STATE OF MICHIGAN

COURT OF APPEALS

ELIZABETH KRUSHENA,

Plaintiff-Appellee,

v

ALI MESLEMANI, M.D. and A & G AESTHETICS, P.L.L.C. d/b/a/ LUMIERE MEDICAL SPA,

Defendants-Appellants.

UNPUBLISHED
September 12, 2013

No. 306366
Oakland Circuit Court
LC No. 2008-094674-NH

Before: MURPHY, C.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Defendants, Ali Meslemani, M.D. and A & G Aesthetics, P.L.L.C. d/b/a Lumiere Medical Spa, appeal as of right a judgment in favor of plaintiff Elizabeth Krushena following a jury trial. We affirm.

I. FACTUAL BACKGROUND & PROCEEDINGS

This medical malpractice case arises from a laser skin treatment, called intense pulse laser (IPL) therapy,[1] which Meslemani administered on plaintiff's face. As a result of the IPL therapy, plaintiff alleges that her face now has stripes of skin that are completely devoid of pigment. Consequently, plaintiff filed a complaint against defendants, alleging negligence, medical malpractice, a violation of the Michigan consumers protection act, fraud and misrepresentation, and breach of an express and/or implied contract.

Following the trial court's partial grant of defendants' motion for summary disposition, a jury trial ensued on the medical malpractice and Michigan consumers protection act claims. Following plaintiff's presentation of evidence, the trial court granted defendants' motion for

[1] Intense pulse light therapy is primarily used to treat the brown discoloration of sun damaged skin. The IPL projects energy from flashes of light and the energy is then preferentially absorbed by sun damaged skin pigment (which is typically darker in color). After the procedure, the dead, sun damaged cells fall off.

directed verdict on the Michigan consumers protection act claim. Ultimately, the jury returned a verdict in favor of plaintiff on the medical malpractice claim, finding that defendants were professionally negligent. The jury awarded plaintiff $117,000 for present noneconomic damages, $3,000 in present economic damages, $1,000 per year from 2011 through 2022 in future noneconomic damages, and $1,000 per year from 2011 through 2022 in future economic damages. Defendants now appeal as of right.

II. ANALYSIS

A. EXPERT WITNESS QUALIFICATION

Defendants argue that the trial court abused its discretion in allowing Dr. Michael Milan, M.D., to testify regarding the applicable standard of care because he was not a qualifying physician. "[T]his Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id*. Statutory interpretation is a question of law that is reviewed de novo. *Id*.

"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 (On Reconsideration)*, 275 Mich App 290, 294; 739 NW2d 392 (2007). "Expert testimony is required to establish the applicable standard of care and to demonstrate that the defendant breached that standard." *Id*.

MCL 600.2169, the statute dealing with the criteria and qualification of an expert witness in a medical malpractice case, provides, in the relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

Woodard, 476 Mich at 545, is the seminal case discussing the interpretation and application of MCL 600.2169. According to the *Woodard* Court, MCL 600.2169(1) requires that "the plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty." *Id*. at 560. Under MCL 600.2169(1)(a), "if a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice." *Id*. at 560-561. "[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified." *Id*. at 561. Thus, "if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery." *Id*. at 561-562.

If the defendant physician possesses a board certification in the challenged specialty, the plaintiff's expert witness must have also received the same board certification in order for the expert witness to be qualified to testify regarding the appropriate standard of care. *Woodard*, 476 Mich at 564. And, under MCL 600.2169(1)(b), "the plaintiff's expert witness must have devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at that time of the alleged malpractice, i.e., the one most relevant specialty." *Id*. at 566 (footnote omitted).

Moreover, the applicable "specialty requirement is tied to the occurrence of the alleged malpractice and not unrelated specialties that a defendant physician may hold." *Gonzalez*, 275 Mich App at 300 (citation omitted). "Essentially, one must look to the area of practice the plaintiff challenges in order to determine who has the capacity to offer an opinion regarding standard of care." *Id*. at 302. When a defendant physician is not board certified in the challenged specialty, but practices that specialty, then "the plaintiff must offer qualifying testimony from a qualified physician who has the capacity to offer an opinion regarding the standard of care in the relevant challenged area of practice." *Id*. at 303.

