

STATE OF MICHIGAN
COURT OF APPEALS

ANN M. BRABBS,

Plaintiff-Appellee,

v

FREDERICK D. RAU, M.D.,

Defendant-Appellant,

and

N'ORTHOPEDICS, P.C.,

Defendant.

UNPUBLISHED

July 28, 2009

No. 282175

Otsego Circuit Court

LC No. 05-011281-NH

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant Rau appeals by right the judgment entered in plaintiff's favor following a jury trial. Rau challenges the trial court's denial of his motion to strike the testimony of plaintiff's expert witness, as well as the trial court's denial of his motion for judgment notwithstanding the verdict (JNOV) or new trial. We affirm.

Plaintiff presented for treatment with Rau complaining of problems with her hand, elbow, and forearm on the right side. After plaintiff failed to gain relief from her symptoms using conservative, non-surgical methods, Rau recommended carpal tunnel release surgery. Evidence adduced below established that there are three types of procedures for carpal tunnel release: traditional open, mini-open, and endoscopic. Defendant chose to perform the mini-open approach, which requires a shorter incision than the traditional open approach. Unhappy with the course of her recovery, plaintiff consulted another doctor who performed two additional surgeries. During the course of the additional surgery, plaintiff discovered that the carpal ligament had not been completely severed by Rau during the first surgery and that the median nerve had been injured. Plaintiff testified that she never regained full use of her right hand. She continues to experience daily pain and numbness in portions of her right hand. She believes her job as a home-care registered nurse is affected by her continuing symptoms to the point that she fears she will soon not be able to continue working.

Plaintiff engaged the services of Edwin Season III, MD, to provide expert testimony for her claim. Rau moved to strike Season's opinions, arguing that because Season lacked familiarity with the mini-open procedure, he was unqualified to provide expert testimony. There was no dispute that both doctors held the same board certifications and that both doctors performed carpal tunnel release procedures. The trial court determined that plaintiff's expert was qualified to testify regarding the standard of care. After the jury returned a verdict in favor of plaintiff, Rau moved for JNOV or new trial, arguing that Season was not qualified to testify, given that he did not perform the mini-open procedure as part of his practice. The trial court determined that the verdict should stand and denied defendant's motion.

Defendant's only issue on appeal is that the trial court abused its discretion by denying his motion to strike Season's testimony and by failing to grant his motion for JNOV or new trial. We disagree. We review a trial court's decisions related to the admission of evidence for an abuse of discretion. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). Similarly, a trial court's decisions related to the qualifications of an expert witness and the admissibility of expert testimony are reviewed for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion has occurred when the trial court's decision falls outside the principled range of outcomes. *Id.* We review de novo a trial court's decision on a motion for JNOV. *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). Questions of law are reviewed de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006).

To prove a medical malpractice claim, the plaintiff must establish the following elements: "(1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997). The first hurdle to qualification as an expert witness in a medical malpractice case is MCL 600.2169, which requires that when a defendant physician is a specialist, an expert whose testimony is offered against that defendant must have specialized in the same specialty at the time of the incident that is the basis for the malpractice action. Further, if the defendant is board certified, the specialist whose testimony is offered against the defendant must be board certified in the same specialty. MCL 600.2169(1)(a). The statute also requires that the proposed expert have practiced for a period of one year prior to the incident which forms the basis of the lawsuit in active clinical practice or education in the that area of specialty. MCL 600.2169(1)(b).

There is no dispute in the instant matter that Season meets the statutory requirements related to board certification and practice requirements. Instead, defendant argues that the trial court should have excluded Season's testimony pursuant to MRE 702 because MCL 600.2169(3) provides authority for the trial court to exclude expert testimony for grounds other than those listed in the statute. MRE 702 allows for expert testimony by one qualified through "knowledge, skill, experience, training, or education." Defendant contends that plaintiff's expert can meet none of these requirements.

Season is board certified in orthopedic surgery, as is defendant. Season routinely performs carpal tunnel release surgery. Season testified that he had received training in the mini-open procedure. It is true that Season was critical of the mini-open technique. However, Season also conceded that the mini-open procedure was consistent with the standard of care. Indeed, Season's testimony that defendant breached the standard of care in his treatment of

plaintiff was *not* based on defendant's decision to utilize the mini-open approach rather than the traditional open approach. Instead, Season based his conclusion that the standard of care had been breached on the fact that the carpal ligament had not been completely severed and the median nerve had been damaged. Both Season and defendant agreed that the goal of a carpal tunnel release surgery, regardless of the technique used, is to completely sever the carpal ligament and avoid injuring the patient's nerves.

Michigan generally embraces a broad view of who may qualify as an expert. See *Mulholland v DEC Int'l*, 432 Mich 395, 403-405; 443 NW2d 340 (1989). Any gaps or limitations in a proposed expert's knowledge or qualifications are relevant to the weight to be given to the witness's testimony, not to the testimony's admissibility. *McPeak v McPeak*, 233 Mich App 483, 493; 593 NW2d 180 (1999). In light of the foregoing facts, the trial court did not abuse its discretion by determining that plaintiff's expert was qualified to give expert testimony on the standard of care for carpal tunnel release surgery.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra