STATE OF MICHIGAN

COURT OF APPEALS

TERESA COX, as Next Friend of BRANDON COX, a minor, TERESA COX and CAREY COX, individually,

Plaintiffs-Appellees/Cross-Appellants,

v

BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT, d/b/a HURLEY MEDICAL CENTER, a municipal corporation,

Defendant-Appellant/Cross-Appellee,

and

EDILBERTO MORENO, M.D,

Defendant.

FOR PUBLICATION
October 27, 2000
9:00 a.m.

ON REMAND

No. 205025
Genesee Circuit Court
LC No. 92-12247-NM

Before: Hood, P.J., and Griffin and Markey, JJ.

HOOD, P.J.

This case is on remand by order of the Supreme Court to consider defendant's issues on appeal. We affirm.

At the commencement of the jury trial, defendant objected to the qualifications of plaintiff's expert, Dr. Houchang Modanlou. Specifically, Dr. Modanlou had been deposed five months earlier as well as two weeks prior to trial. During both depositions, Dr. Modanlou had indicated that he was not familiar with the local standard of care for nurses. The trial court held that a national standard of care governed because plaintiff's theory of the case was based on the cumulative acts of doctors, nurses, and residents who worked in defendant's neonatal intensive care unit ("NICU"). Later in the trial, Dr. Carolyn Crawford testified as an expert for plaintiff regarding the standard of care. She also stated that she was not familiar with the local standard of care. However, both experts testified that national standards of care applied to the care and

treatment rendered by all staff members who participated in the treatment of newborns as a team. The trial court allowed Dr. Crawford to testify regarding the national standard of care over defense counsel's objection.

Brandon Cox was born on February 8, 1990, at twenty-six to twenty-seven weeks gestation by Cesarean section. An umbilical arterial catheter ("UAC") was inserted into Brandon's umbilicus to aid his treatment. The UAC allowed NICU personnel to monitor Brandon and take blood in a convenient fashion. The UAC was inserted by a doctor or resident. Doctors at defendant's hospital secured the UAC by suturing it. Further security was provided by taping the UAC, an act that was done by nurses who received specialized training to work in the NICU. Babies with UACs were monitored for activity level. The UAC was inserted into an artery and, if dislodged, the baby would have blood flow from the area of the umbilicus. Nurses could place babies in restraints to further ensure that the UAC would not dislodge. While Brandon's activity level was not preserved in the medical records, Brandon weighed a mere 907 grams or approximately two pounds and was on a sedative. There is no indication attending nurses found the need to place Brandon in restraints.

On February 9, 1990, Brandon did experience problems. Doctors attended to Brandon, and he stabilized. However, on that date, the UAC was moved out two centimeters. Nurse Edith Klupp performed this action at the request of a doctor. No one resutured the UAC, however, Nurse Klupp testified that it was not required, although this testimony contradicted the testimony of defendant's witness, Dr. Brian Nolan. A cranial ultrasound taken in the early afternoon of February 10, 1990, did not reveal any abnormality.

On February 10, 1990, at 4:00 p.m., Nurse Martha Plamondon attended to Brandon. She drew blood from the UAC and repositioned him. It was common practice to reposition premature babies. At 4:20 p.m., respiratory therapist Richard Scott notified Nurse Plamondon that there was blood on Brandon's abdomen. The facts were in dispute regarding what happened next. Nurse Plamondon testified that Dr. Roberto Villegas, a neonatalogist, was present. She allegedly called out to him about Brandon's condition, and he told her to give Brandon 20 cc of Plasmanate. However, Dr. Villegas had no recollection of Brandon. Furthermore, he testified that he would not have ordered 20 cc of Plasmanate, but would have ordered 10 cc be administered at a time. While it was undisputed that orders for Plasmanate were to reflect which doctor requested the administration, the order for 20 cc of Plasmanate was recorded in the chart, but there was no correlation to a doctor. Dr. Amy Sheerer, a resident, testified that she was paged to the NICU "stat" and arrived by approximately 4:42 p.m. There, she learned from Nurse Plamondon that Brandon suffered 40 cc of blood loss, or approximately half of his blood volume, secondary to UAC dislodgment. Dr. Sheerer was advised that 20 cc of Plasmanate had been administered. She recorded that entry, but could not be certain as to the ordering doctor. Brandon was treated with more Plasmanate and blood. Red blood cells are necessary because they carry hemoglobin for oxygenation. Plasmanate acts to improve blood volume and is convenient until blood can be obtained from the blood bank. While Brandon recovered from this incident, it was later discovered that he suffered from a cranial bleed. Brandon was later diagnosed with a form of cerebral palsy that involves the stiffening of the lower extremities. Plaintiff's experts testified that Brandon's condition was a result of the incident on February 10, 1990, while defendant's experts testified that Brandon's premature birth and instability on

February 9, 1990, caused his condition. In any event, Brandon would never live alone and would require various therapies and surgeries for his difficulties.

Plaintiff's theory as alleged in the amended complaint was that the treatment rendered in the NICU caused Brandon's injuries.[1] Specifically, the placement of the UAC, by doctors, and the subsequent monitoring, by nurses, resulted in the dislodgment. Following the dislodgment of the UAC, the treatment rendered was allegedly deficient. It took twenty minutes to administer help to Brandon, despite the fact that Dr. Villegas was allegedly present. Consequently, plaintiff presented Dr. Eric Amberg to testify regarding damages. Dr. Amberg delineated the extensive therapy that Brandon would require. He also testified that Brandon could never live alone but would be required to live in a group home setting. Dr. Amberg estimated the cost of therapy and group housing. There was no objection to this damage testimony.

Teresa Cox testified that she intended on caring for Brandon. Later, Dr. Robert Ancell testified regarding Brandon's limited employment options and his lost earning capacity. Dr. Ancell estimated damages at one million to one point five million dollars. Dr. Ancell was asked to testify regarding costs of attendant care. Defense counsel objected on the grounds that Teresa intended on caring for Brandon. The trial court sustained the objection. Plaintiff's counsel attempted to elicit the number of years that Brandon would outlive Teresa, but defense counsel objected on the grounds that the tables were based on normal healthy individuals. The objection was sustained. Defense counsel did not request that the trial court strike the earlier testimony of Dr. Amberg.

Defendant's expert, Dr. Steven Donn opined that the cause of Brandon's injuries was not the incident on February 10, 1990. Curiously, despite the fact that defendant continued to assert that the only breach alleged by plaintiff was the breach by Nurse Plamondon, defense counsel questioned Dr. Donn regarding breach of the standard of care by Scott, the respiratory therapist. Dr. Donn testified that he had reviewed the records, and there was no breach of the standard of care by any individual. However, Dr. Donn testified that a national standard of care applied, although there may be individual variations. This testimony regarding the national standard of care was consistent with the testimony of plaintiff's experts.

In closing argument, plaintiff's counsel referred to the negligence of the NICU. Specifically, he noted the actions of Nurse Klupp in moving the UAC out two centimeters, Scott's failure to aid Nurse Plamondon in securing help or aiding him herself, Nurse Plamondon's failure to timely treat Brandon, Dr. Villegas' failure to come to Nurse Plamondon's aid if he was, in fact, present, and the twenty minutes in which Brandon did not receive treatment despite the discovery of the bleeding. Defense counsel did not object initially, but when individual allegations were later raised, he objected. The objection was sustained based on the pleadings and proofs presented. Plaintiff's counsel also referred to the testimony of Dr. Amberg. Defense counsel objected on the grounds that the testimony was excluded regarding attendant

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[1] Specifically, the amended complaint contained paragraphs 12, 13, 17o-t, that alleged that the cumulative negligence of employees of defendant's NICU were responsible for the injuries of plaintiff. We will not reprint those allegations here.

care costs. However, the trial court stated that he could not recall that ruling and sustained the objection. In any event, plaintiff's counsel did not continue to discuss damage testimony but proceeded to discuss the impact of Brandon's condition.

Defendant first argues that the trial court erred in failing to disqualify plaintiff's experts because they were unfamiliar with the local standard of care. We disagree. As an initial matter, we note that objection to the qualifications of plaintiff's experts was not raised until the commencement of trial and during trial. A party must move within a reasonable time after learning of the expert's identify and basic qualifications to strike the expert. *Greathouse v Rhodes*, ___ Mich App ___; ___ NW2d ___ (Docket No. 214434, issued August 18, 2000). The failure to timely do so results in forfeiture of the issue. *Id*. A party may not seek to sabotage another party by depleting the substance of the case without warning. *Id*.; See also *State Highway Comm v Redmon*, 42 Mich App 642, 646; 202 NW2d 527 (1972) ("Counsel cannot sit idly by and then for the first time interpose objections at trial.") In the present case, defendant was aware of the qualifications of Dr. Modanlou at least five months prior to trial. Despite this knowledge, issue was not taken with the qualifications until the time of trial. If the trial court had granted defendant's motion, plaintiff would have been forced to implore the court for a costly adjournment to seek a new expert or proceed to trial without experts to testify regarding the standard of care, a futile endeavor. Accordingly, the issue was forfeited. *Greathouse, supra*.[2]

In any event, the qualifications of an expert rests in the discretion of the trial court, and we will interfere with the trial court's ruling only to correct an abuse of discretion. *Mulholland v*

[2] The dissent contends that the "sole authority" for our conclusion is the *Greathouse* decision and that decision is limited to examining qualifications as defined by the statute. Our review of the *Greathouse* decision indicates that it was not intended to be limited to examining statutory qualifications. The decision noted that it was relying on numerous instances wherein issues were held to be forfeited due to deficiency or delay. If such conduct were allowed, parties could essentially lie in wait and sabotage the case of a party at or just prior to trial. Also, the dissent ignores our citation to the *Redmon* decision. In that case, the plaintiff's expert suffered a heart attack in February 1970, and was rendered unable to testify. In March 1970, the plaintiff notified the defendant that there would be a substitute for the expert witness, with trial scheduled for May 11, 1970. At trial, after the jury was sworn and the first witness was examined, the defendant moved to exclude the substituted expert because his name was not listed on the plaintiff's pretrial summary statement. We noted that the defendant was aware of the first expert's disability for five months and knew of the substitution for 56 days. *Redmon, supra* at 644-645. Despite this knowledge, the defendant failed to act until the time of trial. This Court stated that the defendant did not appear to act in good faith by raising the objection at trial and failed to "raise timely objection" to the proposed new expert witness. *Id*. Therefore, the trial court's refusal to strike the substituted witness was affirmed on appeal. *Id*. at 646. Likewise, in the present case, defendant was aware of the qualifications of Dr. Modanlou five months prior to trial and his inability to testify regarding a local standard of care. Despite this knowledge, defendant did not act to exclude the testimony of Dr. Modanlou until the first day of trial. We cannot condone a course of conduct that leaves a party at the mercy of the trial court's discretion to allow adjournments when the means of challenging any deficiency were readily discernible and available for months prior to trial. In any event, we note that although we conclude that the challenge to the ability to testify regarding the standard of care was forfeited, we nonetheless address the merits of the issue.

DEC Int'l Corp, 432 Mich 395, 402; 443 NW2d 340 (1989). The high standard of review in this area is warranted because a determination of the expert's qualifications in light of the proposed testimony involves complicated factual reviews, cross-examination of an expert is an ample safeguard, and the *issue of qualifications is considered too trifling to warrant appellate review*. *Id*. Review of the amended complaint in this litigation reveals that plaintiff alleged a theory of a chain of negligent acts that resulted in Brandon's injuries. Furthermore, the discovery presented by plaintiff supported the theory. That is, the medical records and depositions of defendant's personnel indicated that, after the UAC was inserted, it was pulled out two centimeters. Brandon was not placed in restraints. He was repositioned. Twenty minutes later, it was discovered that the UAC was dislodged. Despite the discovery, it took fifteen to twenty minutes to take measures to increase Brandon's blood pressure and blood volume. Defendant was placed on notice that the theory was premised on the acts of the NICU unit that operates as a team in caring for premature babies. This information was provided to defendant in the amended complaint and in the discovery depositions. Plaintiff's experts testified that the team unit is governed by a national standard of care. This testimony was corroborated by defendant's expert, Dr. Donn. Defendant was provided with sufficient notice of the theory of liability prior to trial and the theory was supported by the evidence. See *Dacon v Transue*, 441 Mich 315, 329-330; 490 NW2d 369 (1992). Accordingly, we cannot conclude that the trial court abused its discretion in allowing plaintiff's expert to testify regarding a national standard of care. *Mulholland, supra*.

Even if we could conclude that the admission of this evidence was erroneous, reversal is not required unless there is prejudicial error. *Lenzo v Maren Engineer Corp*, 132 Mich App 362, 365; 347 NW2d 32 (1984); See also *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992) "[T]he conduct of a trial is within the control of the presiding judge and does not result in error warranting reversal unless there is some proof of prejudice.") While defendant concludes that the standard of care is governed by a local community standard, there is no evidence in the record to support that contention. While defendant may not have had the burden of proof to demonstrate the standard of care, defendant's failure to present proofs in a separate record that the standard of care is governed by a local standard, precludes any conclusion that the trial court's ruling resulted in prejudicial error. Furthermore, defendant's expert, Dr. Donn, testified that a national standard applied. Accordingly, even if we could conclude that the evidentiary ruling was an abuse of discretion, there is no foundation in the record to conclude that the ruling led to prejudicial error. *Lenzo, supra*.[3]

Defendant next argues that the trial court committed reversible error by identifying the wrong alleged tortfeasor and the wrong standard of care in the standard jury instruction, SJI2d 30.01, read to the jury. We disagree. We review jury instructions in their entirety. *Stoddard v*

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[3] While the dissent contends that there is no requirement that defendant present an offer of proof regarding the local standard of care, without any offer of proof to demonstrate that the national standard of care differs from any local standard, we would be ordering a new trial not based on prejudicial error, but rather, based on speculation that the standard differs. This course of action, to order a new trial without examining the standard, is particularly suspect in light of the fact that *defendant's expert* testified that a national standard of care applied, in concurrence with the opinions of plaintiff's experts.

Manufacturers National Bank of Grand Rapids, 234 Mich App 140, 163; 593 NW2d 630 (1999). It is error to instruct a jury about an issue unsustained by the evidence or the pleadings. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). "However, there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury." *Id*. (citations omitted.) The determination whether an instruction is accurate and applicable to a case rests within the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). Review of the instruction reveals that the trial court took the standard jury instruction and inserted the neonatal intensive care unit to reflect the theory of plaintiff that was supported by the evidence. Defendant's continued assertion, that plaintiff's theory of the case was premised solely on the negligence of Nurse Plamondon, is completely unsupported by the record. Dr. Crawford testified that she took issue with the placement of the UAC, its subsequent movement, the failure to suture after movement, the monitoring of the line, and the response to the bleeding once it was discovered that the UAC had been displaced. The instruction was properly modified to reflect plaintiff's theory of the case, that is, a chain of events in the placement and monitoring of the UAC and subsequent response to displacement resulted in the injuries to the child. The trial court did not abuse its discretion in modifying the instruction to reflect plaintiff's theory of the case. *Stevens, supra*. Furthermore, defendant concludes that only the liability of Nurse Plamondon was at issue and that the standard of care governing her conduct was local. Again, as noted in issue one, plaintiff's theory was premised on a chain of liability of individuals who worked in the NICU and *experts for both plaintiff and defendant were in agreement that a national standard of care applied*. Accordingly, we cannot conclude that the trial court abused its discretion in instructing the jury. *Id.*

We note that the dissent takes issue with the instruction as given on grounds other than those raised by defendant. Specifically, the dissent alleges that the trial court's failure to instruct in accordance with the strict language contained within the standard jury instruction requires reversal. We disagree with the dissent. The trial court modified the standard jury instruction to comport with plaintiff's theory of the case. That is, the trial court did not name an individual profession, but rather, utilized the term neonatal intensive care unit.[4] However, in the course of modifying the instruction the trial court omitted the phrase "ordinary learning, judgment or skill" from the first paragraph of the instruction. However, the phrase is also repeated in the second paragraph of the standard jury instruction. The trial court included the *majority* of this phrase in

[4] Irrespective of the fact that the term "unit" was presented to the jury, this does not mean that a building or wing of the hospital was held accountable as opposed to individuals. Review of the proofs and numerous arguments before the trial court regarding this issue reveals that the evidence presented to the jury was that the "unit" referred to the individuals, including nurses, neonatalogists, residents, and respiratory therapists who worked together "as a unit" in the care and treatment of newborns. We note that defendant merely wanted the instruction to address the negligence of Nurse Plamondon only. The term "unit" could have easily been modified to list the neonatalogists, nurses, residents, and respiratory therapists that comprised the unit and treated Brandon. However, defendant did not make such a request and would only have been satisfied if the instruction was limited to allege liability of Nurse Plamondon, in spite of plaintiff's theory to the contrary.

reading the second paragraph of the instruction to the jury, but omitted the word "ordinary" from the phrase.

While the trial court did omit the terms "learning, judgment or skill" from the first paragraph of the instruction, that language was included in the second paragraph read to the jury. Jury instructions are to be viewed as a whole rather than extracted piecemeal to establish error. *City of Lansing v Hartsuff*, 213 Mich App 338, 348; 539 NW2d 781 (1995); *Larzelere v Farmington Township*, 63 Mich App 465, 468; 234 NW2d 568 (1975). The omission of an instruction is not error warranting reversal if the instructions as a whole cover the substance of the omitted instruction. *Hartstuff, supra*. Review of the instructions as a whole reveals that the substance of any omission from the first paragraph was presented in the second paragraph. Error warranting reversal did not occur. *Id.*, *Murdock, supra*.[5] The dissent contends that the omission of the word "ordinary" requires reversal. We disagree. In *Cody v Marcel Electric Co*, 71 Mich App 714, 720-721; 248 NW2d 663 (1976), the plaintiff alleged that the omission of the word "necessarily" from the instruction regarding the plaintiff's theory of negligent design required reversal. We held that omission of the word did not render the instruction erroneous and also would have made the instruction misleading. *Id.* Additionally, in *Van Every v Southeastern Michigan Transportation Authority*, 142 Mich App 256, 259-260; 369 NW2d 875 (1985), the plaintiff alleged that the trial court's omission of the word "disability" from the instruction and the failure to correct the omission after objection constituted reversible error. This Court held that where it was perfectly clear that no prejudice could have resulted from the slight omission from the standard instruction, reversal is not required. *Id*. at 261. Generally, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994). In the present case, plaintiff presented the testimony of Dr. Crawford to establish that the acts of members working in the NICU did not act in accordance with the standard of care. However, defendant did not take issue with that conclusion and did not argue that Nurse Plamondon's actions comported with that of an individual nurse with "ordinary learning, judgment or skill."[6] Defendant's experts challenged causation. Specifically, defendant's experts alleged that the brain injuries suffered by Brandon were not the result of the bleed out incident due to the

[5] Defendant relies on *Danner v Holy Cross Hospital*, 189 Mich App 397, 398; 474 NW2d 124 (1991) for the proposition that the jury could not be instructed regarding the negligence of the unit. Review of that decision reveals that it does not support defendant's position. Rather, the plaintiff in *Danner* alleged a claim of negligence in circuit court against the defendant hospital in order to avoid application of arbitration. Despite the plaintiff's artful pleading in characterizing the claim as one of corporate negligence, we held that the claim, in fact, alleged a claim of medical malpractice that was governed by arbitration. The decision did not abolish vicarious liability for members of a team in a neonatal intensive care unit that allegedly act negligently in rendering care to a premature newborn.

[6] Curiously, we note that while defendant continually argued that plaintiff's theory of the case was premised on the liability of Nurse Plamondon solely, it did not present proofs to match that allegation. That is, it did not present a nurse to testify regarding the local standard of care and justify Nurse Plamondon's actions. Instead, the defense of the action consisted of neonatalogists who did not comment on the propriety of Nurse Plamondon's actions and any fifteen to twenty minute delay in rendering treatment, but emphasized their opinions regarding causation.

displacement of the UAC on February 10, 1990, but were the result of his premature birth and complications that arose on February 9, 1990. Accordingly, we cannot conclude that the omission of the word "ordinary" from the modified instruction resulted in prejudice to defendant when it did not take issue with this instruction on this basis below or on appeal and did not challenge the "learning, judgment or skill" of NICU employees, ordinary or otherwise, but rather challenged any liability based on causation. *Van Every, supra*; *Cody, supra*.

Furthermore, review of the history of the evolution of the Standard Jury Instructions ("SJI") reveals that deviations from the standard language no longer mandates reversal. Shortly after the SJI were originally mandated by GCR 516.2, our Supreme Court ruled that where an accurate SJI was properly requested at trial, but not given, and the omission or deviation was brought to the attention of the trial judge prior to jury deliberations, prejudicial error would be presumed. *Javis v Ypsilanti Bd of Ed*, 393 Mich 689, 702-703; 227 NW2d 543 *(*1975). In such cases, reversal was mandated. This "automatic reversal" rule was reaffirmed four years later in *Socha v Passino*, 405 Mich 458; 275 NW2d 243 (1979). There, the Court stated:

> We have reconsidered the *Javis* rule in the factual context of this case. We reaffirm what we said in *Javis:*
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> "The SJI were compiled in an effort to uniformly present juries in civil cases with clear, concise and unbiased instructions to guide their deliberations. Secondarily, the SJI were also designed to conserve the energies of trial counsel and the trial courts by eliminating the need to draft and select proposed instructions on commonly encountered subjects for jury resolution. These enumerated benefits of the SJI are present, of course, only if the SJI are regularly employed by the trial courts."
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> We have reevaluated the arguments for and against the strict rule announced in *Javis* and reassert:
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> "Whatever wasted effort that will result from the reversal of those few cases wherein a trial court erroneously deviates from the SJI will be overcome by the benefits of conserved trial court time at the instruction stage, certainty to trial counsel as to how the law will be stated to the jury, and a clear and concise instruction for the jury to work with." [*Id*. at 467-468 (citations omitted.)]

By 1985, however, the Court concluded that the goals of *Javis* had been achieved and that continuation of the "automatic reversal" rule was no longer warranted. In *Johnson v Corbet*, 423 Mich 304, 324-325; 377 NW2d 713 (1985), the Court opined that trial courts had become accustomed to using the SJI, and that the "strict standard for SJI error" announced in *Javis* was no longer needed in order to assure compliance with the court rule or to achieve the policy goals that moved the *Javis* Court to adopt the rule of that case. The Court concluded that, from that point forward, review of claimed error for violations of MCR 2.516 must be tested according to the harmless error standard of MCR 2.613:

> While the appellate court should not hesitate to reverse for a violation of Rule 2.516, it should not do so unless it concludes that noncompliance with the

> rule resulted to such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be "inconsistent with substantial justice." *Id*. at 327.

The Court's rationale in *Johnson* is particularly applicable in this case, as has been pointed out earlier herein. We reemphasize here what is clearly now the rule. A failure to give a verbatim rendition of the language of a standard jury instruction is not grounds for reversal where the theories of the parties and the applicable law are adequately presented to the jury when the instructions are viewed in their entirety. We find that to be the case here.

Defendant next argues that plaintiff's counsel made improper comments during closing arguments regarding the claimed negligence of Nurse Krupp, Dr. Villegas, and violations of policy and procedure where there was no evidence to support such claims. We disagree. "When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal." *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999). Unless the attorney's comments indicate a deliberate course of conduct designed to prevent a fair and impartial trial, there is no cause for reversal. *Id*. Reversal is required where prejudicial statements are made that reflect a studied attempt to inflame the jury or deflect the jury's attention from the issues involved. *Id*. Review of plaintiff's closing argument reveals that the comments were proper commentary on the evidence. Nurse Klupp admitted to moving the UAC two centimeters. There was no additional action taken to secure the UAC after that movement. Brandon was not placed in restraints. Brandon was later repositioned, and the UAC was found dislodged. Dr. Villegas either was not present on the scene or was negligent in rendering treatment by failing to come to the aid of Nurse Plamondon, causing a delay in treatment to Brandon by fifteen to twenty minutes. Furthermore, any commentary on defendant's policies and procedures was not used for the purpose of demonstrating a breach of the standard of care. Rather, it was merely noted that while Dr. Donn testified that suturing the UAC was unnecessary, Dr. Donn taught the procedure to new residents and it was defendant's policy to suture the UAC in place. Accordingly, the comments were not error. Furthermore, there is no indication that the comments were designed to prejudice or deflect the jury's attention to the issues. *Kubisz, supra*.

Lastly, defendant argues that plaintiff's counsel improperly referred to damage testimony that had been excluded. We disagree. Review of the record reveals that Dr. Ancell's testimony regarding attendant care costs was excluded based on the preceding testimony given by Brandon's mother, Teresa. However, Dr. Amberg testified regarding the therapies needed and costs of living in a group home setting. Defendant did not move to exclude this testimony at any time. Accordingly, defendant's argument is without merit. Furthermore, there is no indication in the record that defendant requested that any verdict be divided into the type of damages awarded. Accordingly, any contention that this commentary had any bearing on the verdict, even if improper, is speculative. Finally, we note that defendant never challenged the amount of damages attested to by plaintiff's experts. Rather, defendant's theory was that the injuries were due to the premature birth and complications arising from the prematurity and did not take issue with any damage award.

Finally, we would be remise in failing to address the circumstances that led to this third claim of appeal from the same jury verdict. In *Cox v Board of Hospital Managers*, unpublished

per curiam opinion, docket no. 184859, issued November 22, 1996, a panel of this Court concluded that defendant's issues were not properly raised because of the failure to file a cross-appeal. Defendant filed a motion for rehearing from this decision that was denied. At that time, defendant had received an opinion from this Court regarding a procedural defect and had the right to file an application for leave to appeal the decision with the Supreme Court. Defendant did not do so. Instead, defendant filed a new claim of appeal, assigned docket no. 200943, but defendant did not attach a trial court order to establish jurisdiction. After being notified of the defective filing by letter that requested a copy of the circuit court order, defendant submitted a copy of the Court of Appeals order denying rehearing in docket no. 184859. This appeal was dismissed due to defendant's failure to cure the deficiency. Defendant failed to identify any provision in the court rules that provides for a lateral appeal to the Court of Appeals from a Court of Appeals decision. MCR 7.203(A) sets forth the jurisdiction for a claim of appeal of right and does not provide for an appeal to this Court from a Court of Appeals decision.

At that time, defendant did not seek to file a delayed application for leave to appeal with the Supreme Court. Instead, defendant filed a motion before the circuit court. There, defense counsel represented that the Court of Appeals had rendered a decision and requested the trial court sign an order incorporating the judgment of the Court of Appeals in order to file a claim of appeal. Defense counsel asserted that this representation had been made by Court of Appeals staff.[7] The trial court indicated that it was disturbed by the fact that the Court of Appeals issued an order but "they [sic] don't bother to draft one and implement it and they [sic] want the circuit court to order what they [sic] say?" Defense counsel stated that he was "similarly puzzled," and this Court gave no direction in its unpublished opinion. Plaintiff's counsel advised the trial court that defendant's issues were not raised on cross-appeal and were not addressed on appeal, and therefore, defendant needed a new trial court order to file a new claim of appeal. Despite the statement of plaintiff's counsel, the trial court signed the order because it did not want to deprive either side of an opportunity to pursue a remedy on appeal and noted that the judgment for plaintiff would accrue interest during the pendency of the appeal. At the time of the trial court's ruling on the motion, the trial had occurred over three years earlier.

We cannot allow parties who disagree with a decision of the Court of Appeals to seek redress by returning to the trial court for entry of a new order for a second claim of appeal as of right. A decision rendered by this Court would never be final if such conduct were permitted. In that instance, a party would have the opportunity to ask a subsequent panel of this Court to provide relief that the first panel did not grant.[8] Accordingly, even if we were to conclude that defendant's issues on appeal provided grounds for relief, we would sua sponte apply the unclean hands maxim to allow the trial judgment to stand. *Stachnik v Winkel*, 394 Mich 375, 382-383;

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[7] Our staff is precluded from giving legal advice. Even if a member of the staff did advise defense counsel to take this course of action, defense counsel fails to cite any authority for the proposition that oral advice may supersede or circumvent the appellate rules governing jurisdiction.

[8] To preclude "judge" shopping in circuit court, MCR 8.111(D) requires that parties inform the court whether another action governing the same transaction or occurrence was filed or is pending.

230 NW2d 529 (1975). Defense counsel stated to the trial court that it had "several options" when he sought to have a new trial court order enter that incorporated the judgment of the Court of Appeals. Defense counsel has failed to provide a plausible explanation for filing a new claim of appeal from the prior opinion of the Court of Appeals and failed to explain why he did not seek application for leave to appeal to the Supreme Court. The lack of an explanation for the conduct and the failure to substantiate conduct with citation to the court rules could indicate that defendant was attempting to lengthen the time frame for resolution of any decision in an attempt to force plaintiff to settle the litigation. It has been six years since the judgment was rendered by a jury. If defendant had filed an application for leave to appeal following this Court's decision in 1997, the appellate process would be exhausted by now. We caution members of the bar that seeking a new trial court order to avoid the effect of a Court of Appeals decision in lieu of seeking an application for leave to appeal with the Supreme Court will not benefit the litigant that comes before this Court with such unclean hands. *Stachnik, supra*.

Affirmed.

/s/ Harold Hood
/s/ Jane E. Markey