STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY A. STAGE and EDWARD STAGE,

Plaintiffs-Appellants/Cross-Appellees,

and

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff-Appellee,

v

MT. CLEMENS GENERAL HOSPITAL, INC.,

Defendant-Appellee/Cross-Appellant,

and

ESTATE OF LENNA V. DINES, D.O., Deceased,

Defendant-Appellee.

UNPUBLISHED
November 26, 2002

No. 228254
Macomb Circuit Court
LC No. 95-002946-NH

Before: Whitbeck, C.J. and Sawyer and Kelly, JJ.

PER CURIAM.

In this medical malpractice case tried before a jury, plaintiffs appeal by right an order denying their motions for judgment notwithstanding the verdict (JNOV), new trial, and additur. We affirm.[1]

[1] Defendant Mount Clemens General Hospital, Inc. (MCGH) cross-appeals orders denying its motion for directed verdict, ruling that plaintiffs' expert witnesses were qualified to render testimony against defendants, and denying its motion for summary disposition. Because of our resolution of the issues raised on appeal, it is unnecessary to address the cross-appeal.

I. Background

Beginning in May 1991, plaintiff, Kimberley A. Stage,[2] began complaining to her doctor of irregular menstrual cycle, bloating, and heavy menses. An examination revealed a normal endometrial lining and no mass. She was prescribed Darvocet for the pain. After approximately one year of similar complaints and prescriptions, plaintiff presented to Lenna V. Dines, D.O.,[3] an osteopathic general surgeon, complaining of severe pain in her pelvic region. A laparoscopy revealed endometrial implants on plaintiff's left ovary and fallopian tube. Although at trial it was contested whether Dines consulted with plaintiff about the options for treating endometriosis, plaintiff ultimately elected to undergo surgery in December 1994. Dines performed the surgery at defendant MCGH's facility removing plaintiff's uterus, cervix, and fallopian tubes. Because plaintiff continued to complain of pelvic pain, plaintiff underwent a second surgery to remove her left ovary on which had developed a large cyst. Dines did not remove plaintiff's right ovary. Plaintiff continued to complain of pain through July 1994. Because Dines could not identify an etiology for this pain, she advised plaintiff to seek treatment at a pain clinic. Plaintiff's right ovary was eventually removed.

Plaintiffs brought this medical malpractice action against Dines and defendant MCGH. Against both defendants, plaintiffs alleged negligence for performing an unnecessary hysterectomy, failing to offer/perform alternative procedures, and failure to obtain a second opinion.[4] Against defendant MCGH, plaintiffs also alleged negligent credentialing of Dines. Plaintiff Edward Stage alleged a claim for loss of consortium.

Following trial, the jury returned a verdict for plaintiffs against defendant estate in the amount of $46,000 for non-economic damages from the time of the surgery until one year thereafter. The jury found that Dines was negligent. The jury found no cause of action against defendant MCGH. Plaintiffs filed motions for JNOV, new trial, and additur. The trial court denied these motions.

II. JNOV

Plaintiffs argue that the trial court erred in denying their motion for JNOV. We disagree. This Court reviews a trial court's decision with regard to a motion for JNOV de novo. *Morinelli v Provident Life and Accident Ins Co,* 242 Mich App 255, 260; 617 NW2d 777 (2000). This Court views the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party and "if reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Id.* at 260-261.

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[2] "Plaintiff" refers to plaintiff Kimberly A. Stage. "Plaintiffs" refers to Kimberly A. Stage and Edward Stage. Plaintiff Edward Stage will be referred to as such.

[3] Lenna V. Dines, D.O. will be referred to as Dines. Dines expired during the litigation of this case. She was replaced as a defendant by the Estate of Lenna V. Dines, D.O. (defendant estate) which withdrew its answer and defaulted.

[4] Plaintiffs alleged that defendant MCGH was vicariously liable for Dines' actions.

Plaintiffs argue that, because the jury found Dines negligent in failing to offer/explain other treatment for endometriosis, the jury should also have found defendant MCGH negligent on the same basis. However, to establish vicarious liability against a hospital, a plaintiff must show that an *agent* of the hospital committed malpractice. *Cox v Flint Bd of Hospital Mgrs*, 467 Mich 1, 42-43; 651 NW2d 356 (2002). Here, the evidence established that Dines was not an agent of defendant MCGH, but rather an independent staff physician. Therefore, we find this argument without merit.

Plaintiffs also argue that the trial court should have held that MCL 333.21513 "automatically holds the [defendant MCGH] liable" for Dines' negligence. Plaintiff did not seriously argue this issue before the trial court but merely objected to the ruling "for the record." Furthermore, plaintiffs' brief lacks discussion as well as citation to supporting legal authority for their assertion that this statute confers automatic vicarious liability on a hospital for acts of a non-agent. "It is axiomatic that where a party fails to brief the merits of an allegation or error, the issue is deemed abandoned by this Court. This is also the case where a party fails to cite any supporting legal authority for its position." *Ewing v Detroit,* 252 Mich App 149, 169; 651 NW2d 780 (2002) (citations omitted). Therefore, we find this issue abandoned.

Plaintiffs also contend that defendant MCGH had a duty, pursuant to the American Osteopathic Association (AOA) accreditation requirements, to inform plaintiff of available alternative treatments. Accordingly, plaintiff argues that defendant MCGH should have been found negligent for its own failure to obtain informed consent from plaintiff. We disagree. Expert testimony is required to establish the standard of care in a medical malpractice action and to demonstrate the defendant's alleged failure to conform to that standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994); 600.2912d(1). Plaintiffs cite only to the AOA standards, not to the testimony of an appropriate expert. Although plaintiffs reference the testimony of Michael Smith, D.O., this testimony only indicates that the AOA requirements are binding on defendant MCGH, not that they set the standard of care. Furthermore, it is the duty of the physician to inform the patient of the risks associated with the procedure, not the hospital or its personnel. *Lincoln v Gupta,* 142 Mich App 615, 625; 370 NW2d 312 (1985).

Plaintiffs also argue that "all the evidence indicated that [d]efendant MCGH should have prevented this surgery from occurring." Plaintiff cites to (1) evidence that "Dines performed more gynecologic surgery than the entire Department of Obstetrics and Gynecology combined" and (2) evidence that Dines failed to follow defendant MCGH's "SIMS criteria,"[5] that were in place to prevent unnecessary hysterectomies. Despite plaintiffs' contention, there was contrary evidence presented at trial that the "SIMS criteria" were not the standard of care and that the number of surgeries performed by Dines merely indicated she was a busy surgeon. Therefore, the trial court did not err in denying plaintiffs' motion for JNOV.

III. New Trial

Plaintiffs next argue that the trial court erred in denying their motion for new trial. We disagree. On appeal, this Court reviews a trial court's decision whether to grant a new trial for

[5] Surgical Indications Monitoring Obstetrical and Gynecological Surgery Procedures.

an abuse of discretion. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

A. Reference to the Financial Status of Defendant Estate

Plaintiffs argue that the trial court erred in permitting defendant MCGH to disclose to the jury the reason for defendant estate's withdrawal of their answer and default. During her deposition, Dines denied that she committed malpractice. However, defendant estate subsequently withdrew its answer and defaulted, thereby admitting liability. The trial court ruled that defendant estate's reason for withdrawing its answer was admissible because it was relevant to Dines' credibility. Whether to admit or exclude evidence lies within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). We find the trial court did not abuse its discretion in ruling that this evidence was admissible.

Pursuant to MRE 402, all relevant evidence is admissible. Pursuant to MRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The evidence was admissible because it was relevant to Dines' credibility. The evidence was also admissible because it was necessary to explain to the jury that they were required to make a factual finding of Dines' negligence in regard to plaintiffs' claims against defendant MCGH and could not merely rely on defendant estate's admission of liability.

Plaintiffs also object to defense counsel reading defendant estate's motion to withdraw its answer and representing that the estate was bankrupt. However, we note that that plaintiffs failed to object or request a curative instruction. Even assuming the conduct complained of was improper, the error was harmless, because the trial court provided an instruction that attorneys' statements are not to be considered as evidence. The jury is presumed to follow its instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993).

B. Prior Complaints Filed Against Defendants

Plaintiffs next argue that the trial court erred in ruling that plaintiffs could not present as evidence prior complaints filed against Dines and defendant MCGH. Each of the complaints against Dines involved allegations of medical malpractice, specifically unnecessary or wrongful surgery and/or removal or organs. Plaintiffs sought to introduce the evidence (1) to establish defendant MCGH's notice of Dines' malpractice and (2) impeach the testimony of defendant MCGH's employee, Michael Smith, D.O., who claimed he was unaware of the cases filed against Dines. However, the trial court did not exclude evidence of the prior lawsuits, but rather, excluded the complaints themselves. The trial court did not abuse its discretion in excluding the complaints because, as the trial court noted, "the commonly inflammatory language" used in drafting them, would have been more prejudicial than probative. MRE 403; *Tobin v Providence Hospital*, 244 Mich App 626, 637-638; 624 NW2d 548 (2001).

C. Admissibility of Defendant MCGH's Personnel File on Dines

Next, plaintiffs argue that the trial court erred in ruling that defendant MCGH's file on Dines was not discoverable based on MCL 333.20175(8), because defendant waived the privilege by admitting Smith's affidavit. A review of Smith's affidavit and testimony reveals that Smith testified generally about the process by which physicians apply for reappointment. Smith also testified to facts concerning Dines' application for reappointment. However, Smith did not refer to specific documents within the file, nor did defendant MCGH produce any of the privileged documents at trial. Therefore, we conclude that defendant MCGH did not waive its statutory privilege.

Plaintiffs also argue that the trial court erred in determining that the documents were privileged because it failed to consider, pursuant to *Gallagher v Detroit-Macomb Hospital,* 171 Mich App 761; 431 NW2d 90 (1988), defendant MCGH's bylaws, internal rules and regulations, and whether the committee's function is that of retrospective review for purposes of improvement and self-analysis, or part of current patient care. However, plaintiffs provide no factual support for their assertion that the trial court failed to properly review the necessary information when conducting its in camera review. Additionally, a review of *Gallagher* reveals that the portion of the opinion to which plaintiffs cite addresses the admission of an incident report on the incident that resulted in the plaintiff's injury. *Id.* at 768-769. We find that this analysis does not apply to the personnel files at issue because such files could not be considered part of current patient care. Therefore, we find that the trial court did not err in ruling that defendant MCGH's file on Dines was not discoverable.

Plaintiffs finally argue that the trial court erred by failing to identify by date and author each of the documents it deemed privileged. Plaintiffs cite *Monty v Warren Hospital Corp,* 422 Mich 138, 146; 366 NW2d 198 (1985) for this proposition. However, *Monty* does not require the trial court to identify the dates and authors of documents, but rather, permits the trial court to require the parties to provide this information before it conducts an in camera review. *Id.* Therefore, we find that the trial court did not err ruling that defendant MCGH's file on Dines was not discoverable.

D. The Exclusion of ACOG Criteria on Quality Assurance

Plaintiffs argue that the trial court erred in refusing to admit American College of Obstetrics and Gynecology (ACOG) criteria on quality assurance in obstetrics and gynecology. Plaintiffs sought admission of the evidence to support its claim that defendant MCGH failed to implement a procedure and/or guideline governing when hysterectomies should be performed on women of childbearing age. The trial court permitted plaintiffs to question witnesses about the criteria, but excluded admission of the criteria as an exhibit finding that the jury would place undue weight on the criteria. We find the trial court did not abuse its discretion. *Ellsworth, supra* at 188. Plaintiffs were able to bring to bring the criteria to the jury's attention through witness testimony. The exhibit was cumulative and could have been weighed too heavily by the jury, particularly because, as we previously noted, there was no testimony by an expert witness that established such criteria as the standard of care.

Plaintiffs also argue that the exhibit was admissible as a learned treatise pursuant to MRE 707. However, while statements from publications may be read into evidence, the publication may not be received as an exhibit. MRE 707; *Hilgendorf v St John Hospital & Medical Center Corp*, 245 Mich App 670, 701; 630 NW2d 356 (2001). The exhibit was properly excluded.

E. References to Plaintiff as a Drug Addict

Plaintiffs argue that "[t]houghout the course of the trial[,] defense counsel and his witnesses repeatedly referred to [p]laintiff . . . as a drug addict or abuser of drugs." Plaintiffs cite only one such reference arguing that it was more prejudicial than probative pursuant to MRE 403. In the single reference cited by plaintiffs, Dines simply states her opinion that plaintiff may have been abusing drugs based on her extensive use of pain medications and an undiscerned etiology of the pain. There was also evidence from other witnesses that plaintiff sought pain medication while her treating doctors could not discern the etiology of her pain. This was factual testimony, not the derogatory name-calling plaintiffs argue. Because this evidence was not more prejudicial than probative, the trial court did not err in permitting such testimony.

F. Defendant MCGH's Expert Witnesses

Plaintiffs argue that the trial court erred in permitting the testimony of defendant MCGH's expert witnesses, Mary Garavaglia, D.O. and Michael Smith, D.O., because they "were never identified until days before trial." This Court reviews a trial court's decision whether to admit or exclude expert witness testimony for an abuse of discretion. *Stitt v Holland Abundant Life Fellowship (On Remand)*, 243 Mich App 461, 468; 624 NW2d 427 (2000).

The purpose of identifying witnesses in advance is to avoid trial by surprise. *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993). A review of the record reveals that plaintiffs were not surprised by the testimony of these experts. Plaintiffs deposed Smith in August 1997. Smith and Garavaglia were also identified in plaintiffs' own trial witness list. Additionally, plaintiffs were apprised of Garavaglia's expert opinion regarding the standard of care and Smith's expert opinion regarding defendant MCGH's credentialing procedures as early as June 1998, when defendant MCGH cited to the their affidavits in its motion for summary disposition. Plaintiffs were clearly given notice of both the names of the witnesses and the expected content of their potential testimony.

Plaintiffs also argue that, pursuant to MRE 702 and MCL 600.2955, Smith and Garavaglia's testimony was unreliable and unfounded because they (1) failed to read Dines' deposition and (2) failed to review the Dines' complete medical chart. However, the record indicates that Smith and Garavaglia were familiar with Dines' records. Additionally, Smith and Garavaglia were aware of Dines' deposition testimony. Moreover, a gap in an expert's knowledge is a fit subject for cross-examination and goes to the weight of the testimony, not the admissibility. *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995). Therefore, the trial court did not abuse its discretion in permitting them to render expert testimony.

Plaintiffs also argue that the trial court improperly permitted Benjamin Paolucci, D.O. to "render opinions as to the appropriateness of care rendered by the hospital, as well as the appropriateness of the surgery performed by Dines." Plaintiffs' argument is based on the trial court's ruling that Paolucci was not qualified to render opinions regarding non-surgical treatment

of gynecologic conditions. Plaintiffs argue that if Paolucci was not qualified to render such opinions, he was also not qualified to render opinions as to the appropriateness of care rendered by defendant MCGH or the appropriateness of the surgery performed by Dines. However, plaintiffs' argument entirely lacks citation to supporting legal authority. Therefore, we decline to address it. *Ewing, supra* at 169.

G. Intervening Plaintiff Blue Cross and Blue Shield of Michigan

Plaintiffs argue that the trial court violated the fundamental rights of intervening plaintiff Blue Cross and Blue Shield of Michigan (BCBS) by failing to permit it to participate at trial. We find that plaintiffs lack standing to make this argument. In order to have standing, a party must have a legally protected interest that is in jeopardy of being adversely affected. *Bowie v Arder,* 441 Mich 23, 42-43; 490 NW2d 568 (1992).

Pursuant to a contract between plaintiff and BCBS that contained a subrogation clause, BCBS paid for health care services rendered to plaintiff. In accord with this contract, BCBS alleged a derivative claim against defendant MCGH. It is not apparent to this Court, and plaintiffs fail to elucidate, how their interest would have been affected by BCBS's inability to have an attorney present at trial.

Nonetheless, we find that the trial court did not preclude BCBS from having counsel present at trial. The trial court stated that BCBS could have counsel present at trial, but that it would not permit duplicate examination of witnesses. Additionally, plaintiffs' counsel agreed to represent both plaintiffs and BCBS. Plaintiffs' counsel also stated on the record that it would cooperate with BCBS's counsel in trying the lawsuit. BCBS's counsel was present at trial and questioned Paolucci. The trial court's discretion in matters relative to the conduct of trial include authority to control the questioning of witnesses to avoid the needless consumption of time. MRE 611(a); *Persichini v William Beaumont Hospital,* 238 Mich App 626, 632; 607 NW2d 100 (1999). We find that the trial court did not abuse its discretion in this regard.

Based on the reasons discussed above, we find that trial court did not err in denying plaintiffs' motion for new trial.

IV. Plaintiffs' Motion for Additur

Plaintiffs finally argue that the trial court erred in denying their motion for additur. We disagree. This Court reviews a trial court's denial of a motion for additur for an abuse of discretion. *Palenkas v Beaumont Hospital,* 432 Mich 527, 533; 443 NW2d 354 (1999). To make this determination, the trial court must objectively consider the evidence presented as well as the conduct of the trial. *Id* at 532. When reviewing a motion for additur, the appropriate consideration is whether the evidence supports the jury's award. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

Plaintiffs argue that because the jury found that Dines was negligent, it was required to award economic damages and future non-economic damages. However, there is no legal requirement that a jury's finding of liability necessitates an award of damages. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 173; 568 NW2d 365 (1997). Awards for

personal injury, pain and suffering in particular, rest within the fact finders' sound discretion. *Meek v Dep't of Transportation*, 240 Mich App 105, 122; 610 NW2d 250 (2000).

In regard to future non-economic damages, the evidence showed that plaintiff's pain and suffering was relieved by the surgical procedure, regardless of whether it was necessary. Additionally, the jury was presented with Dines' deposition testimony indicating that plaintiffs did not desire to have more children. Moreover, the jury was free to believe that alternative procedures would also have resulted in the future injuries which plaintiffs claim naturally flowed from the surgery. In contrast, the jury's award of non-economic damages for one year after the surgery was supported by testimony that plaintiff experienced pain and discomfort during that time.

Plaintiffs also argue that because the jury found that Dines was negligent, it "must also award the economics [sic] [damages] associated therewith." However, plaintiffs again fail to cite to any record evidence that plaintiffs suffered economic damages associated with plaintiff's injury. It is entirely possible that a party could suffer a physical injury, but not suffer any economic harm. For these reasons, we find that the trial court did not err in denying plaintiffs' motion for additur.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly