STATE OF MICHIGAN

COURT OF APPEALS

KAREN SWANSON, Plaintiff-Appellee,	UNPUBLISHED March 22, 2011
v	No. 295236 Genesee Circuit Court LC No. 07-087620-NH
KIMBERLY A. PUMMILL, M.D., P.C., KIMBERLY A. PUMMILL, M.D. and GRAND BLANC PLASTIC SURGERY, Defendants-Appellants.	

Before: K.F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this medical malpractice action, defendants appeal as of right a judgment for plaintiff. For the reasons set forth in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff filed a medical malpractice complaint against defendants after defendant Dr. Kimberly A. Pummill performed breast surgery on plaintiff, which consisted of "bilateral open capsulectomy[[1]] with saline implant explantation[[2]] and bilateral mastopexy.[[3]]" Plaintiff alleged that defendants were negligent in, among other respects, failing to advise plaintiff of the risks associated with the surgical procedure (informed consent), failing to select the appropriate

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[1] "Capsulectomy" is the "[r]emoval of a capsule, as around a breast implant." *Stedman's Medical Dictionary* (26th ed) (1995).

[2] "Explantation" is "[t]he act of transferring an explant." *Stedman's Medical Dictionary* (26th ed) (1995). An "explant" is "[l]iving tissue transferred from an organism to an artificial medium for culture." *Id.*

[3] "Mastopexy" is "[p]lastic surgery to affix sagging breasts in a more elevated and normal position, often with some improvement in shape." *Stedman's Medical Dictionary* (26th ed) (1995).

operative technique to obtain the best result and maintain the integrity of the blood supply to the breast tissue and nipple, and failing to timely provide appropriate post-operative follow up care and intervention to diagnose and treat problems and complications to minimize the injury and damage to plaintiff's breasts. Plaintiff further alleged that defendants' negligence and malpractice caused plaintiff's injuries, including "[t]he development of nipple necrosis and infection, resulting in the loss of her nipple, which required extensive surgical procedures including numerous debridements, a mastectomy [of her right breast] and reconstruction, as well as the need for further revisions and corrective surgery, including tattoing."

The issues in this case concern the trial court's rulings on two pre-trial motions filed by defendants and one pre-trial motion filed by plaintiff, as well as the trial court's denial of defendants' motion for new trial based on these rulings. The first of these motions is plaintiff's motion to preclude evidence regarding a prior medical malpractice lawsuit she filed against another physician who removed a cyst from her wrist. Apparently, plaintiff had testified in a deposition that the physician defendant in that case failed to inform her of the risks and complications associated with the surgical procedure to remove the cyst. Plaintiff asserted that such evidence was not relevant and was unfairly prejudicial, while defendants argued that they should be permitted to cross-examine plaintiff regarding the former lawsuit if it was probative of her truthfulness or untruthfulness. The trial court granted plaintiff's motion, stating:

> The facts are not exactly similar. The allegation is similar, the allegation being that she didn't have proper— . . . —informed consent, but the facts are a wrist versus a nipple and a last minute change in process as she's going under anesthesia versus a planned informed consent done in a way that she had time to think about it. I just don't see the similarities, and so we're not going to talk about the prior surgery.

The second ruling at issue concerns defendants' pre-trial motion in limine to preclude testimony related to the number of prior medical malpractice lawsuits that had been filed against defense expert Dr. Lauran Bryan. Dr. Bryan testified in her deposition that "[a]bout five" medical malpractice lawsuits had been filed against her. Plaintiff investigated and discovered that Dr. Bryan was a defendant in more than five medical malpractice cases. On the record at the hearing on the motion, defense counsel admitted that Dr. Bryan actually had eight, not five, medical malpractice lawsuits brought against her, stating: "the issue in this case is that Dr. Bryan at her deposition had testified that she remembered five lawsuits. In fact, there are eight." The trial court denied defendants' motion, stating, "[i]f a witness lied, the subject of the lie should be talked about." The trial court essentially ruled that plaintiff could cross-examine Dr. Bryan regarding the number of prior medical malpractice lawsuits, but did not rule that evidence of the prior medical malpractice lawsuits was admissible: "I don't know that that means that you need to go on and detail every lawsuit, but you can ask the witness if, in fact . . . [i]f, in fact, she told an untruth during that deposition, you can get into that."

