STATE OF MICHIGAN

COURT OF APPEALS

DAVID DEMPSEY,

Plaintiff-Appellee,

v

SUZANNE M. PEASE, R.N., MERCY HEALTH SERVICES, ST. JOSEPH MERCY HOSPITAL – MT. CLEMENS, and THE MACOMB COUNTY JAIL,

Defendants-Appellants.

UNPUBLISHED
December 4, 2001

No. 222894
Macomb Circuit Court
LC No. 96-005850-NH

DAVID DEMPSEY,

Plaintiff-Appellee,

v

SUZANNE M. PEASE, R.N., ST. JOSEPH MERCY HOSPITAL – MT. CLEMENS, THE COUNTY OF MACOMB, and THE MACOMB COUNTY JAIL,

Defendants-Appellants.

No. 225065
Macomb Circuit Court
LC No. 96-005850-NH

Before: Griffin, P.J., and Meter and Kelly, JJ.

PER CURIAM.

Defendants appeal by right from (1) a judgment for plaintiff entered after a jury trial and (2) an order awarding plaintiff attorney fees and costs as mediation sanctions. Plaintiff alleged that while he was an inmate at the Macomb County Jail, defendant Suzanne Pease, a nurse, wrongly injected him with a high dose of medication that resulted in his permanent impotence. The jury awarded a total of $200,000 in damages, and the trial court awarded a total of $150,500 in attorney fees and costs. We vacate the $100,000 verdict on plaintiff's breach of contract claim but affirm in all other respects.

I

Defendants first argue that the trial court should have granted their motion for judgment notwithstanding the verdict (JNOV) with respect to plaintiff's corporate negligence theories. Defendants contend that defendants Mercy Health Services (Mercy) and St. Joseph Mercy Hospital (St. Joseph) conceded vicarious liability for the acts of Nurse Pease and that the trial court therefore should have granted defendants' motion for JNOV with respect to plaintiff's claim of negligent hiring, training, retention, and supervision. Defendants contend that if a principal concedes vicarious liability for a negligent act of an agent, then a claim for negligent hiring, training, retention, or supervision of the employee cannot be maintained against the principal.

We review de novo a trial court's decision to deny a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). We "view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party." *Id.* "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* at 260-261.

We reject defendants' argument for the following reasons. First, defendants cite no binding Michigan authority setting forth the principle they argue on appeal.[1] Second, there exist several Michigan cases in which plaintiffs brought claims of both negligent hiring, training, retention, or supervision *and* vicarious liability. See, e.g., *Teadt v Lutheran Church*, 237 Mich App 567, 572; 603 NW2d 816 (1999), *Leitch v Switchenko*, 169 Mich App 761, 763; 426 NW2d 804 (1988), and *Smith v Merrill Lynch*, 155 Mich App 230, 234-236; 399 NW2d 481 (1986). Finally, and most importantly, defendants failed to contemporaneously object to the jury passing judgment on the claim of negligent hiring, training, retention, and supervision.

Indeed, before closing arguments, defendants discussed the verdict form but failed to object to question number 8 on the form,[2] which asked, "Were Defendants, Mercy Health Services and St. Joseph's Mercy Hospital – Mt. Clemens, actively negligent in the hiring, training, retention and supervision of its employees, including Suzanne Pease, R.N.?" and which is the count defendants ask this Court to vacate on appeal. Defendants waited until their motion for JNOV to cite arguably applicable cases and to make the argument they reiterate on appeal. As stated in *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999):

> The policy underlying the issue forfeiture rule provides no basis for distinguishing constitutional from nonconstitutional error. In both instances, requiring a contemporaneous objection provides the trial court "an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and

[1] The two cases defendants cite on appeal – *Amcast Indus Corp v Detrex Corp*, 779 F Supp 1519 (ND Ind, 1991), reversed in part on other grounds 2 F 3d 746 (CA 7, 1993), and *Leidig v Honeywell, Inc*, 850 F Supp 796 (D Minn, 1994) – do not constitute binding authority on this Court.

[2] While defendants made *some* type of corporate negligence argument in discussing the verdict form, they nonetheless failed to object to question number 8 on the form.

> would be by far the best time to address a defendant's constitutional and nonconstitutional rights." [*People v Grant*, 445 Mich 535,]551[; 520 NW2d 123 (1994)]. Applying the *Olano/Grant* forfeiture rule to unpreserved claims of constitutional error thus serves the important historical and policy reasons underlying the preservation requirement.

Here, defendants ended up agreeing with the verdict form and did not make a reasoned argument for eliminating question number 8 from the form. Accordingly, defendants failed to preserve the instant issue, as discussed in the above passage from *Carines.*

Therefore, an analysis using the "plain error" standard of review is appropriate. See *Carines, supra* at 761-764. Three requirements must be met to obtain relief under the plain error rule: (1) an error must have occurred; (2) the error must have been plain, i.e., clear or obvious; and (3) the plain error must have affected substantial rights, i.e., it must have affected the outcome of the lower court proceedings. *Id.* at 763-764. If these three elements are established, then an appellate court must exercise its discretion in deciding whether to reverse. *Id*. Reversal is warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or reputation of judicial proceedings. *Id.*

In our opinion, no clear or obvious error occurred in this case, given the absence of binding authority supporting defendants' argument. We reject defendants' invitation to vacate the $75,000 corporate negligence verdict.

II

Next, defendants argue that the trial court should have granted their motion for JNOV with respect to plaintiff's breach of contract claim. Defendants contend that plaintiff could not maintain a breach of contract cause of action because (1) plaintiff was not a third-party beneficiary of the contract for medical services that existed between the Macomb County Jail and Mercy/St. Joseph, and (2) the contract failed to specify the performance of a particular act but merely addressed the provision, in general, of medical services.

In addressing defendants' motion for JNOV, the trial court ruled that under *Koenig v City of South Haven*, 460 Mich 667; 597 NW2d 99 (1999), plaintiff was indeed a third-party beneficiary of the contract and thus had standing to bring the action. We agree with this analysis. Indeed, the contract at issue clearly designated the inmates of the jail as the recipients of the medical services. Therefore, under *Koenig, supra* at 681-683, the inmates constituted a "class of direct beneficiaries" whose members could sue for breach of contract. The trial court did not err in this aspect of its ruling.

We conclude that trial court did err, however, in analyzing the second aspect of defendants' breach of contract argument, i.e., the claim that the contract did not contain sufficiently specific promises to be actionable. In *Penner v Seaway Hospital (After Remand)*, 169 Mich App 502, 505; 427 NW2d 584 (1988), the plaintiff argued that the defendant breached a contract to diagnose and treat the plaintiff's decedent. This Court stated:

> In this case, plaintiff's first amended complaint alleged that defendant breached the alleged agreement by failing to properly diagnose the decedent's

> ailments and render appropriate medical care. In addition, plaintiff alleged that the decedent received no medical care during his last four days at the hospital. After examining the allegations in plaintiff's complaint, we conclude that the allegations are an attempt to disguise a tort action sounding in malpractice into a contract action so as to avoid governmental immunity. Plaintiff's complaint does not allege the existence of a "special agreement" between the decedent and the hospital. The "Authorization For Treatment" form signed by the decedent merely authorized the hospital and its doctors to render appropriate medical care. Their failure to do so constitutes malpractice. This case is unlike *Stewart* [*v Rudner*, 349 Mich 459; 84 NW2d 816 (1957)], wherein the defendant doctor specifically agreed to perform a Caesarean section. *In our case, there was no agreement to perform any specific act. In fact, the only acts that the decedent agreed to allow the hospital to perform were those that were deemed necessary or advisable in the professional judgment of the attending physician. Thus, plaintiff has not established a contract cause of action.* [Emphasis added.]

In *Marchlewicz v Stanton*, 50 Mich App 344, 348-349; 213 NW2d 317 (1973), this Court stated the following with regard to a medical breach of contract issue:

> It is not necessary, to support plaintiff's claim in this regard, that the existence of a 'special contract' be pleaded or proved. It is only necessary that testimony be adduced from which the jury could properly find the existence of an 'express promise to cure or effect a specific result which was in the reasonable contemplation' of the parties and relied on by plaintiff.

There was no promise in the instant case to effect a specific result. See also *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990) (holding that a case involving legal representation was "grounded in malpractice only" because "[p]laintiff's complaint as a whole evidences that damages flowed not from defendant's failure to represent their son, but from her failure to do so adequately"), *Baldyga v Independence Health Plan*, 162 Mich App 441, 444-445; 413 NW2d 30 (1987) (medical claim sounded in malpractice rather than contract because the plaintiff sought recovery for negligent medical care that was provided, as opposed to seeking recovery for the failure to provide medical care at all), and *Guilmet v Campbell*, 385 Mich 57, 70; 188 NW2d 601 (1971), superseded on other grounds by statute as stated in *Bucalo v Board of Regents of the University of Mich*, 432 Mich 859 (1989) ("[a]s in all contract cases for personal services, in order to find for the plaintiffs here the jury must have found from the evidence that the doctors made a specific, clear and express promise to cure or effect a specific result which was in the reasonable contemplation of both themselves and the plaintiff which was relied upon by the plaintiff").

The gist of the contract at issue here was the provision of necessary medical services as opposed to the provision of a specific act or result. Accordingly, under the above cases, the trial

court should indeed have granted defendant's motion for a directed verdict or JNOV with respect to the breach of contract claim.[3]

While there is some question regarding whether defendants properly preserved this issue for review (the record, although unclear, suggests that they did not raise it until *after* trial),[4] we conclude that reversal is nonetheless warranted under the plain error analysis from *Carines*, *supra* at 763-764. Indeed, under the relevant case law and the language of the contract, the error was plain, and given the jury's award of $100,000 on the breach of contract claim, the error clearly affected the outcome of the proceedings. Moreover, given the large verdict on an unavailable claim, the error seriously affected the fairness, integrity, or reputation of judicial proceedings. See *id.* The breach of contract claim should have been vacated.

III

Next, defendants argue that the trial court should have granted their motion for JNOV in its entirety because plaintiff "failed to present evidence establishing that his claims of impotency were more likely than not caused by the alleged acts of negligence." This argument is disingenuous. Indeed, during the direct examination of plaintiff's expert witness, Dr. James O'Brien, the following exchange occurred:

> *Q*. Doctor, I would like you to assume that on or about April 17th, 1995, at about 11:30 p.m., Mr. David Dempsey was wrongly administered an intramuscular

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[3] In *Rocco v Michigan Dep't of Mental Health*, 114 Mich App 792, 800; 319 NW2d 674 (1982), affirmed sub nom *Ross v Cosumers Powers Co*, 420 Mich 567; 363 NW2d 641 (1984), the plaintiffs argued that the defendant contractually agreed to care for their decedent. The court stated that "plaintiffs' complaint states a valid cause of action for breach of contract and is not a mere restatement of their tort action." *Rocco*, *supra* at 801. The Supreme Court subsequently affirmed in *Ross*, *supra* at 647. At first blush, *Rocco* appears to support plaintiff's position in the instant case. However, we conclude that *Rocco* is distinguishable because it involved an alleged contract to care for a patient in a mental hospital that the defendant allegedly breached by placing the decedent with an unrestrained, murderous ward mate. *Rocco*, *supra* at 795. The *Rocco* situation was analogous to an *absence* of general care. In other words, the *Rocco* defendant allegedly broke the contract at issue because it *failed to provide care* as opposed to *providing care negligently*. Here, the gist of plaintiff's breach of contract claim was that nursing care was *performed negligently* and that damages associated with impotence resulted. On appeal, plaintiff again contends that he was provided care that did not meet the standard of "generally recognized quality of care." This situation did not provide for an actionable breach of contract claim.

[4] Defendants' motion for a directed verdict, in which they raised this issue, is date-stamped June 23, 1999, *after* the conclusion of the trial. However, the proof of service (also date-stamped June 23, 1999) indicates that the motion was served on plaintiff on June 14, 1999. It appears that defendants prepared a directed verdict motion during trial and served it on plaintiff but for some reason did not actually file the motion with the court under after trial.

dosage of 200 milligrams of Prolixin Decanoate, and, thereafter, he became impotent.

Do you have an opinion within a reasonable degree of medical certainty whether or not Mr. Dempsey's organic impotence was caused, more probably than not, by the Prolixin Decanoate?

A. Yes, I do.

Q. And can you tell us what your opinion is?

A. My opinion is that it's more probable than not that it's related to Prolixin.

Q. Now, what do you base your opinion on?

A. I base my opinion basically on a review of medical records, deposition testimony, and the effects of the drugs.

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And I'm basing my opinion on the pharmacology of the drugs and the circumstances and the events surrounding that. Mr. Dempsey's ability to function prior to the event, and apparent inability to function at the present time.

Reading this exchange in a commonsense fashion, this testimony allowed the jury to conclude that if Nurse Pease administered Prolixin to plaintiff as claimed, the injection more likely than not caused plaintiff's impotence. Plaintiff presented sufficient evidence to survive a directed verdict, and the trial court correctly denied defendants' motion for JNOV on the issue of causation.

IV

Next, defendants argue that the trial court should have granted their motion for JNOV in its entirety because plaintiff "failed to present expert testimony which was grounded in a reliable scientific basis." Once again, we disagree.

We initially note that although defendants frame this issue as one of causation or sufficiency of the evidence, the body of their argument makes clear that they are really making an *evidentiary* argument. Indeed, in their appellate brief they state, "In the present matter it is obvious that there is no reliable scientific data sufficient to meet the requirements of MRE 702. Since there is no scientifically reliable data to establish a cause-and-effect relationship between Prolixin Decanoate or Haldol Decanoate[5] and impotence, there is no basis for Dr. O'Brien's opinion." Despite the evidentiary nature of their argument, defendants failed to object

[5] There was some question at trial regarding whether Nurse Pease administered Prolixin or Haldol to plaintiff.

contemporaneously to the admission of Dr. O'Brien's testimony and accordingly failed to preserve the issue for review. A plain error standard of review is once again appropriate. See *Carines, supra* 761-764.

In our opinion, no clear or obvious error occurred in the admission of Dr. O'Brien's testimony. See *id*. In *People v Stiller*, 242 Mich App 38, 50-55; 617 NW2d 697 (2000), the defendant contended that the prosecutor failed to prove that the victim died of a drug overdose because only the level of drugs in the victim's blood at autopsy (and not at her death) was known, and the autopsy level was possibly higher than the death level because of a phenomenon called "post-mortem redistribution." The defendant additionally contended that because of this circumstance, the testimony of the prosecutor's expert witness was inadmissible under MRE 702. *Id*. at 54. The defendant "contend[ed] that the trial court should have compelled the prosecution to correlate autopsy blood concentrations with concentrations at the time of death before allowing [the expert witness] to testify regarding the causative effect of the[] drugs on [the victim's] death." *Id*. In rejecting the defendant's argument, this Court stated:

> In support of his theory, defendant relies primarily on *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485; 566 NW2d 671 (1997), *Amorello v. Monsanto Corp*, 186 Mich App 324; 463 NW2d 487 (1990), *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Frye v United States*, 293 F 1013 (DC App, 1923), which was superseded as applied to federal cases as stated in *Daubert, supra* at 587.
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> An application of *Nelson, Amorello, Daubert*, and *Frye* to the instant case provides no basis for reversal. *Nelson, supra* at 491, indicated that MRE 702 requires a trial court to "determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted." *Amorello, supra* at 332, indicated that "[t]he facts and data upon which [an] expert relies in formulating an opinion must be reliable." *Daubert, supra* at 592-593, indicated that an expert's reasoning and "methodology" must be scientifically valid and properly applicable to the facts at hand. *Frye, supra* at 47, indicated that scientific evidence must be generally accepted in the scientific community to be admissible.
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> Here, there was nothing novel, suspect, or unreliable about Cohle's testimony regarding the level of drugs in Sloan's blood at the time of the autopsy. These data were scientifically determinable. Nor was there anything novel, suspect, or unreliable about Cohle's conclusion that because of the absence of other causes of death and because of the drug levels in Sloan's body, the likely cause of death was drug intoxication. Assuming, arguendo, that postmortem redistribution affected the level of drugs found in Sloan's body at the autopsy as compared to the time of death, the effect of this redistribution was disputed at trial, and such evidence is relevant to the weight, not the admissibility, of Cohle's testimony. The jury was adequately informed of the ramifications that postmortem redistribution, according to defendant's experts, could have on a determination of the cause of Sloan's demise. No error occurred. [*Stiller, supra* at 54-55.]

In the instant case, there similarly was nothing novel or suspect about O'Brien's conclusion that the injection likely caused defendant's damages because of "the pharmacology of the drugs and . . . Mr. Dempsey's ability to function prior to the event, and apparent inability to function at the present time." Indeed, defendants' own witnesses admitted that Prolixin and Haldol can cause impotence, albeit transient impotence.[6] While there admittedly was no evidence of studies showing a cause-and-effect relationship between Prolixin/Haldol and *permanent* impotence, there nevertheless was nothing novel or suspect about O'Brien's conclusion that because of the known potential for transient impotence and the sequence of events in this case (i.e., permanent impotence following the injection), the injection likely caused plaintiff's damages. Moreover, to the extent that the other drugs plaintiff was taking around the time of the injection might have caused impotence, the jury was informed of this fact. See *id*. at 55. We discern to find no clear or obvious error with respect to Dr. O'Brien's testimony and reject defendants' plea for reversal.

V

Finally, defendant argues that the trial court erred in calculating the amount of mediation sanctions. We conclude that a remand with regard to the award of fees and costs in this case is unwarranted. First, with regard to costs, defendants set forth a laundry list of costs it deems not allowable but make no reasoned argument in their appellate brief for *why* these costs were not reimbursable. Accordingly, defendants effectively waived the issue of costs for appellate review. Indeed, a party may not merely announce a position and "leave it to this Court to discover and rationalize the basis for his claims. . . ." See *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 151-152; 577 NW2d 200 (1998).

With regard to attorney fees, we conclude that the $200 hourly rate was not an abuse of discretion in light of the complex nature of the case and the background and skill of plaintiff's attorney, who is a registered pharmacist. With regard to the number of hours compensated, the trial court, which presided over the trial and the evidentiary hearing on attorney fees, was in a much better position than this Court to determine if plaintiff was credible with respect to the amount of hours he claimed to have spent on the case. The trial court reviewed the evidence and reduced the total billable hours to an amount it deemed reasonable. Given the complex nature of the case, the large number of witnesses, and the lengthy trial, it cannot be said that the trial court abused her discretion in setting the billable hours at 700. See *Elia v Hazen*, 242 Mich App 374, 377; 619 NW2d 1 (2000) (setting forth standard of review).

We vacate the $100,000 verdict on plaintiff's breach of contract claim but affirm in all other respects.

/s/ Richard Allen Griffin
/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly

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[6] We note that one of *defendants*' witnesses testified that impotence was "not necessarily" a permanent side effect of Haldol or Prolixin. He opined that permanent side effects would only result from long-term use of the drugs at high doses.