

STATE OF MICHIGAN
COURT OF APPEALS

ALICE COLLINS,

Plaintiff-Appellee,

V

HARVEY M. LEFKOWITZ, D.P.M. P.C., d/b/a
MICHIGAN FOOT AND ANKLE P.C., and
ANTHONY GIORDANO, D.P.M.,

Defendants-Appellants.

UNPUBLISHED
December 13, 2011

No. 298801
Oakland Circuit Court
LC No. 08-096471-NH

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

WILDER, J. (*concurring in the result*).

I concur with the result reached by the majority opinion. But, because I respectfully disagree with the analysis, I write separately.

I. BASIC FACTS

This appeal arises from a malpractice action brought by plaintiff against defendants. Plaintiff suffered from bunions and elected to have surgery, specifically a Lapidus procedure, performed by defendants.¹ This procedure involves, among other things, the removal of a portion of the first metatarsal bone and a portion of the first cuneiform.² It does not involve the second metatarsal bone.

Weeks after having the surgery, plaintiff complained of pain from her foot. It was determined that she had a fracture of the second metatarsal bone that was not healing. Plaintiff underwent additional surgery to address this fracture.

¹ Plaintiff met with defendants in Ferndale, Michigan for office visits but had her surgery in Warren, Michigan.

² “First” indicates the bones associated with the “big toe.” “Second” would be the adjacent toe.

Plaintiff's case in chief consisted of her own testimony and the video depositions of Dr. Lombardo and Dr. Harvey Lefkowitz.³ Dr. Lombardo first testified regarding the standard of care of podiatrists. Although his practice is in Florida, Dr. Lombardo testified that he was familiar with the local standard of care because of Internet searches he conducted that showed similar demographics between where he practiced and Ferndale. Before opening statements on the first day of trial, defense counsel argued that Dr. Lombardo was not qualified to testify regarding the local standard of care because merely relying on similar populations or demographics was inadequate to establish knowledge of the applicable local standard of care. The trial court disagreed, finding that plaintiff met her burden related to Dr. Lombardo's qualifications, and permitted the deposition to be played.

Dr. Lombardo testified that cutting through the second metatarsal bone during a Lapidus procedure violates the applicable standard of care. Dr. Lombardo also testified that, according to the X-rays he reviewed, he thought that defendant, Dr. Anthony Giordano, had cut plaintiff's second metatarsal during the surgery. Specifically, Dr. Lombardo thought Dr. Giordano transected, or cut "through and through," the second metatarsal.

Defendants did not dispute the assertion that a "through-and-through" cut of the second metatarsal would violate the local standard of care. Defendants denied, however, that Dr. Giordano had cut the second metatarsal through and through.⁴ Defense counsel framed the ultimate issue for the jury as such during his opening statement:

The Plaintiff's case is that . . . there was a bone cut through on the second metatarsal of [plaintiff's] left foot[;] that's what we are fighting about. . . .

We are fighting about the fact that one doctor has looked at this X-ray from July 6th of 2006, one doctor, Dr. Lombardo and said that during that operation, during the operation Dr. Giordano cut that bone[;] that's what the fight is about. It's really a simple issue when you get right down to it. Because if you believe that the bone was cut though by Dr. Giordano that day[,] he's going to lose.

* * *

A hundred percent (100%) of the experts agree . . . that if you cut the second metatarsal through and through during a Lapidus on the first [metatarsal] you have committed malpractice. They would agree to that, but it didn't happen here. He did not cut it.

³ Dr. Lefkowitz was listed as a defendant but was dismissed prior to trial.

⁴ I disagree with the majority's conclusion that "there was no dispute that plaintiff had gone into surgery to have a bunion on her first toe removed and had left with her second toe cut 'through and through.'" The record is clear that defendant denied there was a through and through cut and denied violating the standard of care.

Despite defendant's initial objection to the trial court finding that Dr. Lombardo was qualified to testify as an expert witness, at the conclusion of plaintiff's case in chief, defendant did not move for a directed verdict.

Consistent with defendant's opening statement, defense expert, Dr. Lawrence Fallat, testified that a "through-and-through" cut of the second metatarsal is a violation of the standard of care. But Dr. Fallat explained that mere "cutting" or "scoring" of the second metatarsal is within the standard of care because it is "virtually impossible" to avoid during this type of procedure. Dr. Fallat saw evidence of scoring on the post-operative X-rays but, contrary to Dr. Lombardo, did not see any sign of a through-and-through cut.

Dr. Giordano admitted at trial that he scored or nicked the second metatarsal during the procedure. But he opined that the score later "transversed into . . . a through fracture."

After deliberating, the jury returned a verdict in favor of plaintiff for \$27,000 in economic damages, \$25,000 in non-economic damages, and \$63,000 in future non-economic damages. Defendants now appeal as of right.

II. ANALYSIS

Defendants argue that they are entitled to a reversal of the judgment because plaintiff's expert, Dr. Lombardo, was not qualified to testify regarding the applicable local standard of care, and that, therefore, plaintiff lacked the proper expert support to establish a claim of malpractice. While I agree with defendants' argument that Dr. Lombardo was not qualified to testify regarding the local standard of care, nevertheless for different reasons than are adopted by the majority, I would affirm the verdict.

A trial court's determination regarding whether an expert is qualified to testify regarding the specifics of the standard of care is reviewed for an abuse of discretion. *Bahr v Harper-Grace Hosps*, 448 Mich 135, 141; 528 NW2d 170 (1995). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

"In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care; (2) breach of that standard by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury." *Gonzalez v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007). This appeal primarily involves only the first element.

Generally, expert testimony is necessary to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Greathouse v Rhodes*, 242 Mich App 221, 229; 618 NW2d 106 (2000), reversed on other grounds 465 Mich 885 (2001). If the defendant is a general practitioner, the plaintiff must prove that the defendant "failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community." MCL 600.2912a(1)(a). If the defendant is a specialist, the plaintiff must prove 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). Because this case involves the practice of medicine for podiatrists, a local standard of care, pursuant to MCL 600.2912a(1)(a), is applicable. *Jalaba v Borovoy*, 206 Mich App 17, 21; 520 NW2d 349 (1994). Plaintiff urges this Court to find that (1) the application of a local standard of care to podiatrists is an antiquated practice that should be disregarded by this Court, and (2) alternatively, a national standard of care for specialists should apply to podiatrists because podiatrists are specialists in the treatment of feet. I believe we are compelled, however, to reject plaintiff’s arguments. First, plaintiff’s argument that podiatrists are specialists fails to overcome statutes and case law that make clear that a podiatrist is a limited (i.e. general) practitioner. MCL 333.18001 *et seq.*; *Jalaba*, 206 Mich App at 21; *DeHart v State, Dept of Licensing & Regulation, Bd of Registration in Podiatry*, 97 Mich App 307, 314; 293 NW 2d 806 (1980). Second, given that podiatrists are general practitioners, the plain language of MCL 600.2912a(1)(a) and MCL 600.2912a(1)(b), delineating different standards for general practitioners and specialists, and the binding authority of *Jalaba* dictate that we apply a local rather than national standard of care in the instant case.

In my judgment, it is clear that the trial court abused its discretion in finding that Dr. Lombardo was properly qualified as an expert in this case because plaintiff failed to meet her burden of proving that Dr. Lombardo was familiar with the applicable local standard of care.⁵ *Bahr*, 448 Mich at 141; see also *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994) (“In order for expert testimony to be admitted, the witness must possess the necessary learning, knowledge, and skill, or practical experience that would enable the witness to testify competently about the area.”). Dr. Lombardo testified that his purported knowledge of the local standard of care primarily was based on Internet searches he conducted that showed that the population size of Ferndale was similar to the population sizes of the two cities where he practiced, Ocoee, Florida and Glen Cove, Florida. However, sole reliance on similar populations or demographics is inadequate to establish the requisite knowledge regarding the local standard of care. An expert’s opinion must be based on some *medically relevant* information to establish his knowledge of the standard of care. See *Turbin v Graesser*, 214 Mich App 215, 218; 542 NW2d 607 (1995) (expert was qualified to testify when, *in addition* to comparing demographic information, he examined various written materials, which included pamphlets and brochures regarding the various hospitals in the area in question, copies of yellow pages, and a listing of Michigan hospitals that included various types of data about the hospitals). Because there was no foundation to show that the *medical standard of care* in Ocoee or Glen Cove was similar to Ferndale or Warren, the trial court abused its discretion when it qualified him as an expert and admitted his testimony on this topic.

But “[i]n civil cases, evidentiary error is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice.” *Guerrero v Smith*, 280 Mich App 647, 655; 761 NW2d 723 (2008) (internal quotations omitted). Normally, the failure of the plaintiff’s expert to testify regarding the applicable standard of care would be fatal to plaintiff’s case. See

⁵ The majority opinion appears to acknowledge that Dr. Lombardo may not have been qualified to testify as to the local standard.

Locke v Pachtman, 446 Mich 216, 222; 521 NW2d 786 (1994). However, because “[a] plaintiff may establish the standard of care through defense witnesses,” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 493; 668 NW2d 402 (2003), the fact that Dr. Lombardo’s testimony was erroneously admitted does not preclude plaintiff from going forward with her claim under the particular facts of this case. Here, defendant did not move for directed verdict at the end of the plaintiff’s proofs. Subsequently, during defendant’s case in chief, defendant’s expert, Dr. Fallat, *did* offer testimony regarding the applicable standard of care, stating that, while cutting or nicking the second metatarsal is within the local standard of care, cutting all the way through the second metatarsal would be a violation of the local standard of care. Thus, even though Dr. Lombardo’s testimony regarding the applicable standard of care was erroneously admitted, any error was harmless because the jury had before it relevant evidence of the applicable standard of care through the testimony of Dr. Fallat. As such, the jury’s verdict is not inconsistent with substantial justice, and we should not disturb it. See MCR 2.613(A)⁶; *Guerrero*, 280 Mich App at 655.

/s/ Kurtis T. Wilder

⁶ MCR 2.613(A): “An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.”