The final ruling at issue in this case concerns defendants' motion to strike the presentation of the deposition testimony of Dr. Mohammad Ali, one of plaintiff's treating physicians, to the jury. During the deposition, plaintiff elicited testimony that defendant Dr. Pummill violated the standard of care. According to defendants, plaintiff had not listed Dr. Ali as an expert witness, and defendants did not have sufficient notice of the deposition and were

"ambushed" and "had to cross-examine this doctor without sufficient preparation." Plaintiff asserted that Dr. Ali was a treating physician, not a retained expert, and that Dr. Ali was listed on both plaintiff's and defendants' witness lists. The trial court ruled that Dr. Ali could testify regarding his treatment of plaintiff, but could not give standard of care testimony:

> The Court does not think that there was any kind of devious activity or ambush going on in this case. I understand the custom and the practice. We try to settle these cases because these witnesses are so expensive, and we try to avoid their depositions until we truly know we have to go to trial; and I understand [plaintiff's counsel] met with the doctor March 13, today is March 23 (sic), so he probably had an idea of what the man was going to say at the deposition on March 20. The problem is, is defense did not. And I don't think that plaintiff calculated that somehow this information could be misused, it's just something that was learned at the last minute.
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> But the problem is . . . that when it's learned at the last minute, it's unfair to the defense to not be able to prepare for it. They learned on the 20th and today's the 23rd. And he was not formally listed as an expert witness in the standard of practice of this particular patient's needs, and I'm going to have to tell you that you cannot offer standard [of] care testimony, expert testimony from that witness, because the information was so lately learned. You can offer him for treatment, you can offer him for those purposes, but as far as his commenting on Dr. Pummill's practice, we learned that information too late and it's just not fair.
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> [Dr. Ali] can't criticize. He can tell us what he saw, if he saw this injury, he can tell us how he treated it, but that's it.

Shortly before trial began, plaintiff moved to withdraw her informed consent claim, and the trial court granted the motion. The case proceeded to trial on the issues of defendants' alleged negligence in failing to select the appropriate operative technique to obtain the best result and maintain the integrity of the blood supply to the breast tissue and nipple and in failing to timely provide appropriate post-operative follow up care and intervention. The jury returned a verdict in favor of plaintiff, and on April 3, 2009, the trial court entered a judgment for plaintiff in the amount of $322,757.67, plus costs and interest.

Following the verdict, defendants moved for new trial, arguing that the trial court erred in refusing to exclude any reference to the number of times that Dr. Bryan had been sued for medical malpractice, in prohibiting defendants from impeaching plaintiff with her deposition testimony in the prior medical malpractice case against another physician, and in allowing plaintiff's treating physician, Dr. Ali, to offer testimony that criticized defendant Dr. Pummill in spite of the trial court's ruling that Dr. Ali could not provide standard of care testimony. According to defendants, the trial court's rulings on these motions affected their substantial rights and resulted in an unfair trial. For reasons that will be explained more fully below, the trial court denied defendants' motion for new trial.

II. STANDARDS OF REVIEW

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). The abuse of discretion standard recognizes "that there will be circumstances in which . . . there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside this principled range of outcomes." *Id.* To the extent that the trial court's decision involves a preliminary question of law, such as whether the evidence was admissible under the rules of evidence, this Court reviews questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

This Court also reviews for an abuse of discretion a trial court's decision regarding a motion for new trial. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An error in the admission or exclusion of evidence is a ground for granting a new trial if a failure to do so would be inconsistent with substantial justice. *Merrow v Bofferding*, 458 Mich 617; 581 NW2d 696 (1998); MCR 2.613(A).

III. ANALYSIS

A. EVIDENCE REGARDING THE NUMBER OF PRIOR MEDICAL MALPRACTICE CASES AGAINST DR. LAURAN BRYAN

Defendants argue that the trial court abused its discretion in denying their motion to exclude evidence regarding the number of times that defense expert Dr. Lauran Bryan had been a defendant in other medical malpractice lawsuits and in denying their motion for new trial on the same basis.

As explained above, Dr. Bryan testified at her deposition that "[a]bout five" medical malpractice lawsuits had been filed against her and that three of these lawsuits involved breast surgery. The trial court ruled that plaintiff could cross-examine Dr. Bryan regarding the number of prior medical malpractice lawsuits that had been filed against her, but did not rule that evidence of the prior medical malpractice lawsuits was admissible. At trial, defendants did not call Dr. Bryan as a witness, even though the trial court's ruling did not prevent them from doing so.

After the jury returned its verdict in favor of plaintiff, defendants moved for new trial, in part, based on the trial court's ruling regarding Dr. Bryan. The trial court denied defendants' motion on this basis, stating:

> The Defendants argued that evidence that Dr. Lauran Bryan was previously sued does not constitute any relevant evidence of a pattern of negligence or breach of the standards of care in this case and should be excluded. Defendants relied on the case of *Wischmeyer v. Schanz*, 449 Mich. 469 (1995) for the holding that an expert being named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608. However, the holding is narrower than the Defendants claim. The Court held:

> While prior failed back surgeries are relevant to the competency of an expert witness whose expert opinion regarding defendant's failure to perform the appropriate type of surgery at the correct level is premised on the number and variety of back surgeries the expert has performed, the mere fact that an expert may have been named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge.
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> In other words, *Wischmeyer* narrowly excluded the "mere fact" that an expert may have been named in "*an* unrelated medical malpractice action." However, the case did allow relevant failed surgeries to show the competency of an expert witness. The case did not address situations where the expert witness was named in numerous medical malpractice actions. And lastly, the case did not address a situation where an expert witness may have lied about the number of times he or she had been sued for medical malpractice. Accordingly, this Court did not find *Wischmeyer* to be analogous or controlling in this case.
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> In our case there was a dispute as to exactly how many times Dr. Bryan had been sued for medical malpractice. At her deposition Dr. Bryan testified that she had been sued "about five" times. The Plaintiff wanted to impeach Dr. Bryan at trial because the number of times she had been sued for medical malpractice might have been as high as ten. Defendants argue that the admission of evidence as to "whether she was lying about the number of cases is not supported by law." Defendants' argument is essentially that, even if an expert witness lies about how many times he or she was sued for malpractice, such evidence can never be admitted at trial.
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> To that this Court disagreed and disagrees. The portion of *Wischmeyer* the Defendants rely upon in support of their position merely states that a trial judge is "charged with overseeing attacks on an expert's credibility and insuring that questions . . . are not unduly limited or improvidently extended." The Court in *Wischmeyer* went on to say that, "The trial judge must also be alert to questions which harass, intimidates or belittle a witness." This Court cannot see how an inquiring [sic] into whether an expert witness lied about how many times he or she was sued could be construed as harassment, intimidation, or belittlement.
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> Based on the forgoing, this Court denied the Defendants' Motion in Limine and finds no error requiring a new trial. . . .

In denying defendants' motion for new trial, the trial court also ruled that defendants, by electing not to call Dr. Bryan to testify, were harboring error as an appellate parachute, observing that defendants

> decided not to call Dr. Lauran Bryan to testify at trial based upon a ruling made by this Court. The Defendants did not file a motion for reconsideration on the issue. The Defendants did not file an interlocutory appeal. Nor did the Defendants move to amend their witness list and add a new witness. Now the

> Defendants argue that they were prejudiced by their very own decision not to call Dr. Bryan.

According to defendants, the trial court's denial of their motion in limine and motion for new trial ruling violated MRE 608(b) and unfairly forced defendants to exclude Dr. Bryan as a witness at trial.

Witness credibility is always at issue and may be attacked on cross-examination. See MRE 611(c) ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. . . ."). "The scope and duration of cross-examination is in the trial court's sound discretion" and this Court "will not reverse absent a clear showing of abuse." *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995). MRE 608(b) authorizes, for the purpose of attacking or supporting the witness's credibility, inquiry into specific instances of conduct on cross-examination under the following conditions:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . .

Defendants assert that the trial court failed to determine whether Dr. Bryan's statement that she had "[a]bout five" previous medical malpractice claims against her was intentionally inaccurate, thus, reflecting on her character for truthfulness. According to defendants, a prerequisite to the admission of evidence under MRE 608(b) is the trial court's determination that the conduct is reflective on the witness' character for truthfulness. Even assuming that the trial court erred in failing to make such a determination, any error on the part of the trial court in this regard did not prevent defendants from calling Dr. Bryan as a witness at trial. Rather, defendants themselves made the decision not to call Dr. Bryan as a witness. A party may not harbor error as an appellate parachute. See *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002). Error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence. *In re Utrera*, 281 Mich App 1, 11; 761 NW2d 253 (2008).

In addition, contrary to defendants' contention on appeal, the trial court's ruling did not allow plaintiff to utilize extrinsic evidence to establish that Dr. Bryan had been untruthful. MRE 608(b) generally prohibits the use of extrinsic evidence for impeachment purposes. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). Extrinsic evidence is "[e]vidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness." Black's Law Dictionary, (9th ed), p 637. The trial court's ruling did not allow the introduction of extrinsic evidence. To the contrary, the trial court's ruling permitted plaintiff's counsel to inquire on cross-examination regarding the number of previous cases in which Dr. Bryan was a defendant in a medical malpractice case. Defendants' brief on appeal asserts that the trial court's ruling "would allow plaintiff to utilize extrinsic evidence in an attempt to establish that Dr. Bryan had been untruthful in her statement[.]" However, there is no danger that any extrinsic evidence was admitted during Dr. Bryan's testimony because defendants elected not to have Dr. Bryan testify at trial. Because defendants have not provided

the trial transcripts to this Court on appeal,[4] we are unable to determine if extrinsic evidence was admitted elsewhere during trial. To the extent that there is no record for this Court to review, we decline to consider the issue. *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000).

Defendants cite *Wischmeyer* for the proposition that an expert being named in an unrelated medical malpractice action is not probative of the expert's truthfulness under MRE 608. In *Wischmeyer*, the plaintiff's only medical expert denied on cross-examination that he had ever been a defendant in a medical malpractice suit. *Wischmeyer*, 449 Mich at 481. Counsel for the defendant cross-examined the expert regarding whether he recalled a specific medical malpractice case against him, and the expert denied recalling the lawsuit. *Id.* at 482. Our Supreme Court ruled that it was improper for defense counsel to inquire into the medical malpractice action against the expert, stating:

> While prior failed back surgeries are relevant to the competency of an expert witness whose expert opinion regarding defendant's failure to perform the appropriate type of surgery at the correct level is premised on the number and variety of back surgeries the expert has performed, *the mere fact that an expert may have been named in an unrelated medical malpractice action is not probative of his truthfulness under MRE 608 or relevant to his competency or knowledge.* [*Wischmeyer*, 449 Mich at 482 (emphasis added).]

The facts of this case are distinguishable from the facts of *Wischmeyer* because in this case, the witness may have been untruthful, whereas in *Wischmeyer* there was no evidence that the witness was untruthful. Thus, in this case it was not just the "mere fact" that Dr. Bryan was named in unrelated medical malpractice actions, but the fact that she appears to have been untruthful regarding the number of times she had been sued. Under the circumstances of this case, the trial court did not abuse its discretion in allowing plaintiff to cross-examine Dr. Bryan regarding the number of prior medical malpractice lawsuits against her.

Defendants finally argue that the trial court's improper ruling unfairly forced defendants to exclude Dr. Bryan as a witness. The trial court did not rule that Dr. Bryan could not testify at trial. The trial court ruled that because Dr. Bryan may have been untruthful in her deposition testimony regarding the number of times she had been sued for medical malpractice, plaintiff could cross-examine her regarding the number of prior medical malpractice lawsuits in which

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[4] On May 18, 2010, plaintiff filed a motion to compel defendants to secure the full trial transcript or, in the alternative, to dismiss defendants' claim of appeal. This court denied plaintiff's motion, stating: "The court orders that the motion to compel production of the complete transcript or to dismiss the appeal is DENIED, defendants-appellants having now ordered the preparation of the complete transcript as required by MCR 7.210(B)(1)." *Swanson v Pummill*, unpublished order of the Court of Appeals, entered June 23, 2010 (Docket No. 295236). With the exception of a transcript of an excerpt of the testimony of one witness at trial, this Court has not received the trial transcripts in this matter.

she had been named. For the reasons articulated above, the trial court's ruling in this regard was not improper and was not an abuse of discretion. Defendants, not the trial court, decided not to present Dr. Bryan as a witness at trial. Furthermore, defendants concede that even without Dr. Bryan's testimony, they were not left without expert testimony because there was one expert who did testify on defendants' behalf. Defendants elected not to call Dr. Bryan; they may not harbor error as an appellate parachute. *Marshall Lasser, PC*, 252 Mich App at 104.

For all the reasons articulated above, the trial court did not abuse its discretion in ruling that plaintiff could cross-examine Dr. Bryan regarding the number of prior medical malpractice suits that had been brought against her or in denying defendants' motion for new trial on this basis.

