

STATE OF MICHIGAN
COURT OF APPEALS

JAMES EDWARDS,

Plaintiff-Appellant/Cross-Appellee,

v

MADHUSUDANA R. TUMMALA, M.D.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

November 27, 2001

No. 222223

Genesee Circuit Court

LC No. 96-042539-NH

Before: Griffin, P.J., and Meter and K. F. Kelly, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from the judgment entered by the trial court on a jury verdict of no cause of action in favor of defendant and the trial court's order denying his motion for new trial. Defendant cross appeals. We affirm.

Plaintiff, born in 1939, was employed at the Buick plants in Flint until his early retirement in March 1993. In August 1993, he slipped on a wet wooden step and injured his left shoulder and arm. Diagnosed as having sustained a rotator cuff injury to his left shoulder, plaintiff was scheduled for surgery in January 1994.

The present case involves a chest x-ray taken on January 14, 1994, as part of the pre-surgery screening process, and interpreted by defendant Madhusudana R. Tummala, M.D., a radiologist at Hurley Hospital in Flint. Plaintiff claims this chest x-ray demonstrated the presence of a developing mass in the upper right apex of plaintiff's lung and asserts that defendant was negligent in failing to report such findings and in failing to recommend to plaintiff's treating physicians that they seek out earlier chest x-rays for comparison or, as an alternative, perform a CT scan to assist in further diagnosis.

Following the surgery on his left rotator cuff, plaintiff continued to experience progressive problems with his right hand and arm and consequently was seen by a number of doctors. In March 1995, as a result of further radiographic studies performed at the University of Michigan Medical Center, it was discovered that plaintiff had a lung tumor in the apex of his right lung which had progressed to the stage where it was interfering with the nerves, arteries, and veins lying near the apex of the lung that serve the arm and hand. This particular effect from a lung tumor is called Pancoast's Syndrome.

Plaintiff filed suit against defendant in January 1996,¹ claiming that the opacity seen at the apex of the right lung on the January 14, 1994, x-rays was an early stage of the lung tumor that during the following months developed into Pancoast's Syndrome. Plaintiff alleged that had this tumor been noted in January 1994, it could have been surgically removed before causing irreversible damage to his right arm and hand, likewise minimizing the risk of recurrence. Plaintiff maintained that because of the delay in diagnosing this tumor, it progressed to the point where surgery was no longer an option and it caused plaintiff to develop a permanent "claw" hand deformity and significantly increased the risk of cancer recurring.

Defendant, on the other hand, claimed that the opacity seen in the upper right apex was consistent with the fibroid scarring that typically develops following a resolved fungal infection such as tuberculosis and that his report complied with the standard of care in light of what he visualized on this film.

The case was tried before a jury in February and March, 1999. At trial, both sides presented expert witnesses in support of their respective positions. Following lengthy deliberations, the jury returned a verdict finding no professional negligence on the part of defendant. The trial court entered a judgment of no cause of action and subsequently denied plaintiff's motion for new trial. The present appeal focuses on certain evidentiary rulings by the trial court.

I

Plaintiff first claims that the trial court abused its discretion in denying plaintiff the opportunity to place into evidence x-ray films taken in 1987 that were allegedly relevant and admissible pursuant to MRE 401 and MRE 403. Plaintiff contends that the jury in this case was presented with two competing views, supported by expert testimony, regarding the significance of the opacity visualized on the January 1994 x-rays, and that the issue of malpractice depended on the credibility that the jury would assign to the witnesses. In this context, plaintiff argues the trial court abused its discretion when it precluded plaintiff from introducing into evidence a set of 1987 chest x-ray films of plaintiff. Plaintiff maintains that if admitted into evidence, the films would have shown the jury what the fibrotic scarring caused by the earlier disease process (tuberculosis) looked like before 1994 and would have demonstrated that the hazy, cloudy opacity seen in the 1994 films is nothing a reasonable radiologist should confuse with fibrotic scarring. However, a review of the record indicates that the trial court did not abuse its discretion in making this evidentiary ruling and later denying plaintiff's motion for a new trial based on this alleged error.

A trial court is granted considerable leeway in its evidentiary rulings. As this Court explained in *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001),

¹ Plaintiff also brought suit against Hurley Hospital, which was eventually dismissed as a defendant in June 1998.

Our courts are reluctant to overturn a jury's verdict, particularly if there is ample evidence to justify the jury's decision, and we will not do so on the basis of an erroneous evidentiary ruling unless refusal to take this action would be inconsistent with substantial justice. MCR 2.613(A); MRE 103(a); *Chmielewski v Xermac, Inc.*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996), *aff'd* 457 Mich 593; 580 NW2d 817 (1998). It is well established that this Court reviews a trial court's evidentiary rulings for an abuse of discretion and, in making that determination, we consider the facts on which the trial court acted to determine whether an unprejudiced person "would say that there is no justification or excuse for the ruling made." *Roulston v Tendercare (Michigan), Inc.*, 239 Mich App 270, 282; 608 NW2d 525 (2000).

See also *Tobin v Providence Hosp*, 244 Mich App 626, 638; 624 NW2d 548 (2001); *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 517; 592 NW2d 786 (1999); *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). The trial court's decision denying plaintiff's motion for new trial is likewise reviewed under an abuse of discretion standard. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996).

Pursuant to MCL 600.2912a(1)(b), in a medical malpractice action, the plaintiff has the burden of proving that the defendant, if a specialist, failed to provide the recognized standard of care or practice within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury. To prove that standard of care, the plaintiff must show how other doctors in that field of medicine would act and not how any particular doctor would act. *Carbonell v Bluhm*, 114 Mich App 216, 224; 318 NW2d 659 (1982). The standard of care for a specialist is nationwide. *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 383; 525 NW2d 891 (1994). It is generally improper for an expert to testify about the appropriate standard of care from the basis of what he or she would have personally done in that situation. *May v William Beaumont Hosp*, 180 Mich App 728, 761; 448 NW2d 497 (1989).

As defendant argues and the trial court recognized, the determinative fact with regard to the admissibility of the 1987 x-ray films is plaintiff's own concession, at trial and in his brief on appeal, that "[a]dmittedly, these chest x-rays were not done at Hurley Hospital and were not available to Defendant in January, 1994, when Defendant read the chest x-rays at issue in this case." Based on this undisputed fact, the trial court correctly held, pursuant to MRE 403, that the minimal probative value of the 1987 x-ray films with regard to the issue whether defendant breached the requisite standard of care in reading the 1994 x-ray films was substantially outweighed by the danger of unfair prejudice:

What [were] his observations of the '94 films at the time that he observed them, not something hindsight that somebody can come back later and say, well, look, we've got this film that will show differently. He didn't have the '87 films.

And everyone here has agreed that he was under no obligation to seek the '87 films at the time that he reviewed the '94 films and gave his impression.

All the jury's gonna [sic] be asked to decide here is whether when he looked at the '94 film, was there – did he breach the standard of care by not determining or finding out that there was, in fact, some obstruction or mass in the apex of the lung area and failed to note that and failed to have follow-up as a result of that. That's what's before this Court, not the '87 films.

And the reason I don't want the '87 films coming in is because I don't want the jury to get confused on those issues. I don't want them to think that this is a question of whether or not the '87 film would have showed differently had he had it. That is not the issue here. The issue is simply did he breach the standard of care when he looked at the '94 films and not determining that there was a mass there.

Plaintiff also admits in his brief on appeal that

The Court and Defendant were, of course, correct in asserting that the only issue the jury had to decide in determining whether the standard of care was breached was whether a radiologist, looking only at the 1994 films, and no others, should have regarded the opacity as sufficiently worrisome as to warrant further investigation.

Thus, as plaintiff himself admits, a comparison of the 1987 and 1994 films was a tangential issue which, as the trial court realized, would have been more prejudicial than probative pursuant to MRE 403. As the trial court correctly held, the issue with respect to professional negligence was not whether defendant's interpretation of the 1994 films was in hindsight factually correct, particularly when viewed in comparison with the 1987 films, but rather whether his interpretation comported with the standard of care owed by a reasonably prudent radiologist. Any marginal probative value plaintiff claimed the 1987 films had to issues other than the standard of care was substantially outweighed by the danger of unfair prejudice. Because the jury would have entangled the comparison evidence with the appropriate standard of care analysis, the trial court, in its broad discretion, did not err in excluding evidence of the 1987 x-ray films pursuant to MRE 401 and MRE 403. See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999); *Gore, supra* at 737.

II

Plaintiff next alleges that he was denied a fair trial when the trial court permitted defendant to argue that other subsequent treating physicians also failed to diagnose plaintiff's cancer and when evidence of such subsequent treatment was placed before the jury. Plaintiff maintains that it was error for the trial court to allow defendant to introduce evidence and present arguments to the jury directing the jury's attention to the so-called "missed opportunities" of subsequent treating doctors to diagnose plaintiff's tumor; such evidence was allegedly irrelevant to the question of defendant's liability and was unfairly prejudicial to plaintiff's case. We disagree.

As noted above, broad discretion is accorded to a trial court in rendering its evidentiary rulings. *Lagalo, supra*. A lawyer's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. *Wilson v*

General Motors Corp, 183 Mich App 21, 26; 454 NW2d 405 (1990). Reversal may also be required where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict. *Id.* A trial court's admonition to the jury before opening statements and after closing arguments that the statements of counsel were not evidence is generally sufficient to cure the prejudice arising from improper remarks of counsel. *Tobin, supra* at 641.

During the course of trial, primarily through questioning by plaintiff's counsel, plaintiff's medical treatment prior and subsequent to defendant's review of the January 1994 x-rays was made a part of the record, largely without objection. Through the testimony of his expert witnesses, plaintiff attempted to show, based on medical records and films from subsequent treatment, the size of plaintiff's tumor at various points in time and that it could have been treated with less residual problems for some time after defendant's x-ray report. In his closing argument, plaintiff's counsel argued at length that, but for defendant's interpretation of the January 1994 x-ray, plaintiff's tumor would have been discovered earlier, and plaintiff's cancer would have been more successfully treated, thereby referencing treatment by other physicians which did not reveal the cancer. By offering this testimony and argument, plaintiff "opened the door" to cross-examination and argument on such issues concerning causation and damages. *Carbonnell, supra* at 224.

Defense counsel was then permitted to cross-examine one of plaintiff's expert witnesses regarding whether films taken on May 17, 1994, and December 2, 1994, by physicians who were treating plaintiff for symptoms related to the undiagnosed tumor, showed any abnormality, if there was ever such an abnormality reported, and if there was ever any comparison done of those films with the films of January 14, 1994, which were reviewed by defendant. The proofs already introduced at trial paved the way for such cross-examination, which was properly limited by the trial court's instruction to the issues of proximate cause and damages.

Moreover, the allegedly improper remarks of defense counsel during opening and closing arguments were likewise legitimately linked to these specific issues and constituted fair comment on the evidence and theories of opposing counsel. See *Heintz v Akbar*, 161 Mich App 533, 538-539; 411 NW2d 736 (1987). In any event, the trial court gave the standard jury instruction that the arguments of attorneys are not evidence and further gave a limiting instruction that the evidence in question was admitted for a limited purpose, thus effectively curing any alleged error. *Tobin, supra*. Moreover, the record indicates that plaintiff failed to timely preserve any objection to defendant's closing argument and made no request for a curative instruction. It was not until *after* the jury had been instructed and sent out to deliberate that plaintiff's counsel made a "record" of his objections to defense counsel's closing comments. Plaintiff has not otherwise established any deliberate course of misconduct on the part of defense counsel that would indicate a verdict influenced by unfair prejudice. *Wilson, supra*.

Even assuming arguendo that the trial court did err in admitting evidence or argument regarding plaintiff's subsequent treatment and "missed opportunities," any error was harmless because the jury found that defendant had not breached the requisite standard of care. Thus, the jury never reached the issues of proximate cause or damages to which this evidence related, and plaintiff's substantial rights were not prejudiced by the admission of the evidence. MCR 2.613(A); *Krohn, supra*.

In light of our determination that plaintiff has failed to assert the existence of error entitling him to reversal of the no cause of action judgment, we need not consider the issue raised by defendant in his cross appeal.

Affirmed.

/s/ Richard Allen Griffin

/s/ Patrick M. Meter

/s/ Kirsten Frank Kelly