STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER DILIBERTI and SUSAN DILIBERTI,

Plaintiffs-Appellants,

v

DR. CRAIG ESSEX, D.O. and ST. JOSEPH HOSPITAL CENTERS, an assumed name of MERCY MOUNT CLEMENS CORPORATION,

Defendants-Appellees.

UNPUBLISHED
September 15, 1998

No. 190260
Macomb Circuit Court
LC No. 92-003807 NH

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of judgment in favor of defendants after a jury rendered a verdict of no cause of action in this medical malpractice action. Plaintiffs also contest the trial court's denial of their motion for judgment notwithstanding the verdict or a new trial. We reverse.

I.

Although we reverse the trial court on the basis of plaintiffs' second allegation of error, we will address plaintiffs' first issue because it presents a question that is likely to appear again if there is another trial in this matter. On appeal, plaintiffs first argue that the trial court erred in striking portions of the de bene esse deposition testimony provided by three of plaintiffs' expert witnesses. We disagree. Defendants objected to the admission of the challenged deposition testimony on grounds of relevance, form, and foundation. In each case, the trial court excluded the evidence without articulating the specific basis for its decision. The decision to admit or exclude expert testimony is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of discretion. *Berryman v K Mart Corp*, 193 Mich App 88, 98; 483 NW2d 642 (1992). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id.*

In this case, the trial court did not abuse its discretion with respect to any of the stricken testimony, because the evidence at issue was irrelevant and without foundation. In a medical malpractice action, an expert witness is usually required to establish the applicable standard of care, *Locke v Pachtman*, 446 Mich 216, 224; 521 NW2d 786 (1994), and the party offering the expert testimony must demonstrate the witness' knowledge of the applicable standard of care, *Turbin v Graesser (On Remand)*, 214 Mich App 215, 217; 542 NW2d 607 (1995). The relevant standard of care is based on how other physicians in defendant's field of medicine would act, rather than on how any particular physician would act. *Carbonell v Bluhm*, 114 Mich App 216, 224; 318 NW2d 659 (1982). Accordingly, an experts use of the pronoun "I" in testifying to the applicable standard of care is improper. *Id.* Here, the stricken portions of the testimony of both Drs. Chudler and Schwartz were properly excluded because they merely addressed how those physicians, personally, would have treated Christopher Diliberti's condition. See *id.* at 224-225.

Likewise, the stricken portions of Dr. O'Donnell's testimony were properly excluded, because plaintiffs failed to establish that O'Donnell—a pharmacologist who was not a physician authorized to prescribe drugs—was knowledgeable of the standard of care applicable to defendants prescribing the drug in question. See MRE 702; cf. *Haisenleder v Reeder*, 114 Mich App 258, 264; 318 NW2d 634 (1982) (explaining that a member of one medical school of thought may only testify regarding the standard of care applicable to members of another medical school of thought if he is familiar with the applicable standards of care). Although plaintiffs were able to establish O'Donnell's expert knowledge of the effects of the drug, they failed to establish his expert knowledge of the medical circumstances under which the drug would properly be prescribed. For these reasons, we conclude that the trial court did not abuse its discretion in excluding the challenged evidence.

II.

Plaintiffs next argue that the trial court abused its discretion in failing to grant their motion for a new trial on the ground that defense counsel improperly cross-examined one of plaintiffs' expert witnesses, Dr. Emanuel Tanay.[1] Pursuant to MCR 2.611(A)(1)(a), a new trial may be granted on the basis of an irregularity in the proceedings which materially affected the substantial rights of all or some of the parties. *Elazier v Detroit Non-profit Housing Corp*, 158 Mich App 247, 249; 404 NW2d 233 (1987). We review a trial court's decision on a motion for new trial for an abuse of discretion. *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997). Plaintiffs properly preserved this issue for appeal by promptly objecting to the alleged improper cross-examination at trial, see MRE 103(a)(1), and by including this allegation of error in their motion for new trial.

A.

First, plaintiffs contend that defense counsel improperly attacked Tanay for his representation of criminal defendants in competency hearings and determinations with respect to insanity defenses. We disagree. MRE 611(b) provides:

> A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

The scope and duration of cross-examination rests within the sound discretion of the trial court, and the trial court's exercise of this discretion will not be reversed absent a clear showing of abuse. *Wilson v Stilwill*, 411 Mich 587, 599; 309 NW2d 898 (1981). Here, we conclude that the trial court did not abuse its discretion. The evidence regarding Tanay's qualifications and prior work experience, including his work as an expert witness on behalf of criminal defendants, was (1) relevant to his credibility as an expert witness in this case, and (2) did not serve to unfairly embarrass or harass the witness. See *Wilson*, *supra* at 599-601; *Williams v Fiedlar*, 22 Mich App 179, 186-187; 177 NW2d 461 (1970), aff'd 386 Mich 221; 191 NW2d 52 (1971).

B.

Plaintiffs also contend that defense counsel engaged in an improper attack on Tanay with respect to his experience in the case of *People v McPeters*, 181 Mich App 145; 448 NW2d 770 (1989). We agree. On cross-examination, Tanay denied that he had ever refused to testify as an expert witness for a fee set by a trial court. Thereafter, defense counsel sought to question Tanay about his experience in *McPeters*.[2] Plaintiffs' counsel objected to cross-examination on the subject, arguing that it was not relevant to Tanay's truthfulness or credibility as an expert in this case, and that it was unfairly prejudicial because it would only serve to embarrass the witness. The trial court overruled plaintiffs' objection, explaining that defense counsel could ask Tanay certain questions about *McPeters*, not for the purpose of assailing Tanay's character,[3] but for the purpose of impeaching him with prior inconsistent statements under MRE 613.

The trial court's rationale for its ruling was flawed in two respects. First, MRE 613 does not specifically establish the admissibility of prior inconsistent statements. Instead, it merely establishes the foundational procedure by which such statements, if admissible, must be introduced. MRE 613; see also *People v Lyles*, 148 Mich App 583, 589-590; 385 NW2d 676 (1986). Second, the greater part of defense counsel's cross-examination of Tanay regarding *McPeters* consisted of specific questions regarding the details of a prior *event*, rather than any inquiry into prior *statements* made by Tanay. Therefore, MRE 613 was, for the most part, wholly inapplicable. The lone prior statement regarding *McPeters* brought to Tanay's attention was his statement from the *McPeters* trial that he did not intend to listen to audio tapes offered to refresh his recollection. However, that statement was not "inconsistent" with his assertion that he never refused to testify as an expert witness for a fee set by a trial court. See *People v Johnson*, 113 Mich App 575, 579; 317 NW2d 689 (1982) ("As a general rule, the only contradictory evidence that is admissible is that which directly tends to disprove the exact testimony of the witness.").

As noted above, a witness may be cross-examined on any matter that is relevant to an issue in the case, including credibility. MRE 611(b). The trial court is responsible for exercising reasonable control over the mode and order of interrogating witnesses so as to protect them from harassment and undue embarrassment. See MRE 611(a); *In re Hensely*, 220 Mich App 331, 333; 560 NW2d 642

(1996). Thus, the trial court "must be alert to questions which harass, intimidate or belittle a witness." *Wilson*, *supra* at 599. In this case, defense counsel's questions regarding *McPeters* suggested to the jury that Tanay had intentionally refused to recall or attempt to recall the pertinent facts of a criminal defendant's case after the defendant's lawyer failed to secure his requested fee. While these questions certainly tended to harass, intimidate and belittle Tanay, his answers to them were not—and could not have been—of any probative value. The question whether Tanay ever refused to testify as an expert witness for a particular fee in another case was simply not relevant to his credibility in this case. This is so because no resolution of that question would have any tendency to make Tanay's truthful testimony as an expert witness in this case any more or less probable. MRE 401.

Accordingly, the trial court abused its discretion when it allowed defense counsel to ask harassing and irrelevant questions regarding the *McPeters* incident. MRE 611(b); see also MRE 608(b); *Heshelman v Lombardi*, 183 Mich 72, 84-85; 454 NW2d 603 (1990). Because a likely effect of the trial court's error was to unfairly diminish the jury's perception of Tanay, who was plaintiffs' only expert witness permitted to testify regarding applicable standard of care, we cannot say that the error was harmless. Therefore, we hold that the trial court abused its discretion when it denied plaintiffs' motion for a new trial. MCR 2.611(A)(1)(a); *Elazier*, *supra* at 249.

III.

Finally, plaintiffs argue that the trial court abused its discretion in failing to elicit sufficient facts during voir dire. Given our disposition of this case, and plaintiffs failure to preserve this issue for appeal with an objection below,[4] we need not address this issue.

Reversed.

/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] Plaintiffs also suggest that the trial court erred in denying their motion for judgment notwithstanding the verdict on the same ground. A motion for judgment notwithstanding the verdict should be granted only when there was insufficient evidence to create an issue for the jury. *Pontiac School District v Miller, Canfield, Paddock, and Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). Because plaintiffs do not argue that the evidence was insufficient to create an issue for the jury, we will not review the trial court's decision with respect to plaintiffs' motion for judgment notwithstanding the verdict.

[2] In *McPeters*, *supra* at 148-152, Tanay was subpoenaed to testify at trial for a fee set by the trial court. When he appeared at trial, he allegedly claimed to have had no recollection of the case and refused to listen to an audio tape played to refresh his recollection.

[3] Defense counsel explained that he was not seeking to raise the *McPeters* incident in an effort assail Tanay's character for truthfulness under MRE 608(b), but rather in an attempt to directly impeach Tanay's explicit denial that he refused to testify as an expert witness for a fee set by a trial court. MRE 608(b) provides that a trial court, in its discretion, may allow inquiry on cross-examination into specific

instances of conduct involving a witness, if such inquiry is probative of the witness' character for truthfulness or untruthfulness. See *Heshelman v Lombardi*, 183 Mich 72, 84-85; 454 NW2d 603 (1990).

[4] Plaintiffs' assertion in their brief on appeal that trial counsel preserved the issue by requested specific voir dire questions regarding the subject matter in controversy is without citation to the record.