STATE OF MICHIGAN

COURT OF APPEALS

EARL JEROME CISTRUNK, JR., Personal Representative of the Estate of EARL CISTRUNK, Deceased, and ERNESTINE CISTRUNK,

Plaintiffs-Appellants/Cross-Appellees,

v

OAKWOOD HERITAGE HOSPITAL, TED COLEMAN, M.D., PROFESSIONAL EMERGENCY CARE, P.C., MONICA RAMIREZ, P.A., and ER-ONE, INC.,

Defendants-Appellees,

and

BABIANO KIM, M.D.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
June 15, 2010

No. 287457
Wayne Circuit Court
LC No. 06-615302-NH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Plaintiffs, Earl Jerome Cistrunk, Jr., personal representative of the estate of Earl Cistrunk, deceased (Cistrunk)[1], and Ernestine Cistrunk appeal as of right a judgment of no cause of action following a jury trial in this medical negligence action. Defendant Babiano Kim, M.D. (Dr. Kim), cross-appeals as of right the same judgment. We affirm.

[1] Cistrunk passed away during the pendency of this appeal. There is no claim by plaintiffs that Cistrunk's death was in any way related to the alleged negligence that is the subject matter of this lawsuit.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The alleged medical negligence in this case arises out of treatment Cistrunk received at Oakwood Heritage Hospital (Oakwood Hospital) on November 8, 2004, which plaintiffs claim caused Cistrunk to become permanently incontinent.

Cistrunk's prior medical history included a diagnosis of prostate cancer in 1991, for which he was treated with radiation therapy for several months. Cistrunk's cancer went into remission until 2000, at which time the cancer returned and Cistrunk underwent a radical prostatectomy to remove the prostate gland. During the post-operative period, Cistrunk experienced incontinence and wore diapers, but regained full control of his urine after about one year.

In April 2004, Cistrunk presented to Oakwood Hospital due to severe pain in his left side. Cistrunk was hospitalized for two days, during which time he passed a kidney stone on his own. Dr. Kim was assigned to serve as Cistrunk's urologist during his hospitalization. After his discharge from the hospital, Cistrunk continued to experience left side and back pain and followed up with Dr. Kim several times in the time period leading up to November 2004. In September 2004, Cistrunk underwent a CT scan, which was read by a radiologist as showing a new mass in the left kidney that had not shown up in studies conducted in April 2004.

Based on the results of Cistrunk's CT scan and symptomology, Dr. Kim recommended that Cistrunk undergo a cystoscopy. Dr. Kim discussed the cystoscopy procedure with Cistrunk, which entails threading a thin, lighted instrument called a cystoscope through the penis in order to examine the bladder and urethra. Dr. Kim also discussed removing a stone if he found one during the cystoscopy. The testimony at trial conflicted as to whether Dr. Kim advised Cistrunk about certain medical risks associated with a cystoscopy, although it is undisputed that Dr. Kim did not warn Cistrunk of the possibility of permanent incontinence.

Dr. Kim performed the cystoscopy on Cistrunk on November 8, 2004, at Oakwood Hospital. During the outpatient surgery, in which Cistrunk was under general anesthesia, Dr. Kim encountered a bladder neck contracture, a narrow, scarred area that had formed as a result of the 2000 prostatectomy and/or the radiation that preceded it. The bladder neck contracture obstructed entry into the bladder with the cystoscope. In order to access the bladder, Dr. Kim made six incisions in the scarred area, whereafter he was able to enter the bladder and find a four-millimeter kidney stone in the left ureter, which he removed. At the conclusion of the surgery, Dr. Kim inserted a size 18 French Foley (6 millimeter) catheter through Cistrunk's penis into his bladder. Cistrunk was discharged home that same morning.

Later that day, after going home, Cistrunk felt bloated in his abdomen and had pain, so he presented to Dr. Kim's office for evaluation. Dr. Kim was not at his office. The receptionist called Dr. Kim and told Cistrunk's wife that Dr. Kim advised them to return to Oakwood Hospital and go to the emergency department. The Cistrunks drove directly to Oakwood Hospital, arriving at around 3:00 p.m.

Cistrunk, who still had the catheter in place, informed the Oakwood Hospital emergency staff that he had just undergone surgery by Dr. Kim and that Dr. Kim's office advised him to return to the hospital. Cistrunk's emergency room (ER) physician was defendant Ted Coleman,

M.D. (Dr. Coleman). A physician's assistant, defendant Monica Ramirez, and a nurse, Richard Wheatley, were also involved in Cistrunk's care. Due to a suspected mechanical obstruction in the catheter, Ramirez ordered that the catheter be irrigated with saline, which was performed by Wheatley. The catheter irrigation produced a small clot and drainage of about 10 cc's of light-red-tinged urine, which was less fluid return than expected given that 30 cc's were used for the irrigation. Cistrunk's catheter drainage problems persisted and Ramirez ordered Wheatley to change the catheter, with no apparent reference to the size of the replacement catheter.

Wheatley performed the re-catheterization and chose a size 24 French Foley (8 millimeter) catheter. When Wheatley inserted the size 24 catheter, he encountered resistance. Cistrunk testified that the catheter insertion caused him excruciating pain. He "hollered" during the procedure and told Wheatley that he could not have inflicted any more pain on him if he had shot him with a bullet. After placement of the catheter, 10 cc's of dark red urine flowed out of it. An entry in Cistrunk's chart three hours later indicates that 300 cc's of urine had drained through the newly replaced catheter and Cistrunk was discharged home.

Cistrunk returned to Oakwood Hospital's emergency department the following day due to continued pain and poor urine return through the catheter. Ramirez again saw Cistrunk and consulted with Dr. Kim, after which time Cistrunk's size 24 catheter was removed.

In the weeks that followed, Cistrunk experienced incontinence. In December 2004, Cistrunk consulted with urologist Dr. John Damiani. Dr. Damiani evaluated Cistrunk on December 22, 2004, and again on January 12, 2005, by way of an in-office cystoscopy. Dr. Damiani determined that Cistrunk was totally incontinent while standing up. The incontinence was such that Cistrunk was using five adult diapers per day. Dr. Damiani recommended that Cistrunk have an artificial sphincter implanted into his scrotal sac in order to control the flow of urine. Cistrunk underwent the sphincter implantation procedure in January 2005, but his difficulties retaining urine continued. Despite a second surgery on the artificial sphincter in May 2005, Cistrunk's incontinence problems continued. By the time of trial in May 2008, Cistrunk was expelling urine through a tube that went through his abdomen and into his bladder.

Plaintiffs commenced this action in May 2006. As ultimately amended, plaintiffs allegations against Dr. Kim included claims that he breached the standard of care by: 1) failing to obtain Cistrunk's informed consent in not discussing alternative treatment options other than a cystoscopy and the potential risks of permanent incontinence in the face of Cistrunk's prior medical history, altered anatomy due to the prostatectomy, and a potentially compromised bladder neck due to possible scarring that can form and mask an underlying incontinence problem caused by the prior treatment; 2) making six incisions at the site of the bladder neck contracture, far more than necessary in light of the tenuous nature of Cistrunk's continence following radiation and a prostatectomy; and 3) failing to personally care for Cistrunk when he returned to Oakwood Hospital on November 8, 2004 with complications after the cystoscopy. Plaintiffs' allegations against the defendant emergency department staff included claims that they breached the standard of care by: 1) failing to consult with Dr. Kim before providing treatment to Cistrunk on November 8, 2004, when he presented with post-operative complications; 2) choosing a larger size replacement catheter; and 3) traumatically inserting the replacement catheter. Defendants refuted these claims, contending that there was no breach of the standard of care.

Following an eight-day jury trial, in which plaintiffs and defendants presented competing testimony by medical experts in all relevant fields of medicine and the individual parties all testified, the jury returned a unanimous verdict (eight to zero) of no cause of action. The trial court entered a judgment for defendants and denied plaintiffs' timely motions requesting either a judgment notwithstanding the verdict (JNOV) or a new trial. Plaintiffs thereafter perfected this appeal of right and Dr. Kim cross-appealed.

II. JUDGMENT NOTWITHSTANDING THE VERDICT

Plaintiffs first argue that the trial court erred in denying their motion for JNOV with respect to Dr. Kim's failure to obtain Cistrunk's informed consent prior to his November 8, 2004, cystoscopy by not warning Cistrunk of the risks associated with the procedure, particularly the risk of permanent incontinence in light of Cistrunks' underlying medical history, and in failing to discuss other available treatment options. We disagree.

We review rulings on motions for JNOV de novo on appeal. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 272; 696 NW2d 646 (2005). When ruling on a motion for JNOV, a trial court should consider the evidence, and all legitimate inferences therefrom, in the light most favorable to the nonmoving party. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). If the evidence is such that reasonable jurors could disagree, JNOV is not properly granted. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

It is undisputed that the "doctrine of informed consent requires a physician to warn a patient of the risks and consequences of a medical procedure." *Wlosinski v Cohn*, 269 Mich App 303, 308; 713 NW2d 16 (2005). The burden of establishing that a defendant has breached the applicable standard of care is on the plaintiff. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). At issue in this case is whether the applicable standard of care required Dr. Kim to warn Cistrunk of the risk of permanent incontinence prior to, or during, the November 8, 2004 cystoscopy and the availability of other treatment options. Here, there was competing evidence on both sides, and there was sufficient evidence in Dr. Kim's favor to create an issue of fact for the jury.

The competing evidence included the testimony of Dr. Kim himself. Dr. Kim testified that prior to the November 8, 2004, procedure he discussed with Cistrunk his recommendation of performing a cystoscopy, a retrograde pyelogram (x-ray visualization of the ureter and kidney enhanced by injection of a dye), and a possible stone basket (tool used to remove stones found during the cystoscopy). He also testified that it is his habit and routine to explain the potential complications, although he admitted that he would not have discussed incontinence with Cistrunk because it was not a risk of the planned procedure. Dr. Kim did not expect to find a bladder-neck contracture because, according to him, Cistrunk did not present with symptoms of that condition. Dr. Kim responded to the question whether he gave Cistrunk the option of doing nothing (allowing the stone to pass by itself) by indicating that he told Cistrunk the CT scan findings showed the possibility of cancer, and that he had symptoms of another kidney stone. Waiting for the stone to pass spontaneously was not a viable option because he had treated

Cistrunk conservatively for seven months after first detecting it, and it had not passed. As such, he did not advise Cistrunk that waiting for it to pass was an available option.

At the time of Cistrunk's November 8, 2004 cystoscopy, Dr. Kim discovered the bladder-neck contracture, which he testified was "severe." Dr. Kim further testified that his habit or technique is to make several "very small, tiny" cuts in the face of a bladder-neck contracture, under direct vision of the scope, just enough to gain access into the bladder. He did not make deep cuts on Cistrunk's bladder-neck contracture. He testified that the kidney stone he found during the surgery was stuck in the opening of the left ureter, and that it could not have passed spontaneously because it was larger than 4 millimeters and the bladder-neck contracture was narrower than that. Dr. Kim testified that he did not breach the standard of care when treating Cistrunk.

Dr. Kim's urology expert bolstered Dr. Kim's testimony. Dr. Richard Santucci testified that the standard of care did not require Dr. Kim to tell Cistrunk that the planned procedures, cystoscopy with retrograde pyelogram and stone basket, could cause incontinence, "because it literally doesn't happen . . . it doesn't, just doesn't happen." Dr. Kim could not have discussed a risk attendant to the bladder-neck contracture, as it was an unexpected event. Dr. Santucci opined that when Dr. Kim encountered the unexpected bladder-neck contracture, under the circumstances presented, the standard of care did not require termination of the surgery to discuss with the patient doing incisions of the contracture. Going forward was consistent with the informed consent form, which stated:

> I understand that before, during and following these procedures unexpected conditions may be revealed or developed. Under these circumstances *I authorize the surgical team to exercise their professional judgment in modifying these procedures or in adding other procedures* [that it] consider[s] advisable and necessary. [Emphasis added.]

With respect to the six incisions made by Dr. Kim, Dr. Santucci testified that he did not breach the standard of care with his chosen procedure as there are "multiple ways to skin a cat" when choosing an appropriate technique. Dr. Santucci also testified that a bladder-neck contracture is not good for the patient despite the fact that it may have been providing Cistrunk with some continence following his prior cancer treatments. With regard to whether Dr. Kim should have anticipated the possibility of a bladder neck contracture in order to warn of attendant risks, Dr. Santucci testified that Cistrunk did not have a lot of symptoms, which is why finding the contracture was "such a surprise." Although Dr. Santucci conceded that a physician must tell his or her patient about options other than surgery, he also indicated that in Cistrunk's situation, dissolving the stone, using shockwave therapy, or going into the bladder from above were either not recommended or not viable options for various reasons, including the type and location of the stone. He also stated that simply doing nothing and waiting for a stone that is making a patient miserable to pass spontaneously is "an almost comical option," because when people are having stone pain, they really want it treated.

Plaintiffs' evidence, of course, contradicted Dr. Kim's. Plaintiffs presented expert testimony that Dr. Kim should have anticipated a possible bladder-neck contracture in light of Cistrunk's prior medical history and symptomology, as well as increased risks associated with an altered pathology post-prostatectomy, and that failing to warn of possible permanent

incontinence or discuss other treatment options was a breach of the standard of care. The parties also had an opportunity to thoroughly cross-examine one another's experts. The jury, therefore, had to determine which side's evidence was more credible, and entitled to greater weight. Given the competing evidence, that the standard of care was vigorously disputed, and the fact that this case was, in part at least, a "battle of the experts" and a contest over which experts were more credible, there was a question of fact for the jury. Reasonable jurors could differ on the question whether Dr. Kim breached the standard of care with respect to plaintiffs' informed consent theory. Therefore, the trial court did not err in denying plaintiffs JNOV.

III. NEW TRIAL

Plaintiffs also argue that the trial court abused its discretion in denying their request for a new trial pursuant to MCR 2.611(A)(1)(e) on their informed consent claim because the no-cause verdict was against the great weight of the evidence. We disagree.

Appellate review of this issue is for an abuse of discretion. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). An abuse of discretion involves far more than a difference of judicial opinion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "Rather, an abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Estate of Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). In deciding whether the verdict runs contrary to the overwhelming weight of the evidence, a trial court judge may not substitute his or her judgment for that of the jury, unless the record reveals that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). This Court substantially defers to the judgment of the trier of fact. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).

Plaintiffs devote only one paragraph to this issue, and do not develop this argument, nor cite any supportive authority. This Court is not obliged to develop a party's argument, or to search for authority to sustain or reject it. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, this argument is deemed abandoned. In any event, review of the record reveals that this case depended heavily on the jury's determination of witness credibility and who to believe with respect to whether, under the circumstances presented, Dr. Kim breached the standard of care concerning informed consent. We find that the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial on their informed consent claim.

IV. TESTIMONY OF DR. JOLIN

Plaintiffs argue that the trial court abused its discretion in granting the ER defendants' motion to exclude certain portions of plaintiffs' expert Dr. Scott Jolin's *de benne esse* deposition testimony. We disagree. "We review a trial court's decision to admit or exclude evidence for an abuse to discretion." *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "[A]ny error in the admission or exclusion of evidence will not warrant appellate relief 'unless refusal to take this action appears . . . inconsistent with substantial justice,' or affects 'a substantial right of the [opposing] party.'" *Id*., quoting MCR 2.613(A) and MRE 103(a).

On the first day of trial, the ER defendants moved in limine to exclude certain testimony by Dr. Jolin, an emergency medicine expert. Specifically, the ER defendants sought to exclude

testimony by Dr. Jolin concerning his opinions regarding Dr. Coleman's familiarity with the risks of catheterization in the ER. Defendants based their motion on plaintiffs' failure to plead a claim regarding Dr. Coleman's competence in failing to know the risk factors and argued that plaintiffs' elicitation of such testimony would amount to trial by ambush. Plaintiffs conceded that they did not plead that Dr. Coleman should have been aware of the risk factors involved, just that Dr. Coleman should have conferred with a urologist, and as such, his lack of knowledge bolsters that point. The trial court granted the motion, instructing plaintiffs to "[j]ust stay away from the area of asking Dr. Jolin whether or not he knew, whether or not Dr. Coleman knew." On the day Dr. Jolin's *de benne esse* video deposition was to be played before the jury, the parties obtained additional rulings regarding defendants' objections to the admissibility of certain portions of Dr. Jolin's testimony.

Plaintiffs argue that the trial court's rulings excluded testimony by Dr. Jolin in which he: (1) commented on Dr. Coleman's lack of familiarity with the risks associated with catheterization in a patient like Cistrunk; (2) addressed the significance of Dr. Coleman's lack of familiarity with those alleged risks; and (3) rendered his opinion that Cistrunk suffered injury as a result of the ER re-catheterization. The ER defendants argue that the trial court only excluded testimony by Dr. Jolin relating to Dr. Jolin's opinion that Dr. Coleman was not familiar with the complications that might arise when attempting to catheterize a patient with Cistrunk's history.

Review of the record reveals that the testimony plaintiffs claim was excluded was in fact excluded. The basis of the trial court's ruling in granting defendants' motion in limine is not entirely clear. It appears that the trial court may have granted the motion based on a lack of foundation as to what Dr. Coleman knew or did not know. With respect to Dr. Jolin's testimony regarding the cause of Cistrunk's injury, the trial court expressly indicated that Dr. Jolin's opinion was inadmissible because he was speculating. Plaintiffs fail to explain on appeal why this latter ruling was incorrect; as such, we deem plaintiffs' argument on the matter abandoned. See *Wilson*, 457 Mich at 243.

In Dr. Jolin's *de benne esse* deposition, he was asked his "opinion as to whether or not Dr. Coleman was familiar with the complications that could arise when attempting to insert a Foley catheter in a patient with [] Cistrunk's history." Dr. Jolin answered: "Well, based on Dr. Coleman's deposition, he stated that he was not aware of any complications." He was then asked the significance of this lack of knowledge. The questions and answers reveal that the problem herein lies mainly with questions being asked of the witness. Dr. Jolin was not being asked his opinion whether it was a breach of the standard of care for Dr. Coleman not to know of the risks, but rather, his opinion *whether* Dr. Coleman knew of the risks. Dr. Jolin could not have had personal knowledge of what Dr. Coleman did or did not know. There is no way that Dr. Jolin could have "gotten into the head" of Dr. Coleman, so his opinion was purely speculative and inadmissible. The trial court expressly permitted Dr. Jolin's testimony that the average emergency physician would be familiar with the risk factors associated with insertion of a urinary catheter, and Dr. Coleman was cross-examined at length regarding what he did and did not know. Plaintiffs admitted in response to the motion in limine that the testimony they sought to admit went to the weight of their contention that Dr. Coleman should have contacted a urologist, a theory they were allowed to and did present through expert testimony at trial.

Because we find that the subject testimony was properly excluded for lack of foundation, we need not address defendants' argument that plaintiffs were improperly seeking to present an entirely new theory of liability.

V. TESTIMONY AND MEDICAL RECORD ENTRIES OF DR. DAMIANI

Plaintiffs argue that the trial court abused its discretion in excising certain entries in the medical records of Dr. John Damiani, a subsequent treating urologist, which records were admitted as evidence, and redacting portions of Dr. Damiani's videotaped deposition relating to such entries. Evidentiary rulings are reviewed on appeal for an abuse of discretion, and no appellate relief is warranted unless failure to do so is inconsistent with substantial justice or affects the opposing party's substantial rights. *Craig*, 471 Mich at 76.

On the first day of trial, the parties discussed with the court their plans to stipulate to the admission of certain medical records. The ER defendants moved to exclude from Dr. Damiani's medical chart certain entries and to redact from his deposition discussion of those record entries pertaining to Cistrunk's November 8, 2004, medical care at Oakwood Hospital. Specifically, based on grounds of hearsay and speculation, defendants sought to exclude references to a "forceful traumatic catheterization" and a "traumatically inserted" Foley catheter that "ruptured [Cistrunk's] sphincteric mechanism." Plaintiffs argued that while the statements were hearsay, they were admissible under the medical records exception, MRE 803(4). Dr. Damiani testified that he had never read Cistrunk's Oakwood Hospital medical chart, that the information he received pertaining to Cistrunk's November 8, 2004, re-catheterization came strictly from Cistrunk, and when asked if he knew what caused Cistrunk's incontinence Dr. Damiani responded, "I can only go by the sequence of events and what the patient related," and "it would be conjecture on my part to speculate from what the patient told me and the mechanism that he described." The trial court noted that the description of the re-catheterization being "traumatic suggests that there was an injury and something was damaged and Dr. Damiani said 'I don't know what was damaged,' so that is what that suggests. He made a conclusion that there was a trauma involved." As such, the trial court granted defendants' motion to exclude the above references.

Hearsay is an out-of-court statement, offered in evidence for the truth of the matter asserted. MRE 801(c). Here, plaintiffs sought to admit statements in Dr. Damiani's medical records about a forceful, traumatic re-catheterization for their truth. There was no other potential purpose. Plaintiffs never argued that they sought to use them for impeachment, or any other non-substantive purpose (e.g., charge of recent fabrication). See MRE 801(d)(1). Therefore, the statements in Dr. Damiani's medical records were hearsay. There are exceptions, however, to the general rule that hearsay is not admissible. MRE 802. "Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). Admission of a disputed portion of a medical record implicates the concept of hearsay within hearsay. *Merrow v Bofferding*, 458 Mich 617, 625; 581 NW2d 696 (1998); MRE 801(c). In this case, there are two levels of hearsay: (1) Dr. Damiani's medical records in which he documents his visit and conversation with Cistrunk; and (2) Cistrunk's statements to Dr. Damiani regarding the November 8, 2004, re-catheterization at Oakwood Hospital. The first level of hearsay, Dr. Damiani's medical chart, is admissible under MRE 803(6), which provides an exception to the hearsay rule for records of regularly conducted activity. *Merrow*, 458 Mich at 626-627. The second level of hearsay,

Cistrunk's statements to Dr. Damiani, may be admissible under MRE 803(4). MRE 803(4) permits the admission of:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

At his deposition, Dr. Damiani interpreted his handwritten progress note in which the alleged traumatic nature of the re-catheterization was first addressed:

> Patient complains of incontinence starting after procedure by Dr. Kim. Patient had a kidney stone on the left, had passed spontaneously back in July. Had a CT without contrast, and there's a two to three centimeter left renal mass. Contrast CT was done, no results. On 11/8/04, patient had cysto, sent home with Foley, went into retention. Doctor placed a large catheter. Patient had pain, bleeding, forceful and traumatic catheterization. Went home bleeding. [Portion of entry is illegible]. The Foley was [discontinued]. The patient has been nearly totally incontinent. Patient uses five Depends a day.

If the description of Cistrunk's re-catheterization as "forceful" and "traumatic" are considered to be Dr. Damiani's conclusions, they are inadmissible because Dr. Damiani testified that he was neither present during the re-catheterization, and therefore lacked personal knowledge, nor could he render an opinion regarding the cause of Cistrunk's incontinence.[2] As such, his comments would be properly excluded for lack of foundation and speculation. If such descriptions are considered to be statements by Cistrunk to Dr. Damiani in the course of seeking a medical diagnosis and treatment, the issue is whether such descriptions were reasonably necessary to such diagnosis and treatment. In his deposition, Dr. Damiani described his medical record entries as follows:

> *Q.* And you only believe it was forceful because of what the plaintiff told you?
>
> *A.* Yes, the patient had described the catheterization process, and that's how he described it.
>
> *Q.* And you say "traumatic." Did he use those words?
>
> *A.* No, it was probably a term I used because he was describing the catheter being jammed up there and causing pain and, you know, the process. I mean

[2] Notations in the medical records regarding the re-catheterization having "ruptured [Cistrunk's] sphincteric mechanism" were properly excluded due to Dr. Damiani's admission during his deposition that he did not diagnose a ruptured sphincteric mechanism in the course of his evaluation of Cistrunk, nor did he determine a cause for Cistrunk's incontinence.

when the patient related the story of what he experienced, "traumatic" was a term that I used to characterize his account.

Q. But you don't know as we sit here today whether it was traumatic or not, do you?

A. I was not in the emergency room when it was done, no.

The above testimony indicates that Dr. Damiani was not documenting his conclusions, but rather, characterizing or summarizing Cistrunk's statements to him regarding the November 8, 2004, re-catheterization. Had this testimony been presented to the jury, it would be clear to the jury that the statements contained in Dr. Damiani's medical records were attributable to Cistrunk. Because MRE 803(4) permits the admission of a patient's statements "describing medical history, or past . . . pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary," we deem the entries in Dr. Damiani's medical records regarding a "traumatic" or "forceful" re-catheterization to have been admissible. Cistrunk specifically sought out Dr. Damiani, a urologist, in order to ascertain why he was incontinent so that he could be treated for same. At the time, Cistrunk was obviously under the impression that the re-catheterization may have been the cause or external source of his incontinence. While we find that the trial court abused its discretion in excluding references in Dr. Damiani's medical records to Cistrunk's description of the November 8, 2004, re-catheterization, we do not find that appellate relief is warranted because plaintiffs have failed to establish that failure to do so is inconsistent with substantial justice or affects their substantial rights. See *Craig*, 471 Mich at 76. Cistrunk testified in detail regarding the re-catheterization procedure and how forceful and excruciatingly painful it was, such that Wheatley could not have inflicted any more pain on him than if he had shot Cistrunk with a bullet. Furthermore, Dr. Damiani was not plaintiffs' proximate cause expert. Plaintiffs produced other medical expert testimony regarding the cause of Cistrunk's incontinence.

Given our rulings with respect to plaintiffs' issues on appeal, the issues presented in Dr. Kim's cross-appeal are rendered moot. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering