Order

Michigan Supreme Court
Lansing, Michigan

May 16, 2018

154622

PATRICIA MERCHAND,
Plaintiff-Appellee,

v

SC: 154622
COA: 327272
Ingham CC: 12-001343-NH

RICHARD L. CARPENTER, M.D.,
Defendant-Appellant,

and

MID-MICHIGAN EAR, NOSE,
AND THROAT, P.C.,
Defendant.
_____/

On March 6, 2018, the Court heard oral argument on the application for leave to appeal the August 2, 2016 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REMAND this case to that court for consideration of the other evidentiary challenges raised by plaintiff but not addressed by that court in its initial review of this case.

In this case, plaintiff filed suit alleging that defendant committed medical malpractice during surgery by negligently injuring her right hypoglossal nerve. After a trial, the jury found defendant not professionally negligent, and the trial court entered a judgment of no cause of action. Plaintiff appealed, challenging, among other things, the trial court's ruling prohibiting plaintiff from presenting testimony from her expert witness, Dr. Michael Morris, regarding parallels between defendant's recordkeeping in the instant case and his recordkeeping in other cases in which he had been sued for malpractice. In an offer of proof, Dr. Morris opined that in the other cases, like in the instant case, defendant failed to record complications that arose during surgery or related patient complaints. Dr. Morris also opined on the accuracy of defendant's surgical methods and about other instances of defendant's alleged malpractice.

The Court of Appeals majority reversed the trial court and remanded for a new trial, holding that Dr. Morris' testimony was admissible under MRE 404(b) to demonstrate defendant's scheme, plan, or system of creating medical records that did not accurately reflect his interactions with patients when surgeries resulted in complications. But as the dissenting judge recognized, plaintiff never argued in the trial court that this

evidence was admissible for a proper purpose under MRE 404(b). *Merchand v Carpenter*, unpublished per curiam opinion of the Court of Appeals, issued August, 2, 2016 (Docket No. 327272), pp 2-3 n 3 (O'BRIEN, J., dissenting). The proponent of the evidence has the burden of establishing a proper, noncharacter purpose for its admission under MRE 404(b). See *People v Denson*, 500 Mich 385, 398 (2017). Because plaintiff here failed to make a cognizable argument under MRE 404(b) before the trial court, any failure to admit this evidence on that basis would not amount to an abuse of discretion. *Rock v Crocker*, 499 Mich 247, 255 (2016) ("A trial court does not abuse its discretion when its decision falls within the range of principled outcomes."). Therefore, we reverse the Court of Appeals' judgment and remand to that court for consideration of the other evidentiary challenges raised by plaintiff but not previously addressed.

STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA MERCHAND,

Plaintiff-Appellant/Cross-Appellee,

v

RICHARD L. CARPENTER, M.D.,

Defendant-Appellee/Cross-Appellant

and

MID-MICHIGAN EAR, NOSE, AND THROAT, P.C.,

Defendant.

UNPUBLISHED
August 2, 2016

No. 327272
Ingham Circuit Court
LC No. 12-001343-NH

Before: OWENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right from a judgment of no cause of action in favor of defendant following a jury trial. For the reasons stated below, we reverse and remand for a new trial.

I. FACTS

The underlying case arises from a medical malpractice action filed by plaintiff against defendant for a permanent injury to plaintiff's right hypoglossal nerve (HGN),[1] allegedly suffered during defendant's routine removal of plaintiff's right submandibular gland in August 2010.[2] Plaintiff suffered from sialadenitis, a salivary gland infection. Defendant, a board-

[1] The HGN is the 12th cranial nerve and controls movement of the tongue. There is a right and a left HGN, which provide motor activity to the right and left sides of the tongue.

[2] MMENT was dismissed from the lawsuit with prejudice by stipulation of the parties prior to trial.

certified otolaryngologist (an ear, nose, and throat doctor), used a harmonic scalpel, a surgical instrument that uses ultrasonic vibrations to simultaneously cut and cauterize tissue, to remove a stone from plaintiff's right salivary gland and a portion of the gland. According to defendant's records, the surgery lasted 23 minutes, there were no complications, and plaintiff's anatomy presented no anomalies. The pathology report on the excised portion of gland notes that the gland was inflamed, but was without infection.

Immediately after the anesthesia from the surgery wore off, plaintiff noticed that her tongue felt thick, that she was biting it all the time, and that a lot of saliva was coming from the right side of her mouth. She testified at trial that, prior to the surgery, she had experienced no problems with her tongue, with biting her tongue, or with saliva or spit coming from her mouth. Plaintiff and members of her family testified that, in the days and months following the surgery, plaintiff experienced tongue biting, difficulty swallowing and chewing, impaired speech, and spitting when talking. Plaintiff's daughter testified that plaintiff talked through "gritted teeth" in an effort not to bite her tongue, and would frequently exclaim "ow," and grab the side of her face.

Plaintiff testified at trial that she repeatedly told defendant about her tongue-biting and drooling symptoms at several follow-up visits over the next nine months, but defendant did not record her complaints in her medical record. Defendant's record of plaintiff's treatment charts some swelling and drainage, notes that defendant drained and cauterized plaintiff's incision and prescribed antibiotics, and states that plaintiff's incision is "healing nicely" and "doing well." Defendant testified that it was possible, but unlikely, that plaintiff informed him of post-operative complications. Plaintiff's last appointment with defendant was in March 2011.

In April 2012, plaintiff noticed that her tongue was deviating and that there were deep impressions in it. She contacted her primary care physician, who, after reviewing plaintiff's medical record and the results of an MRI, confirmed denervation of the right side of plaintiff's tongue. The physician referred plaintiff to an expert in neurology, who concluded that plaintiff's symptoms were consistent with an injury to plaintiff's HGN in August 2010.

At trial, Dr. Michael Morris, plaintiff's standard of care expert witness, explained that, in order to remove the submandibular gland, the surgeon makes an incision approximately four centimeters below the patient's jawbone, cutting through the skin, subcutaneous tissue, and muscle until reaching the connective tissue and obtaining a visual of the submandibular gland. As the surgeon elevates the submandibular gland, the muscles under the gland become visible. In those muscles are the HGN and the lingual nerve, nerves that supply the tongue with sensation and activity. Dr. Morris said that, when removing the submandibular gland, a surgeon has to identify those nerves to ensure preserving them. He opined that defendant breached the standard of care by failing to identify the HGN and by using the harmonic scalpel to separate the gland from the tissue in a way that brought the vibrating scalpel too close to the HGN.

Dr. Steven Schechter, a board-certified neurologist and clinical neurophysiologist testified to a reasonable degree of medical certainty that, based on the absence of symptoms prior to surgery, and the progression of symptoms following the surgery, plaintiff's nerve injury resulted from something that occurred during surgery. He explained that an injury to the HGN during surgery would not result in immediate, total paralysis of the tongue, and that deficits in

motor function would take months and years to develop. Dr. Schechter testified that the worsening of plaintiff's symptoms over time as reflected in the medical records was typical of an injury to the right HGN that occurred at the time of surgery.

Drs. Eugene Rontal and Henry Borovik, both board-certified ontolaryngologists, testified as expert witnesses on defendant's behalf. Both concluded that defendant did not injure plaintiff's HGN, reasoning that an injury to plaintiff's HGN during the August 2010 surgery would have produced immediate effects. Dr. Rontal said that the tongue deviation would have happened immediately and been obvious, and the tongue fasciculation, i.e., muscle twitching, that plaintiff currently experiences would have developed within three to four months of the injury. In like fashion, Dr. Borovik testified that, if defendant had injured plaintiff's HGN, there would have been an immediate loss of motor function.

After just over four hours of deliberation, the jury found defendant not professionally negligent by a vote of 6 to 2. After further proceedings not relevant to the instant appeal, the trial court entered a judgment of no cause of action in favor of defendant on April 21, 2015. Plaintiff appeals from the judgment, and defendant raises two issues on cross appeal.

II. ISSUES ON APPEAL

On appeal, plaintiff raises a number of issues related to certain pretrial and trial rulings by the trial court prohibiting plaintiff's introduction of evidence from defendant's past medical malpractice cases, his 2012 termination from MMENT, and his 2013 arrest and prosecution in Florida for obtaining controlled substances without a valid prescription.

First, plaintiff contends that, because defendant presented himself as an expert, the trial court should have allowed her to cross-examine him under MRE 608(b) regarding past poor performances in order to attack his credibility. We disagree. We review the trial court's ruling regarding the admission of evidence for an abuse of discretion, *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). 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 if the trial court's decision falls outside the range of principled outcomes." *Macomb Co Dep't of Human Services v Anderson*, 304 Mich App 750, 754; NW2d 408 (2014).

MRE 608(b) authorizes, for the purpose of attacking or supporting the witness's credibility, inquiry into specific instances of conduct under the following conditions:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, 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.

However, it is axiomatic that the mere fact that a physician has been sued for medical malpractice is not probative of his or her truthfulness, competency, or knowledge. *Heshelman v Lombardi*, 183 Mich App 72, 85; 454 NW2d 603 (1990). Physicians who testify as expert witnesses in medical malpractices cases may be questioned about their own past poor outcomes because such is relevant to the expert's competency and the weight to be given his or her testimony. *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995). Even then, counsel cannot ask general questions about the number of times an expert witness has been sued for medical malpractice, *Persichini v William Beaumont Hosp*, 238 Mich App 626, 629; 607 NW2d 100 (1999), or questions about malpractice claims unrelated to the subject matter of the expert witness's testimony, *Wischmeyer*, 449 Mich at 482.

In the instant case, plaintiff cites no authority for her proposition that defendant should be subject to the same type of cross-examination to which witnesses that have been qualified as experts by the trial court are subject. Although plaintiff testified to his education, training, and experience, to how he generally performs a submandibular gland excision, and to how his usual practice compared with plaintiff's surgery, he did not seek qualification at trial as an expert, and the trial court explicitly stated that it would have denied such qualification had he sought it. The fact that defendant has been sued for medical malpractice in the past is not probative of his truthfulness, competency, or knowledge, *Heshelman*, 183 Mich App at 85, nor does it make it more or less likely that he committed malpractice in the instant case. Thus, any probative value in cross-examining defendant about past medical malpractice cases in an attempt to attack his credibility would have been substantially outweighed by prejudice arising from the danger that such questioning would lead the jury to conclude that defendant had a proclivity for committing malpractice. See *Wlosinski v Cohn*, 269 Mich App 303, 311-312; 713 NW2d 16 (2005). For these reasons, we conclude that the trial court did not abuse its discretion by prohibiting plaintiff from cross-examining defendant relative to prior medical malpractice cases under 608(b).

On more solid ground is plaintiff's contention that the trial court abused its discretion by prohibiting the testimony of Dr. Morris regarding the parallels between this case and records in plaintiff's past medical malpractices cases. It is not clear from the record under which rule of evidence plaintiff sought to admit Dr. Morris's testimony at trial. However, Plaintiff contends on appeal that the evidence was admissible under 404(b) to show defendant's scheme, plan, or system of creating medical records that did not accurately reflect his interactions with patients where surgeries resulted in serious complications. We agree.

MRE 404(b) applies equally in both civil and criminal cases, *Lewis v LeGrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003), and provides in relevant part:

> 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 other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

In *Lewis*, we provided a concise formulation of the elements that must be satisfied for other acts evidence to be admitted in a civil case; these elements were originally set forth by our Supreme Court in *People v VanderVliet*, 444 Mich 52, 508 NW2d 1114 (1993):

> (1) the evidence is offered for some purpose other than character to conduct, or a propensity theory; (2) the evidence is relevant (having any tendency to make the existence of a fact more or less probable) and material (relating to a fact of consequence to the trial); (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice; and (4) the trial court may provide a limiting instruction under MRE 105. [*Lewis*, 258 Mich App at 208, citing *Vandervliet*, 444 Mich at 74-75.]

A proper purpose is one other than one establishing defendant's character to show he acted in conformity therewith. *VanderVliet*, 444 Mich at 74.

In the instant case, plaintiff sought to cross-examine defendant at trial about his allegedly fictitious medical records in order attack his credibility pursuant to 608(b). Referring to defendant's testimony that it was possible but unlikely that plaintiff had informed him of her post-operative complaints, plaintiff sought to attack defendant's credibility with evidence that other patients with serious post-operative complaints also alleged that defendant had failed to chart their complaints. Although evidence from records of past medical malpractice cases is not admissible under 608(b), it is admissible under MRE 404(b) for a non-character purpose. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000) ("That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes."). Further, evidence admitted for a proper purpose under MRE 404(b) may be proved by extrinsic evidence. *People v Jackson (Mem)*, 475 Mich 909, 910; 717 NW2d 871 (2006).

The evidence plaintiff seeks to admit satisfies the *VanderVliet* factors as set forth in *Lewis*. First, it is proper to admit the other acts evidence at issue for the non-character purpose of showing that defendant has a "scheme, plan, or system in doing an act." MRE 404(b). Plaintiff contended below that she repeatedly told defendant about her tongue biting and excessive drooling following surgery and that defendant failed to chart her complaints. Rather, defendant told her that she was healing nicely and that the symptoms she was experiencing was a normal part of the healing process. Dr. Morris's review of other malpractice cases revealed the same pattern. At trial, defendant testified that it was possible that plaintiff told him about her tongue biting and excessive drooling, but unlikely. In addition, he said that he was not specifically aware of any other patients who complained that he did not chart their post-operative complaints, even though several people making just such allegations had brought actions against defendant for medical malpractice. The evidence of defendant's recordkeeping in past malpractice cases cannot be used to attack defendant's credibility or to show character or propensity, but it can be properly used to show that defendant followed a particular pattern when it came to cases with serious complications resulting from surgery.

Second, the other acts evidence is relevant and material. Evidence is relevant if has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In the

instant case, the other acts evidence offered by plaintiff tends to show that defendant has a scheme, plan, or system of recordkeeping that severs any potential link between his surgery and the patient's post-operative complications by simply failing to chart them. If defendant's system is to omit mention of complications and patients' complaints to insulate himself from liability, this has the tendency of calling into question defendant's position that plaintiff's surgery and post-operative recovery were unremarkable, and supporting plaintiff's theory that the post-operative symptoms she experienced suggested an injury to her HGN.

Third, the probative value of the evidence is not substantially outweighed by unfair prejudice. MRE 403 requires the exclusion of relevant evidence only where its probative value is substantially outweighed by unfair prejudice. Unfair prejudice refers to the tendency that the jury will give undue or preemptive weight to the evidence. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 618; 600 NW2d 66 (1999). Here, the other acts evidence has substantial probative value in showing that defendant has a scheme or plan when it comes to charting that minimized his exposure to liability by not recording patients' post-operative complaints. Arguing to the contrary, defendant asserts that the probative value of admitting the records under 404(b) is limited, given defendant's admission that he occasionally makes charting errors and the testimony at trial establishing that plaintiff experienced various post-operative complications. Admitting to occasional charting errors is one thing; having a "scheme, plan, or system" that insulates one from liability is another. Fairness and accuracy demands that the jury be presented with sufficient evidence to determine which it is. In addition, defendant always has the option of requesting an appropriate limiting instruction. MRE 105; *Lewis*, 258 Mich at 208.

Defendant contends that any error in the exclusion of evidence was harmless error because this case came down to a "battle of the experts," with plaintiff's expert opining that symptoms of an HGN injury are progressive, going from mild to severe, while defendant's experts insist that they are immediate. Defendant further contends that plaintiff's treatment records equally support the theories of both parties regarding whether HGN damage occurred during the surgery. However, defendant's record of plaintiff's treatment is silent regarding the tongue biting and drooling plaintiff experienced immediately after surgery. If such silence is due to the systematic omission of complications traceable to surgery, then excluding the other acts evidence was not harmless. Presented with evidence of such a system, the jury could reasonably have found it supported plaintiff's theory that her HGN was injured during surgery. The admission of the excluded evidence has significant probative value relative to a fair and accurate determination of whether defendant omitted plaintiff's post-operative symptoms because they were normal parts of the healing process, or because they were the type of complications from surgery that defendant systematically excludes from patients' records. Therefore, we conclude that substantial justice requires vacating the jury's verdict and remanding the matter to the trial court for a new trial. MCR 2.613 (A). In light of our disposition of this issue, we find it unnecessary to address plaintiff's remaining issues.

III. ISSUES ON CROSS APPEAL

Defendant raises two issues on cross appeal.[3] First, he contends that the trial court abused its discretion by ruling that the evidence of defendant's alleged criminal conduct in Florida was admissible under MRE 608(b). Prior to trial, defendant filed a motion in limine to exclude evidence of defendant's arrest, prosecution, and plea agreement in Florida. The trial court ruled that the evidence at issue was not admissible under MRE 609, which addresses the circumstances in which evidence of a criminal conviction may be used to impeach a witness, because the incident did not lead to a conviction under Florida law.[4] The trial court further ruled that relevant evidence of the Florida conduct was admissible under 608(b). However, on the first day of trial, subsequent to argument from the parties, the trial court "added onto" its prior ruling, determining that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and concluding that it was inadmissible under MRE 403. On cross appeal, defendant raises the issue of the admissibility of the evidence under 608(b) as "an alternative ground to affirm" which we need address only if we disagree with plaintiff's "position on this point in the main appeal." Having not reached plaintiff's position on this point in the main appeal, we decline to address the issue in defendant's cross appeal.

Defendant also contends that the trial court erred by giving a res ipsa loquitur instruction. We disagree. We review for an abuse of discretion the trial court's ruling regarding whether a jury instruction is applicable to the facts of the case. *Swanson v Port Huron Hosp* (On Rem), 290 Mich App 167, 183; 800 NW2d 101 (2010).

The general rule in medical malpractices claims is:

> [T]here is no presumption of negligence from the mere failure of judgment on the part of a doctor in the diagnosis or in the treatment he has prescribed, or from the fact that he has been unsuccessful in effecting a remedy, or has failed to bring about as good a result as someone else might have accomplished, or even from the fact that aggravation follows his treatment." *Jones v Porretta*, 428 Mich 132, 151-152; 405 NW2d 863, 872 (1987).

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[3] For the sake of clarity, we will continue to use the terms "defendant" and "plaintiff" rather than "cross appellant" and "cross appellee" respectively.

[4] Under Florida law, when a defendant pleads *nolo contendere* and there is no adjudication of guilt, evidence of defendant's offense cannot be used to impeach defendant under Fla Stat 90.610, which is similar to MRE 609. *Dopson v State*, 719 So 2d 37, 38 (Fla Dist Ct App, 1998). "If the defendant successfully completes his probation he is not a convicted person but if the probation is violated the court may then adjudicate and sentence." *Thomas v State*, 356 So 2d 846, 847 (Fla Dist Ct App, 1978). In the instant case, not only did defendant obtain an order withholding adjudication, but prior to the start of trial, the Florida court sealed defendant's records pursuant to Fla Stat 943.059.

Nevertheless, in certain situations, the doctrine of res ipsa loquitur permits a plaintiff to establish a prima facie case for negligence with circumstantial evidence. *Id*. at 150-51. "The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id*.

In order to avail themselves of the res ipsa loquitur doctrine, plaintiffs must meet 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) "[e]vidence 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, 525 (2005), quoting *Jones*, 428 Mich at 150-151.]

That the injury complained of does not ordinarily occur in the absence of negligence either must be supported by expert testimony or be within the common understanding of the jury. *Locke v Pachtman*, 446 Mich 216, 231; 521 NW2d 786 (1994).

In the instant case, Dr. Morris stated his opinion that plaintiff's injury is an event that normally would not have happened absent defendant's negligence. He opined that, had defendant identified the HGN and used the scalpel on the gland and not the surrounding tissue, where the scalpel likely came too close to the nerve, the nerve would have been protected. Dr. Morris acknowledged under cross-examination that injury to the nerve is a recognized complication of the type of surgery plaintiff underwent, but explained that, under the particular circumstances of plaintiff's surgery, there is no reasonable explanation for the injury other than negligence:

> Because the – there wasn't a significant amount of disease in the gland. The outside surface was normal in appearance, according to the pathologist. There was [sic] no anatomical problems reported in the operative note as far as complications or anomalies or differences in Mrs. Merchand's neck that would have made injury to the nerve more likely.
>
> There wasn't excessive bleeding or other conditions during surgery that would have made the nerve more difficult to protect or to identify, so under the circumstances of her operation and her illness, damage to the hypoglossal nerve is not an accepted complication, and the risk of hypoglossal nerve as we – is very, very low, as a consequence.

Defendant contends that Dr. Morris's testimony that injury to the nerve is a recognized risk of submandibular gland excision of which he informs his patients is inconsistent with his

assertion that the subject event is of a kind that ordinarily would not occur absent negligence, and thus does not satisfy the first res ipsa loquitur requirement. However, the phrase, "the event," refers to more than just the fact of the injury, but encompasses the circumstances under which the injury occurred. See *Wilson v Stilwill*, 411 Mich 587, 608, 610; 309 NW2d 898 (1981) (implying that even in the cases of a known and accepted complication, such as a post-operative infection, the circumstances surrounding the complication may give rise to an inference of negligence). Accordingly, the essence of Dr. Morris's testimony is that given plaintiff's condition and the lack of complications or anomalies, injury to her nerve during surgery is an event that normally does not happen absent negligence.

Defendant also observes that, Dr. Morris admitted that infection could be another precipitating factor for HGN injury, but did not take into account the infection that plaintiff developed eight days after surgery. This claim ignores Dr. Morris's considerable testimony regarding evidence in defendant's records of infection, and his conclusion that infection was "[a]bsolutely not" the cause of injury to plaintiff's HGN. That Dr. Morris did not give the same weight as does defendant to whatever evidence existed of plaintiff's post-operative infection does not mean that he did not consider it.

Finally, defendant argues that the res ipsa loquitur instruction was unwarranted because plaintiff pointed to Dr. Morris's testimony and claimed that she had "direct evidence" of malpractice by defendant. Direct evidence is "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Black's Law Dictionary* (10th ed). Regardless of how plaintiff characterized Dr. Morris's testimony, it is undisputed that the only person in the operating room who observed and had knowledge of how defendant used the harmonic scalpel was defendant.

Plaintiff's theory was that defendant injured her HGN during surgery. Dr. Schechter testified that plaintiff's symptoms were consistent with an injury to the nerve that occurred at the time defendant removed her submandibular gland, and Dr. Morris testified that, given the circumstances of the surgery, the injury would not have occurred absent negligence. Defendant does not dispute that plaintiff presented evidence sufficient to show that the harmonic scalpel was in the exclusive control of defendant, that plaintiff did not contribute actively and voluntarily to her injury, and that the true explanation of plaintiff's injury is more readily accessible to defendant than to plaintiff. *Woodard*, 473 Mich at 7. The trial court's decision to instruct the jury on res ipsa loquitur is supported by published authority and the facts of the case. We conclude, therefore, that trial court did not abuse its discretion by determining that a res ipsa loquitur instruction was warranted.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Stephen L. Borrello

STATE OF MICHIGAN

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PATRICIA MERCHAND,

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RICHARD L. CARPENTER, M.D.,

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UNPUBLISHED
August 2, 2016

No. 327272
Ingham Circuit Court
LC No. 12-001343-NH

Before: OWENS, P.J., and BORRELLO and O'BRIEN, JJ.

O'BRIEN, J. (*dissenting*).

I respectfully dissent. This medical-malpractice lawsuit arises out of a surgery performed by defendant, Richard L. Carpenter, M.D., on plaintiff, Patricia Merchand, in 2010. Plaintiff alleges that defendant negligently injured her hypoglossal nerve (HGN) during the removal of her submandibular gland. Plaintiff presented expert testimony that supported her theory that defendant negligently injured plaintiff's HGN during the surgery. Defendant presented expert testimony that supported his theory that he was not negligent and that plaintiff's injuries were a known complication of the surgery. The jury heard this conflicting testimony and returned a verdict of no cause of action. On appeal, plaintiff claims that the trial court abused its discretion in excluding evidence regarding eight to ten other malpractice cases against defendant, in excluding evidence regarding defendant's alleged criminal activity in Florida two or more years after plaintiff's surgery, in excluding evidence regarding the termination of defendant's employment from Mid-Michigan Ear, Nose, and Throat, P.C., and a variety of other evidence in

hopes of impeaching defendant's credibility.[1] Because this evidence is irrelevant, more prejudicial than probative, and otherwise inadmissible, I would conclude that the trial court correctly excluded this evidence. Accordingly, I would affirm the jury's verdict of no cause of action.

I. OTHER-ACTS EVIDENCE

On appeal, plaintiff argues, and the majority concludes, that the trial court abused its discretion in excluding the testimony of Dr. Michael Morris, who was qualified as an expert, regarding numerous other malpractice allegations against defendant.[2] I disagree with my colleagues' conclusion that "the testimony of Dr. Morris regarding the parallels between this case and records in plaintiff's past medical malpractice cases" "was admissible under [MRE] 404(b) to show defendant's scheme, plan, or system of creating medical records that did not accurately reflect his interactions with patients where surgeries resulted in serious complications" for several reasons.[3]

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[1] A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). So long as "the trial court selects one of these principles outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. See also *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (expressly adopting *Babcock*'s articulation of the abuse-of-discretion standard in civil cases).

[2] At the outset, it should be noted that I agree with my colleague's rejection of plaintiff's argument that defendant should have been subject to cross-examination as an expert even though he was not qualified as an expert and did not provide expert testimony. Plaintiff's claim that a new trial is required because "Defendant was paraded before the jury as an 'expert' surgeon" is not supported in fact or law. Additionally, plaintiff certainly could have objected to testimony regarding defendant's medical background but apparently chose not to. Nevertheless, because this specific conclusion had no bearing on the outcome of this appeal, my agreement in this regard is largely irrelevant.

[3] As the majority recognizes, "[i]t is not clear from the record under which rule of evidence plaintiff sought to admit Dr. Morris's testimony at trial." It should be made clear that plaintiff did *not* argue that Dr. Morris's testimony in this regard was admissible for system, plan, or scheme purposes before the trial court. At best, plaintiff merely referenced non-character purposes for admitting evidence in several briefs before the trial court, stating on more than one occasion as follows: "Evidence can be offered under MRE 404(b) for other purposes such as 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." Notably, these mere references were made only in relation to licensing and criminal allegations against defendant and *never* in relation to other malpractice allegations. In fact, plaintiff's response to defendant's

First, this testimony is irrelevant. *Lewis v LeGrow*, 258 Mich App 175, 208; 670 NW2d 675 (2003) (providing that character evidence is admissible for non-character purposes so long as it satisfies several requirements, one of which is that the evidence is relevant). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In concluding that Dr. Morris's testimony "regarding the parallels between this case and records in plaintiff's past medical malpractice cases" is relevant, my colleagues explain as follows:

> In the instant case, the other acts evidence offered by plaintiff tends to show that defendant has a scheme, plan, or system of recordkeeping that severs any potential link between his surgery and the patient's post-operative complications by failing to chart them. If defendant's system is to omit mention of complications and patients' complaints to insulate himself from liability, this has the tendency of calling into question defendant's position that plaintiff's surgery and post-operative recovery were unremarkable, and supporting plaintiff's theory that the post-operative symptoms she experienced suggested an injury to her HGN.

In my view, an expert's testimony regarding defendant's allegedly inaccurate recordkeeping does not have the tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable than it would be without that testimony. Stated simply, defendant's recordkeeping is not at issue in this case.[4] Rather, it is his ability to perform what the majority describes as a "routine removal of plaintiff's right submandibular gland" that is at issue. Whether or not defendant negligently injured plaintiff's HGN in doing so is not made more or less probable based on his alleged recordkeeping deficiencies.[5] Had plaintiff, for example, pursued recovery under a theory that

motion in limine to exclude evidence regarding other malpractice allegations, including the attached brief, only references MRE 404(b) once, when she indicates that "[t]he court [in *Heshelman v Lambardi*, 183 Mich App 72, 82; 454 NW2d 603 (1990)] held that evidence of prior malfeasance by a witness is admissible only under very specific circumstances for a very specific reason pursuant to MRE 608(b) and MRE 404(b)." That is the *only* reference to MRE 404(b) with respect to the other malpractice allegations. Despite plaintiff's failure to make any cognizable argument under MRE 404(b) and the uncertainty as to which rule of evidence plaintiff sought to admit this testimony before the trial court, the majority nevertheless concludes that the trial court abused its discretion in excluding it under MRE 404(b), and I find such a conclusion troublesome.

[4] To be clear, plaintiff does not claim that defendant's failure to adequately record surgery complications or post-operative symptoms played any role in her injury. Her claim is clear—defendant negligently injured her HGN *during* the surgery at issue.

[5] The majority apparently acknowledges this lack of relevancy: "The fact that defendant has been sued for medical malpractice in the past . . . does not make it more or less likely that he committed malpractice in the instant case." While this conclusion was reached in reference to plaintiff's argument that defendant should be cross-examined as an expert without being qualified as an expert, I see no reason why the same conclusion does not apply with respect to

involved defendant's failure to properly recognize complications or properly address post-operative symptoms, my conclusion may well have been different. But, she did not. Rather, plaintiff's claim is straightforward—it is her position that defendant negligently injured her HGN *during* the surgery, and both parties presented conflicting evidence as to whether that was what actually occurred.[6]

Secondly, assuming arguendo, any relevancy is substantially outweighed by the danger of unfair prejudice. *Lewis*, 258 Mich App at 208 (providing that character evidence is admissible for non-character purposes so long as it satisfies several requirements, one of which is that the evidence is not unfairly prejudicial). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. In concluding that Dr. Morris's testimony "regarding the parallels between this case and records in plaintiff's past medical malpractice cases" was not unfairly prejudicial, my colleagues explain as follows:

> Here, the other acts evidence has substantial probative value in showing that defendant has a scheme or plan when it comes to charting that minimized his exposure to liability by not recording patients' post-operative complaints. Arguing to the contrary, defendant asserts that the probative value of admitting the records under [MRE] 404(b) is limited, given defendant's admission that he occasionally makes charting errors and the testimony at trial establishing that plaintiff experienced various post-operative complications. Admitting to occasional charting errors is one thing; having a "scheme, plan, or system" that insulates one from liability is another. Fairness and accuracy demands that the jury be presented with sufficient evidence to determine which it is. In addition, defendant always has the option of requesting an appropriate limiting instruction. MRE 105; *Lewis*, 258 Mich at 208.

It is my belief that any probative value of Dr. Morris's testimony as to the existence of any fact of consequence to the determination of this action was substantially outweighed by the danger of unfair prejudice in allowing an expert to testify regarding a variety of other allegations of malpractice against defendant. As an example, plaintiff sought to admit Dr. Morris's

the majority's relevancy analysis under MRE 404(b). The fact that these malpractice cases also allegedly reflect similar recordkeeping tendencies does not, in my view, render them any more relevant than they ordinarily are.

[6] Importantly, we should not overlook the fact that plaintiff was permitted to present a substantial amount of testimony portraying defendant's recordkeeping practices in this case as insufficient. Plaintiff testified that she informed defendant of a variety of complications and post-operative symptoms that were not adequately recorded, and experts, both plaintiff's and defendant's, opined that defendant's recordkeeping lacked sufficient detail. Even defendant admitted that he possibly failed to record various complaints made by plaintiff. Frankly, plaintiff's position that defendant inadequately failed to record her complications and post-operative symptoms was made clear to the jury. Whether the jury found it credible was a determination for the jury, not this Court, to make.

testimony regarding a malpractice case in which defendant's nasal surgery allegedly resulted in blindness. It is unclear how the admission of this evidence would make the allegation that defendant negligently injured plaintiff's HGN during the surgery at issue more or less probable, but it is certainly clear that it would unfairly prejudice the jury against defendant. Furthermore, as defendant correctly recognizes, the admission of this evidence would require him to defend numerous malpractice allegations, all of which have nothing to do with what is at issue here—the issue of whether defendant negligently injured plaintiff's HGN during surgery.

Finally, I believe the majority has overstated the value of Dr. Morris's testimony in this regard. The following is the testimony, *in its entirety*,[7] that plaintiff sought to admit:

> *Q*. Doctor Morris, just so you know what we're doing right now, we're creating a separate record on some issues that were not addressed in front of the jury.
>
> Doctor Morris, have you had an occasion to become familiar with other patient care rendered by Richard Carpenter other than this case?
>
> *A*. Yes.
>
> *Q*. Tell me about how you've become aware of that.
>
> *A*. Through the process of being asked to review and reviewing other cases that were presented to me for review who were cared for by Doctor Carpenter.
>
> *Q*. Ju[s]t approximately how many cases have you reviewed involving Richard Carpenter's treatment of patients?
>
> *A*. Eight or 10.
>
> *Q*. And have any of those involved nerve injuries?
>
> *A*. Yes.
>
> *Q*. Just approximately how many of those?
>
> *A*. Two or three others.

[7] This is the entirety of the testimony that plaintiff admitted in a special record for purposes of appellate review. Had plaintiff intended to introduce additionally testimony or evidence regarding these other malpractice cases, I am unable to find any indication as to what that evidence might have been in the record. Surely it is plaintiff's, not this Court's, burden to identify that testimony and evidence.

Q. Okay. What type of nerve injury cases have you had a chance to review?

A. Nerve injuries of the neck, recurrent neck injuries, marginal mandibular nerve injuries. That's all I can think of.

Q. In one of those cases did it actually involve a submandibular gland and tumor removal surgery?

A. Yes.

Q. And in respect to all the different cases that you have reviewed concerning Richard Carpenter and the separate reports and office records, do you have any particular insight concerning his operative reports?

A. Yes.

Q. What is that, please?

A. That the operative report doesn't characterize any problem occurring during the surgery even if there's a complication that's significant.

Q. Is that information frequently left out of his operative reports?

A. Yes.

Q. How about with respect to his office records. Based on reviewing charts from, you know, many, many of his patients, do you have any observations concerning how he maintains his . . . charting in his office records for patient complaints?

A. Yes.

Q. What is that?

A. That what the patients complain about to him isn't recorded but they may see another doctor in his practice the next day or the next week and the other doctor records that information that had to be present on the day they saw Doctor Carpenter.

Q. Okay. And have you also gained any familiarity concerning just, you know, how meticulous Richard Carpenter's dissections are during surgeries?

A. Yes.

Q. What is the information you have learned?

A. That during some of his surgeries, operation on one part of the nose led to problems in another part of the nose that wasn't even involved with the

surgery, or an operation in those ended up causing blindness in a patient. That wasn't part of the nasal surgery. Or operations on the thyroid gland, removed the wrong side of the gland was another case.

Q. Was that what you would describe as meticulous dissection?

A. No.

Q. Is that what would call careful attention to the details of the operation of the acts performed in the surgery?

A. No.

The absence of that testimony, alone, is what the majority claims requires a new trial in this matter. I strongly disagree. First, the final four questions of this examination, i.e., the questions regarding "how meticulous Richard Carpenter's dissections are during surgeries," the details of the injuries allegedly sustained during those surgeries, and whether Dr. Morris "would call [it] careful attention to the details of the operation of the acts performed in the surgery" *have absolutely, unequivocally nothing to do with a system, plan, or scheme in recordkeeping*. Furthermore, none of the testimony quoted above reflect what the majority, in apparently adopting plaintiff's theory, labels as "a 'scheme, plan, or system' that insulates one from liability[.]" Rather, it reflects Dr. Morris's opinion about the adequacy of defendant's recordkeeping. Additionally, and perhaps most importantly, allowing the admission of this testimony by Dr. Morris, who testified as an expert, requires and opens the door to an incredible amount of other evidence regarding these surgeries as well as all other surgeries performed by defendant that reflect on his recordkeeping.

If this evidence is admitted, it is my view that defendant will obviously be able to offer evidence in response to Dr. Morris's testimony in this regard. Specifically, if testimony regarding defendant's recordkeeping during somewhere between eight and ten surgeries that allegedly resulted in malpractice is admissible, I would assume that testimony regarding defendant's recordkeeping during all other surgeries that did not result in malpractice allegations would also be admissible to refute the notion that his recordkeeping is faulty only in surgeries in which he wishes to cover up his own negligence. Further, I would assume someone, other than Dr. Morris who apparently reviewed these records at plaintiff's counsel's request, will have to lay foundation as to their accuracy. In reviewing the record, I am left with no indication nor evidence as to whether these other patients made or did not make the complaints that Dr. Morris opines they would have. Additionally, based on the record, I discern no admissible evidence as to whether any of those other patients' injuries actually resulted from defendant's negligence. Presumably, defendant will be able to challenge that with his own expert testimony, and I agree with the trial court's conclusion that the admission of both parties' attempts to prove or disprove these other medical malpractice allegations would be "highly prejudicial" and deny defendant any chance at "a fair trial." Ultimately, it is my view that these other surgeries and malpractice allegations by Dr. Morris have no bearing on the issue of whether defendant was negligent in this

case. While I readily admit that witness credibility is always at issue, it cannot be disputed that all character evidence, especially irrelevant character evidence, impacts a witness's credibility.[8] That does not, however, render it automatically admissible.

Accordingly, I would conclude that the trial court did not abuse its discretion in excluding "the testimony of Dr. Morris regarding the parallels between this case and records in plaintiff's past medical malpractice cases" under MRE 404(b). Indeed, as we have held before, "close evidentiary question[s] ordinarily cannot be an abuse of discretion," *Lewis*, 258 Mich App at 200, and the evidentiary question in this case, at a minimum, was close. Based on that conclusion, I would affirm the jury's verdict of no cause of action.[9]

Although not addressed by the majority, my conclusion renders it necessary to briefly address other evidentiary challenges made by plaintiff before the trial court and again on

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[8] Notably, the majority clearly concludes that "[t]he evidence of defendant's recordkeeping in past malpractice cases cannot be used to attack defendant's credibility . . . ." If Dr. Morris's testimony in this regard is not being admitted to negatively impact defendant's credibility, it is very difficult for me to ascertain what relevancy it has.

[9] While unnecessary in light of my conclusion with respect to MRE 404(b), I would also note that this testimony could have been excluded under MRE 608(b) as well. It appears undisputed that the evidence at issue constituted character evidence, MRE 608(a), and MRE 608(b) unequivocally prevents the admission of that type of extrinsic evidence:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, 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.
>
> The giving of testimony, whether by an accused or by another other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Dr. Morris's testimony is unequivocally extrinsic evidence offered to attack defendant's character. Thus, it is inadmissible under MRE 608(b). While cross-examination may, but is not required to, be permitted in this regard, Dr. Morris's testimony is simply inadmissible extrinsic evidence. Nevertheless, assuming that his testimony was admissible under MRE 608, it remained subject to MRE 402 and MRE 403, and, as stated above, both rules prevent its admission.

appeal.[10] Plaintiff claims that defendant's "claimed disabilities, both physical and mental,"[11] "evidence of Defendant's former partners . . . who fired him for reasons including Defendant's lack of trustworthiness,"[12] and evidence regarding 2012 criminal allegations against defendant in Florida should have been presented to the jury[13]. In support of these claims, plaintiff states as follows: "Under MRE 608(b), evidence of specific instances of conduct is admissible if probative of truthfulness or untruthfulness." That is simply untrue. In fact, MRE 608(b) provides, in pertinent part, *the exact opposite*: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may *not* be proved by extrinsic evidence." (Emphasis added.) While that subsection does provide that cross-examination *may* be permitted in this regard, it is within the trial court's discretion and subject to MRE 402 and MRE 403. And, for similar reasons as those stated with respect to MRE 404(b) above, the trial court's decision to exclude this evidence did not constitute an abuse of discretion.[14]

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[10] It should be noted that the type of evidence that plaintiff wishes to admit in this regard is completely unclear. As this is not addressed by the majority, it is not clear how it will be handled on remand.

[11] Plaintiff alleged before the trial court that defendant suffered from a mental disability based only upon his deposition testimony. Nothing else in the record supports this allegation, and plaintiff has not made any assertion that this alleged mental disability existed at the time of the surgery in this case. Rather, as with the other evidence discussed on appeal, plaintiff simply sought to admit this evidence in hopes that it would render defendant's testimony less credible.

[12] Plaintiff claims that "Defendant's former partners at [Mid-Michigan Ear, Nose, and Throat, P.C.] fired him for reasons including Defendant's lack of trustworthiness." This lack of trustworthiness apparently arose from defendant's violation of a recently implemented office policy, what plaintiff's counsel describes as "billing irregularities," and other reasons. It was plaintiff's position that this evidence was admissible because defendant "opened the door" by testifying without objection that he served as Mid-Michigan Ear, Nose, and Throat, P.C.'s president in the past.

[13] Plaintiff describes this 2012 alleged criminal activity, which allegedly occurred two years after the surgery at issue in this case and was resolved by a nolo contendere plea, as "obtaining narcotics by fraud." Even she admits, however, that "there is no similarity between the facts underlying Defendant's obtaining narcotics by fraud and the medical malpractice at bar." Nevertheless, she claims that we can assume "that Defendant had been abusing prescription narcotics for quite some time" and that this "chronic abuse of narcotics may have had an effect on his ability to perform Plaintiff's surgery." This is an assumption I am not willing to make based on plaintiff's unsupported and self-serving hypotheses. Plaintiff has not alleged that defendant was intoxicated, in any manner, during plaintiff's surgery.

[14] Plaintiff's position is simple, and is one that this Court and our Supreme Court have rejected time and time again. Her position is that a variety of evidence against defendant, i.e., "evidence concerning . . . the underlying facts of a criminal prosecution for obtaining prescription narcotics by fraud, evidence concerning the fact that a reason he was discharged from his medical practice

II. RES IPSA LOQUITUR INSTRUCTION

I also disagree with my colleague's conclusion that the trial court did not abuse its discretion in instructing the jury on res ipsa loquitur. This Court has unequivocally held that a res ipsa loquitur instruction is improper when the type of injury sustained is a known complication of the medical procedure at issue and can occur without any negligence on behalf of the treating physician. *Swanson v Port Huron Hosp (On Remand)*, 290 Mich App 167, 185; 800 NW2d 101 (2010) ("Since this type of injury is a known complication of laparoscopic surgery, and since this type of injury can occur without any negligence on the part of the treating physician, it is axiomatic that instructing the jury on the doctrine of res ipsa loquitur was an abuse of discretion."). Here, both plaintiff's and defendant's experts testified that nerve injury is a known complication of submandibular gland excision and could occur without any negligence on behalf of the treating physician.[15] While it is true, as plaintiff and the majority point out, that the experts disagree as to whether it was defendant's negligence that caused the injury in this case, that, alone, is insufficient to support a res ipsa loquitur instruction.

My colleagues rely on *Wilson v Stilwill*, 411 Mich 587, 608; 309 Mich NW2d 898 (1981), for the "impl[ication] that even in the cases of a known and accepted complication, such as a post-operative infection, the circumstances surrounding the complication may give rise to an inference of negligence." I cannot agree with that understanding of *Wilson*. In my view, *Wilson* compels the opposite understanding. As the Supreme Court stated in that case, "The mere occurrence of a post-operative infection is not a situation which gives rise to an inference of negligence when no more has been shown than the facts that an infection has occurred and that an infection is rare." *Id*. In this case, like in *Wilson*, plaintiff has shown only that an injury

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was that the other physicians were unable to trust him, and evidence of his other botched surgeries on other patients," should be admissible to present "an accurate and fair picture of Defendant to the jury[.]" It cannot be disputed that this evidence is character evidence, see generally MRE 404, and this evidence has absolutely no bearing on the jury's determination as to whether defendant negligently injured plaintiff's HGN while removing her submandibular gland. Moreover, extrinsic evidence of specific instances of conduct is not admissible under MRE 608(b), and that is precisely the type of extrinsic evidence that defendant seeks to admit.

[15] Specifically, Dr. Morris, plaintiff's standard-of-care expert, testified as follows:

> *Q*. Okay. So everybody remembers [because this question was originally objected to], injury to those nerves, lingual nerve, hypoglossal nerve, marginal mandibular branch, are all recognized complications of a submandibular gland excision surgery, true?
>
> *A*. True.

While Dr. Morris also opined that plaintiff's injury would not have occurred but for defendant's negligence in this case, I cannot ignore the fact that he admitted that it was a "recognized complication[.]"

occurred and that such an injury is rare absent negligence on behalf of the treating physician. Thus, as in *Wilson*, "plaintiffs have not met the threshold requirement for an inference of negligence[.]" *Id*.

Accordingly, I would conclude that the trial court abused its discretion in instructing the jury on res ipsa loquitur. However, in light of the jury's verdict, this instructional error was harmless.

/s/ Colleen A. O'Brien