attempting to inflame or prejudice the jury. The comments were not improper.

Finally, plaintiff asserts that the trial court abused is discretion in instructing the jury on SJI2d 30.04. We disagree. The trial court's decision to give a jury instruction is reviewed for an abuse of discretion. *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). We must review jury instructions in their entirety and should not extract them piecemeal. *Id.* It is not necessary to reverse a jury's verdict if, on balance, the parties' theories and the applicable law are adequately and fairly presented to the jury. *Id.* Where the Michigan Standard Jury Instructions are applicable, accurately state the applicable law, and are requested by a party, they must be given. MCR 2.516(D)(2); *Pontiac Sch Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997), quoting *Duke v American Olean Tile Co*, 155 Mich App 555, 565; 400 NW2d 677 (1986).

In *Jones v Porretta*, 428 Mich 132, 136; 405 NW2d 863 (1987), one of the challenged instructions provided: "The mere fact that an adverse result may occur following surgery is not in itself evidence of negligence." Our Supreme Court explained that the instruction is inappropriate in res ipsa loquitur cases where either an expert testifies that the injury could not occur without negligence or it is

common knowledge that injury would not occur where the physician exercised proper care and skill. *Id.* at 154-156. However, "[w]here proofs put the significance of an adverse result in issue, it may be more appropriate to explain the physician's duty of care by advising the jury that there are inherent risks in medical treatment which are beyond the physician's control." *Id.* at 146.

Plaintiff's theory is that a neonatal nurse practitioner improperly performed the lumbar puncture, causing Caitlyn's paralysis. Plaintiff does not claim that Caitlyn's injury was caused by negligence based on a res ipsa loquitur theory. Defendant's theory is that the paralysis was a complication of the umbilical artery catheter and that complication is an inherent risk in the use of the catheter. There was no expert testimony that Caitlyn's paralysis would not have occurred absent negligence, and plaintiff does not assert that this is common knowledge.

Under the guidance of *Jones*, we find that the instruction was not improper. It merely informed the jury that there are inherent risks in medical treatment and that the paralysis itself does not prove negligence. The instruction was not contrary to the applicable law and reflected the parties' theories. The trial court did not abuse its discretion in giving the instruction.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Joseph B. Sullivan