The trial court did not abuse its discretion in permitting Milan to testify regarding the standard of care. The challenged practice area was "[a] reasonable and prudent physician specializing in cosmetic procedures and providing IPL and/or other similar services to a customer and/or patient[.]" Thus, because Meslemani was a board certified general surgeon practicing cosmetic surgery, and the alleged malpractice involved cosmetic surgery, plaintiff was required to offer testimony from a qualified physician specializing in cosmetic surgery. The evidence clearly established that Milan, plaintiff's medical expert, was a certified plastic and reconstructive surgeon practicing only cosmetic surgery. Consequently, because Milan's specialty was the same as the challenged specialty, it was proper for him to provide standard of care testimony.

Defendants incorrectly assert that Milan was not qualified because he did not regularly complete IPL therapy procedures during the relevant time frame. As the trial court noted, the challenged specialty in this case was cosmetic surgery, thus, any argument regarding Milan's IPL therapy experience as compared to Meslemani's IPL therapy experience would go to the weight and credibility of Milan's testimony, not its admissibility. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (it is well established that the determination of the weight and credibility of evidence lies within the province of the jury). Moreover, during the relevant time frame, Milan had IPL therapy knowledge and training even though he had not yet begun completing IPL therapy procedures in his office. Because Milan was a qualifying medical expert in cosmetic surgery, the trial court properly allowed Milan's standard of care testimony.

B. EXPERT WITNESS TESTIMONY

Defendants argue that the trial court abused its discretion in allowing Linda Gulla to offer testimony that amounted to standard of care testimony because she was not a medical professional. "The determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001).

Expert testimony is admissible "[i]f 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 . . . ." MRE 702. Gulla testified that she was a master aesthetician and certified laser technician and the trial court qualified her as an expert in the operation of the Cutera IPL machine. Because Gulla was not a qualifying medical expert pursuant to MCL 600.2169, the trial court entered an order limiting Gulla's expert testimony to the operation of the Cutera IPL machine and she was not permitted to render expert testimony regarding medical judgment or standard of care. Defendants assert that, despite this order, the trial court abused its discretion when it allowed Gulla to answer several questions because her testimony touched upon medical judgment and/or standard of care.

After carefully reviewing Gulla's testimony, including the three specific portions of testimony in which defendants claim error, we conclude that defendants' argument that Gulla's answers amounted to medical judgment and/or standard of care testimony is erroneous. Rather, as evidenced by the record and with respect to the testimony challenged on appeal, defendants' counsel (and the trial court) were vigilant in ensuring that Gulla was only permitted to testify regarding her knowledge of the operation of the Cutera IPL machine, and thus, each of Gulla's answers specifically related to the operation of the machine. Additionally, when one of Gulla's answers crossed into medical judgment and/or standard of care, the trial court struck the

testimony from the record.[2] Thus, the trial court did not allow Gulla to present medical judgment and/or standard of care testimony, and consequently, it did not abuse its discretion.

C. ADMISSION OF EVIDENCE

Defendants assert that the trial court abused its discretion in admitting the Cutera IPL guidelines into evidence. "The decision to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion." *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 676; 816 NW2d 464 (2012). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id*. at 677 (quotation marks and citation omitted).

The Michigan Rules of Evidence have clearly established that relevant evidence is admissible, while irrelevant evidence is not admissible. MRE 402; *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Additionally, relevant evidence may be excluded "'if its probative value is substantially outweighed by the danger of unfair prejudice[.]'" *Wayne*, 261 Mich App at 196, quoting MRE 403.

Defendants cite to *Jilek v Stockson*, 490 Mich 961; 805 NW2d 852 (2011), claiming that internal policies, guidelines, or procedures are inadmissible in medical malpractice cases. In *Jilek*, 490 Mich at 961, the Supreme Court reversed this Court, and held, in part, that this Court erred in ignoring *Gallagher v Detroit-Macomb Hosp Ass'n*, 171 Mich App 761; 431 NW2d 90 (1988), as binding precedent. *Id*. at 961, citing *Jilek v Stockson*, 289 Mich App 291, 316-317; 796 NW2d 267 (2010) (BANDSTRA, J., dissenting). In turn, *Gallagher* provides that "an institution's internal rules and regulations do not add to its obligations to the public or establish a standard of care[.]" *Gallagher*, 171 Mich App at 764-765; see also *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002) ("Defendants are correct in their assertion that internal policies of an institution, including a hospital, cannot be used to establish a legal duty in a negligence claim.").

The trial court did not abuse its discretion when it permitted the Cutera IPL guidelines to be admitted as evidence. Despite defendants' attempts to draw an analogy between an institution's internal operating rules or policy and the Cutera IPL guidelines, the testimony clearly established that the Cutera IPL guidelines and parameters are nothing more than the manufacturer's suggestions for operation of the Cutera IPL machine. The evidence did not establish that a party's failure to adhere to the Cutera IPL guidelines would be akin to a violation of the standard of care. The Cutera IPL guidelines were relevant because they explained how the Cutera IPL machine could be operated and this evidence was more probative than prejudicial

[2] However, in their brief on appeal, defendants do not acknowledge that the trial court actually struck this latter testimony—testimony that defendants argue to this Court should have been stricken.

because Milan, Gulla, Meslemani, and Dr. Barry Austin, M.D., defendants' expert witness, all testified that the Cutera IPL guidelines did not establish the standard of care. Thus, the trial court did not abuse its discretion in admitting the Cutera IPL guidelines into evidence.

As a corollary argument, defendants assert that the trial court abused its discretion in allowing Gulla to testify regarding the parameters within the Cutera IPL guidelines. However, as discussed above, the trial court did not abuse its discretion when it admitted the Cutera IPL guidelines into evidence, and thus, Gulla's testimony regarding the manufacturer's suggestions within the Cutera IPL guidelines for the operation of the Cuter IPL machine was also proper.

Additionally, even if we were to conclude that the trial court abused its discretion, the error would be harmless. MCR 2.613(A) provides, "[a]n 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." Here, Meslemani, Austin, Gulla, and Milan all testified that the Cutera IPL guidelines did not establish the standard of care, and thus their admission, without any testimony suggesting that they established a standard of care, did not prejudice defendants. Consequently, it does not "affirmatively appear[] that failure to grant relief is inconsistent with substantial justice[.]" *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003).

D. GREAT WEIGHT OF THE EVIDENCE

Defendants contend that the jury's $12,000 future medical damages award was against the great weight of the evidence. A defendant must move for a new trial in the trial court to preserve a great weight of the evidence argument. *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990); see MCR 2.611. Defendants did not file a motion for a new trial, so this issue is unpreserved for appellate review and we review it for plain error affecting substantial rights. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006); *Heshelman*, 183 Mich App at 83.

"When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact." *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). "If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses." *Id*. at 406-407. Therefore, a new trial is not warranted when the jury's verdict is within the range of the evidence. *Means v Jowa Security Servs*, 176 Mich App 466, 477; 440 NW2d 23 (1989).

Here, there is no plain error because the evidence supports the jury's future medical damage award. Milan testified that he charged plaintiff $2,295 for the three fractional laser procedures and that while the fractional laser therapy improved plaintiff's appearance, the difference in pigmentation had not been eliminated. Additionally, plaintiff testified that she would continue to need periodic fractional laser treatment throughout her lifetime to maintain an even skin tone because she will always have white stripes of skin devoid of pigment on her face. Consequently, the jury's verdict is within the range of competent evidence and this Court must defer to the jury's judgment.

Affirmed.

Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Christopher M. Murray