

STATE OF MICHIGAN
COURT OF APPEALS

MARY ANTHONY,

Plaintiff-Appellant,

v

TRINITY HEALTH-MICHIGAN, TRINITY
HEALTH-MICHIGAN doing business as ST.
JOSEPH MERCY OAKLAND, TRINITY
HEALTH-MICHIGAN doing business as ST.
JOSEPH MERCY OAKLAND-ALICE
GUSTAFSON OUTPATIENT SURGICAL
CENTER, LISA ANN BRANDT, R.N., JOYCE
LIMBO DINGLASAN, R.N., and MARY ANN
ZUCHOWSKI, R.N.,

Defendants,

and

UZMA REHMAN, D.O.,

Defendant-Appellee.

Before: LETICA, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right following a jury verdict of no cause of action against defendant Uzma Rehman, D.O. On appeal, plaintiff argues that the trial court erred by (1) denying plaintiff's motion for a new trial because the jury's verdict was against the great weight of the evidence, and (2) awarding case evaluation sanctions to Rehman because the relevant court rule was amended while this case was pending. We affirm the trial court's denial of plaintiff's motion for a new trial but reverse the award of sanctions.

UNPUBLISHED

December 14, 2023

No. 362718

Oakland Circuit Court

LC No. 2018-170602-NH

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This case arises from a December 30, 2016 wrist surgery performed by Rehman on plaintiff. Defendants Mary Ann Zuchowski, R.N., Joyce Limbo Dinglasan, R.N., and Lisa Ann Brandt, R.N., participated in the surgery. Just before the surgery, plaintiff's arm skin was cleansed with Betadine. During the surgery, plaintiff's arm rested on an absorbent drape on an arm board. The only complication during the procedure was that a small tear was noted in the radial artery, which was repaired. After the surgery, Rehman cleaned plaintiff's arm, and applied a dressing and splint. In documents completed by the nurses involved in the procedure, the nurses noted no injury to plaintiff's skin postoperation.

According to plaintiff, on January 1, 2017, she started to feel "burning or stinging" on the back of the arm that Rehman performed surgery on. The painful area was covered, so plaintiff removed the dressing and discovered a large blister on the backside of her forearm. Plaintiff claims that, starting on January 2, 2017, she made multiple calls to Rehman's office asking for an appointment to get her bandage changed. Plaintiff did not mention the blister on her arm, and was told by Rehman's staff to keep her appointment scheduled for over a week later.

On January 10, 2017, plaintiff visited the Alice Gustafson Outpatient Surgical Center, where medical staff examined and made a record of her blister. On January 12, 2017, plaintiff had her postsurgical appointment with Rehman. Rehman examined plaintiff's burn and opined that it was not from the surgery because no one observed the injury during or directly after the procedure and the blister appeared to be only a few days old, not 13 days old.

Plaintiff filed the instant action claiming in relevant part that Rehman negligently performed plaintiff's wrist surgery by, among other things, allowing the Betadine to pool on plaintiff's forearm, causing a burn. The matter went through case evaluation which resulted in an award in favor of plaintiff, but both plaintiff and Rehman rejected the award.

The case was tried over several days in March 2022. During trial, Rehman testified that Betadine was applied to the area where the blister later appeared, and that plaintiff's arm would have been resting where the blister appeared. Rehman also stated that she was aware that Betadine burns can occur during surgery if the chemical pools, though she had never encountered, read, or heard of this happening in an orthopedic surgery. She had only heard of this happening in abdominal surgeries when Betadine pools under a patient's back or buttocks.

Plaintiff's expert testified that he believed it was more likely than not that plaintiff's injury was the result of a Betadine burn that occurred during her surgery when the chemical pooled under her arm. The expert believed that the medical staff was truthful in their reports about not observing any changes in the condition of plaintiff's skin during the procedure; he explained that the burn could have been only slightly red immediately following the surgery and thus gone undetected. Plaintiff's expert conceded, however, that there were other potential causes for plaintiff's injury, such as a contact burn.

The nurse who prepped plaintiff's arm testified regarding that procedure and stated that she did not believe a Betadine burn was possible in the circumstance of plaintiff's surgery. Another nurse, who detailed the charting and examination practices of the procedure, testified that

she and the other staff present could not have missed signs of a burn after the surgery. Rehman also presented an expert who disagreed with plaintiff's theory of her injury because he had never seen a Betadine burn occur in an extremity surgery. Rehman's expert conceded, however, that Betadine burns can occur because of pooling and friction. The jury rendered a verdict of no cause of action in favor of Rehman.

Thereafter, plaintiff moved for a new trial, arguing that the jury's verdict was against the great weight of the evidence because Rehman did not present any evidence supporting an alternative theory for how and when plaintiff was burned. In response, Rehman explained that she only needed to disprove plaintiff's theory, not prove an alternative theory. According to Rehman, a new trial was not warranted because the jury simply credited Rehman's evidence rebutting plaintiff's factual theory of the case. The trial court agreed with Rehman and denied the motion for a new trial.

Meanwhile, Rehman moved for case evaluation sanctions under MCR 2.403(O). Rehman acknowledged that MCR 2.403(O) had been removed from the court rules while the case was pending, but argued that the rule should still apply because the case evaluation award was rejected before the rule was eliminated. Plaintiff responded by arguing that MCR 2.403(O) should not apply because the verdict was entered after the rule was removed, and court rules as amended apply to pending actions. After oral argument, the trial court granted case evaluation sanctions. This appeal followed.

II. NEW TRIAL

On appeal, plaintiff first challenges the trial court's denial of plaintiff's motion for a new trial. Plaintiff contends that she is entitled to a new trial because she presented evidence at trial establishing how the burn to the back of her forearm occurred, and defendant failed to put forth evidence supporting an alternative theory for how plaintiff's burn occurred. This, according to plaintiff, rendered the jury's no-cause verdict against the great weight of the evidence. We disagree.

A. STANDARD OF REVIEW

It is within the trial court's discretion to grant or deny a new trial on the ground that the verdict was against the great weight of the evidence. *Settington v Pontiac Gen Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). It follows that such a decision is reviewed for an abuse of discretion. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 302 Mich App 7, 21; 837 NW2d 686 (2013). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); *Zaremba Equip Inc*, 302 Mich App at 21.

When a party moves for a new trial because the verdict was against the great weight of the evidence, the reviewing court must consider the evidence in the light most favorable to the nonmoving party and allow all reasonable inferences therefrom. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). When the evidence presented could lead reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

B. ANALYSIS

The trial court did not abuse its discretion by denying plaintiff's motion for a new trial because the jury was presented with conflicting evidence, and there was competent evidence to support the jury's resolution of this conflict.

To establish a claim for medical malpractice, plaintiff must establish (1) the standard of care governing the defendant's conduct, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injury was both factually and legally caused by the defendant's breach of the applicable standard of care. *Craig*, 471 Mich at 86. Proving factual causation "generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* at 86-87 (quotation marks and citation omitted).

A plaintiff must present substantial evidence from which a jury could conclude that more likely than not, factual causation existed. *Weymers v Khera*, 454 Mich 639, 647-648; 563 NW2d 647 (1997). This requires setting forth "specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Skinner v Square D Co*, 445 Mich 153, 174; 516 NW2d 475 (1994). A theory of causation premised on mere conjecture or speculation is insufficient. *Id.*

The trial court here instructed the jury on the doctrine of *res ipsa loquitor*. Under that doctrine, plaintiff was entitled to an inference of negligence if she established the following conditions:

- (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
- (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
- (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005) (cleaned up).]

If plaintiff established her entitlement to this inference, then the burden of proof shifted to defendant to rebut it, but the burden of persuading the jury of her entitlement to this inference remained with plaintiff at all times. See MRE 301.

Plaintiff contends that she is entitled to a new trial because she presented evidence supporting her theory for how she was burned, and defendant did not present evidence supporting an alternative theory for how she was burned. The problem with this argument is that it seems to ignore that the burden of persuasion rested with plaintiff at all times. See MRE 301. That is, plaintiff had the burden of persuading the jury to agree with her theory about the cause of her burn.

Plaintiff's theory of her injury is that her forearm was burned during her surgery when Betadine pooled at the burn site. In support of this theory, plaintiff presented circumstantial evidence. She established that Betadine was applied to her arm before the surgery, and that, during her surgery, her arm rested on the burned area. She also presented expert testimony that pooled Betadine could cause burns. Plaintiff's expert testified that he believed it was more likely than not that plaintiff's burn occurred during her surgery as a result of Betadine pooling, although he also conceded that there were other potential causes for plaintiff's injury.

In response, Rehman submitted evidence rebutting plaintiff's theory that her burn occurred during surgery. Like plaintiff's evidence, Rehman's evidence was circumstantial. Rehman relied on (1) nurse's testimony and medical records stating that plaintiff's arm was examined for injury after the surgery and no sign of a burn was noted, and (2) Rehman's and a nurse's testimony regarding the precautions taken to eliminate the risk of the formation of an under-arm Betadine pool and irritational contact with the skin. Rehman also relied on the testimony of her expert, who opined that it was unheard of for a Betadine burn to occur during an orthopedic surgery, and that it was more plausible that the burn occurred postoperatively.

Faced with this conflicting evidence about whether plaintiff's burn occurred during her surgery, the jury reasonably concluded that it did not. See *Craig*, 471 Mich at 86 (explaining that the evidence must be viewed in the light most favorable to the nonmoving party). Neither this Court nor the trial court can substitute its judgment for that of the jury's when the evidence can lead reasonable minds to disagree. *Foreman*, 266 Mich App at 136.

On the basis of a series of unpublished opinions, plaintiff counters that the jury's verdict was against the great weight of the evidence because it was "illogical" for the jury to disregard plaintiff's theory for how she was burned, and plaintiff's theory was otherwise supported by both plaintiff's and Rehman's experts. Addressing the latter point first, both experts merely agreed that Betadine can burn, which is not the same as agreeing that a Betadine burn likely occurred during plaintiff's surgery. As already explained, the experts disagreed about the likelihood that plaintiff's burn was the result of Betadine pooling during her wrist surgery. As for whether the jury's verdict was "illogical," there was nothing illogical about the jury accepting the possibility of an alternative explanation for plaintiff's burn, particularly because there were no medical records concerning the condition of plaintiff's arm between the surgery and her first visit to a medical facility 11 days later. The only evidence concerning the condition of plaintiff's arm during that time was plaintiff's testimony, and the jury was free to disbelieve that testimony, even if it was uncontradicted. See *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008) ("The jury has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted, and we must defer to the jury on issues of witness credibility.") (Citation omitted.)

For these reasons, we conclude that the trial court did not abuse its discretion by denying plaintiff's motion for a new trial. The jury's verdict was supported by competent evidence, and the trial court properly declined to substitute its judgment for that of the jury's. See *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

III. CASE EVALUATION SANCTIONS

Next, plaintiff argues that the trial court improperly awarded case evaluation sanctions to Rehman because the court rule authorizing those sanctions was removed while this case was pending. In light of recent caselaw, we agree.

A. STANDARD OF REVIEW

A court's decision whether to grant sanctions is a question of law subject to de novo review on appeal. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The findings of fact underlying a decision to award attorney fees are reviewed for clear error. *Brown v Home-Owners Ins Co*, 298 Mich App 678, 690; 828 NW2d 400 (2012). "To the extent that this review requires the construction and interpretation of court rules, this Court applies a de novo standard of review." *Tindle, DO v Legend Health, PLLC*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket No. 360861); slip op at 2.

B. ANALYSIS

At the heart of this issue is our Supreme Court's December 2, 2021 amendment to our court rules that removed subrule MCR 2.403(O), effective January 1, 2022. See Administrative Order No. 2020-06, 508 Mich lxxix (2021). The current version of the rule does not contain a provision on sanctions. But, before it was removed, MCR 2.403(O) permitted a party to be awarded case evaluation sanctions under certain circumstances. Plaintiff does not dispute that, if MCR 2.403(O) applies, then Rehman was entitled to case evaluation sanctions.

Recently, in *RAD Constr, Inc v Davis*, ___ Mich App ___, ___; ___ NW2d ___ (2023) (Docket Nos. 361177 and 363142), this Court addressed the applicability of the now-removed MCR 2.403(O) on proceedings that began before the rule was removed and concluded after it was removed. In *RAD Constr*, the parties engaged in case evaluation in January 2021, and the plaintiff rejected the case evaluation award in February 2021. *Id.* at ___; slip op at 8. The case proceeded to a trial that concluded in April 2022, and the trial court awarded the defendants case evaluation sanctions in September 2022. *Id.* at ___; slip op at 8. On appeal, this Court vacated the award of case evaluation sanctions, reasoning that, because the sanctions were awarded after MCR 2.403(O) was removed on January 1, 2022, "the trial court had no authority to sanction" the plaintiff after that time. *Id.* at ___; slip op at 8-9. As part of its reasoning, the *RAD Constr* Court noted that there was an exception to applying amended rules to pending actions as stated in *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 337; 602 NW2d 596 (1999). The *Reitmeyer* Court had explained that an amended court rule should not be applied "where a party acts, or fails to act, in reliance on the prior rules and the party's action or inaction has consequences under the new rules that were not present under the old rules." *Id.* (quotation marks and citation omitted). But the *RAD Constr* Court found "no reason to apply" the exception stated in *Reitmeyer* to the case before it. *RAD Constr*, ___ Mich App at ___; slip op at 8.

Here, the trial court reasoned that the now-eliminated MCR 2.403(O) applied to this case because the rule was still in effect when plaintiff rejected the case evaluation award, which was the action that subjected plaintiff to sanctions under that rule. In light of *RAD Constr* (which the trial court did not have the benefit of when it rendered its decision), we conclude that this reasoning

was erroneous. While it is true that plaintiff rejected the case evaluation award while MCR 2.403(O) was still in effect, the same was also true of the plaintiff in *RAD Constr*, but the *RAD Constr* Court still concluded that, because MCR 2.403(O) was removed before the trial court awarded case evaluation sanctions, “the trial court had no authority to sanction” the plaintiff. *Id.* at ____; slip op at 8-9.

On appeal, the parties dispute whether the amended rule should apply or whether this case falls into the exception to applying amended rules to pending actions as stated in *Reitmeyer* and recognized in *RAD Constr*. Generally, this would be a factual question best left for the trial court, but because Rehman’s argument for applying the exception is so lacking, we decline to remand for further proceedings for the sake of judicial economy.

In arguing that the exception should apply, Rehman fails to explain how she acted or failed to act in reliance on the prior rule, or how her actions or inactions had consequences under the new rules that were not present under the old rule. See *Reitmeyer*, 237 Mich App at 337. Instead, Rehman only relevantly asserts that “[i]t would cause an injustice to [Rehman] under the facts of this case to allow [plaintiff] to escape sanctions given that the parties evaluated under the old rules and acted accordingly.” This is plainly insufficient to meet the standard for applying the old rule. See *id.* (explaining that “an injustice is not present merely because a different result would be reached under the new rules”) (quotation marks and citation omitted).

We therefore conclude that the trial court erred by awarding case evaluation sanctions to Rehman, and accordingly reverse the sanctions award.

Affirmed in part and reversed in part. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Anica Letica
/s/ Colleen A. O’Brien
/s/ Thomas C. Cameron