B. TESTIMONY OF DR. MOHAMMAD ALI

Defendants argue that the trial court erred in admitting portions of Dr. Ali's deposition testimony in violation of its own order prohibiting Dr. Ali from testifying regarding the standard of care and in denying their motion for new trial on this basis.

On March 20, 2009, just days before trial was scheduled to begin, plaintiff deposed Dr. Ali. During the deposition, plaintiff elicited testimony from Dr. Ali that defendant Dr. Pummill violated the standard of care. As noted above, defendants moved to preclude Dr. Ali's deposition testimony from being presented to the jury, and the trial court ruled that Dr. Ali's testimony regarding his treatment of plaintiff was admissible, but that Dr. Ali's standard of care testimony was inadmissible and that any testimony in which Dr. Ali criticized Dr. Pummill's treatment of plaintiff was admissible because Dr. Ali was deposed so close to trial that it would not be fair to defendants. After the jury returned its verdict, defendants moved for a new trial, in part, based on their contention that the trial court failed to enforce its order prohibiting Dr. Ali from giving standard of care testimony. The trial court denied the motion, ruling that its decision to allow Dr. Ali to testify as a non-expert witness was within its discretion and that:

> It should be noted that Dr. Ali was a named witness on Plaintiff's timely filed list. It is clear to this Court that the Defendants were perfectly free to depose Dr. Ali at any time in this case, but that they chose not to do so. Furthermore, it is also clear that the Plaintiff could have called Dr. Ali to testify at the time of trial whether or not he was previously deposed.
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> Defendants fail to explain how their substantial rights were materially affected by the testimony of Dr. Ali. Even if this Court were to assume for the sake of argument that Dr. Ali did in fact testify that the Defendants breached the standard of care, such testimony would only have been cumulative of Plaintiff's other expert witnesses. In other words, the Defendants fail to make any showing of how the case would have been decided differently or how it was decided in an unfair manner. Accordingly, any error relating to Dr. Ali's testimony would have been harmless.

According to defendant, the following deposition testimony of Dr. Ali, which was read to the jury, violated the trial court's order and constituted standard of care testimony:

> *Q.* [Plaintiff's Counsel] Should not. Okay. Do you have an opinion, Doctor, as to whether this technique by Doctor Pummill affected the outcome in this case? In other words, was it the cause of the ischemia and necrosis that we've talked about?
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> *A.* I believe it was.

Contrary to defendants' assertion on appeal, it does not appear the preceding testimony was presented to the jury. Prior to trial, the trial court held a hearing and ruled on the admissibility of specific portions of Dr. Ali's testimony and whether it constituted standard of care testimony. Apparently, a copy of Dr. Ali's testimony was stricken based on the parties' agreement and the trial court's rulings on the record, and the portions of the transcript that were not stricken were either read to or submitted to the jury. Plaintiff attached to her brief on appeal the copy of Dr. Ali's testimony that was presented to the jury, and the above-quoted excerpt of Dr. Ali's testimony is clearly stricken. Because defendants have not provided this Court with the trial transcripts, we are unable to ascertain whether, in fact, the above testimony was read into the record or otherwise heard by the jury; therefore, defendants' argument in this regard is waived. *Thomas*, 239 Mich App at 649.

Defendants also argue that the admission of the following portion of Dr. Ali's deposition testimony was improper:

> *Q.* [Plaintiff's Counsel] Okay. And you want to preserve as much blood supply—
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> *A.* But more—but moreso for plastic surgeons because we arrange tissue from one part to the other. I mean if you don't have a clearcut understanding, which we call a flap surgery, which the blood supply is coming off, you can—skin and tissues can die very rapidly.

This testimony appears at page 64 of Dr. Ali's deposition transcript. On the record at the hearing before trial, the trial court specifically declined to remove the testimony on page 64 of Dr. Ali's deposition, stating: "frankly, the doctor is speaking generically and not critically there, so it stays in." The complained-of testimony is not standard of care testimony, at least in the sense that Dr. Ali explicitly testified regarding the standard of care and that defendant Dr. Pummill breached the standard of care. Moreover, it is not critical of defendant Dr. Pummill's surgical treatment of plaintiff. Rather, in his testimony, Dr. Ali was explaining the surgical procedure and the importance of preserving the blood supply to avoid the death of skin and tissue. Such testimony was not prohibited by the trial court's order.

Finally, defendants assert that the following testimony was improper and violated the trial court's order:

> *Q.* All right. Now, here's my question, Doctor. Please listen to me. Setting aside the report, can you give me a cogent reason why a reasonably

prudent plastic surgeon would cut all the way down to the pectoralis muscle in a mastopexy only where there's no reduction? Is there a reason to cut through all that breast tissue?

A. Yes. To maintain the volume and to bring it all the way into the sides, correct, it is. To add more volume, bring it more down to the central portion, rather than the side. You want to bring the whole tissue down to increase the projection.

Q. Wouldn't you be cutting off the bottom of the breast by doing it that way?

A. No. You're just cutting off here, not the bottom. Bottom part is fine. You can leave this as it is. So if you were to do this—

Q. Wouldn't you be—okay.

A. So this is the pedicle that has been designed, this is the breast tissue that is left. Now, the question is what to do with the rest of it. How are you going to bring it around to close it and that depends how much—thick you want to leave the tissue to give the projection, to close the skin. Now, you just cannot lift skin alone. That doesn't work. Skin will slough off. What you want is to maintain some tissue. Now, how much tissue you want to take off is a clinical judgment, you want to go full thickness, you want to go a centimeter, two centimeters, that's a clinical judgment that the—

Q. You've never heard of a skin-only mastopexy?

A. There is a skin-only mastopexy, correct, but it does not mean just skin alone. There's always some tissue attached to it.

Q. Okay. Doctor—

A. At least a centimeter of skin is preserved.

According to defendants, this testimony was irrelevant and was offered to confuse the issues and cast an improper cloud over defendant Dr. Pummill. The complained-of testimony explained the mastopexy procedure and why surgeons do certain things in performing the procedure. One of the surgical procedures that plaintiff alleged Dr. Pummill negligently performed was mastopexy, so Dr. Ali's testimony regarding this procedure was, at the very least, relevant inasmuch as it explained the surgical procedure to the jury. MRE 401. Furthermore, the testimony was not unfairly prejudicial under MRE 403. Evidence is unfairly prejudicial under MRE 403 if there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v* Schaw, 288 Mich App 231, 237; 791 NW2d 743

(2010). In this case, the evidence was arguably not tremendously probative, but it was more than marginally probative. Moreover, the trial court noted that Dr. Ali's testimony was cumulative to other standard of care testimony offered by plaintiff.[5] Thus, there is little danger that Dr. Ali's testimony was given undue or preemptive weight by the jury. Moreover, Dr. Ali's testimony was not critical of defendant Dr. Pummill, and to the extent that it could be considered standard of care testimony, the fact that it was cumulative to other standard of care testimony offered by plaintiff renders any error in the admission of the testimony harmless.

In sum, the complained-of testimony did not violate the trial court's order prohibiting the admission of standard of care testimony or testimony that criticized defendant Dr. Pummill's treatment of plaintiff; thus, the trial court did not abuse its discretion in admitting the testimony from Dr. Ali's deposition. Furthermore, the trial court did not abuse its discretion in denying defendants' motion for new trial on this basis.

C. IMPEACHMENT EVIDENCE

Defendants argue that the trial court abused its discretion in granting plaintiff's motion to preclude defendants from using her deposition testimony in a previous medical malpractice case to impeach her credibility in the present case and in denying their motion for new trial based on this ruling.

As noted above, plaintiff moved to preclude evidence regarding a prior medical malpractice lawsuit she filed against another physician who removed a cyst from her wrist. The trial court granted plaintiff's motion because the facts in the cases were dissimilar in that the previous case involved a wrist, whereas the instant case involved a nipple, and the previous case involved a last minute change, whereas the instant case involved a scenario where plaintiff had time to think about informed consent. After the jury returned its verdict, defendants moved for new trial, arguing, in part that the trial court erred in prohibiting defendants from impeaching plaintiff with prior deposition testimony in her previous medical malpractice case. The trial court denied defendant's motion for new trial on this basis, stating:

> Essentially, the Defendants are arguing that the Plaintiff *might* be lying now because she *might* have lied in the past. This Court determined and determines that any conduct of the Plaintiff in the prior lawsuit does not constitute evidence which is probative of truthfulness or untruthfulness in our case. If the Plaintiff was shown to have lied in her previous deposition, it could possibly be used in our case to show her lack of credibility. However, this Court is faced with a statement made in a prior case and a statement made in this case and this Court cannot infer any untruthfulness based upon them.

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[5] Once again, defendants' failure to provide the trial transcripts results in the waiver of this issue on appeal. *Thomas*, 239 Mich App at 649. Without the trial transcripts, we are unable to review the trial testimony to confirm if plaintiff presented other expert testimony regarding the standard of care.

> Furthermore, this Court considers that even if it is somehow evidence of untruthfulness, the fact that the Plaintiff has even a small history of medical malpractice litigation could be viewed unfavorably by the jury. In other words, it is this Court's opinion that the prior testimony clearly would be more prejudicial than probative.
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> Lastly, this Court considers Defendants' entire argument as moot when the Plaintiff dismissed her informed consent claim in this case.

The trial court did not abuse its discretion in ruling that defendants could not impeach plaintiff's credibility with her deposition testimony in her previous lawsuit. MRE 608(b) provides, in relevant part:

> **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In her deposition in the previous case, plaintiff claimed that the physician failed to inform her of the risks and complications associated with a surgical procedure to remove a cyst from her wrist. Under MRE 608(b), evidence of a specific instance of conduct is admissible only "if probative of truthfulness or untruthfulness." However, there is no evidence that plaintiff's prior deposition testimony regarding the other physician's alleged failure to advise her of the risks of the surgery was untruthful. Moreover, the conduct involved, plaintiff testifying that a physician in an unrelated medical malpractice case failed to inform her of the risks and complications associated with a surgical procedure to remove a cyst, was not related to truthfulness. Thus, the deposition was not probative of plaintiff's veracity, and the decision to exclude the evidence was not an abuse of discretion.

Moreover, evidence that plaintiff had claimed in an unrelated lawsuit that another physician had failed to warn her of the risks associated with a different medical procedure could have confused the jury, particularly since plaintiff's informed consent claim had been dismissed. Therefore, exclusion of the evidence based on MRE 403 was not an abuse of discretion.

Defendants argue that the trial court should have admitted plaintiff's prior deposition testimony under MRE 404(b)(1) because it established a scheme, plan or system material to the defense. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such crimes,

wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b)(1), other acts evidence must (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed by unfair prejudice, and (4) the trial court may, upon request, provide a limiting instruction to the jury. *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). "Where the only relevance is to character or the defendant's propensity to commit the crime, the evidence must be excluded." *Id.*

In this case, the requirements to admit the evidence under MRE 404(b)(1) are not met. Defendants assert that the evidence was offered for the purpose of establishing that it was more likely that plaintiff failed to listen than that defendant Dr. Pummill was a poor communicator. However, such a purpose is improper because the evidence is essentially being offered to establish plaintiff's character or propensity not to listen when doctors are informing her of the risks and complications of surgical procedures. To be admissible under MRE 404(b)(1), evidence must be offered to prove something other than a character to conduct or propensity theory. *People v Ortiz*, 249 Mich App 297, 304; 642 NW2d 417 (2002); *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Even assuming that evidence from plaintiff's deposition was offered for a proper purpose, however, the second and third requirements to admit evidence under MRE 404(b)(1) are not met. Whether plaintiff claimed that another doctor in an unrelated medical malpractice case failed to properly advise her of the risks and complications of wrist surgery is not relevant to whether defendant Dr. Pummill failed to so advise plaintiff in the present case. Furthermore, given that plaintiff's informed consent claim in the present case was dismissed, such evidence should have been excluded under MRE 403 because it is minimally probative and carries a high risk of confusing the jury.

In sum, for the reasons articulated above, the trial court did not abuse its discretion in precluding defendants from using plaintiff's deposition testimony in a previous medical malpractice case to impeach her credibility in the present case. Furthermore, the trial court did not abuse its discretion in denying defendants' motion for new trial on the same basis.

D. CUMULATIVE ERROR

Defendants argue that the cumulative effect of the trial court's errors in this case warrants reversal and a new trial. Even if any single error at trial would not merit reversal, the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). To merit reversal, the cumulative effect of the errors must undermine confidence in the reliability of the verdict. *Id.* "Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Id.* The trial court did not make the errors alleged by defendants. Because defendants have not established that any errors occurred, there can be no cumulative effect of errors meriting reversal. *Id.*

Affirmed. Plaintiff being the prevailing party may tax costs. MCR 7.219

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause