

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE DIFALCO, JAMES DIFALCO and K. JIN
LIM, Trustee in Bankruptcy for the ESTATE OF
JOYCE DIFALCO AND JAMES DIFALCO,

Plaintiffs-Appellees,

v

ROBERT L. DOCK, M.D., F.A.C.O.O.G.; SINAI
HOSPITAL, d/b/a SINAI PROFESSIONAL
OB/GYN; and SINAI GRACE HOSPITAL, d/b/a
SINAI PROFESSIONAL OB/GYN,

Defendants-Appellants.

UNPUBLISHED
December 16, 2004

No. 250675
Oakland Circuit Court
LC No. 2000-028388-N

JOYCE DIFALCO, JAMES DIFALCO, and K.
JIN LIM, Trustee in Bankruptcy for the ESTATE
OF JOYCE DIFALCO AND JAMES DIFALCO,

Plaintiffs-Appellants,

v

ROBERT L. DOCK., M.D., F.A.C.O.O.G.; SINAI
HOSPITAL, d/b/a SINAI PROFESSIONAL
OB/GYN; and SINAI GRACE HOSPITAL, d/b/a
SINAI PROFESSIONAL OB/GYN,

Defendants-Appellees.

No. 250999
Oakland Circuit Court
LC No. 2000-028388-NM

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

In Docket No. 250675, defendants appeal as of right from a jury verdict finding defendant Dr. Robert Dock liable for medical malpractice in his treatment of plaintiff Joyce DiFalco's ovarian cancer and awarding plaintiffs \$250,000 in damages. Defendants challenge the trial court's denial of their motion to strike plaintiffs' affidavit of merit and also raise several issues related to the trial and to the recovery of costs. In Docket No. 25099, plaintiff Joyce

DiFalco appeals as of right from the trial court's granting of remittitur, reducing the jury's award to \$125,000. We affirm.

I. Background

Plaintiff filed the instant action alleging that Dock committed malpractice in failing to timely diagnose her ovarian cancer and that as a result she was required to undergo aggressive chemotherapy, which would not have been necessary but for Dock's negligence. The essence of plaintiff's claim was that Dock failed to perform a follow-up ultrasound within four to six weeks of observing a complex cystic mass involving plaintiff's right ovary during a laparoscopic procedure, as required by the applicable standard of care.

II. The Affidavit of Merit

Defendants filed a motion to strike plaintiffs' affidavit of merit, which was denied by the trial court on the basis that plaintiff's counsel had a reasonable belief that the doctor signing the affidavit of merit met the requirements of MCL 600.2912, and therefore, was qualified to do so. Defendants argue that this finding was erroneous. We disagree.

MCL 600.2912d(1) requires that the plaintiff in a medical malpractice action "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169." To be qualified as an expert under MCL 600.2169, a doctor must be licensed and:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, *specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered.* However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c) [pertaining to general practitioners], *during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to . . .*

(i) *The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed* and, if that party is a specialist, the active clinical practice of that specialty. [Emphasis added.]

An affidavit of merit is sufficient "if counsel reasonably, albeit mistakenly, believed that the affiant was qualified under MCL 600.2169." *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002). This Court reviews de novo the trial court's determination that plaintiff's counsel had a reasonable belief that the affiant was qualified to sign the affidavit of merit. *Grossman v Brown*, 470 Mich 593, 598-599; 685 NW2d 198 (2004).

Defendant Dock is a board certified obstetrician/gynecologist and was practicing in that area when the alleged malpractice occurred, in July and August 1998. Thus, plaintiff was

required to file an affidavit of merit signed by a doctor who was also a board certified obstetrician/gynecologist and who practiced gynecology in the year immediately preceding July 1998. The doctor signing the affidavit of merit, Dr. David E. David, was a board certified obstetrician/gynecologist. However, during his deposition, he indicated that he had discontinued his gynecology practice in 1996. Therefore, David was not qualified under MCL 600.2169 to testify against Dock. Thus, plaintiff's affidavit of merit was defective, unless plaintiff's counsel reasonably believed that David practiced gynecology in the year immediately the occurrence of the alleged malpractice.

To establish that his belief in this regard was reasonable, plaintiff's counsel submitted the affidavit of his witness consultant, who averred that: (1) he assisted plaintiff's counsel in finding medical experts; (2) he specifically inquired into David's "credentials and present qualifications" and was informed by David that he continued practicing in the area of gynecology through 2000; (3) he received a resume of David, which indicated that David continued in private practice; (4) he informed plaintiff's counsel of David's credentials; and (5) he did not know that David had discontinued his gynecology practice in 1996 until David's deposition in this case. The trial court determined that the this affidavit was sufficient to establish that plaintiff's counsel had a reasonable belief that David was qualified to sign the affidavit and denied defendants' motion to strike. We agree.

Defendants argue that, under this Court's decision in *Geralds v Munson Healthcare*, 259 Mich App 225, 232; 673 NW2d 792 (2003), plaintiff's counsel was not entitled to rely on the inquiry posed by his witness consultant. In *Geralds, supra*, this Court held that the plaintiff's counsel could not form a reasonable belief as to the credentials and qualifications of the affiant based on the belief by a referring doctor that the affiant was board certified, on the affiant's having been president of the American Board of Emergency Medicine and on information contained on that board's website. *Id.* at 228, 232. No one affiliated with counsel – including the referring doctor – asked the affiant if he was in fact board certified, even though the affiant's curriculum vitae did not indicate that he was board certified. This Court concluded that “[i]t is unreasonable for an attorney to form a belief regarding the board certification of a physician without asking the physician about his board certification.” *Id.* at 233. Contrary to defendant's assertion, however, *Geralds* does not require that only plaintiff's counsel ask the pertinent questions of the affiant; rather *Geralds* requires that *someone*, either plaintiff's counsel or someone acting on counsel's behalf, actually ask the pertinent questions of the affiant rather than relying on second-hand information or assumptions. We agree that, under *Geralds*, it would have been insufficient for plaintiff's counsel to rely on a representation by the consultant that he “knew” that David maintained the requisite practice without the consultant having made the specific inquiry as to whether such was the case. However, that was not what transpired here; rather, the consultant made specific inquiry to the doctor himself as to the nature of his practice and was told by David that he continued practicing gynecology through the year 2000. The only reasonable interpretation of such a statement at that time, was that David was practicing in the area of gynecology in a time frame including the year immediately preceding July and August 1998. Thus, plaintiff's counsel had a reasonable belief that David was qualified to sign the affidavit of merit.

III. Sufficiency of the Evidence as to Breach of the Standard of Care and Causation

Defendants argue that the trial court erred in denying their motions for summary disposition, directed verdict and judgment notwithstanding the verdict, because plaintiff did not present sufficient testimony as to the appropriate standard of care, as to defendant's breach of that standard of care and as to causation. We disagree.

This Court reviews the trial court's denial of each of these motions de novo, viewing the record and evidence presented at trial, respectively, in the light most favorable to plaintiff. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 118 (2002). A directed verdict is appropriate only where reasonable jurors could not honestly reach different conclusions. *Wiley, supra* at 491. Similarly, the trial court should grant a JNOV motion only if the evidence fails to establish a claim as a matter of law, and when the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998).

In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard of care by the defendant; (3) injury; and (4) proximate causation between the alleged breach and the injury. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). Expert testimony is required to establish the standard of care; ordinary laypersons are not equipped by common knowledge and experience to judge the skill and competence of a doctor's conduct to determine whether it meets the standard of care. *Locke, supra* at 223. The party offering the testimony of an expert must demonstrate the expert's knowledge of the applicable standard of care. *Bahr v Harper-Grace Hosp*, 448 Mich 135, 134-135; 528 NW2d 170 (1995). However, such testimony is not patently deficient merely because the expert does not define, specifically, the applicable standard of care. *Id.* at 144-145.

Plaintiff's expert, Dr. Myer Borenstein, testified that he was familiar with the standard of care, and that Dock breached that standard of care by failing to perform a follow-up ultrasound within four to six weeks after observing a complex ovarian cyst during the July 2, 1998 laparoscopy. Defendants argue that Borenstein's testimony was insufficient to establish the applicable standard of care, because Borenstein's definition of the standard of care was improper and because Borenstein only judged defendant's conduct by what Borenstein himself would have done. While Borenstein does refer to what he himself would have done, he also makes objective statements as to what the standard of care required. Here, as in *Wiley, supra* at 493, Borenstein's references to himself are more in the nature of example; he also testified unequivocally that the standard of care required a timely ultrasound.

Certainly, as noted by this Court in *Haisenleder v Reeder*, 114 Mich App 258, 265; 318 NW2d 634 (1982), "counsel should clearly elicit that the expert knows the standard and what the standard was before questioning as to what that standard would have required." Plaintiff's counsel did not do so in this case. Still, Borenstein's testimony that he was familiar with the standard of care, that an ultrasound should have been done within four to six weeks after the laparoscopy, and that Dock breached the standard of care by failing to perform such an ultrasound, was legally sufficient to allow the issue to go to the jury and to support the jury's finding that Dock committed malpractice. See *Bahr, supra* at 144-145.

Turning to causation, plaintiff asserts that, as a result of Dock's breach of the applicable standard of care, she was forced to undergo eleven sessions of double-agent chemotherapy, which she would not have had to undergo otherwise. To prevail as to causation, plaintiff must establish both cause in fact and proximate cause. Cause in fact requires that the damages would not have occurred "but for" defendant's conduct; proximate cause is "that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury." *Wiley, supra* at 496. Plaintiff was required to "present substantial evidence from which [the] jury [could] conclude that more likely than not, but for [Dock's] conduct, the plaintiff's injuries would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 711 (1994).

Plaintiff offered the testimony of Dr. Larry Milner, her oncology expert, to establish that had Dock performed an ultrasound prior to October 1998, her cancer would have been diagnosed at a time when it was of a lesser stage and grade and would have permitted her to avoid chemotherapy, or at worst, undergo a milder form of chemotherapy. Defendants point out that their experts both testified that chemotherapy would have been recommended to plaintiff regardless when her cancer had been diagnosed and that plaintiff conceded that more than likely she would have undergone chemotherapy had it been recommended to her. However, the jury could have chosen to believe Milner, who testified clearly and unequivocally that plaintiff would have had different treatment options – most notably, milder chemotherapy or no chemotherapy – had she been diagnosed earlier. Thus, Milner's testimony was sufficient to allow a reasonable juror to conclude that plaintiff was forced to undergo eleven sessions of aggressive, double-agent chemotherapy as a result of defendant's failure to perform the follow-up ultrasound.

IV. Evidentiary Issues

Defendants argue that the trial court abused its discretion in allowing testimony regarding whether Dock should have performed a CA-125 blood test on plaintiff and whether plaintiff's cancer was discernable in April 1998. We disagree.

A trial court's decision to admit evidence is within its sound discretion and will not be reversed on appeal absent an abuse of discretion. *Chimielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). An abuse of discretion occurs where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification for the ruling made, or where the result is so violative of fact and logic that it evidences perversity of will, a defiance of judgment or the exercise of passion or bias. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003). Error may not be predicated on the admission of evidence unless that admission affected a substantial right of a party. *Id.* at 196-197.

Defendants argue that because plaintiff's only allegation of malpractice against Dock is that he breached the standard of care by failing to conduct a follow-up ultrasound within four to six weeks of the July 2, 1998 laparoscopy, testimony as to when plaintiff's cancer was first discernible and whether Dock should have performed a blood test to determine plaintiff's CA-125 levels (a possible indicator of the presence of cancer) was irrelevant. We disagree. When plaintiff's cancer would have first been discernible was relevant to the determination of when plaintiff's cancer could have been diagnosed, which itself was relevant to the causation issue. Further, any references to the CA-125 blood test were very limited and included an explanation by Borenstein, as well as of defendant's experts, that in an infertile patient as young as plaintiff,

this test would not have been reliable. Thus, the testimony of plaintiff's own expert indicated that Dock did not breach any standard of care in failing to perform this test. Certainly, admission of this testimony did not deprive defendant of any substantial right and did not affect the outcome of the trial.

V. Jury Instructions

Defendants assert that the trial court erred in giving certain jury instructions regarding causation and damages, and further, that the trial court abused its discretion in refusing to give special instructions requested by defendants as to damages and defining the factual basis for plaintiff's claims against Dock. We disagree.

Claims of instructional error are reviewed de novo. *Cox v Flint Board of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 675 (2003); *Case v Consumers Power Co*, 463 Mich 1, 6; 61 NW2d 17 (2000). A trial court's determination whether a standard instruction was applicable and accurate is reviewed for an abuse of discretion, *Lewis v Legrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003), and its determination whether an instruction is supported by the evidence is entitled to deference, *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). A standard jury instruction must be given when requested by a party if it is applicable and accurately states the law. MCR 2.516(D)(2), *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 590; 657 NW2d 804 (2002). Whether an instruction is accurate and applicable based on the characteristics of a case is in the sound discretion of the trial court, *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). The trial court is to determine when the standard jury instructions are applicable in the context of the "personality" of the particular case and with due regard for each party's theory of the case. *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985). Thus, the trial court has a duty to determine the subject matter of the instructions to be given to the jury, including the applicability of a particular standard jury instruction requested by counsel. *Id.* at 326.

Each of the challenged standard instructions properly informed the jury of the applicable law and was supported by the evidence presented at trial. Standard instruction 15.03, regarding proximate cause, was appropriate because there was more than one proximate cause of plaintiff's having to undergo chemotherapy: (1) the continued development of her cancer independent of any conduct, and (2) defendant's failure to timely diagnose that cancer and prevent its continued development. Even if the giving of this instruction was error, it was clear throughout this case, and in the jury instructions considered as a whole, that the jury could only find defendants liable if it found that Dock breached the standard of care and that breach caused some harm to plaintiff.¹ There is nothing in SJI 2d 15.03 that negates this notion. The trial court did not abuse its discretion in finding that SJI 2d 15.03 was applicable and supported by the evidence.

¹ Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case, supra* at 6; *Bachman v Swan Harbour Association*, 252 Mich App 400, 424; 653 NW2d 415 (2002).

Further, with regard to instructions SJI2d 50.10 and SJI2d 50.11, relating to damages, these instructions were appropriate in that they aided the jury in evaluating damages for Dock's conduct in the context of plaintiff's preexisting cancer. Thus, the trial court did not abuse its discretion in finding that the challenged instructions were applicable and supported by the evidence. Even if they were not appropriate, however, any error in giving these instructions was rectified by the trial court's granting of remittitur on the basis that the jury awarded damages for the entire ordeal and not just the incremental difference between no chemotherapy and aggressive chemotherapy; thus, any error is not inconsistent with substantial justice.²

Defendants requested that the trial court instruct the jury that plaintiff's sole claim for damages was for having to undergo chemotherapy as a result of a delayed diagnosis of cancer, and that the sole claimed breach of the standard of care was the failure to perform an ultrasound by August 16, 1998. The trial court declined to do so. When the standard instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested if the supplemental instructions properly inform on the applicable law and are supported by the evidence. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001). The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). The trial court need not give a supplemental instruction if doing so adds nothing to an otherwise balanced and fair jury charge and does not enhance the ability of the jury to decide the case intelligently, fairly and impartially. *Novi v Woodson*, 251 Mich App 614, 630-631; 651 NW2d 448 (2002). The trial court's decision regarding supplemental instructions is reviewed for an abuse of discretion, *Chastain, supra* at 590. Given the nature of this case, and the Supreme Court's clarification of the types of damages recoverable in a delayed diagnosis of cancer case, see *Wickens v Oakwood Health Care System*, 465 Mich 53, 62; 631 NW2d 686 (2001), we find that defendant's requested special instruction as to plaintiff's sole claim for damages being for having to undergo chemotherapy was applicable and appropriate. Still, given the trial court's ultimate granting of defendants' motion for remittitur to an amount compensating plaintiff for the incremental damages of having to undergo aggressive chemotherapy, any error in not giving this instruction did not deprive defendants of substantial justice. See MCR 2.613(A), *Case, supra*.

Additionally, we find that defendant's requested special instruction as to the nature of the alleged breach of the standard of care was not appropriate. The trial court specifically instructed the jurors that to find that Dock was professionally negligent, they must find that he failed to act within the recognized standard of practice or care within the specialty of obstetrics and gynecology at the time of the alleged malpractice and that they must look to expert testimony to determine what the standard of care required. What was required by the applicable standard of care was a question of fact to be determined by the jury, based on the expert testimony presented, and it involved the evaluation of conflicting testimony and a weighing of credibility. The instructions as given properly directed the jurors to look to the expert testimony to determine

² Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*.

what the standard of care required of Dock; the instructions adequately instructed the jurors in this regard and there was no need to give defendant's proposed instruction. Further, defendant's proposed instruction assumed a specific conclusion as to the determination of the applicable standard of care – that all that was required was a follow-up ultrasound and nothing more – and, therefore, it was inappropriate. Thus, the trial court did not abuse its discretion in declining to give this instruction.

VI. Costs

Defendants argue that the trial court erred in denying prevailing party costs against James DiFalco, on the basis that James DiFalco's claim for loss of consortium and lost wages in caring for his sick wife were dismissed with prejudice prior to trial. We disagree. Because James DiFalco's claims were derivative of plaintiff's claims, their claims are properly considered to be a single cause of action, on which defendants were not prevailing parties. It is well settled that "a derivative claim for loss of consortium stands or falls with the primary claims in the complaint." *Long v Chelsea Hosp*, 219 Mich App 578, 589; 557 NW2d 157 (1996). Indeed, defendants' bill of costs submitted below supports this conclusion. Defendants' bill of costs seeks to recover for costs incurred in defending plaintiffs' claim; it reveals no costs whatsoever attributable to defending against any separate element of James DiFalco's loss of consortium or loss of wages claim. Given the jury verdict in favor of plaintiff Joyce DiFalco, the denial of costs to defendants was not an abuse of discretion.

VII. Remittitur

Plaintiff asserts that the trial court abused its discretion in granting defendants' motion for remittitur and reducing the amount of the jury's award by half. We disagree.

In determining whether to grant a motion for remittitur a trial court must consider whether the evidence supported the jury award. *Henry v Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999). The trial court's inquiry is limited to objective considerations regarding the evidence presented and the conduct of the trial. *Palenkas v Beaumont Hosp*, 432 Mich 527, 53-533; 433 NW2d 354 (1989); *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636-637; 567 NW2d 468 (1997). Remittitur is justified when a jury verdict exceeds the highest amount the evidence will support. MCR 2.611(E)(1). When determining whether an award is excessive, a court may consider whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption or mistake of law or fact, whether it was within the limits of what reasonable minds would deem to be just compensation for the injury inflicted, and/or whether the amount actually awarded is comparable to other similar cases. *Palenkas, supra* at 532-533. A verdict should not be set aside simply because the method of computation used by the jury in assessing damages cannot be determined, unless it is not within the range of evidence presented at trial. *Green v Evans*, 156 Mich App 145, 156-157; 401 NW2d 250 (1985).

This Court reviews a trial court's decision to deny a motion for remittitur for an abuse of discretion. *Palenkas, supra* at 531. As our Supreme Court explained in *Palenkas*:

[T]he question of the excessiveness of a jury verdict is generally one for the trial court in the first instance. The trial court, having witnessed all the testimony and evidence as well as having had the unique opportunity to evaluate the jury's

reaction to the proofs and to the individual witnesses, is in the best position to make an informed decision regarding the excessiveness of the verdict. Accordingly, an appellate court must accord due deference to the trial court's decision and may only disturb a grant or denial of remittitur if an abuse of discretion is shown. *Id.*

When reviewing a trial's court's decision as to remittitur, this Court must view the evidence in the light most favorable to the nonmoving party. *Wiley, supra* at 499. "An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made." *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997).

In granting the motion for remittitur, the trial court noted that plaintiff's cancer was diagnosable at the latest in October 1998, when it would have been a late stage two cancer still requiring chemotherapy, albeit a milder dose than was needed in February 1999, and that plaintiff testified that if her doctor had recommended chemotherapy, she would have accepted that recommendation. Thus, the court concluded that the evidence did not support an award of noneconomic damages for the pain and suffering for undergoing *any* chemotherapy at all, but only for the incremental difference of such damages between undergoing the more "extensive chemotherapy the plaintiff endured" and the milder chemotherapy she necessarily would have undergone had her cancer been diagnosed earlier. Under these circumstances, the trial court concluded that an award of \$250,000 was excessive and reduced the verdict to \$125,000, finding that to be the amount appropriate to compensate for the pain and suffering associated with having to undergo the more aggressive treatment.

Reviewing the evidence in a light most favorable to plaintiff, the trial court's ruling was not without justification. Plaintiff testified that she underwent eleven sessions of chemotherapy and that she suffered from nausea, vomiting and achy joints for five to six days after each treatment, as well as from hair loss and neuropathy in her heel for the duration of her treatment. Plaintiff also testified that she was suffering no long term effects of the chemotherapy and had resumed "for the most part" her normal pre-treatment activity. Thus, the jury's award of \$250,000 would have provided plaintiff with approximately \$3,700 for each of the sixty-six days that she testified she was physically ill as a result of chemotherapy. On the record before us, we conclude that the trial court's determination that this was excessive and that a reduced award of \$125,000 more appropriately compensated plaintiff for the temporary, albeit extremely unpleasant, effects of the more aggressive chemotherapy was not an abuse of discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood