STATE OF MICHIGAN

COURT OF APPEALS

SUSAN BUREK, Personal Representative of the Estate of JAMES BUREK, Deceased,

Plaintiff-Appellant-Cross-Appellee,

v

KIMBERLY BETH HART, M.D., ARTHUR FRAZIER, M.D., HARPER HOSPITAL, also known as HARPER-HUTZEL HOSPITAL, HURON VALLEY SINAI HOSPITAL, HURON VALLEY HOSPITAL, INC., and BARBARA ANN KARMANOS CANCER INSTITUTE,

Defendants-Appellees-Cross-Appellants.

UNPUBLISHED
November 5, 2009

No. 283729
Wayne Circuit Court
LC No. 04-422090-NH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the jury's verdict of no cause of action in this medical malpractice case. We affirm.

I. Overview

This is a medical malpractice case that was brought in 2004 by James Burek ("Burek") and his wife, plaintiff Susan Burek ("plaintiff"), arising out of radiation treatments provided to Burek in early 2002 after he was diagnosed with prostate cancer at age 49 in 2001. Burek died in 2006, while the case remained pending, and plaintiff, as the personal representative of her husband's estate, continued the litigation. There is no dispute between the parties that Burek suffered severe and extensive radiation burns to his prostate and surrounding organs and tissue that ultimately caused his death. There was general agreement by all of the experts that Burek's radiation burns and injuries were among the most severe and extensive that they had ever seen as radiation oncologists, which is the field of practice for defendants Dr. Hart and Dr. Frazier. Plaintiff put the blame on defendants, attributing the injuries and ultimately Burek's death to the negligence of defendants. Defendants, while acknowledging the severity of Burek's injuries, attributed the injuries to well-known complications of radiation treatment that occur without the commission of any negligence and to Burek's heightened sensitivity to radiation therapy.

The course of Burek's radiation treatments entailed use of mixed-beam radiation (neutron-beam treatments followed by photon-beam treatments), which plaintiff claimed was experimental and investigational. Neutron-radiation beams, generated by a cyclotron machine, are much more powerful than photon beams. The photon-beam radiation treatments, which consisted of 20 sessions, were performed at defendant Huron Valley Hospital, while the neutron-beam treatments, which involved 10 separate sessions performed before the photon-beam treatments were undertaken, were performed at defendant Harper Hospital, overseen by defendant Dr. Frazier. The treatments took place in early 2002. Plaintiff asserted that the various medical defendants were liable for recommending, selecting, and utilizing mixed-beam radiation therapy when the standard or traditional radiation treatment, which involved solely the use of photon beams, would have been proper and sufficient, given the nature of Burek's early-stage, localized prostate cancer. Plaintiff additionally asserted that defendants were liable for failing to obtain Burek's informed consent to the treatment, where he was not informed that the mixed-beam therapy was investigational and experimental. Finally, plaintiff asserted that defendants were liable for negligently administering the radiation relative to dosage and/or delivery. As a broad overview of the defense, defendants argued that mixed-beam radiation therapy was not investigational nor experimental but was medically accepted for purposes of treating Burek's particular cancer, that defendants secured informed consent from Burek to pursue and perform the therapy, that use of mixed-beam radiation constituted a medically proper course of treatment under the circumstances, and that there was no negligence in administering the radiation.

At the heart of this appeal is the question regarding the proper application of, and instruction on, the doctrine of res ipsa loquitur (the thing speaks for itself), which we shall refer to as RIL for the remainder of this opinion. Because, as plaintiff claims, she necessarily could not point to or prove any specific act of negligence in the administration of the radiation which caused the radiation burns, including an inability to show whether it was the neutron or photon beams, or both, that caused harm, plaintiff relied on the doctrine of RIL. Plaintiff argued that the accepted fact that Burek was severely burned by radiation gave rise to an inference of negligence pursuant to the doctrine of RIL.

Following a lengthy jury trial spanning two months, the jury found that there was no civil liability on the part of any of the defendants with respect to all of plaintiff's negligence theories.[1] A judgment of no cause of action was subsequently entered by the trial court.

On appeal, plaintiff argues that the trial court erred relative to the doctrine of RIL by limiting and restricting the jury's consideration of the doctrine when it improperly modified the standard jury instruction on RIL, by confusing the jury with the modified RIL instruction, and by granting a directed verdict in favor of defendant Huron Valley, which deprived plaintiff of fair consideration of the doctrine. Plaintiff further argues that the trial court erred in giving the jury a modified verdict form, which confused the jury with respect to plaintiff's multiple liability

[1] Defendants Huron Valley Hospital and Ann Karmanos Cancer Institute ("Karmanos") were granted a directed verdict.

theories or claims. Plaintiff additionally argues that the trial court erred in regard to evidentiary rulings, where the court excluded evidence that Burek's health insurer considered the mixed-beam radiation treatments to be experimental, although coverage was mistakenly provided, and where the court excluded impeachment evidence consisting of a policy statement by a medical society concerning the investigational nature of mixed-beam treatment in relation to treating Burek's early-stage prostate cancer. Finally, plaintiff contends that the trial court erred in allowing defendants to offer a causation defense that Burek was more sensitive to radiation than other cancer patients, where there was no scientific foundation for such a defense.

