STATE OF MICHIGAN

COURT OF APPEALS

YOLANDA LOPEZ and LUPE LOPEZ,

Plaintiffs-Appellants,

v

SANDRA B. GLADDING, M.D. and GENERAL SURGICAL ASSOCIATES, P.C.,

Defendants-Appellees,

and

MERCY HEALTH SERVICES and ST. MARY'S HEALTH SERVICES,

Defendants.

UNPUBLISHED
April 18, 2000

No. 214279
Kent Circuit Court
LC No. 96-002196 NH

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's entry of judgment reflecting the jury's verdict of no cause of action with respect to plaintiff's medical malpractice claims against defendants Sandra B. Gladding, M.D. and General Surgical Associates, P.C. Plaintiffs claim that a new trial is warranted because the trial court admitted improper testimony by one of defendants' witnesses and improperly instructed the jury. We affirm.

Plaintiffs first contend that the trial court erred when it allowed David D. Baumgartner, M.D., an internal medicine and infectious disease specialist, to testify as a liability expert in favor of defendant Gladding, a general surgeon. We review for an abuse of discretion the trial court's decision to admit evidence. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Our review of Baumgartner's testimony reveals that he did not explicitly testify concerning the applicable standard of care for a general surgeon, and did not testify whether defendant Gladding conformed to the applicable standard of care for a general surgeon. Therefore, his testimony did not

violate the requirements of MCL 600.2169(1); MSA 27A.2169(1). Baumgartner, one of plaintiff Yolanda Lopez's treating physicians, testified regarding what was done for Lopez in the course of her treatment and why certain measures were taken. Baumgartner also testified concerning what he would have done had he been consulted earlier in the case. Baumgartner stopped short, however, of expressing any opinion with respect to what the applicable standard of care required and whether defendant Gladding conformed to that standard.

Furthermore, even if we accepted plaintiffs' characterization of Baumgartner's testimony as improper testimony concerning the applicable standard of care, reversal is not required. An error in the admission of evidence only requires reversal if the party advocating reversal demonstrates that a substantial right was prejudiced by the admission of the evidence. MRE 103(a); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 329; 454 NW2d 610 (1990). In the instant case, plaintiffs have completely failed to demonstrate that Baumgartner's testimony prejudiced their substantial rights. We note that defendant Gladding presented the expert testimony of a general surgeon, qualified under MCL 600.2169; MSA 27A.2169, to testify that Gladding did not breach the applicable standard of care in her treatment of Yolanda Lopez. Defendant Gladding did not rely on Baumgartner's testimony to establish that she met the applicable standard of care. Moreover, the trial court properly instructed the jury that to find defendant Gladding professionally negligent, it needed to find that she failed "to do something that a general surgeon of ordinary learning, judgment, or skill in the field of general surgery would do, or [that she did] something which a general surgeon of ordinary learning, judgment, or skill would not do under the same or similar circumstances." We also note that through attorney objections and the trial court's comments it was made abundantly clear before the jury that Baumgartner was not a general surgeon and was not testifying in that capacity. We detect no evidence that the jury's verdict of no cause of action was based on or affected by Baumgartner's testimony. Because plaintiffs have not demonstrated that Baumgartner's testimony prejudiced their substantial rights, we find no error requiring reversal. MRE 103(a).

Plaintiffs also argue that Baumgartner should not have been allowed to testify because they were led to believe that he would not be used as a liability expert and because he was not properly listed as a liability expert on defendants' expert witness list, which failed to comply with the pretrial order. We find that plaintiffs have waived our consideration of this issue. Objections to the admission of evidence should be made timely on the record, in order to give the trial court the opportunity to address them. MRE 103(a)(1). While plaintiffs objected at trial to Baumgartner's testimony, they failed to timely object to the testimony on the basis of the aforementioned grounds. *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 637; 601 NW2d 160 (1999) ("Objections based on one ground are insufficient to preserve an appellate review based on other grounds."), quoting *In re Leone Estate*, 168 Mich App 321, 326; 423 NW2d 652 (1988). Plaintiffs first challenged Baumgartner's testimony as not properly noticed by defendants' expert witness list in their motion for new trial.[1]

Lastly, plaintiffs argue that they were entitled to have SJI2d 30.05, the res ipsa loquitur instruction, read to the jury. In *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995), the Supreme Court set out the following requirements that a plaintiff must prove to allege malpractice based on res ipsa loquitur:

> Where a plaintiff raises res ipsa loquitur in the medical malpractice context, we require that the plaintiff prove that the event (1) is of a kind that ordinarily does not occur in the absence of someone's negligence, (2) is caused by an agency or instrumentality within the exclusive control of defendant, and (3) is not due to any voluntary action or contribution on the part of the plaintiff.

Our review of the instant record reveals that plaintiffs failed to satisfy the first *Wischmeyer* requirement. While defendant Gladding opined that a leaking stitch probably caused a pin-sized hole in Yolanda Lopez's esophagus, plaintiffs presented no testimony or evidence that a leaking stitch constitutes the type of event "that ordinarily does not occur in the absence of someone's negligence." *Id*. Because plaintiffs failed to offer the necessary proof that the res ipsa loquitur instruction applied under the facts of this case, the trial court properly refused to instruct the jury according to SJI2d 30.05. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991).

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] We note that in light of our finding that Baumgartner did not testify as a liability expert, plaintiffs' argument based on defendants' failure to list Baumgartner as a liability expert witness lacks merit. We further observe that to the extent that plaintiffs argue on appeal that Baumgartner's testimony represented an unfair surprise, plaintiffs themselves listed Baumgartner on their pretrial expert witness list. Plaintiffs indicated their expectation that Baumgartner would testify regarding his involvement in Yolanda Lopez's care and treatment, topics on which he did eventually testify at trial. Thus, even were we again to assume the existence of some evidentiary error, under these circumstances we detect no prejudice to any of plaintiffs' substantial rights. MRE 103(a).