STATE OF MICHIGAN

COURT OF APPEALS

SYBIL JONES, as Conservator of DWAYNE PITTMAN,

Plaintiff-Appellant,

v

HUTZEL-HARPER HOSPITAL,[1] a/k/a HUTZEL HOSPITAL,

Defendant,

and

GEORGE SHADE, M.D.,

Defendant-Appellee.

UNPUBLISHED
January 12, 2006

No. 256633
Wayne Circuit Court
LC No. 02-208432-NH

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff, Sybil Jones as conservator of her son Dwayne Pittman, appeals as of right from the judgment of no cause of action entered on the jury verdict. Because the trial court committed no evidentiary errors, we affirm.

Plaintiff argues that the trial court erroneously excluded testimony by her causation expert, Dr. Ronald Gabriel, about data derived from fetal monitoring tapes. She also argues that the court abused its discretion when it allowed plaintiff's causation expert, Dr. Homer Ryan, a neonatologist, to testify about the cause of Pittman's brain injury. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion is found only in the extreme case where the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or where an unprejudiced

[1] Hutzel-Harper Hospital reached a settlement agreement with plaintiff before trial and is not a party to this appeal.

person would say that there was no justification for the ruling. *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). However, a court necessarily abuses its discretion when it admits evidence that is inadmissible as matter of law. *Craig, supra* at 76. An error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Id.*

Expert testimony is admitted pursuant to MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court has an obligation under MRE 702 "to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id.* at 782. While the exercise of this gatekeeper function is within a court's discretion, the court may neither abandon this obligation nor perform the function inadequately. *Id.* at 780. There are three conditions for the admissibility of expert testimony under MRE 702: (1) the expert is qualified, (2) the testimony is relevant in that it assists the trier of fact to understand the evidence or determine a fact in issue, and (3) the testimony is derived from scientific, technical, or other specialized knowledge. *Craig, supra* at 78-79. Expert testimony may be excluded when based on assumptions that do not comport with the established facts or are derived from unreliable data. *Tobin v Providence Hospital*, 244 Mich App 626, 650-651; 624 NW2d 548 (2001); *Badalamenti v Wm Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999).

The record reflects that Dr. Gabriel testified at his deposition that, based on his calculation of the timing of the fetal monitoring strips, Pittman suffered bradycardia at approximately 6:30 p.m. on October 19, 1982. Dr. Gabriel concluded that one of the strips was recorded on October 19, 1982, because someone had hand written "4:10 p.m." on it and the child had already been delivered at 4:10 p.m. on October 20, 1982. Due to the uncertainty of the time and date of the strips, the court ruled that Dr. Gabriel could not testify about the fetal monitor tapes, their significance, or how they related to any subsequent brain damage. "[W]e don't know who put 4:10 on that piece of paper in the medical records, when they put 4:10 on that medical record or why. So we are assuming that some medical professional . . . indicated 4:10 p.m. and that it really was 4:10 p.m. and it really was October 19th at 4:10 p.m." In addition, Dr. Gabriel indicated that he was not an expert in interpreting fetal monitor strips and would defer to those who were experts. Therefore, the court ruled Dr. Gabriel's testimony that the baby was experiencing fetal distress that was characterized by bradycardia shown on the fetal monitor strips was not based on a reliable foundation and was inadmissible.

Plaintiff argues that Dr. Gabriel did not offer testimony that contradicted established facts but instead was consistent with established facts. However, the proponent of evidence bears the burden of establishing its admissibility. *Gilbert, supra* at 781. Plaintiff failed to establish when

the "4:10 p.m." note was written on the strip, who wrote the note, or for what reason. Because Dr. Gabriel's testimony about the timing of the strips and the significance of the data based on that timing was speculative, we conclude that the trial court did not abuse its discretion when it excluded the testimony.

In any event, even if the trial court had erred by excluding Dr. Gabriel's testimony about the fetal strips, reversal would not be warranted because refusal to reverse would not be inconsistent with substantial justice. *Craig, supra* at 76. First, Dr. Ronald Zack testified for plaintiff about the fetal monitoring strips and explained to the jury that the strips showed evidence of heart beat decelerations consistent with hypoxia. Thus, the jury heard expert testimony that the monitor strips showed the fetus was in distress. Further, plaintiff offered Dr. Gabriel's testimony to prove causation, however, the jury did not reach the question of causation because it found defendant not professionally negligent. Because the verdict did not rest on causation, the exclusion of causation testimony did not prejudice plaintiff.

Plaintiff also asserts that the trial court abused its discretion when it allowed Dr. Homer Ryan to testify for the defense regarding the cause of Pittman's brain injury. Plaintiff contends that because Dr. Ryan was a neotatologist, not a neurologist, he was not qualified to address the causation of fetal brain injury. MCL 600.2169(2) guides a court's assessment of an expert's qualification in a medical malpractice case. *Craig, supra* at 78. MCL 600.2169(2) provides:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

The trial court held a hearing to assess Dr. Ryan's qualifications. Dr. Ryan testified that he studied injuries to neonatal brains while in medical school and studied causation factors for neonatal brain injury during his residency. Dr. Ryan was board certified in pediatrics and neonatology and had practiced continuously as a neonatologist since at least 1980. He testified that he knew the causes of injuries to neonates so that he could prevent such injuries.

The court analyzed Dr. Ryan's credentials under MRE 702, but not MCL 600.2169(2). The court determined that Dr. Ryan was qualified to testify as a causation expert and stated its reasoning as follows:

> This is not a 600.2169 issue, as I think I mentioned earlier, in terms of qualifications of an expert or the admissibility of expert testimony with respect to the standard of care. I have been told that this witness will not be testifying to the standard of care either with respect to pediatric [sic] or neonatology, it is therefore a MRE 702 issue, testimony by experts and an expert may be qualified or person

> may be qualified as an expert if the Court determines that scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. A witness may be qualified as an expert, I'm paraphrasing only slightly, by knowledge, skill, experience, training or education.
>
> By education [Ryan] is qualified to testify because of his medical training at Boston College and because of his residency at St. John and at Children's. He had practical experience as well as knowledge or additional knowledge, if you will, by virtue of the two years I think he said he spent at the naval base in Okinawa, qualifies under MRE 702. The fact that he may have been in his second year of his fellowship in neonatology is of no moment in terms of whether he's qualified to testify as a witness because he's not giving standard of care testimony, if he were he would probably be disqualified . . . . But since it's not a standard of care issue . . . . He's qualified as an expert.

In determining that Dr. Ryan was qualified to testify as a causation expert, the court considered Ryan's education, professional training and the length of time that he had practiced as a neonatologist. The record reveals that Dr. Ryan was qualified to give causation testimony in this case because of his training in neonatology, which gave him the necessary expertise to evaluate causation of neonate brain injury. Thus, because the testimony was admissible under MCL 600.2169(2), and further because the verdict did not rest on plaintiff failure to prove causation, refusing to reverse would not result in substantial injustice.

Finally, plaintiff argues that the cumulative effect of evidentiary errors combined to result in substantial prejudice warranting reversal. For cumulative evidentiary error to mandate reversal, consequential errors must result in substantial prejudice that denied the aggrieved party a fair trial. *Lewis, supra* at 200. "Actual errors must combine to cause substantial prejudice to the aggrieved party so that failing to reverse would deny the party substantial justice." *Id.* at 201. Because the claimed evidentiary errors were not actual errors, there was no cumulative error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis