

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES OEGEMA, as conservator for ELEANOR  
OEGEMA, a minor,

UNPUBLISHED  
April 30, 2013

Plaintiff-Appellee,

V

No. 298114  
Ingham Circuit Court  
LC No. 2004-000280-NH

PATRICIA BELL, D.O. and ALLIANCE  
OBSTETRICS AND GYNECOLOGY, P.C.,

Defendants-Appellants,

and

EDWARD W. SPARROW HOSPITAL  
ASSOCIATION,

Defendant.

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Before: JANSEN, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Defendants Patricia Bell and Alliance Obstetrics and Gynecology, P.C. appeal, by leave granted, the trial court's order granting plaintiff's motion for a new trial based on its finding that the jury's verdict was against the great weight of the evidence. Because there was sufficient evidence to support the jury verdict, the trial court abused its discretion in granting plaintiff's motion. We therefore reverse the trial court's order and reinstate the jury's verdict.

In 1998, Melanee Oegema selected defendant Dr. Patricia Bell (who was employed by defendant Alliance Obstetrics and Gynecology, P.C.) as her obstetrician to attend her in the preparation for and birth of her first child. On December 8, 1998, Ms. Oegema presented at Sparrow Hospital to give birth to her child. During the birth, the child suffered a shoulder dystocia wherein her shoulder became impacted on Ms. Oegema's pelvic bone. There are certain maneuvers that can be performed by attending medical staff to relieve the shoulder dystocia but, in this case, plaintiff alleges that these maneuvers were not performed or were incorrectly performed, resulting in a permanent and severe injury to the child's brachial plexus nerves, other nerves and muscles of her right shoulder, arm and hand. The child, through her father, filed her complaint on February 24, 2004, alleging medical malpractice on the part of all defendants.

The matter proceeded to trial, at the conclusion of which the jury returned a verdict of no cause of action, finding that none of the defendants were professionally negligent. Plaintiff thereafter moved for a new trial, which the trial court granted as to defendants Dr. Bell and Alliance Obstetrics only, finding that the verdict with respect to these defendants was against the great weight of the evidence. This Court granted Dr. Bell and Alliance Obstetrics (hereafter “defendants”) leave to appeal that ruling.<sup>1</sup>

On appeal, defendants assert that the trial court abused its discretion in granting plaintiff’s motion for a new trial because there was competent evidence to support the jury’s verdict. Defendants claim that the trial court essentially sat as the thirteenth juror in this matter and based its finding that the jury’s verdict was against the great weight of the evidence on its own assessment of Dr. Bell’s credibility, substituting its judgment for that of the jury. Defendants further assert that even absent Dr. Bell’s testimony, there was sufficient evidence to support the jury’s verdict such that the trial court ruling constituted an abuse of discretion. We agree.

A trial court’s decision regarding a motion for new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). “The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). We give a trial court’s determination that a verdict is *not* against the great weight of the evidence substantial deference. *Arrington v Detroit Osteopathic Hosp Corp*, 196 Mich App 544, 560; 493 NW2d 492 (1992). A trial court’s determination that a verdict *is* against the great weight of the evidence will be given less deference, however, to insure that the trial court has not invaded the province of the jury. *Id.* In either situation, though, it is incumbent upon the reviewing court to engage in an in-depth, detailed analysis of the record. *Id.*

It is a long-held and oft-cited principle that courts in general must give substantial deference to the jury’s determination regarding the credibility of witnesses. *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006). It is the jury’s responsibility to determine the credibility and weight of the trial testimony, and they alone have the discretion to believe or disbelieve a witness’s testimony, even when the witness’s statements are not contradicted. *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). A judge may not repudiate a jury verdict on the ground that “he disbelieves the testimony of witnesses for the prevailing party.” *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998). As explained in *Lemmon*:

The issue whether a state trial court judge in a jury trial may assess evidence as a “13th juror” is a question of state law. The historic division of functions between the court and the jury needs no citation of authority. It is the province of the jury

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<sup>1</sup> Plaintiff does not appeal the trial court’s denial of her motion for a new trial as it pertains to Sparrow Hospital.

to determine questions of fact and assess the credibility of witnesses. As the trier of fact, the jury is the final judge of credibility. The approach that would allow a trial judge to sit as a thirteenth juror and overrule the credibility determinations of the jury suggests that a judge may freely repudiate the jury's findings . . .

