

STATE OF MICHIGAN
COURT OF APPEALS

SAJA MIKHAIL,

Plaintiff-Appellee,

v

HAWASLI & ASSOCIATES SURGICAL
SPECIALISTS, PC, doing business as EASTSIDE
SURGICAL ASSOCIATES, and ABDELKADER A.
HAWASLI, M.D.,

Defendants-Appellants.

UNPUBLISHED

October 15, 2026

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No. 372401

Wayne Circuit Court

LC No. 23-009733-NH

Before: MURRAY, P.J., and BOONSTRA and RIORDAN, JJ.

PER CURIAM.

Defendants Hawasli & Associates Surgical Specialists, PC, doing business as Eastside Surgical Associates, and Dr. Abdelkader Hawasli appeal as of right the trial court’s final judgment in favor of plaintiff, Saja Mikhail. We affirm.

I. INTRODUCTION

Dr. Hawasli challenges the court’s decision to sustain an objection at trial that defense counsel mischaracterized the evidence by referring to Ms. Mikhail’s parathyroid glands as microscopic. Dr. Hawasli also argues that evidence of the cost of a medication that was not approved by the Federal Drug Administration at the time of trial should not have been admitted into evidence, and that the damages awarded to Ms. Mikhail for those costs were too speculative and contingent. Finally, while Dr. Hawasli argues that these issues independently require a new trial, he also argues that the cumulative effect of both issues should also result in this Court granting a new trial.

II. ANALYSIS

A. STANDARDS OF REVIEW

An issue is preserved for appeal when it is raised in the trial court and subsequently argued on appeal. *Hein v Hein*, 337 Mich App 109, 114; 972 NW2d 337 (2021). Dr. Hawasli raised both issues in his motion for a new trial. Therefore, these issues have been preserved.

The trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). Likewise, a decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *Shivers v Covenant Healthcare Sys*, 339 Mich App 369, 373; 983 NW2d 427 (2021). This standard of review acknowledges that "there may be more than one reasonable and principled outcome," so when a trial court's decision falls within this range of outcomes, an abuse of discretion has not occurred. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007).

B. DEFENSE COUNSEL'S QUESTION

Dr. Hawasli first argues that remarks made by the trial court deprived him of a fair trial because not only was the basis for defense counsel's hypothetical question established in the record, but the court essentially took the issue out of the case when she told the jury that defense counsel was mischaracterizing the evidence by referring to Ms. Mikhail's glands as microscopic.

Under MCR 2.611(A):

(1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:

(a) Irregularity 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.

(b) Misconduct of the jury or of the prevailing party.

* * *

(e) A verdict or decision against the great weight of the evidence or contrary to law.

* * *

(g) Error of law occurring in the proceedings, or mistake of fact by the court. [MCR 2.611(A)(1)].

An error by the trial court regarding the exclusion of evidence does not automatically warrant a new trial and it will not be granted unless the ruling is "inconsistent with substantial justice." MCR 2.613(A). A trial court is presumed fair and impartial and there is a heavy burden on any litigant who argues otherwise. *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). Moreover, a trial judge's remarks are examined in context to determine whether they were improper and prejudicial, and "where it is apparent from the record that the verdict rendered

was that of the jury and not the expressed opinion of the trial judge,” this Court will not reverse a jury verdict. *Keefer v C R Bard, Inc*, 110 Mich App 563, 577; 313 NW2d 151 (1981). If a court’s remarks place great influence on one side over the other regarding a jury issue, then a new trial may be granted. *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961).

Here, the trial court sustained the objection because Dr. Hawasli’s counsel was referring to Ms. Mikhail’s parathyroid glands as “microscopic” as if it was an established fact, when the size of Ms. Mikhail’s parathyroid glands was a disputed question for the jury. But because Dr. Alkafaji testified that Ms. Mikhail’s parathyroid glands were unable to be diagnosed with the naked eye, and that the glands were confirmed to be parathyroid glands while under a microscope, the record was not completely barren of facts to serve as the basis for the question posed by Dr. Hawasli’s counsel. *Steinberg v Ford Motor Co*, 72 Mich App 520, 530; 250 NW2d 115 (1976) (the trial court erred in refusing to allow expert opinion from plaintiff’s expert as to the cause of the brake failure when facts forming the basis of the opinion had been established in the record). The question was therefore permissible, and the trial court abused its discretion in sustaining the objection.

Any error, however, was harmless. Here, the record establishes that Dr. Hawasli’s counsel was still able to present their defense following the objection. Defense counsel asked Dr. McQuiston if it was a breach of the standard of care for a person to remove something that cannot be seen with the naked eye, to which Dr. McQuiston responded that it was not a breach. Furthermore, the jury was already aware that Ms. Mikhail’s parathyroid glands were diagnosed in the microscopic, rather than gross, section of the pathology report. The pathology report was an exhibit at trial and both Dr. Hawasli and Dr. Alkafaji testified to this information. Because Dr. Hawasli was able to present evidence regarding the size of the parathyroid glands, and his expert was able to opine on how that size impacted the standard of care, no unfair trial occurred.

Moreover, while Dr. Hawasli argues that the court effectively told the jury the defense’s theory was wrong, in the full context of the objection, and given the presumption of impartiality, *In re Susser Estate*, 254 Mich App at 237, the court was not asserting an opinion by stating that defense counsel was mischaracterizing the evidence. The court elaborated on its decision to sustain by stating that the record established that parathyroid glands exist in a range of sizes, which did not place great influence on one side over another regarding an issue left for the jury. *Young*, 364 Mich at 558. Rather, the court explicitly stated that the size of Ms. Mikhail’s parathyroid glands was a question for the jury and, therefore, not an established fact.

In light of defense counsel’s ability to present the theory that the unintentional removal of Ms. Mikhail’s parathyroid glands was not a breach of the standard of care because he could not see the glands with his naked eye, and because the court explicitly stated the size of Ms. Mikhail’s parathyroid glands was a question for the jury, there was no irregularity in the proceedings that denied Dr. Hawasli a fair trial. While there was evidence in the record establishing a sufficient ground for defense counsel’s question to Dr. McQuiston, the court’s decision to sustain the objection, given the above reasons, was a harmless error that was not inconsistent with substantial justice.

C. SPECULATIVE DAMAGES

Dr. Hawasli argues that Ms. Mikhail's claim for over \$10 million in future economic damages is barred because such damages are too contingent and speculative. Dr. Hawasli also contends that the jury was influenced by compassion in making its damages determination. This issue is preserved.

A plaintiff may recover economic damages for future medical costs. MCL 600.6305(1)(b)(i). Expert witnesses may proffer an opinion if, under the "more likely than not" standard, the expert's specialized knowledge will help the jury understand the evidence or make a factual determination, sufficient facts or data is used as the basis for the expert's testimony, the testimony is founded on reliable methods and principles, and the opinion indicates the expert applied the methods and principles to the underlying facts of the case. MRE 702.

In a tort action remote, speculative, and contingent damages are not recoverable. *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). The plaintiff has the burden of proving damages with reasonable certainty, though mathematical precision is not required to overcome speculation as long as a reasonable basis for the computation exists. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Moreover, "[q]uestions regarding what damages may be reasonably anticipated are issues better left to the trier of fact." *Health Call*, 268 Mich App at 97. If injury to some degree is established, recovery is not precluded due to a lack of precise proof. *Ensink*, 266 Mich App at 525.

Michigan courts have not directly addressed the issue of the admission of evidence of a product pending FDA approval and its impact on a damages award to a party. Thus, we rely on our general damages law. Here, while at the time of trial the injectable medication TransCon PTH (TransCon) did not have FDA approval, the approval status is insufficient to establish that the damages award was speculative and contingent.

In *Ensink*, 262 Mich App at 526-527, this Court held that summary disposition was improper on a damages issue when sufficient evidence was provided to establish that it could properly be submitted to a jury. In making this determination, the Court relied on testimony from an expert witness who stated that the plaintiff had a "better than fifty percent chance of 'some improvement' in [his] condition." *Id.* at 527. Thus, a damages determination could be made by a reasonable juror under these circumstances. *Id.*

Here, it is undisputed that Ms. Mikhail suffers from permanent hypocalcemia as a result of her hypoparathyroidism and that by the time of trial TransCon had already undergone phase three clinical trials. According to Dr. Clines's testimony, TransCon continued to be distributed within the United States despite the initial denial of its FDA application and, more likely than not, the medication would be approved by the FDA. Defense witness, Dr. Sanfield, also confirmed that TransCon continued to be available for clinical trials in the United States following the application denial. Moreover, both Dr. Clines and Dr. Sanfield testified that the denial did not relate to the effectiveness or safety of the medication, but rather to the manufacturing control strategy.

While Dr. Hawasli argues that this reason for denial mirrors that of the FDA's decision to pull NATPARA's approval,¹ Dr. Sanfield confirmed that NATPARA was pulled from distribution, even for compassionate use. Here, however, evidence showed that TransCon continued to be administered in clinical trials in the United States and was approved for an early access program in Germany. Hence, a reasonable certainty existed at the time of trial that TransCon would be approved by the FDA, and any questions regarding its viability for Ms. Mikhail's condition were properly left to the jury to address and decide. *Health Call*, 268 Mich App at 97.

In addition, a reasonable basis for computation existed for the \$80,000 to \$100,000 per year price range of TransCon. *Ensink*, 262 Mich App at 525. Dr. Clines, who previously had patients on NATPARA, testified that, more likely than not, TransCon would be priced within the same range as NATPARA, which was \$80,000 to \$100,000 per year out of pocket. Expert Life Care Planner, Darlene Caruthers, confirmed this range in her life care plan after she consulted with physicians, including Ms. Mikhail's treating physicians, and also researched governmental data hospital transparency sites. Dr. Sanfield likewise testified that TransCon may be within the same range as NATPARA. It is also important to note that no testimony was supplied by Dr. Hawasli that contradicted this evidence or provided a different price range for TransCon.

Since mathematical precision is not required to award damages, *Ensink*, 262 Mich App at 525, the price range was determined on a reasonable basis through research, historical information, and expert testimony. Moreover, the certainty requirement regarding the amount of damages is relaxed, *Health Call*, 268 Mich App at 96, because it is undisputed that Ms. Mikhail suffers from a permanent hypocalcemia due to her lack of parathyroid glands.

Dr. Hawasli argues that *Hannay v Dep't of Transp*, 497 Mich 45, 86; 860 NW2d 67 (2014), is the leading authority; however, these circumstances are distinguishable. While Ms. Mikhail had never taken the medication, Dr. Clines, her treating endocrinologist, confirmed that Ms. Mikhail would be a candidate for TransCon and that she planned to offer the drug to her as a treatment option. Conversely, in *Hannay*, 497 Mich at 87-88 there was no testimony that the hygienist program *actually planned* to admit the plaintiff into the program, meaning that the plaintiff and the individuals who testified had no final control over this condition. Moreover, Dr. Clines testified that approximately 80% of patients treated with TransCon during clinical trials were able to obtain normal levels of calcium. Dr. Clines also described Ms. Mikhail's current treatment plan as "plugging leaks," and testified that it may negatively impact her kidney function, whereas TransCon actually replicates the job of a normal parathyroid hormone.

The jury was aware of these facts, presumably found the experts to be credible and, because juries routinely assess damages with a degree of imprecision, *Ensink*, 262 Mich App at 526, the damages here are not too speculative because a reasonable basis exists for the calculation and award. This Court will not invade the jury's damages determinations where reasonable minds may differ in regard to the level of certainty when proving damages. *Severn v Sperry Corp*, 212 Mich App 406, 415-416; 538 NW2d 50 (1995).

¹ NATPARA was a similar intravenous drug used to supply a person with the proper PTH level.

For these reasons, the trial court did not abuse its discretion when it denied Dr. Hawasli's motion for a new trial because the denial was within the range of principled outcomes, and the jury was also explicitly instructed not to be influenced by sympathy. The great weight of the evidence also supports the verdict because multiple credible witnesses testified to the price range of TransCon and no evidence was provided to the contrary of this range.

D. CUMULATIVE EFFECT OF THE ERRORS

Finally, Dr. Hawasli argues that the cumulative effect of the remarks by the trial judge and the admission of TransCon at trial fundamentally deprived him of a fair trial. However, errors must result in substantial prejudice that deprived the aggrieved party of a fair trial in order for the cumulative effect of the errors to be grounds for reversal. MCR 2.613(A); *Lewis v LeGrow*, 258 Mich App 175, 200-201; 670 NW2d 675 (2003). Here, for the reasons noted, there was no substantial prejudice warranting reversal. *Lewis*, 258 Mich App at 200.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark T. Boonstra

/s/ Michael J. Riordan