STATE OF MICHIGAN

COURT OF APPEALS

NAOMI WELCH,

Plaintiff-Appellee,

v

ELIE G. KHOURY, M.D.,

Defendant-Appellant,

and

CHRISTOPHER ESSHAKI, CHUNG K. KIM, M.D., and ST. MARY'S MERCY HOSPITAL,

Defendants.

UNPUBLISHED
January 28, 2010

No. 285106
Wayne Circuit Court
LC No. 05-522354-NH

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

In this medical malpractice action involving a hip-replacement surgery and its aftermath, defendant Elie G. Khoury, M.D.[1] appeals by right a judgment entered in favor of plaintiff Naomi Welch following a jury trial. Plaintiff asserted that defendant, while not having committed malpractice relative to the surgery itself, was negligent in failing to properly read a postoperative x-ray showing that the placement of the femoral component of a prosthesis was not correctly centered or aligned, thereby perforating the canal, thinning the femoral cortex, creating a stress riser, and ultimately causing a fracture of plaintiff's femur when she put weight on the leg. According to plaintiff, had the x-ray been properly interpreted, corrective surgery, as required by the standard of care or practice, would have been performed without delay, preventing the occurrence of the fracture. Instead, plaintiff had to endure corrective surgery more than a week later that addressed not only the prosthesis but also the fracture, which surgery was followed by infections, a hip dislocation, sciatic nerve injury, and additional surgeries. The jury verdict was for $1,933,818, and judgment was eventually entered in the amount of $920,040, including

[1] The remaining defendants are not parties to this appeal. Accordingly, our reference to "defendant" in the singular throughout this opinion will pertain to defendant Khoury only.

prejudgment interest, after the verdict was reduced pursuant to the medical malpractice cap and a settlement setoff. Plaintiff was also awarded case evaluation sanctions. We affirm in all respects except for the trial court's award of expert witness fees, on which issue we reverse and remand for a hearing to determine the appropriate amount awardable consistent with *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 107-108; 709 NW2d 174 (2005), rev'd in part on other grounds 479 Mich 280 (2007), *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991), and *Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987).

Defendant first argues that the trial court erred by excluding the testimony of his proposed fact and causation experts, radiologists Dr. Hugh Kerr and Dr. Chung K. Kim, on the ground that they were not orthopedic surgeons and their testimony would confuse the jury. We disagree.

We review the trial court's decision whether to admit evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). But to the extent that the inquiry requires examination of the meaning of the rules of evidence, a court rule, or a statute, our review is de novo. *Id*. An abuse of discretion occurs when the lower court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In medical malpractice cases, issues of negligence and causation are normally beyond the ken of laymen; therefore, expert testimony is generally required to establish the applicable standard of care or practice, breach of the standard, and causation. *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986). MCL 600.2169(1) provides in pertinent part:

> 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:
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> (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. [Emphasis added.]

"MCL 600.2169(1) only applies to expert testimony on the appropriate standard of practice or care; it does not apply to other kinds of expert testimony, such as expert testimony on causation." *Woodard v Custer*, 476 Mich 545, 558 n 4; 719 NW2d 842 (2006).

In plaintiff's affidavit of merit, with respect to the standard of care, Dr. Gabriel Danaceau averred that defendant needed to "[p]roperly seat the femoral component," "[a]ccurately interpret the intraoperative and postoperative x-rays," and "[r]eoperate to fix the prosthesis which was inserted through the femoral bone cortex and replace it with a longer stemmed femoral component." The standard of care was breached, according to Dr. Danaceau, by defendant's

failure to properly seat the femoral component, failure to correctly interpret the x-rays, and failure to re-operate.[2] Dr. Danaceau finally averred that "[t]he violations of the standard of care by [defendant] were a proximate cause and did indeed cause the injuries [to plaintiff], including her femur fracture and need for subsequent surgeries and surgical complication."

The relevant standard of care in this case ultimately involved the question whether defendant was required to perform another surgery to correct problems with the prosthesis, which determination was inextricably tied to the placement of the prosthesis and interpretation of the postoperative x-ray. The question of compliance with this standard of care thus presented an issue of orthopedic surgery, and not radiology. Any testimony offered by the radiologists to establish that the x-ray showed nothing of concern and was unremarkable necessarily would have implicated this orthopedic surgery standard of care, and would therefore have been improper under MCL 600.2169(1).[3] By way of example, if the x-ray were not problematic, as the radiologists were apparently prepared to testify, *the standard of care would not have required any follow-up or corrective surgery*, and the radiologists' testimony that the x-ray showed nothing of concern would necessarily have implied to the jury that the standard of care did not require another surgical procedure to alter or fix the results of the hip-replacement surgery.[4] Because such testimony by the radiologists would have directly implicated the standard of care, it was barred by MCL 600.2169(1). Even the testimony of Drs. Kerr and Kim that suggested a lack of connection between the fracture and the positioning of the prosthesis would have suggested to the jury that there was never a prosthesis alignment problem and that the standard of care therefore did not require defendant to perform corrective surgery.

Defendant protests that the testimony of the radiologists would have related solely to *breach* of the standard of care and to *causation*. However, he presents no argument that

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[2] At trial, all of the experts were in agreement that defendant did not commit any malpractice with respect to the hip-replacement surgery in and of itself, including the seating and positioning of the prosthesis. Even plaintiff's experts testified that defendant did nothing wrong during the surgery, as the misalignment or misplacement of the prosthesis is something that can occur absent malpractice; it is the nature of the surgery that gives rise to this risk. The risk is addressed by performing postoperative x-rays in order to discover any problems. At that point, if problems do exist, the orthopedic surgeon must perform follow-up or corrective surgery as soon as possible. Ultimately, it was the alleged misreading of the postoperative x-ray that drove plaintiff's malpractice case. Nonetheless, for the reasons stated in this opinion, we find that the question of compliance with the standard of care was an issue of orthopedic surgery, and not radiology.

[3] "The phrase 'standard of practice or care' is a term of art in the malpractice context, and the unique standard applicable to a particular defendant is an element of a medical malpractice claim that must be alleged and proven." *Roberts v Mecosta Co*, 470 Mich 679, 692 n 8; 684 NW2d 711 (2004).

[4] Defendant vehemently argues that the radiologists were not going to testify regarding whether corrective surgery should have been performed. However, this argument fails to appreciate the inescapable inference that would have arisen from any testimony by the radiologists that corrective surgery was unnecessary.

testimony regarding a "breach" of the standard, as opposed to testimony regarding the standard itself, does not require the witness to practice in the same specialty or have the same certification as the defendant doctor. We decline to explore this issue further, especially given that any possible error was harmless, as discussed below, and that any such testimony by the radiologists would also have certainly touched on the standard of care, itself, in violation of MCL 600.2169(1).

We acknowledge defendant's argument that the radiologists' testimony likely would have encompassed the issue of causation. However, for the reasons explained earlier, that same testimony would have certainly encompassed the issue of the standard of care as well. It is evident that the trial court recognized the potential multiple applications of any testimony by the radiologists—i.e., that the testimony would have encompassed the elements of standard-of-care, breach, and causation. But this recognition is the very reason that the court concluded that the evidence could confuse and mislead the jury.

Moreover, it is difficult to accept defendant's causation argument in light of the deposition testimony. At his deposition, Dr. Kerr testified that he was only going to give his opinion that the x-ray showed that the prosthesis was satisfactorily positioned, consistent with defendant's interpretation of the x-ray. Dr. Kerr's testimony suggests that he was *not* prepared to speak directly to the issue of causation in this case. And defendant fails to point to any testimony by Dr. Kim that the alignment of the prosthesis, as reflected in the x-rays, did not result in or cause the subsequent femur fracture and other injuries, nor does our review of the record reveal that Dr. Kim was prepared to testify on such matters. It is questionable whether the radiologists would even have been qualified under MRE 702 and MCL 600.2955 to give an opinion on fracture causation in this case, and defendant's failure to establish that the radiologists had the necessary qualifications or that they were even prepared to testify on the issue of fracture causation effectively deflates his appellate argument. We note that defendant does seem to argue that because the radiologists were qualified to interpret the postoperative x-ray and identify the location of the prosthesis and fracture site in the later x-rays, causation inferences could have been drawn from their opinions on these matters. However, even if such inferences could have been drawn from the radiologists' testimony, the radiologists themselves were apparently not ready to render an opinion that fracture causation was lacking, instead giving deference to the orthopedic surgeons.[5]

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[5] We find that the unpublished case law cited by defendant is irrelevant, given that the cases pertained solely to causation testimony and because the experts were qualified. Also, defendant's reliance on *Sturgis Bank & Trust Co v Hillsdale Community Health Ctr*, 268 Mich App 484; 708 NW2d 453 (2005), is misplaced because the Court in that case simply held that affidavits of merit executed by a nurse and nurse practitioner satisfied MCL 600.2912d(1) and did not violate MCL 600.2169, even if the affiants were not qualified to actually testify at trial on the element of causation. The Court stated that the "issue whether plaintiff's affiants can substantively attest or address matters of causation is not a concern for the purposes of the 'first stage' of the litigation in which an affidavit of merit must be filed under § 2912d(1); rather the issue can be pursued in later proceedings such as at trial." *Id.* at 494-495. Here, the proceedings were at the trial stage and, therefore, not concerned with affidavits of merit. *Sturgis Bank* is not
(continued…)

Furthermore, an analysis under MRE 401, 402, and 403 supports the trial court's ruling. For the reasons stated above, the proffered testimony here would have necessarily and improperly touched on the issue of the standard of care, and any relevance or probative value that it had on the issue of causation, even if the radiologists were otherwise qualified and prepared to discuss causation, would have been substantially outweighed by the danger of unfair prejudice, confusion of the issues, and the jury being misled. MRE 403. The jury likely would have been unable to make the technical legal distinctions between applying the evidence to the causation element and not applying that same evidence to the standard-of-care element, even if it had been instructed by the trial court. The overlapping impact of the radiologists' testimony on the multiple elements in this medical malpractice case would have created an unacceptable risk that the evidence would be used improperly. See *id.*

This was a case concerning alleged malpractice by an orthopedic surgeon, and limiting the testimony to opinions by orthopedic surgeons was appropriate under the circumstances presented. While x-rays were the focal point of this case, the radiologists' deposition testimony indicated, without dispute, that x-ray interpretation in hip-replacement cases has historically been within the province of the orthopedic surgeon conducting the surgery. Indeed, according to the radiologists, orthopedic surgeons pay no heed to the interpretations reported by the radiologist in such cases. Even defendant's experts implicitly admitted that, in cases such as this, the orthopedic surgeon has the necessary insight and expertise, beyond that of a radiologist, to assess the x-rays for purposes of determining the need to possibly engage in further surgical intervention.

Finally, even assuming arguendo that the trial court erred by excluding the proffered radiologists' testimony, we conclude that any error was harmless. Harmless-error analysis governs evidentiary rulings and decisions by the trial court. See MCR 2.613(A). Exclusion of the radiologists' testimony did not leave defendant without the ability to effectively challenge and counter plaintiff's case. Indeed, defendant presented expert testimony by two orthopedic surgeons (three if defendant, himself, is included) that fully and forcefully supported his conduct and actions throughout the surgery and its aftermath. These witnesses testified that defendant properly interpreted the x-rays, that no follow-up surgery was required by the applicable standard of care, and that defendant did nothing improper that would have caused plaintiff's fracture or other injuries. The elements of the malpractice action were thoroughly addressed by defendant's experts, who opined that the elements were not satisfied. Additional testimony by the radiologists would have added little if anything to the defense, especially considering their tacit admissions that radiologists play no meaningful role in interpreting x-rays in hip-replacement surgeries. We conclude that the trial court's exclusion of the radiologists' testimony, even if somehow erroneous, was not decisive to the outcome of trial. It is axiomatic that we will not reverse on the basis of harmless error. *Guerrero v Smith*, 280 Mich App 647, 656; 761 NW2d 723 (2008).

Defendant next argues that plaintiff's damage claims related to infections and sciatic nerve injury were "lost opportunity" claims, implicating MCL 600.2912a(2) and *Fulton v*

(…continued)

applicable.

William Beaumont Hosp, 253 Mich App 70; 655 NW2d 569 (2002).[6] Defendant also maintains that plaintiff failed to support these claims with evidence at trial. Defendant argues, therefore, that the trial court erred by denying his motion for judgment notwithstanding the verdict (JNOV)[7] on the claims associated with the infection and sciatic nerve injuries.[8] Defendant further argues that a notice of intent must contain specific statements concerning the manner in which the alleged breach of the standard of care caused a specific injury, and that plaintiff's notice fell short of this requirement with regard to her claims of infection and sciatic nerve injury. He contends that there was no reference to the required percentages under the "lost opportunity" doctrine and, regardless, that the notice was otherwise deficient even without consideration of the doctrine. Accordingly, defendant asserts that the trial court erred by allowing these injury claims to go forward.

Plaintiff maintains that she solely presented claims for "traditional" medical malpractice, which are not governed by the "lost opportunity" doctrine. With respect to defendant's notice of intent argument, plaintiff notes that he stipulated below that she had satisfied the statutory requirements.

A review of the complaint does not reveal any express claim for a lost opportunity to obtain a better result. Nevertheless, consistent with the model civil jury instructions, the trial court broadly instructed the jury on the "lost opportunity" doctrine. The court also instructed the jury that establishing "proximate cause" meant that plaintiff had to show that defendant's negligent conduct caused plaintiff's injuries and that the injuries must have been the natural and probable result of the negligent conduct. The court later elaborated that, to satisfy her burden of proof on causation, plaintiff had to persuade the jury that "it is more likely than not" that defendant's negligent conduct caused her injuries.

MCL 600.2912a(2) provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was

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[6] The *Fulton* Court held that "MCL 600.2912a(2) requires a plaintiff to show that the loss of the opportunity to survive or achieve a better result exceeds fifty percent." *Fulton*, 253 Mich App at 83.

[7] We review de novo a trial court's ruling on a motion for JNOV, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). A motion for JNOV should only be granted if the evidence, viewed in this light, fails to establish a claim as a matter of law. *Id.*

[8] The jury was given a broad instruction on lost opportunity, with no limitations to claims of infection and sciatic nerve injury, and defendant does not challenge the instruction and its wording. Nor does he challenge the jury's implicit yet necessary finding that plaintiff satisfied the burden expressed in the instruction as to any injuries or damages not associated with the infections and the sciatic nerve. Yet, defendant wishes us to vacate the entire judgment.

> proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

MCL 600.2912a(2) has caused much confusion regarding its interpretation, such that three Justices of our Supreme Court in *Stone v Williamson*, 482 Mich 144, 147, 162-164; 753 NW2d 106 (2008), recently stated that the language is incomprehensible and unenforceable as written, providing no guidance concerning its meaning or how courts are to apply the language. In *Stone*, the plaintiff had an aneurysm that ruptured, and the aneurysm had gone undetected despite physical examinations and testing by a number of doctors. The plaintiff underwent emergency surgery to repair the rupture; however, amputation of both legs became necessary, in part because of preexisting conditions. Following the surgery, the plaintiff experienced multiple organ failure and other complications. The plaintiff thereafter filed a medical-malpractice action. At trial, he presented experts who testified that, had the aneurysm been properly diagnosed, elective surgery could have been performed, increasing the plaintiff's chance of a better medical outcome. *Id*. at 147-148. The defendants argued that the risk of death should have been factored out of the equation, and looking at the percentages with respect to complications (5 percent with elective surgery and 40 percent with a rupture), the difference was only 35 percent, which was insufficient under *Fulton*. *Stone*, 482 Mich at 148-149. The trial court disagreed, instructing the jury to aggregate the risks, and the jury returned a verdict in favor of the plaintiff in the amount of $2,327,835. *Id*. Our Supreme Court affirmed the verdict because six Justices concluded that it was not a lost-opportunity case. But that was largely the extent of any relevant agreement by a majority of the Justices. As reflected in the Chief Justice's summarization, all seven Justices found that *Fulton*'s analysis was incorrect or should no longer be good law, three Justices found that the language in MCL 600.2912a(2) was unenforceable because it was incomprehensible, and four Justices agreed that MCL 600.2912a(2) was enforceable (although only three of those four were in agreement on its interpretation). *Stone*, 482 Mich at 164. The four Justices who agreed that MCL 600.2912a(2) is enforceable would have held "that loss of the opportunity is, by itself, a compensable injury, although the opportunity must be 'lost'—that is, the bad result must occur—in order for a claim to accrue." *Id*.

Six Justices agreed that the plaintiff's case constituted a traditional medical-malpractice case, and this majority was in agreement with the following statements and sentiments expressed in the lead opinion:

> Although I believe that the lower courts erred by applying *Fulton* and that the trial court incorrectly instructed the jury on the issue of whether plaintiff had shown that defendant's negligence caused him to lose a greater than 50 percent chance of a better result, I would conclude that it is not necessary to order a new trial. For each defendant, the trial court instructed the jury that it had to find by a preponderance of the evidence (1) that the defendant was professionally negligent, (2) that plaintiff sustained injury and damages, and (3) that the professional negligence or malpractice of that defendant was a proximate cause of the injury and damages. After giving these instructions, the court further instructed the jury: "I'm going to talk about damages. In an action alleging claims of professional negligence against a physician, even if you find

> professional negligence, the Plaintiff cannot recover unless the Plaintiff's chance of having a better result was changed by greater than 50 percent." Thus, after being instructed that it had to find the traditional elements of medical malpractice and, in addition, had to find that plaintiff had lost an opportunity of greater than 50 percent, the jury returned a verdict indicating it had found that all these elements were satisfied. Indeed, a review of the record shows that plaintiff suffered amputations and other injuries, and from the testimony presented the jury could have concluded that it was more likely than not that the amputations and other injuries were caused by the defendants' negligence and would not have occurred absent that negligence. Most importantly, regardless of the jury's finding of lost opportunity, it is clear from the way the instructions were given that the jury found that the traditional elements were met: defendants' negligence more probably than not caused plaintiff's injuries. Thus, I believe that the jury properly found that plaintiff had satisfied the causation and injury elements. Accordingly, I would hold that reversal is not required and would affirm the result of the judgment of the Court of Appeals. [*Stone*, 482 Mich at 162-163.]

We are unable to distinguish *Stone* for purposes of our analysis in the case at bar. Here, plaintiff claimed that defendant's failure to properly read the x-ray and to perform immediate corrective surgery resulted in or caused the leg fracture along with, ultimately, the subsequent infections and sciatic nerve injury. And, like in *Stone*, the jury was instructed on traditional malpractice elements, along with receiving an instruction requiring the jury to find that plaintiff had lost an opportunity, greater than 50 percent, to attain a better result. The jury returned a verdict indicating that it had found that all the elements were satisfied. A review of the record shows that plaintiff suffered infections and a sciatic nerve injury, and the jury could have concluded, from the testimony presented by Drs. Marks and Danaceau, that it was more likely than not that these injuries were caused by defendant's negligence and would not have occurred absent that negligence. We conclude that, as stated in *Stone*, "regardless of the jury's finding of lost opportunity, it is clear from the way the instructions were given that the jury found that the traditional elements were met: defendant['s] negligence more probably than not caused plaintiff's injuries." *Id.* at 163.

In *Velez v Tuma*, 283 Mich App 396; 770 NW2d 89 (2009), this Court reviewed, interpreted, and applied *Stone*. In *Velez*, the plaintiff alleged that the defendant failed to timely and properly diagnose and treat an acute vascular insufficiency condition, which resulted in her left leg being amputated below the knee. *Id*. at 397. The *Velez* Court initially noted that, "because a majority of the *Stone* Court held that the *Stone* case was not a lost-opportunity case, the correctness of *Fulton* could not be reached and it remains undisturbed." *Velez*, 283 Mich App at 402. The Court found that the plaintiff presented a traditional malpractice case, as in *Stone*, where she claimed a physical injury that was more probably than not caused by the defendant's negligence and did not claim loss of an opportunity to attain a better result. *Id*. at 403. The *Velez* Court distinguished *Fulton* on the ground that *Fulton* involved a specific claim by the plaintiff that there was a loss of the opportunity to survive. *Id*. The *Velez* Court also distinguished *Klein v Kik*, 264 Mich App 682; 692 NW2d 854 (2005), and *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518; 687 NW2d 143 (2004), two cases relied on by defendant here, on the basis that they were true "lost opportunity" cases, not traditional malpractice cases. *Velez*, 283 Mich App at 404-405.

The *Velez* Court stated that, "in our case plaintiff suffered a physical injury, the loss of her leg because of defendant's alleged negligence." *Id.* at 404. The plaintiff's expert opined that, had the defendant complied with the standard of care, the plaintiff would not have lost her leg. *Id.* at 406. The plaintiff established that the defendant's negligence more probably than not caused the amputation. *Id.* Further, "[a]s in *Stone*, plaintiff's injury . . . was not the loss of an opportunity to avoid physical harm or the loss of an opportunity for a more favorable result; instead, plaintiff suffered the physical harm, the unfavorable result." *Velez*, 283 Mich App at 406.

We fail to see how *Velez* is distinguishable from the instant case. Plaintiff here asserted that she incurred infections and a sciatic nerve injury (physical harm—i.e., unfavorable results) caused by defendant. She never claimed that she was entitled to damages simply for a lost opportunity to avoid the physical harm. *Stone* controls here. Because *Velez* followed *Stone*, and given that *Ensink* and *Klein* were both issued prior to *Stone*, we conclude that plaintiff did not present a "lost opportunity" claim. Indeed, the nature of her claim, relative to the infections and sciatic nerve injury, parallels the claims in *Stone* and *Velez*. Reversal is unwarranted.

With respect to the argument challenging the sufficiency of the notice of intent in connection with the claims of infection and sciatic nerve injury, defendant stipulated that the notice of intent was satisfactory and complied with MCL 600.2912b. Accordingly, defendant's argument fails and has been waived. See *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005) (noting that "[a] litigant may not harbor error, to which he or she consented, as an appellate parachute").

We next address defendant's appellate challenges concerning the medical malpractice cap. The jury returned a verdict awarding plaintiff $750,000 in past noneconomic damages and an additional $750,000 in noneconomic damages for future pain and suffering. The medical malpractice cap on noneconomic damages found in MCL 600.1483 provides in relevant 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[9] apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00.
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> (4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index [CPI]. . . .

[9] The exceptions are inapplicable in this case.

The first question is whether the cap applicable at the time the complaint was filed should be utilized ($371,800), as opposed to the higher cap amount in existence when judgment was entered ($401,500), given CPI changes. A second issue with respect to the cap concerns whether it should be applied or apportioned in a manner that reduces in an equal ratio the past and future damages, leaving $185,900 or $200,750 (50 percent of cap depending on applicable cap year) in past *and* future noneconomic damages, or whether the cap should be applied to completely eliminate all of the future noneconomic damages awarded by the jury, leaving only past damages for the full cap amount to survive (either $371,800 or $401,500). This second issue must be resolved because it has a bearing on interest payments on the judgment. In the context of this medical malpractice action, interest on an award for future damages is *not* calculated from the time the complaint was filed; however, interest on past damages would begin to run from the date the complaint was filed. MCL 600.6013(1) and (8).

The trial court applied the medical malpractice cap that existed at the time judgment was entered, not the date the complaint was filed. Further, the court apportioned the cap so as to fully set aside the jury's award of future noneconomic damages, resulting in an award of only past noneconomic damages, reduced to the full amount of the cap. Defendant challenges these rulings, arguing that the cap in 2005, which was the year the complaint was filed, should be applied and that the noneconomic damages should be apportioned to past and future damages in the same ratio apportioned by the jury, so that prejudgment interest will not be awarded on what are actually future damages.

This Court has recently addressed and rejected the exact arguments posed here by defendant. *Velez*, 283 Mich App at 417-420. We agree with the holdings and underlying reasoning provided in *Velez*, and we therefore decline defendant's invitation to call for a conflict panel on these issues.

Next, defendant challenges the amount awarded to plaintiff for attorney fees and expert fees, which were part of the case evaluation sanctions incurred by defendant. Defendant does not dispute that plaintiff is entitled to case evaluation sanctions pursuant to MCR 2.403(O). This Court reviews the amount awarded as case evaluation sanctions, including an award of reasonable attorney fees, for an abuse of discretion. *Peterson v Fertel*, 283 Mich App 232, 239; 770 NW2d 47 (2009). "A trial court does not abuse its discretion when the result reached falls within the range of reasonable and principled outcomes." *Univ Rehabilitation Alliance, Inc v Farm Bureau Gen Ins Co of Michigan*, 279 Mich App 691, 698; 760 NW2d 574 (2008).

Plaintiff requested $450 per hour in attorney fees, and the trial court reduced the amount to $400 per hour, covering 279½ hours of service, which number of hours was requested by plaintiff's counsel and agreed to by the court. Defendant argues that an hourly rate of $400 is clearly unreasonable under objective standards and that $200 to $225 per hour is a rate consistent with actual practice.

With respect to case evaluation sanctions, plaintiff was entitled to "actual costs." MCR 2.403(O)(1). "[A]ctual costs" include "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation." MCR 2.403(O)(6)(b).

In *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.), our Supreme Court recently explored the issue of determining reasonable attorney fees in the context of case evaluation sanctions. A majority of Justices held:

> In determining a reasonable attorney fee, a trial court should first determine the fee customarily charged in the locality for similar legal services. In general, the court shall make this determination using reliable surveys or other credible evidence. Then, the court should multiply that amount by the reasonable number of hours expended in the case. The court may consider making adjustments up or down to this base number in light of the other factors listed in *Wood* [*v DAIIE*, 413 Mich 573; 321 NW2d 653 (1982),] and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors. [*Smith*, 481 Mich at 537.[10]]

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[10] The six factors listed in *Wood* include: (1) the professional standing and experience of the lawyer, (2) the skill, time, and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the length and nature of the professional relationship with the client. *Wood*, 413 Mich at 588; see also *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). MRPC 1.5(a) refers to the following factors:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.

The lead opinion in *Smith* concluded that two factors, namely, the "results obtained" and whether the fee is fixed or contingent, should be eliminated from consideration. However, in a concurring opinion, two Justices disagreed with this portion of the lead opinion, and three dissenting Justices did not agree with eliminating any of the factors. Therefore, for our purposes here, all of the factors remain open for consideration. See *Univ Rehabilitation*, 279 Mich App at 700-701 n 3.

The *Smith* Court explained the method that should be followed in determining the fee customarily charged in the locality for similar legal services:

> In determining this number, the court should use reliable surveys or other credible evidence of the legal market. . . .
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> The reasonable hourly rate represents the fee customarily charged in the locality for similar legal services, which is reflected by the market rate for the attorney's work. "The market rate is the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the type of work in question." We emphasize that "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." The fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in surveys and other reliable reports. But we caution that the fee applicant must present something more than anecdotal statements to establish the customary fee for the locality. Both the parties and the trial courts of this state should avail themselves of the most relevant available data. For example, as noted earlier, in this case defendant submitted an article from the Michigan Bar Journal regarding the economic status of attorneys in Michigan. By recognizing the importance of such data, we note that the State Bar of Michigan, as well as other private entities, can provide a valuable service by regularly publishing studies on the prevailing market rates for legal services in this state. We also note that the benefit of such studies would be magnified by more specific data relevant to variations in locality, experience, and practice area. [*Smith*, 481 Mich at 531-532 (citations omitted).[11]]

Here, the parties submitted data and survey evidence to the trial court, and at the hearing on sanctions, plaintiff's counsel spoke in regard to his experience, membership in various organizations, and other relevant criteria. This is a case arising and tried in Wayne County. Thus, we deem the metropolitan Detroit area to be the "locality" for purposes of examining the fee customarily charged in the locality for similar legal services. Given the locality and the extensive litigation experience of plaintiff's counsel, which spans more than 30 years, considering the 2003 Economics of Law Practice Survey (ELPS) by the State Bar showing that top attorneys in the Detroit area were earning $440 per hour four years before trial and two years before the complaint was filed here, and given the cited information from the 2007 *Michigan Lawyers Weekly* article on Detroit attorneys, we cannot conclude that the trial court abused its discretion by allowing an hourly rate of $400. We acknowledge that the 2003 and 2007 ELPSs could also support an hourly rate lower than $400. But even if the trial court had started with a

[11] The Court noted that "trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Smith*, 481 Mich at 530.

lower hourly rate under the *Smith* analysis, any adjustments in the rate would have been upward after consideration of the *Wood* factors and MRPC 1.5(a). We reach this conclusion because (1) this was a difficult and complicated medical malpractice case, (2) counsel is highly experienced, (3) much skill, time, and labor was involved, (4) it was an expensive case to litigate, and (5) an excellent result was achieved, which was limited only because of the statutory cap. There was no abuse of discretion by the trial court in the hourly rate awarded to plaintiff for her counsel's time.

Defendant also argues that plaintiff's counsel's time records reveal inflated or insufficiently itemized services, requiring a reduction in the total hours requested and awarded. With respect to the number of hours in attorney fees requested by plaintiff below, even though defendant had initially raised the issue in his brief, when the trial court asked defense counsel whether he challenged the number of hours, defense counsel responded, "Your Honor, I'm going [to] leave that to your review." We find that defendant effectively abandoned this issue at the hearing, waiving the argument for appeal. See *In re Gazella*, 264 Mich App at 679. Furthermore, even on review, we hold that the trial court did not abuse its discretion by awarding plaintiff 279½ hours in attorney fees.

In *Smith*, 481 Mich at 532, our Supreme Court stated:

> In considering the time and labor involved (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*) the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. 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.

The only arguments presented by defendant on appeal pertain to the references in counsel's records to "correspondence" and "trial prep." In reviewing the list of services performed, we find that counsel generally provided sufficient details. Many of the references to "correspondence" included additional details. There are indeed some references to "correspondence" that lack details, and there is no indication in the "correspondence" references to the nature or subject matter of the correspondence. The "trial prep" references provide no details. However, in plaintiff's reply brief below, plaintiff went into extensive detail, which is reiterated in her appellate brief, with respect to what encompassed the "trial prep," which probably explained why defendant effectively abandoned any challenge at the hearing on sanctions and did not demand an evidentiary hearing. The court's determination that counsel's submissions were sufficient to award 279½ hours in attorney fees fell within the range of reasonable and principled outcomes, especially considering the unchallenged details contained in plaintiff's reply brief.

Finally, defendant contends that plaintiff was improperly allowed to recover all of her requested expert fees. Defendant complains that plaintiff provided no invoices from her experts and did not explain the basis for, or what was done to justify, certain expert fees that she claimed. Defendant also complains, relying on *Lufran Co*, that plaintiff requested thousands of

dollars for fees that could "only have been incurred for non-taxable activities such as discovery, conferences to educate counsel, strategy sessions, and assessing an opposing party's positions." The trial court awarded plaintiff $35,644 in expert witness fees.

Case evaluation sanctions include actual costs, MCR 2.403(O)(1), and the term "actual costs" is defined, in part, as "those costs taxable in any civil action," MCR 2.403(O)(6)(a). *Campbell v Sullins*, 257 Mich App 179, 203-204; 667 NW2d 887 (2003). Expert witness fees constitute "actual costs" under MCR 2.403(O). *Campbell*, 257 Mich App at 203-204. MCL 600.2164 provides in relevant part:

> (1) No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. . . .
>
> (2) No more than 3 experts shall be allowed to testify on either side as to the same issue in any given case, unless the court trying such case, in its discretion, permits an additional number of witnesses to testify as experts.
>
> (3) The provisions of this section shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion.

Regardless of whether an expert testifies, the prevailing party may recover expert fees for trial preparation. *Peterson*, 283 Mich App at 241.

In *Lufran Co*, 159 Mich App at 67, this Court determined that experts are properly compensated for court time and the time required to prepare for their testimony. The *Lufran Co* panel further indicated, however, that it did "not regard conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position to be properly compensable as expert witness fees." *Id*.

Here, the trial court's ruling appears to have gone beyond what is allowable under *Lufran Co* and the related caselaw. A review of the "services performed" by plaintiff's experts, as outlined by plaintiff in a list submitted to the trial court, reveals that the notations simply refer to the expert's name, with no actual indication regarding the nature of the services performed, e.g., "Dr. Danaceau; expert." We cannot discern from the existing record whether any of the expert fees actually awarded in this case would or would not have been permissible under *Lufran Co*. Therefore, as this Court expressed in *Hartland Twp*, 189 Mich App at 599, we must "reverse the award of . . . expert witness fees and remand for a hearing to determine the amount of reasonable expert witness fees in a manner consistent with *Lufran*."

Affirmed in part, reversed in part, and remanded for further proceedings concerning the award of expert fees consistent with this opinion. We do not retain jurisdiction. No taxable costs under MCR 7.219, neither party having prevailed in full.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald