STATE OF MICHIGAN

COURT OF APPEALS

WALTER CLARK DAVIS and BRENDA DAVIS,

Plaintiffs-Appellees,

v

OAKLAND GENERAL HOSPITAL,

Defendant-Appellant,

and

WILLIAM BORGERDING, D.O, KERI TOPOUZIAN, D.O., and SHELDON N. KAFTAN, D.O.,

Defendants.

UNPUBLISHED
July 9, 1999

No. 204523
Oakland Circuit Court
LC No. 93-453163 NO

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

WHITBECK, J. (*dissenting*).

I respectfully dissent. I would remand this case for a new trial based on the trial court's erroneous admission of testimony from Dr. Arnold Markowitz expressing his personal preferences in relation to the use of the drug phenobarbital to treat the principal plaintiff Walter Davis ("plaintiff").

During direct examination testimony, Dr. Markowitz, an expert called by plaintiffs, stated with regard to defendant's use of the medication phenobarbital in treating plaintiff:

> The other thing is sedation. And there are a whole bunch of different ways to sedate. They chose a particular protocol here *using a drug called phenobarbital which is not one of my favorites* because it doesn't seem to work as well as --. [Emphasis supplied.]

At that point, the following exchange occurred among plaintiff's counsel, defendant's counsel and the trial court in the presence of the jury:

[*Plaintiff s' counsel*]: Excuse me. Did you say not one of your favorites?

[*Dr. Markowitz*]: It is not one of my favorites.

[*Defendant's counsel:*] Objection as to relevancy.

The Court: Gentlemen, just hang on for a second.

[*Plaintiffs' counsel*]: He hasn't completed his answer. But I wanted him to slow down just a little bit.

The Court: Yeah, but right now I'd like to hear the objection.

[*Defendant's counsel*]: Yeah. Not one of his favorites, that's like the personal pronoun I don't use it. That's irrelevant and immaterial at this type of hearing.

The Court: Well, I would agree, Counsel, to a point with what you're saying but – *but I don't see anything objectionable with the doctor saying it's not one of his favorites*. That's a conclusion that you use and I'm sure the jury understands. Go on. [Emphasis supplied.]

Shortly thereafter, Dr. Markowitz stated in response to a question about what medications the standard of care required to be provided to plaintiff once it was learned that he was undergoing active hallucinations:

> I prefer a different family of drugs that seem to have more of a sedating and anxiety and tremor reducing effect to begin with and that way you avoid some of these – some of the hallucinations. It's just a – it's a matter of choice but I don't think their choice of drugs was negligent here either.

I agree with my colleagues that the trial court abused its discretion in its above decision overruling defendant's objection and thereby admitting the portions of the above testimony from Dr. Markowitz in which he expressed a personal distaste for use of phenobarbital. The pertinent issue is whether defendant or its agents breached the applicable standard of care, not whether another particular doctor would have pursued a different form of treatment.

However, I respectfully part company with my colleagues in their conclusion that the erroneous admission of Dr. Markowitz's testimony about his personal disdain for the use of phenobarbital was harmless. As the majority indicates, a ruling admitting evidence does not constitute error requiring reversal, despite being preserved by objection below, unless it affects a substantial right of a party. MRE 103(a). However, relief is appropriate if "refusal to take such action would be inconsistent with substantial justice." *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996); accord, MCR 2.613(A).

In this case, I conclude that failing to grant relief to defendant based on the error at hand would be inconsistent with substantial justice. The question of whether defendant or its agents were negligent in treating plaintiff was a close one. The jury returned a general verdict; thus, we do not know exactly how it found defendant liable for negligence. I find it plausible that the consensus of the jury may have been that it would not be reasonable to expect a hospital to either continually monitor plaintiff or place him in restraints. In light, however, of Dr. Markowitz's testimony about phenobarbital, the jury may have been led to conclude that defendant or its agents should have administered a "better" sedative and that this would probably have prevented plaintiff from jumping out the window. This was not a proper matter to place before the jury, due to the lack of evidence that use of phenobarbital was beneath the standard of care. In this regard, the trial court's remark in overruling defendant's objection to the effect that it saw nothing objectionable about testimony from Dr. Markowitz expressing personal disdain for phenobarbital would have further erroneously signaled the jury that such testimony could be used in determining whether defendant or its agents were negligent. Unlike my colleagues, I am simply not convinced that Dr. Markowitz's conclusory testimony that the use of phenobarbital was not negligent was enough to remove the undue prejudice. Thus, I would reverse the judgment at issue and remand for a new trial because I find a substantial possibility that the error at issue affected the verdict.

I respectfully dissent.

/s/ William C. Whitbeck