STATE OF MICHIGAN

COURT OF APPEALS

ESTATE of BARBARA JOHNSON by JOEDEANNA JOHNSON, Successor Personal Representative,

Plaintiff-Appellant/Cross-Appellee,

v

ROBERT F. KOWALSKI, M.D.,

Defendant-Appellee/Cross-Appellant,

and

TRINITY HEALTH-MICHIGAN d/b/a MERCY HOSPITAL CADILLAC, FOUR SEASONS EMERGENCY ASSOCIATES, LLC, and MUNSON MEDICAL CENTER,

Defendants.

FOR PUBLICATION
May 29, 2012
9:05 a.m.

No. 297066
Wexford Circuit Court
LC No. 07-020602-NH

Before: MARKEY, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right a judgment of no cause of action in this medical malpractice case asserting certain of the trial court's evidentiary rulings denied plaintiff a fair trial. Specifically, plaintiff contends the court abused its discretion by not admitting as an exhibit for impeachment purposes an affidavit of a nonparty doctor-witness and by excluding pre-suit correspondence concerning the affidavit between plaintiff's attorney and a representative of the witness's insurer. We conclude the trial court abused its discretion and that the error was not harmless. We reverse and remand.

I. FACTUAL BACKGROUND

Plaintiff's decedent, Barbara Johnson, a horse owner, was severely bitten in the face by one of her mares while assisting in the birth of a foal. Although the bite resulted in deep gashes below her right eye and along her jaw caused heavy bleeding, Mrs. Johnson managed to call for an ambulance and also her daughter. The decedent was transported to the Emergency Room of

the defendant hospital, arriving at about 2:38 p.m., according the EMS report. Defendant, Robert F. Kowalski, M.D., the physician on duty in the ER at the time, assessed Mrs. Johnson at about 2:45 p.m., finding she was alert, oriented, with bleeding into her mouth, but her airway was open and being maintained by suctioning blood as needed.

Dr. Kowalski testified that between 2:50 and 2:52 p.m., he requested the assistance of an ENT[1] and an anesthesiologist "STAT" to help manage Mrs. Johnson's airway and that a medical helicopter be summoned to transport her to a larger hospital with better trauma treatment capability. Anesthesiologist Dr. Charles Urse responded and shortly thereafter, ENT specialist Dr. Lisa Jacobson also responded to the "STAT" call for assistance. Both Drs. Kowalski and Urse testified in their pretrial depositions and at trial that they were at Mrs. Johnson's bedside while she was relatively stable and where they were discussing the best medical procedure to maintain the patency of Mrs. Johnson's airway. Around 3:00 p.m., Dr. Kowalski was called away to another Emergency Room patient who had gone into cardiac arrest. Thereafter, at about 3:05 p.m., Mrs. Johnson began having more serious difficulty breathing, crying out that she could not breathe. Dr. Urse administered medications and attempted to orally intubate Mrs. Johnson but the amount of blood in her mouth and throat made it impossible. Dr. Urse, with Dr. Jacobson's assistance, performed a cricothyroidotomy to ventilate the patient's lungs by inserting breathing tubes directly through her throat. This was only partially successful. Mrs. Johnson suffered cardiac arrest. She was resuscitated and placed on life support, but she had sustained permanent brain damage. Five days later, she was removed from life support and died.

Plaintiff's theory of the case was that when Dr. Kowalski left Mrs. Johnson to attend the other patient, Dr. Urse was not present and that assistance was not summoned until after Mrs. Johnson's condition suddenly deteriorated. Plaintiff contended Dr. Kowalski was negligent by failing to immediately intubate Mrs. Johnson before being called away to the other patient and leaving Mrs. Johnson unattended. According to plaintiff's theory, Dr. Urse had not arrived until after the patient's fatal deterioration began at about 3:05 p.m. Dr. Urse then took steps to intubate Mrs. Johnson, but blood in the patient's mouth and throat prevented him from completing the procedure. Dr. Urse then performed a cricothyroidotomy with Dr. Jacobson's assistance. This too was not completely successful as Mrs. Johnson went into cardiac arrest and suffered loss of oxygen to the brain. Plaintiff's counsel formed this theory of the case during the presuit notice-of-intent period, MCL 600.2912b, apparently on the basis of his review of the medical records.

Plaintiff's counsel named Dr. Urse as a potential defendant in plaintiff's notice of intent, MCL 600.2912b, but did not name him in the complaint. On July 26, 2007, counsel wrote to Nancy A. Croze, a claims representative of American Physicians Assurance Corporation, the liability insurer for Dr. Urse, advising her that based on his understanding of the facts, Dr. Kowalski bore sole responsibility for the medical accident. After setting forth his understanding of the facts of the case, plaintiff's counsel indicated that he was planning to file a lawsuit only against Dr. Kowalski, assuming that his information was accurate. Counsel stated in his letter

[1] A doctor specializing in the treatment of the ear, nose and throat is an ENT or otolaryngologist.

that he needed "some kind of verification perhaps in the form of an affidavit by Dr. Urse" that would confirm his understanding of the facts and that counsel "could draft such an affidavit."

Based on the July 26, 2007, letter and other communication with plaintiff's counsel, Croze wrote to counsel on August 15, 2007, enclosing Dr. Urse's August 9, 2007 affidavit. Croze stated in her letter: "I am confident that this document will meet your needs as you assess your intentions for pursuit of the case."

Two pertinent paragraphs of the affidavit stated:

> 4. . . . I was contacted, by beeper or through the OR front desk staff (I can't recall completely which one) in regards to a STAT ER page on patient Barbara Johnson on the afternoon of April 4, 2005. Then I immediately proceeded to the PACU to obtain the anesthesia department airway box, and then immediately proceeded to the Emergency Room, arriving within approximately two to three minutes after I was notified.
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> 5. That my findings and treatment are summarized in my hand-written progress note contained in the medical record.

At trial and in his deposition 18 months before, Dr. Urse testified contrary to plaintiff's theory of the case that he was, in fact, at Mrs. Johnson's bedside discussing treatment options with Dr. Kowalski while the patient was stable and before Dr. Kowalski was called away. Dr. Urse further testified that his one-page progress note did not include the events preceding the patient's acute deterioration and that he signed his affidavit believing that the information desired was the timeframe it took for him to arrive at the Emergency Room after receiving the STAT page. He testified that he never saw the correspondence between plaintiff's counsel and Croze.

Two weeks before trial, the trial court heard and granted defendant's motion for a protective order regarding plaintiff's effort to subpoena Croze and her file. During the hearing, the court suggested, without deciding, that the Urse affidavit could arguably be used at trial as a prior inconsistent statement to impeach Dr. Urse's testimony.

On the first day of trial, after a jury had been selected and sworn, plaintiff's counsel sought a ruling from the court on the admissibility and use of the Dr. Urse's affidavit and the correspondence between plaintiff's counsel and Croze. Counsel argued that plaintiff's "whole case rest[ed] upon the medical records which contradict the testimony" of Drs. Urse and Kowalski that they were both present with Mrs. Johnson before the onset of fatal respiratory distress. Plaintiff's counsel agreed that use of the affidavit would be limited to impeaching the anticipated trial testimony of Dr. Urse and that the letters were intended only to provide context for the affidavit. With respect to the letters, the court ruled that it would not permit reference to them in opening statement but would not preclude their use at trial "if a proper foundation is laid" that Dr. Urse "in fact reviewed those letters and was in some way endorsing the facts that are contained therein at the time he executed the affidavit." Regarding the affidavit, the court ruled it was hearsay and could not be used until Dr. Urse testified in a contrary manner. Nonetheless, defense counsel did not object to plaintiff's counsel's request to refer to the

affidavit in opening statement, without showing it, by saying "that [Dr. Urse] signed something which I believe is contrary to his testimony." In his opening, plaintiff's counsel stated:

> Now let's look at Dr. Urse who I believe you will see changed his position regarding what happened just like Dr. Kowalski did. Dr. Urse signed an affidavit when this lawsuit—before this lawsuit was filed and didn't say anything about being on the scene with Dr. Kowalski. We wanted to know, we have read the records, we want to know before the lawsuit; you weren't there, were you, Dr. Urse? He made no mention of having been there in his affidavit.
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> Again, Dr. Kowalski will testify contrary to the evidence in the chart that Dr. Urse, and Dr. Urse will change his testimony. When I say change, I mean he gave an affidavit before the case started, not mentioning this meeting [between Dr. Urse and Dr. Kowalski] that supposedly occurred between 2:45 and 3:00. Dr. Urse will change his testimony . . . . And such testimony of Kowalski and Urse must be false or the record and Nurse Joel and everything we know about this case is wrong. There is no in between. . . . Dr. Urse will say he was in the room, and he was in the room with Dr. Kowalski until Dr. Kowalski was called out.
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> The affidavit signed by Dr. Urse indicates nothing about him being in the room with Dr. Kowalski. Nothing. And we specifically inquired that question, that's what we wanted to know, who was in the room between 2:45 and 3:00. And we felt with that affidavit, that he had verified he was not initially in the room, but he testified in deposition contrary to that

Dr. Urse testified at trial as discussed already. When asked, Dr. Urse recalled having signed his affidavit and brought a copy to the trial. When plaintiff's counsel sought to display the affidavit to the jury, defense counsel objected that it was hearsay. Plaintiff argued that it was a prior inconsistent statement. The trial court suggested that counsel needed to lay a better foundation. When plaintiff's counsel asked Dr. Urse if his one-page progress note reflected the treatment he provided, Urse answered, "Yeah, it's a summary of events that occurred starting when she started to have respiratory distress" and "a summary of what had occurred that I thought was important." Dr. Urse identified a copy of the affidavit, identified his signature, and agreed the affidavit was a notarized statement given under oath. Dr. Urse was asked to and read aloud paragraph 4 of the affidavit. At this point, the trial court suggested that the affidavit be marked, and was, as Exhibit 17. In an effort to establish the affidavit as a prior inconsistent statement, plaintiff's counsel asked Dr. Urse about paragraph 5 of the affidavit and about the content of his progress note. Counsel moved for the admission of Exhibit 17, but the trial court ruled that it had not heard any testimony from Dr. Urse that was inconsistent with his affidavit.

On further cross-examination, Dr. Urse acknowledged that his progress note does not state all that he had done or all that occurred and that he did not think it important to note that he had conferred with Dr. Kowalski regarding treatment options. He also admitted that he reviewed plaintiff's notice of intent and that he talked to a "legal representative" before signing the affidavit. But Dr. Urse denied ever seeing the correspondence at issue and explained, "I thought

that when I filled out the affidavit, that you were asking me about when I got contacted and how long it took me to get down to the ER, that was my understanding, and that's what I wrote." Counsel noted that he did not ask that the affidavit be prepared and to which Dr. Urse replied "that's what my legal representative said and I read it and I said that is what happened and I signed it."

The trial court ruled regarding Exhibit 17:

> All right. To move this matter along, I'm going to rule that proposed 17 will not be received. I'm not precluding you from asking questions to the witness. I think you have done so, [plaintiff's counsel]. I do believe, however, that Dr. Urse read the portion that you referred him to somewhat meekly and it was difficult for me to hear and a couple of jurors were trying to get my attention while he was doing so. So for that reason, I will allow you to ask that question again. But that's going to be the Court's ruling as to the admissibility of 17.

After the trial court's ruling, plaintiff's counsel was allowed to require Dr. Urse to again read into the record paragraph 5 of his affidavit, which states: "That my findings and treatment are summarized in my hand-written progress note contained in the medical record."

Near the close of the proofs, plaintiff's counsel again sought to admit as rebuttal exhibits Dr. Urse's affidavit, counsel's July 26, 2007 letter, and Croze's August 15, 2007 letter. The trial court reasoned that there was no evidence that Dr. Urse knew of the letters or that he was, in the affidavit, responding to what plaintiff's counsel thought the facts were at the time he wrote his letter. The trial court also noted that the content of the affidavit was not contrary to Dr. Urse's testimony, either at trial or in his deposition. Therefore, the trial court ruled:

> The Court will stick with its prior ruling as it relates to Proposed Exhibit 17. The statement has been used for the extent that it was able to for purposes of impeachment. MRE 613 permits that and I permitted you to do that.
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> The plaintiffs have had an adequate opportunity to cross examine Dr. Urse, to lead him as it was put, because he was adverse to them, and the Court was lenient with that, as well as [defense counsel] did not object frequently as it relates to that. That was all part of the plaintiff's case in chief, and I'm not going to permit that testimony to be offered, and I will deny the request.

On query from plaintiff's counsel regarding referring to the affidavit in his closing argument, the trial court advised:

> It's part of the record. You can argue it. You can argue that he provided an affidavit, that his findings and treatment are summarized in the handwritten progress notes contained in medical records. He told you, members of the jury, that he signed an affidavit to that effect, and you can argue that those medical records are the true story and that what he said from the stand is not the true story, and that will be for the fact finder to agree or disagree with you.

Following the trial court's advise, and as he did in his opening statement, plaintiff's counsel argued that the defense in this case was fabricated, that the Dr. Urse's affidavit indicated that there was no meeting between Dr. Urse and Dr. Kowalski, that Dr. Urse did not come to Mrs. Johnson's room between 2:53 and 3:00 p.m. as the two doctors testified.

The trial court instructed the jury regarding a prior inconsistent statement of a witness according to M Civ JI 3:15 as follows:

> If you decide that a witness said something earlier that is not consistent with what the witness said at this trial, you may consider the earlier statement in deciding whether to believe the witness, but you may not consider it as proof of the facts in this case; however, there are exceptions. You may consider an earlier statement as proof of the facts in this case if the statement was made by plaintiff, defendant, or an agent or employee of either party; the statement was given under oath subject to the penalty of perjury in a deposition; or the witness testified during the trial that the earlier statement was true.

As noted already, the jury returned a verdict of no cause of action. Plaintiff now appeals by right.

II. STANDARD OF REVIEW

A trial court's decision regarding the admission or exclusion of evidence will not be disturbed on appeal absent an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). But questions of law underlying a trial court's evidentiary decision, such as the construction of a constitutional provision, rule of evidence, court rule or statute, are reviewed de novo. *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007); *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Even if a trial court's decision regarding the admission or exclusion of evidence is outside the range of principled outcomes, so an abuse of discretion, reversal is not warranted unless a substantial right of a party is affected, MRE 103(a), or it affirmatively appears that failure to grant relief is inconsistent with substantial justice, MCR 2.613(A). *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

III. ANALYSIS

Plaintiff argues that the trial court abused its discretion by not admitting Dr. Erse's affidavit in evidence as Exhibit 17. Plaintiff further argues that the trial court abused its discretion by failing to admit the letters exchanged between plaintiff's counsel and insurance adjuster Croze. Plaintiff contends that, when read together, the contents of documents diverge from the testimony of the witness and therefore constitutes a prior inconsistent statement. Being inconsistent, plaintiff argues, the trial court should have admitted them for impeachment purposes. We agree.

A. THE TRIAL COURT ERRED IN EXCLUDING THE AFFIDAVIT

The trial court's ruling on the affidavit was ambiguous at best. MRE 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

MRE 613(b) recognizes that a prior inconsistent statement of a witness is admissible to impeach the credibility of a witness. *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998); *Gilchrist v Gilchrist*, 333 Mich 275, 280; 52 NW2d 531 (1952). If admitted, a prior inconsistent statement of a witness is not regarded as coming within the rule excluding hearsay, MRE 802, because it is not offered as substantive evidence to prove the truth of the matter asserted, MRE 801(c), but rather only offered to test the credibility of the witness's testimony in court. *Merrow*, 458 Mich at 631; *People v Steele*, 283 Mich App 472, 487; 769 NW2d 256 (2009). But a party seeking to impeach a witness with a prior inconsistent statement must satisfy the foundational criteria provided for in MRE 613(b). *Barnett*, 478 Mich at 165; *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). One criterion for admissibility of a prior inconsistent statement, not disputed here, is that the witness actually made the prior statement. *Merrow*, 458 Mich at 631-632. Another criterion for admissibility of a prior inconsistent statement under MRE 613 is that prior out-of-court statement of the witness is in fact inconsistent with the witness's testimony in court. *Barnett*, 478 Mich at 165; *Gilchrist*, 333 Mich at 280.

The Michigan Rules of Evidence do not expressly prescribe a test for inconsistency. McCormick, Evidence (6th ed) § 34, pp 151-152 sets forth the prevailing view:

> Under the more widely accepted view, any material variance between the testimony and the previous statement suffices. The pretrial statement need "only bend in a different direction" than the trial testimony. For instance, if a prior statement omits a material fact presently testified to, which it would have been natural to mention in the prior statement, the statement is sufficiently inconsistent. The test ought to be: Could the jury reasonably find that a witness who believed the truth of the facts testified to would be unlikely to make the prior statement of this tenor? [Citations omitted.]

In this case, the trial court twice—once when plaintiff moved to admit the affidavit during her case-in-chief and once when counsel proffered the affidavit as rebuttal evidence—stated its belief that Dr. Urse's affidavit was not inconsistent with his trial testimony. If that were so, the affidavit would be irrelevant to the witness's credibility and inadmissible hearsay for any other purpose. Consequently, if indeed there were no inconsistency between the affidavit and Dr. Urse's testimony, neither the affidavit nor its contents should have been admitted.

Nonetheless, the trial court obviously determined that even if the court did not, a reasonable jury might indeed perceive an inconsistency. The trial court allowed Plaintiff's counsel the opportunity to cross examine the witness on the affidavit. The trial court actually allowed the witness to read the affidavit to the jury which, of course, is the same as admitting it. *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972). In reaching its decision to admit the contents of the affidavit via its being read, but not the document itself, the trial court stated

on the record its belief that MRE 613 applied: "The [affidavit] has been used for the extent it was able to for purposes of impeachment. MRE 613 permits that and I permitted you to do that." Thereafter, the trial court allowed plaintiff's counsel during closing argument to discuss the contents of the "inadmissible" affidavit. Finally, the trial court actually instructed the jury regarding prior inconsistent statements. M Civ JI 3:15.

The only conclusion to draw is that the trial court determined that, although the court was not convinced, a jury could reasonably find that the affidavit was in fact inconsistent with the witness' testimony, and the court left it for the jury to decide. In this sense, the court's decision was correct. But, unless the affidavit were deemed collateral, the court clearly erred by refusing to admit the document itself.

The contents of the affidavit were clearly not about a collateral issue. As the trial court itself acknowledged, plaintiff's entire theory of the case was premised on the fact that the affidavit and medical records told the "true story," and that Dr. Urse "changed his position regarding what happened."

In *Osberry v Watters*, 7 Mich App 258, 262; 151 NW2d 372 (1967), the Court adopted Professor Wigmore's test to determine what extrinsic evidence is admissible for impeachment purposes:

> The test to determine whether contradictory evidence may be introduced is stated by Wigmore:
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> > "Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?" 3 Wigmore, Evidence (3d ed), § 1020, p 692, citing *People* v. *DeFrance*, 104 Mich 563 (28 LRA 139).

The facts contained in the affidavit which set forth Dr. Urse's activities leading up to the Johnson's rapid deterioration, independent of its tendency to impeach the witness, are relevant to the case. Not only "could" they "have been shown in evidence," they were shown into evidence by both parties to the suit. The affidavit was not collateral and therefore should have been admitted.

Of course, if our ruling ended here, the failure to admit the actual document would be harmless inasmuch as the trial judge allowed the contents of the affidavit into evidence, allowed plaintiff counsel to discuss its contents during closing argument, and instructed the jury to consider whether the affidavit contradicted Dr. Urse's testimony. The more difficult question involves the email between Plaintiff's counsel and insurance adjuster Croze.

B. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE EMAIL

With respect to the email, the question presented is a simple one of logical relevance. Logical relevance is the foundation for admissibility. *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Logical relevance is defined by MRE 401 and MRE 402.

As defined by MRE 401, "relevant evidence" is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."

Here, plaintiff sought to impeach the credibility of Dr. Urse not only by introducing Dr. Urse own prior and arguably inconsistent statement (the affidavit), but also by introducing communications between plaintiff's counsel and Ms. Croze for Dr. Urse's insurer. Plaintiff contends that the credibility of Dr. Urse's testimony can only be properly judged by viewing it in context. In effect, plaintiff argues, the email explains the affidavit's contents and why they are inconsistent with Dr. Urse's trial testimony. If Dr. Urse was aware of the substance of the email exchanged between Ms. Croze and plaintiff's counsel, the jury might conclude that the phrasing of the affidavit was a deliberate attempt to obfuscate the central issue of the case. Similarly, even if Dr. Urse was unaware of the email exchange, if the affidavit was nonetheless prepared by his insurer and he signed it at his insurer's direction, his testimony, while honest, might nonetheless lack credibility because the witness himself was misled and therefore the accuracy of both his affidavit and his trial testimony are suspect.

In trial, the credibility of a witness is almost always relevant. *People v Layher*, 464 Mich 756, 761-764; 631 NW2d 281, citing with approval, *United States v Abel*, 469 US 45; 105 S Ct 465; 83 L Ed 2d 450 (1984). The jury, as the finder of fact and judge of credibility "has historically been entitled to all evidence that might bear on the accuracy and truth of a witness' testimony." *Abel*, 469 US at 52. Moreover, inasmuch as the questions posed to Dr. Urse arose during cross examination, "[t]here is a general canon that on cross examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal*." *Wilson v Stilwill*, 411 Mich 587, 599; 309 BW2d 898 (1981), quoting 3A Wigmore, Evidence (Chadbourn Rev), § 944 p 778 (Court emphasis).

Thus any evidence that Dr. Urse knew the contents of the email, or was himself misled by his insurer, is clearly relevant, and admissible, to impeach his trial testimony. On this score, we have here a classic case of "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact . . . ." MRE 104(b). In such case, the court shall admit [the evidence] upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." *Id*. Here, the relevancy of the email exchanged between Ms. Croze and plaintiff's counsel are relevant for the reasons set forth above, but only if Dr. Urse was aware of the emails, or if not, was he kept in the dark by his insurer.

It appears from the record that the trial court found "no evidence" that Dr. Urse knew of the email. But the court apparently erroneously decided the question under subpart (a) of MRE 104, and not according to subpart (b). The standard for screening evidence under subpart (b) is quite low.

MRE 104(b) is identical to its federal counterpart. In *VanderVliet*, 444 Mich at 68, our Supreme Court, in deciding the applicable standard for Rule 104(b), specifically adopted the United States Supreme Court's holding in *Huddleston v United States*, 485 US 681; 108 S Ct

1496; 99 L Ed 2d 771 (1988). In *Huddleston*, the government charged the defendant with receiving stolen property and attempted to introduce evidence, pursuant to FRE 404(b), that the defendant had in the past received stolen television sets. The defendant denied ever having dealt with stolen televisions sets. The Supreme Court held:

> "[Q]uestions of relevance conditioned on a fact are dealt with under Federal Rule of Evidence 104(b). . . . In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact—here, that the televisions were stolen—by a preponderance of the evidence.
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> We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. '[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.' *Bourjaily v United States*, 483 US 171, 179-180 [107 S Ct 2775; 97 L Ed 2d 144] (1987)." [*VanderVliet*, 444 Mich at 68-69 n 20, quoting *Huddleston*, 485 US at 689-691.]

As stated above, so long as some rational jury could resolve the issue in favor of admissibility, the judge must let the jury weigh the disputed facts. Specifically, the judge must allow the jurors to assess the credibility of the evidence presented by the parties.

Here, the sum of the evidentiary presentation could lead a rational jury to find that Dr. Urse, either wittingly or unwittingly, participated in an effort to "sandbag" the plaintiff. It is impossible to ignore the timing and the substance of the email between plaintiff's counsel and Croze.

As noted above, plaintiff's counsel named Dr. Urse as a potential defendant in plaintiff's notice of intent, MCL 600.2912b. But on July 26, 2007, counsel wrote to Croze that based on his reading of the medical records, Dr. Kowalski bore sole responsibility for the medical accident because Dr. Kowalski failed to summon Dr. Urse in a timely fashion. After setting forth his understanding of the facts of the case, an understanding he gleaned from the medical records, plaintiff's counsel indicated that he was planning to file a lawsuit only against Dr. Kowalski, *assuming that his information was accurate*. Counsel stated in his letter that he needed "*some kind of verification perhaps in the form of an affidavit by Dr. Urse*" that would confirm his understanding of the facts and that counsel "could draft such an affidavit."

Dr. Urse testified that he was shown the plaintiff's Notice of Intent, together with the proposed affidavit by a "legal representative." He then signed the affidavit.

On August 15, 2007, Croze sent the affidavit to plaintiff's counsel with the disarming note, "*I am confident that this document will meet your needs as you assess your intentions for pursuit of the case*."

When viewed together, the sum of this evidence is sufficient enough that a reasonable jury could conclude that Dr. Urse's trial testimony differed markedly from his affidavit.

C. THE TRIAL COURT ERRORS WERE NOT HARMLESS

Because the improperly excluded evidence may have affected the jury's determination regarding the credibility of Dr. Urse, a critical witness, the error cannot be considered harmless. See *Powell v St John Hosp*, 241 Mich App 64, 72-75; 614 NW2d 666 (2000).

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff may tax costs under MCR 7.219 as the prevailing party.

/s/ Jane E. Markey
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause