# STATE OF MICHIGAN

# COURT OF APPEALS

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MARGARET MANETTA, as Personal Representative of the Estate of ROBERT MANETTA, Deceased,

Plaintiff-Appellee,

v

JAMES E. JOHNSON, D.O., and MACOMB SURGICAL ASSOCIATES,

Defendants-Appellants,

and

MT. CLEMENS GENERAL HOSPITAL INCORPORATED,

Defendant.

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UNPUBLISHED
October 30, 2007

No. 265988
Macomb Circuit Court
LC No. 2001-001272-NH

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendants, James E. Johnson, D.O. and Macomb Surgical Associates, appeal as of right the denial of their motion for judgment notwithstanding the verdict (JNOV), remittitur, or relief from judgment, following a jury verdict in plaintiff's favor in this medical malpractice case. We affirm.

On September 23, 1998, defendant Dr. James Johnson, a board certified vascular surgeon, performed an aortic femoral bypass on plaintiff Robert Manetta[1] in an effort to improve the blood flow to his legs. After the surgery, tests were performed and revealed that blood flow was not properly reestablished to the right foot. As a consequence, Dr. Johnson elected to immediately perform a femoral popliteal graft. This surgery was successful. Plaintiff was discharged from Mt. Clemens General Hospital on September 29, 1998.

[1] Because the medical malpractice was committed against Robert Manetta, he will be referred to as "plaintiff."

During plaintiff's first post-operative follow-up appointment with Dr. Johnson on October 5, 1998, there was evidence of possible infection. The antibiotic Septra DS was prescribed. Three days later, plaintiff returned with pain in the area of the right thigh incision and had difficulty walking. At some point in October, there was drainage from the right thigh incision site which had opened to be four inches long, two inches wide, and two inches deep. On October 19, 1998, Dr. Johnson took a culture of the wound and told plaintiff that he would call if anything developed. The culture and sensitivity test result was available on October 22, 1998, but Dr. Johnson never received it. He never requested it either. The lab test result showed that plaintiff's wound was infected with staphlycoccus aureus, which was not susceptible to Septra DS.

On or about November 5, 1998, Dr. Johnson advised plaintiff that he could take his pre-planned trip to Las Vegas. Plaintiff and his wife flew there on November 9, 1998. On that same date, plaintiff began experiencing flu-like symptoms. On November 12, 1998, plaintiff was admitted to a hospital in Las Vegas with a severe blood infection of staphylococcus aureus bacteria, which caused endocarditis that destroyed plaintiff's mitral heart valve. He was placed on a respirator and was critically ill.

After extensive antibiotic treatment, on November 23, 1998, a heart catheterization was performed in anticipation of open heart surgery to replace the mitral heart valve. The catheterization was done through a graft that Dr. Johnson had placed. Trial testimony varied as to why—either the catheterization procedure or the endocarditis (via dislodged vegetation)—but on November 24, 1998, the right femoral popliteal bypass graft occluded. Blood flow could not be reestablished and amputation below the knee was necessary. Plaintiff also underwent open heart surgery to replace his mitral valve. Because of the valve replacement, plaintiff was prescribed Coumadin from which he developed a severe reaction, including body sores and kidney damage resulting in the need for dialysis.

On March 23, 2001, plaintiff filed this medical malpractice action. Plaintiff's allegations included that Dr. Johnson's failure to properly sterilize the second surgical field caused or contributed to the staphylococcus infection. Further, Dr. Johnson's failure to properly diagnose and treat plaintiff's infection, which resulted from the surgery from whatever source, caused the severe blood infection (sepsis) that resulted in endocarditis and the destruction of plaintiff's mitral heart valve. Consequently, a heart catheterization procedure, open heart surgery, and mitral valve replacement were required and amputation of plaintiff's right leg below the knee, as well as other damages, resulted.

Following extensive pretrial proceedings, a nine-day jury trial commenced on November 12, 2003, and culminated in a verdict in plaintiff's favor. The jury found that Dr. Johnson, an agent of defendant Mt. Clemens General Hospital, breached the applicable standard of care and proximately caused plaintiff to sustain economic and noneconomic past and future damages. Four days after the verdict was rendered, on November 30, 2003, plaintiff died from causes unrelated to any injuries claimed in this case. Following extensive post-trial proceedings, a judgment was entered on June 20, 2005. After defendants' motion for JNOV, remittitur, or relief from judgment was denied, this appeal was filed.

First, defendants argue that they were entitled to JNOV because plaintiff's standard of care expert, Dr. Wayne Gradman, was not a board certified vascular surgeon and thus was not

qualified to render such testimony against Dr. Johnson, a board certified vascular surgeon. However, it does not appear that defendants raised this issue in their motion for JNOV. Rather, as referenced in their brief on appeal, MCR 7.212(C)(7), it appears that defendants only objected to Dr. Gradman's testimony on this ground before Dr. Gradman testified at trial. Accordingly, after review of the trial court's decision to allow this testimony for an abuse of discretion, i.e., an outcome falling outside the principled range of outcomes, we disagree. See *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (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.

Dr. Johnson is a doctor of osteopathy (D.O.). He is board certified in general surgery by the American Board of Osteopathic Surgery and is board certified in general vascular surgery by the American Board of Osteopathic Surgery. Plaintiff's standard of care expert, Dr. Gradman, is an M.D. It was uncontested that Dr. Gradman is board certified in general surgery by the American Board of Surgery. Defendants argue that Dr. Gradman is not board certified in vascular surgery—he purportedly has only a "certificate of added qualification" in vascular surgery, therefore Dr. Gradman was not qualified to render standard of care testimony against Dr. Johnson. We disagree.

Before Dr. Gradman was permitted to testify as an expert at trial he was voir dired by defendants' counsel. The primary focus of inquiry was this issue of board certification. Counsel questioned Dr. Gradman's purported board certification as a vascular surgeon and Dr. Gradman testified that he was, in fact, board certified. Upon further examination, Dr. Gradman explained that originally, in 1984, he had a "special certificate of qualification" in vascular surgery from the American Board of Surgery. However, in 1988 a board of vascular surgery was established and since then he has been board certified by the American Board of Vascular Surgery. On direct examination by plaintiff's counsel, Dr. Gradman had testified that he is a vascular surgeon—that is 100 percent of his practice, he passed the vascular surgery boards that he must take every ten years, and the standard of care for a vascular surgeon is the same whether the surgeon is an M.D. or a D.O.

At the end of his voir dire examination, defense counsel objected to Dr. Gradman testifying against defendants because Dr. Gradman was "not board certified, and as such should not be allowed to testify against the board certified vascular surgeon." This is the same argument defendants raise on appeal. But, Dr. Gradman testified that he is, in fact, board certified in vascular surgery. His testimony indicated that when he first became eligible for

special recognition in the area of vascular surgery, only a certificate of special qualifications was available. However, since that time the American Board of Vascular Surgery was established and Dr. Gradman has taken all of the necessary tests to be board certified by the American Board of Vascular Surgery. Therefore it is unclear why defendants persist in arguing that Dr. Gradman is not board certified; without any more detailed and specific challenge to Dr. Gradman's board certification we cannot discern defendants' reasoning. And, our efforts are further stymied by the limited record created by this late challenge to Dr. Gradman's qualifications. Therefore, it appearing from the record that the requirements of MCL 600.2169(1)(a) were met, we conclude that the trial court did not abuse its discretion when it allowed Dr. Gradman to offer standard of care expert testimony against Dr. Johnson.

Next, defendants argue that the trial court erred by refusing to instruct the jury as to M Civ JI 15.06, the instruction pertaining to an outside force constituting a proximate cause of the injury or damages suffered by a plaintiff. We disagree. Defendants appear to admit that they did not preserve this issue for appeal by raising it in the trial court—only defendant Mt. Clemens General Hospital raised this issue. See MCR 7.212(C)(7). However, because it is debatable whether defendants' counsel joined in on the request for the instruction, we will review the issue as if it had been preserved.

Generally, claims of instructional error are reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The instructions are examined as a whole and should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. *Id*. Further, the trial court must give a requested instruction if it is applicable to the case. MCR 2.516(D)(2); *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). This Court reviews for an abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurately states the law. *Id*. However, instructional errors do not require reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Case*, *supra*.

The jury instruction at issue here, M Civ JI 15.06, which is titled "Intervening Outside Force (Other Than Person)," provides:

> If you decide that [*the defendant / one or more of the defendants*] [*was / were*] negligent and that such negligence was a proximate cause of the occurrence, it is not a defense that [description of force] also was a cause of this occurrence.
>
> *(However, if you decide that the only proximate cause of the occurrence was [description of force], then your verdict should be for the [*defendant / defendants*].)

The *Note on Use* provides that "*The paragraph in parentheses should be given only if there is evidence that the outside force may have been the sole proximate cause" and that "[i]n the blanks, insert a description of the force, as for example flood, fire or wind."

The proposed jury instruction that the trial court denied to give was:

> If you decide that one or more of the defendants were negligent, and that such negligence was a proximate cause of the occurrence, it is not a defense that an

> unforeseen complication of the cardiac cath in Las Vegas was also a cause of this occurrence. However, if you decide that the only proximate cause of the occurrence was an unforeseen complication of the cardiac cath in Las Vegas, then your verdict should be for the defendants.

The trial court's refusal to give the requested instruction was grounded on the fact that M Civ JI 15.06 deals with an outside force other than a person—like wind, flood and fire—as a proximate cause. No such outside force was claimed in this case. Rather, defendants consistently argued that negligence in the performance of the cardiac catheterization by physicians in Las Vegas was a proximate cause of some of plaintiff's injuries. The trial court held that the other jury instructions pertaining to proximate cause properly and adequately covered the issues. The requested instruction was simply not applicable. The trial court's refusal to give the requested instruction did not constitute an abuse of discretion. Clearly, negligence purportedly committed by another person is not the type of "outside force" referred to by M Civ JI 15.06.

Next, defendants argue that the trial court erred when it refused to apportion the capped noneconomic damages between past and future damages. After reviewing this issue of statutory interpretation de novo, we disagree. See *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004).

The jury awarded plaintiff $500,000 in past noneconomic damages and $3 million in future noneconomic damages. As required by MCL 600.6098(1), the trial court reviewed the verdict and determined that the lower noneconomic damages cap provided for in MCL 600.1483 applied. Thereafter, as required by MCL 600.6098(1), the court set aside the amount of noneconomic damages in excess of $366,000—the damage cap in effect at the time of the jury verdict. See MCL 600.1483. The court further held that the entirety of the $366,000 was awarded as past noneconomic damages.

Defendants argued in the trial court, as they do here, that the ultimate award must be apportioned consistent with the jury's past and future noneconomic damage awards. That is, only $52,286 (14.28 percent) should be awarded for past noneconomic damages and $313,714 (85.72 percent) should be awarded as future noneconomic damages. But, none of the statutes that pertain to the limitation on noneconomic damage awards requires such apportionment. For example, MCL 600.6304(5) provides:

> In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

MCL 600.6098(1) provides:

> A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

And, MCL 600.1483(1), in relevant part, provides:

> In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00[2] . . . .

These statutes do not require apportionment of the damages awarded by the jury. The rules of statutory interpretation are well-established: our goal is to ascertain and give effect to the intent of the Legislature. *Danse Corp v Madison Heights*, 466 Mich 175, 181-182; 644 NW2d 721 (2002). The Legislature is presumed to intend the meaning it plainly expressed; thus, clear and unambiguous language may not be subjected to judicial construction. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). By the same token, we must not read into a statute something that was not put there by the Legislature. *AFSCME v Detroit*, 468 Mich 388, 412; 662 NW2d 695 (2003).

Defendants, however, argue that "the remainder of Chapter 63 of the RJA demonstrates beyond question that the intent of the Legislature was that reduced noneconomic damage awards are to be apportioned in accordance with the jury's verdict." Defendants direct us to MCL 600.6305(1) and MCL 600.6306(1) and (3). First, MCL 600.6305(1) requires that any verdict or judgment rendered by a trier of fact in a personal injury action subject to that chapter include specific findings, including past and future economic and noneconomic damages. The jury verdict did, in fact, include those specific findings in this case.

Second, MCL 600.6306(1) provides for the entry of an order of judgment by the court after a verdict is rendered by a trier of fact in favor of a plaintiff. The statute mandates that the order of judgment list, in the prescribed order, the judgment amounts, as follows:

> (a) All past economic damages, less collateral source payments as provided for in section 6303.
> (b) All past noneconomic damages.
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
> (d) All future medical and other health care costs reduced to gross present cash value.
> (e) All future noneconomic damages reduced to gross present cash value.
> (f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.

Even if MCL 600.6305(1) and 600.6306(1) are read *in pari materi* with MCL 600.6304(5), 600.6098(1), and 600.1483(1) as defendants suggest they should be, nothing in either MCL 600.6305(1) or MCL 600.6306(1) leads us to conclude that the reduced noneconomic damages award must be allocated in any proportion between past and future damage awards.

[2] MCL 600.1483(4) provides for this limitation on noneconomic damages to be adjusted by the state treasurer at the end of each calendar year.

Third, in support of their argument that the reduced noneconomic damages award should be allocated between past and future damages, defendants direct us to MCL 600.6306(3), which provides:

> If the plaintiff was assigned a percentage of fault under section 6304, the total judgment amount shall be reduced, subject to section 2959, by an amount equal to the percentage of plaintiff's fault. When reducing the judgment amount as provided in this subsection, the court shall determine the ratio of total past damages to total future damages and shall allocate the amounts to be deducted proportionally between the past and future damages.

However, rather than supporting defendants' argument, MCL 600.6306(3) actually decimates it. This statutory provision demonstrates that the Legislature is well aware of how to word the statute so as to mandate that the trial court, when reducing the judgment amount as provided by §§§ 6304(5), 6098(1), and 1483(1), "determine the ratio of total past damages to total future damages and [ ] allocate the amounts to be deducted proportionally between the past and future damages." See MCL 600.6306(3). Therefore, we decline defendants' invitation to read into the statute something that the Legislature did not write into the statute. See *AFSCME, supra*. If the Legislature had intended such a result, the Legislature knew how to make its intentions clear.

In summary, the trial court did not err when it refused to apportion the reduced noneconomic damages award proportionately between past and future damages. The jury awarded plaintiff $500,000 in past noneconomic damages and, because of the statutory cap on noneconomic damages, the trial court reduced that award to $366,000. The trial court's award of the $366,000 as entirely past damages had the effect of setting aside the amount of noneconomic damages the jury awarded that was in excess of the statutory cap, including plaintiff's award of future noneconomic damages. This does not constitute a statutory violation. Had plaintiff only been awarded, for example, $100,000 in past noneconomic damages and $1 million in future noneconomic damages, obviously plaintiff's damage award of $366,000 would include some of both the past and future awards. That is not the case here. But for the statutory cap, plaintiff would have been entitled to a judgment of $3,500,000 in noneconomic damages pursuant to a jury verdict; instead, plaintiff's judgment is for $366,000 in noneconomic damages. This award does not constitute a statutory violation from which relief is warranted.

Finally, defendants argue that they are "entitled to JNOV, remittitur, or relief from the judgment as to future damages because [plaintiff] died four days after the jury verdict and before the judgment was entered." Defendants clarify their issue on appeal as follows: "Defendants are literally seeking JNOV as to the award of future damages." This claim fails.

This court reviews the trial court's decision on the motion for JNOV de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the decision, this Court views the evidence in the light most favorable to the nonmoving party to determine if the evidence failed to establish a claim as a matter of law. *Id*. In other words, "[a] motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury." *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

Here, defendants are arguing that because plaintiff died after the jury verdict was rendered but before the judgment was entered, they are entitled to JNOV with regard to the award of future economic and noneconomic damages. But, evidence that plaintiff was going to die within days of the trial being completed was not before the jury. Rather, the evidence that was before the jury included that plaintiff was sixty years old and that his life expectancy was an additional ten years. The jury, however, actually based its future damage awards on the conclusion that plaintiff would only live another five years. Nevertheless, the evidence was sufficient to create an issue of fact for the jury as to whether plaintiff was entitled to future economic and noneconomic damages. Therefore, defendants' motion for JNOV was properly denied.

To the extent that defendants are attempting to argue that they are entitled to a new trial on the ground that there was newly discovered evidence—plaintiff's death, we reject such argument. See MCR 2.611(A)(1)(f). A trial court's decision on a motion for new trial is reviewed for an abuse of discretion, but associated questions of law are reviewed de novo. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001).

As defendants acknowledged, to be entitled to a new trial based on newly discovered evidence, the moving party must show that (1) the evidence is newly discovered, (2) the evidence is not cumulative, (3) including the new evidence on retrial would probably cause a different result, and (4) the party could not with reasonable diligence have produced the evidence at trial. See *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Defendants argue that plaintiff's death satisfied this test: "[t]he evidence itself was not discovered until after trial; it is hardly cumulative; it will definitely change the result; and it could not have been produced at trial." Defendants accede that there are no Michigan cases on point that support their argument; this is not surprising. That plaintiff died days after the jury rendered its verdict cannot be "newly discovered evidence"—this "evidence" did not exist at the time of the trial, and could not have been presented to the jury, because plaintiff was alive. Therefore, the trial court did not abuse its discretion when it denied defendants' request for JNOV or new trial premised on this ground.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto