

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH GLAZA, f/k/a ELIZABETH
DEMONTIGNY,

UNPUBLISHED
March 22, 2011

Plaintiff-Appellant,

v

GARY D. GILYARD, M.D., and GARY D.
GILYARD M.D., P.C.,

No. 292499
Wayne Circuit Court
LC No. 07-719036-NH

Defendants-Appellees.

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the jury's verdict of no cause of action in this medical malpractice case. We affirm.

I.

This medical malpractice action arises out of Dr. Gary D. Gilyard and Gary D. Gilyard M.D., P.C.'s (collectively "defendants") treatment of plaintiff's right knee following a workplace injury on June 9, 2004. Plaintiff was initially treated by a different surgeon for her complaints of popping, pain and swelling of the right knee. That physician performed a knee arthroscopy, during which he discovered a loss of cartilage in the weight bearing area of the joint and performed a chondroplasty. Following that procedure, plaintiff had some improvement, but also developed paresthesias in the lateral aspect of her right foot. An EMG demonstrated compromise of the L5 and S1 nerve roots.

Not long thereafter, plaintiff was seen by a second orthopedic surgeon, Dr. Gilyard. She first saw him on November 8, 2004. After his initial evaluation, Dr. Gilyard's impressions were that plaintiff had a full-thickness cartilage lesion in the medial femoral condyle, posterior lateral rotary instability, and bursitis. He prescribed physical therapy to strengthen the knee and the use of a brace. He also recommended a second arthroscopy, this one involving a posterior-lateral reconstruction to address what he believed likely to be ligament laxity as well as removal of the bursa. Plaintiff signed a consent form.

According to Dr. Gilyard's testimony, once he had plaintiff under anesthesia, he was able to fully manipulate her knee without limitations due to pain and guarding. He testified that, at

that time, he discovered that the posterior-lateral corner was not lax, but instead that there was a full-thickness cartilage lesion and that her patella was not tracking properly, causing a subluxation of patello-femoral joint. He opened the knee and, rather than the procedures specifically named in the consent form, performed a tibial tubercle osteotomy and an OATS procedure. The tibial osteotomy involves actually fracturing the superior portion of the tibia, shifting its position and affixing it with surgical screws. Dr. Gilyard testified that this was necessary to correct the patella subluxation that he had discovered. The OATS procedure involves the transplanting of a plug of cartilage into the full-thickness tear.

Following the surgery, plaintiff was kept in the hospital overnight and released the following day. Her leg was not casted. She was told not to weight bear at all on that leg and was given a CPM (continuous passive motion machine) to use. This device is intended to provide gentle movement to the knee joint and plaintiff testified that she kept her leg in it and used it as instructed.

Several days later, plaintiff's pain pump either malfunctioned or ran out of medication. She was taken to a local emergency room where she was given various narcotic pain medications. She apparently suffered an adverse reaction to these medications after returning home and became delusional on the night of January 21-22. In that state, she attempted to walk on the injured leg and her husband had to try to restrain her in the bed. She was transported to the emergency room where an x-ray did not reveal any damage to plaintiff's knee. However, x-rays taken two days later at Dr. Gilyard's office did reveal that the surgical screws were no longer properly in place such that the tibial osteotomy was no longer properly aligned and secure. Dr. Gilyard performed a second surgery, placing additional screws. As with the first surgery, he did not cast the leg. Some days thereafter, plaintiff suffered a severe episode of cramping in the leg and her leg involuntarily flexed so as to pull her knee all the way up to her chest. When this occurred, her osteotomy could not hold. This time, the screws held, but the bone broke. In an attempt to correct this, Dr. Gilyard performed a third surgery. As it was not possible to place additional screws, he used stone staples to hold the tubercle in position. He testified that he was still able to obtain an excellent alignment.

Plaintiff alleged several violations of the standard of care by Dr. Gilyard and an expert testified on her behalf. This expert asserted that Dr. Gilyard did not obtain informed consent from plaintiff to perform the osteotomy, as plaintiff had been told that he would be performing a far less invasive surgery that did not involve breaking her bones. Second, plaintiff's expert testified that the tibial osteotomy was not indicated at all, as plaintiff did not, in fact, have a patella subluxation and, even if she did, conservative measures should have been tried first. Third, the expert testified that Dr. Gilyard should have casted plaintiff's leg after each surgery to prevent exactly the type of reinjuries that occurred post-surgically and because immobilization is required following a tibial osteotomy. Fourth, he testified that Dr. Gilyard did not obtain an adequate reduction of the fracture following the second failure of the osteotomy and left plaintiff with the very type of patella subluxation for which he indicated he had performed the surgery. Finally, he testified that Dr. Gilyard should not have performed the OATS procedure at the same time as the osteotomy because the OATS procedure requires prompt mobilization in order to heal while mobilization is contraindicated following an osteotomy. Plaintiff's expert opined that the use of the CPM device was responsible for the loosening of the screws following the first surgery. Finally, he testified that, as a result of the multiple surgeries and resulting internal

scarring, she was left with greatly reduced motion in the knee, muscle atrophy, and reflex sympathetic dystrophy, a very painful and permanent condition.

Dr. Gilyard and the expert retained on his behalf each testified that he had not violated the standard of care in any respect. They testified that the general language in the consent form referencing the possibility of other procedures, as well as the pre-surgery conversation with plaintiff that Dr. Gilyard described, was sufficient to constitute informed consent for the tibial osteotomy and the OATS procedure. They further testified that each of Dr. Gilyard's three surgeries was performed with proper technique and that, in each, the fracture was adequately reduced. They also testified that it was fully within the standard of care to perform the OATS procedure and the osteotomy in the same surgery and that, contrary to plaintiff's expert's testimony, gentle mobilization is not contraindicated following an osteotomy and is, in fact, helpful in healing from that procedure. Finally, they testified that the use of the CPM machine had nothing to do with either failure of the screws, which were due completely to the unforeseeable incidents described by plaintiff or willful noncompliance with the directions not to bear weight on her right leg.

While there was a dispute as to the present condition of plaintiff's knee, that dispute was small in comparison to the disputes regarding whether Dr. Gilyard had been negligent. The records of plaintiff's present physician were admitted and these indicated that she could only bend her right knee from 5 degrees to 20 degrees while awake and, when anesthetized, her leg could be bent to 75 degrees, presumably as there was no limitation due to pain. The normal range of motion for the knee is from 0 degrees to 135 degrees. In addition, defendants' expert agreed that plaintiff likely had reflex sympathetic dystrophy, but testified that it is not possible to know when she developed it and that she might have even developed it after her initial arthroscopy, before she even saw Dr. Gilyard, given the extent of her pain at that time. Plaintiff's expert testified that had Dr. Gilyard complied with the standard of care, plaintiff's limitations on motion would be minor and she would not have developed reflex sympathetic dystrophy, which is generally the result of repeated traumas and surgeries to the same area. Dr. Gilyard testified that he did not believe plaintiff's range of motion was as severely limited as she claimed. He was not asked to comment as to whether plaintiff had reflex sympathetic dystrophy or, if so, as to the cause.

The jury found that defendants were not professionally negligent in the care of plaintiff and did not reach the questions of causation or damages. The trial court subsequently entered a judgment of no cause of action.

II.

Plaintiff's appeal does not assert any error regarding the testimony of Dr. Gilyard or either party's expert. Rather, plaintiff asserts that the trial court erred by: (1) allowing Rita Ingersoll, a nurse case manager working for plaintiff's employer's workers' compensation carrier, to testify as to statements in her file, which she had used to refresh her recollection even though she had not produced that file in response to plaintiff's subpoena; (2) admitting a medical assessment report authored by Ingersoll over hearsay objection; (3) allowing Ingersoll to offer testimony regarding her experience with the continuous passive motion machine; (4) refusing to admit the report of a non-testifying physician who had examined plaintiff on behalf of her employer's workers' compensation insurer; (5) allowing the defense to argue that the initial

loosening of the surgical screws was the fault of plaintiff's husband; and (6) allowing defendants to show the jury a surveillance video of plaintiff.

A. INGERSOLL'S TESTIMONY

Ingersoll is a registered nurse who, on assignment by plaintiff's employer's workers' compensation carrier, coordinated plaintiff's medical care and regularly attended medical appointments with plaintiff. Plaintiff does not assert that Ingersoll was not properly listed on defendants' initial witness list or on defendants' final trial witness list filed on March 21, 2008. Ingersoll was not deposed during discovery.

On the first day of trial, prior to jury selection, plaintiff's counsel moved to bar Ingersoll from testifying as she was an agent for the workers' compensation carrier and her testimony would likely lead to the jury learning of the workers' compensation claim. Plaintiff further argued that Ingersoll would not be competent, as a non-physician, to give medical opinion testimony. Defense counsel responded that Ingersoll would be called only as a fact witness as to: (1) how plaintiff came to be seen by Dr. Gilyard; (2) plaintiff's noncompliance with orders not to weight bear; and (3) what plaintiff understood about the nature of the surgery to which she was consenting. With that limitation, and the trial court's direction not to raise workers' compensation in front of the jury, the trial court concluded that Ingersoll could testify.

On the same day, plaintiff's counsel served Ingersoll with a subpoena for her file concerning plaintiff, directing that a copy of it be produced to counsel's office the next day. Ingersoll did not comply with the subpoena and neither she nor anyone else filed a motion to quash.

Ingersoll was called as the first witness on April 28, 2009. Prior to her taking the witness stand, plaintiff did not object to her testimony again or inform the court that Ingersoll had failed to comply with the subpoena for her file. On direct examination, Ingersoll testified that she had recently refreshed her recollection regarding plaintiff by reviewing her file. In cross-examination, Ingersoll was asked why she had not complied with plaintiff's subpoena for the file. Ingersoll responded that she did not have time to produce it and the subpoena was not accompanied by payment for the production of the records. She stated that she had left two messages at the office of plaintiff's counsel regarding these issues.

Plaintiff argues that the trial court erred by allowing Ingersoll to testify based on a refreshed recollection because she failed to produce the file that she reviewed prior to trial to refresh her recollection. We disagree. Plaintiff's unpreserved objection is reviewed for plain error affecting her substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008). MRE 612(b) provides in relevant part:

If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

Plaintiff does not articulate how the production of Ingersoll's file would have aided the cross-examination or affected the outcome of the proceedings, or why a motion to compel compliance with the subpoena was not brought. Accordingly, we do not conclude that plaintiff has established a plain error affecting her substantial rights.

Plaintiff also argues that the trial court abused its discretion by admitting Ingersoll's November 2, 2004 medical assessment/status report under MRE 803(6). MRE 803(6) provides in relevant part:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Plaintiff argues that the report should have been excluded by the hearsay rule because it lacked trustworthiness, as Ingersoll prepared it in the context of plaintiff's workers' compensation claim.

In *Slayton v Mich Host, Inc*, 144 Mich App 535, 552-553; 376 NW2d 664 (1983), this Court concluded that a doctor's letter was lacking in "inherent reliability and trustworthiness" because the doctor was hired by the "defendant's insurer to examine [the] plaintiff in order to defend [the] defendant against [the] plaintiff's workers' compensation claim." This case is arguably distinguishable from *Slayton* because there is no evidence that Ingersoll was hired specifically to aid a workers' compensation insurance company in defending against plaintiff's claim for compensation. Further, even if the report should not have been excluded from the hearsay rule under MRE 803(6), any error in its admission was harmless. MCR 2.613(A); *Price v Long Realty, Inc*, 199 Mich App 461, 467-468; 502 NW2d 337 (1993). The report reflects a chronology of plaintiff's treatment prior to seeking a second opinion from Dr. Gilyard. Although plaintiff claims in her brief that the report suggests that plaintiff was responsible for her own injuries, she does not point to any language in the report to support this claim. Further, plaintiff claims in her brief that the report suggests that she was not adhering to Dr. Gilyard's instructions, but according to the report, plaintiff had not yet seen Dr. Gilyard or received instructions from him because her first appointment had been rescheduled. The focus of the report was plaintiff's request for Ingersoll to recommend a doctor she could consult for a second opinion, Ingersoll's subsequent recommendation of several doctors, and plaintiff's ultimate choice of Dr. Gilyard. We do not find that the report was prejudicial to plaintiff. Plaintiff has not argued, and there is no evidence in the record, that the admission of these facts in the report was outcome determinative.

Lastly, plaintiff argues that the trial court erred in allowing Ingersoll to testify that over the last twenty years she has provided services to many patients following tibial osteotomies and that CPM use never caused a loosening of the screws in these patients. Plaintiff argues that this

amounted to expert testimony concerning whether a CPM can be safely used in the context of a tibial osteotomy and whether it could have been the cause of the disruption to plaintiff's surgery. As noted above, at the beginning of trial, plaintiff objected to Ingersoll's proposed testimony, arguing that, as a nurse, she was not competent to provide a medical opinion. The trial court ruled that Ingersoll could testify only as a fact witness.

MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

"Panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod on other grounds 433 Mich 862 (1989).

On the one hand, this testimony was rationally based on Ingersoll's perceptions from coordinating and facilitating medical care for many recovering patients and therefore appears to fall within MRE 701. On the other hand, however, the testimony presented a risk that the jury would view Ingersoll as an expert regarding the device, its proper use and its effects. As this is an evidentiary issue, our review is limited to whether the trial court abused its discretion. While the question whether Ingersoll's testimony went beyond that of a fact witness is close, we cannot say that the trial court abused its discretion in concluding that it did not. Moreover, both Dr. Gilyard and defendants' expert orthopedist testified that a CPM machine could not have caused the violent disruptions to plaintiff's knee during recovery.¹ Thus, Ingersoll's testimony was not the sole or even primary testimony in this regard and served not as expert opinion, but as factual support for the expert opinions of Dr. Gilyard and his expert.

B. MEDICAL EVALUATION REPORT

Plaintiff's next claim of error was the trial court's refusal to admit the medical evaluation report written by a doctor who had examined plaintiff on behalf of her workers' compensation carrier. He states in the "physical examination" portion of the report that plaintiff is "unable to bend her knee." He describes her prognosis as "guarded." In addition, in the section entitled "diagnostic impression," he notes that "[i]f I were the treating physician, after the first surgery, I would have probably immobilized her in a cast to avoid flexion of her knee as she had a failure for the first time." These statements are plainly hearsay and do not, as plaintiff suggests, fall

¹ Plaintiff also argues that Ingersoll was not qualified to testify regarding the purpose of a CPM machine, namely to provide joint mobility, typically for shoulders, knees and hips. However, admission of this general testimony as to which there is no dispute was not error. Moreover, even if erroneously admitted, Ingersoll's testimony in this regard was harmless because Dr. Gilyard as well as both experts testified as to the purpose and mechanics of the machine. MCR 2.613(A).

within any exception. Indeed, plaintiff does not state what, if any, exception she relies upon. There was no error in excluding the report from this non-testifying physician who did not treat plaintiff.

C. PROHIBITED TESTIMONY

We also reject plaintiff's argument that the trial court abused its discretion by allowing defense counsel to question plaintiff's husband regarding his attempts to physically restrain plaintiff in her bed during her delusional episode so that she would not attempt to walk on her leg. That testimony was clearly relevant to defendants' theory as to how the screws became loosened and was properly admitted. Contrary to plaintiff's argument, this did not violate the court's earlier order excluding testimony that plaintiff advised hospital staff that her husband had violently assaulted her, that hospital personnel contacted the police and that charges against the husband were filed but then dismissed by the prosecutor. The testimony that was permitted did not suggest any improper behavior by plaintiff's husband and allowed no more than the suggestion that the loosening of the screws was an unfortunate accident caused by plaintiff's delusional state purportedly brought on by excessive narcotic medication. The jury was not instructed that they could find non-party fault and in defense counsel's closing statement, he stated that "I don't know what happened" during those events and that "it doesn't matter" because "it's nothing that Dr. Gilyard caused to happen." Under these circumstances, we find no error.

D. SURVEILLANCE VIDEOTAPE

Plaintiff's last claim of error concerns the trial court's admission of a surveillance videotape of plaintiff. We have viewed the videotape shown to the jury in its entirety. We conclude that, as to damages, it has modest probative value and modest prejudicial impact. As to whether Dr. Gilyard committed malpractice, we find that it has neither probative value nor prejudicial value. Although the video was not included on defendants' exhibit list, and the investigator who authenticated it was not listed as a witness, the trial court allowed defendants to present it on the theory that the events shown on the video served to rebut unexpected testimony made by plaintiff and her family members as to her level of disability. Plaintiff has made a credible argument that the tape should not have been admitted in light of the violation of the scheduling order and that it was not inconsistent with plaintiff's own testimony regarding her condition. However, this issue is reviewed under the abuse of discretion standard and the trial court's decision was reasoned and not without a basis. Moreover, as noted, the tape was not relevant at all to the question of defendants' negligence, which was the sole issue upon which the jury decided the case.

Affirmed. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro