

STATE OF MICHIGAN
COURT OF APPEALS

SHERI M. ANDERSON,
Plaintiff-Appellee,

UNPUBLISHED
August 25, 2009

v

STATE FARM MUTUAL AUTO INS. CO.,
Defendant-Appellant.

No. 277096
Wayne Circuit Court
LC No. 03-305800-NI

Before: Servitto, P.J., and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant, State Farm Mutual Automotive Insurance Company, appeals as of right from a final judgment entered following a jury verdict in favor of plaintiff, Sheri M. Anderson, in this first-party action for No-Fault PIP benefits. Because defendant showed no evidentiary error requiring reversal and because the trial court did not err when it denied defendant's motion for directed verdict, JNOV, or new trial, we affirm.

Plaintiff filed this action for no-fault medical benefits from defendant insurer when defendant stopped paying for pain treatments plaintiff was receiving from anesthesiologist Dr. Maurice H. Converse. Plaintiff was involved in a car accident on December 3, 1999, in which her head struck the car window. Plaintiff began receiving treatment for pain from Dr. Converse in August 2000, receiving injections of steroids, anesthetic, and a substance called Sarapin, in the side of her face and head. Plaintiff testified that these injections were the only treatments that helped her chronic facial pain and headaches. Defendant initially covered the treatments, but stopped paying in January 2002 after an investigation of plaintiff's claim.

Plaintiff filed this action on February 21, 2003, and the matter proceeded to a jury trial that commenced on March 20, 2006. Plaintiff continued to receive treatments from Dr. Converse, with the number of injections totaling 22 injections two times per week. By the time of trial Dr. Converse claimed billing in excess of \$2 million for the treatments. At trial, defendant's obligation to pay for the treatments turned on two issues: whether plaintiff's pain was caused by the car accident or by her multiple sclerosis; and whether the treatments received from Dr. Converse were reasonable and necessary. Dr. Converse was qualified as an expert witness with respect to treatment for pain and his testimony was admitted at trial by way of his November 19, 2003, deposition. Plaintiff also presented the testimony of various medical experts and defendant presented competing testimony of its own medical experts. The jury returned a verdict in favor of plaintiff and awarded her approximately \$2.5 million and the trial

court entered judgment on the verdict. The trial court denied defendant's timely motion for new trial or JNOV. Defendant now appeals as of right.

I

Defendant first argues that the trial court was incorrect, as a matter of law, when it held that defendant needed to show by "other" evidence that plaintiff was actually malingering before the evidence of plaintiff's secondary gain could be admitted, and that circumstantial evidence was insufficient. Plaintiff responds that the trial court did not abuse its discretion in precluding the introduction of evidence at trial of the existence of a healthcare policy that paid some of plaintiff's medical bills. In general, we review a decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "However, any error in the admission or exclusion of evidence will not warrant appellate relief 'unless refusal to take this action appears . . . inconsistent with substantial justice,' MCR 2.613(A), or affects 'a substantial right of the [opposing] party.' MRE 103(a)." *Craig, supra* at 76.

In *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 180; 318 NW2d 679 (1982), this Court recognized that no-fault "benefits are payable for 'all reasonable charges' which relate to the care, recovery or rehabilitation of the injured person." MCL 500.3107(1)(a), provides in pertinent part:

Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

In this case, because of the non-coordinated status of plaintiff's benefits, plaintiff was receiving benefits under a "full policy," meaning defendant was obligated to pay plaintiff benefits "as primary" even though there was a health insurance carrier, namely Blue Cross, paying the benefits as "primary." Thus, defendant would directly pay plaintiff the amounts paid to Dr. Converse on her behalf by Blue Cross as stated in her Blue Cross-issued Explanation of Benefits (EOBs). Defendant claims that it would also reimburse plaintiff for any deductible or co-pay. At trial, the jury did not learn about the existence of plaintiff's Blue Cross medical coverage, that Blue Cross paid Dr. Converse for his services, or that plaintiff was paid directly by defendant through a reimbursement process because the trial court granted plaintiff's pretrial motion in limine seeking to exclude that information from the jury.

Defendant argues on appeal that it was error for the trial court to exclude evidence of the non-coordinated status of plaintiff's benefits as well as any mention of the fact that plaintiff had health insurance benefits through Blue Cross that had paid Dr. Converse for his services. Again, plaintiff raised this issue before the trial court in her motion in limine to exclude evidence of the non-coordinated status of the subject benefits and evidence of amounts defendant voluntarily paid. The trial court heard extensive oral arguments on plaintiff's pretrial motion in limine and

then the trial court granted plaintiff's motion in both respects relying on *Nasser v Auto Club Ins Ass'n*, 435 Mich 33; 457 NW2d 637 (1990).

In *Nasser*, our Supreme Court stated that in general, the collateral source rule bars evidence of insurance coverage when the evidence is presented to show mitigation of damages. *Nasser, supra* at 58. However, an exception exists where a defendant seeks to prove that an injured plaintiff is malingering or that insurance payments are the plaintiff's motivation to not work. *Id.*, citing 47 ALR 3d 234, 239-240. For the exception to apply, "[s]ufficient facts must be adduced which raise serious doubts in the minds of the jurors as to the extent of the injury actually suffered." *Id.* at 59, quoting *Blacha v Gagnon*, 47 Mich App 168, 171; 209 NW2d 292 (1973). "Thus, the evidence should be admitted 'only if it appears to the trial judge from other evidence that there is a real possibility that plaintiff was motivated by receipt of collateral source benefits to remain inactive as long as he did.'" *Id.*, quoting 22 Am Jur 2d, Damages, § 967, p 1004. "Moreover, once it is determined that the evidence is being offered for a competent purpose—i.e., as proof of malingering or motivation, rather than in mitigation of damages—the trial court must determine whether, even though relevant, the evidence nonetheless should be excluded as being more prejudicial than probative." *Id.* at 59-60, citing MRE 403."

Here, defendant argues that it sought the admission of evidence of plaintiff's Blue Cross medical insurance coverage to prove, in accordance with *Nasser*, that there is a "real possibility" that plaintiff's motive for submitting to twenty-two injections, twice weekly for several years despite the relatively low level of pain relief she receives from the injections is not actually pain relief or pain management but actually "the continued receipt of collateral source benefits." Under the collateral source rule, evidence of collateral benefits is generally disallowed, and in order for it to be admitted, defendant must establish foundationally, from "other evidence," that an injured plaintiff is malingering or that insurance payments are the plaintiff's motivation. *Nasser, supra* at 59.

Our review of the record reveals that defendant presented the case to the trial court merely as one of competing medical evidence regarding the efficacy of plaintiff's injection therapy. Defendant points out in its brief on appeal, and we agree, that it was not required to provide *direct* evidence of plaintiff's malingering to the trial court. However, *Nasser* is plain that defendant was required to present "other evidence" to the trial court to indicate that plaintiff was malingering or that insurance payments are plaintiff's motivation. *Nasser, supra* at 59. It is clear from the record that the trial court understood the *Nasser* requirements, despite defendant's claims otherwise in its brief on appeal. In its analysis of the issue, the trial court explicitly stated the *Nasser* standard more than once and even summarized the facts and holding of the case during the hearing. Using *Nasser* as a guideline, the trial court found that defendant's offer of expert medical evidence challenging the usefulness of plaintiff's chosen medical treatment alone "would not lead [it] to determine that there is, as the *Nasser* Court said, a real possibility that the plaintiff is malingering . . ." That medical professionals disagree on the appropriateness and effectiveness of plaintiff's chosen treatment without more fails to fulfill the *Nasser* foundational requirement and thus cannot justify the admission of collateral source evidence at trial. *Id.*

In any event, at the motion hearing, defendant's counsel admitted during argument that defendant had no independent evidence to present regarding plaintiff's alleged malingering or her motivation for treatment when he stated:

There's no evidence of motivation relative to these dollars being the driving force behind [Dr. Converse's] continued treatment. And I submit that one of those facts are there, that's something the Court could do if the Court was convinced there was a question of fact, but by phrasing this as a motion in limine at this particular point, we're really not in a position to bring that forward. It is not a question of I'm alleging [plaintiff] is committing fraud.

Considering the dearth of independent or circumstantial evidence of malingering presented to the trial court by defendant, together with defense counsel's concession at the hearing on the motion, we conclude that the trial court did not abuse its discretion when it held that defendant did not meet its foundational burden under *Nasser* and thus properly excluded evidence of plaintiff's receipt of collateral source benefits at trial. *Craig, supra* at 76; *Nasser, supra* at 59.¹

II

Next, defendant argues that the trial court abused its discretion when it allowed Dr. Converse to give expert testimony in this case under MRE 702 because he was not qualified to do so. Plaintiff responds that the trial court did not abuse its discretion in allowing Dr. Converse to provide expert opinion testimony where, after a two day evidentiary hearing, the trial court concluded that he was qualified to do so under MRE 702. This Court reviews a trial court's rulings concerning the qualifications of a proposed expert witness to testify for an abuse of discretion. *Woodard, supra* at 557. "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Id.*

In performing its gatekeeper function, a trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony-including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data-is reliable." *Gilbert, supra* at 779. "[R]eference in

¹ Because the trial court properly determined that defendant was not offering the collateral source evidence for a competent purpose, as proof of malingering or motivation, rather than in mitigation of damages, we need not review the trial court's MRE 403 analysis. *Nasser, supra* at 59-60.

MRE 702 to ‘scientific’ evidence ‘implies a grounding in the methods and procedures of science,’ and the rule’s reference to ‘knowledge’ ‘connotes more than subjective belief or unsupported speculation.’” *Id.* at 781, quoting *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

In *Gilbert*, our Supreme Court clarified that MRE 702 requires that the trial court specifically ensure that each aspect of an expert witness’s proffered testimony is reliable.

This gatekeeper role applies to *all* stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert, supra* at 782.]

