

STATE OF MICHIGAN
COURT OF APPEALS

ALICE COLLINS,

Plaintiff-Appellee,

v

HARVEY M LEFKOWITZ, D.P.M. PC, 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UNPUBLISHED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.

PER CURIAM.

In this medical malpractice case, defendants Dr. Harvey Lefkowitz and Dr. Anthony Giordano appeal as of right from the final judgment in favor of plaintiff. Plaintiff filed suit stemming from an injury she suffered when Dr. Giordano cut through her second metatarsal during bunion surgery defendants performed on her first metatarsal. Affirmed.

On July 6, 2006, defendants performed a procedure on plaintiff's left foot as an outpatient surgery at Southeast Michigan Surgical Hospital in Warren, Michigan. It involved the removal of a portion of the bone from the base of the first metatarsal and the sawing through parts of two adjoining bones (the great toe and the first metatarsal), in order to fuse the joint. The object of the surgery was to correct the bunion on her left foot and place the toe in alignment in order to relieve her pain and to make her foot and toe look more "normal."

After the surgery, plaintiff experienced pain, which was often severe, for weeks. She had extensive pharmaceutical and other treatments to control the pain. Plaintiff continued to visit Dr. Giordano every week or every two weeks. The second month after the surgery, plaintiff learned from a third party that she had a fractured bone in her foot. Plaintiff testified that Dr. Giordano told her "I accidentally . . . cut into another bone" during the procedure.

Defendants and amicus curiae argue that the trial court erred in allowing plaintiff's expert witness, Dr. Lombardo, testify about the local standard of care. We conclude that any error in the admission of plaintiff's expert's testimony was not grounds for setting aside the jury verdict under MCR 2.613(A).

The proper standard of care for purposes of MCL 600.2169(1)(a) is determined as a matter of law. *Cox v Flint Bd. of Hosp Managers*, 467 Mich 1, 16 n 16, 651 NW2d 356 (2002) (stating that this Court “erred in holding that the standard of care was an evidentiary matter reviewed for an abuse of discretion”). Accordingly, as a question of law, we review this issue de novo. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).

“Proof of a medical malpractice claim requires the demonstration of the following four factors: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury.” *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). In a medical malpractice action, a plaintiff must establish proximate causation between the breach of the standard of care and the plaintiff’s injuries. *Craig v Oakwood Hosp*, 471 Mich at 86, 90; 684 NW2d 296 (2004). Expert testimony is essential to establish this causal link. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

In 1975, faced with the argument that the locality rule should be abandoned for a more national standard, the Legislature codified the two different standards of care for medical malpractice defendants. MCL 600.2912a. The local standard was designated for the “general practitioner” and the national for the “specialist.” It falls to this Court to determine which medical caregivers fit into the category of “general practitioner” and which are “specialists.” The case *Jalaba v Borovoy*, 206 Mich App 17, 21; 520 NW2d 349 (1994), established that a local standard of care applies to podiatrists. MCL 600.2912a(1)(a) requires plaintiff to establish that:

[t]he defendant, if a general practitioner, 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, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

The proponent of expert testimony in a medical malpractice case has the burden of establishing that the expert is qualified and that the expert’s opinion is reliable. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067-1068; 729 NW2d 221 (2007).

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 600.2169(2) provides:

In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:

- (a) The educational and professional training of the expert witness.
- (b) The area of specialization of the expert witness.
- (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
- (d) The relevancy of the expert witness's testimony.

MCL 600.2955 further directs, in part:

(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.

In determining an expert's qualifications under MCL 600.2169(2)(d), the trial court must evaluate the relevancy of the expert's testimony. Under MCL 600.2912a, the expert's testimony against a podiatrist would be relevant if it showed that the defendant failed to provide "the

recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community. . . .”

A non-local expert may still be qualified to testify if he demonstrates familiarity with the standard of care in an area similar to the community in which the defendant practiced. *Turbin v Graesser*; 214 Mich App 215, 217-218; 542 NW2d 607 (1995). The expert may gain this familiarity through a variety of means, including reviewing written materials or verbally contacting local physicians. *Id.* at 218-219. In *Turbin*, the expert testified that he reviewed written information showing similar populations, similar scope of medical specialties, similar available procedures, and similar technology between Lansing, Michigan (where the alleged malpractice occurred) and Tallahassee, Florida (where the expert practiced). *Id.* at 218. This Court found the expert’s review of written materials, “coupled with his impeccable credentials and experience,” sufficient to prove the expert’s familiarity with the appropriate standard of care. *Id.*

In *Mazey v Adams*, 191 Mich App 328, 477 NW2d 698 (1991), a panel of this Court stated that an expert witness may base his knowledge of the applicable standard of care upon hearsay information ascertained from contact with other physicians. *Id.* at 332. In this case, Dr. Lombardo did not speak with any physicians, hospital administrators, or other health care providers in the Ferndale or Warren areas to determine the applicable standard of care. An expert’s verbal communication with physicians in a community would certainly be relevant to determining whether the expert is familiar with the standard of care in that community or whether that community is similar to another community. However, MCL 600.2912a does not require an expert to contact physicians in one area to determine the applicable standard of care in that community or to determine whether that community is similar to another community. Therefore, the fact that Dr. Lombardo did not verbally communicate with local physicians to ascertain the standard of care for general practitioners does not automatically disqualify him from testifying regarding the applicable standard of care.

The only ways in which Dr. Lombardo familiarized himself with Ferndale, Michigan were to look up its population on the internet, and compare it to the Florida communities in which he practices, to compare the hospitals in the communities, and to review a few Michigan cases. He concluded that the communities were similar based upon population size, demographics, available hospitals, and because both were suburbs of a bigger city. He stated that he was aware of southeastern Michigan practice from his previous testimony in a Detroit case. He did not explore any of the differences in medical technology between the localities other than the size and availability of hospitals, or inquire of any other doctors about the standard of care in Ferndale/Warren, nor did he examine the scope of similar procedures available in each area.

Plaintiff contends that Dr. Lombardo’s knowledge of the local standard is not relevant because for the procedure performed, there is a national standard that does not vary by locality. In *Leblanc v Lentini*, 82 Mich App 5; 266 NW2d 643 (1977) this Court held that “in some cases, local standards might be uniform throughout the United States.” *Id.* at 17. The Court also acknowledged that “there are certain areas in connection with medicine that are so well known that ... any expert could testify as to that standard of practice ... there are areas of medicine so well known and taught [that they] are commonplace in every locality, every community both

large and small in the entire United States [and] if this is one of those situations, then of course ... [the Court] will permit the doctor to testify.” *Id.* at 17.

In our estimation, the purpose of the locality rule is to protect doctors from being held to standards that necessarily vary between communities, such as differences in standards based on technology or resources. However, the present case is not one in which the location of the surgery made a difference in the standard of care. This is a case where a doctor performing surgery to fix a bunion on the first toe cut the second toe in half during surgery. Even though defendant was able to produce a witness who testified that this was an expected complication in Warren, Michigan, common sense would suggest that in *any* locality cutting a toe in half that was not the target of the surgery, and then withholding that information from the patient for several weeks after surgery, would be contrary to the standard of care.

We conclude that even if the trial court erred in admitting the testimony of Dr. Lombardo, it was not grounds for reversal under MCR 2.613(A), which provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, [or] for setting aside a verdict, ... unless refusal to take this action appears to the court inconsistent with substantial justice. MCR 2.613(A).

See also *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003) (“This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.”). In this case, even without the “standard of care” testimony of Dr. Lombardo, plaintiff would likely have prevailed. Expert testimony is not necessary, if “the lack of professional care is so manifest that it would be within the knowledge and experience of the ordinary layman that the conduct was careless and not conformable to the standards of professional practice and care employed in the community.” *Lince v Monson*, 363 Mich 135, 141; 108 NW2d 845 (1961). The jury would likely have found in favor of plaintiff given 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,” which Dr. Giordano knew, but did not inform her of until several weeks later when she was experiencing excruciating pain. Both of defendants’ medical experts testified about the standard of care, and opined that defendants had not breached the standard, therefore, the jury would have heard the applicable standard, even if it had not been established by plaintiff. Furthermore, the jury instruction given by the trial court also provided the jury with the proper standard. It is axiomatic that we will not reverse on the basis of harmless error. *Guerrero v Smith*, 280 Mich App 647, 656, 761 NW2d 723 (2008).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens