If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN KASTEN,

Plaintiff-Appellant/Cross-Appellee,

v

ALAN B. NEWMAN, M.D., and ASSOCIATES IN OBSTETRICS AND GYNECOLOGY, P.C.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
December 21, 2021

No. 351977
Oakland Circuit Court
LC No. 2018-170598-NH

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right a judgment of no cause of action entered in favor of defendants, Dr. Alan Newman, M.D., and his medical practice, Associates in Obstetrics and Gynecology, PC, following a jury trial. Defendants cross-appeal the trial court's denial of their motion for a directed verdict at trial. We affirm.

I. FACTS AND PROCEEDINGS

Defendant Dr. Newman was plaintiff's treating obstetrician-gynecologist (OB-GYN). In October 2017, plaintiff's pelvic CT scan showed a thickening of the endometrial lining of the uterus. Dr. Newman was unable to view the interior of the uterus in an in-office procedure because the cervical opening was too firm, and he concluded that plaintiff was not a suitable candidate for a less-invasive laparoscopic hysterectomy, so he recommended that plaintiff undergo an open abdominal hysterectomy. Dr. Newman performed the hysterectomy on November 30, 2017. After plaintiff was discharged from the hospital on December 2, 2017, she experienced increasing pain over the next two weeks. On December 13, 2017, she went to a hospital emergency room because of severe abdominal pain and vomiting. A CT scan showed swelling of the left kidney and blockage in the left ureter. Plaintiff was treated by Jeffrey O'Connor, M.D., a specialist in urology.

Dr. O'Connor attempted to perform a cystoscopy to obtain an internal view of plaintiff's kidneys, but he was unable to advance either the scope or a wire farther than three or four centimeters because the left ureter was completely blocked. Dr. O'Connor concluded that the

ureter became blocked during the hysterectomy, but he could not determine the mechanism by which the injury occurred. Dr. O'Connor fitted plaintiff with a nephrostomy tube to drain urine from the kidney. On February 14, 2018, he performed surgery to reconnect the blocked ureter to her bladder. During the surgery, he discovered "adhesions," i.e., scar tissue outside the small intestine that caused parts of the intestine to stick to each other and to the abdominal wall. He had to call a general surgeon to help him access the urinary organs.

Plaintiff thereafter brought this action against Dr. Newman and his practice for malpractice. Her theory was that Dr. Newman violated the standard of care for an OB-GYN performing an abdominal hysterectomy by failing to either cut down the length of the ureters or to insert catheters into the ureters to ensure that the ureters would not be accidentally clamped, cut, or sutured during the hysterectomy. Plaintiff called Jeffrey Soffer, M.D., as her expert on the applicable standard of care and causation. Dr. Soffer opined that Dr. Newman must have clamped or sutured the left ureter, but Dr. Soffer admittedly did not know if the ureter was actually clamped, or sutured, or both. At trial, defendants moved for a directed verdict on the ground that Dr. Soffer's testimony failed to establish jury-triable questions regarding the standard of care or the causation of plaintiff's injury. The trial court denied the motion.

Dr. Newman's expert witnesses were Peter Weiss, M.D., a specialist in OB-GYN, and Ali Luck, M.D., a specialist in OB-GYN and urogynecology. Dr. Weiss and Dr. Luck opined that Dr. Soffer's recommendation to dissect the lower part of the ureters was inadvisable in an abdominal hysterectomy in a noncancerous patient. They stated that the proper standard of care was to visualize and palpate the ureter to guard against injury. They did not agree that the existence of the ureteral injury proved that the injury occurred during the hysterectomy or that Dr. Newman must have been negligent. The jury returned a verdict of no cause of action.

II. DR. LUCK'S EXPERT WITNESS QUALIFICATIONS

Plaintiff argues that Dr. Luck was not qualified to testify regarding the applicable standard of care because her primary specialty was not general obstetrics and gynecology, but the subspecialty of urogynecology. Plaintiff preserved this issue by timely objecting to Dr. Luck's testimony on the ground that she did not meet the requirements of MCL 600.2169. MRE 103(a)(1).

"This Court reviews for an abuse of discretion the 'qualification of a witness as an expert and the admissibility of the testimony of the witness . . . ." *Lenawee Co v Wagley*, 301 Mich App 134, 161; 836 NW2d 193 (2013), lv den 495 Mich 900 (2013), quoting *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007). "An abuse of discretion occurs when a circuit court chooses a result that falls outside the range of reasonable and principled outcomes." *Lenawee Co*, 301 Mich App at 162. Any preliminary questions of law, including the interpretation and application of statutes, are reviewed de novo. *Mueller v Brannigan Bros Restaurants & Taverns, LLC*, 323 Mich App 566, 571; 918 NW2d 545 (2018). The trial court "necessarily commits an abuse of discretion if it makes an incorrect legal determination." *Id.*

MCL 600.2169(1) provides, in pertinent part:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is

licensed as a health professional in this state or another state and meets the following criteria:

(a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

In *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006), the defendant physician was board-certified in pediatrics, with certificates of special qualifications in pediatric critical care medicine and neonatal-perinatal medicine. The plaintiff's proposed expert witness was board-certified in pediatrics, but without certificates of special qualifications. *Id.* at 554-555. The trial court granted the defendant's motion to strike the plaintiff's expert on the ground that he was not qualified under MCL 600.2169 to testify against the defendant physician. In *Woodard*'s companion case, *Hamilton v Kuligowski*, the defendant physician was board-certified in general internal medicine, with a specialty in general internal medicine. The plaintiff's proposed expert was board-certified in general internal medicine, and devoted a majority of his professional time to the treatment of infectious diseases, a subspecialty of internal medicine. *Id.* at 556. The trial court concluded that the plaintiff's expert was not qualified to testify against the defendant physician because the plaintiff's expert did not devote the majority of his professional time to the practice or teaching of general internal medicine. *Id.* Our Supreme Court held:

Although specialties and board certificates must match, not *all* specialties and board certificates must match. Rather, § 2169(1) states that "a person shall not give expert testimony on the *appropriate* standard of practice or care unless . . . ." (Emphasis added.) That is, § 2169(1) addresses the necessary qualifications of an expert witness to testify regarding the "*appropriate* standard of practice or care," not regarding an inappropriate or irrelevant standard of medical practice or care. Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates

> that are not relevant to the standard of medical practice or care about which the witness is to testify. As this Court explained in *McDougall v Schanz*, 461 Mich 15, 24-25; 597 NW2d 148 (1999), "[MCL 600.2169(1)] operates to preclude certain witnesses from testifying solely on the basis of the witness' lack of practice or teaching experience in the *relevant* specialty." (Emphasis added.) [*Woodard*, 476 Mich at 558-559.]

The Court also noted that § 2169(1) uses the terms "the same specialty" and "that specialty," not "the same specialties" or "those specialties." *Woodard*, 476 Mich at 559. The Court further stated:

> Obviously, a specialist can only devote a majority of his professional time to one specialty. Therefore, it is clear that § 2169(1) only requires the plaintiff's expert to match one of the defendant physician's specialties. Because the plaintiff's expert will be providing expert testimony on the appropriate or relevant standard of practice or care, not an inappropriate or irrelevant standard of practice or care, it follows that the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty. [*Woodard*, 476 Mich at 560.]

Regarding the meanings of the words, "specialty" and "subspecialty," the Court stated that a "subspecialty" was "a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty." *Id*. at 562. "[I]f a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." *Id*. "[I]n order to be qualified to testify under § 2169(1)(b), the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty." *Woodard*, 476 Mich at 566.

Dr. Luck testified that 75 percent of her practice was devoted to urogynecology, and 70 percent of her time was devoted to evaluating patients for hysterectomy and 25 percent involved urinary problems not related to hysterectomy. Although Dr. Luck's and Dr. Newman's specialties substantially overlapped, Dr. Luck devoted less than a majority of her professional time to the specialty of general gynecology. Therefore, she was not qualified to testify on the appropriate standard of care. MCL 600.2169(1). Although the trial court concluded that plaintiff's objection to Dr. Luck's qualifications pertained to weight and credibility, rather than admissibility, MCL 600.2169(1) sets forth a bright-line rule, which the trial court failed to apply.

We conclude, however, that the trial court's error of allowing Dr. Luck to offer testimony regarding the standard of care was harmless. Error may not be predicated on an evidentiary ruling "unless a substantial right of the party is affected." MRE 103(a). This Court will not reverse on the basis of an erroneous evidentiary ruling "unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). "A trial court's error is harmless if, based on review of the entire record, it is more probable than not that the error was not outcome-

determinative; if the probability runs in the other direction, then it is reversible error." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 717; 922 NW2d 662 (2018).

As defendants argue, Dr. Luck's testimony largely focused on the issue of causation rather than the standard of care. Dr. Luck testified about the method used in a hysterectomy to avoid injury to the ureters. She stated:

> [W]hen you work in that area, you're very methodic . . . you clamp right next to the cervix . . .and that's when you do an abdominal hysterectomy, you – actually every step of the way is actually to drop the ureter. We call it dropping the ureters away from where we're going to clamp.

Dr. Luck referred to Dr. Newman's operative note, which indicated that he started cutting at the round ligament that held the uterus in place. This "drops the ureter." Dr. Luck explained that in a radical hysterectomy for a cancer patient, it was necessary to "dissect out the ureters, so meaning you have to devascularize it sometimes; you actually have to drop the–the bladder way down, because what they're trying to do is get as much cancer as possible if it's already spread, which is spreading to like the top of the vagina." In this type of procedure, it is necessary to "completely isolate the ureter." Dr. Luck testified this is not, however, a suitable method for a benign hysterectomy. The above testimony can be characterized as standard-of-care testimony because it described what a physician should do, and explained why complete dissection of the ureter was not appropriate for plaintiff's hysterectomy. However, the testimony also explained why the standard of care differed depending on whether the hysterectomy was part of cancer treatment.

Dr. Luck explained why plaintiff's symptoms and laboratory results did not indicate that Dr. Newman injured the ureter. She explained how small bowel adhesions could lead to a ureteral blockage. She stated a theory that the ureters were "devascularized" from the clamping near the uterus. The reduced blood flow combined with plaintiff's susceptibility to scarring led to the obstruction. This would not have been visible to Dr. Newman at the time of the surgery. She stated that accidental cutting of the ureter is a less dangerous situation for a patient because the physician can see the bleeding and injury immediately.

The substance of Dr. Luck's testimony was thus a mixture of standard-of-care, explanation of the standard of care, and explanation of causation. To the extent that it addressed the standard of care, it was improper under MCL 600.2169(1), but it was also redundant of Dr. Weiss's testimony. We cannot conceive how Dr. Luck could have discussed the alleged flaws in Dr. Soffer's standard-of-care opinion without some degree of repetition of Dr. Weiss's testimony. Dr. Luck's testimony also delved into the reasons why the emergence of a ureteral injury two weeks after the hysterectomy did not prove that Dr. Newman was negligent in performing the hysterectomy. In sum, the erroneous qualification of Dr. Luck as a standard-of-care witness was harmless because her testimony mostly addressed causation and it was admissible for that purpose and, to the extent that her testimony touched on the issue of the standard of care, it was cumulative of Dr. Weiss's testimony. Under these circumstances, the error is not grounds for reversing the judgment for defendants. MCR 2.613(A); MRE 103(a).

III. WITNESS CALLED OUT OF ORDER

Plaintiff also argues that the trial court violated MCR 2.513(G) by allowing defendants' expert witness, Dr. Weiss, to testify out of order, before plaintiff completed her presentation of evidence. "The mode and order of interrogation of witnesses is within the trial court's discretion." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 22; 697 NW2d 913 (2005). Questions concerning the interpretation and application of a court rule are reviewed de novo. *Webb v Holzheuer*, 259 Mich App 389, 391; 674 NW2d 395 (2003).

Plaintiff relies on MCR 2.513(G), which provides:

> In a civil action, the court may, in its discretion, craft a procedure for the presentation of all expert testimony to assist the jurors in performing their duties. Such procedures may include, but are not limited to:
>
> (1) Scheduling the presentation of the parties' expert witnesses sequentially; or
>
> (2) allowing the opposing experts to be present during the other's testimony and to aid counsel in formulating questions to be asked of the testifying expert on cross-examination.

Plaintiff construes MCR 2.513(G) as a limitation on the trial court's authority to permit an expert witness to testify out of order. She argues that the trial court was not authorized to allow Dr. Weiss to testify before plaintiff completed her presentation of proofs because this decision was not intended to "assist the jurors in performing their duties." We disagree with plaintiff's position that the rule prohibits a trial court from deviating from the usual procedure of having the plaintiff first present proofs, see MCR 2.507(B), unless the deviation is necessary to assist the jurors' understanding of the evidence. Although the rule provides a trial court with discretion to "craft a procedure for the presentation of all expert testimony to assist the jurors," it does not preclude a court from allowing a witness to testify out of order for other purposes, such as to accommodate an out-of-state witness's travel schedule.

"Court rules, like statutes, must be read to give every word effect and to avoid an interpretation that would render any part of the [court rule] surplusage or nugatory." *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 510; 890 NW2d 875 (2016) (quotation marks and citation omitted). "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision." *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997) (quotation marks and citation omitted). "If the statutory [or court rule] language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Id*. at 391-392 (quotation marks and citation omitted). The word "shall" in a statute or court rule "indicates a mandatory, nondiscretionary provision," but the word " 'may,' as used within the statute [or court rule] indicates that a trial court has discretion" over the matter in question. *Id*. at 393-394. Applying these principles, the phrase "the court may, in its discretion . . ." allows a court to exercise authority over the order of expert witnesses to assist the jury, but it does not otherwise prohibit a court from exercising authority over the order of witnesses for other reasons.

This conclusion is consistent with the principle that "[e]ach word and phrase in a statute must be assigned such meanings as are in harmony with the whole of the statute, construed in light of history and common sense." *Rott v Rott*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 161051); slip op at 13 (quotation marks and citation omitted). MCR 2.507 governs the conduct of trials. It provides, in pertinent part:

> (B) Opening the Evidence. *Unless otherwise ordered by the court*, the plaintiff must first present the evidence in support of the plaintiff's case. However, the defendant must first present the evidence in support of his or her case, if
>
> (1) the defendant's answer has admitted facts and allegations of the plaintiff's complaint to the extent that, in the absence of further statement on the defendant's behalf, judgment should be entered on the pleadings for the plaintiff, and
>
> (2) the defendant has asserted a defense on which the defendant has the burden of proof, either as a counterclaim or as an affirmative defense. [Emphasis added.]

The phrase "[u]nless otherwise ordered by the court" recognizes that a trial court has authority to modify the order in which evidence is presented, thereby allowing a defendant to present evidence before the plaintiff has rested. The rule then sets forth two circumstances in which a defendant *must* present evidence before the plaintiff's presentation is complete. The trial court thus has discretion to allow the defendant's evidence before the plaintiff's presentation is complete, but the court *must* allow the re-ordering of evidence in the specified circumstances. MRE 611(a) provides that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." This rule requires the trial court to exercise its discretion in directing the order of questioning witnesses for three broad general reasons. Moreover, the language of the evidentiary rule does not restrict the trial court's control of interrogating witnesses and presenting evidence to the three circumstances set forth in the rule. Allowing a defense witness to testify out of order to accommodate a travel schedule serves the purpose of making the presentation effective.

In any event, plaintiff fails to demonstrate that allowing Dr. Weiss to testify out of order, before plaintiff presented all of her evidence, was "inconsistent with substantial justice." MCR 2.613(A). Plaintiff states that the re-ordering of witnesses was "highly prejudicial" because defendants were permitted "to present one of the main defense liability witnesses before Plaintiff got more than two witnesses in to her case-in-chief." This conclusory statement fails to explain why hearing Dr. Weiss's testimony before hearing plaintiff's examination of Dr. Newman and plaintiff's own testimony made the jury more inclined to give credence to defendants' proofs. The jury heard all of the experts' testimony, and both parties were permitted to cross-examine the opposing parties' witnesses. Accordingly, we reject this claim of error.

IV. USE OF LEARNED TREATISE

Plaintiff argues that the trial court erred by allowing defense counsel to ask Dr. Newman a question that was derived from a learned treatise referred to by another testifying doctor. Plaintiff objected to the use of the treatise for anything other than impeachment and to defense counsel's asking a question derived from the treatise, but the trial court found that defense counsel's asking a question derived from it was fair. The trial court thus overruled plaintiff's objection. Defense counsel then asked Dr. Newman if he had "ever been taught" that because of the vasculature in the lower 3 centimeters of the ureter below the uterine vessels, dissection was risky and inadvisable. Dr. Newman replied affirmatively. We review the trial court's decision for an abuse of discretion. *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 333 Mich App 457, 477; 960 NW2d 186 (2020).

MRE 707 governs the use of learned treatises for impeachment. It states:

> To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are admissible for impeachment purposes only. If admitted, the statements may be read into evidence but may not be received as exhibits.

In *Hilgendorf v St. John Hosp & Med Ctr Corp*, 245 Mich App 670, 702; 630 NW2d 356 (2001), this Court acknowledged that some cases "interpreting and applying MRE 707 suggest that no matter how strict the prohibition against using learned treatises in direct examination of an expert witness may be, MRE 707 does not absolutely forbid using learned treatises at other stages of a trial or for other reasons." The Court also noted that in *Greathouse v Rhodes*, 242 Mich App 221; 618 NW2d 106 (2000), rev'd on other grounds 465 Mich 885 (2001), this Court "came closer than any other case to addressing whether a learned treatise can be used for rehabilitation, but it did not solve the problem." However, "*Greathouse* makes clear that MRE 707 prohibits a learned treatise from being used to 'bolster' expert witness testimony on direct examination without concluding in one fashion or another how else a learned treatise might be used." *Hilgendorf*, 245 Mich App at 701-702. This Court concluded that "a learned treatise may be used to rehabilitate an expert witness during redirect examination on subjects or issues related to that treatise used to impeach the expert during cross-examination." *Id*. at 706. However, this Court also held that the defendant's erroneous attempt to use the treatise for a nonimpeachment purpose was not error requiring reversal because the trial court stopped the attorney and "admonished him in front of the jury that reading from the text was not proper." *Id*. at 708.

We agree that defense counsel was not permitted to refer to the treatise to bolster Dr. Newman's testimony regarding the advisability of dissecting the lower three centimeters of the ureter below the uterus. Defendants, however, revised the original question by omitting reference to the treatise while keeping the substance. Plaintiff argues that the revised question did not cure the taint from defense counsel's original attempt to use the treatise's content to corroborate Dr. Newman's testimony. We disagree. The advisability of dissecting down to the ureters was a disputed factual issue in this case. An improper attempt to corroborate Dr. Newman's testimony should not preclude defendants from pursuing this issue. Moreover, similar to the holding in *Hilgendorf*, 245 Mich App at 708-709, any improper use of the treatise in this case was part of a

"brief exchange" and did not affect plaintiff's substantial rights. Accordingly, this issue does not require reversal.

V. APPEAL TO SYMPATHY

Plaintiff argues that she is entitled to a new trial because defendants improperly appealed to the jury's sympathy through a spontaneous statement by Dr. Newman, and through statements by defense counsel in opening statement and closing argument. We disagree.

Plaintiff acknowledges that she failed to object to the allegedly improper remarks during opening statement and closing arguments. Accordingly, those claims are unpreserved. Plaintiff also failed to preserve her claim regarding Dr. Newman's spontaneous statement because she failed to move for a mistrial following the statement. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 732; 761 NW2d 454 (2008).

"Appellate review of claims of misconduct by counsel is de novo to determine whether a party was denied a fair trial." *Moody v Home Owners Ins Co*, 304 Mich App 415, 445; 849 NW2d 31 (2014), rev'd in part on other grounds *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211 (2016). This standard applies by analogy to plaintiff's claim that Dr. Newman himself made an improper appeal to the jury's sympathy. Review of unpreserved issues "is limited to plain error." *Hogg v Four Lakes Ass'n, Inc*, 307 Mich App 402, 406; 861 NW2d 341 (2014). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (quotation marks and citation omitted). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 443; 906 NW2d 482 (2017) (alteration in original, citation and quotation marks omitted).

In *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999), this Court, quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), observed:

> 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.* Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Emphasis added.]

It is improper for counsel to appeal to the sympathy of the jury. *Smith v Musgrove*, 372 Mich 329, 336; 125 NW2d 869 (1964), citing 53 Am Jur, Trial, § 496, p 401. In *Reetz*, 416 Mich

at 104-105, our Supreme Court held that the plaintiff's counsel made an improper appeal to the jury's sympathy by stating that the plaintiff, a seaman, was not entitled to workers' compensation benefits for an occupational injury. The Court held that the defendant was not entitled to relief on this basis because any prejudice "could have been cured by an instruction from the bench to the effect that sympathy or prejudice must not influence the jury's decision." *Id.* at 105. However, the Court further held that the defendant, Kinsman, was entitled to a new trial because the plaintiff's attorney "inflamed the passions of the jury against Kinsman by constantly stressing the corporate nature, wealth, power, and insensitivity of Kinsman." *Id.* at 110. The Court found that "[t]he effect of these comments was to create in the minds of the jurors an image of Kinsman as an unfeeling, powerful corporation controlled by a ruthless millionaire. Even a juror who harbored no prejudice against corporations or millionaires might have been swayed by these inflammatory remarks to alter his view of the evidence." *Id.* at 111. The Court concluded:

> Our prior cases should have made clear that even isolated comments like these are always improper, even if not always incurable or error requiring reversal. However, when, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal. [*Id.* at 111.]

In the instant case, while Dr. Newman was on the witness stand, he spontaneously remarked, "You don't think you'll ever be up here . . . ." After plaintiff's counsel warned him not to speak directly to the jury outside of the question-and-answer format, Dr. Newman made multiple apologies for speaking out of turn. To the extent that the comment can be construed as an appeal for sympathy or pity, is was only mildly so and it was an isolated statement. It was not a dramatic or inflammatory remark, and there was no repetition that caused any effect to become "indelibly impressed on the juror's consciousness." *Reetz*, 416 Mich at 111. Moreover, considering the brief and relatively innocuous nature of the remark, the trial court's jury instruction that the jury could not base its verdict on sympathy was sufficient to cure any perceived prejudice. Jurors are presumed to have followed the court's instructions. *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 25; 837 NW2d 686 (2013).

Plaintiff also argues that she was prejudiced by defense counsel's statements in opening statement and closing argument that Dr. Newman was "passionate" about his work, and that he was "committed and invested to his career" and to his patients, including plaintiff. Defense counsel also commented on how Dr. Newman was personally affected by the allegations of malpractice. These remarks about Dr. Newman's dedication to his patients and to plaintiff were not excessively florid or sentimental. There was no attempt to distract the jurors from the evidence. Defense counsel's argument focused mainly on the evidence. For example, in opening statement, defense counsel discussed a physician's inability to predict how much scar tissue would form after surgery, the known risks of abdominal hysterectomy, the surgical procedure, the lack of direct evidence of clamp injury, the possibility of ureteral injury in the absence of negligence, and the opinions of Dr. Weiss and Dr. Luck. The references to Dr. Newman's professional dedication were not objectively excessive or designed to distract the jury from the evidence. Furthermore, the trial court's instruction that the jury was not to allow sympathy to influence its verdict was sufficient to protect plaintiff's substantial rights. Accordingly, plaintiff is not entitled to a new trial with respect to this issue.

VI. CUMULATIVE EXPERT TESTIMONY

Plaintiff complains that the trial court allowed three defense witnesses, Dr. Newman, Dr. Weiss, and Dr. Luck, to testify regarding the applicable standard of care. In particular, plaintiff argues that Dr. Luck's testimony should have been excluded because it was cumulative of Dr. Weiss and Dr. Newman's standard-of-care testimony. Again, we review the trial court's decision to allow Dr. Luck to testify for an abuse of discretion. *Lenawee Co*, 301 Mich App at 161.

In this case, although Dr. Newman testified regarding his understanding of the standard of care, he was primarily a fact witness. Dr. Weiss was defendants' principal standard-of-care-witness. Moreover, defendants' decision to call two expert witnesses, in addition to Dr. Newman, was permissible under MCL 600.2164(2), which provides that "[n]o more than 3 experts shall be allowed to testify on either side as to the same issue in any given case, unless the court trying such case, in its discretion, permits an additional number of witnesses to testify as experts." As discussed earlier, Dr. Luck's testimony clarified and elaborated on Dr. Weiss's testimony by explaining why the standard of care for a benign abdominal hysterectomy did not require dissection to the lower part of the ureters. But her testimony also delved into possible causes other than Dr. Newman's alleged professional negligence for plaintiff's ureteral injury. The testimony was therefore only partially cumulative. In light of these considerations, the trial court's decision to permit Dr. Luck's testimony was within the range of reasonable and principled outcomes. Accordingly, there was no abuse of discretion.

VII. IMPEACHMENT BY PRIOR TESTIMONY

Plaintiff argues that the trial court erred by not allowing her to impeach Dr. Newman with his deposition testimony in two prior malpractice actions, neither of which proceeded to trial. The trial court principally relied on MRE 403 to preclude the requested cross-examination, but also cited MRE 404(b)(1) in support of its decision. We review the trial court's decision for an abuse of discretion. *Spectrum Health Hosps*, 333 Mich App at 477. On appeal, plaintiff argues that Dr. Newman's prior deposition testimony was admissible under MRE 608 and 613, but because she did not assert these rules in the trial court, this argument is unpreserved, and accordingly, is reviewed for plain error affecting plaintiff's substantial rights. *Hogg*, 307 Mich App at 406; *Kern*, 240 Mich App at 336.

MRE 403 permits a trial court to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Plaintiff argues that the probative value of the prior statements was not outweighed by these other considerations because Dr. Newman's prior statements would have impeached his deposition testimony that he never caused a bladder or bowel injury to a patient. We disagree. The revelation of the prior lawsuits, or even the implied revelation, would have created a risk of insinuating that Dr. Newman was chronically negligent or had a history of malpractice, which in turn could have opened the door to examination of the circumstances involving the other lawsuits. The trial court did not abuse its discretion by precluding plaintiff from introducing prejudicial admissions unrelated to the present lawsuit for the purpose of impeaching deposition testimony. Plaintiff argues that she could have offered the impeachment without referencing the prior lawsuits, but she does not explain how she could give context to Dr. Newman's prior deposition

testimony without revealing the previous suits. The trial court did not abuse its discretion by avoiding this complication by excluding the prior testimony.

In addition, MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rule allows evidence of prior bad acts when offered for a nonpropensity purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." Plaintiff's nonpropensity purpose for the evidence was to impeach Dr. Newman's deposition testimony denying any prior incidents of surgical injury. Although this purpose was not devoid of merit, evidence offered under MRE 404(b)(1) remains subject to exclusion under MRE 403, which the trial court separately recited as a basis for excluding the testimony. *Rock v Crocker*, 499 Mich 247, 257; 884 NW2d 227 (2016). The trial court did not abuse its discretion by excluding the evidence to avoid the inference that Dr. Newman had a propensity for causing surgical injuries.

Plaintiff additionally argues that she was entitled to use extrinsic evidence to impeach Dr. Newman because the prior malpractice actions against him were noncollateral matters. Generally, a witness may not be impeached regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence." MRE 608(b). Instances of the witness's conduct "may, however, in the discretion of the trial court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . ." MRE 608(b). MRE 608(b) generally "prohibits impeachment of a witness on collateral matters." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey*, 273 Mich App 26, 35; 730 NW2d 17 (2006); see also *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007). Thus, impeachment using extrinsic evidence regarding collateral, irrelevant, or immaterial matters is generally forbidden. *Dorsey*, 273 Mich App at 35. Nevertheless, "a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness's statements." *Id.*

MRE 613 governs the procedure for examining a witness concerning a prior statement.[1] In *People v Rosen*, 136 Mich App 745; 358 NW2d 584 (1984), lv den 422 Mich 924 (1985), this Court recognized "three kinds of fact that are not considered to be collateral":

---

[1] MRE 613 provides:

> (a) **Examining Witness Concerning Prior Statement**. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.

> The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true." [*Id.* at 759, quoting *People v Guy*, 121 Mich App 592, 604-605; 329 NW2d 435 (1982).]

The facts of the prior lawsuits were not directly relevant to the substantive issues in this case. They did not show "bias, interest, conviction of crime and want of capacity or opportunity for knowledge." They did not pertain to Dr. Newman's "account of the background and circumstances of a material transaction . . . he would not have been mistaken about if his story were true." Moreover, even if the prior lawsuits could be deemed a noncollateral matter, this would not override the trial court's MRE 403 analysis. Accordingly, plaintiff fails to establish plain error affecting her substantial rights.

VIII. CUMULATIVE ERROR

Plaintiff argues that even if no individual error was sufficient to require reversal, the cumulative effect of multiple errors deprived her of a fair trial. Plaintiff did not argue in the trial court that the cumulative effect of any errors deprived her of a fair trial. Therefore, this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Accordingly, we review this issue for plain error affecting plaintiff's substantial rights. *Hogg*, 307 Mich App at 406; *Kern*, 240 Mich App at 336.

"The cumulative effect of a number of minor errors may require reversal." *Stitt v Holland Abundant Life Fellowship*, 243 Mich App 461, 471; 624 NW2d 427 (2000). Under the cumulative-error doctrine, this Court will reverse and remand for a new trial when the cumulative effect of several errors deprived a party of a fair trial. *People v Bahoda*, 448 Mich 261, 292 n. 64; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

Plaintiff established one error, namely the qualification of Dr. Luck as a standard-of-care expert despite the mismatch of her subspecialty and Dr. Newman's specialty under MCL 600.2169. As explained earlier, however, this error was harmless. Defendants' use of a treatise on direct examination of Dr. Newman was not prejudicial where the treatise was a subject of plaintiff's expert's testimony, the challenged reference was brief, and defense counsel rephrased the question to avoid reference to the treatise. Also, to the extent that Dr. Newman made an inappropriate remark in front of the jury, or that defendants' counsel commented on the effect of

---

> (b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness**. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

this case on Dr. Newman, the remarks were relatively innocuous and, in any event, the trial court's instruction that the jury was not to allow sympathy to influence its verdict was sufficient to alleviate any perceived prejudice and protect plaintiff's right to a fair trial. Accordingly, plaintiff fails to establish cumulative error depriving her of a fair trial.

IX. DEFENDANTS' CROSS-APPEAL

Defendants argue on cross-appeal that the trial court erred by denying their motion for a directed verdict. They argue that Dr. Soffer's testimony failed to establish a question of fact whether Dr. Newman violated the applicable standard of care or caused plaintiff's injury. We disagree.

This Court reviews de novo a trial court's decision on a motion for a directed verdict. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). This Court must view "the evidence, as well as any legitimate inferences, in the light most favorable to the nonmoving party and decide whether a factual question exists about which reasonable minds might have differed." *Id*.

Preliminarily, we note that defendants' arguments on appeal are directed in part at the scientific reliability of Dr. Soffer's testimony. However, defendants did not challenge the admissibility of Dr. Soffer's expert testimony on grounds of unreliability under MRE 702, and they do not argue on appeal that the trial court erred by admitting his testimony. Therefore, we do not consider the substantive admissibility of Dr. Soffer's testimony, and instead, we confine our analysis to the legal sufficiency of his testimony.

"In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995) (citations omitted); *Kalaj v Khan*, 295 Mich App 420, 429; 820 NW2d 223 (2012). In medical malpractice cases, expert testimony is required to establish the applicable standard of care and demonstrate a breach of that standard. *Gonzalez v St. John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 294-295; 739 NW2d 392 (2007).

With respect to the standard of care for a specialist, "the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice" that the defendant "failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances . . . ." MCL 600.2912a(1)(b). The standard of care applicable to a specialist in a medical malpractice action is "that of a reasonable specialist practicing medicine in the light of present day scientific knowledge." *Naccarato v Grob*, 384 Mich 248, 254; 180 NW2d 788 (1970). Our Supreme Court has further recognized that claims imposing strict liability are "not cognizable in either ordinary negligence or medical malpractice." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 425-426; 684 NW2d 864 (2004).

Expert testimony may not be based on mere speculation, and there "must be facts in evidence to support the opinion testimony of an expert." *Teal v Prasad*, 283 Mich App 384, 395;

772 NW2d 57 (2009). The admission of expert testimony is governed by MRE 702 and MCL 600.2955. MRE 702 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.

MCL 600.2955 provides:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
>
> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

> (3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

In *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004), our Supreme Court held that the trial court erred by admitting the expert testimony of Dr. Ronald Gabriel. Dr. Gabriel testified that the defendant obstetrician's administration of high doses of the drug Pitocin to the plaintiff's mother caused the plaintiff to suffer head trauma before his birth, causing him to be born with cerebral palsy. Dr. Gabriel's theory was that the Pitocin induced excessive uterine contractions in which the plaintiff's head repeatedly "pounded" and "ground" against the mother's pelvic anatomy. According to this theory, the repeated pounding caused the plaintiff's brain to sustain "compression injuries, which resulted in elevated venous 'pressures' and impeded 'arter[ial] blood flow' to the 'outlying, watershed' regions of the brain . . . ." *Id*. at 92 (alterations in the original). However, Dr. Gabriel failed "to cite a single study supporting his traumatic injury theory." He relied on studies showing that "Pitocin caused cerebral palsy in animals when given in excessive amounts," but "[t]hese studies did not involve the 'bumping and grinding' mechanism on which Dr. Gabriel's expert testimony relied." *Id*. at 83-84. The Supreme Court concluded "that there was little evidence that Dr. Gabriel's theory was 'recognized,' much less generally accepted, within pediatric neurology." *Id*. at 84. The Court therefore concluded that "the trial court clearly erred in declining to review Dr. Gabriel's testimony before its admission." *Id*. at 85.

The Court in *Craig* further held that the defendants were entitled to judgment notwithstanding the verdict even if Dr. Gabriel's testimony had been properly admitted because the plaintiff failed "to establish that defendants' breach of the applicable standard of care proximately caused his cerebral palsy." *Id*. at 85. "[A] plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.' " *Id*. at 87, quoting *Skinner v Square D Co*, 445 Mich 153, 174; 516 NW2d 475 (1994) (alterations in original). "Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or 'but for') that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig*, 471 Mich at 87 (emphasis in original). "[A] plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our caselaw requires more than a mere possibility or a plausible explanation." *Id*. The plaintiff "establishes that the defendant's conduct was a cause in fact of his injuries only if he 'set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.' " *Id*. at 87, quoting *Skinner*, 445 Mich at 174. "A valid theory of causation, therefore, must be based on facts in evidence" that " 'exclude other reasonable hypotheses with a fair amount of certainty.' " *Craig*, 471 Mich at 87-88, quoting *Skinner*, 445 Mich at 166.

The Court in *Craig* concluded that Dr. Gabriel's testimony failed to establish a causal link between the alleged breach of the standard of care and the plaintiff's injuries. The Court identified "a fatal flaw" in the plaintiff's prima facie case, namely, that "Dr. Gabriel never testified that the injuries stemming from this pounding and its accompanying vascular effects could cause cerebral palsy, mental retardation, or any of the other conditions now presented by plaintiff." *Craig*, 471 Mich at 92. Dr. Gabriel failed to trace the "asymmetric development" of the plaintiff's brain tissue

to "the vascular mechanisms he described or forward to the specific neurological conditions presently displayed by plaintiff." *Id.*

"[A]n expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts." *Badalamenti*, 237 Mich App at 286. "This is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." *Id.* In *Badalamenti*, the plaintiff's claim was that the defendant was negligent in failing to diagnose the plaintiff for cardiogenic shock. Only one expert witness, Dr. Daniel Wohlgelernter, testified that the plaintiff was in fact suffering from cardiogenic shock on the day in question. *Id.* at 284-285. However, the evidence established that the plaintiff's hemodynamic measurements were within normal range, which would not have been the case if he was in cardiogenic shock. Dr. Wohlgelernter testified that cardiogenic shock causes significant damage to the heart's pumping action, but the plaintiff's echocardiogram showed that the plaintiff's pumping function was nearly normal. Dr. Wohlgelernter attempted to reconcile this discrepancy by expressing " 'skepticism' of the echocardiogram performed by Dr. John Cieszkowski" and of Dr. Cieszkowski's findings in the echocardiogram. *Id.* at 287. The Court concluded that Dr. Wohlgelernter's opinion that the plaintiff had cardiogenic shock was not supported by evidence. *Id.* at 288-289. The trial court therefore erred by denying the defendant's motion for judgment notwithstanding the verdict. *Id.* at 281, 289.

In *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016), the plaintiff's expert, Dr. Paul Priebe, testified that "it is virtually always malpractice to injure the common bile duct during a laparascopic cholecystectomy, absent extensive inflammation or scarring." He did not provide supporting authority for his opinion. *Id.* at 15. The defendants argued that the expert's opinion was not reliable because "several experts and at least one peer-reviewed publication" supported the defendants' "opinions that clipping the common bile duct is a known potential complication of laparoscopic cholecystectomy because of the lack of depth perception on the two-dimensional video monitor used to view the area while performing the surgery." *Id.* at 17. The Supreme Court concluded that the trial court

> did not abuse its discretion by concluding that Priebe's background and experience were not sufficient to render his opinion reliable in this case when Priebe admitted that his opinion was based on his own beliefs, there was no evidence that his opinion was generally accepted within the relevant expert community, there was no peer-reviewed medical literature supporting his opinion, plaintiff failed to provide any other support for Priebe's opinion, and defendants submitted contradictory peer-reviewed literature. [*Id.* at 28.]

Defendants argue that under the principles governing the reliability of expert testimony and proof of causation, Dr. Soffer's testimony failed to establish that Dr. Newman violated the standard of care or caused plaintiff's injury. Defendants state that Dr. Soffer impermissibly speculated on the standard of care. Specifically, that he not only failed to cite medical literature supporting his standard-of-care opinion, but also admitted that the treatise that he discussed actually contradicted his opinion. They compare his testimony to the unsupported expert testimony in *Elher*. We disagree with defendants' characterization of Dr. Soffer's testimony.

Dr. Soffer stated that the standard of care required an OB-GYN performing an open hysterectomy to ensure that the ureters were safely out of the way of clamps and sutures on the uterine blood vessels. He stated two ways to do this: (1) by the placement of ureteral catheters by the OB-GYN or a urologist; or (2) by dissecting the lower ureters. Dr. Soffer testified that some OB-GYNS used a third method, palpation and visualization, but this method was not foolproof. When defendants impeached him with the Te Linde treatise statement that dissection of the lower ureters is not advisable, Dr. Soffer replied that two other authors stated otherwise in a different section of the same chapter. We note that Dr. Soffer referred to these authors only generically, as "Smith" and "Johnson," because he could not recall their names. However, this argument pertains only to the reliability of Dr. Soffer's testimony under MRE 702 and MCL 600.2955, and defendants did not raise this evidentiary issue in the trial court, nor do they directly raise it on appeal. Thus, the trial court was not called upon to exercise its gatekeeping role to determine reliability. For purposes of the instant issue, we are required to view Dr. Soffer's testimony in a light most favorable to plaintiff, as the nonmoving party. Viewed in this manner, Dr. Soffer's testimony established a jury-triable question of fact. Therefore, defendants were not entitled to a directed verdict on the ground that plaintiff failed to present sufficient expert testimony regarding the standard of care.

Defendants also argue that Dr. Soffer's testimony failed to establish a question of fact regarding causation because Dr. Soffer's opinion was based on the unsubstantiated assumption that plaintiff's ureteral blockage originated during the hysterectomy. Defendants questioned Dr. Soffer about his deposition testimony that Te Linde's *Operative Gynecology* stated that the causes of ureteral injuries were: crush, ligation, transection, infection, inflammation, kink, angulation with secondary obstruction, small bowel obstruction, ischemia, and resection. They asked Dr. Soffer whether he could rule out all other possibilities and conclude with certainty that Dr. Newman caused a crush or clamp injury. Dr. Soffer replied that plaintiff's injury did not happen as the result of small bowel problem, ischemia, or resection. The injury happened at the time of surgery, leaving crush, ligation, and transection as the possible causes. Plaintiff's surgical records did not indicate that a clamp or crush injury occurred, but a total ureteral obstruction could not occur spontaneously; therefore, Dr. Soffer concluded that the injury occurred during surgery.

Dr. O'Connor also stated that there were no events in plaintiff's history after the hysterectomy that could have caused a complete blockage of the ureter. Dr. O'Connor ruled out the possibility that the blockage of the ureter originated with the abdominal adhesions because he had never seen adhesions cause a complete blockage. He determined that the injury originated with the hysterectomy, but he could not specify whether the ureter was lacerated with a suture or cut with a knife or electrocautery. Dr. O'Connor's opinion was not mere speculation because there was a logical causal relationship between the surgery and the ureteral blockage. Dr. O'Connor eliminated other possible causes because the injury was not present at the time of the hysterectomy, and there was no event in plaintiff's history since the hysterectomy that could cause the blockage. He also eliminated the possibility of a kink in the ureter because a kink would not cause a total blockage that obstructed dye and the wire. He eliminated the adhesions as a cause because he knew of no evidence that intestinal scar tissue could cause total blockage in a ureter. Dr. O'Connor's testimony was not an exercise in "the logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this)." *West v Gen Motors Corp*, 469 Mich 177, 186 n 12; 665 NW2d 468 (2003). "[R]uling out other potential explanations" for an injury is the "well-recognized process" of "differential diagnosis." *People v McKewen*, 326 Mich App 342, 351; 926

NW2d 888 (2018), lv pending, citing *Lowery v Enbridge Energy Ltd Partnership*, 500 Mich 1034, 1046; 898 NW2d 906 (2017) (MARKMAN, J., concurring). Dr. O'Connor's conclusion that the injury originated in surgery, and his explanation of the basis for this conclusion, was competent evidence to form the basis for Dr. Soffer's conclusion.

Relying on Dr. O'Connor's conclusion that the injury originated in surgery, Dr. Soffer eliminated all causes except for crush, or suture, or both. Both of these causes resulted from inadequate protection of the ureters during the hysterectomy. Dr. Soffer's testimony therefore established a causal relationship between Dr. Newman's alleged breach of the standard of care and plaintiff's injury. Rather than attempt to exclude either physician's testimony as invalid under MRE 702, defendants opted instead to undermine Dr. Soffer's testimony by highlighting the weakness of Dr. O'Connor's finding and Dr. Soffer's extrapolation of a cause from that finding. This strategy evidently worked, because the jury found that Dr. Newman was not negligent. However, the testimony was sufficient to establish jury-triable questions of fact regarding breach of the standard of care and causation. Therefore, the trial court properly denied defendants' motion for a directed verdict.

Defendants also argue that Dr. Soffer's testimony that the ureteral injury would not have happened in the absence of negligence was contrary to statements in the treatise that ureteral injuries are always a risk of hysterectomy. However, whether the treatise undermined Dr. Soffer's opinion was a matter for the jury to decide. Therefore, the trial court did not err by denying defendants' motion for a directed verdict.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly