

STATE OF MICHIGAN
COURT OF APPEALS

BARBARA WLOSINSKI, Personal
Representative of the Estate of MICHAEL
WROBEL, Deceased,

Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN
and BLUE CARE NETWORK OF MICHIGAN,

Intervening Plaintiffs,

v

STEVEN COHN, M.D., and WILLIAM
BEAUMONT HOSPITAL,

Defendants-Appellants.

FOR PUBLICATION
December 20, 2005
9:15 a.m.

No. 253286
Oakland Circuit Court
LC No. 2001-033241-NH

Official Reported Version

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in the conclusion reached by my colleague, Judge O'Connell, in reversing the trial court's denial of defendants' motion for summary disposition on plaintiff's claim of lack of informed consent as well as in his determination that evidence of Dr. Cohn's success/failure rate was not admissible on the issue of informed consent. MRE 404. In addition, as referenced by Judge O'Connell, the decision by our Supreme Court in *Jenkins v Patel*, 471 Mich 158, 161; 684 NW2d 346 (2004), is dispositive of this case, has retroactive effect, and accurately stands for the proposition that the noneconomic damages cap applies to a wrongful death action with an underlying medical malpractice claim.

I differ, however, and therefore dissent on the admissibility of Dr. Cohn's success/failure rate with respect to plaintiff's claims of negligent supervision by defendant William Beaumont Hospital of Dr. Cohn. While evidence of Dr. Cohn's success/failure rate is inadmissible with

respect to plaintiff's informed consent claim (MRE 404), Dr. Cohn's success failure rate is relevant (MRE 401), admissible (MRE 404[b]) evidence concerning plaintiff's cause of action for negligent supervision.¹ MRE 404(b)(1) specifically lists evidence demonstrating a party's knowledge of a fact among the types of evidence of past acts that are not excluded by MRE 404. In contrast to the opinion of my distinguished colleague Judge O'Connell, in accord with MRE 404(b)(1), Dr. Cohn's success/failure rate was *not* character evidence for the purposes of plaintiff's negligent supervision claim against Beaumont Hospital because it was used to establish the hospital's knowledge of Dr. Cohn's skill.

However, the trial court failed to issue an instruction limiting the jury's consideration of the success/failure rate evidence to the negligent supervision claim against Beaumont Hospital and cautioning against considering it for the purposes of the informed consent and negligence actions against Dr. Cohn.² The failure to issue a limiting instruction was error requiring reversal and grounds for a new trial.

/s/ Bill Schuette

¹ It is possible that evidence would be admissible for one purpose and not another because a determination of whether past acts evidence is excluded under MRE 404(b) hinges on the purpose for which it is offered. *People v Johnigan*, 265 Mich App 463, 465-466; 696 NW2d 724 (2005). That said, defendants would likely be entitled to a limiting instruction pursuant to MRE 105, which states that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly," as well as consideration under MRE 403.

² Contrary to my distinguished colleague, Judge Borrello, I believe this issue was adequately preserved for review. While defendants' arguments opposing the consideration of Dr. Cohn's individual success rates were largely discounted by the trial court because of their noncompliance with page-limit requirements, the oral arguments, motion for reconsideration, motion for a directed verdict, and requested cautionary instruction (on which the trial court never ruled) sufficiently developed the parties' arguments for this Court's consideration.