STATE OF MICHIGAN

COURT OF APPEALS

LEVI CHESTER, as Personal Representative of the ESTATE OF NATHANIEL WILLIAMS, Deceased,

Plaintiff-Appellant/Cross-Appellee,

V

ST. JOHN HOSPITAL AND MEDICAL CENTER and MARSON MA, PH.D.,

Defendants-Appellees/Cross-Appellants,

and

LENA BREMAN,

Defendant-Appellee,

and

ORCHARDS CHILDREN'S SERVICES, JUDY MAGERUM, PH.D., LEONA PETERSON, STEPHEN JOHN BONNIS, BABES IN WONDERLAND, INC., and ELIZABETH HERMES,

Defendants.[1]

UNPUBLISHED
December 14, 2001

No. 221605
Wayne Circuit Court
LC No. 96-620720-NO

Before: Whitbeck, P.J., and Holbrook, Jr., and Zahra, JJ.

PER CURIAM.

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[1] This opinion will refer to St. John Hospital and Dr. Marson Ma as "defendants." None of the other parties' rights are at issue on this appeal.

Plaintiff appeals as of right from the judgment on the jury verdict of no cause of action in this medical malpractice case. We affirm.

I. Facts

This case arises from the death of three-year-old Nathaniel Williams. At the time of his death, Nathaniel was placed in foster care. Nathaniel and his two siblings were removed from the home of Faith Williams and Levi Chester in October 1993 after the FIA determined that Williams was using the family's food stamps to buy drugs, Williams had abandoned the children for several days, and Chester had no plan for the children's care.

In the early morning on May 31, 1995, Nathaniel's foster mother, Leona Peterson, took him to the emergency room at St. John Hospital, complaining that for two days Nathaniel had not been eating, had been sleeping excessively, and suffered from headaches. Dr. Marson Ma examined Nathaniel and concluded that he suffered from sinusitis, an infectious illness. Nathaniel returned to Peterson's home. The next day, Peterson left Nathaniel with her teenage son and went to work. Peterson's son claimed to have found Nathaniel unconscious on the bathroom floor. Nathaniel was transported to Saratoga Community Hospital in cardiac and respiratory arrest, and died soon thereafter. The parties' experts agree that Nathaniel died of blunt force trauma to the head, but disagree as to the timing of the injuries.

On March 27, 1996, plaintiff filed this case. The beneficiaries who originally sought damages included Nathaniel's father, mother, and two siblings. Plaintiff alleged that Dr. Ma was negligent in failing to diagnose the true nature and extent of Nathaniel's injuries. According to plaintiff, Nathaniel suffered the fatal injuries prior to being examined by Ma on May 31, 1995. Plaintiff further alleged that Ma breached his statutory duty to report physical abuse that should have been apparent upon examining Nathaniel on May 31, 1995. A lengthy trial ensued, which resulted in a jury verdict of no cause of action.

II. Standard of Review

On appeal, plaintiff challenges several of the trial court's evidentiary rulings. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Such an abuse will be found only when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*. Moreover, evidentiary errors are not a basis for disturbing a judgment unless declining to take such action would be inconsistent with substantial justice. *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001), citing MCR 2.613. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected …." MRE 103(a). An error affecting substantial rights is one that is outcome-determinative. *People v Parcha*, 227 Mich App 236, 247; 575 NW2d 316 (1997).

III. Analysis

Plaintiff first argues that the trial court erred in reading a statement to the jury that referenced Faith Williams' abandonment of her children and drug use.[2] Plaintiff contends that because it waived its claim for damages with respect to Williams prior to trial, evidence of her conduct was irrelevant and unfairly prejudicial.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188-189; 600 NW2d 129 (1999). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 282-283; 608 NW2d 525 (2000). Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). A trial court has broad discretion in regard to controlling trial proceedings. MCL 768.29.

Evidence of Williams' conduct was relevant to the issues at trial. Whether the remaining beneficiaries were entitled to damages was the ultimate issue at trial. Moreover, Nathaniel's natural father was a beneficiary seeking damages and testimony at trial was certain to disclose the fact that a foster parent was involved in Nathaniel's care. Under these circumstances, the trial court reasonably concluded that the jury would likely be confused as to Nathaniel's family's basic circumstances. A short explanation of the family's circumstances was relevant to the jury's basic understanding and determination of the issues in this case. MRE 401; *Dep't of Transportation, supra*.

Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The short statement was read once to the jury at the outset of trial. Given that the vast majority of the evidence during the nine-day trial centered on defendants' conduct in caring for Nathaniel and whether that conduct breached the applicable duty of care or violated child protection laws, we cannot say that the court's one-time reference to Williams' conduct was given undue or preemptive weight by the jury or was inequitable. MRE 403; *Allen, supra*. Therefore, the trial court's decision to admit the statement referencing Williams' conduct did not rise to the level of an abuse of discretion. *Barrett, supra*.

In any event, any error in regard to the admission of this evidence was harmless. The short, one-sentence reference to Williams' conduct was unlikely to have affected the jury's verdict given the substantial evidence from which the jury could find for defendants. Defendants' experts testified that Nathaniel did not suffer the fatal injuries until June 1, 1995.

[2] We reject defendants' argument that this issue was waived by plaintiff and, thus, was not preserved for our review. At the trial court's request, the parties stipulated to a statement that summarized the circumstances leading to Nathaniel's placement in foster care. However, a thorough review of the record establishes that while plaintiff submitted the agreed upon statement to the court, it continued to object to the court's reference to Williams' conduct.

They further stated that Dr. Ma acted reasonably in diagnosing sinusitis and not filing a report with protective services. Contrary to plaintiff's claim, the speed with which the jury reached its verdict does not indicate that the jurors were unfairly biased against plaintiff. The quick verdict could just as easily have been due to the strength of defendants' proofs. Under these circumstances, plaintiff has not shown that the proposed error affected its substantial rights or otherwise made a difference in the outcome. MRE 103(a); *Miller, supra* at 531; *Parcha, supra* at 247.

Plaintiff next argues that the trial court erred in ruling that a report prepared by FIA caseworker Karen Truchan was admissible. Plaintiff particularly objected to the report's reference to Faith Williams' abandonment of her children and drug use. Plaintiff claims that as a result of the trial court's ruling regarding the report's admissibility, it was forced not to call Truchan as a witness at trial.

A thorough review of the record establishes that the trial court ultimately ruled Truchan's report was admissible only on cross-examination in the event plaintiff opened the door to the issue of the children's placement in foster care. Plaintiff asserts that ruling was erroneous because the report constituted inadmissible hearsay. We decline to address the propriety of the court's ruling because the record establishes that plaintiff's counsel stipulated to the report's limited admissibility.[3] "[A] plaintiff may not harbor error as an appellate parachute." *Zurcher v*

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[3] During a hearing on plaintiff's motion in limine, plaintiff's counsel stated, in part:

> The only thing I wanted to add, your Honor, was earlier I indicated to the Court that if the Court feels we're opening the door by calling Ms. Truchan, that's one thing. I can understand that.
>
> You say, I'm not going to let you call Truchan to give certain testimony and then keep her report out. If that's the Court ruling **my position would be, okay, I understand that and I won't call Truchan**. What I thought you said was that they can call her and they can interject this material into the case regardless of what I do, whether the door is open or not.
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> **I don't mind the Court telling me don't open the door and it doesn't come in; then I won't open the door**. I didn't think I was opening the door with that witness by the way. If that's the problem I won't open the door. They shouldn't be given the right to say we're going to interject all of these issues just because she made out a report. It's very prejudicial to our case.
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> * * *
>
> You're Honor, I've said and I will repeat myself, if the Court feels that I am creating some fiction with Truchan's testimony, **then I won't introduce that testimony**. And to the extent I don't open the door, I don't think the defendants have any legal right to introduce this kind of evidence. I think it's highly

(continued…)

Herveat, 238 Mich App 267, 305 n 21; 605 NW2d 329 (1999); see *Alar v Mercy Memorial Hosp*, 208 Mich App 518, 542; 529 NW2d 318 (1995).

Furthermore, plaintiff has failed to demonstrate that Truchan's testimony would have affected the outcome of trial. Plaintiff suggests that Truchan's testimony would have indicated the Williams children were not removed from their home as a result of abuse. However, Truchan's deposition testimony makes clear that the children were removed as a result of Williams' drug abuse and abandonment as well as Chester's failure to have a plan to care for the children. Under these circumstances, plaintiff has not shown that the proposed error affected its substantial rights or otherwise made a difference in the outcome. MRE 103(a); *Miller, supra* at 531; *Parcha, supra* at 247.[4]

Plaintiff also argues that the trial court erred in ruling that evidence regarding the discharge of Assistant Medical Examiner Dr. Laning Davidson was admissible. Plaintiff contends that erroneous ruling forced it not to call Dr. Davidson as a witness at trial.[5]

We conclude that the trial court did not abuse its discretion by ruling evidence that Dr. Davidson was discharged could be admitted. Assuming Davidson testified regarding his autopsy findings, the fact that he was discharged from his position at the medical examiner's office would have been relevant to his competence. Such evidence calls into question Dr. Davidson's performance during his tenure as assistant medical examiner.[6] MRE 401; *Dep't of Transportation, supra*. Moreover, because the trial court significantly limited the evidence related to the discharge that would be admissible, the danger of unfair prejudice did not substantially outweigh the probative value of evidence that Davidson had been discharged. MRE 403; *Allen, supra*.

(…continued)

> prejudicial. I'm willing to do whatever I need to do to keep it not an issue. [Emphasis added.]

Those statements make clear that plaintiff's counsel acceded to the admission of the report in the event plaintiff opened the door to the issue.

[4] Insofar as plaintiff raises the additional argument in connection with this issue that the trial court erred in reading the statement regarding the children's removal to the jury, that argument lacks merit for the reasons stated prior.

[5] We reject defendants' argument that this issue is moot given the trial court's later ruling that Medical Examiner Dr. Kanluen could not testify regarding Dr. Davidson's discharge. Because plaintiff specifically argues that the trial court's initial ruling forced it not to call Dr. Davidson, and thereby prejudiced its presentation of its case in chief, the ruling with respect to Dr. Kanluen after the close of plaintiff's proofs does not nullify plaintiff's argument. The court's ruling regarding Dr. Kanluen had no effect on the alleged prejudice plaintiff has already suffered.

[6] Contrary to plaintiff's argument, MRE 608(b) is not dispositive of whether the evidence was admissible. As plaintiff asserts, mere evidence that defendant was discharged is not probative of his truthfulness or untruthfulness. However, such evidence is generally relevant to Davidson's competence as medical examiner. See MRE 401.

Furthermore, any error in regard to this issue was harmless. Plaintiff claims that the trial court's error caused it not to call Dr. Davidson as a witness. However, Dr. Davidson's autopsy report was admitted into evidence, and the vital aspects of that report, including Dr. Davidson's opinions and conclusions regarding the nature and timing of Nathaniel's injuries, were testified to at length by the parties' medical experts. Plaintiff does not suggest what, if any, subject Dr. Davidson would have testified to that would not have been merely cumulative to the information in his report and would have made difference in the outcome. Thus, plaintiff has not shown that the trial court's ruling affected its substantial rights or otherwise affected the outcome. MRE 103(a); *Miller, supra* at 531; *Parcha, supra* at 247.

Last, plaintiff argues that the trial court erred in allowing defendants' pathology expert, Dr. Laurence Simson, to retake the stand to testify regarding an additional autopsy slide provided by the Wayne County Medical Examiner's Office. We conclude that the trial court acted within its broad discretion to control trial proceedings when it allowed Dr. Simson's additional testimony. MCL 768.29. The ninth slide contained tissue not previously examined or testified to by Dr. Simson. When the new slide came to light, it was not grossly violative of fact and logic to allow Dr. Simson to testify on that limited issue. This is particularly true given that the court explained to the jury that neither party was at fault for the medical examiner's office's initial failure to provide the ninth slide and Dr. Simson's additional testimony would be limited to his findings and conclusions with respect to the ninth slide. Moreover, on cross-examination, plaintiff was able to highlight the extent to which Dr. Simson and Dr. Davidson were in agreement with respect to the slide.

Given our conclusion that a new trial is not warranted, we need not address defendants' issue on cross-appeal.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra