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	UNPUBLISHED June 11, 2013 No. 308276 Macomb Circuit Court LC No. 2010-001541-NH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.

PER CURIAM.

In this medical-malpractice case, plaintiffs, Raymond and Linda Leitz, allege that defendant, David Ginnebaugh, M.D., was negligent by failing to timely diagnose Raymond's appendicitis, resulting in serious medical complications and a prolonged stay in the intensive-care unit (ICU). Plaintiffs appeal as of right the trial court's judgment of no cause of action in favor of Dr. Ginnebaugh and Partridge Family Physicians, P.C.,[1] after a jury found that Dr. Ginnebaugh was not professionally negligent. The sole issue on appeal is whether the trial court committed error requiring reversal by refusing to allow plaintiffs' counsel the right to impeach defendants' expert witnesses using a learned treatise pursuant to MRE 707. Because we conclude that the trial court erred and deprived plaintiffs of a substantial right, we reverse and remand for a new trial.

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[1] Plaintiffs sued Partridge Family Physicians, P.C. on a theory of vicarious liability for the acts and omissions of Dr. Ginnebaugh. The parties had previously stipulated to the dismissal of defendant, Henry Ford Health System.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On October 10, 2007, plaintiffs, who were patients of Dr. Ginnebaugh, went to Dr. Ginnebaugh's office for flu shots. After receiving their flu shots, plaintiffs ran some errands and returned home. At about lunchtime, Raymond developed stomach pain. Later in the afternoon, he began complaining more and more about his stomach pain. It became "bad," and he was "doubling over." As a result, plaintiffs contacted Dr. Ginnebaugh's office and scheduled an appointment to see the doctor at 4:00 p.m. Dr. Ginnebaugh's nurse, Lisa Lange, informed Dr. Ginnebaugh that Raymond was having abdominal pain.

Dr. Ginnebaugh met with plaintiffs for about 15 minutes. He first asked Raymond to explain how he was feeling, and he then conducted a physical examination. While Raymond was lying on a table, Dr. Ginnebaugh examined his abdomen and asked him where he had pain. Raymond responded that the pain was "all over." Dr. Ginnebaugh noted that the pain was right above the pubic area and minimal and that Raymond did not have any rebounding, guarding, or peritoneal signs. Aside from "a little bit of discomfort," Raymond did not appear sick. Dr. Ginnebaugh began to think that Raymond had a urinary tract infection. Dr. Ginnebaugh performed a urinalysis that did not signify an infection. Dr. Ginnebaugh then examined Raymond a second time to determine whether his bladder was distended; it was not. Dr. Ginnegaugh did not perform a rectal examination. Dr. Ginnebaugh told plaintiffs that Raymond's pain was probably diverticulosis,[2] that it might be appendicitis[3], and that Raymond needed a CAT scan. He wrote Raymond a prescription for an antibiotic (Cipro) and pain medication (Loritab) and sent him for the CAT scan. Although Dr. Ginnebaugh did not order that the CAT scan be performed "stat," he expected to be called with the results within one hour of completion. According to plaintiffs, Dr. Ginnebaugh told them that he would call them that evening if any problem showed up on the CAT scan.

Plaintiffs went to Henry Ford Hospital that evening for the CAT scan. The pain that Raymond had been experiencing got worse. He was feeling "pretty poor" and holding his right side. He was sweating and did not have an appetite. Plaintiffs got the medication that Dr. Ginnebaugh prescribed and went home. Raymond took the medication at home that evening, including one pain pill at 9:00 p.m. and a second at midnight. According to Linda, the medication appeared to relieve Raymond of some of the pain.

The next morning, Raymond was lethargic and felt so poorly that he remained in bed. He did not want anything to eat. He took another pill for pain, and his pain seemed to go away. At about 9:00 a.m., Linda called Dr. Ginnebaugh's office, explaining that she had been expecting a call regarding the CAT scan results. At about 10:10 a.m., Dr. Ginnebaugh's office "picked up" the voicemail, and Dr. Ginnebaugh told Lange to "track down" the results of the CAT scan. Lange contacted plaintiffs and told Linda that Dr. Ginnebaugh's office did not yet have the results and that she would call plaintiffs back. At 12:02, Dr. Ginnebaugh's office received the

[2] Raymond had a history of diverticulosis.

[3] Plaintiffs testified that Dr. Ginnebaugh did not tell them that it might be appendicitis.

CAT scan report. Dr. Ginnebaugh could not read the report, so he asked Lange to get clarification. Lange did so, and at 1:00 p.m. she told Dr. Ginnebaugh what it said.

The CAT scan report generated by the radiologist, Dr. Parrish, stated that "the appendix was big with stool and probable oral contrast. Could be chronic. Follow up any signs of appendicitis." The report also stated, "Questionable mild thickening of the sigmoid colon could be related to minimal diverticulitis, although no surrounding inflammation is seen."

After receiving clarification regarding the report, Lange called plaintiffs and explained that Raymond had an enlarged appendix. Lange asked Linda if Raymond was feeling any better. According to Linda, she asked Raymond how he was feeling, and Raymond stated that he was feeling "a little better." According to Dr. Ginnebaugh, Linda told Lange that Raymond was feeling 50 percent better. Lange noted that Raymond had no appetite, intermittent nausea, a sore right lower quadrant (that had been throbbing earlier), fatigue, and a normal bowel movement in the morning. Lange instructed plaintiffs to return to Dr. Ginnebaugh's office or go to the emergency room if Raymond developed a fever or his abdominal pain became "markedly worse."

Sometime between 2:00 p.m. and 3:00 p.m. that afternoon, Raymond started to feel very cold, so he went into the shower and turned on the hot water to "warm up." However, he started to feel worse and began shaking. As he got out of the shower, he collapsed in the bathroom. Linda heard him fall and came to his aid. Linda helped him get into the bedroom and called 911. An ambulance arrived and paramedics took Raymond to the emergency room at Henry Ford Hospital. Raymond was sweating and nauseas, began vomiting black material, and had a temperature of 104 degrees.

Dr. Weng, a surgeon at Henry Ford Hospital, evaluated Raymond. Dr. Weng tracked down the CAT scan, looked at it, and stated, "It looks to me like we need get [sic] that appendix right out." A white blood cell count was high and consistent with appendicitis. That evening, Dr. Weng performed an open appendectomy and described Raymond's appendix as "frankly gangrenous."[4] Dr. Weng did not, however, report that the appendix had ruptured or note the presence of pus, abscess, or fecal drainage. Nevertheless, a pathology report referenced the presence of pus and a probable distal perforation.

In the days following surgery, Raymond's condition deteriorated and he was eventually placed in the ICU, intubated, and placed on a ventilator. He lapsed in and out of consciousness, and doctors informed his family that there was a chance he could die. He suffered the following complications: rapid heartbeat, atrial fibrillation, sepsis, systemic inflammatory response syndrome (SIRS), multi organ dysfunction, ileus, aspiration pneumonia, pulmonary edema, and acute respiratory failure requiring mechanical ventilation. In addition, Raymond also suffered ICU psychosis. He spent 18 days on a ventilator and was eventually taken off and released from the hospital on November 4, 2007.

[4] Dr. Weng originally intended the surgery to be laparoscopic.

Plaintiffs incurred $126,241.64 in ICU costs. As a result of the complications, Raymond lost between 25 and 40 pounds. He could not walk and had to use a wheelchair, walker, and cane. Over the next several months, he received treatment from various healthcare professionals. He was out of work for three to four months and lost at least $10,000 of income.

Plaintiffs sued defendants for medical malpractice. The trial court conducted a trial on December 6, 2011, through December 9, 2011, and concluding on December 12, 2011. The following medical experts testified for plaintiff: Dr. Sander Kushner and Dr. Leonard Malewski. Dr. Thomas Graves, Dr. Hugh Kerr, Dr. Ginnebaugh, Dr. Richard Burney, and Dr. Kevin Grady testified for the defense.

Dr. Kushner testified that Dr. Ginnebaugh breached the standard of care by not taking a thorough history, not performing a proper physical examination, not doing laboratory testing (a white blood cell count), not thoroughly considering appendicitis, waiting too long for the results of the CAT scan, and not performing a rectal examination, which, according to Dr. Kushner, is classically taught to every medical student when you have lower abdominal pain. Dr. Kushner opined that a rectal exam on Raymond probably would have been positive, i.e., elicited tenderness on the right side of the abdomen. Dr. Kushner also opined that had Dr. Ginnebaugh performed a proper physical examination on October 10, there more likely than not would have been a finding of appendicitis at 4:00 p.m. Finally, Dr. Kushner testified that had Raymond been seen in the emergency room and by a surgeon on the evening of October 10, a surgeon would have operated on Raymond that night and he would have been out of the hospital within 48 hours. Plaintiffs' counsel also elicited from Dr. Kushner his opinion that the Rakel Texbook of Family Practice was a reliable authority:

> *Q*. Are you familiar with a Rakel, family textbooks?
>
> *A*. Yes, Rakel is the so called Bible of family medicine. Doctor Rakel wrote many books on family medicine and it's utilized to teach residents.
>
> *Q*. Would it be considered by Bible a reliable authority?
>
> *A*. Yes.
>
> *Q*. Is that still in publication?
>
> *A*. I believe it is.
>
> *Q*. Was that in publication when you were a student?
>
> *A*. It was.
>
> *Q*. It's about the 8th edition now?
>
> *A*. The editions keep changing. I don't know which one is the latest.

Dr. Malewski testified that rectal exams can very well help diagnose retrocecal appendicitis, which is the most difficult appendicitis to diagnose. He also testified that although

he wouldn't necessarily do a rectal exam if a person presents with classic symptoms of appendicitis, he does rectal exams if a patient does not present with such symptoms. According to Dr. Malewski, the narcotics Raymond was taking masked his appendicitis symptoms. Furthermore, the delay in operation was more likely than not a substantial contributing factor to Raymond's complications after surgery. Dr. Malewski opined that a rectal examination on October 10 would more likely than not have elicited tenderness on Raymond's right side. The doctor also opined that Raymond's appendix was perforated at some point before the surgery and that there was a high likelihood that the gangrene caused Raymond harm, i.e., bacteria in his bloodstream. Dr. Malewski testified that had an appendectomy been performed on the night of October 10 or the next morning, Raymond probably would have gone home the next day without complications or infection.

Dr. Ginnebaugh's expert witnesses testified in his defense, claiming that he did not violate the standard of care. Dr. Graves testified on direct examination that the standard of care did not require a rectal examination. He contended that a rectal exam would not have been more helpful or definitive than a CAT scan. During plaintiffs' cross-examination of Dr. Graves, the following exchange occurred:

> *Q.* Isn't it true, Doctor, that you can't rule out or make an appropriate diagnosis of appendicitis without doing a rectal examination?
>
> *A.* I disagree with that.
>
> *Q.* Are you familiar with the text Rakel, R-a-k-e-l. [sic]
>
> *A.* Yes.
>
> *Q.* Was that one of the books the professor disagreed with?
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> *A.* Our particular residency didn't like it. He was a very political family doctor. He was kind of a hero because he was one of the first when family practice became a specialty, he was one of the first guys that wrote a book and then the way the older guys taught us, we were really happy that we had a family practice guy writing a book because usually it's a specialist, but it was a horrible book.
>
> *Q.* What's a [sic] book?
>
> *A.* The Rakel, the family practice Rakel text.
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> *Q.* Have you ever read it?
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> *A.* I read part of it. It's not really a book that most family doctors use.
>
> *Q.* Oh really. Isn't it the leading textbook that's been published for 40 years. [sic]
>
> *A.* I have no idea how it sells but I don't know a family doctor that –

* * *

Q. I'm going to show you page 1194 from the fifth edition of Rakel which was testified as the reliable authority by Doctor Kushner and you think you may have read this in the past.

A. I haven't read it. I specifically told you that -- my residency director was one of the founding physicians.

Q. I heard all that. The question is did you do any research for this deposition?

A. No.

Q. Or for this trial?

A. No.

Q. Can you read this line, the first line under Physical Examination please?

Defense counsel objected on the basis that plaintiffs were improperly using the Rakel textbook under MRE 707; counsel argued that Dr. Graves indicated that he did "not find this textbook to be reliable or authoritative" and also argued that it was not a proper use of the textbook "to now just have him read something that he's already said he doesn't endorse" and finds out of date. The trial court sustained the objection, and plaintiffs' counsel sought to make a record for purposes of his offer of proofs. The jury was excused.

In support of his argument that he was entitled to impeach Dr. Graves with the learned treatise, Plaintiffs' counsel quoted extensively from MRE 707 and pointed out that Dr. Kushner had testified the day before that the Rakel textbook was a reliable authority. Plaintiffs' counsel argued, "this is not close. This has to come in. I don't know what the objection is. The rule is clear as day." Defense counsel argued that "this expert [Dr. Graves] does not find that textbook to be reliable or authoritative," that no foundation had been laid regarding which portion of the textbook plaintiff's counsel was seeking to impeach Dr. Graves with, and that even if the rule allowed Dr. Graves to be cross-examined by a textbook that a 78-year-old "D.O. physician" (referring to Dr. Kushner) found to be reliable or authoritative, it would be for impeachment purposes only. The trial court found that because "you've got a diverse opinion, a diametrically diverse opinion on the part of the two experts," plaintiffs had failed to establish the textbook as a reliable authority. Plaintiffs' counsel pointed out to the trial court that MRE 707 "doesn't say consensus. It says or other expert – I don't see there's any discretion." The trial court reiterated, "It hasn't been establish [sic]. That's the ruling of the Court." Plaintiffs' counsel

responded, "That's reversible, clearly." The trial court replied, "Bring them back in," and the jury returned to the courtroom. Plaintiffs' counsel continued his cross-examination of Dr. Graves without impeaching him with the Rakel textbook.[5]

After Dr. Graves testified, Dr. Ginnebaugh testified in his own defense. On cross-examination, plaintiffs' counsel attempted to solicit Dr. Ginnebaugh's agreement that the Rakel textbook was a reliable authority by asking him if there was any other family-practice textbook held in higher regard. Dr. Ginnebaugh responded that whenever he referred to the book, he never found what he was looking for and stated that "it's on the shelf and we basically never use it." Dr. Ginnebaugh testified that he knows of no textbook that covers what he needs to know in his specialty because of the ready availability of all sorts of journals, articles, and other materials. Plaintiffs' counsel later attempted to elicit from Dr. Ginnebaugh his concession that a rectal examination should be done in certain presentations, including a retrocecal appendix, and that the standard of care required it in that circumstance.[6] Dr. Ginnebaugh admitted that he had agreed with that proposition in his deposition, taken before trial, but indicated at trial that "I was mistaken on that in my deposition." He went on to say, "[I]f you want to get technical in the evaluation of abdominal pain, you don't have to do a rectal ever. Now that sounds crazy, but that's from somebody that I respect, and it would be hearsay to put it, if you name people and that kind of stuff."

Following the presentation of proofs, the jury rendered a verdict in favor of the defense, finding that that Dr. Ginnebaugh was not professionally negligent.

On appeal, plaintiffs contend that the trial court committed reversible error by prohibiting them from impeaching the credibility of the defense experts and Dr. Ginnebaugh regarding whether the standard of care required a rectal examination.

II. STANDARD OF REVIEW

We review evidentiary issues for an abuse of the trial court's discretion. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled

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[5] In order to impeach Dr. Graves, plaintiffs' counsel intended to read into evidence the following text from page 1194 of the Rakel textbook regarding physical examination and the diagnosis of appendicitis in the presence of acute abdominal pain:

> "The diagnostic process cannot succeed without knowing the vital signs and performing abdominal, pelvic, and rectal examinations. . . . 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* (Philadelphia: W.B. Saunders Company, 5th Ed., 1995), ch 43, p 1194.]

[6] Defense expert Dr. Burney testified that Raymond had a retrocecal appendix, i.e., an appendix that curved behind the colon.

outcomes." *Lockridge v Oakwood Hosp*, 285 Mich App 678, 689; 777 NW2d 511 (2009). To the extent the trial court's decision to admit evidence involves a preliminary question of law, we review the issue de novo. *Id.* An error in the exclusion of evidence does not warrant appellate relief '"unless refusal to take this action appears to the court inconsistent with substantial justice" or "a substantial right of the party is affected." MCR 2.613(A); MRE 103(a); see also *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

III. ANALYSIS

In *Jones v Bloom*, 388 Mich 98, 118; 200 NW2d 196 (1972), the Michigan Supreme Court held that "medical textbooks or other publications may be used to cross-examine expert witnesses if the expert recognizes the publication as authoritative, or if the trial court takes judicial notice of the publication as authoritative." *Jones* quoted favorably the rationale for allowing impeachment through the use of learned treatises as set forth by the Illinois Supreme Court in *Darling v Charleston Community Memorial Hospital*:

"An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues." [*Id.* at 112, quoting *Darling v Charleston Community Mem Hosp*, 33 Ill 2d 326, 336; 211 NE2d 253 (1965).]

Our Supreme Court also noted its prior recognition that "the expert testimony of witnesses is in all probability far less reliable than the testimony that is derived from textbooks."[7] *Id.* at 115.

MRE 707 provides as follows:

> 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. [Emphasis added.]

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[7] *Jones* quoted portions of 6 Wigmore, Evidence (3d ed), § 1961, which contrasted the motives of the writer of a learned treatise to the motives of an expert witness in litigation, who is paid to testify by one of the parties, thus raising a specter of concern regarding his or her credibility and trustworthiness and the motivation to assume a partisan view. *Jones*, 388 Mich at 112-114. *Jones* concluded that "[t]he fact that the textbooks used on cross-examination would contain hearsay material is not a sufficient justification to prevent this type of cross-examination in view of the countervailing arguments in favor of admissibility." *Id.* at 115.

For purposes of MRE 707, an "authority" is an "accepted source of expert information or advice." *McCarty v Sisters of Mercy Health Corp*, 176 Mich App 593, 600; 440 NW2d 417 (1989).

Here, we conclude that the trial court abused its discretion by prohibiting plaintiffs' use of the Rakel textbook on the basis that Dr. Kushner and Dr. Graves disagreed about whether the textbook was a reliable authority. MRE 707 plainly states that a published treatise or periodical may be established as a reliable authority by the testimony or admission of "the witness," i.e., the witness being cross-examined, "or by other expert testimony." See also *Wolak v Walczak*, 125 Mich App 271, 275-276; 335 NW2d 908 (1983) (holding that a trial court did not abuse its discretion by excluding two medical treatises for impeachment purposes under MRE 707 where "[n]either the defendant-doctors, whom plaintiff sought to impeach, nor plaintiffs' own expert testified that the treatises were reliable authorities" and where the court did not find them authoritative by judicial notice). Dr. Kushner's testimony was "other expert testimony" under MRE 707, and his testimony alone could be sufficient to establish the Rakel textbook's reliability, see *Wolak*, 125 Mich App 275-276.

Notwithstanding this error, defendants argue three alternative grounds to affirm the court's ruling. First, defendants argue that plaintiffs failed to establish that the Rakel textbook was a reliable authority because Dr. Kushner's testimony regarding the textbook was too broad, i.e., it was not specific to the chapter, section, or the author of the chapter regarding gastroenterology. We disagree. In *Dziurlikowski v Morley*, 143 Mich App 729, 732-733; 372 NW2d 648 (1985), we noted that the defense expert had "admitted [during cross-examination] that *Anesthesiology Magazine* was a reliable publication." Thus, we concluded that "*any statements contained therein* were admissible for impeachment purposes regardless of whether [the expert] had relied upon them on direct examination." *Id*. at 733 (emphasis added). Therefore, our decision in *Dziurlikowski* demonstrates that when an expert testifies that a medical periodical is a reliable publication, *any statements* contained in the medical periodical are admissible for impeachment under MRE 707. Here, Dr. Kushner's testimony established that the Rakel textbook was a reliable authority. He expressly testified that it was a reliable authority and also testified that it was the "Bible of family medicine" and "utilized to teach residents." See *McCarty*, 176 Mich App at 600-601 (holding that an expert established that a review journal was a reliable authority under MRE 707 by testifying that the journal was "as reliable as anything we have in literature" and "as close to a bible as obstetricians have today"). Under *Dziurlikowski*, Dr. Kushner was not required to testify that a certain chapter, page, statement, or contributing author in the Rakel textbook was reliable; his testimony that the textbook was a reliable authority is all that MRE 707 requires; once Dr. Kusher established that the textbook was a reliable authority, any statements contained in the textbook were admissible (by being read into evidence) for impeachment purposes. See *Dziurlikowski*, 143 Mich App at 732-733; MRE 707.

Defendants' second argument is that plaintiffs failed to establish that the Rakel textbook was a reliable authority because plaintiffs were not using the most contemporaneous version of the textbook. Defendants provide this Court with no legal authority for the proposition that plaintiffs were required to use the most contemporaneous version of the Rakel textbook. Thus, defendants have abandoned this issue. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned."). Nevertheless, we reject defendants' argument. The fact that

the version of the Rakel textbook that plaintiffs sought to use was not the most recent edition does not per se rule out its reliability as an authoritative textbook and make it unavailable for use under MRE 707. Our Supreme Court has emphasized that science is always changing and that medical textbooks—like expert medical witnesses—should not be considered unreliable simply because of this fact.[8] *Jones*, 388 Mich at 115-116. Again, under *Dziurlikowski*, all that was required was Dr. Kushner's testimony that the Rakel textbook was a reliable authority. See *Dziurlikowski*, 143 Mich App at 732-733. The *Dziurlikowski* Court did not require expert testimony that a specific issue or article in *Anesthesiology Magazine* was reliable—only the magazine itself in general. *Id.* By looking to only whether the magazine in general was a reliable authority, the Court did not require the most recent issue of the magazine. *Id.*

Defendants' third argument is that the desired impeachment was not impeachment at all because it is not contradictory of Dr. Graves's testimony. We disagree. Dr. Graves testified that appendicitis can be ruled out or appropriately diagnosed without doing a rectal examination and that the standard of care did not require a rectal examination in this case. The relevant portion of the Rakel textbook states the following when discussing appendicitis: "The diagnostic process cannot succeed without knowing the vital signs and performing abdominal, pelvic, and rectal examinations." Rakel, *Textbook of Family Practice* (Philadelphia: W.B. Saunders Company, 5th Ed., 1995), ch 43, p 1194. The statement in the textbook contradicts Dr. Graves's testimony.

Accordingly, we hold that the trial court abused its discretion by prohibiting plaintiffs from using the Rakel textbook under MRE 707.

We also hold that the error warrants a new trial. See generally *Jones*, 388 Mich at 120 (reversing and remanding for a new trial where the trial court erroneously prohibited the plaintiff from cross-examining a defense expert with a medical textbook); *McCarty*, 176 Mich App at 594-595, 601 (reversing and remanding for a new trial where the trial court erroneously prohibited the plaintiff from cross-examining a defense expert with a medical journal); *Dziurlikowski*, 143 Mich App at 732-733 (finding that the trial court was "clearly erroneous" in prohibiting the plaintiffs from using a reliable medical article for impeachment under MRE 707). The trial court's error affected plaintiffs' substantial rights, and refusal to afford plaintiffs relief would be inconsistent with substantial justice. See MCR 2.613(A); MRE 103(a); see also *Craig*, 471 Mich at 76. Because of the court's error, plaintiffs could not use the Rakel textbook to impeach the credibility of Dr. Graves, Dr. Ginnebaugh, or any other defense experts on the subject of whether a rectal exam was required. Whether the standard of care required Dr. Ginnebaugh to perform a rectal exam and whether such an exam would have made a difference in Raymond's outcome were significant issues at trial. Of the five medical experts that testified for the defense, four provided testimony indicating either that the standard of care did not require a rectal exam or that a rectal exam would not have made a difference in Raymond's outcome. It

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[8] The Court in *Jones* noted, "If a new discovery has occurred since the publication of the textbooks, the expert has the opportunity to explain this to the jury. (Indeed, in such a situation, the expert's credibility would be enhanced since he would appear to be more knowledgeable than the textbooks.)" *Jones*, 388 Mich at 115-116.

was vital for plaintiffs, who only had two experts testify on their behalf, to have the ability to use the reliable medical textbook to cross-examine and impeach these defense witnesses. This is particularly true given the "practical difficulty in obtaining experts to testify in malpractice cases," especially on behalf of plaintiffs, and our Supreme Court's consistent recognition "that the expert testimony of witnesses is in all probability far less reliable than the testimony that is derived from textbooks" given expert witnesses' interests and bias. *Jones*, 388 Mich at 114-118.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Michael J. Kelly