STATE OF MICHIGAN

COURT OF APPEALS

ZAKRYA HALL, a Minor, by her Next Friend, KEISHA WADE,

Plaintiff-Appellee/Cross-Appellant,

v

HENRY FORD HEALTH SYSTEM and HENRY FORD COTTAGE HOSPITAL,

Defendants-Appellants/Cross-Appellees,

and

BON SECOURS COTTAGE HEALTH SERVICE, KURT E. TECH, M.D., and EASTPOINTE RADIOLOGISTS, P.C.,

Defendants.

UNPUBLISHED
March 1, 2005

No. 248358
Wayne Circuit Court
LC No. 00-017269-NH

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendants Henry Ford Health System and Henry Ford Cottage Hospital (defendants) appeal as of right from a judgment for plaintiff Keisha Wade entered after a jury trial. Plaintiff cross-appeals, challenging several of the trial court's pretrial and post-trial rulings. We affirm.

On March 25, 1997, plaintiff took her daughter, Zakrya Hall, to the emergency room (ER) at St. John Hospital (St. John) for an ear infection and possible wheezing. Hall was diagnosed with an ear infection. The following day, plaintiff again brought Hall to the ER because of breathing problems. Hall was diagnosed with bronchiolitis, an inflammatory disease of the lungs often associated with respiratory syncytial virus (RSV). On March 27, 1997, Hall was admitted to St. John, and a chest x-ray of Hall was performed. Dr. Kurt Tech interpreted the x-ray and found no evidence of hypocalcemia (also known as nutritional rickets). Evidence later suggested that hypocalcemia had been present in the child.

Because of insurance-related issues, Hall was transferred to Henry Ford Hospital on March 28, 1997. She was treated for bronchiolitis and released on the following day. On March

31, 1997, Hall began experiencing further breathing difficulties, and plaintiff brought her to the ER at Henry Ford Cottage Hospital. Dr. Hussein Arastu evaluated Hall and diagnosed her with bronchiolitis; he determined, however, that her symptoms did not warrant admission to the hospital. The following morning – April 1, 1997 – the child again began experiencing breathing problems and suffered a respiratory arrest en route to the ER. As a result of the respiratory arrest, she suffered a severe injury to her brain and will need full-time care for the rest of her life.

Plaintiff sued St. John, as well as the instant defendants, in June 1998. She settled her claim against St. John, and defendants were dismissed without prejudice. Then, on March 26, 2000, plaintiff filed the complaint in the instant case. The complaint alleged, inter alia, that Hall suffered a respiratory arrest because of hypocalcemia and that Dr. Tech committed malpractice in failing to diagnose hypocalcemia. The complaint alleged that defendants committed malpractice by, inter alia, diagnosing Hall with bronchiolitis "when the clinical picture did not fit that diagnosis."

Despite the allegations in the complaint, plaintiff at trial did not focus exclusively on hypocalcemia but instead alleged that Hall's injury resulted from hypocalcemia *or* RSV and that defendants were liable under either scenario. In her appellate brief, plaintiff explains that she shifted her theory of liability in the case in response to the pretrial arguments made by Dr. Tech, who claimed that RSV, and not hypocalcemia, ultimately caused Hall's respiratory arrest. Plaintiff states:

> In response to . . . competing explanations for . . . Hall's arrest, plaintiff adopted a theory of this case which would not be dependent on the jury's answer to the question of whether the seizure was due to RSV or hypocalcemia. Instead, the basic thrust of the plaintiff's case as it developed during the course of this case was that it did not matter whether . . . Hall's arrest was due to RSV or hypocalcemia. What did matter under the plaintiff's theory was that . . . Hall, who had been taken to the hospital repeatedly in the six days prior to her arrest, should have been in a hospital on April 1, 1997.

The trial court allowed plaintiff, at the close of her proofs at trial, to amend the complaint in accordance with the new theory of liability.

The jury awarded plaintiff $55,574,408 in damages, with $4,400,000 of that amount representing noneconomic damages. The jury found that defendants were eighty percent at fault and that St. John and Dr. Tech[1] were each ten percent at fault. The court found that defendants were responsible for the entire amount of the verdict, but it (1) deducted the amount of plaintiff's settlements with St. John and Dr. Tech; (2) reduced the verdict to a present value of $17,949,529; and (3) reduced the verdict by $1,393,399 based on the statutory cap on noneconomic damages.

I

[1] Plaintiff settled with Dr. Tech using a "high-low" settlement agreement.

On appeal, defendants first argue that the trial court erred in failing to grant a partial directed verdict with regard to certain of plaintiff's arguments that she made during trial. We review de novo a trial court's decision with respect to a directed verdict motion. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party." *Id.* "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id.*

At trial, defendants argued that a directed verdict should have been granted with regard to plaintiff's argument that Dr. Arastu had "written discharge instructions in medicalese" on March 31, 1997. Defendants claimed that "[t]here was no evidence that that had any causal link to anything that happened to this child." The court replied:

> What kind of a directed verdict would that be?
>
> * * *
>
> . . . there are a lot of other things that Dr. Arastu did, so why would we pick that particular thing? I mean, that wouldn't be dispositive of the case. Even if the Court were to agree with you that that didn't go anywhere, it certainly isn't dispositive.

Defendants then stated:

> For documentation, there was discussion about the idea that the doctor hadn't documented well, but there was no evidence that that caused any specific harm because documentation alone doesn't have any impact. There's no causation on that.

The court replied that "[t]he documentation was only circumstantial evidence that he hadn't asked the questions and done what he was supposed to do."

Defendants then mentioned plaintiff's argument about defendants' failure to give Prednisone to Hall, stating that "[t]here's no testimony that that would alter the outcome in this case." They further mentioned that the dosages of Amoxicillin or Albuterol given to Hall on March 31, 1997, "had nothing to do with the outcome" and that "axillary temperatures . . . had no impact on the outcome."

The court replied:

> . . . these are just little things that came out in testimony. These aren't, by any means, the linchpin of the allegations against Dr. Arastu.
>
> So, I mean, they're certainly not dispositive and couldn't be the basis of a directed verdict, so it's denied.

Defendants state in their appellate brief:

> [A]lthough plaintiff elicited multiple criticisms by experts of various omissions by the Henry Ford defendants' staff, plaintiff's causation theory was that the child should have been hospitalized either because of rickets or because of severe bronchiolitis, and if the child had been hospitalized, immediate resuscitation would have been available if and when she arrested. None of plaintiff's experts testified that different medication, or different documentation, or taking the child's temperature a different way, or different discharge instructions, would have made any difference whatsoever. . . . [T]he trial court [erred in refusing] to grant a directed verdict on any one of the theories.

Defendants are not entitled to appellate relief with respect to this issue. Indeed, the cases defendants cite in support of their argument – *Zdrojewski v Murray*, 254 Mich App 50; 657 NW2d 721 (2002), *Tobin v Providence Hosp*, 244 Mich App 626; 624 NW2d 548 (2001), and *Berwald v Kasal*, 102 Mich App 269; 301 NW2d 499 (1980) – involved claims that were submitted to the jury as theories of negligence. See *Zdrojewski*, *supra* at 55 ("plaintiff presented three theories of negligence"), *Tobin*, *supra* at 645 ("it is impossible to know if the jury rejected the other theories advanced by plaintiff and rendered judgment based on this improperly submitted theory"), and *Berwald*, *supra* at 275 ("even if properly admitted at trial as independent claims of negligence, the trial court erred in failing to grant defendants' motion for a directed verdict"). Here, it is clear from the parties' arguments at trial that the arguments defendants currently cite were not submitted to the jury as theories of negligence. In fact, defendants admit in their appellate brief that "[p]laintiff's theory . . . was simply that the child required hospitalization." The trial court was not required to grant directed verdicts with regard to arguments that plaintiff did not use as theories of negligence in the case. Considering the record as a whole, it is clear that the jury awarded damages based on the theory of negligence actually submitted to the jury and not on the arguments cited currently by defendants. Accordingly, reversal is not warranted. See, generally, *Zdrojewski*, *supra* at 64-65.

It is true that in *Berwald*, *supra* at 273-271, the Court held that testimony about additional acts of negligence by a defendant cannot be used to bolster a plaintiff's primary theory of negligence and should be excluded from evidence. However, defendants do not make this argument in their main appellate brief but instead argue that *a directed verdict should have been granted* with respect to the additional claims. While they do mention this argument in a reply brief, reply briefs cannot be used to create new arguments on appeal. See MCR 7.212(G) ("[r]eply briefs must be confined to rebuttal of the arguments in the appellee's . . . brief").

II

Defendants next argue that the trial court erred

> in precluding defendants from introducing proof that [plaintiff] claimed to have given her daughter Vitamin D, which would have completely negated proximate cause with respect to plaintiff's repeatedly injected claim of malpractice in failing to inquire whether Vitamin D had been given to the child.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 124; 680 NW2d 485 (2004).

Before trial, plaintiff moved to exclude evidence regarding plaintiff's alleged failure to administer Vitamin D to Hall, apparently because it would be inadmissible evidence of comparative negligence.[2] Defendants made the following (somewhat unclear) statements in arguing that the alleged failure by plaintiff to administer Vitamin D to Hall was relevant to the case:

> The testimony is that there was a failure to diagnose her rickets. . . . Why there was a failure to diagnose her rickets would be relevant [sic] because she was a healthy, normal[] appearing child who looked well fed. No one would have anticipated that she had rickets.
>
> The reason that becomes relevant is the mom didn't give the vitamins. She was told to give the vitamins. We're not saying she's comparatively negligent, but why you wouldn't think of it [sic]. Why you wouldn't be looking at this child and thinking she had rickets has everything to do with the fact that she's malnourished, and how she got malnourished is going to be relevant.

The trial court ruled:

> Certainly any negligence that she might be responsible for is not relevant. The court will not allow that to come in. Even plaintiff though concedes that the fact that the child may not have had Vitamin-D could come in. Now, how you would get that in, I don't know, I don't know if it's in the records or what. But the fact that her mother failed in some way to do something that she should have done is not going to come in.
>
> She has no[] personal claim. If she were making an individual claim, then it might be relevant as the case law points [out], but it is not relevant in our inquiry.

During opening statements, plaintiff's attorney stated that if a baby comes into a hospital having risk factors for hypocalcemia, the health care provider should ask "[i]f your baby is breast feeding, is it getting Vitamin-D supplementation. And if it's not, get a calcium level." Defendants' attorney then stated, during opening statements, that "the evidence will show that this child was on a diet and she was getting vitamin supplements. . . . She was getting vitamins." After a bench conference precipitated by an objection from plaintiff's attorney, defense counsel stated that "[t]his little girl was getting everything, Vitamin D, the supplements." The court then accused defense counsel of being hard of hearing, and plaintiff's counsel interjected by stating that "[t]here will be no testimony in this case that this child was getting Vitamin D."

Plaintiff's attorney then, throughout the course of the trial, elicited from his expert witnesses that defendants did not inquire whether Hall had been receiving Vitamin D. Subsequently, defense counsel requested permission to introduce plaintiff's responses to requests

---

[2] Inadequate Vitamin D can be a cause of hypocalcemia.

to admit in which she allegedly admitted that she had been giving Hall Vitamin D. The court denied counsel's request, concluding that plaintiff's answers to the request to admit did not in fact establish that Hall was receiving Vitamin D *at the time of defendants' alleged negligence.*

Defendants appear to contend on appeal that the trial court misinterpreted its own pretrial ruling – the ruling to exclude evidence that plaintiff had failed to give Hall Vitamin D – by also excluding evidence that plaintiff *had in fact given Hall Vitamin D.* While it is true that the trial court initially, during opening statements, appeared to misinterpret its own pretrial ruling, its later ruling to exclude the evidence of plaintiff's having given Vitamin D to Hall was based not on its pretrial ruling but on its finding that there was no evidence that plaintiff had in fact been administering Vitamin D to Hall during the relevant period. Defendants take issue with this ruling and argue that "[t]he mother's credibility was for the jury and it should have been permitted to consider this evidence."

We disagree that an error requiring reversal occurred. In her answers to the requests to admit, plaintiff admitted that she gave Hall Vitamin D but stated that she "does not recall the exact amounts." She admitted that she administered a full bottle of a Vitamin D liquid "as per the directions on the bottle." Nowhere in her responses, however, did plaintiff admit that she administered Vitamin D to the child *around the time of defendants' alleged negligence.* In fact, the questions were centered around plaintiff's alleged instructions from Hall's pediatrician to begin administering Vitamin D on October 9, 1996, over five months before defendants' purported negligence. Plaintiff's responses to the requests to admit simply did not establish that Hall was receiving Vitamin D supplementation during the relevant period.

Under MRE 403, the trial court may exclude evidence if its probative value is substantially outweighed by the danger of confusion of the issues or misleading of the jury. Here, given the absence of evidence that Hall was receiving Vitamin D during the pertinent period, admitting plaintiff's responses to the requests to admit could have led to considerable jury confusion. We simply cannot conclude that the trial court abused its discretion in excluding the evidence. Moreover, even if the trial court *had* erred in excluding the evidence, an error in excluding evidence does not merit reversal unless it "affirmatively appears that failure to grant relief is inconsistent with substantial justice." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Again, given the absence of evidence that Hall was receiving Vitamin D during the pertinent period, it does not "affirmatively appear[]" to us that "failure to grant relief is inconsistent with substantial justice." *Id.*

III

Defendants next argue that the trial court abused its discretion in limiting evidence and arguments regarding how plaintiff had shifted her theory of liability throughout the course of her prior lawsuit and the instant lawsuit. Defendants contend that the jurors should have been informed, to a greater extent than they were, that plaintiff initially focused on hypocalcemia as the cause of Hall's respiratory arrest but then shifted her focus, at least in part, to RSV.

Defense counsel attempted to inform the jury during opening statements that plaintiff had shifted her theory of liability, but plaintiff's attorney objected, and the trial court sustained the objection, instructing defense counsel to "confine your remarks to your theory of the case on what you think the evidence will show." Plaintiff's attorney stated, in the presence of the jury,

that "we never changed our theory[.]" Later, at the close of trial, the court allowed defense counsel to read the original complaint in the instant case to the jury – the complaint that emphasized hypocalcemia as the cause of Hall's arrest and that stated that defendants were negligent in "assessing the child's condition as bronchiolitis when the clinical picture did not fit that diagnosis."

Defendants contend on appeal that they should have been allowed to reveal to the jury that plaintiff focused on hypocalcemia not just in their original complaint in the instant case but also throughout the course of their prior lawsuit against defendants and St. John. Defendants state that

> [i]t was absolutely critical for the jury to learn that plaintiff's counsel and plaintiff's experts had missed the bronchiolitis/RSV causation theory in not one but two lawsuits, and not only in an initial complaint filed "before discovery" in this action, as characterized by plaintiff's counsel, but in a second complaint filed after two years of discovery and expert consultations in the prior suit.

Defendants contend that the trial court's limitation of evidence and arguments relating to the instant case allowed plaintiff's attorney to make the following, allegedly disingenuous, statements during closing arguments:

> You know a complaint is something that starts the litigation. It's what gets you into the courtroom. And then there's a process called discovery. And [in] discovery you take depositions and discover things about a case. And in this case discovered [sic] . . . there's a lot of evidence . . . that maybe it really wasn't the hypocalcemia.
>
> * * *
>
> [Y]ou can learn from what the experts have told you. Take into account what they said. Which is what you folks need to do.
>
> You heard a lot of testimony that this is more consistent with RSV. You got to take that into account. Now, maybe it's rickets, if you think that's what it is. Fine. If you think it's a combination, that's fine.
>
> I mean I don't care why she arrested. I know she arrested because of their negligence.

We again find no basis for reversal, even assuming that the trial court erred in limiting defendants' arguments and evidence with regard to plaintiff's "shifting theories." As noted earlier, an error in excluding evidence does not merit reversal unless it "affirmatively appears that failure to grant relief is inconsistent with substantial justice." *Id*. Defendants were allowed to read to the jury the original complaint in the instant case. This complaint alleged that defendants were negligent in diagnosing RSV in the child. Defendants were also allowed to introduce certain answers to interrogatories in which plaintiff admitted that its experts would likely testify that "defendants negligently failed to diagnose and properly treat nutritional rickets[.]" In closing arguments, defense counsel informed the jurors that the interrogatory

answers were given in May 1999. He then indicated that plaintiff was still focusing on hypocalcemia a month later, when a medical witness was deposed. He then noted that plaintiff did not amend her complaint to focus on RSV as well as hypocalcemia until two weeks after the trial began and that "there's been some back-peddling on proximate cause." Defense counsel stated that plaintiff's attorney "changed his theories."

We conclude that the jury was sufficiently informed about plaintiff's "shifting theories." It does not "affirmatively appear" to us that the trial court's limiting defendants from delving further into the issue affected the outcome of the case. *People v Fett (On Remand)*, 261 Mich App 638, 639-640; 684 NW2d 369 (2004); *Lewis, supra* at 200.

IV

Defendants next argue that the trial court abused its discretion in "excluding evidence that the child's needs could be and were being met by $18,000 annually, an amount far less than the $48,000 to $125,000 claimed to be necessary by plaintiff's experts."

As noted by defendants, the jury ultimately awarded damages for Hall's medical needs in accordance with the figures set forth by plaintiff's witnesses. Defendants had sought to counter certain of the witnesses' testimony by introducing evidence allegedly showing that Hall's needs were being met by far less than the amounts proposed by the witnesses. Specifically, defendants referred to a probate court document reflecting that, at plaintiff's request, a trust had been approved that would provide $18,000 annually for the care of Hall, with the money coming from the settlement with St. John. The trial court ruled, in part, that "[w]e can talk about what her needs are. We cannot talk about whether or not her needs are currently being met. Because any judgment that comes out in this case, the previous settlement gets subtracted from it anyway."

Defendants claim that they should have been able to introduce evidence that Hall's needs were being met by $18,000 annually, and they argue, in part, that any reference to the settlement could have been kept from the jury.

No error requiring reversal occurred. Indeed, the documents to which defendants refer on appeal do not conclusively establish that Hall's needs were being adequately met by $18,000 annually. It is possible that this amount merely represented an acceptable annual amount *within the confines of the settlement monies obtained from St. John*. See, e.g., *Brewer v Payless Stations, Inc*, 412 Mich 673, 678; 316 NW2d 702 (1982), in which the Court emphasized that juries should not be informed of prior settlement amounts partly because "a small settlement could disadvantage a plaintiff if the jury perceived that amount as bearing on the total value of the claim." While defendants here did not seek to introduce evidence of the settlement amount itself, informing the jury that Hall's needs were being met by $18,000 annually would nevertheless invoke the above principle from *Brewer*. In other words, the jury, if given this information by defendants, might have concluded that $18,000 annually was a solid, final, adequate amount for Hall's needs, even though that amount was arrived at in the context of the total settlement monies received from St. John.

Moreover, the trial court did not preclude defendants from admitting evidence that Hall required far less money for her needs than the amounts proposed by plaintiff; it simply prohibited defendant from telling the jury that Hall's needs were being met by the settlement

monies. As noted by plaintiff on appeal, defendants "remained free to call at trial its own experts in this area to dispute the costs of the life care plan or dispute whether . . . Hall's condition necessitated all of the elements of that plan." In light of all the circumstances, the trial court did not abuse its discretion with respect to this issue.

V

Defendants next argue that the trial court abused its discretion in "precluding defendants from cross examining plaintiff's expert regarding the earning power of any money awarded by the jury when safely invested, as the trier of fact could safely assume it would be."

Plaintiff's expert life care planner testified that Hall would need $59,318,587 over her lifetime for future medical care expenses. In reaching this figure, he calculated inflation at a compounded rate of 4.5 percent annually. He indicated that the future damages total would be $17,227,608 after the trial court reduced the $59,318,587 to present value using the five percent annual simple interest reduction (as opposed to a compound interest reduction) required by Michigan law. See *Nation v WDE Elec Co*, 454 Mich 489, 492-499; 563 NW2d 233 (1997) (reduction of the jury's award of damages to present-day value is to be performed by the trial court using a simple, and not compound, interest reduction).

Defendants sought to demonstrate that if the $17,227,608 in present-day damages were invested safely and accrued 5.5 percent annually in realistic, *compounded* interest, plaintiff essentially would receive an unneeded windfall of $532,761,825. The trial court rejected defendant's argument, stating that the reduction to present value of future damages was a function for the court and that "we're not going to take testimony on reducing to present value. That is not a jury function, it is irrelevant." The trial court later instructed the jury to ignore any references to present value that had been made by plaintiff's witness. Defendants argue that "[t]he ruling essentially hid from the jury the practical and economic realities of an award which would, at the urging of plaintiff's expert, include inflation at a compounded rate, while being subject only to present value reduction by a simple rate."

While defendants' argument holds a certain mathematical and logical appeal, it simply is not tenable under the current state of Michigan law. The law indicates that the jury is to determine the *total* amount of the plaintiff's damages. See MCL 600.6304(1)(a). Then, the trial court is to reduce the total amount of future damages to present-day value using a five percent simple interest calculation. *Nation, supra* at 492-499. "Until the Legislature sees fit to more clearly say otherwise, continued application of simple interest is the prudent way to proceed." *Id.* at 499. It was not the jury's province to reduce their award of damages to present-day value; instead, the trial court makes this reduction, using a simple interest calculation. The trial court did not abuse its discretion in disallowing the cross-examination of plaintiff's witness that was desired by defendants.

VI

Defendants next argue that plaintiff's attorney engaged in multiple acts of prejudicial misconduct requiring reversal. As noted in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 838 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.

Moreover, "[a] lawyer's comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel's remarks were such as to deflect the jury's attention from the issues involved and had a controlling influence on the verdict." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999).

A

Defendants contend that plaintiff's attorney improperly interrupted defense counsel's opening statement several times. They first point out that the attorney interrupted defense counsel to state falsely that "I knew that I could count on this person to misquote and we never changed our theory, our theory as it's pled in the original complaint." While the attorney did act inappropriately in making this statement, given that plaintiff did in fact change her theory, we conclude that any prejudice caused by the statement was adequately cured by the trial court's allowing defendants to introduce evidence and arguments concerning plaintiff's "shifting theories," as discussed in part III of this opinion.

B

Defendants take issue with plaintiff's attorney's statement that "he's misquoting things" after defense counsel stated in his opening statement that an expert witness, Dr. Jerome Klein, would testify that Dr. Arastu had no duty to get a chest x-ray of Hall on March 31, 1997. The trial court responded to plaintiff's attorney's interruption by stating, "Okay, but I assume that Dr. Klein's deposition is going to be read into evidence. . . . The evidence is what's in the deposition or in the testimony and not what [defense counsel] says."

While defendants are correct in alleging on appeal that Dr. Klein, in his deposition, did in fact testify that Dr. Arastu "didn't have a duty" to get a chest x-ray of Hall in the ER, Dr. Klein also stated, "My understanding was that the standard of care required the child to be hospitalized . . . and with being hospitalized, the child would have had an x-ray." Moreover, Klein's deposition was eventually read to the jury. Under these circumstances, no prejudice is apparent from the comment about which defendants complain.

C

Defendants contend that plaintiff's attorney improperly interrupted defense counsel's opening statement by stating that "[t]here will be no testimony in this case that this child was getting Vitamin D." While plaintiff's counsel did arguably act improperly in making this statement (because the trial court's pretrial ruling concerning Vitamin D only precluded evidence that plaintiff had *not* administered Vitamin D to the child and did not preclude evidence that plaintiff *had* administered Vitamin D to her), we conclude that any impropriety in this regard was harmless in light of the trial court's later, correct ruling to exclude plaintiff's answers to interrogatories, as discussed in part II of this opinion. Defendants additionally contend that plaintiff's attorney erred in stating during closing arguments that Hall had been "without Vitamin D supplementation." Again, we simply cannot conclude that this statement prejudiced defendant, in light of the lack of evidence that Hall had in fact been receiving Vitamin D supplementation during the relevant timeframe.

D

Defendants take issue with plaintiff's attorney's comments in the following colloquy that occurred during defense counsel's opening statement:

> And then the examination is done. However, they do indicate that the child has been eating good [sic], she had an ear infection and the nursing notes indicate –
>
> MR. McKEEN [plaintiff's attorney]: While he's looking, Your Honor, may I see the document he was referring to a moment ago?
>
> MR. RAMAR [defense counsel]: Yeah, it's the –
>
> MR. McKEEN: No, sir, your alleged protocol. *Did you read the entire document to the jury, sir?*
>
> MR. RAMAR: I'll finish it, let me do my opening.
>
> MR. McKEEN: You'll finish it, okay, *I'll wait for you to finish it then. You can tell them what it says in the last line, sir.* [Emphasis added.]

We agree with defendants that plaintiff's attorney should not have interrupted defense counsel's opening statement in order to point out that defense counsel had not read a document in its entirety to the jury. Indeed, defense counsel was not required to read the entire document during the course of his opening statement. The slight and nonsubstantive interruption by plaintiff's attorney, however, simply did not rise to the level of prejudicial error, especially given the extremely lengthy trial proceedings that occurred after the attorneys gave their opening statements.

E

Defendants contend that plaintiff's attorney improperly interrupted defense counsel during his opening statement when defense counsel stated, "And the discharge instructions indicate if she has any problems, come on back from St. John and from Henry Ford and Cottage.

Any problems, come on back. Is that reasonable; sure that's reasonable." Plaintiff's attorney stated, "Your Honor, the instructions on 3-31 were to see a doctor in two days. There isn't any dispute about that. Your Honor, if he's going to quote me – " The court then stated that "if he is absolutely misstating the evidence, that's very serious." Defense counsel then read the following sentence from the discharge instructions: "Remember to see your physician and return to the emergency department if symptoms increase in severity, fail to resolve, or if new symptoms develop." The court added that the instructions also stated, "M.D. two day[s]."

Plaintiff's attorney should not have interrupted defense counsel with his statement about the discharge instructions, considering that defense counsel was accurately representing what the instructions said. This misconduct was harmless, however, given that defense counsel immediately read to the jury the portion of the instructions that supported his statement.

F

After the discussion about the discharge instructions, the court stated:

> Okay, look I've said it before, I'll say it again. The evidence is going to be what you see in the exhibits and what you hear from the witnesses. What [defense counsel] stated to you was something that was there, but it wasn't everything that was there. He's putting his spin on it. You will look at the evidence and that's what you will base your decision on.

Defendants contend that plaintiff's attorney improperly latched onto the term "spin" and accused defense counsel of "spinning" things (1) during defense counsel's cross-examination of one of plaintiff's witnesses and (2) after defense counsel objected to part of plaintiff's attorney's cross-examination of a defense witness. After plaintiff's attorney's first use of the term "spinning," the trial court stated, "Well, I'm not sustaining [plaintiff's attorney's objection] on the basis – I'm not adopting the spin, but I don't think it's a proper question." The trial court essentially indicated that the allegation of "spinning" was unfounded, thus neutralizing any possible prejudice caused by the attorney's use of the term. In the second instance, plaintiff's attorney merely stated, "He [defense counsel] can save his spin for his closing statement." Defense counsel replied that he disagreed with plaintiff's attorney's characterization of the evidence, and the trial court stated, "Well, you'll be able to question [the witness] on that." Plaintiff's attorney's brief use of the term "spin" surely did not prejudice the jury.

G

Defendants contend that

> [d]uring defense closing argument, plaintiff's counsel repeatedly interjected with running diatribes, disputing defense counsel's characterization of the evidence. . . . Plaintiff counsel characterized the defense theory or defense testimony as "ridiculous" at least 13 times in closing argument . . . and defense experts as a "fool" or a "joke."

In support of this argument, defendants merely cite transcript pages and do not set forth in their brief the actual passages or explain why plaintiff's attorney's statements were unfounded. The

briefing of this argument is simply inadequate and we decline to address it on appeal.[3] *Palo Group Foster Care, Inc v Michigan Dept of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998).

H

Defendants object to the following statement made by plaintiff's attorney in his closing argument:

> The key in a situation like this is to get the person the help they need to maximize the extent of the ability they have and to minimize the extent of the disability.
>
> There's only one way that that can be done. This child will never get the level of physical therapy, occupational therapy that she needs. *She will never have a home of her own.* She will never have the type of things that [a rehabilitation counselor and life care planner] came and educated us about. [Emphasis added.]

Defense counsel objected, stating that "he knows that is a lie that she doesn't have a home of her own. We can get into that. That is an out and out lie." Plaintiff's attorney then stated, "Tell him to sit down, Your Honor" and soon afterwards stated, "let me move on." Defendants argue on appeal that plaintiff's attorney consciously lied "in light of the fact that monies from the prior settlement with St. John Hospital had been used to purchase a home for the child."

We cannot agree that plaintiff's counsel acted improperly in this instance. Indeed, counsel went on to state:

> This is a child who's going to require supervision for the rest of her life. Right now her mother fills that role of her 24 hour care provider. It's not fair.
>
> There will be a time when her mother's not with her anymore. We all hope for children the best.

The attorney's "home of her own" comment can be viewed as pertaining to a home in which Hall lives independently of her mother, with other caregivers. The attorney was making the jury aware that adequately compensating Hall for her injuries would allow Hall to live more of an independent life. No error requiring reversal occurred.

---

[3] There are other instances in section VI of defendants' appellate brief – such as the section dealing with plaintiff's attorney's asking the court to "tell [defense counsel] to sit down" – in which defendants merely allege wrongdoing on the part of plaintiff's attorney and cite transcript pages without setting forth the actual challenged passages in context or explaining, with pertinent details, why the attorney's statements were unfounded. These arguments are also inadequately briefed.

I

Defendants object to several instances during closing arguments in which plaintiff's attorney suggested that defendants bore the most responsibility for Hall's injuries and that defendants were incorrect in implying that St. John was seventy-five percent responsible for them. Defendants are not entitled to appellate relief with respect to this issue, even assuming that the comments in question were improper. First, the court corrected any prejudice by instructing the jurors that "[i]n regard to St. John's Hospital, the only issue that you are to address in your deliberations is the percentage of fault, if any, that is attributable to St. John's Hospital." Second, because joint and several liability applied, as discussed in part VII(A) of this opinion, the attorney's statements about fault allocation were ultimately harmless.

J

Defendants contend that plaintiff's attorney acted improperly by accusing defense counsel, during his cross-examination of one of plaintiff's witnesses, of asking needless questions and having "an agenda of having [the witness] miss his flight." This was indeed an improper commentary by plaintiff's attorney. There is no indication from the record that defense counsel had any reason to want the witness in question to miss his flight. Viewing the lengthy proceedings as a whole, however, this brief comment – and the trial court's inadequate response to the comment – simply could not have caused prejudice to defendants, especially because defense counsel explicitly replied that he was not in fact trying to cause the witness to miss his flight.

K

Defendants take issue with the following statement made by plaintiff's attorney during his closing argument:

> [Defense counsel] asked one of my experts, is it fair that we should be responsible for St. John Hospital's mess. *Aside from the fact that it's insensitive to refer to this little girl as somebody's mess*, in another hasten [sic] to remind you that she was not a mess when she got to Henry Ford Hospital. She was neurologically intact. She was 100 percent salvageable. [Emphasis added.]

Plaintiff's attorney was evidently referring to the following question asked by defense counsel while he was cross-examining one of plaintiff's witnesses:

> Sometimes, people's mistakes flow downstream, too, don't they, Doctor? It isn't necessarily the last person who's there who's necessarily responsible. Sometimes, the mistakes that other people make haunt other people later on, correct?

Plaintiff's attorney arguably should not have made the statement in question, given that defense counsel did not in fact refer to Hall as "a mess." However, attorneys are given some leeway during closing arguments, see *Heintz v Akbar*, 161 Mich App 533, 539; 411 NW2d 736 (1987), and plaintiff's attorney here was essentially extrapolating from and characterizing defense counsel's questioning of the witness. No error requiring reversal is apparent.

L

Defendants contend that plaintiff's attorney made an improper "civic duty" argument by stating the following in his closing argument:

> You folks need to make a decision in the case about what is a standard we're going to expect of people and [sic] entrusted with the important responsibility of caring for our children in the emergency rooms. And it is imperative that you not adopt a standard of care that indulges them the right to make assumptions, that allows them to make disposition decisions, sending children home who are at risk for arrest when they don't take adequate histories. And find out that indeed they are at risk of arrest. That would be a travesty. Don't let it happen.

Attorneys are not to appeal to the jurors to look beyond the facts of the case before them and use their verdict to serve the broader public good. See, generally, *Joba Const Co, Inc v Burns & Roe Inc*, 121 Mich App 615, 637; 329 NW2d 760 (1982). Here, however, like in *Joba*,

> [w]hile the jury could have inferred from the challenged remarks that the city, or even the jurors themselves, could be benefitted from finding defendant[s] liable, this clearly was not directly or explicitly argued to the jury. The remarks of plaintiff's counsel did not inject issues into the trial broader than those pled and brought out by the testimony below. [*Id.*]

Plaintiff's attorney did not explicitly state that the public at large would be positively affected if the jury returned a verdict against defendants. No error requiring reversal occurred.

M

Defendants contend that plaintiff's attorney, in his rebuttal closing argument, insinuated that poor care was given to Hall at Henry Ford Hospital because of insurance concerns. This contention is without merit. Indeed, no such insinuation occurred. The attorney merely stated, "[defendants] have a deal with HAP, with their insurance company." Defense counsel objected, and plaintiff's attorney stated that Hall was "[t]ransferred for insurance purposes[.]" He made no insinuation that defendants provided poor care to Hall because of insurance concerns.[4]

N

---

[4] We note that defendants contend that plaintiff's attorney made certain improper statements to the court outside the presence of the jury. These comments, unheard by the jury, did not taint the jury's verdict. We further note that defendants' statement of the issue in section VI of their appellate brief includes an allegation that the trial judge, as well as plaintiff's attorney, committed misconduct requiring reversal. However, defendants' briefing concerning the alleged prejudicial misconduct on the part of the trial judge is simply inadequate to present the issue for our review. See, e.g., *Palo Group, supra* at 152.

Finally, defendants contend that plaintiff's attorney's behavior as a whole improperly attacked the integrity of defense counsel, reflected an explicit purpose to prejudice or inflame the jury, and ultimately did prejudice the jury. See, e.g., *Ellsworth, supra* at 191-192, and *Powell v St. John Hosp,* 241 Mich App 64, 81-82; 614 NW2d 666 (2000). We disagree. While certain of the attorney's actions *were* improper, as discussed above, his actions, viewed in the entire context of the lengthy and hotly contested trial, simply did not rise to the level of error suggested by defendants.

VII

Defendants next argue that the trial court improperly applied statutory law and thus erred in several respects in its calculation of the judgment. We review issues of statutory construction de novo. *Ghaffari v Turner Construction Co,* 259 Mich App 608, 612; 676 NW2d 259 (2003), lv gtd on other grounds ___ Mich ___; 688 NW2d 511 (2004).

A

Defendants first claim that they are not liable for the part of the verdict attributable to St. John and Dr. Tech. As noted earlier, the jury assessed ten percent of the fault to Dr. Tech and ten percent of the fault to St. John. The court held that defendants were jointly and severally liable for *all* the damages assessed by the jury. Defendants contend that this was an improper ruling.

MCL 600.2956 states that the liability of each defendant in a tort action is several and not joint, except as provided in MCL 600.6304. MCL 600.6304(6)(a) indicates that, if the plaintiff is found to be without fault in a medical malpractice action, "the liability of each *defendant* is joint and several" (emphasis added). Defendants contend that "a 'defendant' cannot be jointly and severally liable for damages attributable to a nonparty, nondefendant such as, in this case at the time of the verdict, St. John and Dr. Tech."

In *Markley v Oak Health Care Investors (After Remand)*, 255 Mich App 245, 248; 660 NW2d 344 (2003), the Court considered the issue of joint and several liability in a case in which the plaintiff first sued Community Health Center (Community); then sued the defendants, Oak Health Care Investors, for the same injury; and then settled with Community. The Court stated:

> Here, with regard to wrongful death, Community and defendants, through successive negligent acts, produced a single, indivisible injury, i.e., the death of plaintiff's decedent. Although plaintiff filed separate lawsuits, Community and defendants are in theory jointly and severally liable for wrongful death, and we shall treat them as such, otherwise a plaintiff in a similar situation could avoid the effect of our ruling today by simply suing joint tortfeasors in separate actions. We shall effectively treat defendants as if they had been sued jointly with Community by plaintiff in a single action. [*Id.* at 252.]

The *Markley* Court then stated:

> [E]ven if the jury had been given the opportunity to allocate fault in some degree to Community, it would not have resulted in a reduction of the $300,000 verdict as between defendants and plaintiff because liability is joint and several and plaintiff would have every legal right to recover the full amount from defendants despite the possibility that defendants would pay more than their fair share. [*Id.* at 253.]

The Court held that the defendants *were,* however, entitled to a setoff for the amount of the settlement that the plaintiff reached with Community. *Id.* at 256-257.

The trial court here acted in accordance with *Markley.* It held defendants jointly and severally liable for plaintiff's damages but allowed a setoff for the settlements with St. John and Dr. Tech. Defendants acknowledge on appeal that *Markley* applies to the instant case but contends that *Markley* was incorrectly decided. We are bound to follow *Markley,* however, unless it is "reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals[.]" MCR 7.215(J)(1). *Markley* has not been reversed or modified by the Supreme Court, and we decline to call for a conflict panel under MCR 7.215(J)(2) and (J)(3) in order to dispute its holding. Indeed, it is reasonable to interpret the phrase "each defendant" in MCL 600.6304(6)(a) as referring to *each defendant that has been sued by the plaintiff for the particular injury at issue*. Appellate relief is unwarranted.

B

Next, defendants argue that the jury's award of future damages should have been reduced to present-day value using a compound interest calculation rather than a simple interest calculation. They acknowledge that *Nation, supra,* mandates the use of a simple interest calculation, but they contend that *Nation* was incorrectly decided by the Supreme Court. We cannot grant relief with respect to this issue. Indeed, the Court of Appeals is bound to follow Supreme Court precedent. *Boyd v W G Wade Shows,* 443 Mich 515, 523; 505 NW2d 544 (1993).

C

Finally, defendants argue that the trial court erred in applying a particular rate of prejudgment interest to the annuity it ordered defendants to purchase in partial satisfaction of the judgment.

During post-judgment proceedings, the court applied MCL 600.6307, which provides that, in certain circumstances, "the court shall enter an order that the defendant or the defendant's liability insurance carrier shall satisfy [part] of the judgment, less all costs and attorney fees the plaintiff is obligated to pay, by the purchase of an annuity contract[.]" MCL 600.6307(a) states that

> [t]he purchase price of the annuity contract shall be equal to 100% of the future damages subject to this section, less an amount determined by multiplying the amount of those damages by a percentage equal to the rate of prejudgment interest as calculated under section 6013(5) or section 6455(2) on the date the trial was commenced.

MCL 600.6013(5) states, in part:

> for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

MCL 600.6455(2) states:

> Except as otherwise provided in this subsection, for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

The trial court applied prejudgment interest to the annuity not according to MCL 600.6013(5) or MCL 600.6455(2) but instead according to MCL 600.6013(6), which states:

> For a complaint filed on or after January 1, 1987, but before July 1, 2002, if the civil action has not resulted in a final, nonappealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in subsection (8).

MCL 600.6013(8) states, in part that

> interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section.

Defendants claim that the court should have applied the twelve percent interest rate found in MCL 600.6013(5). Plaintiff counters with the following argument:

> The annuity provision in § 6307 was passed in 1986. When that statute was passed, it referred to § 6013(5). As of 1986, § 6013(5) was the general judgment interest statute, which called for interest to be calculated on the basis of the sale of United States treasury notes. However[,] in 1987, one year after § 6307 was passed, § 6013 was amended. In that amendment, several subsections

> of MCL 600.6013 were renumbered. The 1987 amendment of § 6013 caused the fluctuating treasury bill interest rate provision to be renumbered from § 6013(5) to § 6013(6). In that 1987 amendment of § 6013, the 12% interest provision applicable to actions founded on written instruments was designated as § 6013(5).
>
> * * *
>
> [T]his renumbering of § 6013 does not in any way alter the intent of the Legislature in enacting § 6307 in 1986. The Legislature clearly intended to apply the fluctuating treasury bill rate which was then contained in § 6013(5).

Defendants counter by citing *Gilbert v Second Injury Fund*, 463 Mich 866, 866; 616 NW2d 161 (2000), in which the Court suggested that courts must apply statutes as written, even if the results are "absurd."

We need not enter into an analysis of whether a statute must be applied exactly as written even if the ensuing results are "absurd." Indeed, MCL 600.6307(a) states that the court must subtract an amount of money from the purchase price of the annuity contract using a "percentage equal to the rate of prejudgment interest as calculated under section 6013(5) or section 6455(2) on the date the trial was commenced." Because of the disjunctive phrase, the court could rely on MCL 600.6455(2) in making the subtraction. Because MCL 600.6455(2) mirrors the fluctuating treasury bill rate found in MCL 600.6013(6), we conclude that no error requiring reversal occurred with respect to the trial court's use of the fluctuating treasury bill interest rate in determining the applicable reduction from the purchase price of the annuity contract. Reversal is unwarranted.

VIII

In her cross-appeal, plaintiff first argues that MCL 600.6307, the annuity statute discussed in section VII(C) of this opinion, violates her right to due process of law[5] and is therefore unconstitutional. She states that a defendant, "in purchasing an annuity in compliance with [the] statute, is given an inexplicable 'discount,' which directly reduces the amount of the plaintiff's recovery." She states, "The annuity calculation provided in MCL 600.6307(a) represents a completely arbitrary exercise of governmental authority which has the effect of taking from the plaintiff a substantial amount of the money awarded to her by the jury."

We review de novo issues involving the constitutionality of a statute. *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). Moreover, "[s]tatutes are presumed constitutional." *Id.* An appellate court must "exercise the power to declare a law unconstitutional with extreme caution[.]" *Id.*

---

[5] Plaintiff also claims an equal protection violation, but this claim is inadequately briefed and is therefore not properly presented for appeal. *Palo Group, supra* at 152.

Plaintiff admits in her appellate brief that the appropriate inquiry with regard to her due process argument is whether "the reduction called for by MCL 600.6307(a) has a rational relationship to a legitimate legislative aim." See *Phillips, supra* at 434. Defendants identify the following "rational basis" for the statute in question:

> The annuity purchase statute, MCL 600.6307, clearly has a rational basis . . . . It provides a benefit to the plaintiff – a guaranteed stream of income in the future through an annuity – and an incentive to the defendant to arrange for that guarantee of future income through the purchase of the annuity at a slight discount. By this the Legislature has effectively ensured that, by fair approximation, plaintiff will receive damages for losses more contemporaneously with the losses as they occur. The Legislature could rationally have viewed this as a fair tradeoff, providing both sides with a benefit.

Defendants have articulated a legitimate legislative aim with respect to the statute in question. In essence, the statute aids a plaintiff in the collection of a certain subset of future damages.[6] Plaintiff's brief argument on appeal concerning the unconstitutionality of the statute simply has failed to persuade us that it is in fact unconstitutional, especially given the significant amount of deference we must afford the Legislature's actions. See, generally, *Phillips, supra* at 434-435.

IX

Plaintiff next argues that, if this Court disagrees with *Markley, supra,* and holds that defendants cannot be held jointly liable for plaintiff's total damages, we must reverse the trial court's decision to allow a setoff against the judgment for the settlements reached with St. John and Dr. Tech. As noted above, we are following *Markley* and are not calling for a special panel under MCR 7.215(J)(2) and (J)(3) in order to dispute the holding of the case. Accordingly, plaintiff's argument is moot and need not be addressed.

X

Plaintiff next argues that the statutory limitation on noneconomic damages contained in MCL 600.1483 is unconstitutional and should not have been applied to the instant case. Plaintiff makes no reasoned argument in support of this issue but simply contends that the damages cap is unconstitutional "for the reasons expressed" in two dissenting opinions authored by judges of this Court. We conclude that plaintiff's briefing of this issue is inadequate. See, generally, *Zdrojewski, supra* at 78 n 12, and *Palo Group, supra* at 152. Even if plaintiff *had* properly briefed this issue, she would not be entitled to appellate relief. Indeed, her arguments were rejected by this Court in *Zdrojewski, id.* at 75-81. We are bound to follow *Zdrojewski* under MCR 7.215(J)(1), and calling for a conflict panel under MCR 7.215(J)(2) and (J)(3) in order to dispute the holding of *Zdrojewski* would likely be a futile exercise, given the Supreme Court's holding in the analogous case of *Phillips, supra* at 428, that the damages caps applicable to a

[6] MCL 600.6307 excludes certain types and amounts of future damages from being subject to the annuity requirement.

lessor's liability in motor vehicle leases of thirty days or less do not violate a plaintiff's constitutional rights to a jury trial, equal protection, or due process.

XI

Plaintiff raises two additional issues in her cross-appeal. However, she expressly concedes in her appellate brief that we need not address these issues if we, in the primary appeal, affirm the judgment against defendants. Because we are in fact affirming the judgment against defendants, we do not address plaintiff's two additional issues.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette