STATE OF MICHIGAN

COURT OF APPEALS

SHOBHA STAMPWALA,

Plaintiff-Appellant,

v

JOSEPH ZAMIRI, M.D., and STERLING PHYSICIANS, P.C.,

Defendants-Appellees.

UNPUBLISHED
June 3, 2003

No. 235329
Oakland Circuit Court
LC No. 98-010900-NH

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment based on a jury verdict of no cause of action. We affirm in part, reverse in part, and remand.

I. Facts and Procedure

In 1997, plaintiff was diagnosed with having a cancerous growth in her left breast. Plaintiff met with defendant Dr. Joseph Zamiri and discussed performing a lumpectomy to remove the cancerous growth. Plaintiff testified that Dr. Zamiri did not tell her that there was a possibility that she would need a mastectomy, but Dr. Zamiri testified that he did discuss the possibility of a mastectomy with plaintiff. Before her surgery, plaintiff signed a form consenting to a lumpectomy. During the surgery, Dr. Zamiri discovered additional, unexpected cancerous growth in plaintiff's breast. While plaintiff was still under anesthesia in the surgery room, Dr. Zamiri went into the waiting room and told plaintiff's sister, Dharmista Stampwala, and plaintiff's brother-in-law/ex-husband, Suresh Stampwala, that plaintiff needed a mastectomy. Dr. Zamiri told Dharmista and Suresh that plaintiff would eventually need a mastectomy, whether it was during this surgery or at a later date. Dharmista and Suresh agreed to the mastectomy and Dr. Zamiri proceeded to perform the procedure. After the surgery, plaintiff filed suit against defendants, alleging: (1) defendants were liable for medical malpractice because Dr. Zamiri's failure to obtain plaintiff's informed consent before performing the mastectomy violated the standard of care owed to plaintiff and (2) defendants were liable for assault and battery because Dr. Zamiri's performed the mastectomy without plaintiff's consent. During pretrial proceedings, just two days prior to the start of trial, plaintiff voluntarily dismissed the medical malpractice count. Within hours of placing the voluntary dismissal of the medical malpractice claim on the record, plaintiff sought to withdraw the dismissal and reinstate the claim. However, the trial court refused to allow plaintiff to reinstate the medical malpractice

claim. A jury trial ensued. Following the trial, a jury entered a verdict of no cause of action against plaintiff.

II. Dismissal of Medical Malpractice Count

Plaintiff first argues that the trial court abused its discretion in denying her request to reinstate her medical malpractice claim against defendants. "This Court reviews for an abuse of discretion a trial court's decision concerning a motion to reinstate an action." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 138; 624 NW2d 197 (2000). A voluntary dismissal by a plaintiff is without prejudice unless stated in the notice of dismissal. MCR 2.504(1). There is no indication in the present case that the voluntary dismissal was meant to be with prejudice.

In this case, the trial court refused to rule on plaintiff's motion for summary disposition in regard to her battery claim until plaintiff decided whether she was going to voluntarily dismiss her medical malpractice claim. It appears plaintiff voluntarily dismissed her malpractice claim because she believed the trial court had insinuated that it would be willing to grant summary disposition in her favor on her battery claim if plaintiff dismissed her malpractice claim.[1] After the trial court declined to rule on plaintiff's motion for summary disposition and made several rulings plaintiff perceived to be unfavorable to her battery claim, plaintiff sought to reinstate her malpractice claim. The trial court refused to reinstate plaintiff's medical malpractice claim without giving any reason for its decision other than that plaintiff had voluntarily dismissed it. Because the standard of review is abuse of discretion, we are obligated to affirm the trial court's decision unless an unprejudiced person could say that there was no justification or excuse for the ruling. *Alken-Ziegler, Inc v Waterbury Headquarters Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). Here, the trial court did not give any justification for its ruling. All of the discovery, including the discovery related to the malpractice claim, had been completed. There is no indication that defendants would have been prejudiced by the reinstatement. In fact, the dismissal of the malpractice claim led to considerable effort by both parties to redact the deposition transcripts to remove any references to the standard of care related to the malpractice claim. Because reinstatement of the malpractice claim would not have prejudiced defendants and the trial court did not give any valid reason for refusing to reinstate the claim, we conclude that the trial court abused its discretion in denying plaintiff's motion to reinstate the claim.

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[1] There is no indication that plaintiff filed a written notice or stipulation of dismissal or that the trial court entered a written order of dismissal. See MCR 2.504(A). We recognize that it is not always feasible to file such a notice, stipulation, or order at the same time an oral decision is made to dismiss a case or claim during a hearing. The parties and the court must be given a reasonable amount of time to reduce such an oral stipulation or order to writing. In the meantime, "[a]n oral ruling has the same force and effect as a written order." *McClure v H K Porter Co, Inc*, 174 Mich App 499, 503; 436 NW2d 677 (1988). Therefore, the parties and the court may rely on the oral stipulation or order until it is practicable to reduce it to writing. Nonetheless, a court speaks through its orders. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Accordingly, a written stipulation or order to voluntarily dismiss a claim or case should have been entered within a reasonable time of the oral ruling or decision. No written order was ever entered in this case.

Defendants contend that, because the jury returned a verdict of no cause of action in regard to plaintiff's battery claim and battery is easier to prove than medical malpractice, any error by the trial court in dismissing plaintiff's malpractice claim was harmless. We disagree.

"Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent." *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992). "If a physician treats or operates on a patient without consent, he has committed an assault and battery and may be required to respond in damages. Consent may be express or implied. It has been held that consent is implied where an emergency procedure is required and there is no opportunity to obtain actual consent or where the patient seeks treatment or otherwise manifests a willingness to submit to a particular treatment." *Werth v Taylor*, 190 Mich App 141, 146; 475 NW2d 426 (1991) (citations omitted). In the present case, the jury was properly instructed that defendants were not liable for battery if plaintiff expressly or impliedly consented to the mastectomy. However, the thrust of plaintiff's malpractice claim is that defendants violated the standard of care by failing to obtain her *actual* consent for the operation. In regard to a medical malpractice claim, expert testimony is required to establish the standard of care and to demonstrate the defendant's alleged failure to conform to that standard. *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994). "Claims of negligence based on the failure of a physician or surgeon to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient come within the general rule regarding the need for expert testimony." *Paul v Lee*, 455 Mich 204, 212; 568 NW2d 510 (1997), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2 (1999). In this case, plaintiff's expert witness, Dr. Margaret Dunn, testified in deposition that the standard of care is for a physician to obtain informed consent from a patient in writing before performing a procedure unless the patient is too ill or unfit to consent.[2] Because implied consent is a defense to battery, but expert witness testimony establishes that only actual written consent satisfies the standard of care for physicians in a medical malpractice case, plaintiff's verdict of no cause of action on the battery claim would not necessarily require a similar verdict in regard to her malpractice claim.[3] Therefore, we cannot conclude that the trial court's error was harmless. Although we affirm the no cause of action verdict in regard to plaintiff's battery claim, we remand to the trial court for reinstatement of plaintiff's medical malpractice claim.

III. Admissibility of Testimony Regarding Plaintiff's Former Marriage

Next, plaintiff argues that the trial court abused its discretion in admitting testimony concerning her relationships with Dharmista and Suresh. Plaintiff maintains that the admission of this testimony was irrelevant and unfairly prejudicial. At trial, it was adduced that Dharmista and Suresh were married, but Suresh sought and obtained a divorce. Plaintiff and Suresh were

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[2] Because plaintiff was precluded from reinstating her medical malpractice claim, all standard of care testimony was redacted from the deposition testimony prior to presenting Dr. Dunn's testimony at trial.

[3] We do not conclude as a matter of law that actual consent is always required in a medical malpractice case. However, Dr. Dunn's testimony in this case was enough to create a question of fact regarding whether actual consent was the appropriate standard of care.

then married. A few months later, plaintiff filed for divorce. Dharmista and Suresh were later remarried. From plaintiff and Suresh's brief marriage, plaintiff's only child was born. Throughout this period, plaintiff, Dharmista, and Suresh lived in the same house.

We review the trial court's decision regarding the admission of evidence for an abuse of discretion. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." MRE 401. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "Evidence that shows bias or prejudice on the part of a witness is always relevant." *Powell v St John Hosp*, 241 Mich App 64, 72; 614 NW2d 666 (2000).

We conclude that the trial court did not abuse its discretion in admitting the testimony at issue. This testimony was relevant to Dharmista and Suresh's credibility and their motivations for testifying in plaintiff's favor. The main issue in the case was whether Dr. Zamiri had consent to perform the mastectomy. Because Dharmista and Suresh testified in regard to consent, their credibility was at issue. The contested testimony included Dharmista and Suresh's testimony on cross-examination that plaintiff, Dharmista, Suresh, and their children were a "family unit" and pooled their money. Despite Dharmista and Suresh's admissions that the three combined their assets, they denied having a financial interest in the outcome of the case. Although the testimony regarding the unusual relationship between plaintiff, Dharmista, and Suresh may have been somewhat prejudicial to plaintiff, it was relevant to show their closeness and Dharmista and Suresh's financial motivation for an outcome favorable to plaintiff. Because the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, the trial court did not abuse its discretion in admitting it into evidence.

IV. Consent Instructions

Next, plaintiff takes issue with the trial court's jury instructions on the issue of consent. Plaintiff argues that the trial court erred by instructing the jury that the subsequent conduct of the parties may sometimes be taken into consideration to determine if consent to the intentional touching was given. On appeal, we generally review de novo claims of instructional error. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). However, we review the trial court's determination whether an instruction is accurate and applicable to the case for an abuse of discretion. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). "There is no error requiring reversal if the theories and applicable law were adequately and fairly presented to the jury." *Id.*

First, plaintiff argues that the trial court's subsequent conduct instruction was erroneous as a matter of law. The trial court instructed the jury as follows:

> Sometimes subsequent conduct of the parties can also be taken into consideration to determine if originally there was a meeting of the minds to give consent to the willful and intentional touching. Implied consent requires a

> meeting of the minds or mutual agreement and does not exist unless the minds of the parties meet by reason of words or conduct.

Plaintiff argues that the jury may only consider a patient's conduct subsequent to a surgical procedure to determine whether the patient gave consent for *another, later* surgical procedure. Plaintiff contends that subsequent conduct may not be considered to determine consent to a procedure that has already occurred. Plaintiff is correct in stating that, in *Banks v Wittenberg*, 82 Mich App 274, 280; 266 NW2d 788 (1978), this Court determined that it was proper for the trial court to instruct the jury that it could consider the plaintiff's conduct after his first surgical procedure in order to determine whether he gave implied consent to a second procedure. *Banks* does not stand for the proposition that a jury may be instructed that a patient's conduct after a procedure may be considered to determine whether he consented to the procedure. Conversely, *Banks* does not preclude consideration of subsequent acts to determine whether the patient consented to the initial procedure. Plaintiff does not cite any law stating that a jury may not be instructed to consider evidence of subsequent conduct when determining consent to an intentional touching. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' " *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Plaintiff has not shown that the trial court erred in giving the jury instruction at issue.

Plaintiff also argues that the trial court's consent instruction was erroneous because its use of the term "in other words" minimized the preceding instruction.[4] However, plaintiff failed to preserve this issue for appeal by specific objection. Therefore, we review this issue for plain error. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 350; ___ NW2d ___ (2003), lv pending (Supreme Court Docket No. 123720). To obtain relief, plaintiff must demonstrate a clear or obvious error that affected the outcome of the case. *Id.* Plaintiff has failed to give any reason why the trial court's use of this phrase was plain error that affected the outcome of the case. Therefore, plaintiff's argument fails.

V. Plaintiff's Motion for JNOV or New Trial

Plaintiff next asserts that the trial court erred in denying her motion for a new trial. Plaintiff argues that the trial court should have granted her a new trial for several reasons. A trial

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[4] The instruction at issue read as follows:

> Generally, implied consent is where the intention is not manifested by direct or explicit words between the parties, but is to be gathered by the implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction.
>
> *In other words*, implied consent is one which arises under circumstances which, according to the ordinary course of dealing and common understanding of persons, show a mutual intention to agree. [Emphasis added.]

court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Bynum v The ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002). First, plaintiff argues that an irregularity in the proceedings occurred when the trial court refused to allow plaintiff to reinstate her medical malpractice claim and redacted all standard of care references from Dr. Dunn's testimony, while leaving standard of care testimony from defendants' expert. A new trial may be granted whenever a party's substantial rights are materially affected and there was an "[i]rregularity in the proceedings of the court, jury or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial." MCR 2.611(A)(1)(a). A new trial my also be granted when a party's substantial rights are materially affected and an error occurred in the proceedings. MCR 2.611(A)(1)(g). As discussed, *supra*, the trial court abused its discretion in denying plaintiff's request to reinstate her malpractice claim. Therefore, plaintiff is entitled to a trial on this claim. However, the trial court's abuse of discretion in refusing to reinstate the malpractice claim does not entitle plaintiff to a new trial on the battery claim. The redacted testimony at issue related to the standard of care and was only applicable to the dismissed medical malpractice claim. Furthermore, plaintiff does not argue which testimony was erroneously redacted from the depositions or why her battery claim was prejudiced by these redactions. Therefore, although the trial court abused its discretion in disallowing plaintiff from trying her malpractice claim, we cannot conclude that the trial court abused its discretion in denying plaintiff's motion for a new trial on her battery claim on this basis.

Second, plaintiff argues that the trial court abused its discretion in denying her motion for a new trial on the battery claim because the jury verdict of no cause of action was against the great weight of the evidence. A court may grant a new trial whenever a party's substantial rights are materially affected and a verdict is against the great weight of the evidence or contrary to law. MCR 2.611(A)(1)(e).

> When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict "only when it was manifestly against the clear weight of the evidence." This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. [*Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (citations omitted).]

In support of her argument, plaintiff asserts that that there was no credible evidence that plaintiff consented to the mastectomy. However, Dr. Zamiri testified that he "vividly" recalled discussing the possibility of a mastectomy with plaintiff and that plaintiff consented to the surgery.

> The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. [*Id.* (citations omitted).]

Credibility of the witnesses was a major issue in this case and the jury apparently believed Dr. Zamiri and concluded that plaintiff had consented to the mastectomy. We refuse to substitute our judgment of credibility for that of the jury and conclude that a review of the record does not

reveal a miscarriage of justice. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on great weight of the evidence grounds.

Plaintiff also argues that the trial court erred in denying her motion for judgment notwithstanding the verdict (JNOV). However, plaintiff's argument in this regard is conclusory and plaintiff does not give any reason why the trial court abused its discretion in denying her motion for JNOV.[5] "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Green Oak Twp v Munzel*, 255 Mich App 235, 244; ___ NW2d ___ (2003). "An appellant's failure to properly address the merits of his assertion of error constitutes an abandonment of the issue." *Id.*

VI. Admissibility of Testimony of Dr. Telmos

Next, plaintiff argues that the trial court abused its discretion in admitting the testimony of defendants' expert witness, Dr. Allen Telmos. "We review a trial court's decision regarding the admissibility of expert witness testimony for an abuse of discretion." *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). Plaintiff argues that Dr. Telmos' testimony was inconsistent with the foundational facts of the case and that his opinions were contrary to Michigan law.

> This Court has held that an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 499; 491 NW2d 243 (1992); *Thornhill v Detroit*, 142 Mich App 656, 658; 369 NW2d 871 (1985). This is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation. *Green, supra* at 500. [*Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999).]

First, plaintiff argues that Dr. Telmos' testimony was inadmissible because he "changed the facts" when he referred to the surgery as "cancer" surgery, rather than a lumpectomy. The rationale in *Badalamenti* is not applicable to this testimony. Dr. Telmos testified that he understood that plaintiff wanted to be cured of cancer and that Dr. Zamiri had discussed the possibility of a mastectomy with her. This testimony is not inconsistent with witness testimony that plaintiff saw Dr. Zamiri for treatment of a cancerous growth in her breast or Dr. Zamiri's testimony that he discussed the possibility of a mastectomy with plaintiff and that she agreed to the surgery.

Plaintiff also argues that Dr. Telmos' testimony that Dr. Zamiri obtained consent to perform the mastectomy from plaintiff's family was inconsistent with the testimony of the witnesses. On the contrary, the testimony at trial showed that Dharmista and Suresh consented

[5] In support of her position that the trial court erred in denying her motion for a new trial, plaintiff merely argues as follows: "Plaintiff submits that the Court committed an error of law by failing to grant its pretrial and limine motion granting Plaintiff judgment as a matter of law on the issue of battery."

to the mastectomy. Plaintiff further argues that Dr. Telmos' testimony that Dr. Zamiri had implied consent to cure plaintiff was inconsistent with the testimony of the witnesses. Dr. Telmos appeared to base this conclusion on Dr. Zamiri's testimony that he discussed the possibility of a mastectomy with plaintiff before the surgery. Therefore, Dr. Telmos' opinion does not rely on any erroneous foundational facts and the reasoning in *Badalamenti* does not apply.

Finally, plaintiff argues that Dr. Telmos' testimony that a surgeon can obtain consent to perform non-emergency surgery from a patient's family was contrary to Michigan law.[6] However, Dr. Telmos did not testify as plaintiff suggests. Dr. Telmos testified that a patient must consent to surgery before it can be performed. He testified that it would have been wrong for Dr. Zamiri to perform the mastectomy without plaintiff's prior consent, and that plaintiff had given Dr. Zamiri this consent at a pre-operative meeting. He testified that a surgeon had implied consent to cure a patient's disease where the patient's life was at risk, but acknowledged that plaintiff's life was not at risk during the operation at issue. The *Badalamenti* reasoning does not apply to this testimony and plaintiff fails to explain why this testimony was otherwise inadmissible. Moreover, the trial court instructed the jury that consent could only be found by actual or implied consent given by plaintiff. The jury is presumed to have followed the instructions. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Therefore, plaintiff's argument lacks merit. Because Dr. Telmos' testimony was not inconsistent with the foundational facts or contrary to law, the trial court did not abuse its discretion in admitting Dr. Telmos' testimony.

VII. Admissibility of Consent Testimony

Next, plaintiff argues that the trial court abused its discretion in admitting Dr. Zamiri and Dr. Tara Shah's testimony that they talked to Dharmista and Suresh during the surgery and obtained their consent to perform the mastectomy. Plaintiff argues that this testimony was inadmissible because it was contrary to Michigan law that surgery that goes beyond the scope of the patient's consent and is not necessary to preserve the patient's life may constitute assault and battery. *Franklyn v Peabody*, 249 Mich 363, 367-368; 228 NW 681 (1930); *Werth, supra* at 146. We disagree. Neither Dr. Zamiri nor Dr. Shah testified that the only consent needed or given to perform the mastectomy was from Dharmista and Suresh. Dr. Shah testified that Dr. Zamiri talked to Dharmista and Suresh about the mastectomy merely as a matter of courtesy. Dr. Zamiri testified that he believed that he already had plaintiff's consent to perform the mastectomy. Furthermore, plaintiff does not explain why this evidence would be inadmissible under the *Badalamenti* rationale even if Dr. Zamiri and Dr. Shah had testified that they believed that they were only required to obtain plaintiff's family's consent before performing the mastectomy. Moreover, as discussed, *supra*, the trial court instructed the jury that consent could only be found by actual or implied consent given by plaintiff.

VIII. Admissibility of Testimony of Dr. Kolins

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[6] Surgery that goes beyond the scope of the patient's consent and is not necessary to preserve the patient's life may constitute assault and battery. *Franklyn v Peabody*, 249 Mich 363, 367-368; 228 NW 681 (1930); *Werth, supra* at 146.

Plaintiff also argues that the trial court abused its discretion in allowing defendants' expert pathologist, Dr. Mark Kolins, to testify at trial. Plaintiff contends that the trial court abused its discretion in allowing Dr. Kolins to testify because he was not listed as a witness in the final pretrial order. "The decision whether to allow a party to add an expert witness is within the discretion of the trial court." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). Although Dr. Kolins was not listed in the final pretrial order, he was listed in a timely-filed witness list. Therefore, plaintiff was on notice during discovery that defendants might call Dr. Kolins as a witness. Plaintiff argues that she changed her trial strategy because she did not think that Dr. Kolins was going to testify, but plaintiff does not argue how she changed her trial strategy or how this change in trial strategy prejudiced her. Furthermore, plaintiff does not discuss any of Dr. Kolins' testimony or explain how his testimony adversely prejudiced her. Therefore, we cannot say that the trial court abused its discretion in allowing Dr. Kolins to testify at trial.

IX. Juror Challenge

Next, plaintiff asserts that the trial court erred in failing to excuse a potential juror for cause when the potential juror had been a patient of Dr. Zamiri in the 1960's. "[T]he decision to grant or deny a challenge for cause is within the sound discretion of the trial court." *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236; 445 NW2d 115 (1989). Plaintiff takes issue with the trial court's decision to excuse the juror for cause, presumably[7] under MCR 2.511(d)(3), which provides that a juror may be challenged for cause on the grounds that he is biased for or against a party or attorney.

In *Poet, supra* at 241, the Supreme Court held that in order for a party to establish that the trial court abused its discretion in refusing to grant a party's challenge of a juror for cause,

> there must be some clear and independent showing on the record that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable.

Here, plaintiff used a peremptory challenge to excuse the juror at issue and did not demonstrate a desire to excuse another subsequently summoned juror. Therefore, she was not prejudiced by the trial court's denial of her challenge for cause and reversal is not required.

X. Award of Costs

Finally, plaintiff argues that the trial court erred in allowing defendant costs for depositions that were not filed with the clerk. Costs are generally allowed to the prevailing party in an action. MCR 2.625(A)(1). Given our remand of this action for reinstatement of plaintiff's

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[7] The extent of plaintiff's argument is a conclusory sentence that reversal is warranted pursuant to MCR 2.511 and *Poet, supra*.

medical malpractice, the prevailing party is yet to be determined. Therefore, we vacate the award of costs as premature.[8]

XI. Conclusion

In sum, we affirm the trial court's treatment of plaintiff's battery claim, but reverse the trial court's denial of plaintiff's motion to reinstate her medical malpractice claim and remand for further proceedings regarding that claim. Additionally, we vacate the trial court's award of costs.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

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[8] We note that on remand, MCL 600.2549 provides for the award of deposition costs:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

"Under the plain language of the statute, [a] trial court err[s] in taxing the costs of those depositions that have not been filed in a court clerk's office." *Elia v Hazen*, 242 Mich App 374, 381; 619 NW2d 1 (2000).