Defendant doctors cross appeal, as do the medical-entity defendants, claiming that the case should have been dismissed, where plaintiff's medical experts were not qualified to testify with respect to mixed-beam or neutron-radiation therapy, and where plaintiff could not establish breach of the standard of care and causation, given the failure to submit reliable expert testimony.

II. Challenge to the Verdict Form

Plaintiff argues that the trial court erred in using a modified verdict form that served to confuse the jury regarding plaintiff's claims and that was otherwise improper. The law on claimed instructional errors is equally applicable to alleged errors relative to the verdict form given to the jury, especially where we are considering the issue in the context of standard instructions, which include standard verdict forms. Accordingly, we will set forth the relevant law on jury instructions, including the applicable standard of review.

In *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), our Supreme Court addressed the standard of review with respect to claimed instructional errors in civil proceedings:

> We review claims of instructional error de novo. Jury instructions should include "all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." Instructional error warrants reversal if the error "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.'" [Citations omitted.]

Although instructional errors are, in general, reviewed de novo on appeal, the issue of whether a requested standard jury instruction is applicable and accurate is within the discretion of the trial court and thus reviewed for an abuse of discretion. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003); *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). The *Bordeaux* panel also stated that jury instructions are to be reviewed in their entirety and should not be extracted piecemeal. *Id.* at 169. Reversal is not required if, on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. *Id.*; see also *Lewis, supra* at 211.

Jury instructions are subject to MCR 2.516(D), which provides:

> (1) The Committee on Model Civil Jury Instructions appointed by the Supreme Court has the authority to adopt model civil jury instructions (M Civ JI)

> and to amend or repeal those instructions approved by the predecessor committee. . . . A model civil jury instruction does not have the force and effect of a court rule.
>
> (2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee must be given in each action in which jury instructions are given if
>
> (a) they are applicable,
>
> (b) they accurately state the applicable law, and
>
> (c) they are requested by a party.
>
> * * *
>
> (4) This subrule does not limit the power of the court to give additional instructions on applicable law not covered by the model instructions. Additional instructions when given must be patterned as nearly as practicable after the style of the model instructions, and must be concise, understandable, conversational, unslanted, and nonargumentative.

Instructional errors that arise because of a departure from MCR 2.516 do not require reversal unless they amount to an error or defect in the trial such that the failure to set aside the verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 326; 377 NW2d 713 (1985) (noting that, while a harmless-error analysis is proper, the Court "will continue to require adherence to the express language of Rule 2.516"). "A trial court may give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is understandable, concise, conversational, and nonargumentative." *Bordeaux, supra* at 169, citing *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 123; 492 NW2d 761 (1992).

Michigan Civil Jury Instruction 66.01 is a straightforward verdict form that asks whether the defendant was negligent, whether the negligence, if found, was a proximate cause of the plaintiff's injury or damages, what the damages incurred by the plaintiff, if any, amounted to in total, whether the plaintiff was negligent, whether the plaintiff's negligence, if found, was a proximate cause of the plaintiff's injury or damages, and it asks the jury to allocate the percentage of negligence attributable to the plaintiff, if any. Under M Civ JI 66.01A, which addresses personal injury actions, the questions are the same, except that there are added details as to computing damages.

The standard verdict form was applicable to the facts and theories presented in this case, it was legally accurate and consistent with law, and the parties requested use of the standard form. See MCR 2.516(D)(2). Under the court rule, the trial court should have used the standard verdict form. However, reversal is not necessary. The jury ultimately answered all of the questions necessary to encompass all of the theories alleged by plaintiff; therefore, substantial justice was not offended and plaintiff received fair and adequate consideration of the theories. Even had the jury stopped with question 3 (whether Burek was injured in one or more of the

ways claimed, taking into consideration all of plaintiff's claims and not just the informed-consent claim), the jury would have answered all of the questions necessary to render a full and complete verdict. Without injury connected to any of the liability theories, plaintiff had no case, and while the answer to question 3, standing alone, left open the possibility that the jury may have found negligence on the part of defendants, but a lack of causation (or injury), that possibility was effectively extinguished when the jury proceeded to answer questions 6, 8, and 10, finding that none of the defendants committed negligence under any of plaintiff's theories of liability. Contrary to plaintiff's argument, the verdict form did not direct the jury to consider only the informed consent liability theory, where question 3 required consideration of all of plaintiff's theories other than informed consent. And, regardless of the verdict form and the direction to stop answering questions if the answer to number 3 was "no," the jury proceeded to answer questions 6, 8, and 10. Although the court's verdict form did, to some extent, draw attention to the informed consent issue and away from the other theories of liability, there is simply no merit to plaintiff's argument that it is seriously doubtful that the jurors went beyond the first two informed consent questions. The jury addressed all of the theories of liability alleged by plaintiff. There was no prejudice to plaintiff and any error in not using the standard verdict form was harmless.

With respect to jury questions 1 and 2 and plaintiff's argument that those questions addressed whether Burek was informed of risks instead of whether he was informed of the investigational and experimental nature of the treatment, we first note that the *instruction* on informed consent spoke of informing Burek about, solely, risks or hazards; there was no mention of informing, or failing to inform, Burek of the investigational and experimental nature of the treatment. The transcript of the court's discussion with the parties about the jury instructions reveals that plaintiff's counsel affirmatively sought the informed consent instruction that was eventually given by the court. It is only logical that the instruction would parallel the language in the verdict form. Accordingly, plaintiff waived this argument, given the request for an informed consent instruction absent the language that plaintiff now contends should have been included in the verdict form relative to the informed consent questions. See *People v Carter,* 462 Mich 206, 215, 219; 612 NW2d 144 (2000) (waiver is the intentional relinquishment or abandonment of a known right and one who waives a right under a rule may not then seek appellate review of a claimed deprivation of that right, for his waiver has extinguished any error). Moreover, the reference to "risks" associated with mixed-beam radiation treatment, as used in jury questions 1 and 2, necessarily encompassed the question whether Burek was informed that the treatment was investigational and experimental, assuming that the jury even agreed that the treatment was investigational and experimental, as there was competing testimony on the subject. Relative to questions 1 and 2, plaintiff certainly argued to the jury, quite adamantly, that defendants failed to inform Burek about the alleged experimental and investigational character of the treatment, and there is nothing in the record suggesting that the jurors were not permitted to consider this argument when answering questions 1 and 2. Additionally, as argued by defendants, the issue would have been considered by the jurors when they answered the other negligence questions (6, 8, and 10), assuming that they did not consider the issue in the context of questions 1 and 2. Reversal is unwarranted on this argument.

Finally, plaintiff argues that, under MCR 2.514, the trial court was not permitted to give a combination of both special questions and general questions. MCR 2.514 provides in pertinent part:

> (A) Use of Special Verdicts; Form. The court may require the jury to return a special verdict in the form of a written finding on each issue of fact, *rather than a general verdict*. If a special verdict is required, the court shall, in advance of argument and in the absence of the jury, advise the attorneys of this fact and, on the record or in writing, settle the form of the verdict. The court may submit to the jury:
>
> (1) written questions that may be answered categorically and briefly;
>
> (2) written forms of the several special findings that might properly be made under the pleadings and evidence; or
>
> (3) the issues by another method, and require the written findings it deems most appropriate.
>
> The court shall give to the jury the necessary explanation and instruction concerning the matter submitted to enable the jury to make its findings on each issue. [Emphasis added.]

We see nothing in the language of MCR 2.514, nor in MCR 2.516, that absolutely forbids combining special and general questions or verdicts. MCR 2.514 only indicates that a court can use a special verdict form rather than a general verdict form; we do not believe that the necessary corollary is that there can be no combination. Regardless, assuming that there can be no combination of special and general verdict questions or forms, the error was non-prejudicial and harmless for the reasons stated above.

In sum, plaintiff's arguments regarding the verdict form do not support reversal of the jury's verdict.

III. Exclusion of Evidence

Plaintiff argues that the trial court erred in excluding evidence that Burek's health insurer, Blue Cross Blue Shield of Michigan (BCBSM), considered mixed-beam radiation treatment to be investigational and experimental. On the subject, plaintiff sought to introduce the testimony of Dr. Jerry Johnson of BCBSM. Plaintiff further argues that the trial court erred in precluding her from using a policy statement in a letter issued by the American Society for Therapeutic Radiation and Oncology (ASTRO) as impeachment evidence that would have shown the investigational nature of the neutron or mixed-beam treatment and the treatment's lack of medical acceptance for purposes of treating early-stage, localized prostate cancer.

We review a trial court's decision whether to admit evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). To the extent that the inquiry requires examination of the meaning of the Michigan Rules of Evidence, this Court addresses such a question in the same manner as the examination of the meaning of a court rule or a statute, which are questions of law that we review de novo. *Id.*

We agree with the arguments presented by defendants relative to the BCBSM issue. First, Dr. Johnson indicated in a letter that BCBSM considered mixed-beam and neutron-beam

therapy to be investigational and unproven and thus not covered by insurance. But there is nothing in the record indicating that this conclusion was based entirely on medical principles and science, as opposed to also taking into consideration insurance-related classification matters that might be driven more by economic, financial, and policy concerns rather than pure medical science. Indeed, a BCBSM policy document contained in the record that also touches on neutron-beam radiation and insurance coverage has a disclaimer at the bottom providing, "This policy is not intended to offer coverage or medical advice." In that same vein, no foundation is given relative to the basis upon which BCBSM determined that the treatment at issue was investigational and unproven.[2] Plaintiff could not simply introduce Dr. Johnson's testimony that BCBSM considered the treatment to be investigational without providing some foundation for that determination. Plaintiff does not point to anything in the record indicating that Dr. Johnson himself had personal knowledge as to how and why BCBSM reached the conclusion that the mixed-beam treatment was investigational, nor is there any indication in the record that Johnson opined that it was his own personal belief that the treatment was investigatory.

MRE 702 provides:

> If 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 or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The foundational questions required to be answered pursuant to MRE 702 before scientific evidence or testimony can be admitted, e.g., is the testimony based on sufficient facts and the product of reliable scientific principles, have not been answered by plaintiff in relation to any testimony by Dr. Johnson on BCBSM's policy position regarding medical issues. Furthermore, there is no indication that Dr. Johnson himself is qualified under MRE 702 to render an opinion on whether neutron or mixed-beam radiation is investigational or experimental.

Moreover, we agree with defendants' assessment that any testimony by Dr. Johnson on the issue of whether the treatment was investigational and experimental implicates MCL 600.2169. MCL 600.2169 provides in pertinent 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:

---

[2] Dr. Johnson's letter indicates that BCBSM's position is consistent with ASTRO's position; however, the letter does not provide that BCBSM based its coverage determination on ASTRO's position. Moreover, hearsay concerns arise if Dr. Johnson were to rely on ASTRO's position.

> (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. [Emphasis added.]

As explained by our Supreme Court in *Woodard v Custer*, 476 Mich 545, 558 n 4; 719 NW2d 842 (2006), "MCL 600.2169(1) . . . applies to expert testimony on the appropriate standard of practice or care[.]" "The phrase 'standard of practice or care' is a term of art in the malpractice context, and the unique standard applicable to a particular defendant is an element of a medical malpractice claim that must be alleged and proven." *Roberts v Mecosta Co*, 470 Mich 679, 692 n 8; 684 NW2d 711 (2004). The standard of care in negligence cases "always requires reasonable conduct." *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004).

As reflected in M Civ JI 30.02, on which the jury was instructed, negligence may consist of the failure by a doctor to reasonably inform his or her patient of the risks or hazards of a particular medical procedure. Testimony that a procedure is experimental and investigational can support a conclusion that the treating doctor had an obligation to inform the patient of the experimental and investigational character of the procedure, as providing the information would constitute reasonable conduct. Stated otherwise, such testimony speaks to the standard of care or practice with respect to the informed consent claim; it goes to the heart of, and is inseparable from, the standard of care. Such testimony would bear on the standard-of-care question whether a reasonable radiation oncologist would have performed the mixed-beam therapy under the circumstances. There is, however, no proof nor claim that Dr. Johnson practices the same medical specialty as the defendant doctors as required by MCL 600.2169(1)(a).

With regard to the use of Dr. Johnson's testimony for purposes of rebuttal, plaintiff makes no claim, and there is no record evidence, that defendants argued at trial to the jury that the treatment was medically accepted given that BCBSM paid for the treatments. Therefore, the trial court's ruling did not permit introduction of the evidence at issue for purposes of rebuttal. Plaintiff insists that defendants, in forcing plaintiff to submit proofs on medical costs, which necessarily included BCBSM documentation, effectively secured the presentation of insurance coverage evidence to the jurors, who likely inferred that BCBSM found the treatment to be accepted within the medical community. Thus, it is argued, not only did the trial court's order deprive plaintiff of evidence supporting her position, it bolstered defendants' case. Plaintiff appears to be arguing that the excluded testimony should have been permitted to rebut an implied argument or a speculative inference.

At the time the court ruled to exclude the evidence, the issue of proofs on damages was not part of the equation in the court's handling of the motion in limine. On review of the record, when the issue of medical-cost damages and proofs arose during the trial, plaintiff voiced concerns that, because the proofs would indicate that BCBSM was involved and paid costs, defendants might argue to the jury that such proofs showed that the treatment was accepted in the medical community. Plaintiff *did not argue* that admission of any evidence referencing BCBSM, in and of itself, created a problem or gave rise to a right to have Dr. Johnson testify; rather, plaintiff's only concern was that defendants might make the improper argument to the

jury based on the proofs. Plaintiff affirmatively expressed contentment with the trial court's reassurance that defendants could not make such an argument without opening the door to rebuttal testimony by Dr. Johnson, and defendants themselves stated that they had no intent to make the argument feared by plaintiff. The argument made by plaintiff now on appeal could be viewed as having been waived and, minimally, it was not preserved. Furthermore, it is necessarily speculative to conclude that the jury would view the evidence regarding BCBSM as establishing that BCBSM found the treatment to be medically accepted; defendants certainly did not make that argument.

Moreover, assuming that the excluded testimony should have been admitted, the error was harmless, MCR 2.613(A), where plaintiff presented testimony by experts opining that the therapy was investigational and experimental, yet plaintiff's claims still failed, and it is doubtful that Dr. Johnson's testimony would have led to the jury rendering a different verdict. In sum, reversal is unwarranted on plaintiff's argument that the trial court erred in excluding the testimony regarding BCBSM.

With respect to the ASTRO letter, we could conclude that there was no error in excluding its use for purposes of impeachment. We hold that reversal is unwarranted because the ASTRO letter did not set forth an official ASTRO position, the year of treatment was four years before the letter was drafted, the wording of the ASTRO letter is a bit ambiguous, the letter is not technically a published treatise, periodical, or pamphlet, MRE 707, the letter tends to bolster plaintiff's experts, the letter might have been considered substantively by jurors despite any limiting instruction to the contrary, and because the letter appears to arguably create some tension with MCL 600.2169. And although these grounds, some of which are arguable and more compelling than others, might not independently support exclusion of the ASTRO letter, in combination there is a danger that any probative value on impeachment is substantially outweighed by the danger of unfair prejudice, MRE 401-403.

Furthermore, assuming error, it was harmless. Plaintiff had already presented expert testimony that was directly contrary to defendants' experts on the issue of whether the treatment was experimental or investigational. Also, the information in the ASTRO letter, in a very broad sense as to a conclusive position on mixed-beam radiation by an ASTRO committee, was conveyed to the jury by testimony from plaintiff's expert, Dr. Kumar. Reversal is unwarranted.

IV. Foundation for Radiation-Sensitivity Defense

Plaintiff's next argument on appeal is that the trial court erred in allowing defendants to utilize a causation defense at trial, i.e., Burek was more sensitive to radiation than others, that was not shown to rest on a proper scientific and factual foundation.

"Whether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony are within the trial court's discretion." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002), citing *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999); see also *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). A court's ruling to exclude or admit expert testimony is therefore reviewed for an abuse of discretion. *Id.*; *Tate, supra* at 215. An abuse of discretion occurs when the decision results in an outcome that falls outside a principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). If this Court's inquiry into the admissibility of evidence

entails a preliminary question of law, such as whether the Michigan Rules of Evidence or statutory provisions preclude admissibility, or simply an issue concerning the construction of an underlying evidentiary rule or statute, this Court reviews the matter de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003); *Dobek, supra* at 93. When a court permits the admission of evidence that is inadmissible as a matter of law, an abuse of discretion is established. *Id.*

Under MRE 104(a), a trial court is not bound by the rules of evidence, except as to privilege, when resolving a preliminary question regarding the qualifications of a person to be a witness or the admissibility of evidence. MRE 104(a) applies to the admission of expert testimony under MRE 702, allowing the court to address the preconditions set forth in MRE 702 before admitting the testimony. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004).

MRE 702, set forth above, was intended to emphasize the trial court's gatekeeping role to exclude unreliable expert testimony consistent with the United States Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). See Staff Comment to 2004 Amendment of MRE 702; *Woodard, supra* at 599 n 15 (Taylor, C.J.); *Gilbert, supra* at 781. While the exercise of the gatekeeper function is within a court's discretion, the court can neither abandon this obligation nor perform the function inadequately. *Id.* at 780. "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data." *Dobek, supra* at 94.

Our Legislature has also enacted MCL 600.2955 in an apparent attempt to codify the holding in *Daubert, supra.* See *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd in part on other grounds 465 Mich 885 (2001).[3] According to the statute itself, a

---

[3] MCL 600.2955 provides in pertinent part:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.

(continued…)

trial court "shall consider all of the . . . factors" listed in MCL 600.2955(1). See *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007).

Additionally, MCL 600.2169(2) provides:

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

In a medical malpractice action, a plaintiff must prove the applicable standard of care, breach of the standard of care, and an injury proximately caused by the breach of the standard of care. *Gonzalez v St John Hosp & Medical Ctr (On Rehearing)*, 275 Mich App 290, 294; 739 NW2d 392 (2007). "Failure to prove any one of these elements is fatal." *Cox*, *supra* at 10. Expert testimony is essential to establish a causal link between the alleged malpractice and the alleged injury. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

We are going to approach our analysis on two fronts, the first addressing preservation and waiver issues based on how events transpired below, and the second looking at the substance of plaintiff's appellate arguments.

(…continued)

> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

As reflected in the lower court record, two defense attorneys raised the issue of radiation sensitivity during opening statements, suggesting that Burek was an unfortunate patient who happened to be overly sensitive, thereby explaining the extensive complications. Plaintiff did not object. Then, Dr. Kumar, plaintiff's own expert, testified on cross-examination that some patients are more sensitive to radiation, which cannot be predicted beforehand, that sensitive patients can develop severe and significant complications from radiation, that a sunburn analogy is a sound analogy, that there was no way to tell whether Burek was more or less sensitive to radiation as there was no test ever completed (this was on *redirect* examination), and that, essentially, the extent of Burek's complications were so great that they could not be blamed on radiation sensitivity if the radiation was properly delivered. We also note that Dr. Larner, another one of plaintiff's experts, testified that some patients develop complications even when radiation is properly administered. Relative to Dr. Kumar's and Dr. Larner's testimony, plaintiff did not object to the admission of any of this evidence or to defendants having broached the subject.

Next, favorable testimony by Dr. Laramore taken from an old, pretrial deposition (not the mid-trial deposition de bene esse) was read into evidence by plaintiff, which testimony indicated an absence of evidence that Burek had a unique susceptibility or hypersensitivity to radiation therapy. Thus, at this point in the trial, plaintiff had raised no objection regarding evidence on radiation sensitivity, and had herself procured testimony that there was no evidence that Burek was more sensitive to radiation than the typical patient. Next, plaintiff successfully barred the playing of that part of Dr. Laramore's deposition de bene esse in which Laramore indicated that Burek's complications arose because he was overly sensitive to radiation. Thus, at this point, the jury had still not heard any damaging sensitivity *evidence*, and the opening statements had not been objected to by plaintiff. This leads us to Dr. Forman's testimony that Burek developed complications due to radiation sensitivity. But plaintiff did not object to the rendering of this opinion, let alone object on the basis of MRE 702, MCL 600.2169(2), or MCL 600.2955(1), although she did object slightly thereafter on relevancy grounds as to Dr. Forman's discussion of a disease that had no association with Burek or the case. Then, on cross-examination, plaintiff delved into the issue of radiation sensitivity with Dr. Forman in some detail, but was unsuccessful in attempting to have Forman concede that there was no evidence that the complications were caused by a special sensitivity. Rather, Dr. Forman asserted that the supporting facts were the complications themselves, given that, in his opinion, there were no errors in the radiation dosages or in the delivery of the radiation. Finally, defendants maintained in closing arguments that radiation sensitivity caused the severe complications. Again, there was no objection to defendants' closing remarks.

Plaintiff's only objection relevant to the arguments made on appeal was raised as to Dr. Laramore's testimony by way of deposition de bene esse, and this objection was sustained. Indeed, plaintiff received the benefit of Dr. Laramore's favorable testimony on radiation sensitivity, coming from the old deposition, while avoiding the damaging part of Laramore's testimony coming from the deposition de bene esse, which was excluded. There was a complete failure to preserve any appellate challenge with respect to the opening statements, closing arguments, and Dr. Forman's testimony. Further, it can be said that plaintiff waived any argument that the topic of radiation sensitivity should not have been explored at all, where plaintiff pursued the issue on examination of Dr. Kumar and Dr. Forman, and in having Dr. Laramore's old deposition read into evidence. See *Carter*, *supra* at 215, 219.

With respect to the substance of plaintiff's appellate arguments, she asserts that there was a lack of any scientific foundation for the proposition or principle "that the internal organs of some people are more sensitive to radiation than others[.]" However, Dr. Kumar agreed that some people are more sensitive to radiation therapy than others, and he accepted the sunburn analogy. Plaintiff also used the proposition to her advantage by eliciting testimony from Dr. Kumar that there was no evidence that Burek had a sensitivity to radiation and by introducing Dr. Laramore's deposition testimony that he had no knowledge of any susceptibility or hypersensitivity to radiation on the part of Burek. Indeed, this line of questioning alone implicitly accepts the scientific proposition that some people are overly sensitive to radiation or more sensitive than others. If there was no supporting science that radiation burns can occur or be more severe in hypersensitive patients, why even ask whether there was evidence that Burek was hypersensitive. In her reply brief, after being confronted by defendants' arguments that Dr. Kumar accepted the sensitivity and sunburn-analogy propositions, plaintiff argues that there was no science behind radiation-sensitivity differences between patients such that the extent of any differences would cause or explain the severe and horrific complications suffered by Burek. Although Dr. Kumar did not believe that radiation sensitivity explained or caused the severe and extensive burns suffered by Burek, he did testify that patients exposed to radiation who were particularly sensitive could develop severe and significant complications. The record reflects a lack of any scientific dispute that some patients are more sensitive to radiation treatment than others and that radiation sensitivity can result in severe and significant complications. We cannot find, on this record, a violation of MRE 702, MCL 600.2169(2), or MCL 600.2955. Also, Dr. Forman testified that his position was based on personal experiences in using ionizing radiation in treating cancer patients and on data from Memorial Sloan-Kettering, and Dr. Kumar acknowledged supporting medical literature and seemed to also rely on personal experience in treating cancer patients. MRE 702; MCL 600.2169(2). The opinion that some cancer patients are more radiation sensitive than others was scientifically reliable and it assisted the trier of fact. MCL 600.2955.

Because of forfeiture and waiver issues, because of Dr. Kumar's and Dr. Larner's acceptance of the science on sensitivity that plaintiff now challenges, and because of the support for the doctors' opinions on radiation sensitivity from the doctors' own practical experiences and medical data and literature, we find no basis for reversal on this particular argument raised by plaintiff.

Plaintiff also argues that, assuming the scientific reliability of sensitivity differences, there was a complete lack of a factual basis for any expert to opine that Burek was more sensitive to radiation than the average patient. Again, the only testimony actually heard by the jury indicating that Burek was especially sensitive to radiation came from Dr. Forman. Contrary to plaintiff's argument, a sufficient factual basis for his conclusion was provided by Dr. Forman, where he claimed that radiation sensitivity could be surmised on the basis of the specific injuries incurred by Burek as viewed in conjunction with the evidence, according to Forman, that Burek was given proper doses of radiation that were properly delivered. Plaintiff relied on testimony to the contrary (Drs. Kumar and Laramore), which indicated that there was no evidence that Burek had any sensitivity to radiation. Plaintiff appears to simply disagree with Dr. Forman's opinion and interpretation of the facts, finding him not to be credible, but this does not support a conclusion that Dr. Forman's opinion was inadmissible. As this Court stated in *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007):

> Moreover, when determining whether a witness is qualified as an expert, the trial court should not weigh the proffered witness's credibility. Rather, a trial court's doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility. "'Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility.'" The extent of a witness's expertise is usually for the jury to decide. [Citations omitted.]

The issue raised by plaintiff, i.e., whether there was a sufficient factual basis to opine that Burek was more prone to radiation sensitivity than other patients, is answered in the affirmative given Dr. Forman's testimony and the supporting testimony of radiation therapists, dosimetrists, and treating doctors on radiation dosages and delivery, thereby making Forman's testimony admissible. And any disagreement as to Dr. Forman relying on certain facts to support his opinion concerned issues of weight and credibility, which were matters properly left to the jury for resolution. Reversal is unwarranted.[4]

V. Discussion of RIL

As indicated in our overview, plaintiff sought a jury instruction on RIL, asking the trial court to give the jurors the standard civil jury instruction, M Civ JI 30.05, which provides:

> If you find that the defendant had control over the [*body of the plaintiff / instrumentality which caused the plaintiff's injury*], and that the plaintiff's injury is of a kind which does not ordinarily occur without someone's negligence, then you may infer that the defendant was negligent.
>
> However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury.

The trial court, while agreeing to instruct the jury on RIL, modified the standard instruction, directing the jury as follows:

> *Now regarding the defendants' responsibility for monitoring Mr. Burek's movements during the neutron beam radiation.* If you find that the defendants had control over the body of the plaintiff James Burek and the instrumentality

---

[4] Plaintiff argues that she was surprised at trial by the radiation-sensitivity defense, but the record reveals that the issue of radiation sensitivity was addressed in depositions conducted before trial. Additionally, while plaintiff does not seek reversal on the basis that defendants' affidavit of meritorious defense was deficient, she does claim that it evidenced a lack of notice to her regarding a defense of radiation sensitivity. We find that plaintiff had knowledge long before trial that radiation sensitivity was or could be an issue, and we conclude that defendants' affidavit complied with MCL 600.2912e(1).

> which caused the plaintiff's injury and that the plaintiff's injury is of the kind that does not ordinarily occur without someone's negligence, then you may infer that the defendants were negligent.
>
> However, you should weigh all the evidence in this case in determining whether the defendants were negligent and whether that negligence was a proximate cause of plaintiff's injuries. [Emphasis added.]

As can be seen, the introductory sentence of the court's instruction constituted the deviation from M Civ JI 30.05, with the remainder of the instruction paralleling the standard instruction. It is the initial limiting sentence in the court's modified RIL instruction (monitoring Burek's movements and neutron radiation only) with which plaintiff takes issue, raising numerous arguments as to why the court's instruction constituted error.

The seminal Michigan case on the doctrine of RIL was issued by our Supreme Court in *Jones v Porretta*, 428 Mich 132; 405 NW2d 863 (1987), which serves as the basis for the standard instruction. See use note to M Civ JI 30.05. The *Jones* Court ruled that, in order to avail oneself of RIL, a plaintiff must show that (1) the event was of a kind that ordinarily does not occur in the absence of negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, (3) it was not due to any voluntary action or contribution on the part of the plaintiff, and (4) evidence of the true explanation of the event must have been more readily accessible to the defendant than to the plaintiff. *Jones, supra* at 150-151. In a medical malpractice case, more than an adverse or bad result is required before the RIL doctrine can be applied. *Id.* at 151-153. While an adverse result may be offered to the jury as part of the evidence of negligence, it does not, standing alone, create an issue for the jury. *Id.* at 154. "Something more is required, be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect." *Id.*

We decline to address the myriad arguments presented by plaintiff in challenging the modified RIL instruction. Although we question the correctness of giving the jury any RIL instruction, considering the existence of multiple defendants, multiple instrumentalities (photon machine and neutron/cyclotron machine), and multiple radiation therapy sessions conducted at different times and locations, we ultimately need not resolve the issue. Assuming error in not simply giving the standard RIL instruction, the error was harmless, MCR 2.613(A), and did not result in substantial injustice, *Johnson, supra* at 326. We first note the following remarks by plaintiff's counsel when the parties and the court were discussing the instructions:

> But, you know, on this res ipsa issue, again, we talked about this thing over and over again. There may be much to do about nothing. Again, the standard jury instructions covered circumstantial evidence. This [RIL] does not create the presumption of negligence. It only allows them to infer negligence, if they so desire. And they can do that anyway.

Indeed, the trial court did instruct the jury on the principle of circumstantial evidence, stating:

> Now it is not necessary that every fact be proven by a witness or an exhibit. A fact may be proven indirectly from the circumstances from which it

> usually and reasonably follows according to the common experiences and observations of mankind. This is called circumstantial evidence which you are to consider along with the other evidence in the case.

We cannot conclude that the jury, on hearing the RIL instruction, believed it to be absolutely prohibited from finding defendants negligent on plaintiff's negligent-administration-of-radiation theory, given, in part, on the fact that it was instructed on circumstantial evidence. So while the RIL instruction in itself would not have allowed the jury to infer negligence as to the administration of radiation aside from failure to control Burek's movements, the much broader circumstantial evidence instruction conceivably gave the jury the avenue to find negligence as to any and all aspects of radiation administration on the basis of circumstantial evidence.

Indeed, plaintiff's counsel aggressively argued during closing arguments that circumstantial evidence supported a finding that the radiation was negligently administered, emphasizing Dr. Kasper's testimony that the radiation struck organs and tissue outside of an acceptable margin around the prostate. Here are excerpts from the closing argument presented by plaintiff's counsel, without objection or interference from the trial court:

> [T]he delivery had to be somehow wrong because he got radiation far in excess of what was needed to treat his cancer.
>
> * * *
>
> That is also evidence that radiation should not be there if it was . . . targeted correctly.
>
> * * *
>
> It was clear that this beam was not targeted correctly.
>
> We know Mr. Burek got too much radiation. He got burned up. Was it Dr. Hart's prescribing this mixed beam therapy, was it the delivery of the beam and not aligning him correctly and making sure he didn't move or was it all of them combined together with not prescribing it in the first place.

Additionally, RIL gives rise to an inference, not a presumption. In *Gadigian v City of Taylor*, 282 Mich App 179, 186; __ NW2d __ (2009), this Court stressed that inferences do not carry an obligation to find a certain fact. And this point is made clear in the RIL instruction given to the jury here ("you *may* infer" – "However, you should weigh all of the evidence").

As opposed to the situation in *Jones, supra*, our jury, while instructed that a "doctor is not liable merely because of an adverse result," was not instructed that a doctor is not a guarantor of results. Moreover, the Court did not reverse in one of the consolidated cases in *Jones* because the trial court coupled the "no guarantor of results" language with "amplifying language properly defining in affirmative terms the duty of care of a physician to a patient." *Jones, supra* at 136. On review of the instructions here, the court also carefully spelled out the duty of care owed by the doctors to Burek, and the "not liable merely because of an adverse result" language was

directly followed by the instruction, "However, a doctor is liable if the doctor is negligent and that negligence was a proximate cause of an adverse result." Also, in this case, plaintiff presented multiple liability theories, all of which were soundly rejected by the jury. It defies logic to conclude that, had the prefatory sentence to the RIL instruction not been given, the jury would have rendered a verdict in favor of plaintiff. Viewed in their entirety, the instructions, on balance, fairly and adequately presented plaintiff's theories and case to the jury.

Taking into consideration all of the circumstances presented, and assuming error with the modified RIL instruction, we cannot conclude that plaintiff was prejudiced by the presumed error.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering