[Cite as *Lucsik v. Kosdrosky*, 2017-Ohio-96.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104324

JAMES L. LUCSIK, ET AL.

PLAINTIFFS-APPELLANTS

vs.

MARTIN A. KOSDROSKY, M.D., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-15-841335

BEFORE: S. Gallagher, J., Keough, A.J., and Kilbane, J.

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SEAN C. GALLAGHER, J.:

{¶1} Plaintiffs-appellants, James L. Lucsik (hereafter "Mr. Lucsik") and Ruth Lucsik (collectively "the Lucsiks" or "appellants"), appeal certain rulings of the trial court made during the trial in this case, which resulted in a verdict in favor of defendants-appellees, Martin A. Kosdrosky, M.D. ("Dr. Kosdrosky") and Southwest Urology, Inc. (collectively "appellees"). Upon review, we affirm.

{¶2} On March 3, 2015, the Lucsiks filed a complaint against Dr. Kosdrosky and his medical group, Southwest Urology, Inc., raising claims for medical negligence and loss of consortium. The complaint arose following Dr. Kosdrosky's recommended surgery in the treatment of Mr. Lucsik's intermediate-grade prostate cancer. Appellants claimed that Dr. Kosdrosky was negligent in performing the surgery and by not opting for less risky treatment options, and that as a result of the alleged negligence, Mr. Lucsik suffers from pain, permanent urinary incontinence, permanent sexual dysfunction, and permanent loss of bladder control. The parties' experts differed in their opinions as to whether Dr. Kosdrosky met the standard of care in the care and treatment of Mr. Lucsik.

{¶3} The case ultimately proceeded to a jury trial, which resulted in a defense verdict. On appeal, appellants raise four assignments of error for our review.

{¶4} Under their first assignment of error, appellants claim the trial court erred by allowing appellees to cross-examine plaintiffs' expert witness, Dr. Peron, with uncertified guidelines of the American Urological Association ("the AUA"). The Lucsiks argue that appellees improperly introduced the AUA guidelines as evidence during

cross-examination, that appellees never produced the AUA guidelines prior to trial, and that appellees improperly used the AUA guidelines to establish the standard for urologists to testify as expert witnesses. We find no merit to this argument.

{¶5} Under Evid.R. 702, a witness may testify as an expert if (1) "[t]he witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons"; (2) "[t]he witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony"; and (3) "[t]he witness' testimony is based on reliable scientific, technical, or other specialized information." A witness is not required to have either special education or certification to qualify as an expert. *State v. Baston*, 85 Ohio St.3d 418, 423, 1999-Ohio-280, 709 N.E.2d 128. It is for the trial court to determine whether an individual qualifies as an expert. *Id*. citing Evid.R. 104(A). However, expert testimony is subject to cross-examination, and the weight to be given to the testimony and the credibility of the expert are primarily for the trier of fact. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 178. As recognized by the Ohio Supreme Court, "[w]here expert testimony has been admitted, the licensure issue goes to the weight of the evidence." *State v. Awkal*, 76 Ohio St.3d 324, 332, 1996-Ohio-395, 667 N.E.2d 960.

{¶6} In this matter, appellants did not seek to introduce the AUA guidelines as evidence to establish the standard for urologists to testify as experts or to preclude Dr. Peron from testifying as an expert at trial. Indeed, the trial court permitted the video

testimony of Dr. Peron to be introduced at trial. Rather, during cross-examination, appellants questioned Dr. Peron regarding his qualifications in order to challenge the credibility of his opinion.

{¶7} During cross-examination, Dr. Peron testified that he is a member of the AUA, that he is familiar with their policies, and that he tries to follow their recommendations. Dr. Peron acknowledged that the AUA policy regarding expert testimony states that the qualifications for providing expert witness testimony should include "current certification in urology from the American Board of Urology[.]" Dr. Peron then confirmed that he is "not currently board certified in urology[.]" "Clearly, expert witnesses may be cross-examined regarding their qualifications and the jury must weigh the credibility of the expert and weigh the evidence." *Scott v. Yates*, 4th Dist. Ross No. 1917, 1993 Ohio App. LEXIS 3244, 10 (June 18, 1993); *see also State v. Rohrer*, 2015-Ohio-5333, 54 N.E.3d 654, ¶ 94 (4th Dist.), citing *State v. Hart*, 94 Ohio App.3d 665, 678, 641 N.E.2d 755 (1st Dist.1991) (recognizing that an "expert's credentials go to the weight, not the admissibility, of her testimony.")

{¶8} Appellees used a legitimate approach for challenging the credibility of expert opinion testimony. Accordingly, we overrule the first assignment of error.

{¶9} Under their second assignment of error, appellants claim the trial court erred by precluding all jury instructions regarding the issue of the "loss of a bodily organ system." This term is contained in R.C. 2323.43(A)(3)(a), which places limits on compensatory damages for noneconomic loss in civil actions based on medical claims.

These limits are higher if the plaintiff suffered "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system[,]" or "[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities." R.C. 2323.43(A)(3). Appellants assert that the instruction should have been permitted because there was uncontested expert medical testimony that Mr. Lucsik suffered the loss of a bodily organ system — that being a permanent and substantial loss of his bladder control.

{¶10} Appellees argue that loss of bladder control is not akin to loss of a bodily organ system, and that at best Mr. Lucsik suffered an impaired function of such a system. Appellees further claim that the nonprovision of a jury instruction on damages is necessarily harmless because the jury found for appellees on the issue of liability and never reached the issue of damages.

{¶11} We need not address whether the evidence was sufficient to establish a loss of a bodily organ system for purposes of R.C. 2323.43. We agree that because the jury found for the appellees on the issue of liability, the issue of damages was never reached. Therefore, the lack of a jury instruction in this regard did not affect a substantive right and would have constituted harmless error under Civ.R. 61. *See Hanson v. Ohio Edison*, 9th Dist. Summit No. 17169, 1996 Ohio App. LEXIS 36, 22 (Jan. 10, 1996) (court's refusal to instruct the jury as to punitive damages was harmless error, if error at all, where the jury returned a valid verdict in favor of the defense); *Cintron v. Nader*, 8th Dist. Cuyahoga No. 39564, 1980 Ohio App. LEXIS 12095, 24-25 (June 26, 1980) (applying

harmless error to jury instruction on damages where jury found no liability in medical malpractice action). Appellants' second assignment of error is overruled.

{¶12} Under their third assignment of error, appellants claim the trial court erred with regard to permitting the testimony of appellees' expert over objection. Appellants argue that appellees' expert, Peter Albertsen, M.D., was allowed to offer testimony that differed from the opinion set forth in his expert report. Specifically, appellants claim that Dr. Albertsen's expert report only stated that the care provided to Mr. Lucsik was "well within the standard of care" and did not express an opinion to "a reasonable degree of medical certainty or probability," whereas his videotaped trial testimony expressed that the standard of care was met "to a reasonable degree of medical probability."

{¶13} Loc.R. 21.1 requires expert opinions to be set forth in a report and provided to opposing counsel. The rule provides that the report must reflect the expert's opinions "as to each issue on which the expert will testify" and that no testimony or opinions will be permitted "on issues not raised in [the] report." Loc.R. 21.1. In this case, Dr. Albertsen's expert report expressed his opinion that the care provided to Mr. Lucsik was well within the standard of care and that he saw no evidence from his review of the records that Dr. Kosdrosky deviated from "the standard of care expected from a reasonable prudent urologist." The record reflects that Dr. Albertsen testified to the same issues raised in his report.

{¶14} Evid.R. 702 sets forth the standard for determining the admissibility of expert testimony. *State v. Jones*, 90 Ohio St.3d 403, 416, 2000-Ohio-187, 739 N.E.2d

300. Evid.R. 702(C) requires that an expert's testimony be "based on "reliable scientific, technical, or other specialized information."

{¶15} In Ohio, the admissibility of expert testimony on the issue of proximate cause is contingent on the expression of an opinion with respect to the causative event in terms of probability. *Stinson v. England*, 69 Ohio St.3d 451, 455, 1994-Ohio-35, 633 N.E.2d 532. "[A]n event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Id.* However, there is no requirement that an expert utter any magic words in terms of a reasonable degree of medical certainty or probability. *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶ 27 (1st Dist.); *Coe v. Young*, 145 Ohio App.3d 499, 504, 763 N.E.2d 652 (11th Dist.2001); *Frye v. Weber & Sons Serv. Repair*, 125 Ohio App.3d 507, 514, 708 N.E.2d 1066 (8th Dist.1998). Rather, the expert's testimony, when considered in its entirety, must be equivalent to an expression of probability. *Jeffrey v. Marietta Mem. Hosp.*, 10th Dist. Franklin Nos. 11AP-492 and 11AP-502, 2013-Ohio-1055, ¶ 48; *Frye* at 514.

{¶16} A trial court has broad discretion in the admission of evidence, and its decision to allow expert testimony will not be reversed absent an abuse of discretion. *Blair* at ¶ 28. The record reflects that Dr. Albertsen was qualified to offer an expert opinion. Further, his expert testimony offered an opinion to a reasonable degree of medical probability. We find no abuse of discretion with regard to the admission of Dr. Albertsen's testimony. Appellants' third assignment of error is overruled.

{¶17} Under the fourth assignment of error, appellants claim the trial court erred by striking certain testimony of appellees' expert witness regarding the origin of his fee payments and precluding appellants from cross-examining the expert as to who paid him for his expert testimony.

{¶18} Appellants argue that there was a failure to timely object. However, the record clearly shows that objections were raised during this line of questioning. As the trial court aptly recognized, "sometimes the reporters do not put the objections where they were or sometimes the attorneys can't get it out fast enough. But it's the same body of inappropriate questions."

{¶19} Appellants also rely upon Evid.R. 616(A), which provides that a witness may be impeached by extrinsic evidence showing bias, prejudice, interest, or any motive to misrepresent. However, appellants ignore Evid.R. 411, which provides as follows:

> *Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully*. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness.

(Emphasis added.)

{¶20} In this matter, the questions posed by appellants' counsel went directly to the existence of a malpractice insurance carrier. Although an expert's bias and

pecuniary interest can be fair subjects of cross-examination where there is a commonality of insurance interests, there is no suggestion of commonality in this case. Under these circumstances, we are unable to conclude that the trial court abused its discretion. Appellants' fourth assignment of error is overruled.

{¶21} Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
MARY EILEEN KILBANE, J., CONCUR