STATE OF MICHIGAN

COURT OF APPEALS

WALTER CLARK DAVIS and BRENDA DAVIS,

Plaintiffs-Appellees,

v

OAKLAND GENERAL HOSPITAL,

Defendant-Appellant,

and

WILLIAM BORGERDING, D.O., KERI TOPOUZIAN, D.O., and SHELDON N. KAFTAN, D.O.,

Defendants.

UNPUBLISHED
July 9, 1999

No. 204523
Oakland Circuit Court
LC No. 93-453163 NO

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

In this medical malpractice action, defendant Oakland General Hospital appeals as of right from the trial court's order entering judgment on a jury verdict finding defendant liable for negligence and the amended order of the trial court ordering defendant to pay damages, costs and fees.[1] We affirm.

Defendant first argues that the trial court erred in refusing to grant its motions for a directed verdict and for judgment notwithstanding the verdict (JNOV). Defendant argues that it is not liable to plaintiff for damages because (1) plaintiff's expert witness, Dr. Arnold Markowitz, failed to establish that defendant's professional staff breached the standard of care it owed to plaintiff in treating his alcohol withdrawal and (2) plaintiff failed to establish that the negligence of defendant's staff was the proximate cause of plaintiff's injuries. We disagree.

A trial court's decision regarding a party's motion for a directed verdict is reviewed de novo. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). In determining whether a motion for a directed verdict was erroneously denied, we review all evidence admitted until

the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996). When the evidence could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury. *Id.* Directed verdicts are not favored in negligence cases. *Id.* In reviewing the trial court's denial of defendant's motion for judgment notwithstanding the verdict, this Court reviews the evidence and all legitimate inferences arising therefrom in a light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). The trial court should grant a JNOV motion only if the evidence fails to establish a claim as a matter of law. *Id.*

Proof of a medical malpractice claim requires that the plaintiff demonstrate: (1) the applicable standard of care; (2) breach of that standard of care by the defendant; (3) injury; and (4) proximate causation between the alleged breach and the injury. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Where the treating doctor is a general practitioner, he is held to "the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community." MCL 600.2912a(1)(a); MSA 27A.2912(1)(1)(a); *Jalaba v Borovoy*, 206 Mich App 17, 19-20; 520 NW2d 349 (1994). Here, there is no indication, and defendant does not argue on appeal, that the physicians responsible for plaintiff's care both in the emergency room and on the fifth floor were anything but general residents or interns. Interns and residents are nonspecialists and, thus, are held to the standard of care of the local community or similar communities. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 138; 528 NW2d 170 (1995).

When viewed in the light most favorable to plaintiff, the testimony of plaintiff's expert witness, Dr. Arnold Markowitz, raised genuine fact issues with respect to whether defendant's employees properly treated plaintiff's illness. First, Dr. Markowitz testified that plaintiff should have been diagnosed with alcohol withdrawal syndrome in the emergency room. Instead, the emergency room physician, Dr. Borgerding, diagnosed plaintiff as primarily suffering from pancreatitis, with alcohol withdrawal being a possible or secondary diagnosis of plaintiff's illness. When plaintiff arrived at the hospital, he had severe stomach pain, was shaking, sweating profusely, and experiencing a racing heartbeat. Plaintiff reported to the treatment staff his history of substantial alcohol use as well as the fact that he had not used alcohol in the two to three days before coming to the hospital. Plaintiff was also observed in the emergency room calling out names of people who were not there. Dr. Markowitz testified that such information should have led defendants to diagnose plaintiff as suffering symptoms of early alcohol withdrawal and to foresee the possibility that plaintiff would develop the major symptoms of shakes, tremors, hallucinations, and disorientation.

Dr. Markowitz further testified that proper treatment of a patient with alcohol withdrawal syndrome includes giving the patient thiamin, and properly monitoring, sedating, and restraining the patient. Here, plaintiff was not given thiamin until after he jumped out of the window at approximately 2:45 a.m. Dr. Markowitz testified that thiamin "probably would have reduced [the hallucinations], but it probably would not have totally stopped them." However, Dr. Markowitz concluded that defendants did not breach the applicable standard of care with respect to the administration of thiamin because the thiamin was administered within twelve hours of plaintiff's admission to the hospital. Thus, plaintiff's

expert testimony did not establish that defendants breached the standard of care with respect to the administration of thiamin.

However, Dr. Markowitz opined that defendants failed to properly monitor or restrain plaintiff. We find Dr. Markowitz's testimony with respect to the standard of care regarding the proper monitoring and restraining of plaintiff to be somewhat contradictory. On one hand, Dr. Markowitz opined that, because it was known that plaintiff was having hallucinations when he began calling out names in the emergency room, he should have been continually monitored by having someone sit at his bedside or by a television monitor. In the alternative, plaintiff could have been physically restrained as long as his condition was checked every ten to fifteen minutes. On the other hand, although the evidence indicated that plaintiff was never placed in restraints, Dr. Markowitz later testified that, assuming defendant's employees asked plaintiff the proper probing questions to determine his state of mind,[2] defendant's employees appropriately cared for plaintiff by checking his condition every fifteen minutes. However, when we view the evidence in the light most favorable to plaintiff, we conclude that Dr. Markowitz's testimony created a question of fact with respect to whether defendant breached the standard of care regarding monitoring and restraining plaintiff by failing to either constantly monitor plaintiff or by placing plaintiff in restraints and checking his condition every ten to fifteen minutes.

Furthermore, Dr. Markowitz's testimony raised a question of fact with respect to whether defendants adequately sedated plaintiff. According to Dr. Markowitz, the goal of sedating a patient suffering from alcohol withdrawal syndrome is to prevent the patient from hallucinating or acting on his hallucinations. Dr. Markowitz testified that defendant's doctors were not negligent in using phenobarbitol to sedate plaintiff, but opined that the dosage administered to plaintiff was not adequate because plaintiff continued to have anxiety and an abnormal pulse rate even after receiving the phenobarbitol. Dr. Markowitz's testimony that the phenobarbitol was not working was based on a note written by Dr. Haering at 1:00 a.m. on December 6, 1991, indicating "positive anxiety." However, Dr. Haering testified that the note written at 1:00 a.m. referred to anxiety that plaintiff had experienced in the two to three days since his last drink, rather than anxiety that plaintiff was experiencing at the time the note was written. The 1:00 a.m. note also indicated that plaintiff had a pulse rate of 100 beats per minute, which Dr. Haering testified was "mildly elevated." Also admitted into evidence was a note written by Dr. Haering at 7:30 a.m., after plaintiff had jumped from the window, in which Dr. Haering indicated that plaintiff was not experiencing hallucinations or anxiety. Dr. Haering testified that the 7:30 a.m. note described his physical examination of plaintiff at approximately 1:00 a.m. on December 6, 1991. Dr. Haering further testified that the pulse rate of 108 beats per minute indicated plaintiff's pulse rate at 7:30 a.m. However, Dr. Markowitz questioned the veracity of the 7:30 a.m. note, specifically noting that the 7:30 a.m. note did not indicate that plaintiff had jumped from the window. A determination of whether plaintiff was anxious and had an elevated pulse rate at 1:00 a.m. can only be made on the basis of Dr. Haering's credibility, which is a question of fact for the jury to decide. *Zeeland Farm Services, Inc v JBL Enterprises, Inc,* 219 Mich App 190, 195; 555 NW2d 733 (1996). Thus, the evidence was such that a reasonable juror could have found that the applicable standard of care required defendant's staff to adequately sedate plaintiff, but that they failed to comply with the standard by administering inadequate doses of phenobarbitol.

Finally, Dr. Markowitz concluded that it was inappropriate to put a patient in plaintiff's condition, without the proper sedation, observation or restraints, in a fifth floor room with an operable window. Thus, when viewed in a light most favorable to plaintiff, we conclude that Dr. Markowitz's testimony demonstrated that questions of fact existed with respect to whether defendant's employees breached the applicable standard of care when treating plaintiff.

Defendant also argues at various points in its appellate brief that plaintiff failed to articulate the standard of care that Nurse Susan Eason owed him when treating him for alcohol withdrawal. However, this argument ignores the fact that plaintiff did not allege independent malpractice on the part of Nurse Eason. Instead, plaintiff's theory implicated his nursing treatment only insofar as it was supervised by Drs. Borgerding and Haering. While Nurse Eason was charged with the duties of administering phenobarbital to plaintiff and monitoring him when he was placed on the fifth floor, plaintiff's theory, as articulated in the testimony of Dr. Markowitz, was that the treating physicians failed to order sufficient doses of phenobarbital to sedate him and failed to order proper monitoring or restraint of plaintiff to insure that he did not hurt himself. Because plaintiff did not contend that Nurse Eason was charged with making independent decisions regarding the course of plaintiff's treatment, her acts and omissions were not relevant to the issue of liability. Indeed, according to the testimony of Nurse Rose Boyll, defendant's expert on nursing care, Nurse Eason properly followed all of the supervising doctors' orders. Because plaintiff did not argue that there was a breach in the standard of nursing care owed to him, there was no need to elicit expert testimony with respect to that issue. See *Locke*, *supra* at 223 (expert testimony necessary to establish standard of care in medical malpractice action).

Next, we find that a reasonable jury, viewing the evidence in a light most favorable to plaintiff, could have found that defendant's negligent treatment of plaintiff proximately caused his injuries. As this Court has stated,

> [t]he question whether wrongful conduct is so significant and important as to be considered a proximate cause of an injury depends in part on foreseeability. A proximate cause is one that operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injury would not have occurred. The determination whether wrongful conduct may be considered a proximate cause of an injury involves a determination whether the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. [*Ridley v Detroit*, 231 Mich App 381, 389; ___ NW2d ___ (1998).]

Evidence showed that plaintiff was suffering from alcohol withdrawal. Furthermore, there was evidence that defendant's staff was aware of plaintiff's condition, or should have been aware of plaintiff's condition, and failed to correctly monitor plaintiff to ascertain the course of his unpredictable disorder and prevent him from harming himself by violently responding to the hallucinations defendant's staff knew or should have known plaintiff was having, or could have. Instead of constantly monitoring plaintiff or putting him in restraints, defendant's staff placed him largely unsupervised in a fifth-floor room next to an operable window. As a result, defendant harmed himself by jumping from the window while

experiencing hallucinations. It was foreseeable that, without proper supervision, plaintiff would harm himself while undergoing alcohol withdrawal at any stage of the syndrome, whether he experienced hallucinations or whether he experienced the complete psychosis of delirium tremens. Although plaintiff's act of purposefully jumping from the window might be considered an intervening cause, his act was reasonably foreseeable because, due to the nature of his medical condition, defendant's negligence consisted of a failure to protect plaintiff against the very risk that occurred, i.e., the very real risk that he would harm himself in the course of alcohol withdrawal. *Hickey v Zezulka*, 439 Mich 408, 438 (Brickely, J.), 447 (Riley, J.); 487 NW2d 106 (1992); *Ridley*, *supra*.

In summary, we find that the trial court did not err in denying defendant's motion for a directed verdict because the evidence, when viewed in a light most favorable to plaintiff, could lead reasonable jurors to find defendant liable for medical malpractice based on the failure of its medical staff to properly treat plaintiff's alcohol withdrawal syndrome. Additionally, because the evidence and all the legitimate inferences arising therefrom, when viewed in a light most favorable to plaintiff, established (1) the standard of care applicable to doctors treating alcohol withdrawal, (2) a breach of this standard of care by defendant's medical staff, (3) injury, and (4) proximate causation between the breach and plaintiff's injury, we conclude that plaintiff established his medical malpractice claim as a matter of law. Therefore, that the trial court did not err in denying defendant's motion for JNOV.

Next, defendant argues that the trial court abused its discretion by allowing Dr. Markowitz to testify that phenobarbital was not one of his "favorite" sedatives. While we agree that the admission of the evidence was improper, we find the error to be harmless. A trial court's decision to admit evidence is within the court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). Error requiring reversal may not be predicated on a ruling that admits evidence unless a substantial right was affected. MRE 103(a); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 329; 454 NW2d 610 (1990).

A plaintiff in a medical malpractice case can succeed only if he shows that the defendant breached the applicable standard of care or practice. MCL 600.2912a; MSA 27A.2912(1); *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 382; 525 NW2d 891 (1994); *Carbonell v Bluhm*, 114 Mich App 216, 224; 318 NW2d 659 (1982). The applicable standard of care for general practitioners is that of the local community or similar communities, while the standard of care for a specialist is nationwide. *Cudnik*, *supra* at 383. Evidence concerning how any *particular* doctor would act under the circumstances of a case is not relevant in an action alleging malpractice. *Id.* at 382; *Carbonell*, *supra*.

Thus, Dr. Markowitz's testimony that he personally did not prefer to use phenobarbital as a sedative to treat patients suffering from alcohol withdrawal was not relevant to plaintiff's ultimate task of establishing his claim of medical malpractice, and the trial court abused its discretion in admitting the evidence. MRE 402. However, we find no basis upon which to conclude that the erroneous admission of Dr. Markowitz's testimony prejudiced defendant. Dr. Markowitz explicitly stated that the use of phenobarbital did not constitute negligence. In fact, he indicated on at least three occasions that the

decision to use phenobarbitol was not negligent. Instead, he faulted defendant's staff for not using enough of the drug to sedate plaintiff. Thus, the error in admitting this irrelevant evidence was harmless.

Next, defendant argues that the trial court erred in refusing to grant its motion for a new trial on the ground that the trial court erred in refusing to submit a special verdict form to the jury to require it to specify which of defendant's employees were negligent in rendering plaintiff care. Defendant further argues that the trial court failed to give requested standard jury instructions regarding the allocation of fault among the physicians and nurse that treated plaintiff and regarding the requirement that it must find that one or more of defendant's employee's were negligent in order to find that defendant was negligent. While we agree that the jury should have been required to answer a special interrogatory form and to specify which actors were responsible for plaintiff's negligent care, we conclude that the trial court's failure to use such a verdict form was not an error requiring reversal. Moreover, we conclude that the jury instructions were adequate.

A new trial may be granted as to all or some of the issues where there was an error of law in the proceedings that materially affected a party's substantial rights. MCR 2.611(A)(1)(g). See also MCL 600.6098(2); MSA 27A.6098(2). This Court will not reverse a trial court's decision to deny a motion for a new trial absent an abuse of discretion. *Klinke v Mitsubishi Motors Corp,* 219 Mich App 500, 511; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998).

MCR 2.516(D)(2) requires that standard jury instructions be given when they are applicable, accurately state the applicable law, and are requested by a party. *Luidens v 63rd District Court*, 219 Mich App 24, 27; 555 NW2d 709 (1996). The determination whether a requested jury instruction is applicable and accurately states the law is within the discretion of the trial court. *Klinke*, *supra* at 515. Sufficient evidence must be presented to warrant giving the requested instruction. *Id.* This Court reviews jury instructions in their entirety and will not reverse if, on balance, the theories of the parties and the applicable law were adequately presented to the jury. *Id.*

MCL 600.6304; MSA 27A.6304 provides, as pertinent:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under (MCL 600.2925d; MSA 27A.5925(4)), regardless of whether the person was or could have been named as a party to the action.

Thus, MCL 600.6304; MSA 27A.6304 required the trial court to submit a special interrogatory form to the jury to determine the total fault of all persons, including those released from liability, that contributed to plaintiff's injury. See *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993) (word "shall" designates mandatory provision).[3] However, plaintiff established defendant's liability under a theory of respondeat superior. "Once it has been determined that the man at work is a servant, the master becomes subject to *respondeat superior* liability. It must then be determined whether the tortious conduct of the servant arose within the scope of the employment." *Nichol v Billot*, 406 Mich 284, 294 n 3; 279 NW2d 761 (1979). "'*Respondeat superior*'" provides in essence that the act of an employee during the course of his employment is legally the act of the employer." *Gifford v Evans*, 35 Mich App 559, 568; 192 NW2d 525 (1971). Thus, we find that the trial court's failure to require the jury to answer special interrogatories and to instruct the jury that it was required to apportion the negligence between the doctors and the nurse who were responsible for plaintiff's care is not a basis for reversal, because their acts were legally the acts of defendant, the employer. Furthermore, upon reviewing the instructions as a whole, we find that they correctly informed the jury of the standard of care that defendant's employees owed plaintiff, as well as the doctrine of respondeat superior, from which defendant's liability stemmed. Thus, because there was no instructional error, the trial court did not err in refusing to grant defendant's motion for a new trial.

Finally, we decline to address defendant's argument concerning non-economic damages because the non-economic damages awarded to plaintiff were well below the cap on non-economic damages at the time of trial, adjusted in accordance with MCL 600.1483(4); MSA 27A.1483(4).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski

[1] Pursuant to the stipulation of the parties, Drs. Borgerding, Topouzian, and Kaftan were dismissed as parties to the lawsuit.

[2] We acknowledge Dr. Markowitz's testimony that there was no evidence in the medical records that defendant's employees asked plaintiff the proper probing questions to determine his state of mind from the time he arrived at the hospital to the time he jumped from the window. However, we note that plaintiff, who had the burden of proof, failed to present evidence that the appropriate questions were not asked.

[3] Prior to the 1996 amendment, see 1995 PA 161 and 1995 PA 249, MCL 600.6304(1)(b); MSA 27A.6304(1)(b) required the trier of fact to determine "the percentage of the total fault of all the parties regarding each claim as to each plaintiff, defendant, and third-party defendant." *Department of Transportation v Thrasher*, 196 Mich App 320, 323-324; 493 NW2d 457 (1992), aff'd 446 Mich 61 (1994). Thus, prior to the amendment of this statute, the trial court was not required to calculate the percentages of fault of the tortfeasors who had previously settled with a plaintiff, nor those not named as parties to a tort action. *Id.* at 324.