Similarly, MCL 600.2955 provides criteria for expert testimony in actions for death and other injuries. While this is an insurance matter, namely a first-party claim for no-fault PIP benefits, underlying the case is a car accident involving other injuries to the plaintiff. Thus, the clearly set out requirements of MCL 600.2955 are useful in our analysis of this issue. MCL 600.2955 provides that “a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact.” MCL 600.2955(1). “In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert” MCL 600.2955(1). Providing further guidance, the statute adds that the court “shall consider” a list of factors similar to the *Daubert* indicia of reliability. See *Gilbert, supra* at 781. (“MRE 702 has since been amended explicitly to incorporate *Daubert*’s standards of reliability.”)

The purpose of a *Daubert* hearing is to filter out unreliable expert evidence. *Chapin v A & L Parts, Inc.*, 274 Mich App 122, 139; 732 NW2d 578 (2007). In *Chapin*, this Court explained as follows:

[S]cience is, at its heart, itself an ongoing search for truth, with new discoveries occurring daily, and with regular disagreements between even the most respected members of any given field. A *Daubert*-type hearing of this kind is *not* a judicial search for truth. The courts are unlikely to be capable of achieving a degree of scientific knowledge that scientists cannot. An evidentiary hearing under MRE 702 and MCL 600.2955 is merely a threshold inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science. The courts are not in the business of resolving scientific disputes. The only proper role of a trial court at a *Daubert* hearing is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert’s opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*Chapin, supra* at 139.]

After reviewing the record, we conclude that the trial court fulfilled its gatekeeper function in the hearing on the motion in limine to exclude the challenged testimony. Regarding Dr. Converse's qualification to testify as an expert, the trial court stated as follows:

Dr. Converse, a medical doctor, has been an anesthesiologist for over fifty years, having graduated from Ohio State University School of Medicine, originally licensed as a physician in Ohio in 1955. He has been on staff at four hospital and has been licensed in five other states – Michigan; Washington, D.C.; North Carolina and Virginia. He practiced exclusively in the area of anesthesiology full-time until 1985, when he began practicing on a part-time basis. Dr. Converse is not board certified in anesthesiology; however, he is a member of the American Society of Anesthesiology, The Ohio State Society of Anesthesiology, and the Ohio State Medical Society. The American Board of Anesthesiology, which certifies anesthesiologists, defines anesthesiology to include “the diagnosis and treatment of acute, chronic and cancer-related pain.”

Under MRE 702, a witness may be qualified as an expert based on knowledge, skill, experience, training or education. The Court finds as a matter of law that, given the foregoing credentials, Dr. Converse is qualified to testify as an expert in anesthesiology. Also there can be no question that “specialized knowledge [here, medical] will help the trier of fact to understand the evidence or to determine a fact in issue;” that is, whether Dr. Converse's treatments were reasonable and necessary.

Clearly, Dr. Converse's background qualifies him as an expert in the area of anesthesiology. However, defendant argues that the trial court's inquiry was insufficient to establish that Dr. Converse was qualified to testify as an expert on the specific facts of plaintiff's treatment, i.e. pain management injection therapy requiring twenty-two separate injections twice per week in perpetuity. In other words, defendant asserts that Dr. Converse was not qualified to provide opinion testimony regarding his treatment plan for plaintiff because his opinions do not meet the admissibility requirements of MRE 702 and *Daubert, supra*, for the reason that they are not based on sufficient facts and data, are not the product of reliable principles and methods, and that the principles and methods have not been reliably applied to the facts of the case.

At the *Daubert* hearing, the trial court heard a plethora of expert testimony provided by both parties regarding the efficacy of Dr. Converse's treatment plan as well as his use of the substance, Sarapin, as part of his injection therapy treatment. There were numerous medical opinions provided by both parties' experts. After hearing the evidence, ultimately, the trial court concluded as follows:

Defendant contends that Sarapin has not been shown to be an effective component in the treatment of pain. Drs. Bauer and Shapiro have used Sarapin in their treatment of pain patients for many years and opined that the use of Sarapin is commonly accepted within the medical community. The Court finds that there is anecdotal evidence of the efficacy of Sarapin; Plaintiff's exhibit 21 includes articles authored by physicians who found Sarapin to be effective in pain management. Defendant presented at the evidentiary hearing a 2004 article, published in “Pain Physician”, which claims that, based on two controlled studies

that Sarapin is ineffective in the treatment of pain. The Court finds that there is some support for, and some against, the proposition that Sarapin is an effective component of pain management. The ultimate determination as to the use and effectiveness of Sarapin must be left to the trier of fact.

Having made the foregoing findings of fact, the Court finds as a matter of law that the treatment plan devised and utilized by Dr. Converse was based upon sufficient facts and data, was based upon reliable principles and methods, and that those principles and methods were reliably applied to the facts of the case.

Defendant's motion in limine to strike the testimony of Dr. Converse is Denied.

An expert may be qualified "by knowledge, skill, experience, training, or education," but still must have applied a reliable method to sufficient facts of the case at hand to be qualified to testify. MRE 702. Despite defendant's claims to the contrary, the trial court heard the evidence offered by the parties at the *Daubert* hearing, and then properly inquired into and examined whether Dr. Converse's injection therapy treatment plan as well as the use of Sarapin as part of that plan had been subjected to scientific replication or peer review publication. MCL 600.2955.

The trial court heard evidence that Dr. Converse was not the treating physician that began administering injections to plaintiff's face, head, and neck for her chronic pain. Dr. Converse testified that after reviewing plaintiff's medical records he designed plaintiff's pain management treatment plan after consulting with noted physicians. Dr. Converse explained that he had researched the efficacy of Sarapin before devising the drug mixture that worked best for plaintiff's treatment. He also testified that he used Sarapin in the pain management of over 150 patients throughout his career. While defendant presented opinion testimony from its medical experts that Sarapin was a controversial drug in the field of pain management and questioned its efficacy in plaintiff's treatment, plaintiff's medical experts presented opinion testimony that Sarapin was effective in the treatment of chronic pain and had gained general acceptance in the realm of physicians practicing in the field of pain management over the last twenty-plus years. Plaintiff presented three separate board certified physicians who provided expert testimony regarding Sarapin and Dr. Converse's specific treatment modalities in regard to plaintiff. All three generally agreed that in their professional opinions, Dr. Converse's injection therapy treatment plan for plaintiff's pain management was consistent with accepted methodology in the field of pain management and that Dr. Converse had applied that plan in a clinically appropriate manner to plaintiff's particular circumstances. Defendant's experts challenged Dr. Converse's use of Sarapin in pain management as well as the frequency, duration, number, and injection sites of the injections.

MCL 600.2955(2) states as follows, "[a] novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field." This being the case, it was not the role of the trial court to determine the effectiveness of Sarapin in plaintiff's treatment, but rather to determine from the evidence presented, whether plaintiff established that the use of Sarapin in the area of pain management and specifically in the treatment of chronic pain through injection therapy "achieved general scientific acceptance among impartial and disinterested experts in the field." MCL 600.2955(2). Our review of the

record reveals that the trial court did not abuse its discretion when it determined that it had enough evidence before it to conclude that Sarapin had gained general scientific acceptance among disinterested experts in the field, and that Dr. Converse's use of the drug represented accepted methodology of pain treatment. Further, plaintiff provided a sufficient amount of expert evidence allowing the trial court to fulfill its role as gatekeeper and adequately vet the drug Sarapin itself as well as Dr. Converse's treatment protocol. *Gilbert, supra* at 782. As such, the trial court did not abuse its discretion when it held that Dr. Converse was in possession of sufficient knowledge and facts to reliably apply a reliable method of assessing the efficacy of his treatment protocol to determine its necessity and reasonableness. *Woodard, supra* at 557.

In sum, we conclude that the trial court at the hearing on the motion in limine to exclude Dr. Converse's testimony properly qualified Dr. Converse as an expert to testify as an expert on the specific facts of plaintiff's treatment, i.e. pain management injection therapy. Also, during the hearing on the motion in limine to exclude Dr. Converse's testimony regarding his treatment plan for plaintiff because defendant asserted that his opinions did not meet the admissibility requirements of MRE 702 and *Daubert, supra*, the trial court adequately addressed the factual, methodological, reasonableness, and necessity concerns brought forth by defendant. Defendant has not shown error.

III

Defendant next argues that the trial court abused its discretion by excluding testimony and evidence that was necessary in order for the jury to fairly adjudicate the issues. In general, we review a decision to admit or exclude evidence for an abuse of discretion. *Craig, supra* at 76. "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard, supra* at 557. "However, any error in the admission or exclusion of evidence will not warrant appellate relief 'unless refusal to take this action appears . . . inconsistent with substantial justice,' MCR 2.613(A), or affects 'a substantial right of the [opposing] party.' MRE 103(a)." *Craig, supra*. Defendant separates this issue into subparts, thus we will address each of the subparts in kind.

A. Dr. Mitchell

Defendant argues that the trial court erred when it limited the testimony of one of its experts, Dr. Mitchell, could present at trial. Plaintiff counters that the trial court did not abuse its discretion in limiting the substance of Dr. Mitchell's testimony based on defendant's failure to comply with discovery rules. Dr. Mitchell was the doctor who reviewed plaintiff's medical records at defendant's request, performed an IME, and ultimately opined that defendant should discontinue benefits. During discovery, defendant provided plaintiff with Dr. Mitchell's identifying information, his IME report, and addendum reports that supported his conclusion. At that time defendant represented only that Dr. Mitchell would testify "as to his findings during his independent medical examination of Plaintiff and as to 'no long term benefit from these "nerve blocks" and they need to be terminated immediately.'" Plaintiff submitted interrogatory requests and did not depose Dr. Mitchell during discovery. On March 31, 2005 plaintiff brought a motion to exclude evidence provided by Dr. Mitchell regarding causation.

The trial court entertained oral argument on the matter on May 18, 2005. Plaintiff stated that defense counsel told plaintiff's counsel that Dr. Mitchell intended to testify specifically that

“the injections were not actually either nerve blocks nor trigger point injections and that the needles that Dr. Converse used were insufficient for the purpose of the injections that Dr. Converse alleges to have been undertaken.” Plaintiff’s counsel argued to the trial court that this opinion was not contained anywhere in “the 2,500 page file” defendant provided plaintiff and that it would be unfair to allow the testimony when the substance of this new testimony was not provided during discovery. The trial court determined at the May 18, 2005 hearing that the new testimony defendant intended to provide by Dr. Mitchell was “something different” than that which had been communicated to plaintiff during discovery and thus, it would be “unfair to . . . allow that doctor to testify to that at this juncture.” The trial court ruled that Dr. Mitchell could only testify regarding his conclusion that plaintiff was not receiving long term benefit from the “nerve blocks” and his opinion that they needed to be terminated immediately.

Trial did not commence as scheduled due to the issues presented requiring the *Daubert* hearing as well as other scheduling concerns. Trial commenced on March 20, 2006, ten months after the motion hearing on this matter. In the mean time, plaintiff deposed Dr. Mitchell twice, on September 15, 2005 and November 16, 2005. Plaintiff also cross-examined Dr. Mitchell during the *Daubert* hearing on December 21, 2005. At trial, during Dr. Mitchell’s testimony, the issue arose again on plaintiff’s objection to defendant’s line of testimony. Counsel once again argued the issue outside of the presence of the jury. The trial court enforced its previous ruling and limited Dr. Mitchell’s testimony disallowing him from testifying to exactly why he concluded that plaintiff’s treatments should be terminated immediately because that information was not timely communicated to plaintiff by defendant during discovery. However, the ruling did allow defendant to elicit certain opinions regarding the injections.

The purposes of pretrial discovery regarding expert witnesses include narrowing the issues, eliminating surprise, and allowing the other party to adequately prepare for cross-examination. *Nelson Drainage Dist v Bay*, 188 Mich App 501, 506-507; 470 NW2d 449 (1991); *Roe v Cherry-Burrell Corp*, 28 Mich App 42, 49; 184 NW2d 350 (1970). Thus, at the time of the initial hearing, the trial court’s ruling was in line with *Nelson* and *Roe* because plaintiff was surprised by the new information and may not have had time to adequately prepare for cross-examination with the jury trial impending. *Id.* But trial was delayed for a significant period of time, and plaintiff had opportunities to depose Dr. Mitchell twice as well as cross-examine him at length during an evidentiary hearing. For this reason, defendant argues that by the time trial commenced and Dr. Mitchell was on the stand, both legal bases for the trial court’s ruling had been eliminated because plaintiff was not subjected to unfair surprise that left her unable to adequately prepare for the cross-examination of Dr. Mitchell. But, defendant does not consider the fact that plaintiff prepared her case for trial based on the discovery responses provided by defendant and took her own depositions of experts before the earlier trial dates. Plaintiff prepared her case by developing testimony in these depositions based on countering the defenses offered in the discovery responses defendant provided prior to the expiration of discovery. For this reason, had the trial court allowed Dr. Mitchell to expand his testimony at trial beyond the earlier discovery responses defendant provided, plaintiff would have suffered significant prejudice. To counter the expanded testimony of Dr. Mitchell, plaintiff would have been required to revisit her own experts and depose them again or present her case a second time. Under these circumstances, the trial court did not abuse its discretion in limiting the testimony of Dr. Mitchell at trial.

B. Dr. Nagasawa

Defendant argues that the trial court erred when it limited the testimony of a neurologist who treated plaintiff, Dr. Nagasawa, could present at trial. Plaintiff responds that the trial court did not abuse its discretion in limiting the scope of Dr. Nagasawa's testimony at trial because Dr. Nagasawa admitted during deposition testimony that he lacked the expertise necessary to render an opinion. Dr. Nagasawa, a neurologist with experience in treating MS, had been one of plaintiff's treating physicians and was aware of Dr. Converse's treatment methodology of plaintiff. In its brief on appeal, defendant argues that the trial court excluded certain testimony because Dr. Nagasawa "is not an anesthesiologist and did not have experience giving pain management injections to the face." Defendant continues to argue that this ruling is inconsistent with the trial court's later ruling that allowed plaintiff's witness, Dr. Shapiro, who also is not an anesthesiologist, to testify "regarding the reasonableness and the necessity of the injections given by Dr. Converse." Defendant insists that these two rulings are inconsistent and thus constitute an abuse of discretion.

Based on defendant's description of the trial court's rulings, at first blush it would appear that these rulings are inconsistent. However, defendant fails to mention that at his deposition Dr. Nagasawa admitted that he did not have "the expertise and background to question [Dr. Converse's] use of four injection points to address the pain that plaintiff was having" Considering this admission, the trial court ruled as follows:

THE COURT: Okay. Those are actually two separate issues, whether or not Dr. Nagasawa gave approval to Dr. Converse to do particular injections and whether Dr. Nagasawa could make – render opinions as to whether or not the number of injections given to the plaintiff were reasonable and necessary. The doctor, that is – Nagasawa, when asked whether he had the expertise and background to question the use of injection points to address pain, he said, I would probably say no – . . . that kind of disqualifies him from being able to say whether the number of injections or the type of injections were reasonable and necessary. If he says he probably doesn't have the expertise to render that opinion, I think that pretty much settles the issue.

Considering the fact that Dr. Nagasawa specifically admitted that he did not have the expertise necessary to render an opinion and the trial court's decision was not based merely on the fact that Dr. Nagasawa was not an anesthesiologist, defendant has not borne out its argument that the trial court's decisions with regard to Dr. Nagasawa and Dr. Shapiro were inconsistent. Defendant has not shown an abuse of discretion with regard to this argument, thus, the trial court did not err when it limited the testimony Dr. Nagasawa could present at trial.

C. Dr. Kassam

Defendant argues that the trial court erred when it excluded the testimony Dr. Kassam at trial because defendant had not identified him by the witness list cutoff date. Plaintiff asserts that the trial court did not abuse its discretion in precluding defendant from calling Dr. Kassam at trial for failure to comply with its obligations under the discovery rules. A trial court's decision to allow a party to amend a witness list is reviewed for abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1992). If a witness does not appear on a witness list that is

duly filed and served before the deadline set by the trial court, then the trial court may bar the added witness from testifying at trial unless the witness's proponent demonstrates "good cause" for the late addition. MCR 2.401(I)(2).

Defendant specifically argues that it immediately retained Dr. Kassam, the leading expert in trigeminal nerve blocks, following the testimony of one of plaintiff's treating physicians, Dr. Judge at a March 2004 deposition which was after the witness list cutoff date. Defendant states that Dr. Kassam's report was not complete until June 23, 2004 and was provided to plaintiff's counsel on July 2, 2004. At a motion hearing on October 15, 2004, plaintiff requested that the trial court strike Dr. Kassam because he was named four months after the witness list exchange was due, a month after the close of discovery, over a year after the case commenced, and two years after defendant cut off plaintiff's benefits notwithstanding the fact that defendant had two discovery extensions and two case evaluation extensions. At the motion hearing, defendant responded that there was no way to tell plaintiff about Dr. Kassam in October 2003 because he was not a known witness. Defendant continued that there was no trial date scheduled yet and that Dr. Kassam's report had been in plaintiff's possession for three months at that point and it requested that the trial court exercise its discretion rather than simply strike the witness. Plaintiff continued to assert that she was blindsided by the testimony, did not want the trial date extended another time because the plaintiff is an ill woman who suffers from severe MS that threatens her life, and instead wanted the witness to be stricken.

The trial court ruled as follows:

All right. I'm ready to rule. Dr. Casome [sic] will be stricken as defendant's expert witness. This case has been pending for approximately 18 months. I extended the dates twice in this case. For whatever reason defendant after close of discovery and shortly before, according to plaintiff, hours before the case evaluation gives a report to the plaintiff regarding Dr. Casome's [sic] opinions. It was too little too late. Even if this witness could now be deposed, it would also mean that the plaintiff would have to scramble and find somebody to retain at their own expense, and it means that the defendant would have been allowed to basically wait for as long as possible, give as little information as possible and then say, okay, plaintiff, you do what you can to meet this evidence now. I think that's unfair. I think it's improper. The motion is granted.

Considering that the trial court had already extended the deadline for discovery at defendant's request twice and the fact that had defendant been active and done more during the actual discovery process other than repeatedly provide plaintiff with defendant's insurance file, and that defendant did not seek immediate leave to amend the witness list in March 2004, it appears to this Court that the trial court's decision was a principled outcome. At the time of the exclusionary ruling, the trial court was prepared to set an imminent date for trial, allowing such a last minute witness would require additional experts and a repeat of the discovery process including the retaking of already taken expert depositions. Defendant had not been forthright.

Defendant also urges this Court to look at this question in hindsight because due to the *Daubert* issues and other scheduling issues, trial actually did not commence in this case until March 20, 2006, nearly a year and a half after the motion date of October 15, 2004. Defendant argues that it would not have been a "scramble" for plaintiff to secure an expert witness during

that time. Defendant also points out that the trial court could have shifted the costs of plaintiff's burden to defendant as an alternative remedy. But the record supports the facts that on the day of the motion hearing the trial court fully planned to set a trial date in the immediate future and clearly did not have the benefit of hindsight. Moreover, once defendant knew that trial was not going to proceed on an imminent basis, and that circumstances had changed regarding timing of trial, defendant could have motioned the trial court to revisit the issue to give the trial court another opportunity to consider the alternatives now suggested under the new time table. Defendant neither took advantage of the new timetable, nor gave the trial court that chance. The trial court did not err when it excluded the testimony Dr. Kassam at trial.

D. Dr. Converse/MedBack Clinic/Fraud Investigation

Defendant argues that the trial court also erred when it ruled that the jury was not permitted to learn that prior to first treating plaintiff Dr. Converse had been ordered to surrender his medical license in Michigan and had been placed on probation in Ohio for failing to keep up with his continuing medical education. Defendant asserts that the trial court also erred when it found that the jury would not hear that the MedBack Clinic, where Dr. Converse first began treating plaintiff, was a fraudulent operation and had been closed down by the federal government. Finally, defendant claims that error also occurred because the jury was not permitted to know that it was a fraud investigation by defendant and Blue Cross that triggered scrutiny of Dr. Converse's treatment. Plaintiff contends that the trial court did not abuse its discretion in precluding defendant from introducing evidence regarding Dr. Converse's medical licenses or the criminal investigation and closure of MedBack Clinic because none of it was relevant to the instant case.

Generally, all relevant evidence is admissible but irrelevant evidence is not. MRE 402; *Waknin v Chamberlien*, 467 Mich 329, 333; 653 NW2d 176 (2002). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Waknin, supra* at 333. The trial court also has discretion to exclude even relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Waknin, supra* at 334 n 3, quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

With regard to the status of Dr. Converse's medical licenses, any documentation regarding their status was not part of the trial court record. Instead, defendant attaches appendices to its brief on appeal that it purports substantiate its claims regarding the status of Dr. Converse's medical licenses in Michigan and Ohio. It is well settled that in order to preserve the issue of the admissibility of evidence for appeal, the proponent of evidence excluded by the trial court must make an offer of proof. MRE 103(a)(2); see also *Phinney v Perlmutter*, 222 Mich App 513, 529; 564 NW2d 532 (1997). "As noted in Robinson, Longhofer Ankers, Michigan Court Rules Practice, Evidence, 103.4, p. 26, an offer of proof serves the dual purpose of informing the trial court of the nature and purpose of the evidence sought to be introduced, and of providing a basis for the appellate court to decide whether to sustain the trial court's ruling." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291; 730 NW2d 523 (2006).

Defendant failed at trial to make an offer of proof regarding the substance of the testimony regarding Dr. Converse's licensure in the trial court. Consequently, this issue is not preserved for appellate review, and we decline to review it because this Court is unable to determine whether the trial court erroneously excluded testimony that would have affected defendant's substantial rights. MRE 103(a) ("[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . ."); see also *Phinney, supra* at 529. Were we to review this issue based on the evidence attached to defendant's brief on appeal, we would not find error because defendant has not shown how evidence regarding Dr. Converse's medical license status was relevant to the issues before the jury of whether plaintiff's injuries were related to the accident and whether plaintiff's injection therapy treatment plan was reasonable and necessary. MRE 401; MRE 402; *Waknin, supra* at 333. Moreover, it would fail the MRE 403 balancing test because the evidence injects broader issues into the case than the issues posed to the jury and is therefore more prejudicial than probative.

With regard to the Medback Clinic, again, any documentation of fraudulent or illegal activities at the MedBack Clinic or a federal investigation or shut down of the clinic is not part of the lower court record. Instead, similar to the previous issue, defendant attempted to supplement the record by attaching purported documentation as appendices to its brief on appeal regarding the history and status of the Medback Clinic. The trial court excluded any evidence of the federal investigation of MedBack and/or Dr. Converse after plaintiff brought a pretrial motion to exclude it. Again, this issue is not preserved for appellate review, and we decline to review it. MRE 103(a)(2). However, were we to review the issue based on the substance of arguments before the trial court, we would agree with the trial court's conclusion to exclude the evidence because its probative value would be substantially outweighed by the danger of unfair prejudice. It was alleged that Dr. Converse was initially indicted as a result of the federal investigation of the Medback Clinic involving fraudulent billing practices but any charges against Dr. Converse were ultimately dismissed. While defendant argues that the treatments Dr. Converse performed and then billed for were not reasonable and necessary, defendant does not argue that the services were not actually performed by him or were fraudulently performed. This evidence would be more prejudicial than probative and the jury would give this evidence undue or preemptive weight, thus we would conclude that the trial court did not abuse its discretion when it disallowed this evidence.

With regard to the last issue, defendant claims that error also occurred because the jury was not permitted to know that it was a fraud investigation by defendant and Blue Cross that triggered scrutiny of Dr. Converse's treatment. The trial court ruled on this issue after plaintiff brought a pretrial motion to exclude evidence of defendant's adjuster, Kim Grassel, being a fraud investigator employed by defendant's special investigations unit. The trial court agreed with plaintiff and held as follows:

[S]he can say she's an adjuster for State Farm without saying what unit she works in. I'm concerned about it for a couple of reasons. One, the jury might impute whatever allegations of fraud to the plaintiff and no one has suggested – at least I haven't heard it so far or seen it in any of the motions, no one has suggested that the plaintiff committed any fraud. The suggestion is that she received treatments that weren't reasonable and necessary and State Farm cut her

off as a result of that. The other thing is that it might infer or – not infer, because one draws an inference. It might imply that Dr. Converse was actually found guilty of some fraud, so it's not pertinent to any issue that the jury has to decide. The division in which or the section of unit in which the adjuster works, is not material or relevant to the discussion of whether these treatments were reasonable and necessary, and for that reason, the motion is granted.

We disagree with the trial court's analysis. This is not a third party claim but a first party claim against defendant. Thus, the reasonableness of defendant's actions with regard to its decision to terminate plaintiff's benefits because they were not reasonably necessary for her care, recovery, or rehabilitation is clearly in controversy and thus any facts elucidating defendant's actions are relevant. The evidence regarding what triggered the investigation into plaintiff's claims as well as what team was handling the claim might be particularly helpful to the jury with regard to defendant's decision-making. Also, we disagree with the trial court's conclusion that simply mentioning that Grassel was a fraud investigator employed by defendant's special investigations unit could create the inference that actual fraud occurred or that Dr. Converse was actually guilty of some fraud. Clearly, just from the facts of the case, the jury would be aware that defendant flagged plaintiff's case because of some unusual activity. That being the nature of the case, allowing defendant merely to correctly identify the role of its employee, Grassel, in order to create a clearer picture of the situation for the jury would not result in unfair prejudice to plaintiff. Thus, this evidence would not be more prejudicial than probative and the jury would not give this relevant evidence undue or preemptive weight, and therefore the trial court abused its discretion when it disallowed this evidence.

However, this was a limited ruling on a very narrow issue in this case. If the trial court errs in admitting or excluding evidence, reversal is warranted only if a substantial right of a party is affected and it affirmatively appears that failing to grant relief would be inconsistent with substantial justice. MCR 2.613(A); MRE 103(a); *Craig, supra* at 76; *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). After reviewing this error, we conclude that it constitutes merely harmless error. We cannot say that this evidentiary error affected a substantial right of defendant or that it affirmatively appears that failing to grant relief would be inconsistent with substantial justice. *Id.* Reversal is not warranted based on this error. *Id.*

IV

Finally, defendant argues that the trial court committed error requiring reversal when it denied, in their entirety, defendant's motions for directed verdict, and for JNOV or new trial because the evidence, even when viewed in the light most favorable to plaintiff, indicates that plaintiff no longer suffers from the right-sided facial pain that is the one component of her pain that her experts attribute to the auto accident. Further, defendant asserts that the expert opinions suggesting that the treatments at issue are reasonable are all qualified by assumptions indisputably shown to be not true and thus defendant is entitled to JNOV or partial JNOV, or relief from judgment. Plaintiff responds that the trial court did not err in denying defendant's motions for directed verdict, and for JNOV or new trial because defendant raises new issues on appeal that were not raised in the trial court and that defendant bases the remainder of its argument on a misapprehension of the facts and law pertaining to the case.

This Court reviews a trial court's decision on a motion for new trial for an abuse of discretion. *Coble v Green*, 271 Mich App 382, 389; 722 NW2d 898 (2006). We review de novo the trial court's denial of a motion for JNOV. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). In doing so, this Court "review[s] the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id.* "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005) (citations omitted).

Our review of the record reveals that defendant's argument on appeal that the trial court erred because it should have granted it a partial directed verdict or partial JNOV because there was insufficient evidence to support all of the injections that constituted the injection therapy was not raised in the motion before the trial court. A party challenging the sufficiency of the evidence must first present the issue to the trial court in a motion for a directed verdict (where the defendant claims that the plaintiff presented insufficient evidence to support a claim), or in a post-verdict motion. *Napier v Jacobs*, 429 Mich 222, 229; 414 NW2d 862 (1987). A party who fails to raise the issue regarding sufficiency of the evidence in a civil case is deemed to have waived the issue, absent manifest injustice. *Id.* at 235-237. Defendant has not shown manifest injustice, thus this portion of defendant's issue is waived. *Id.*

The remainder of defendant's issue involves allegations of incorrect diagnosis of plaintiff by Dr. Converse, that plaintiff no longer suffers from the right-sided facial pain attributable to the auto accident, and that the expert opinions suggesting that plaintiff's treatments are reasonable are untrue. Defendant's allegations are part of a larger argument which assumes that the jury could only have believed defendant's theory of the case based on the facts presented. But in support of its argument on this issue, defendant sets forth a version of the facts to substantiate a verdict in its favor but fails to acknowledge countervailing proofs presented at trial. Further, defendant's argument ignores the jury's role in assessing the credibility of the witnesses and weighing the evidence. "A jury is entitled to believe all, part, or none of a witness's testimony." *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346 (1973). This is true even if the evidence stands uncontradicted. *Vargo v Denison*, 140 Mich App 571, 574; 364 NW2d 376 (1985).

There was copious evidence at trial regarding Dr. Converse's diagnosis of plaintiff, the history of plaintiff's injury and pain, possible origins of her pain, the location of her pain, the frequency of her pain, and her pain level. Plaintiff, Dr. Converse, and medical experts presented by both parties opined regarding plaintiff's diagnosis, all aspects of her chronic facial pain, and the reasonableness of her injection treatments. Plaintiff acknowledges in her brief on appeal that there was evidence at trial disputing the diagnoses made by Dr. Converse regarding plaintiff's chronic pain as well as the appropriateness of the treatment plan. It cannot be denied that both parties presented evidence on these issues and it was the jury's function, as the trier of fact, to weigh all of the evidence presented at trial and judge the credibility of the witnesses. Defendant fails to acknowledge all of the testimony presented at trial, and further ignores the jury's function

to make credibility determinations. Thus, we reject defendant's claim that it was entitled to directed verdict, JNOV, or new trial.

Affirmed. Costs to plaintiff.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood