

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND LEITZ and LINDA LEITZ,

Plaintiffs-Appellants,

v

DAVID GINNEBAUGH, M.D., and PARTRIDGE
FAMILY PHYSICIANS, P.C.,

Defendants-Appellees,

and

HENRY FORD HEALTH SYSTEM,

Defendant.

UNPUBLISHED

June 11, 2013

No. 308276

Macomb Circuit Court

LC No. 2010-001541-NH

Before: BECKERING, P.J., and JANSEN and M. J. KELLY, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I cannot conclude that the circuit court abused its discretion by refusing to allow plaintiffs' counsel to impeach defendants' expert witnesses with Rakel's *Textbook of Family Practice* (5th ed), especially given the irregular position of plaintiff's retrocecal appendix.

This Court reviews for an abuse of discretion the circuit court's decision to allow or disallow the impeachment of a witness with a learned treatise. *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593, 600; 440 NW2d 417 (1989). The abuse of discretion standard acknowledges that there will often be "no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (citation omitted). The circuit court abuses its discretion only when it reaches a decision that falls outside the range of reasonable and principled outcomes. *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

MRE 707 provides:

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.

It is true that the parties disagree concerning whether there was sufficient expert testimony to establish that Rakel's *Textbook of Family Practice* was "a reliable authority" within the meaning of MRE 707. In addition, defendants argue that plaintiffs' counsel did not rely on the most contemporaneous version of the textbook. Frankly, however, these are not the salient issues in this case.

As explained by the majority, plaintiffs' counsel sought to impeach defendants' expert witnesses by using the following paragraph from Rakel's *Textbook of Family Practice*, which relates to the diagnosis of appendicitis by physical examination in the presence of abdominal pain:

The diagnostic process cannot succeed without knowing the vital signs and performing abdominal, pelvic, and rectal examinations. The principles of inspection, auscultation, palpation, and percussion are particularly important during examination of the abdomen. . . . The digital rectal examination may be valuable for diagnosing acute appendicitis. Some examiners have noted that tenderness on the right side is the single most useful diagnostic sign of acute appendicitis. [Rakel, *Textbook of Family Practice* (5th ed), ch 43, p 1194.]

The foregoing text *does not* state that the standard of care *requires* a rectal examination when a patient presents with abdominal pain or suspected appendicitis. The text merely states that a "digital rectal examination *may* be valuable for diagnosing acute appendicitis." (Emphasis added).

The evidence presented at trial tended to establish that plaintiff had an irregularly positioned retrocecal appendix, curved behind his colon, for which the standard diagnostic literature offered little applicable guidance. As Dr. Richard Burney explained, plaintiff's appendix is anatomically farther from his rectum than a normally positioned appendix would be. Dr. Burney testified that, because of the unusual position of plaintiff's appendix, a rectal examination likely would not have been helpful in the diagnosis of plaintiff's condition.

As a preliminary matter, I note that Rakel's *Textbook of Family Practice* is a general work and offers no specialized or in-depth discussion of the diagnosis of appendicitis. In fact, as is clear from the tenor of the book and the surrounding text in chapter 43, the treatise merely addresses the general diagnosis of appendicitis in patients with average appendices. Importantly, the above-quoted text does not address or even mention retrocecal appendices or the diagnosis of retrocecal appendicitis. Furthermore, plaintiffs' own expert, Dr. Sander Kushner, whose testimony was used to establish that Rakel's *Textbook of Family Practice* was an authoritative treatise, never actually addressed whether the paragraph in question set forth the standard of care with regard to the diagnosis of appendicitis.

Before a learned treatise may be introduced for impeachment purposes under MRE 707, it must still satisfy the relevancy threshold of MRE 401 and MRE 402, and must not be unfairly

prejudicial, unduly confusing, or unduly misleading under MRE 403. See, e.g., *Stachowiak v Subczynski*, 411 Mich 459, 464-465; 307 NW2d 677 (1981); *Jones v Bloom*, 388 Mich 98, 118; 200 NW2d 196 (1972); *Fletcher v Ford Motor Co*, 128 Mich App 823, 829; 342 NW2d 285 (1983). “Great caution must be exercised by the trial court to ascertain that the authority cited is pertinent to the subject matter under consideration and passages which are irrelevant are not admitted into evidence.” *Jones*, 388 Mich at 118.

Given that the above-quoted paragraph from the Rakel textbook does not discuss the diagnostic concerns associated with retrocecal appendicitis, and in view of the evidence tending to show that plaintiff’s appendicitis would not have been discovered by way of a rectal examination due to his unusually positioned retrocecal appendix, I must conclude that the text was not “pertinent to the subject matter under consideration” and should not have been admitted. *Jones*, 388 Mich at 118; see also MRE 402. For these same reasons, I also conclude that any use of the above-quoted text would have been unduly confusing to the jury. MRE 403. In my opinion, the circuit court properly refused to allow plaintiffs’ counsel to impeach defendants’ expert witnesses with the Rakel textbook.

Even if the circuit court had erred by refusing to allow plaintiffs’ counsel to impeach defendants’ experts with the above-quoted text, I would conclude that any error was harmless. Plaintiffs called Dr. Leonard Malewski, who testified that a rectal examination might well have been useful in the diagnosis of plaintiff’s appendicitis and suggested that such an examination was required by the standard of care.¹ In other words, despite the circuit court’s exclusion of the Rakel textbook, the jury did hear expert testimony that tended to contradict the assertions of defendants’ witnesses. Consequently, even if the circuit court somehow erred by disallowing the use of the Rakel textbook, any error in this regard certainly did not impair plaintiffs’ substantial rights or affect the outcome of trial. See *Hilgendorf v St John Hosp & Med Center Corp*, 245 Mich App 670, 708-709; 630 NW2d 356 (2001).

I perceive no abuse of discretion in the circuit court’s exclusion of the above-quoted paragraph from Rakel’s *Textbook of Family Practice*. I would affirm.

/s/ Kathleen Jansen

¹ However, I note that plaintiffs’ other expert, Dr. Kushner, never actually addressed whether a rectal examination was required by the standard of care. Dr. Kushner merely testified that the Rakel textbook is, in general, a reliable authority.