STATE OF MICHIGAN

COURT OF APPEALS

JOSEPHINE WILSON, as Personal Representative of the ESTATE OF RONALD WILSON, Deceased,

Plaintiff-Appellee,

v

MARY KEIM, CRNA,

Defendant-Appellant,

and

HENRY FORD HEALTH SYSTEM and S. GOVINDASWAMY, M.D.,

Defendants.

UNPUBLISHED
July 24, 2008

No. 275997
Wayne Circuit Court
LC No. 03-330454-NH

JOSEPHINE WILSON, as Personal Representative of the ESTATE OF RONALD WILSON, Deceased,

Plaintiff-Appellant,

v

MARY KEIM, CRNA,

Defendant-Appellee,

and

HENRY FORD HEALTH SYSTEM, HENRY FORD HOSPITAL, and S. GOVINDASWAMY, M.D.,

Defendants.

No. 276022
Wayne Circuit Court
LC No. 03-330454-NH

JOSEPHINE WILSON, as Personal Representative of the ESTATE OF RONALD WILSON, Deceased,

Plaintiff-Appellee,

v

MARY KEIM, CRNA,

Defendant-Appellant,

and

HENRY FORD HEALTH SYSTEM, d/b/a HENRY FORD HOSPITAL, and S. GOVINDASWAMY, M.D.,

Defendants.

No. 276446
Wayne Circuit Court
LC No. 03-330454-NH

Before: Meter, P.J., Talbot and Servitto, JJ.

PER CURIAM.

Defendant Mary Keim (defendant), a certified registered nurse anesthetist (CRNA), appeals as of right from a jury verdict in favor of plaintiff. She raises multiple allegations of error. Plaintiff also appeals, arguing that the trial court erred in (1) applying the lower noneconomic damages cap under MCL 600.1483 and (2) reducing the jury's award of past economic damages. We affirm the finding of liability but vacate certain portions of the award of costs. We also remand this case for a new determination regarding attorney fees and regarding whether the higher noneconomic damages cap applies, and we slightly modify the trial court's ruling concerning the past economic damages.

Plaintiff's decedent, Ronald Wilson, had eye surgery at Henry Ford Hospital on May 29, 2001. He suffered a cardiac arrest during the reversal of his anesthesia, and he died on July 13, 2001, as a result of complications from that cardiac arrest. Plaintiff sued defendant, as well as Henry Ford Health System and Dr. Sunitha Govindaswamy, M.D., the anesthesiologist. These appeals deal solely with the case against defendant.

The jury found for plaintiff and awarded $500,000 in past economic damages and $2,000,000 in past noneconomic damages. It concluded that defendant was twenty percent at

fault for Wilson's death and that Henry Ford and Dr. Govindaswamy were eighty percent at fault.[1]

I

Defendant argues that the trial court should have granted her motion for summary disposition, brought under MCR 2.116(C)(10), because plaintiff failed to bring forth sufficient causation evidence. Specifically, defendant contends that plaintiff's standard-of-care experts offered conflicting reasons for the cause of death.

We review de novo a trial court's grant or denial of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). "A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Pinckney Community Schools*, *supra* at 525. The moving party has the initial burden of supporting its position that there is no genuine issue of material fact by pointing to affidavits, depositions, admissions, or other documentary evidence in the record. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist. *Id*.

At his deposition, Charles M. Bauman, CRNA, one of plaintiff's expert witnesses, opined that Wilson had a cardiac arrest because of the effects of neostigmine, an anesthesia reversal agent. He stated that "neostigmine can cause a profound and irreversible bradycardia."[2] He further stated that, based on his review of the record, Wilson did not get "an adequate amount of . . . Robinul, to counteract the neostigmine." He indicated that Wilson had been given 4 milligrams (mgs) of neostigmine and .8 mgs of Robinul and that he would have given different amounts. Bauman clarified, however, that he did not view it as a breach of the standard of care for defendant to administer 4 mgs of neostigmine and .8 mgs of Robinul. What he did view as a breach was defendant's failure, after Wilson began experiencing bradycardia, to administer a single shot of 1 mg of atropine. Instead, defendant administered two shots of .4 mg of atropine. He stated that "administering fragmented doses of atropine in small amounts can cause a paradoxical reaction to the atropine and [the patient] can have . . . more . . . bradycardia." Bauman testified that he was not critical of defendant for administering morphine.

When asked to describe in what ways defendant breached the standard of care, Bauman stated:

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[1] The record reveals that a "percentage of fault" question was submitted to the jury, despite the fact that joint-and-several liability applied in this medical-malpractice case, because of concerns surrounding the eventual payment of insurance benefits by the different defendants' various insurance carriers.

[2] Bradycardia, alternately known as brachycardia, refers to a low heart rate.

> First breach in my opinion is that she failed to manage the anesthetic properly during the . . . surgery. In failing to manage that properly, she didn't keep the patient deep enough, and so that allowed the patient to buck during the anesthetic. That is against the standard of care, especially during an intraocular procedure. I feel . . . in my professional opinion she failed to manage the reversal of the anesthetic, and more specifically reversal of the neuromuscular blocker, which [resulted in] profound bradycardia and subsequent cardiac arrest.
>
> She failed to use the appropriate anesthetic and paralytic agents during the ocular procedure, and failed to use the appropriate reversal agent . . . atropine in the correct amounts to combat the profound bradycardia. And it is my opinion that she quite likely failed to ventilate the patient for a period of time, which may have compounded the bradycardia. I believe that's it.

As far as causation of injury, Bauman stated, "I think the failure to monitor properly the patient's heart rate after she gave the neostigmine was the critical point." He later elaborated by stating:

> I believe what happened, and I base this opinion on what I can see from the chart and the numeric values here on the chart, I believe she reversed the neuromuscular blocker [Nimbex] with neostigmine and Robinul and for some reason failed to pick up – immediately pick up on a rapid[ly] decreasing heart rate.

The following exchange also occurred:

> *Q*. Are you able to give a percentage that more likely than not had 1 milligram been given to this patient at the time that [defendant] administered the .4 atropine followed by the 3.4 that the outcome would be different?
>
> *A*. No.
>
> *Q*. And why is that?
>
> *A*. Because I don't know what the percentage would be, if there is a percentage. I don't know if there had ever been any studies done on that. All I know is that low doses of atropine cause a paradoxic reaction.

Dr. James Futrell, Jr., M.D., another of plaintiff's experts, offered primarily to establish the negligence of Dr. Govindaswamy and Henry Ford, testified at his deposition that he was critical of the fact that Wilson had been given morphine. He opined that Wilson suffered "a cardiac arrest caused by a preliminary respiratory arrest because he was not ventilated." He stated that morphine itself was not necessarily contraindicated, but

> the administration of morphine at that particular time created an . . . additional duty upon the nurse anesthetist and her superior, Dr. Govindaswamy, to monitor and to support this patient's respiration because of the potential for additive respiratory depression.

He stated that Wilson should have been monitored more closely and given breathing support.

When asked whether the administration of any drugs, besides morphine, contributed to Wilson's problems, he answered:

> The drugs that could have interacted along [the] way . . . included . . . the neostigmine [that was] given. Certainly [n]eostigmine is known and, in fact, a very dangerous drug even though we use it commonly for reversal. If you're not aware of the . . . muscarinic effect . . . of [n]eostigmine which is to stimulate the . . . vagus nerve and could cause brachycardia and cardiac arrest.
>
> That's the reason why Robinul . . . is given, to reverse the complicated side effect of [n]eostigmine. So those drugs were all part and were given along in that period creating some interesting chemistry in a patient who is cold, overventilated, given narcotics and then reversed and then not ventilated.

When asked about the administration of atropine, Dr. Futrell testified:

> The [a]tropine in the dose that it was given in – for a patient that's 255 pounds when you have a – a pulse rate of 20 was low. .4 of [a]tropine is probably the lowest initial dosage to be giving any adult patient. In fact, the literature supports evidence that the lower doses of [a]tropine can, in fact, cause paradoxical effects. And, you know, the more appropriate[] dose for this patient in this particular setting might be one milligram to two milligrams of [a]tropine to reverse what they thought would be the effects of neostigmine.

Dr. Futrell stated that he was critical of the fact that Wilson was given a first dose of only .4 mgs of [a]tropine.

After defendant moved for summary disposition, arguing that plaintiff did not prove causation because Bauman and Dr. Futrell provided conflicting testimony regarding the cause of death, the court denied the motion, stating:

> It was defendant Mary Kiem, a certified registered nurse anesthetist or CRNA that [sic] moved for summary disposition. This is a claim that alleges the negligent administration of anesthesia that lead [sic] to the death of the deceased.
>
> Plaintiff of course must prove that the defendant breached the standard of care and that the defendant's negligent conduct caused damage.
>
> Plaintiff must also prove that the opportunity to survive or achieve a better result was reduced by greater than 50 percent because of the malpractice.
>
> Expert testimony in malpractice cases is usually required to prove the breach of the standard of care and causation.
>
> Here, the plaintiff[']s] standard of practice expert Bauman . . . indicated that the deceased suffered cardiac arrest, that the defendant failed to note a

> decreased heart rate soon enough and administered too low a [dose] of [a]trophine [sic] in an attempt to resuscitate the plaintiff [sic].
>
> Plaintiff's causation expert, Futrell, . . . indicated that the deceased suffered respiratory arrest which was due to the defendant's negligent administration of morphine to an underventilated patient.
>
> The deposition testimony of Bauman [and] Futrell, Bauman at page 50 lines 1 through 7 and Futrell page 103 lines 20 through 25, indicate that the failure to ventilate the patient contributed to the death. Importantly, causation expert Futrell indicated that that particular failure breached the standard of care.
>
> It is in this respect that the testimony of the 2 experts can and should be harmonized. There are certainly instances wherein their testimony appears contradictory, such will be for a jury to sort out.
>
> Additionally, plaintiff has met her burden that the deceased lost greater than a 50 percent chance of survival as a result of defendant's negligence.
>
> Each of the experts testified that if the appropriate care had been rendered, the patient would not have arrested, suffered brain damage and death. Proper monitoring and ventilation would likely have not resulted in cardiac arrest and/or respiratory failure and thus death.
>
> Accordingly the motion for summary disposition is denied.

The trial court did not err in denying the motion for summary disposition. The two experts' testimony was not clearly inconsistent. Bauman mentioned a lack of ventilation of Wilson, and Dr. Futrell was critical regarding the dose of atropine. While, as the trial court noted, there were inconsistencies in their deposition testimony, the testimony nonetheless left open a genuine question of material fact.

Defendant also takes issue with Bauman's inability to quantify, with specificity, the chance of a different outcome if Wilson had been given 1 mg of atropine. However, despite Bauman's reluctance to provide a specific percentage, he testified that the failure to give 1 mg of atropine in a single shot "[a]bsolutely" made a "difference." We view this deposition testimony as sufficient to establish the requisite causation. See MCL 600.2912a(2). Reversal is unwarranted.

II

Defendant additionally contends that the trial court should have granted her motion for a directed verdict based on a lack of causation evidence at trial.[3] As noted in *Smith v Jones*, 246 Mich App 270, 273; 632 NW2d 509 (2001):

> Motions for a directed verdict are reviewed de novo. In reviewing a denied motion for a directed verdict, this Court must determine whether the party opposing the motion offered evidence on which reasonable minds could differ. The test is whether, viewing the evidence in the light most favorable to the adverse party, reasonable persons could reach a different conclusion. If so, the case is properly left to the jury to decide. [Citations omitted.]

Plaintiff contends that there was no admissible causation evidence concerning plaintiff's "atropine" theory of liability because (1) plaintiff's attorney admitted that Bauman was not qualified to testify about the effects of atropine and (2) the trial court sustained defendant's objections to Dr. Futrell's offering testimony concerning the possible change in outcome if the deceased had been given a different dose of atropine.

Defendant misinterprets the record. Plaintiff's attorney did not admit that Bauman was not qualified to testify about the effects of atropine. Instead, he admitted that Bauman was not qualified to testify about the difference it would have made if defendant had called a Code Blue[4] sooner.[5] Moreover, Dr. Futrell testified, *without objection*, that had Wilson been administered the appropriate dose of atropine at the appropriate time, it was more likely than not that "the cardiac arrest could have been eliminated." Dr. Futrell gave this testimony in response to plaintiff's attorney's question regarding whether a different administration of atropine "would have made a difference in my client's outcome." It was only when plaintiff's attorney asked the following question that defendant's foundational objection was sustained: "And had likewise that been done in the matter [sic] you just described, do you have an opinion as to whether my client would likely have survived and lived what was a normal life for him?" In light of this record, we reject defendant's assertion that the trial court precluded Dr. Futrell from offering any testimony concerning the possible change in outcome if Wilson had been given a different dose of atropine. Defendant's appellate argument concerning the atropine claim is without merit.

Defendant additionally contends that plaintiff's "delay" claim, concerning the calling of the Code Blue, was untenable because there was insufficient evidence that defendant delayed in

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[3] The trial court denied defendant's directed verdict motion without providing specific reasoning.

[4] A liability theory advanced by plaintiff at trial was that defendant failed to call a Code Blue in a timely manner after Wilson suffered a cardiac arrest. It was explained at trial that a Code Blue is "called" when a patient is in imminent danger of dying. Pushing the Code Blue button alerts appropriate personnel who have been trained to respond to such a crisis.

[5] Plaintiff's attorney indicated that Dr. Futrell could "fill[] in" the proximate cause gaps in Bauman's testimony.

calling the Code Blue. She contends that the trial court should have granted a directed verdict with regard to this theory.

Defendant's notes in the anesthesia record indicate that Wilson's heart rate dropped precipitously at around 2:50 p.m.; however, defendant testified that she mistakenly recorded the heart-rate drop in the wrong time-frame box. She indicated that the drop actually occurred at 3:00 p.m., which is when the Code Blue was called. Tanya[6] Livingston, an assisting nurse, testified, based on her notes, that Wilson's heart rate dropped at 2:53 p.m. She testified that she then called for Dr. Govindaswamy and then pressed the Code Blue button. She stated that she was not sure if she looked at a clock when recording the 2:53 p.m. time in her notes.

Defendant argues that the times recorded in defendant's and Livingston's notes were mistakes or inaccurate estimates that occurred because of the cardiac emergency and that no reasonable juror could conclude that a delay occurred. We disagree. The charts were evidence that Wilson's heart rate dropped precipitously at around 2:53 p.m., and additional evidence established that the Code Blue was called at 3:00 p.m. Accordingly, there was sufficient evidence in the record of a delay, and defendant's appellate argument is unavailing.

III

Defendant claims that the trial court committed errors requiring reversal in failing to enforce three of its own orders. This issue could be viewed as involving questions of law. We review questions of law de novo. *Shinkle v Shinkle*, 255 Mich App 221, 224; 663 NW2d 481 (2003). Given that the issue also involves the admission of evidence and the denial of mistrial motions, it may also be appropriate to review this issue using the abuse-of-discretion standard. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999); *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997). At any rate, under either standard of review, we find no basis for reversal.

First, we note that we are critical of defendant's failure to include specific page references to the transcripts as part of her appellate argument. Instead, defendant refers back, in general, to her statement of facts. This is inappropriate. As noted in MCR 7.212(C)(7), the argument portion of an appellant's brief is to contain specific page references to the appropriate portion of the record. Nevertheless, we will review the issue, although it is not entirely clear to us to which of the trial court's actions defendant specifically objects.

Defendant first claims that the trial court failed to enforce its order that Dr. Futrell could not offer standard-of-care testimony against defendant. In response to a motion filed by defendant, the court issued an order stating that "Dr. Futrell shall not testify concerning standards of practice applicable to Defendant Mary Keim, CRNA, nor alleged violations of those standards." At trial, Dr. Futrell criticized defendant's recordkeeping. He also indicated that a 1 mg dose of atropine should have been administered. Defendant moved for a mistrial, stating that

[6] This name is also, at times, spelled "Tayna" in the record.

Dr. Futrell had improperly offered standard-of-care testimony against defendant. The court denied the motion, stating, in part:

> First, I do not believe that Dr. Futrell has testified with regard to any breach of the standard of care by Nurse Keim.
>
> He can permissibly testify to what he believes occurred, how it occurred, what occurred, why it occurred. And that's what he has testified to.

We find no error requiring reversal. Dr. Futrell's testimony was not specifically directed toward establishing that defendant violated the standard of care for CRNAs. Instead, he gave an overview of what he believed happened in the case. This was appropriate and was necessary to place his testimony against Dr. Govindaswamy in context.

Defendant next claims that the trial court failed to enforce its order that plaintiff could not argue or infer negligence based on the lack of complications from a November 2000 surgery that Wilson had undergone. Before trial, the court had ruled that "no negligence can be drawn" from the fact that Wilson did not suffer complications during a prior surgery. However, it also ruled that the prior surgery was admissible as it related to "causation and . . . damages." At trial, Dr. Futrell indicated that the prior surgery was significant because it showed that "the patient would be able to undergo a similar procedure under similar circumstances with appropriate monitoring, etcetera, without any particular expected complication." He later testified that the prior surgery "demonstrates that with appropriate management, there's a reasonable expectation . . . that you will be able to manage the patient without any unusual expected complications again." Defendant moved for a mistrial, and the trial court denied the motion, stating:

> I'm satisfied all the testimony goes to the assessment of risk. And that's what is I think is the thrust of the questioning. And it does not go to the issue that was addressed, and that is because if there was [sic] – how can I put it – it is not evidence of malpractice now that there was no bad result before.

The trial court did not err in its ruling. Evidence of the prior surgery was relevant, as the trial court stated, because it helped to demonstrate that Wilson was not subject to any increased risk of harm from anesthesia. Moreover, the trial court instructed the jurors as follows:

> I also charge you that in considering any breach of the standard of care by Henry Ford Health System or Mary Keim, you are not to draw any inference of whether or not there was negligent care on May 29th 2001, from the lack of complications following the November 2 thousand [sic] eye surgery.

Under the circumstances, reversal is unwarranted.

Defendant next claims that the trial court failed to enforce its order that there could be no allegations of malpractice based on defendant's alleged failure to chart appropriately. Before trial, the court ruled, in response to a motion filed by defendant, as follows: "With regard to charting, . . . the charting is clearly admissible. It's not – it cannot be malpractice in and of itself. But it certainly can be evidence that tends in that direction or the other direction. To relevant evidence [sic], it can be introduced." The court also stated, "what a professional puts in the chart

or doesn't put in the chart, is certainly admissible." It added, "[The defense attorneys] can't argue that the failure to chart or the chart is incorrect, the chart is malpractice itself. They cannot argue that."

Defendant has pointed to no instance in which plaintiff violated the trial court's order regarding charting. The testimony by certain witnesses about improper charting was allowable; plaintiff was merely precluded from arguing that the improper charting itself constituted malpractice. Defendant has not demonstrated that this occurred, and reversal is unwarranted.

IV

Defendant argues that the trial court should have granted her motion for a directed verdict or her motion for a judgment notwithstanding the verdict (JNOV) because plaintiff failed to comply with MCL 600.2912b.[7] The standard of review applicable to a motion for a directed verdict is set forth in section II of this opinion. The standard of review applicable to a motion for a JNOV is the same. *Smith*, *supra* at 273-274.

Defendant claims that the notice of intent (NOI) required by MCL 600.2912b was not at all directed toward defendant, the standard of care provided was nonspecific, there was no appropriate statement regarding the manner in which the standard of care was breached, the list of actions required to comply with the standard of care was inadequate, and it was not sufficiently alleged that a breach of the standard of care was a proximate cause of the death.

We conclude that the trial court correctly determined the NOI to be compliant with the statutory requirements and correctly denied the motions for a directed verdict and a JNOV.

MCL 600.2912b(4) mandates that a NOI contain the following information:

> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
>
> (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
>
> (e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

[7] In denying defendant's motion for a directed verdict and her motion for a JNOV, the trial court rejected this argument without elaboration.

The purpose of the NOI is to notify "potential malpractice defendants of the basis of the claims against them." *Roberts v Mecosta Co Gen Hosp (Aft Rem)*, 470 Mich 679, 696 n 14; 684 NW2d 711 (2004). "The expected level of specificity must be considered in light of the fact that discovery would not yet have begun." *Boodt v Borgess Med Ctr (Boodt I)*, 272 Mich App 621, 626; 728 NW2d 471 (2006), reversed on other grounds *Boodt v Borgess Med Ctr (Boodt II)*, ___ Mich ___; ___ NW2d ___; 2008 WL 2601350 (2008).[8] There must be enough details to "allow the potential defendants to understand the claimed basis of the impending malpractice action . . . ." *Roberts*, *supra* at 691-692 n 7. Additionally, the NOI only need have the required information present in an accessible, discernable form. *Boodt I*, *supra* at 628. "The important principle is that [when reading a NOI] a defendant must not be forced 'to guess upon what grounds plaintiff believes recovery is justified,' but at the same time plaintiffs should not be subject to the 'straightjacket' of '[e]xtreme formalism . . . .'" *Id*. at 627, quoting *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Therefore, a NOI is reviewed as a whole. *Boodt I*, *supra* at 630.

The NOI was sufficient according to the statutory requirements and the above case law. Paragraph 1 provided a lengthy statement of facts establishing the factual basis for the claim. See MCL 600.2912b(4)(a). Defendant's claim that the NOI was not directed towards her is unfounded because defendant was mentioned in paragraph 1 as the attending CRNA, and further sections of the NOI set forth the standard of care, breach, actions that should have been taken to avoid the breach, and proximate cause of the injury with regard to the CRNA. The lack of specific negligent acts or omissions directly attributed to defendant in the NOI was by no means fatal; discovery had not yet taken place, so a high level of specificity was not required. See *Boodt I*, *supra* at 626. It was clear that this document was directed towards defendant, among others, and it gave appropriate notice regarding the basis of the suit against her.

The standard of care was also properly stated in paragraph 2. This paragraph stated, in part, that the CRNA and others were required to:

> a. Properly manage the administration of anesthesia during an ocular procedure;
>
> b. Properly monitor a patient under anesthesia during an ocular procedure, so as to avoid causing the patient to "buck" during the procedure;

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[8] Although in *Boodt II*, 2008 WL 2601350, 1, the Supreme Court declared the NOI involved in the case to be invalid for not properly stating the manner in which the breach of the standard of care was the proximate cause of the injury, it did not overrule the general principles from *Boodt I* that are cited in this opinion. In fact, it appears that the Supreme Court found the statement of proximate cause insufficient in spite of its consideration of the general principles from *Boodt I*; the Court ruled, "*[e]ven when the notice is read in its entirety*, it does not describe the manner in which the breach was the proximate cause of the injury." *Id*. (emphasis added). The Supreme Court also noted that a NOI is provided early in the proceedings and that it need not be perfect. *Id*.

c. Properly manage the reversal of anesthesia following an ocular procedure;

* * *

e. Use the appropriate anesthetic and paralytic agents during an ocular procedure;

f. Use the appropriate reversal agents following the administration of anesthesia;

g. Appreciate a patient's medical history when determining the appropriate anesthesia agents and procedures . . . .

These statements were sufficient to provide clear notice about the basis of the malpractice action. The fact that this standard of care was attributed to not just defendant but to several others was not fatal because the same standard of care could apply to personnel in other positions.

Additionally, the allegations of the manner that the standard of care was breached (paragraph 3) and the statement of which actions should have been taken to comply with the standard of care (paragraph 4) were proper. Although both sections repeat what was alleged in the "standard of care" paragraph, that does not cripple the NOI because both sections fulfill the statutory purpose, and, again, there need not have been a high level of specificity, considering that discovery had not yet taken place. *Id*. Further, the NOI suitably stated that the breach was the proximate cause of death in paragraph 5 by referring back to the standard of care in paragraph 2 and to the way that standard was breached in paragraph 3. Paragraph 5 also indicated that Wilson suffered a cardiac arrest as a result of the breach and that this led to his death.

The Supreme Court recently declared a statement of proximate cause in a NOI insufficient because it did not set forth the manner in which it was alleged that the breach was the proximate cause of the injury. *Boodt II*, 2008 WL 2601350, 1. We conclude that this holding does not affect our opinion in the present case because the NOI in the present case did contain the required information – as noted, it alleged that defendant's breach induced a cardiac arrest that ultimately led to death.

When the NOI is viewed as a whole, we find no basis for reversal.

V

Defendant contends that the trial court should have granted her motion for a directed verdict or her motion for a JNOV because Bauman was not familiar with the applicable standard of care.

Defendant takes issue with the following exchange that occurred during Bauman's testimony:

Q. And didn't you testify that you're not familiar with how other CRNA's provide care? You only know what you do and what you were taught?

A. Yes.

Q. And you would expect that you were taught the best practice, not the average level of practice, right?

A. I absolutely believe that. Yes.

Defendant contends that Bauman was only qualified to testify about his own practices and not about the average level of practice. Defendant made a similar argument in her motion for a directed verdict. The trial court rejected the argument without any specific reasoning. Defendant also made a similar argument in her motion for a JNOV, and the trial court again rejected the argument without elaboration.

We find no basis for reversal. Bauman testified that a reasonably prudent CRNA would not start a case without having a 1 mg syringe of atropine drawn up and ready to go. He also testified that a reasonably prudent CRNA would immediately call a Code Blue when a patient goes into cardiac arrest. There were other instances, too, in which Bauman testified about what a reasonably prudent CRNA would do. Despite his belief that he was given a superior education, and despite his acknowledgment that he was not familiar with precisely how other CRNAs provide care, the record ultimately reflects that Bauman was indeed familiar with the standard of care applicable in this case.

Defendant also suggests that Bauman was not familiar "with the local standard of practice for CRNA's in Detroit in 2001, because his only testimony was that he had not worked in the Detroit [sic] since the early 1990's." This argument is without merit. There is simply no indication that the standard of practice in Detroit in 2001 was somehow different from the standard of care with which Bauman was familiar. Bauman testified regarding what a reasonably prudent CRNA would do, and there is no reason to believe that these actions should somehow have been different in the Detroit area.

VI

Defendant argues that the trial court should have granted her motion for a directed verdict or her motion for a JNOV because plaintiff failed to file an affidavit of merit that complied with MCL 600.2912d.[9] Specifically, defendant claims that the affidavit contained no standard of care for a CRNA, contained no statement of actions that should have been taken to comply with the standard of care, and did not state the manner in which defendant's negligent acts were a proximate cause of the plaintiff's death. Also, defendant argues that there was no statement that

[9] In denying defendant's motion for a directed verdict and her motion for a JNOV, the trial court rejected this argument without elaboration.

the standard of care was breached by the health professional receiving the notice, because the affidavit only stated that "[d]efendants" deviated from the standard of care.

MCL 600.2912d(1) requires that an affidavit of merit set forth the following:

> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

We conclude that Bauman's affidavit of merit was acceptable. The affidavit in question did not have the mandatory information enumerated in separate paragraphs, but the information was discernable within the entire document. The requirements of a standard of care, breach, and actions that should have been taken to comply with the standard of care could be found in paragraph 4. This paragraph stated, in part, that defendants should have:

> a. Properly managed the administration of anesthesia during an ocular procedure;
>
> b. Properly monitored a patient under anesthesia during an ocular procedure, so as to avoid causing the patient to 'buck' during the procedure;
>
> c. Properly managed the reversal of anesthesia following an ocular procedure;
>
> * * *
>
> e. Used the appropriate anesthetic and paralytic agents during an ocular procedure;
>
> f. Used the appropriate reversal agents following the administration of anesthesia;
>
> g. Appreciated a patient's medical history when determining the appropriate anesthesia agents and procedures . . . .

There is no reason to believe that a reader would be forced to guess what the standard of care was or guess the manner in which the standard was breached. Moreover, the statement of proximate cause in paragraph 5 was appropriate because it referred back to paragraph 4; a reader

could properly understand that, but for the negligent acts or omissions in paragraph 4, the patient would not have died. Paragraph 5 stated: "As a proximate result of negligent acts and/or omissions of [d]efendants as set forth above, [p]laintiff [sic] suffered unnecessary pain and ultimately died." While *Boodt II*, 2008 WL 2601350, 1, indicated that a general statement of proximate cause such as this is insufficient, we do not view *Boodt II* as binding with respect to this issue because *Boodt II* dealt with a NOI and not an affidavit of merit.[10] The affidavit's information was sufficiently specific, considering that discovery had not yet taken place. The affidavit fulfilled its purpose of ensuring trustworthy medical testimony and discouraging frivolous lawsuits. *Nippa v Botsford Gen Hosp*, 257 Mich App 387, 394; 668 NW2d 628 (2003).

Additionally, it was of no import that the affidavit was directed only towards the "defendants," because Bauman is clearly a CRNA, as stated in paragraph 2, and could only certify claims against another CRNA. Defendant was identified as a CRNA in the caption, and the affidavit properly set forth her alleged negligence.

The trial court correctly found Bauman's affidavit of merit to be sufficient and appropriately denied defendant's motions for a directed verdict and for a JNOV.[11]

VII

Defendant argues that the court erred in failing to find that the jury's award for medical expenses should have been lower. Defendant asserts that the jury's award included $124,168 for past medical expenses. Defendant contends that Health Alliance Plan (HAP) essentially agreed to reduce the charges of $124,168 because it paid $4,271 and asserted a lien for $4,271; defendant argues that this amount, therefore, represented the actual medical expenses. Defendant contends that the trial court should have reduced the jury's award by $119,897 ($124,168 minus $4,271).

The parties frame this issue as one involving a "collateral source." See MCL 600.6303. Defendant states that $119,897 was "subject to collateral source reduction." MCL 600.6303(2) states that "[t]he court shall determine the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source," and MCL 600.6303(1) indicates that a judgment must be reduced by the collateral-source amount. Evidently, defendant believes that the $119,897 should be viewed as "paid or . . . payable by a collateral source" because HAP essentially agreed to absorb that amount of money and instead settle for $4,271.

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[10] As explained in section IV of this opinion, the NOI in this case contained a sufficient statement of proximate cause.

[11] Defendant makes the additional argument that plaintiff's attorney admitted at the directed-verdict motion hearing that Bauman was not qualified to offer opinions concerning proximate cause. Defendant argues that this provides additional support for her argument that the affidavit of merit was inadequate. This argument actually goes towards the sufficiency of the evidence at trial, not the sufficiency of the affidavit of merit. See, e.g., *Sturgis Bank & Trust Co v Hillsdale Comm Health*, 268 Mich App 484, 494-495; 708 NW2d 453 (2005).

We find no abuse of discretion.[12] The trial court did not err in refusing to order a new trial, remittitur, or relief from judgment.

We initially note that the amount of the lien as set forth in the documentation and as argued at the post-trial motion hearing was $4,241.54, not $4,271. The September 2006 letter from HAP stated, in part:

> Per my correspondence, I indicated I need to confirm the total amount paid by the Plan relating to this claim. The Plan has confirmed payment in excess of $100,000, however, most of those claims are "capitulated" and therefore will not be asserted for reimbursement. The total amount of paid claims for which the Plan seeks reimbursement is $4,241.54.
>
> This will confirm that the Plan has agreed to resolve this matter for the sum of $4,241.54 as full and final payment.

At the motion hearing, plaintiff's attorney argued:

> They [HAP] said the bill has been some term that means like recycled or recapitulated so they weren't asking us to reimburse that.
>
> But the fact of the matter is under the wrongful death statute we are entitled to the medical expenses. We put in the medical expenses which were a hundred and 24 thousand.

The attorney also argued that

> the jury may not even have given us that hundred and 24 thousand dollars. Those past economic damages could have been for wages and services around the house and all the other economic damages that we asked for. And it would be inappropriate to reduce that without some showing. I mean, the defendants have the burden of proof on this issue [and] they haven't come forward [with] anything.

After the defense attorneys made their arguments for a reduction in the damages award, the court stated:

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[12] Defendant frames this issue in the context of the trial court's refusal to order a new trial, remittitur, or relief from judgment. The abuse-of-discretion standard of review is applicable. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001) (new trial); *Coble v Green*, 271 Mich App 382, 392; 722 NW2d 898 (2006) (remittitur); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 300; 517 NW2d 319 (1994) (relief from judgment).

> But see, here you're addressing what is a fundamental process and that is trying to determine what the jury meant when they came back with a specific dollar amount.
>
> I mean at the heart of the jury system is the discretion we give these folks in effect to do what they want to do.

One of the defense attorneys responded that the only basis in the record for economic loss were the three figures recited by plaintiff's attorney: $169,000 for lost wages, $21,403 for lost household services, and $124,168 for medical bills, for a total of $314,571. The defense attorney stated:

> So, since the jury verdict exceeded that amount,[13] and there is no other basis to support it, they must have included the medical bill and therefore you don't need a specific breakdown, because there is no other possible way to explain the magnitude then of the economic award because the only three things they argued add up to less than [sic].

Plaintiff's attorney responded that her client had a bill for $124,168 at the time of trial in July 2006 and that the jury properly considered it.

The trial court concluded that there should be no reduction in the damages amount based on the medical bill. As far as reasoning, it stated only that "given the posture of this case there should be no reduction."[14] We find no abuse of discretion in the court's ruling.[15] The trial court did not err in refusing to order a new trial, remittitur, or relief from judgment.

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[13] The jury awarded $500,000 for "medical expenses, loss of financial support, loss of service and/or loss of gifts or valuable gratuities."

[14] A couple of months later, in December 2006, after defendant argued that the evidence supported no amount of past economic damages beyond the $314,571 recited by plaintiff's attorney, the court ruled:

> I am satisfied the record does not support recovery of more than 3 hundred 14 thousand 5 hundred and 71 dollars for past economic loss in this case. It's quantifiable to the penny under the circumstances of this case. So the judgment is reduced from 5 hundred thousand to 3 hundred 14 thousand 5 hundred 71 with regard to past economic damages.

[15] Defendant frames this issue in the context of the trial court's refusal to order a new trial, remittitur, or relief from judgment. The abuse-of-discretion standard of review is applicable. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001) (new trial); *Coble v Green*, 271 Mich App 382, 392; 722 NW2d 898 (2006) (remittitur); *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 300; 517 NW2d 319 (1994) (relief from judgment).

The pertinent case is *Zdrojewski v Murphy*, 254 Mich App 50; 657 NW2d 721 (2002). In that case, the defendants made a similar argument to that made by defendant here. This Court stated:

> In this case, plaintiff's health care insurers, Blue Cross Blue Shield of Michigan (BCBSM) and Medicare[,] made payments for plaintiff's medical care. Under MCL 600.6303(4), these payments would meet the initial definition of a collateral source benefit. However, BCBSM and Medicare also exercised their right to liens against plaintiff's verdict. According to documents filed in the lower court record, as of April 1999, Medicare was seeking approximately $20,000 in benefits paid and BCBSM was seeking approximately $1,700. MCL 600.6303(4) further states that "benefits paid or payable by a . . . corporation, or other legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised pursuant to subsection (3)" are not a collateral source. Here, as of April 1999, BCBSM and Medicare properly exercised their liens under the statute. The record is not clear whether they have further exercised their lien rights since then or whether they may do so in the future. *Regardless of those considerations, the statute does not make any provision for a situation where a lien has been exercised, but for an amount less than the lienholder would be legally entitled to recover.* Because the statute clearly states that benefits subject to an exercised lien do not qualify as a collateral source, and BCBSM and Medicare exercised their liens, health insurance benefits provided by BCBSM and Medicare to plaintiff do not constitute a collateral source under MCL 600.6303(4). [*Zdrojewski*, *supra* at 70 (emphasis added).]

Here, defendant admits that HAP exercised a lien. This lien was arguably for a lesser amount than it was entitled to recover. *Zdrojewski* instructs that in this situation, the health insurance benefits do not constitute a collateral source under the law. Accordingly, defendant's argument on appeal is without merit.

VIII

Defendant claims that the trial court erred in allowing plaintiff to argue to the jury that defendant (1) failed to review Wilson's medical records from the previous procedure, (2) failed to respond to Wilson's cardiac arrest, (3) failed to hand-bag[16] Wilson, (4) failed to administer an appropriate initial dose of atropine, and (5) failed to call a Code Blue sooner. Defendant claims that plaintiff was not entitled to argue these theories because they were not sufficiently set forth in the NOI or Bauman's affidavit of merit and were also not sufficiently apparent from the discovery process. This argument is simply a rehash of the arguments set forth in sections IV and VI of this opinion and need not be decided anew. The pre-suit notice was sufficient; plaintiff simply refined her theories as the case progressed.

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[16] This term refers to manual, artificial ventilation.

Defendant also claims that plaintiff was not entitled to argue some of these theories before the jury because the trial court had earlier ruled that the only viable theories related to the administration of atropine and the alleged delay in calling the Code Blue. We decline to address this issue because it was not listed as part of the statement of questions presented for appeal. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

IX

Defendant next argues that there was no admissible causation evidence concerning the atropine claim because (1) plaintiff admitted that Bauman was not qualified to testify regarding the cardiac effects of atropine and (2) the trial court sustained defendant's objection to having Dr. Futrell offer that testimony. Defendant argues that the court should have granted her a directed verdict on the atropine claim. Defendant's argument is without merit. It is merely a reiteration of part of defendant's argument set forth in section II of this opinion, and we again reject it.

Defendant additionally contends that the trial court failed to inquire into the scientific bases of Bauman's and Futrell's testimony. See MCL 600.2955.

The day before trial, defendant's attorney mentioned that he might have objections to certain expert testimony, "depending on their testimony" at trial. Then, after the second day of trial and after Dr. Futrell had offered some testimony, defendant argued that Dr. Futrell was obligated to produce literature to support some of his medical testimony. Defendant's attorney stated:

> And I think Your Honor has a gate keeping role with regard to keeping evidence in or out that does not have a scientific basis.
>
> And this witness had not done any personal research on these drugs, so he has to look somewhere else. And we don't have any idea where he's looking for the information.

Plaintiff responded that defendant had waited too long to raise such a challenge. The trial court stated, "in the Final Pre-Trial Order and the discussions we had Thursday, there was never a specific objection to specific portions of any expert's testimony or the basis thereof." The court also stated: "The witness testified in this particular area, which []is now apparently being challenged, that this is common knowledge within the profession. That this is well-known and accepted." The court stated that it had a responsibility to move the case along and that defendant had waited too long to challenge the scientific basis for the testimony.

We find no abuse of discretion in the trial court's ruling. See *Hottman*, *supra* at 177 (admission of evidence is reviewed for an abuse of discretion). Dr. Futrell had given a pretrial deposition, and defendant could have raised an objection to the scientific foundation of his testimony before the second day of trial. Dr. Futrell testified that he had been practicing for twenty-six years, that he specialized in anesthesiology, that he had taught anesthesiology residents. He also testified that he was a member of a committee that dealt with "safety" and the "reduction of complications" in anesthesiology. Later, after giving some specific medical testimony and being asked how he learned the information, he stated that it was "part and parcel"

of his training. We conclude that the trial court properly considered the lateness of the request and the nature of Dr. Futrell's testimony and properly exercised its discretion in declining to hold an evidentiary hearing.

As for Bauman, the portions of the record to which defendant refers contain no request for a hearing regarding the scientific basis of Bauman's testimony. They reveal that defendant simply made a brief objection with regard to "foundation," which the trial court overruled. Accordingly, defendant's appellate argument that the trial court should have held a hearing is unavailing.

X

Defendant argues that the trial court erred in granting plaintiff's motion for costs.[17] We review this issue using the abuse-of-discretion standard. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Comm Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997).

Defendant makes the bald statement that "[p]laintiff's request for expert witness fees as costs did not include a breakdown of charges, the hourly rate, or the tasks that went into generating the fees." However, defendant cites no authority indicating that these items were necessary before costs could be awarded. As noted in *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959),

> [i]t is not sufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."

Defendant also states that there was no basis for awarding fees to three of the experts because they did not testify at trial. However, MCL 600.2164, the statute dealing with expert witness fees, does not require that an expert testify in order to receive compensation. Defendant then states that "[p]laintiff's remaining experts did not provide documentation to support their exorbitant fees." We conclude that this general, nonspecific statement is simply insufficient to raise an issue before this Court. See *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 253; 673 NW2d 805 (2003) (dealing with inadequate briefing). Defendant also contends that a hearing should have been held with regard to various expert witness fees. Once again, defendant fails to support her argument and has therefore waived it. *Wilson*, *supra* at 243.

Defendant mentions that plaintiff was awarded $6,311.95 for photocopying and shipping records to experts. She contends that there was no statutory authority to award costs for these activities because "[t]here is no provision within the court rules or statute[s] permitting recoupment of costs for photocopying and mailing records." However, MCR 2.625(A)(1) states that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the

[17] The court granted $97,718.23 in costs.

action." There is no statute or court rule prohibiting "costs" from including the expenses associated with photocopying and shipping records to experts. These expenses were, in fact, costs incurred; as the trial court noted, "[t]hey [were] actual real costs." At first blush, then, it appears that the $6,311.95 was allowable. However, in *JC Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996), a party had obtained reimbursement for the expenses associated with "certified copies of [a] criminal conviction, [a] mediation fee, and [an] exhibit enlargement . . . ." This Court reversed, stating that "there [was] no statutory authority" to award those particular costs. *Id*. The Court essentially indicated that costs are allowable only if a statute or court rule provides for the particular type of costs at issue. *Id*. *JC Building Corp II* is binding on us under MCR 7.215(J)(1). Therefore, we must reverse the award of $6,311.95 in costs. Further support for this conclusion is found in *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 622; 550 NW2d 580 (1996).

Defendant next mentions that the trial court awarded reimbursement for the costs of depositions, for a total of $9,644.55.[18] Defendant contends that plaintiff failed to provide any documentation to verify that the transcripts were filed with the clerk's office, as required by *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 465; 633 NW2d 418 (2001). We agree. MCL 600.2549 states:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Under this plain statutory language and in accordance with *Rickwalt*, *supra* at 465, the deposition expenses here were not recoverable as costs because there was no evidence that the deposition transcripts were filed in a clerk's office or read into evidence. We must reverse the award of $9,644.55 in costs.

Defendant next argues that the trial court erred in awarding $2,249.18 for "subpoena/service fees" and $415 for motion fees.[19] Defendant contends that there was no statutory authority for awarding the "subpoena/service fees." We agree. Plaintiff cites no provision allowing for these types of costs, and therefore we must reverse the award. See, generally, *JC Building Corp II*, *supra* at 429. With regard to the $415, defendant argues that plaintiff failed to provide documentation regarding that amount of money. We disagree. Plaintiff attached to its bill of costs photocopies of various records supporting its request for the $415. Defendant also argues that there is no statutory authority for recovering case-evaluation fees as costs. The documentation indicates that the $415 included $150 for those fees. Plaintiff

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[18] As with the $6,311.95, the trial court allowed the $9,644.55 because it was an "actual real cost[]."

[19] The court awarded these fees because they were actual costs incurred by plaintiff.

cites no provision for allowing these case-evaluation fees as costs, and therefore we must reverse the $150 award of costs associated with case-evaluation fees.

Defendant next argues that the trial court erred in failing to allocate costs between defendant and Henry Ford. To support her argument, defendant cites a case that interprets the case-evaluation court rule, MCR 2.430. As set forth in section XI of this opinion, the trial court did not err in its interpretation of the case-evaluation court rule. Defendant was responsible for reimbursing all allowable costs in this case involving joint-and-several liability.

XI

Defendant next asserts that the trial court erred in awarding plaintiff case-evaluation sanctions. The case-evaluation panel had awarded plaintiff $585,000 against defendant and $65,000 against Henry Ford. Defendant rejected the case-evaluation award. The verdict, after the trial court's adjustments, amounted to $812,295.[20] Defendant contends that this verdict, for purposes of deciding whether case-evaluation sanctions apply, should be apportioned according to the percentage of fault found by the jury.[21]

This issue involves a question of statutory and court-rule interpretation and is thus reviewed de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

MCR 2.403(O) governs the awarding of case-evaluation sanctions. Sanctions were appropriate here if the verdict against defendant was "more than 10 percent below the evaluation . . . ." MCR 2.403(O)(3). In addition, "[e]xcept as provided by subrule (O)(10), in a personal injury action . . . the verdict against a particular defendant shall not be adjusted by applying that defendant's proportion of fault . . . ." MCR 2.403(O)(4)(c). Given this rule, the trial court correctly weighed the verdict against the case-evaluation award without making an adjustment based on defendant's relative fault.

However, defendant contends that the verdict should have been apportioned according to MCR 2.403(O)(10), which states that in actions filed on or after March 28, 1996, "a verdict awarding damages for personal injury . . . or wrongful death shall be adjusted for relative fault as provided by MCL 600.6304." We reject defendant's argument. Indeed, MCL 600.6304(6)(a) states that liability based on a medical malpractice claim is joint and several if the plaintiff is found to be without fault. There were no allegations here of fault on the part of plaintiff. Accordingly, the liability here was joint and several, and payment according to the percentage of fault was not mandated. See MCL 600.6304(6). Under these circumstances, an apportionment

[20] The judgment will be slightly higher based on our instant opinion and may be higher still after the proceedings on remand.

[21] The trial court merely ruled that "plaintiff is clearly entitled to attorney fees under the case evaluation sanction rule."

for purposes of applying the case-evaluation rule is inappropriate. The court did not err in determining that plaintiff was entitled to case-evaluation sanctions from defendant.[22]

Defendant next argues that the amount of attorney fees awarded to plaintiff as sanctions was excessive. The trial court, without a full evidentiary hearing, awarded attorney fees of $231,710, based on an hourly rate of $600 and $400 for plaintiff's two attorneys. Defendant contends that the approved hourly rate was excessive by being two to three times the size of the accepted, average rate for a malpractice case in the area and that use of an hourly rate to calculate attorney fees was not the correct measure because the case was taken on a contingency fee basis.

We review this issue for an abuse of discretion. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). Certain criteria that a court should use for determining the reasonableness of attorney fees are set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973):

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved;[23] (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

The *Crawley* court acknowledged that there is no "precise formula for computing the reasonableness of an attorney's fee" and that the facts that should be considered are not limited to the items mentioned above. *Id*. The Supreme Court agreed when it adopted the *Crawley* guidelines. *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

In *Smith v Khouri*, ___ Mich ___; ___ NW2d ___; 2008 WL 2601346, 5 (2008), the Supreme Court elaborated on the method for calculating attorney fees as case-evaluation sanctions, stating:

> We conclude that our current multi-factor approach needs some fine tuning. We hold that a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that

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[22] In response to certain arguments raised by defendant, we note that unpublished opinions are not precedentially binding in this Court. MCR 7.215(C)(1).

[23] The lead opinion in *Smith v Khouri*, ___ Mich ___; ___ NW2d ___; 2008 WL 2601346, 6 n 20 (2008), indicated that factor 3 is not an appropriate consideration "in determining a reasonable attorney fee for case-evaluation sanctions." However, this conclusion was not adopted by a majority of the justices.

> having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors.

The *Smith* Court also stated:

> If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence. [*Smith*, 2008 WL 2601346, 5.]

Here, defendant requested an evidentiary hearing, but the court declined to grant "a full blown hearing." In light of *Smith*, we remand for a hearing regarding attorney fees and for a recalculation of those fees.[24]

XII

Defendant next argues that the trial court erred in denying two mistrial motions. Defendant's argument, however, is merely a rehash of a portion of her argument set forth in section III of this opinion. We need not revisit it here.

XIII

Defendant argues that plaintiff's attorney and plaintiff's witnesses unfairly prejudiced her to such an extent that reversal is required. As noted in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further

[24] We note that the application of *Smith* to this case is appropriate in accordance with the factors set forth in *Adams v Department of Transportation*, 253 Mich App 431, 435-440; 655 NW2d 625 (2002) (discussing prospective versus retroactive application of court opinions). We further note that defendant's argument that the court's award of attorney fees was wrongly calculated because the case was taken on a contingent-fee basis is without merit. MCR 2.403(O)(6) provides that, when assessing sanctions, the trial judge is to calculate "a reasonable attorney fee based on a reasonable hourly or daily rate . . . ." See also *Temple v Kelel Distributing Co*, 183 Mich App 326, 331-332; 454 NW2d 610 (1990).

> inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted.

Additionally,

> an attorney's comments during trial warrant reversal where they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. [*Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488; 668 NW2d 402 (2003) (internal citation and quotation marks omitted).]

The first part of defendant's argument is merely a rehash of her argument set forth in section III of this opinion. We again reject it. Defendant next argues that plaintiff's attorney improperly questioned defendant about, and Bauman improperly testified about, defendant's response to Wilson's history of atrial fibrillation, "even though [p]laintiff was not claiming . . . a breach" with regard to it. Any error in this regard was harmless; indeed, defendant concedes that "no causation argument was ever made relative to that alleged breach." Therefore, the jury would not have based a finding of liability on it.

Defendant also argues that plaintiff's attorney improperly inquired about the "bucking" incident that occurred when Wilson was anesthetized, even though the "bucking" was not a theory of liability. However, defendant's citation to the record reveals that (1) one reference to "bucking" was made by a witness without prompting by plaintiff's attorney and (2) when the attorney did ask about "bucking," it was in reference to whether defendant had properly charted the incident. As noted in section III of this opinion, and contrary to defendant's implication on appeal, the trial court had ruled that evidence about charting was in fact admissible; plaintiff merely was not allowed to argue that improper charting was malpractice in itself. No improper course of conduct is apparent with regard to the questions and testimony defendant cites concerning charting.[25]

Next, defendant argues that Bauman prejudiced her by handing a juror some notes that had fallen out of the jury box. This argument is patently without merit. Bauman stated as follows: "The gentleman that was sitting in the back row knocked his stuff off the ledge. I merely went over, picked it up, and set it on there; never said a word to the guy; never even looked at him." This simple act of picking up something that had fallen was not an improper, prejudicial act.

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[25] In the context of this issue, defendant refers again to her belief that plaintiff's attorney admitted that Bauman was not qualified to offer any causation testimony. This is an inaccurate representation of the record, as set forth in section II of this opinion.

Defendant next argues that plaintiff's attorney admitted that the only two theories against defendant related to the administration of atropine and the delay in calling the Code Blue. Defendant contends that plaintiff's attorney improperly argued in closing that the failure to hand-bag Wilson and the "bucking" incident were also evidence of negligence. Earlier, during the motion for a directed verdict, plaintiff's attorney mentioned that defendant breached the standard of care by failing to call a Code Blue soon enough and by giving an inappropriate dose of atropine. The following exchange occurred:

> THE COURT: So it is really a two-pronged argument with regard to defendant Keim[-] one[, a]tropine; two, delay in response.
>
> MR. JOHNSON [plaintiff's counsel]: Absolutely.

The parties and the court then continued discussing the directed-verdict motion, and the court stated:

> There is no – there can be no claimed breach here for any pre-operative evaluation or breach of contract, and there is clearly insufficient proof that Nurse Keim was an agent, actual or ostensible. Therefore, there can be no vicarious liability on the part of Henry Ford Hospital based upon ostensible agency.
>
> So the case will go to the jury on those issues as indicated by Mr. Johnson and no more. . . .

With regard to defendant's argument concerning hand-bagging, in counsel's initial reference to hand-bagging, he was simply pointing out that, under his view of the evidence, defendant's indication during opening arguments that the evidence would show that hand-bagging had taken place had never actually materialized. That was not improper. With regard to the additional references to hand-bagging, we simply cannot conclude that counsel's argument resulted in undue prejudice, because counsel did not directly argue that the lack of hand-bagging was the cause of Wilson's death. Counsel instead argued that his client "paid" for defendant's failure to call a prompt Code Blue.

With regard to the "bucking" incident, counsel stated, "And to be clear we're not claiming that because the patient bucked, it had any [e]ffect on the outcome of his health . . . ." Accordingly, the jury was properly informed that this was not a basis for liability, and no prejudice is apparent.

Defendant next argues that plaintiff's attorney improperly insinuated that defendant's departure from employment with Henry Ford was related to her negligence. Defendant states:

> Plaintiff also asked the jury to speculate and infer negligence based upon the fact that Keim has not worked at Henry [F]ord Hospital since the date of the incident, even though the only testimony at trial was that Keim was scheduled to start a new assignment at a differen[t] hospital the following week.

Plaintiff's counsel stated the following during closing arguments:

> She's gone. Last day of work at Henry Ford, ladies and gentlemen. She was there from March of 1999 until May 29, 2001 and she's going to sit in that witness stand and she's going to look you in the face under oath and ask you to believe that it is just a coincidence that she never set foot in that hospital ever again. Just a coincidence. She's gone, never to go back.

Defendant had testified that it was just a coincidence that she ceased work at Henry Ford on the same date as the incident with Wilson; she stated that her agency had scheduled her, in advance, for a job at a different hospital. It is clear that plaintiff's attorney was attempting to discredit defendant's testimony. Defendant has set forth no reasoned argument and has cited no authority for why that was improper. Accordingly, she has abandoned this argument for purposes of appeal. *Wilson*, *supra* at 243. At any rate, the trial court instructed the jury as follows: "Arguments, statements and remarks of attorneys are not evidence. And you should disregard anything said by an attorney which is not supported by evidence, or by your own general knowledge and experience." We find no basis on which to reverse.

Defendant also argues that plaintiff's attorney improperly referred to the number of witnesses that appeared for each side and improperly referred to the fact that plaintiff's future damages would be reduced by a third. Once again, however, defendant cites no authority in support of his arguments and has thus abandoned them. *Id*. Moreover, we note that the court sustained defendant's objection to the reduction-in-future-damages arguments.

Under the circumstances, we find no basis for reversal. We reject defendant's allegation of a pattern of blatant, prejudicial conduct on the plaintiff's attorney.

XIV

Plaintiff argues that the trial court erred in applying the lower noneconomic damages cap set forth in MCL 600.1483. This statute states, in part:

> (1) 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 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> * * *
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

The trial court, in applying the lower cap, stated that the injured person "must have the impairment at issue here at the time of the filing of the lawsuit." Plaintiff disagrees, arguing that

because Wilson had a qualifying injury before his death, the higher cap applies. We agree. This issue involves statutory interpretation, which is reviewed de novo. *Marketos*, *supra* at 412.

The Supreme Court considered a similar issue in *Shinholster v Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004). Justices Markman and Weaver agreed with plaintiff's interpretation in the instant case, *id*. at 562, 572, while Justices Cavanagh and Kelly concurred with the result only, *id*. at 572. The reasoning of Justices Markman and Weaver was adopted by this Court in *Young v Nandi*, 276 Mich App 67, 75-76; 740 NW2d 508 (2007). This Court rejected an argument parallel to that set forth by defendant in the present case, ruling that as long as it can be shown that the deceased suffered one of the qualifying injuries before death, than the higher cap applies in a wrongful-death case. *Id*. Accordingly, if Wilson did experience a qualifying injury before death as a result of defendant's negligence, the higher cap applies.[26]

The jury answered "yes" when asked the following question:

> After May 29, 2001, but before his death, did Ronald Wilson have permanently impaired cognitive capacity rendering him incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal daily living?

However, despite this finding by the jury, MCL 600.1483(1) states that the *court* shall make the pertinent findings. See also *Shinholster*, *supra* at 591 (Corrigan, J.). Here, the court did not make a decision on the issue because it concluded that Wilson's death mandated the application of the lower cap. Therefore, we must remand this case for further proceedings. The trial court must determine whether Wilson suffered a qualifying injury such that the higher cap applies.

XV

Plaintiff next argues that the trial court erred in granting defendant's motion for remittitur. We review the trial court's decision for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 392; 722 NW2d 898 (2006). As mentioned earlier in this opinion, defendant argued that the evidence supported no amount of past economic damages beyond the $314,571 recited by plaintiff's attorney. The court ruled:

> I am satisfied the record does not support recovery of more than 3 hundred 14 thousand 5 hundred and 71 dollars for past economic loss in this case. It's quantifiable to the penny under the circumstances of this case. So the judgment is reduced from 5 hundred thousand to 3 hundred 14 thousand 5 hundred 71 with regard to past economic damages.

Plaintiff argues that there was no evidence that the jury was influenced by passion or prejudice and that the $500,000 award for past economic loss should be reinstated.

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[26] We reject defendant's argument that the lower cap must apply because the "plaintiff" in this case was the estate. See *Young*, *supra* at 72-73.

"In [evaluating] a motion for remittitur, the trial court must decide whether the jury award was supported by the evidence." *Henry v Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999). "The trial court's inquiry is limited to objective considerations regarding the evidence adduced and the conduct of the trial." *Weiss v Hodge*, 223 Mich App 620, 637; 567 NW2d 468 (1997). As stated in *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989):

> 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 . . . .

In his closing argument, plaintiff's attorney set forth the following as past economic damages: $169,000 for lost wages, $21,403 for lost household services, and $124,168 for medical bills, for a total of $314,571. Plaintiff does not argue that the evidence supported a greater award for medical expenses or lost household services. Plaintiff focuses on the award for lost wages, arguing that the evidence supported an amount greater than $169,000.

A vocational rehabilitation counselor testified that Wilson's earning capacity was $25,000 to $30,000 a year and that he did not use the upper-end figures for janitors ($50,000 to $60,000 a year) because those figures were for the automobile industry and the witness "had no information that [Wilson] ever applied for a job in the auto industry." The witness also testified that fringe benefits amount to twenty percent or twenty-five percent of a person's salary. Another of plaintiff's witnesses testified that Wilson's past job-related loss, using an annual salary in the mid-$30,000-range, amounted to $169,000, which is the figure plaintiff's attorney argued to the jury. However, the witness indicated that the $169,000 represented the loss until the date of his report and that there would be "let's say another roughly . . . 20 thousand dollars in past loss" by August 1, 2006.[27]

It is true that if the jury chose to use the upper-end salary for janitors, calculated the value of fringe benefits, and then considered the medical expenses and the value of the lost household services, the $500,000 award was tenable. The problem, however, is that there was simply no evidence that Wilson would have been making the upper-end salary in the five years between his incapacitation and the time of trial. In light of this fact, and in light of the fact that we must give considerable deference to the trial court's decision, *Palenkas*, *supra* 531, we cannot conclude that the trial court erred in granting the motion for remittitur. However, we do conclude that $20,000 should be added back to the verdict amount, based on the evidence that the $169,000 figure did not include $20,000 in additional past wage loss that would have occurred by the time of trial.[28]

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[27] The jury rendered its verdict on July 27, 2006.

[28] We do not consider defendant's argument that remittitur should have been granted in a greater amount because defendant did not raise the argument by way of a cross-appeal. *In re Herbach*
(continued…)

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

(…continued)

Estate, 230 Mich App 276, 284; 583 NW2d 541 (1998). Also, we reject plaintiff's brief argument relating to "gifts/gratuities" provided by Wilson to her; it is unclear to us how these items mentioned by plaintiff would fall under the category of past economic losses; presumably these items would have been purchased by Wilson using lost wages, which were already included in the past economic losses.