

STATE OF MICHIGAN
COURT OF APPEALS

SHIRLEY PAYNE,

Plaintiff-Appellee/Cross-Appellant,

v

JOHN STRUTHERS, D.O., PC,

Defendant-Appellant/Cross-
Appellee,

and

JOHN STRUTHERS, D.O., PC, and DETROIT
OSTEOPATHIC HOSPITAL CORP, d/b/a
RIVERSIDE OSTEOPATHIC HOSPITAL,

Defendant.

SHIRLEY PAYNE,

Plaintiff-Appellee,

v

JOHN STRUTHERS, D.O., PC,

Defendant-Appellant,

and

JOHN STRUTHERS, D.O., and DETROIT
OSTEOPATHIC HOSPITAL CORP, d/b/a
RIVERSIDE OSTEOPATHIC HOSPITAL,

Defendants.

UNPUBLISHED

May 7, 2002

No. 229452

Wayne Circuit Court

LC No. 98-814661-NH

No. 230354

Wayne Circuit Court

LC No. 98-814661-NH

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, defendant John Struthers, D.O., P.C.¹, appeals as of right from a jury verdict for plaintiff, as well as the trial court's order awarding mediation sanctions to plaintiff. Plaintiff cross-appeals the trial court's subsequent remittitur of the economic damages awarded by the jury. We affirm in part and reverse in part.

I. Basic Facts and Procedural History

This medical malpractice case arose when Dr. Struthers replaced plaintiff's right knee with an artificial knee implant. Plaintiff has a history of right knee problems. About thirty years ago, she slipped and fell, and underwent arthroscopy to repair the structures in her lateral knee. In 1982, after falling while roller-skating, she underwent an osteotomy² on her right leg. Although she suffered from what one doctor described as "degenerative joint disease," plaintiff was able to bowl, swim, and take part in polka competitions.

In April 1994, plaintiff was walking down some stairs when her knee "popped" and she fell. At this time she was employed as a secretary earning approximately \$1,400 per month. She went to see Dr. Struthers, who examined her, took an X-ray of her knee, and recommended a total knee replacement. During the knee replacement surgery, Dr. Struthers installed an implant device called an "LCS" with a rotating platform. The rotating platform was chosen because it wears less than other types of implants.

After the surgery, plaintiff took part in physical therapy for about six months. However, because of tightening in the knee joint, Dr. Struthers performed a contracture release³ in order to try to free up the joint. In November 1994, Dr. Struthers removed a bone spur from plaintiff's knee joint because the knee was still not functioning properly. Her knee never got better, and she suffered from severe pain despite cortisone injections rendered by Dr. Struthers. She was unable to return to work, and eventually lost her job.

In 1995, because plaintiff's knee still had not improved, Dr. Struthers suggested that she get a second opinion. She first went to the University of Michigan Hospital, but was dissatisfied with the treatment she received at the institution. The physician who examined plaintiff wrote a letter to Dr. Struthers informing him that plaintiff's pain was unexplainable and that there was no evidence to suggest that further surgery would improve her pain.

¹ Riverside Hospital was dismissed by stipulation of the parties. Dr. Struthers filed for bankruptcy. Because the filing of a bankruptcy petition operates as a stay of judicial proceedings against a debtor, this Court dismissed without prejudice the appeal and cross-appeal as they relate to Dr. Struthers only.

² A procedure to cut the thighbone to reduce the amount of weight put on the knee.

³ A procedure in which the patient is anesthetized and the knee is forcibly bent.

Plaintiff then went to Henry Ford Hospital, where she was examined by John Schurman, M.D., the head of bone and joint surgery. Dr. Schurman examined plaintiff and told her that the LCS installed by Dr. Struthers would have to be replaced. Plaintiff again underwent surgery and a long period of physical rehabilitation. In spite of the second surgery, she has been deemed disabled by the Social Security Administration, cannot polka dance, can barely walk up and down stairs, cannot carry laundry upstairs, has difficulty sitting for long periods of time, and describes the condition of her knee as “worse than ever.”

Plaintiff filed suit against Dr. Struthers, his professional corporation, and Riverside Osteopathic Hospital. At trial, plaintiff’s experts pointed to two errors in Dr. Struthers’ work that may have caused plaintiff problems: (1) Dr. Struthers may have failed to sever the posterior cruciate ligament (PCL) even though severing the PCL is required when using the LCS with the rotation platform; and (2) the knee implant Dr. Struthers used was too large for plaintiff’s leg bones, resulting in a six-millimeter overhang that may have caused pain.

After trial, the jury awarded plaintiff \$179,000 in past economic damages, a total of \$199,500 in future economic damages, \$100,000 for past pain and suffering, and a total of \$70,000 for future pain and suffering, for a total award of \$548,500. The trial court reduced the award to a present value of \$505,954.00, awarded plaintiff mediation sanctions of \$20,812.50 for attorney fees and \$6,252.10 for actual costs, and added interest of \$31,559.00, for a total final judgment against both Dr. Struthers and his professional corporation in the amount of \$564,577.60.

Thereafter, on defendants’ motion, the trial court remitted the economic damages portion of the award to \$44,088.71, the amount of the Blue Cross lien on plaintiff’s suit for actual medical expenses. Defendants also moved for a new trial, claiming that the evidence was insufficient to support a finding of negligence. The motion was denied.

II. Standard of Review

At the outset, we note that defendant initially argues that the trial court erred by allowing the jury to consider theories of liability presented but not sufficiently supported by the evidence, and failing to “grant a motion for a JNOV.” A review of the post trial motions reveals that defendant did not file a motion for JNOV; defendant filed a motion for a new trial. A trial court’s denial of a motion for JNOV is reviewed de novo by this Court and a trial court’s denial of a motion for a new trial is reviewed for an abuse of discretion. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000); see also *Hilgendorf v St John Hosp*, 245 Mich App 670, 682; 630 NW2d 356 (2001).

III. Defendant’s New Trial Motion

First, defendant argues that the trial court should have granted its motion for a new trial because plaintiff failed to present sufficient evidence to sustain the jury’s verdict. To that end, defendant argues that plaintiff relied on five separate theories to establish liability, all of which were not sufficiently supported by the evidence presented at trial. We disagree.

A review of the record reveals that it was defendant’s *counsel* that made reference to these five separate “theories” of liability in his opening and closing statement. Additionally,

during the trial, *defendant* proceeded to elicit testimony from *plaintiff's* trial expert to bolster these five “theories” and further agreed to provide a list of these “theories” to the jury for their consideration. Because defendant wanted to eventually argue that plaintiff failed to support her five separate theories of liability, defendant, without objection permitted plaintiff to introduce evidence which defendant ultimately touted as plaintiff’s “unsupported theories.” As the trial court correctly noted:

Defendant attempted at trial . . . to throw up so-called . . . theories in an effort to cloud the true issues at trial.

* * *

Plaintiff’s case in the Court’s recollection was relatively simple and focused on the failure of the Defendant to sacrifice the PCL and the argument that he chose an implant of the incorrect size.

It is well settled that “error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.” *Farm Credit Services v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). As the trial court noted, the crux of plaintiff’s claim for medical malpractice were two errors committed by Dr. Struthers: (1) the failure to sacrifice the PCL; and (2) the instillation of a tibial plate that was too large causing a six millimeter overhang. The three other “theories” identified by defendant, as the trial court properly observed, were not “theories” of liability but rather evidence relative to defendant’s overall credibility.

In an action alleging medical malpractice, “[the] plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant” MCL 600.2912a(2); *Wickens v Oakwood Healthcare System*, 465 Mich 53, 57; 631 NW2d 686 (2001). Absolutely crucial to a medical malpractice claim is the establishment of the applicable standard of care and defendant’s breach thereof. *Greathouse v Rhodes*, 242 Mich App 221, 229; 618 NW2d 106 (2000) rev’d on other grounds *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001). Typically, expert testimony is required to establish the standard of care and that defendant failed to conform to that standard. *Id.* at 229.

As to the first alleged medical error, testimony adduced at trial was sufficient to create a factual question as to whether defendant sacrificed the PCL. Plaintiff’s expert witness testified that when he viewed plaintiff’s x-rays, he noted that the bony bridge, a section of knee bone that is usually left intact when the PCL is not severed, was visible on plaintiff’s x-ray. According to plaintiff’s expert, the presence of the bony bridge usually indicates that the PCL was not sacrificed. On the contrary, defendant testified that, while he did not specifically recall severing plaintiff’s PCL, he sacrificed it every single time that he performed this particular surgery. Defendant further testified that the presence of the bony bridge was not necessarily dispositive as it could be retained even though the PCL was actually sacrificed.

The doctor that performed plaintiff’s second total knee replacement surgery could not specifically recall whether he actually observed an intact PCL. Although he recognized that an important aspect of this type of surgery focuses on whether or not the PCL is intact, he did not make an entry in his surgical notes regarding whether or not plaintiff had an intact or severed PCL. Notwithstanding, he deduced that plaintiff’s PCL was intact because he installed an

implant that is designed to be used with an intact PCL. Accordingly, he testified that he believed, within a reasonable degree of medical certainty, that plaintiff's PCL was intact when he performed the second total knee replacement surgery.

Additionally, a review of the record demonstrates that plaintiff decisively established the second error supporting her claim for medical malpractice; specifically, that defendant selected a tibial plate that was too large thus causing a six-millimeter overhang. Consequently, upon review of the record, we cannot find that an unprejudiced person, considering the facts upon which the trial court rendered its decision, could conclude that there was "no justification for the ruling made." See *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). Accordingly, we do not find that the trial court abused its discretion by denying to grant defendant's motion for a new trial.

IV. Remittitur

On cross-appeal, plaintiff argues that the trial court erred by granting defendant's motion for remittitur. The trial court determined that plaintiff failed to provide sufficient evidence to establish that "but for Dr. Struthers' negligence, plaintiff would have resumed gainful employment." Consequently, the trial court held that plaintiff's claim for employment-related economic damages "fail[ed] for want of proof." We disagree.

To determine the propriety of remittitur, the trial court must decide whether the jury's award was supported by the evidence at trial. *Henry v City of Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999). Respecting that the trial court is in a superior position to rule on a motion for remittitur because of its unique ability to view the evidence and evaluate the credibility of the testifying witnesses, this Court will review a trial court's decision concerning whether to grant a remittitur for an abuse of discretion. *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 305; 616 NW2d 175 (2000); *Henry, supra*.

Here, plaintiff testified that she always performed secretarial work and that her job required her to walk to different areas to use certain equipment to perform her work-related duties. Plaintiff testified that when she discussed the procedure with defendant, he not only assured her that "everything would be fine," but further represented that after the procedure, plaintiff would be able to maintain her job "and go back to all [of her] hobbies and everything." Regrettably, after defendant implanted the prosthesis and plaintiff underwent painful physical therapy to regain functioning in her knee, she was never able to resume any of the activities in which she previously engaged and was eventually terminated from her employment.

Plaintiff's expert, Dr. Kan, opined that whether plaintiff would have been able to return to work after the first total knee replacement surgery would depend upon the nature of her employment. On this point, Dr. Kan stated that if plaintiff had to be on her feet all day long ambulating on a hard cement floor, it would be "questionable" whether plaintiff would have been able to return to work following her surgery. However, Dr. Kan also testified, "[a]s I said, some people do extremely well. I've had patients go back and dance the polka after their total knee, and other people become more restricted in their activities." Dr. Schurman's testimony echoed Dr. Kan's in his statement that "most patients" regain eighty to eighty-five percent of their functional return within two or three months following surgery, and will regain the remaining fifteen to twenty percent over the long term.

Defendant's optimistic statements to plaintiff that she would be able to maintain her employment and engage in all of the same activities after surgery in conjunction with Dr. Kan's testimony that some patients do "extremely well" and can resume strenuous physical activity along with Dr. Schurman's testimony that "most patients" regain eight to eight-five percent of their functional return within two or three months, was sufficient evidence to justify the jury's belief as reflected in their verdict, that but for defendant's negligent surgical performance, plaintiff would have been within the category of people that regain eighty to eighty-five percent functional return and thus would have been able to return to work after the procedure as initially represented by defendant. Because a review of the record discloses that the jury's verdict awarding damages for lost wages and lost earning capacity was supported by the evidence presented at trial, we find that the trial court abused its discretion by invading the jury's province and remitting the damages awarded. Accordingly, we reverse the trial court's decision granting defendant's motion for remittitur and thus reinstate the jury's verdict.

Finally, because we find that the trial court did not abuse its discretion by denying defendant's motion for a new trial and otherwise hold that the trial court abused its discretion by remitting the jury's verdict, we thus uphold the trial court's order granting mediation sanctions.

Affirmed in part, reversed in part and remanded for entry of an order consistent with this opinion.

/s/ Jessica R. Cooper

/s/ Harold Hood

/s/ Kirsten Frank Kelly