The conundrum is that, in motions for a new trial based on the claim that the verdict is against the great weight of the evidence, the issue of credibility of the witnesses is implicit in determining great weight or overwhelming weight of that evidence. The problem has been addressed by abstract formulations that caution against overturning verdicts and, less frequently, by an attempt to give concrete guidance to a judge asked to review “the whole body of proofs,” which necessarily includes an evaluation of the credibility of the witnesses. New trial motions based solely on the weight of the evidence regarding witness credibility are not favored . . .

*Lemmon*, 456 Mich at 636-638 (internal citations and quotations omitted).

Our Supreme Court did not, however, completely forbid court review of witness credibility:

We align ourselves with those appellate courts holding that, absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility “for the constitutionally guaranteed jury determination thereof.” We reiterate the observation in *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942), that, when testimony is in direct conflict and testimony supporting the verdict has been impeached, if “it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,” the credibility of witnesses is for the jury.

*Lemmon*, 456 Mich 625 at 642-643.

In this matter, the trial court directed verdict in plaintiff’s favor as to causation, seriously narrowing the issues presented to the jury. The only real issue presented to the jury, for our purposes on appeal, was whether Dr. Bell was negligent, and even more narrowly, whether she performed the appropriate maneuvers to deal with plaintiff’s shoulder dystocia. There is no dispute that plaintiff presented with a shoulder dystocia, that she suffered a permanent brachial plexus injury, or that her injury limits her ability to raise her arm over her head, straighten her arm completely, and presents her with weakness in her arm that requires constant activity to keep it from freezing up or deteriorating further.

The jury found that Dr. Bell was not negligent. In granting plaintiff’s motion for a new trial, the trial court focused exclusively on whether Dr. Bell employed a specific maneuver, called the “McRobert’s maneuver” to release the child’s shoulder from the mother’s pelvis bone in order to enable her delivery and almost entirely on whether Dr. Bell’s testimony that she did, in fact, order the maneuver and that it was performed, was credible in light of the other evidence on the record. Because the decision was based upon the credibility of a witness, in order for this decision to pass muster, it must fall within an “exceptional circumstance” allowing for a court to substitute its judgment for that of the jury regarding witness credibility. Based on *Lemmon*, that

would be where, as a matter of law, testimony supporting the jury was impeached and was deprived of all probative value or where the jury could not believe it. *Lemmon*, 456 Mich at 642-643. Based on the record as a whole, those circumstances are not present here.

At the outset, it is important to note that the trial court acknowledged that the lack of documentation by any of the medical staff, including Dr. Bell regarding any maneuver that was performed to relieve the shoulder dystocia was not a breach of the standard of care. And, no expert testified that a failure to document any maneuvers performed was a breach of the standard of care. Dr. Bell did, however, document that plaintiff suffered a “moderate” shoulder dystocia. When asked to explain what that meant, Dr. Bell testified that it meant that the first steps that were generally to be employed to free the baby, meaning McRobert’s maneuver and the application of suprapubic pressure, were unsuccessful, and Dr. Bell had to employ a secondary measure, in this case, a corkscrew maneuver, to successfully free the baby’s shoulder. One expert witness, Dr. Watson, testified that when she read “moderate” shoulder dystocia in the records, this was exactly the interpretation she had given the documentation, even though the maneuvers employed were not explicitly mentioned. Dr. Watson testified that she would have documented the delivery in exactly the same way. Dr. Watson also testified that James Oegema’s testimony also helped her conclude that a McRobert’s-type maneuver was performed, as he testified that Ms. Oegema’s feet were in the stirrups with her legs bent and her knees chest high, which was consistent with being in a McRobert’s position that helps facilitate delivery, although not in a specific McRobert’s maneuver (which generally requires medical staff pushing the mother’s knees close to her chest).

As indicated by the trial court, there was no testimony by anyone other than Dr. Bell that the McRobert’s maneuver was, in fact, performed. There were undisputedly six people in the delivery room: Nurses Lorie Thaler and Carol Kirtland, resident Dr. Wolf, Melanee Oegema, James Oegema, and Dr. Bell. Nurses Thaler and Kirtland and resident Dr. Wolf cannot recall any details of plaintiff’s birth, including whether any maneuvers were performed to assist in her delivery by them or anyone else in the room. These witnesses did not contradict Dr. Bell’s testimony. They simply could not recall the event one way or another. Both James and Melanee Oegema testified that at no time did any nurse take Ms. Oegema’s legs and push them toward her chest in what was described by the experts as the McRobert’s maneuver. James Oegema did testify, however, that during plaintiff’s delivery, Melanee was positioned in the bed where her knees were about chest high bent and angled—a McRobert’s-type position.

More importantly, even if Dr. Bell did not order the McRobert’s maneuver and it was not performed, it was not definitively established that the failure to perform McRobert’s—alone--amounted to a breach of the standard of care. Plaintiff’s expert, Dr. Cohn testified that McRobert’s is a recommended initial maneuver and that it is a breach of the standard of care to not perform McRobert’s and suprapubic pressure and to simply pull on the baby’s head when faced with a shoulder dystocia. Dr. Watson agreed that if the jury concluded that Dr. Bell did not apply *any* release maneuvers (McRobert’s, suprapubic, corkscrew), that would have violated the standard of care. And, Dr. Wolf testified that if a brachial plexus injury occurs because of traction during a shoulder dystocia event, it is not malpractice and that 25% of children that are delivered with a shoulder dystocia suffer injury.

Dr. Giles testified that plaintiff's situation was one where excessive downward force was used to deliver her head and in the absence of any appropriate maneuvers to manage shoulder dystocia. However, there does not appear to be much of a dispute that suprapubic pressure was applied. Dr. Bell testified that she ordered that such pressure be applied, and James Oegema testified that he heard Dr. Bell say something to Nurse Lorie Thaler at one point, and then observed Thaler on a stool above Ms. Oegema pushing on her stomach. While James Oegema testified that Thaler was pushing near the top of Me. Oegema's stomach, suggesting fundal pressure, all experts and witnesses agreed that they were taught never to apply fundal pressure during childbirth and Thaler and nurse Kirtland both testified that they had never performed fundal pressure and never would. Dr. Watson and Dr. Wolf also testified that when a nurse is elevated on a stool to apply pressure, this is consistent with suprapubic pressure, as fundal pressure would not require that a nurse be in a raised position. From the testimony, then, a reasonable jury could have found that Dr. Bell ordered the application of suprapubic pressure and that the same was applied. Dr. Bell's testimony as to suprapubic pressure was thus not impeached or deprived of all probative value and the jury could have believed her testimony on that issue.

And, Dr. Watson and Dr. Wolf both testified that to deliver a child experiencing shoulder dystocia without employing any maneuvers at all would require a "tremendous" amount of force, to the point where the doctor would nearly have to be on her knees on the floor, pulling. Neither Mr. nor Mrs. Oegema testified to seeing Dr. Bell yanking or pulling with a tremendous amount of force on plaintiff to deliver her. Presumably, first time parents would have noticed and been upset by such an event. Finally, again, Dr. Wolf testified that if a brachial plexus injury occurs because of traction during a shoulder dystocia event, it is not malpractice and that 25% of children that are delivered with a shoulder dystocia suffer injury. The issue was not whether Dr. Bell caused plaintiff's injury, but whether it was her negligence that caused the injury. Based on the evidence, the jury could have found that Dr. Bell acted within the standard of care and that plaintiff was injured nonetheless.

In sum, there was sufficient evidence to support the jury verdict and to support Dr. Bell's version of events. The trial court abused its discretion in substituting its judgment for that of the jury on the issue of Dr. Bell's credibility and in granting plaintiff a new trial. It improperly acted as a thirteenth juror.

We reverse and remand for reinstatement of the jury verdict. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ David H. Sawyer  
/s/ Deborah A. Servitto