Affirmed and Opinion filed October 7, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-00163-CV

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LISA DZIEDZIC, et al., Appellants

V.

DR. NICHOLAS STEPHANOU, et al., Appellees

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 92-00436

O P I N I O N

This is a medical malpractice case. Plaintiffs, Lisa (Lisa) and Frank Dziedzic (Frank), appeal from a directed verdict granted in favor of defendants, Dr. Nicholas Stephanou (Stephanou), Dr. Mark Maunder (Maunder) and Dr. Jonathan Daniels (Daniels). The Dziedzics bring eighteen points of error. We affirm.

I.
Factual Background

Lisa was admitted to the hospital for pre-term labor when she was thirty-two weeks pregnant. Dr. Stephanou, her obstetrician, and two first year resident physicians, Dr. Maunder and Dr. Daniels, treated her. As part of her care at the hospital, Lisa was administered two drugs, terbutaline and magnesium sulfate. Subsequently, Lisa developed long-term respiratory problems.

The Dziedzics filed suit against Stephanou, Maunder and Daniels, alleging the doctors failed to obtain Lisa's informed consent to the drug therapy and failed to warn her of the risk of pulmonary edema associated with taking terbutaline and magnesium sulfate. They also allege the appellees were negligent in administering the drugs. Additionally, the Dziedzics claim Dr. Stephanou was negligent in failing to provide proper post-delivery care. At trial, Maunder and Daniels moved for directed verdict at the end of the plaintiffs' case. The motion was denied. The case was given to the jury, but the jury could not reach a verdict.[1] Therefore, a mistrial was orally announced. Later, all defendants filed a motion for directed verdict which was granted.

In points of error one, two and three, the Dziedzics argue the trial court erred in granting a directed verdict on the informed consent theory. In points of error four, five and six, the Dziedzics argue the trial court erred in granting a directed verdict on the negligence issue.[2] In points of error seven and eight, the Dziedzics argue the trial court erred in directing

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[1] Judge Tracey Christopher was filling in for Judge Hall. After the jury returned stating it was deadlocked, the appellees re-urged their motion for directed verdict. Judge Christopher, who had not heard any of the evidence in the trial, refused to grant a directed verdict.

[2] Under these points, the Dziedzics specifically assert the directed verdict was improper because there was evidence that their injuries were proximately caused by appellants' acts or omissions in (1) giving terbutaline and magnesium sulfate as a treatment to delay preterm labor; (2) failing to stop the drugs when the appellants knew or should have known the patient was suffering adverse reactions; (3) failing to advise the patient her symptoms could be related to the drugs; (4) failing to properly monitor the patient for symptoms related to the drugs; (5) failing to obtain x-rays or arterial blood gases; (6) failing to obtain a prompt pulmonary consult; and (7) failing to advise the Dziedzics that Daniels and Maunder were residents (continued...)

a verdict in favor of Stephanou on the negligence theories as to his (1) failure to remove placental particles at the time of delivery, and (2) failure to timely diagnose and treat Lisa's post-delivery problems of excessive bleeding associated with retained placental tissue. In points of error nine through twelve, the Dziedzics assert the trial court erred in granting a directed verdict on the basis that Dr. Clarke is not a qualified expert under the malpractice act, and erred in not finding the act unconstitutional to the extent it precludes qualified experts to testify when they are not teaching or practicing at the time. In point of error thirteen, the Dziedzics argue it was error to overrule objections to defense expert testimony as to whether a reasonable person would have refused the drug therapy for preterm labor. In point of error fourteen, they argue it was error to overrule objections to defense expert testimony that a physician has no legal duty to obtain a written consent for drug therapy or to warn a patient that the FDA and manufacturer of a drug warn against its use as treatment for preterm labor. In points of error fifteen through eighteen, the Dziedzics complain it was error to overrule objections to the jury charge.

II.
Standard of Review

In reviewing a directed verdict on appeal, an appellate court must "view the evidence in the light most favorable to the party against whom the verdict was rendered and disregard all contrary evidence and inferences." *Quantel Business Sys. v. Custom Controls*, 761 S.W.2d 302, 303 (Tex. 1988). The judgment must be reversed and the case remanded for a jury determination if there is any evidence of probative value raising a material fact issue. *See id*. at 304. However, the judgment must be affirmed if there is no evidence of probative force or if the probative force is so weak that only a mere surmise or suspicion is raised as to the existence of essential facts on an ultimate issue in the case. *See Hycarbex, Inc. v. Anglo-Suisse, Inc.*, 927 S.W.2d 103, 107-108 (Tex. App.—Houston [14th Dist.] 1996, n.w.h.).

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[2] (...continued)
and not licensed physicians.

III.
Waiver

As a preliminary matter, the Dziedzics argue the trial court erred in granting a directed verdict because the appellees did not renew their motion for directed verdict after putting on evidence. Essentially, they argue, the appellees waived their right to a directed verdict. The Dziedzics also argue that an order of mistrial was pronounced in open court and entered on the docket sheet. Therefore, they assert, a directed verdict was legally barred.

Appellant's waiver argument is misplaced. When, under the evidence produced at trial before a jury, a party is entitled to a verdict as a matter of law, the trial court may *sua sponte* or on the motion of a party, instruct the jury as to the verdict it may return, or it may withdraw the case from the jury and render judgment. *See Estate of Grimes v. Dorchester Gas Producing Co.*, 707 S.W.2d 196, 201 (Tex. App.–Amarillo 1986, writ ref'd n.r.e). Moreover, it is well established in Texas that where a jury is unable to agree upon a verdict and has been discharged, but no order of mistrial has been entered, the trial judge may reconsider a motion for instructed verdict and act upon the same. *See Nelson v. Data Terminal Sys., Inc.*, 762 S.W.2d 744, 748-749 (Tex. App.—San Antonio 1988, writ denied).

It is irrelevant whether the defendants made a motion for directed verdict earlier in the trial because any party can move for a directed verdict at the close of the evidence and that is what the defendants did. *See Collora v. Navarro*, 574 S.W.2d 65, 67 (Tex. 1978) (affirming grant of directed verdict for the *plaintiff* at the close of the evidence); *Gumm v. Owen*, 815 S.W.2d 259, 263 (Tex. App.—El Paso 1991, no writ) (affirming grant of directed verdict to *defendant* at the close of the evidence). Furthermore, it is proper for either party to move for a directed verdict after a jury is discharged for inablility to reach a verdict. *See Chasco v. Providence Memorial Hospital* 476 S.W.2d 385, 387(Tex. Civ. App.—El Paso 1972, no writ).

Here, the appellees re-urged their motion for directed verdict after the close of evidence. Therefore, they did not waive the right to a directed verdict. Judge Christopher

orally rendered a mistrial and noted such on the judge's docket sheet. The record contains no order reduced to writing nor any indication that a order was entered on the court's minutes. *See Oak Creek Homes, Inc., v. Jones*, 758 S.W.2d 288, 290 (Tex. App.—Waco 1988, no writ) (discussing the stages of a valid judgment); *In re Fuentes*, 960 S.W.2d 261, 264 (Tex. App.—Corpus Christi 1997, no pet.) (noting judge's docket notations are not sufficient for entry of judgment in record). Therefore, we hold the trial court properly considered and ruled on the appellees' motion for directed verdict.

IV.
Expert Qualification

The defendants moved for directed verdict on the grounds that Dr. Clarke, the only offered expert witness, was not a qualified expert witness. The appellees argued that without Dr. Clarke's testimony, there was no evidence establishing their liability. The doctors assert that the plaintiffs did not establish the standard of care, did not show that the doctors deviated from the standard of care, or that they proximately caused the Dziedzics' injuries. We will first address points of error nine through eleven concerning whether Dr. Clarke was qualified as an expert witness.[3]

The Dziedzics assert that the appellees' objection to Dr. Clarke was waived because it was untimely under Section 14.01(e) of the Medical Liability and Insurance Improvement Act. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, §14.01(e) (Vernon Pamp. 1999). This provision provides that a pretrial objection to the qualifications of an expert witness must be made no later than twenty-one days after the date the objecting party receives a copy of the witness's curriculum vitae or the date of their deposition. *See id*. However, this provision applies only to claims filed on or after September 1, 1995. *See* Medical Liability and Insurance Improvement Act of May 18, 1995, 74th Leg., R.S., ch. 140, § 6, 1995 Tex. Gen.

[3] It is not clear whether the Dziedzics attack the constitutionality of Article 4590i, the Medical Liability and Insurance Improvement Act, under points of error nine through eleven or in point of error twelve. However, because they present the argument in the alternative and request we address the issue only if we find Dr. Clarke is not a qualified expert, we address the qualification issue first.

Laws 985, 989. This claim was filed January 6, 1992. Therefore, this waiver argument is without merit.

Rule 702 of the Texas Rules of Evidence governs the admissibility of expert testimony. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554 (Tex.1995). The rule provides:

> If 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.
>
> Tex. R. Evid. 702.

The admission of such testimony lies within the sound discretion of the trial court and will not be set aside absent a showing of abuse of that discretion. *See Broders v. Heise*, 924 S.W.2d 148, 151 (Tex.1996). The party offering the expert's testimony bears the burden of proving that the witness is qualified under Rule 702. *See id*. Specifically, the offering party must establish that the expert has knowledge, skill, experience, training or education regarding the "*specific issue* before the court which would qualify the expert to give an opinion on that *particular subject*." *Id.* at 153 (emphasis added) *(*citing *Christophersen v. Allied-Signal Corporation*, 939 F.2d 1106, 1112-1113 (5th Cir. 1991) (holding that medical doctors are not automatically qualified to testify regarding every medical issue)). Moreover, the word "knowledge" connotes more than subjective belief or unsupported speculation. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993) .

At the time the Dziedzics initially offered Dr. Clarke's testimony, the appellees objected on the basis that Dr. Clarke was not qualified to give his opinion as to the standard of care and consent requirements for a doctor or resident treating a pre-term labor patient in 1990. After conducting a hearing pursuant to Evidence Rule 104, the judge stated he was "doubtful about the qualifications of this witness." The judge, however, allowed Dr. Clarke

to testify but advised the parties that if his apprehensions concerning the doctor's lack of qualifications bore out, he would consider a motion for judgment notwithstanding the verdict.

Dr. Clarke testified he was, at the time of trial, a licensed doctor of osteopathy who was semi-retired from practice. He stated he had not practiced medicine full time in approximately twelve years. Dr. Clarke also stated he had not delivered a baby in approximately eight years and had not treated any woman in preterm labor in over twelve years. Dr. Clarke testified he had limited experience with terbutaline and magnesium sulfate.[4] When asked what drugs were commonly employed to treat preterm labor he could not answer the question. Additionally, Dr. Clarke testified he had never used residents in his practice of medicine.[5]

The specific issues in this case were whether the appellees, as residents and attending physician, breached their duty of care in treating Lisa for preterm and post-term labor and in obtaining proper informed consent for the use of terbutaline and magnesium sulfate. Dr. Clarke, however, does not possess the requisite knowledge, skill, experience, training or education regarding these specific issues. He admitted that he was not familiar with the medications used today to treat preterm labor. He did not claim to have personal experience or expert knowledge regarding magnesium sulfate. Furthermore, his experience with terbutaline was over twenty years ago and he had never used it in treating preterm labor. He had not even discussed use of the drug with other doctors in over ten years. Finally, he stated he had no experience in working with resident doctors. The record before us demonstrates

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[4] Initially, on cross-examination Dr. Clarke stated he had personal experience with terbutaline and magnesium sulfate. However, the appellees impeached his testimony with deposition testimony in which Dr. Clarke stated that he did not have personal experience with these drugs. He later qualified his testimony by stating that he had knowledge of these drugs from his extensive reading and in talking to other doctors. Dr. Clarke then stated he had not discussed these drugs with other physicians in over ten years. Later yet, Dr. Clarke testified that his only experience with the terbutaline was in dealing with respiratory problems. The doctor also testified that it had been so long since he used terbutaline that he could not tell when he last used the drug although he stated it had been at least twenty years.

[5] During the Rule 104 hearing, Dr. Clarke said the standard of care for a resident is that the resident "is supposed to take care of the patient up to the point he has knowledge of how he's able to take care of the patient for that particular problem."

Dr. Clarke lacked the knowledge and experience necessary to permit him to give an opinion which would assist the jury in determining what the standard of care was for an attending physician or resident caring for a woman in preterm labor. Accordingly, we hold the trial court did not abuse its discretion in granting a directed verdict on the basis that Dr. Clarke was not a qualified expert witness. Therefore, points of error nine through eleven are overruled.

V.
Constitutional Challenge

Because we find Dr. Clarke is not qualified to testify as an expert witness, we will address point of error twelve. The Dziedzics argue that article 4590i violates "due process," "equal protection," and the open courts provision of the Texas Constitution[6] and "statutes discriminating against aged or retired persons." The Dziedzics argue article 4590i acts as "special privilege" legislation protecting the medical profession and is arbitrary and unreasonable. Furthermore, the Dziedzics argue there is no legitimate state interest in precluding a retired or semi-retired physician from testifying.

When we review the constitutionality of a statute, we must presume the statute is valid. *See HL Farm Corp. v. Self*, 877 S.W.2d 288, 290 (Tex. 1994). The party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality. *See Raitano v. Tex. Dept. of Pub. Safety*, 860 S.W.2d 549, 550 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

We hold the Dziedzics have not met their burden of proving article 4590i is unconstitutional. They cite no authority for showing the statute violates due process, equal protection or the open courts provisions of the Texas constitution. They make no legal argument showing how not allowing expert witnesses to be retired from practice under 4590i constitutes a "special privilege." The most authority the Dziedzics cite for the

[6] See TEX. CONST. art. I, §13.

unconstitutionality of 4590i is a string of cases simply showing situations where other statutes have been found unconstitutional. It is not the appellate court's responsibility to create the appellants' argument. *See* TEX. R. APP. P. 38.1(h) (noting that brief must contain a "clear and concise argument for the contentions made, with appropriate citations to authorities and to the record"). Because the Dziedzics have not met their burden, point of error twelve is overruled.

VI.
Informed Consent

In points of error one, two and three, the Dziedzics claim the trial court erred in granting a directed verdict on the "informed consent" theory. The jury was deadlocked on this issue. The Dziedzics argue that Lisa was not warned of the risk of pulmonary edema associated with the use of terbutaline and magnesium sulfate. A claim based on a doctor's failure to fully inform a patient of the risks associated with certain treatment is a negligence cause of action governed by article 4590i. *See* TEX. REV. CIV. STAT. ANN. art. 4590i.

Section 6.03 of article 4590i creates the Texas Medical Disclosure Panel [the Panel] which determines what risks and hazards must be disclosed to patients undergoing medical care and surgical procedures. *See id.* §6.03(a). The Panel provides lists of surgical procedures and treatments requiring disclosure of risks. *See id*. §6.04(b). The Panel also establishes the form and degree of disclosure required for each risk. *See id*. A rebuttable presumption that the physician was not negligent exists if the Panel's guidelines are followed. *See id.* §6.07(a)(1).

If the Panel has made no determination regarding the duty of disclosure for a procedure or treatment, as here, the physician is under the "duty otherwise imposed by law." *See id*. §6.07(b). The law imposes the duty to disclose all risks and hazards which could influence a reasonable person in making their decision to consent to the procedure. *See Peterson v. Shields*, 652 S.W.2d 929, 931 (Tex. 1983). The Dziedzics also have the burden to prove by expert testimony that the risk was inherent to the treatment. *See Galvan v.*

Downey, 933 S.W.2d 316, 318-319 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Therefore, the Dziedzics had to prove by expert testimony that pulmonary edema is a material risk inherent in taking the medication. *See Barclay v. Campbell*, 704 S.W.2d 8, 9 (Tex. 1986).

The appellees moved for directed verdict alleging the Dziedzics did not meet their burden of proof. In their motion for directed verdict, the appellees argued the only reliable expert evidence came from the testimony of appellees witnesses, and their testimony did not establish the elements necessary to show negligence. The appellees argued the only expert evidence showing any negligence on their part came from Dr. Clarke, whose testimony must be disregarded because he is not a qualified expert witness.

We have held Dr. Clarke is not a qualified expert witness. When an expert is not qualified, his testimony has no probative worth and is not proper evidence. *See Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996). A testifying expert cannot establish medical standards of care by testifying as to what he would have done. *See Hersh v. Hendley* 626 S.W.2d 151, 159 (Tex. App.—Ft. Worth 1981, no writ). A defendant doctor, however, can establish the medical standard by which his own conduct is to be judged. *Id*. at 155. Accordingly, if the only evidence on an essential element of a plaintiff's case comes from incompetent expert testimony, the plaintiff does not carry his burden. *See Leitch*, 935 S.W.2d at 119.

Because Dr. Clarke is not a qualified expert witness, his testimony has no probative value and is not proper evidence regarding the issue of whether the risk of pulmonary edema is inherent in taking the drugs that were administered to Lisa. Therefore, we will look to the testimony of appellees and their expert witnesses' testimony to determine if the Dziedzics proved that the risk in treating Lisa with terbutaline and magnesium sulfate was inherent and

material such that it could influence a reasonable person's decision to consent to the procedure.[7]

The Dziedzics argue that Dr. Stephanou's testimony establishes his negligence in not adequately informing the Dziedzics about the use of terbutaline and magnesium sulfate in treating preterm labor. However, the testimony to which the Dziedzics are directing this Court does not establish there was an inherent risk of pulmonary edema associated with the oral or subcutaneous use of these drugs or that the risk was material such that it could influence a reasonable person's decision to consent to the medication. Dr. Stephanou testified the risk of pulmonary edema was less than one percent and only when given intravenously. He stated there was no risk of pulmonary edema when the drug is administered orally, as it was with Lisa. Furthermore, Dr. Stephanou specifically said he discussed the risks associated with the oral or subcutaneous use of terbutaline and magnesium sulfate with Lisa. Therefore, Dr. Stephanou's testimony does not establish his negligence with respect to the informed consent issue.

Next, the Dziedzics point to their own testimony. This is insufficient, however, to establish appellees' duty to disclose the risks of Lisa's treatment. The duty must be established through expert testimony. *See Galvan*, 933 S.W.2d at 318. Therefore, we can not look to the Dziedzics' testimony in determining whether a directed verdict was properly granted in this case.

The Dziedzics also point to the testimony of Dr. Alvarez, one of the appellees' expert witnesses, as establishing the appellees' duty to obtain informed consent from Lisa and the breach of that duty. The Dziedzics specifically point to his testimony stating that most medical texts warn against the possibility of pulmonary edema associated with the use of terbutaline. Upon examination, however, Dr. Alvarez's testimony does not establish the two

[7] The Dziedzics specifically note that the testimony of Dr. Maunder and Dr. Daniels does not establish the duty of a physician to give informed consent because neither witness was asked about terbutaline or magnesium therapy.

part test for proving a duty to give informed consent.[8] Furthermore, Dr. Alvarez's testimony expressly negates the materiality element necessary for establishing the duty to inform. Dr. Alvarez specifically testified that the risk of pulmonary edema resulting from the use of terbutaline is very rare. In addition, he never discussed the risk in relation to the manner in which the drug is administered. Last, the Dziedzics do not point to testimony where Dr. Alvarez discusses the inherent risk or materiality of the risk with respect to the use of magnesium sulfate alone or in combination with terbutaline.

The Dziedzics cite the testimony of Dr. Moore, another one of the appellees' experts, as also establishing the duty to give informed consent. However, Dr. Moore expressly stated there is no risk of pulmonary edema associated with the use terbutaline when administered subcutaneously or orally, as it was with Lisa.

Finally, the Dziedzics point to Dr. Kirshon's testimony, another of the appellees' expert witnesses. Dr. Kirshon testified pulmonary edema is one of the side effects that can occur when using terbutaline and magnesium sulfate. However, he did not testify that the risk associated with these drugs was a material risk. Furthermore, Dr. Kirshon specifically stated terbutaline was a standard drug used to treat preterm labor.

Having examined all of the testimony cited for supporting appellant's points of error one through three, we hold the trial court did not err in directing a verdict for the appellees on the informed consent issue. Points of error one, two and three are overruled.

VII.
Negligence

In points of error four, five and six, the Dziedzics argue the trial court erred in granting a directed verdict in favor of all appellees relating to the joint and several

[8] To establish a duty of disclosure of risks for a procedure or treatment, the plaintiff must prove by expert testimony the existence of two elements: (1) the risk was inherent to the medical procedure undertaken, and (2) the risk was material in that it could influence a reasonable person's decision to consent to the procedure. *See Galvan*, 933 S.W.2d at 319.

"negligence" issues. In points of error seven and eight, the Dziedzics argue it was error for the trial court to grant appellee's motion for directed verdict in favor or Dr. Stephanou on the negligence theories as to his (1) failure to remove placental particles at the time of delivery, and (2) failure to timely diagnose and treat the patient's post-delivery problems of excessive bleeding associated with retained placental tissue.

In order to prove medical malpractice, the plaintiff has the burden of proving (1) the physician-defendant breached the standard of care by undertaking a mode or form of treatment that a reasonable, prudent member of the medical profession would not have taken under the circumstances; and (2) the breach was the proximate cause of the plaintiff's injuries such that there is a reasonable medical probability that the plaintiff's injuries were caused by the negligence of one or more of the defendants. *See Bradley v. Rogers*, 879 S.W.2d 947, 953 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

With regard to the each of the assertions of negligence claimed by the Dziedzics, we have examined the cited testimony and do not find it meets the requisite requirements for proving medical malpractice. Once again, because we held Dr. Clarke is not qualified as an expert witness, his testimony may not be considered in determining whether the Dziedzics established their negligence claim. The only evidence the Dziedzics identify reflecting the standard of care and proximate causation is that of Dr. Clarke. Therefore, the Dziedzics did not meet their burden of proving the appellees' negligence in giving Lisa terbutaline and magnesium sulfate under the circumstances. Therefore, points of error four through eight are overruled.

VIII.
Objections to Testimony

In points of error thirteen and fourteen, the Dziedzics assert the trial court erred in overruling objections to appellees' expert testimony as to whether a reasonable person would have refused the drug therapy for preterm labor and in overruling objections to testimony that a physician has "no legal duty" to obtain a written consent for drug therapy or to advise a patient the FDA and manufacturer of a drug warn against using the drug for treatment of

preterm labor. In order to preserve error, the complaint on appeal must be the same as that presented in the trial court. *See Holland v. Hayden*, 901 S.W.2d 763, 765 (Tex.App.—Houston[14th Dist.] 1995, writ denied). At trial, the Dziedzics objected to Dr. Stephanou's testimony concerning the duty to obtain a written consent form on the basis it constituted a legal conclusion reserved for the trial court and not for the testimony of a witness. On appeal, however, the Dziedzics argue the testimony invaded the province of the jury. Because the objection at trial and the argument on appeal are not the same, the Dziedzics waive any error relating to this testimony.[9]

We now turn to the testimony concerning whether a reasonable person would have refused the drug therapy for preterm labor. A complaint based on the improper admission of evidence is reviewed under an abuse of discretion standard. *See Robinson*, 923 S.W.2d at 558. To obtain reversal of a judgment based on an error in the admission or exclusion of evidence, appellant must show that the error probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a); *see also Mancorp. Inc. v. Culpepper*, 802 S.W.2d 226, 230 (Tex.1990). Therefore, a successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753-54 (Tex.1995).

Texas Evidence Rule 702 provides that if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, then a witness who is qualified as an expert may testify thereto in the form of an opinion or otherwise. Rule 704 permits testimony to be presented before the jury even if it embraces an ultimate issue to be decided by the trier of facts. *See* TEX. R. EVID. 704. An expert may state an opinion on a mixed question of fact and law as long as the opinion is

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[9] Moreover, it is not clear whether the Dziedzics are contending the question to Dr. Stephanou was one for the jury or whether they object because it called for a legal conclusion. Because they do not cite any authority or assert any argument on appeal concerning this testimony, this point is waived. *See* TEX. R. APP. P. 38.1(h); *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983).

confined to the relevant issues and is based on proper legal concepts. *See Louder v. DeLeon*, 754 S.W.2d 148, 149 (Tex.1988). Particularly, expert testimony on proximate cause is admissible so long as it is predicated on the proper legal concept. *See Louder*, 754 S.W.2d at 149.

We hold the court acted within its discretion in admitting Dr. Stephanou's testimony concerning whether a reasonable person would have refused the drug therapy for preterm labor. *See Galvan*, 933 S.W.2d at 319; *Greene v. Thiet*, 846 S.W.2d 26, 30-31 (Tex. App.—San Antonio 1992, writ denied) (noting article 4590i standard of whether a reasonable person would have refused the treatment or procedure can be established through expert testimony). Points of error thirteen and fourteen are overruled.

IX.
Jury Charge

Points of error fifteen through eighteen concern alleged jury charge error. However, these points present nothing for review, because this case was decided by the court on a directed verdict, not by the jury. When a jury is discharged without reaching a verdict and the case is decided by the court, any complaints alleging error in the charge are immaterial and present nothing for review. *See Brown v. Seltzer*, 424 S.W.2d 671, 676 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.). Furthermore, in order to reverse a judgment based on error in the charge, the Dziedzics must establish that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. *See Penick v. Christensen*, 912 S.W.2d 276, 287 (Tex.App.—Houston [14th Dist.] 1996, writ denied). Because this case was decided by directed verdict, any error in the charge could not have caused rendition of an improper judgment; therefore the alleged error in the charge is moot. Accordingly, points of error fifteen through eighteen are immaterial and are overruled.

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed October 7, 1999.

Panel consists of Justices Anderson, Edelman, and Lee[10].

Do Not Publish — TEX. R. APP. P. 47.3(b).

[10] Senior Justice Norman Lee sitting by assignment.