# STATE OF MICHIGAN

# COURT OF APPEALS

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EVALYN NEIRINCK, Personal Representative of the Estate of ROBERT NEIRINCK, deceased

Plaintiff-Appellant,

v

RUDY VERVAEKE, M.D.,

Defendant-Appellee.

UNPUBLISHED
March 10, 1998

No. 191181
Wayne Circuit Court
LC No. 93-325007-NH

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Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order of the Wayne Circuit Court entering a judgment of no cause of action in favor of defendant following a jury trial. We affirm.

I

Plaintiff first argues that the trial court abused its discretion in failing to dismiss three challenged jurors for cause.

Jurors are presumed to be qualified, and the party challenging a juror has the burden of showing that the challenged juror has a biased or prejudiced state of mind. *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 236-237; 445 NW2d 115 (1989). If counsel shows that a prospective juror fits one of the categories set forth in MCR 2.511(D)(4)-(13), a trial court is required to excuse the juror for cause because such a showing is equivalent to proving a biased or prejudiced state of mind. *Poet, supra*, p 236. However, the decision to grant or deny a challenge for cause is within the sound discretion of the trial court. *Id.* The trial court's exercise of discretion must be made with regard for both parties' right to a fair trial and, when a reasonable apprehension exists with respect to a challenged juror, the court should err on the side of the moving party. *Id*., pp 237-238. An apprehension is "reasonable" when a juror "affirmatively articulates a particularly biased opinion which may have a direct effect upon a person's ability to render an unaffected decision." *Id*., p 238. Ultimately, the

court's concern should be "whether the resulting jury could, without significant question, provide the parties with a fair trial." *Id.*, p 251.

Plaintiff argues that the trial court erred in refusing to dismiss jurors Popolous, Rolston, and Sidowick for cause, thus compelling plaintiff to use peremptory challenges to dismiss those jurors. To demonstrate error in such a situation, plaintiff is required to show 1) that the court improperly denied a challenge for cause, 2) that the aggrieved party exhausted all peremptory challenges, 3) that the party demonstrated the desire to excuse another subsequently summoned juror, and 4) that the juror whom the party wished later to excuse was objectionable. *Id.*, p 241.

Here, plaintiff challenged jurors Popolous, Rolston, and Sidowick for cause pursuant to MCR 2.511(D)(4) and (5). Plaintiff, however, has failed to show that the trial court abused its discretion in failing to excuse the three challenged jurors for cause. First, Popolous indicated that he would try to be a fair and impartial juror, and that he would decide the case on the facts presented to him. Second, Rolston repeatedly indicated that she could decide the case on the facts and law presented to her, and did not express a prejudice toward plaintiff or medical malpractice cases in general. Third, Sidowick twice indicated that he could be fair to both parties. Finally, even if the trial court abused its discretion in failing to dismiss one of the challenged jurors for cause, plaintiff has failed to establish that a subsequently seated juror she sought to excuse with a peremptory challenge, Melissa Kamini, was objectionable. Although Kamini worked as an insurance adjuster for an insurance company, her job involved writing estimates on physical damage to vehicles, and she handled very few medical files. Furthermore, Kamini indicated that she was not involved in the insurance company's campaigning or lobbying to change the automobile accident laws in Michigan. We find nothing in the record to indicate that Kamini was prejudiced against plaintiff or her claim. Therefore, we conclude that plaintiff was not denied a fair and impartial jury.

II

Plaintiff next argues that the trial court abused its discretion in finding that plaintiff's expert, Dr. Jack Kaufman, was not qualified to testify as an expert regarding the treatment of coronary artery disease with medication.

Plaintiff sought to admit Dr. Kaufman's testimony to show that, assuming Robert Neirinck's coronary artery disease was properly diagnosed, treatment of the coronary artery disease with medication before the surgery would have placed him in a better, and less risky, condition for the surgery and, ultimately, the surgery would have had a more favorable outcome. MRE 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise[1]." Although, as an internist, Dr. Kaufman regularly treated patients with medications for coronary artery disease, he was not a cardiologist, and there was no testimony that he had knowledge, skill, experience, training, or education regarding the effect of such treatment on the outcome of cardiac surgery. Therefore, we conclude that the trial court did not abuse its discretion in ruling that Dr. Kaufman was not qualified to testify as an expert regarding the use of medications to treat Neirinck's coronary artery disease in anticipation of cardiac surgery. Cf. *Bahr v Harper-Grace Hosps*, 448 Mich 135; 528 NW2d 170 (1995).

III

Plaintiff next argues that the trial court abused its discretion in finding Dr. Melvin Lester, defendant's expert, qualified to testify regarding the standard of care of an internist where Dr. Lester testified that he devoted only twenty-five percent of his professional time to the practice of general internal medicine. Under MRE 702, defendant had the burden of showing that Dr. Lester had knowledge of the applicable standard of care, and that he possessed the necessary learning, knowledge, skill, and experience to testify. *Bahr, supra,* p 141; *McDougall v Eliuk,* 218 Mich App 501, 508; 554 NW2d 56 (1996).

Dr. Lester testified that he has been practicing as an internist since 1965, and that, over the past five or six years, he developed a special interest in vascular medicine, a subspecialty of internal medicine. Although Dr. Lester indicated that he spent a portion of his professional time dealing with vascular medicine, he further testified that he spent all of his professional time treating patients for problems that fall within the field of general internal medicine. Dr. Lester testified that he was familiar with the standard of care applicable to internists dealing with patients with high cholesterol from 1988 to 1991 because he dealt with such problems as an internist every day and discussed such cases with other internists. Therefore, we find no abuse of discretion in the trial court's finding that Dr. Lester was qualified to testify as an expert on the standard of care of a general internist.

IV

Finally, plaintiff argues that the trial court erred in refusing to read SJI2d 10.08 to the jury. Claims of instructional error are reviewed for an abuse of discretion. *Bordeaux v Celotex Corp,* 203 Mich App 158, 168-169; 511 NW2d 899 (1993). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Wiegerink v Mitts & Merrill,* 182 Mich App 546, 548; 452 NW2d 872 (1990). There is no error requiring reversal if, on balance, the theories and applicable law were adequately and fairly presented to the jury. *Id.,* p 548. Furthermore, the refusal to give an accurate and applicable instruction does not require reversal unless the failure to vacate the jury verdict would be inconsistent with substantial justice. *Johnson v Corbet,* 423 Mich 304, 327; 377 NW2d 713 (1985).

SJI2d 10.08 provides:

> Because (name of decedent) has died and cannot testify, you may infer that [he/she] exercised ordinary care for [his/her] safety (and for the safety of others) at and before the time of the occurrence. However, you should weigh all the evidence in determining whether the decedent exercised due care.

Upon request, a trial court is required to give a Michigan Standard Jury Instruction if the instruction is applicable and accurately states the law. MCR 2.526(D)(2). However, SJI2d 10.08 should not be given where there is clear, positive, and credible evidence opposing the presumption. *Potts v Shepard Marine Construction Co,* 151 Mich App 19, 27; 391 NW2d 357 (1986). Clear,

positive, and credible evidence is evidence that leads to an inevitable conclusion by all reasonable minds that the decedent was contributorily negligent. *Id*., pp 27-28.

Defendant presented clear, positive, and credible evidence that Robert Neirinck failed to regularly follow his diet, take his medication, and attend his doctor's appointments. Therefore, we conclude that the trial court did not abuse its discretion in refusing to read SJI2d 10.08 to the jury.

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] This Court has ruled that MCL 600.2169(1); MSA 27A.2169(1) is unconstitutional to the extent that it conflicts with the procedural mandates of MRE 702. *McDougall v Eliuk*, 218 Mich App 501, 507-508; 554 NW2d 56 (1996), lv gtd 456 Mich 903 (1997). Therefore, a doctor's qualifications as an expert witness are tested under MRE 702 rather than MCL 600.2169(1); MSA 27A.2169(1).