STATE OF MICHIGAN

COURT OF APPEALS

EARL MANN, Individually and as Personal Representative of the ESTATE OF LINDA MANN,

Plaintiff-Appellee,

v

BAY MEDICAL CENTER,

Defendant-Appellant.

UNPUBLISHED
October 18, 2002

No. 223557
Bay Circuit Court
LC No. 97-004020-NH

Before: Markey, P.J., and Cavanagh and R.P. Griffin*, JJ.

PER CURIAM.

In this medical malpractice case, defendant appeals by right the trial court's orders on the jury's award of $190,000, plus interest and costs, and denying posttrial motions for new trial or judgment notwithstanding the verdict (JNOV). We affirm.

While a patient at defendant Bay Medical Center, plaintiff Linda Mann ("plaintiff") suffered complications from an injection of Vistaril and was left with a serious disfigurement of her right buttock.

Plaintiffs' theory of the case was that the nurse who administered her injection chose an injection site that had been used too recently, was too low on the buttocks, and administered the medicine subcutaneously (into the tissues just under the skin) instead of intramuscularly (deeply into muscle tissue), that these were breaches of the normal standard of care, and that these errors caused the tissue necrosis and other complications that followed. Defendant's witness maintained that the injury was a consequence of the nurse's having inadvertently struck and damaged a blood vessel, which is a normal risk of injection that usually brings no complications. Here, however, because plaintiff was so obese that some of her blood vessels had to serve excessive amounts of tissue, damaging one of the vessels caused an interruption in the blood supply that was fatal to the accompanying tissue.

A plastic surgeon attempted to repair plaintiff's injury with skin grafts taken from the her legs, leaving scars on them as well. The jury awarded plaintiff Linda Mann $185,000 in

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

damages, and awarded plaintiff Earl Mann, Linda's husband, $5,000 in expenses and loss of consortium. Linda Mann has since died for reasons unrelated to the present controversy. For purposes of this appeal, Earl Mann represents his wife's interests as personal representative of her estate.

Defendant argues that plaintiffs failed to satisfy the requirements for expert testimony concerning breach of the applicable standard of care, plus causation. Defendant raised these arguments below in moving for directed verdict and JNOV. This Court reviews a trial court's decision on a motion for a directed verdict de novo as a question of law. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). This Court likewise reviews de novo a trial court's decision on a motion for JNOV. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). When reviewing a trial court's decision on a motion for a directed verdict, this Court views the evidence in a light most favorable to the nonmoving party to determine whether a factual question exists over which reasonable minds could differ. *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1995). The same approach governs review of a trial court's decision on a motion for JNOV. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). A trial court should not set aside a jury verdict if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Plaintiff presented Eloise Gilland, a registered nurse, who testified that the nurse who gave the injection in question chose a site too low on the buttocks, failed to rotate injection sites in order to give each more time to heal, and failed to withdraw the needle when the patient complained of pain. Nurse Gilland further opined that plaintiff's injury and the attendant documentation led her to conclude that the nurse negligently gave what should have been an intramascular injection subcutaneously. The witness further opined that the attending physician did not timely visit the patient after the mishap. Defendant argues that this witness' testimony concerning the alleged violation of the standard of care was wholly speculative. We disagree.

In order to prevail in a medical malpractice action, the plaintiff must prove the applicable standard of care, breach of that standard, injury, and proximate causation. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995), citing MCL 600.2912a. Both the defendant's breach of the standard of care and the damages caused by that breach must, but for exceptions not applicable here, be established by expert testimony.[1] *Thomas v McPherson Community Health Center*, 155 Mich App 700, 705; 400 NW2d 629 (1986).

"'Circumstantial evidence may be sufficient to establish a case.'" *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001), quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). However, in medical negligence cases, "a bad result, *of itself*, is not evidence of negligence sufficient to raise an issue for the jury." *Jones v Porretta*, 428 Mich 132, 154; 405 NW2d 863 (1987) (emphasis in the

[1] Expert testimony is not required where the alleged negligence is a matter of common knowledge and observation, or where the plaintiff establishes the elements of *res ipsa loquitur*. *Thomas v McPherson Community Health Center*, 155 Mich App 700, 705; 400 NW2d 629 (1986).

original). Although not sufficient by itself, a bad result may nonetheless be presented as evidence of negligence. *Id.* To prove medical negligence, "[s]omething more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect." *Id.*

In this case, Nurse Gilland provided expert testimony that plaintiff's injury should not have occurred without negligence. Additionally, plaintiffs' attorney elicited from the attending physician that the *Physician's Desk Reference* states that "[i]nadvertent subcutaneous injection" of Vistaril "may result in significant tissue damage," which suggests that such cause and effect is well understood within the medical community.

Concerning the injection site, defendant points to Nurse Gilland's testimony that from certain pictures, she could not tell exactly where the injection was administered. However, the witness opined that the entire wound covered an area too low for an injection, thus obviating any need to identify the precise injection location.

Defendant also argues that the attending physician's testimony that he visited the patient on the same day as the mishap refutes Nurse Gilland's account of his not doing so until the following morning. But any refutation required the jury to believe the physician's account, which, of course, it was free not to do. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) ("An appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony.").

These evidentiary particulars indicate that Nurse Gilland's opinion that the injury plaintiff suffered resulted from an improper subcutaneous injection, along with the other breaches of the standard of care to which she attested, was a conclusion drawn from competent, and supported, circumstantial evidence, not mere speculation.

Defendant protests that plaintiffs' attorney never asked Nurse Gilland if the choice of injection site, or alleged subcutaneous injection where an intramuscular one was appropriate, actually caused the injury at issue. This is an artful reading of the evidence, however. Gilland's testimony concerning the nature of the injury and the likely errors leading to its development clearly indicated a cause-and-effect theory.

Defendant further argues that the trial court erred in allowing Nurse Gilland to testify that she believed that Linda Mann's injury was the result of a faulty injection on the ground that this is a medical conclusion that a nurse is not qualified to give. Defendant further points out that on cross-examination, the witness agreed that the chemical and physiological processes within the affected tissues were a matter beyond ordinary nursing knowledge, and that she would defer to the plastic surgeon's expertise in that regard. We find these arguments unpersuasive.

That a registered nurse is qualified to articulate to the standard of care in administering injections can hardly be questioned, and Nurse Gilland's specific understanding that Vistaril should not be injected subcutaneously likewise falls within a nurse's expertise. Given the latter, it hardly seems as if a nurse is not necessarily testifying beyond her expertise if she makes known her understanding of the precise reasons why certain injections should be done in certain ways. Further, the witness' reticence to opine as to exactly what happened under the skin in this

instance does not denigrate from her general knowledge of why the injury developed in this case. That a general warning exists within the *Physician's Desk Reference* concerning the likelihood of damaged tissue if Vistaril is injected subcutaneously suggests that identifying such cause and effect is an effect that a nurse is qualified to identify. Gilland was competent to opine that that the injury in question was caused by improper injection techniques; consequently, she satisfied the requirement for expert testimony on both the standard of care and causation.

Dr. Edgar Allport, the plastic surgeon who treated plaintiff's wound, testified for the defense, stating unequivocally that Vistaril had nothing to do with plaintiff's injury, that it resulted from the combination of an incidental striking of a blood vessel in the course of a properly administered injection, and the patient's obesity, the latter exacerbating the consequences of the former. Defendant asserts that the trial court erred in denying the motion for new trial, arguing that Dr. Allport's testimony destroyed plaintiffs' theory of the case. We disagree. This Court reviews a trial court's decision regarding a motion for new trial for an abuse of discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997).

Defendant cites no authority for the proposition that any witness' testimony must be believed unless specifically rebutted. A court "must, despite any misgivings or inclinations to disagree, leave the test of credibility where our system reposed it—in the trier of the facts." *Sloan v Kramer-Orloff Co*, 371 Mich 403, 412; 124 NW2d 255 (1963).

Moreover, plaintiff testified that Dr. Allport had complained about her attitude, and admitted that she "probably was a real witch" at the time, and that the doctor did not like her at all. Whether because it concluded that Dr. Allport held a personal grudge against plaintiff or for any other reason, the jury was free to disbelieve Dr. Allport's benign account of what happened. Although Dr. Allport made a strong case for the defense, he simply set forth an alternative explanation for plaintiff's injury for the jury to consider. The jury was free to reject Dr. Allport's theory, and the trial court was obliged to respect the jury's decision. *Sloan, supra*; *Ellsworth, supra*.

Finally, defendant argues that it was denied a fair trial as the result of several instances of misconduct on the part of plaintiffs' attorney.

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982) (footnote omitted)].

Recent cases concerning unpreserved claims of attorney misconduct comport with *Reetz's* holding that unpreserved issues are reviewed for plain error affecting substantial rights. *Kern v*

Blethen-Coluni, 240 Mich App 333, 336; 612 NW2d 838 (2000), citing MRE 103(d), and *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first takes issue with plaintiffs' attorney mentioning insurance while questioning prospective jurors. Defense counsel in response asked to begin jury selection anew. We agree with defendant that plaintiffs' attorney engaged in improper questioning. MRE 411; MCL 500.3030. "References to the insurance coverage of either party during voir dire is presumptively improper." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 411; 516 NW2d 502 (1994). However, we agree also with the trial court that the defense did not suffer significant prejudice in the matter. Reversal is not required where the mention of insurance did not include an indication that either party was in fact insured, where the likelihood that the defendant had "deep pockets" existed from the nature of the defendant itself regardless of the question of insurance, and where the attorney mentioning it did not do so in clear disregard of instructions from the trial court. *Id.* at 411-412.

In this case, defendant Bay Medical Center was self-insured, and plaintiffs' attorney's questioning, at worst, only indirectly implied that an insurer might have an interest in these proceedings. Further, defendant's status as a hospital likely signaled the existence of "deep pockets" apart from the question of insurance. Additionally, plaintiffs' attorney did not further mention insurance once the trial court expressed its dismay over the matter. Finally, the trial court instructed the jury that the question of insurance had no bearing on the case and admonished it to "refrain from any inference, speculation, or discussion about insurance." Jurors are presumed to understand and follow their instructions. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). For these reasons, the trial court did not abuse its discretion in treating the mention of insurance in this instance as harmless error.

Defendant otherwise cites certain remarks in plaintiffs' attorney's closing arguments as instances of misconduct. An attorney's comments do not normally constitute grounds for reversal unless they reflect a deliberate attempt to deprive the opposing party of a fair and impartial trial. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). Reversal is required only where the prejudicial statements of an attorney reveal a deliberate intention to inflame or otherwise prejudice a jury, or to deflect the jury's attention from the issues involved. *Id.*

Defendant states that counsel repeatedly argued that the nurse who gave the injection, and defendant hospital itself, lacked character because they did not accept responsibility for their actions. Defendant points to only a single example of such argument, however:

> And then you look at the chart, her chart where she talks about what happened. She starts documenting the way she gave an injection which is—nobody else could find in the Bay Medical chart? Trying to explain what she did wrong. Tryin' to hide it, cover it up. That's no character.

Defendant points out that the nurse's character was never directly placed in issue and suggests that plaintiffs' attorney thus improperly impugned her character in closing argument. However, plaintiffs' theory of the case obviously ran counter to defendant's nurse's innocent explanations for how complications arose from the one injection. Implicit in plaintiffs' theory was that the nurse who administered, and documented, the injection was endeavoring to hide a

mistake. Plaintiffs' attorney thus was arguing from the evidence and reasonable inferences from it. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, a plaintiff's lawyer shares with a prosecutor the privilege of not having to confine arguments to the "blandest of all possible terms." *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896; 478 NW2d 445 (1991).

Defendant additionally argues that plaintiffs' attorney disparaged defense counsel by stating that he had never heard anyone talk out of both sides of her mouth to that degree, and by gesturing at defense counsel while arguing that it is not only "skinny" people who deserve competent medical care. Concerning the former, although defendant provides no record citation for the alleged incident, we find the following statement in plaintiffs' rebuttal: "Wow! I've never seen anybody talk out of both sides of their mouth so much in my life." We find this exclamation unproblematic. Closing argument would be bland indeed if counsel were not allowed to suggest that opposing counsel was selectively picking and choosing evidentiary particulars to emphasize to the jury.

Concerning the latter, plaintiffs' counsel did state that "what they're saying is, you have to be completely healthy and skinny in order to get good care at Bay Medical Center." Of course, the transcript does not indicate that there was any gesture toward defense counsel in connection with the mention of lean persons. The words themselves are reasonable argument in light of defendant's suggestion that plaintiff's obesity rendered her especially prone to suffer the adverse consequences of a properly administered injection, which formed the basis for the defense's theory of the case. If plaintiffs' attorney did indeed gesture toward defense counsel as if to imply that counsel thought herself and others blessed with a trim figure to be medically privileged, then a timely objection could well have triggered a proper admonishment or instruction from the trial court. Thus, to whatever extent there was any misconduct in this regard, reversal is nonetheless inappropriate. *Reetz, supra* at 105.

Defendant points to one remaining moment in closing argument in alleging attorney misconduct, arguing that plaintiffs' attorney improperly implied that some sort of conspiracy existed among defendant's experts. The record citation provided brings to light the following argument:

> You know, what about the doctors that came in to testify? You know, the ones that all work in this area, the ones that stick together, practice together. Of course they're gonna say what they . . . need to say. They want to keep their jobs. [The attending physician] works at Bay Medical Center. You think he's gonna come in here and say, oh, yeah, man. We messed up. We really . . . did something wrong. He's not gonna say that.
>
> Dr. Allport told you, he didn't like her. So, he's gonna come in here and tell the truth and help her? I don't think so. That shows no character.

Defendant states that plaintiffs produced no evidence that any of the doctors had spoken to each other, and argues that plaintiffs' counsel tried to prejudice the jury by suggesting their being in league with each other. However, counsel was not obliged to offer evidence of any specific conspiracy in order to remind the jury that certain witnesses had connections, and thus some identity of interest with defendant, or at least that medical practitioners may tend to

sympathize with others in related fields who are accused of malpractice. This unobjected-to argument did not deny defendant a fair trial. Further, the trial court instructed the jury to decide the case solely on the basis of the evidence, and that evidence did not include the statements of counsel.

For these reasons, defendant fails to show that the trial court abused its discretion in denying the motion for a new trial.

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin