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STATE OF MICHIGAN

IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF,

Plaintiffs-Appellants,

v.

DANIEL K. FAHIM, M.D.,
MICHIGAN HEAD & SPINE INSTITUTE

Defendants-Appellees,

And

* DANIEL K. FAHIM, M.D., P.C.,
* KENNETH P. D'ANDREA, D.O., and
* WILLIAM BEAUMONT HOSPITAL, d/b/a BEAUMONT HOSPITAL – ROYAL OAK*,
Jointly and Severally,

Defendants.

Supreme Court Case No: 163120

Court of Appeals No: 352648

Oakland County Circuit
Case No: 18-166129-NH

*denotes dismissed from the case

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Whether this Court's decisions in *Edry v Adelman*, 486 Mich 634 (2010), and *Elher v Misra*, 499 Mich 11 (2016), correctly describe the role of supporting literature in determining the admissibility of expert witness testimony on the standard of care in a medical malpractice case?

Plaintiffs-Appellants answer "No"
Defendants-Appellants argue "Yes"
The Trial Court answered "Yes"
The Court of Appeals answered "Yes"

II. If not, what a plaintiff must demonstrate to support an expert's standard-of-care opinion?

Plaintiffs-Appellants answer "A Plaintiff must demonstrate that the expert's standard-of-care opinion is rationally derived from valid scientific principles and can do so using any reasonable factors under the circumstances of a given case, including, the expert's personal knowledge, training, and experience."

Defendants-Appellants did not address this question below
The Trial Court did not address the question below
The Court of Appeals did not address this issue

III. Whether the appellants' standard-of-care expert met the standards for determining the reliability of expert testimony and was thus qualified to testify as an expert witness under MRE 702 and MCL 600.2955 or whether a *Daubert* hearing was necessary before making that decision?

Plaintiffs-Appellants answer "Yes, the expert is qualified under the appropriate test, as set forth herein". As to whether further *Daubert* inquiry is needed, given the extensive analysis of the expert's opinion, methodology, and supporting materials, Plaintiffs-Appellants answer that "no further inquiry is required; but in future cases, the trial court should be endowed with discretion as to, under the facts of the particular case, a *Daubert* inquiry is required."

Defendants-Appellees answer "No"
The Trial Court answered "No"
The Court of Appeals answered "No"

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STATEMENT OF BASIS OF JURISDICTION

The Trial Court issued its order granting summary disposition to Defendants on November 25, 2019. (Exhibit A, order of 11/25/2019; Apx at 000001) Plaintiffs-Appellants filed a timely Motion for Reconsideration, which was considered by the trial court, but ultimately denied, by Order dated January 21, 2020. (Exhibit B, order of 1/21/2020; Apx at 000005). Plaintiffs-Appellants thereafter filed a timely claim of appeal, dated February 10, 2020. The Court of Appeals issued its opinion on May 6, 2021. (Exhibit C, majority opinion; Apx at 000009; Exhibit D, concurring opinion; Apx at 000017). Pursuant to MCR 7.305(C)(2), Plaintiffs filed a timely application for leave to appeal on June 11, 2021.

On February 4, 2022, this Court issued an order directing oral argument on the issue of granting leave, and instructed the parties to file supplemental briefs no later than April 25, 2022. (Exhibit E; Apx at 000019). Supplemental briefing was had, and the oral argument on the application took place on December 7, 2022. This Court then issued the Order of May 26, 2023, granting the application and directing the parties to address three questions to resolve the issues presented in the appeal. (Exhibit V, Apx at 000195). Accordingly, this Court has jurisdiction to hear the instant matter.

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INTRODUCTION

This is a medical malpractice action arising out of the negligent performance of lumbar surgery by Defendant Dr. Fahim on Plaintiff Lynda Danhoff. Plaintiffs produced an eminently qualified surgical expert – one who had performed the procedure in question at least 50 times. The trial court, on Defendant's motion, held that the expert had not sufficiently supported his opinion of negligence, and struck the expert, while informing Plaintiffs that it would consider additional materials, which supported the expert's opinion. Plaintiffs filed a Reconsideration Motion, including the requested material. The trial court issued an opinion on reconsideration which specifically referenced the additional material, but which affirmed its previous opinion that the expert should be stricken.

Plaintiffs appealed to the Court of Appeals, which upheld the trial court's ruling in a 2-1 opinion. The majority held that under *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010) *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016), scientific literature was a requirement in a medical malpractice case. The concurring opinion pointed out that this interpretation effectively prevents malpractice cases from proceeding where the procedure involved is such that specific scientific literature will never be generated.

Plaintiffs applied for leave to appeal to this Court, and after a December 7, 2022 oral argument on the Application, this Court granted the Application by Order dated May 26, 2023. As was true of the Order granting the oral argument on the Application, this Court asked the parties to brief three questions relating to the holdings of *Edry* and *Elher* in particular, and the role of scientific literature in medical malpractice cases more generally.

The first question (The three questions are set forth in the "Statement of Questions Presented" section of the brief, *supra*) involves whether *Edry* and *Elher* correctly set forth the role of literature in assessing the admissibility of expert opinions. In order to provide this Court

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a complete basis upon which to answer this question, Plaintiffs will set out the Michigan history of the requirement of expert testimony in medical malpractice cases, then review the development of the evaluation of whether a proffered expert is qualified to provide such testimony, and finally, the role of literature in providing support for such expert testimony. As set forth in Section I, *infra*, *Edry* and *Elher* improperly elevate literature to an unnecessary exalted status, which status is not borne out by the language of MRE 702, MCL 600.2955, *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) or *Kumho Tire Corp Ltd v Carmichael,* 526 US 136; 119 SCt 1167; 143 Led 2d 238 (1999). Depending on the case, the expert might not need to produce any supporting literature at all; in other cases, the expert's opinion will be governed by the state of available literature.

The language used by *Edry* and *Elher* has led to lower courts striking standard-of-care expert testimony, by holding, as the trial court did herein, that such testimony needed to be supported by direct medical literature. The panel below in the instant appeal got it wrong, and many other panels have gotten it wrong as well. Whether the fault lies with the unwise language chosen by this Court, or the improper interpretation of that language by the lower courts, *Edry* and *Elher* have come to be seen as allowing a trial court to demand direct supporting literature before a standard-of-care expert can be qualified to testify in a medical malpractice case. This is wrong because the gatekeeper role of the trial court is never to determine which view of medicine is correct, or to determine the appropriate tools for the expert to employ in determining such view of medicine; it is simply to determine if the expert's methodology is sound, and whether the opinions derived from such methodology are medically reasonable. This Court should reverse the Court of Appeals. A balanced reading of MRE 702 and MCL 600.2955, provides the trial court sufficient discretion to evaluate which factors are significant given the medical issues and expert opinions relating to such. (Section I, *infra*).

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The second question flows from the first, inasmuch as this brief will urge the court to broadly answer the first question "No". To answer the second question, what a Plaintiff should demonstrate to support standard-of-care testimony in a medical malpractice case requires a complex answer, because medical malpractice cases differ as to the medical negligence at issue. Other jurisdictions, both state and federal, have endorsed a more flexible test focusing on what practitioners in the field are likely to follow and why. The Michigan *Daubert* statute, 600.2955, has been interpreted in a way as to allow the trial court to choose among the various listed means of supporting an opinion, in order to determine whether the expert employed an appropriate methodology, and whether the opinions arrived at were reasonable based on the field involved. That is the only blanket answer which can be given to the second question. (Section II, *infra*).

The third question brings the focus of the inquiry back to the instant appeal. Plaintiffs will show that under a measured application of MCL 600.2955 and MRE 702, Plaintiffs' expert, Dr. Koebbe, provided sufficient support for his opinion such that it should be held to be reliable. In the instant case, Dr. Koebbe testified that, as to the specific procedure being performed, it constituted medical negligence to enter the peritoneal space with surgical instruments during the lumbar procedure. Although Defendants had not presented any scholarly materials in support of their Motion, Dr. Koebbe, when called upon, supported his opinion with scholarly materials. The trial court nonetheless struck the testimony of Dr. Koebbe because it was unsupported by direct literature supporting the conclusion of a breach of the standard of care. Under any appropriate *Daubert* standard, including the proper interpretation of *Edry* and *Elher*, Dr. Koebbe's opinion regarding the standard of care qualifies as reliable and admissible under MRE 702.

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However, this Court should not stop there. The entire current practice needs to be addressed. This Court should clearly state that in the determination of expert reliability in the medical malpractice context, the trial court is empowered to assess the methodology employed by the proffered expert, and the reasonableness of the resulting opinion, in light of all the factors applicable to the case. This can, but need not always, involve an assessment of any underlying literature. What the trial court must avoid is elevating its gatekeeper role to that of the "trier of science". (Section III, *infra*).

STATEMENT OF FACTS

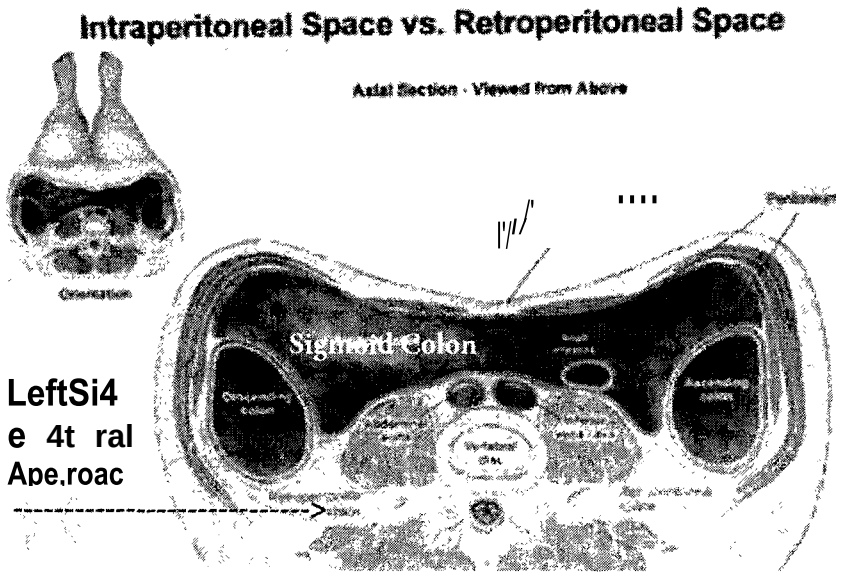
Plaintiff, Lynda Danhoff, is a 59-year-old woman who, in 2015, threw out her lower back while working. She sought medical advice from neurosurgery defendant, Dr. Daniel Fahim, at defendant Michigan Head and Spine Institute. Dr. Fahim recommended lumbar surgery with instrumentation be performed on Lynda's low back. The lumbar surgery was planned as a two-phase operation that would take part at defendant Beaumont Hospital over a three-day span.

Phase I was a left sided: "L3-4 radical anterior discectomy, structural anterior graft, anterior lumbar arthrodesis with allograft, anterior instrumentation, and microdissection." This surgery was performed by defendant Dr. Fahim and defendant resident, Dr. D'Andrea, on 12-7-15. Phase II was performed on 12-9-15 by Dr. Fahim and an unknown surgical assistant and was a posterior approach through Mrs. Danhoff's spine to place instrumentation. (Medical records, Exhibit F; Apx at 000020). The malpractice took place during the 12-7-15 Phase I operation when the surgical team perforated through Mrs. Danhoff's peritoneal wall into the peritoneum and then perforated her sigmoid colon in two places. This was done by a surgical instrument during the operation.

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The diagram below is a cross section showing the structures that Dr. Fahim and Dr. D'Andrea would have encountered during their lateral approach to Lynda Danhoff's lumbar disc space. The approach was from the left side and was supposed to stay in the retroperitoneal space. Once a hole, or tunnel, is created towards the disc, retractors and other instruments, along with surgeon's fingers, are used to push the surrounding structures out of the way to allow access to the disc space. There should be no instruments going through the peritoneum wall or getting into the peritoneal space where the patient's organs are located.



Defendant Dr. Fahim was deposed on April 18, 2019. (Dep of Fahim, Exhibit G at 25-26, 29-31; Apx at 000023, at 000024-26). Throughout his deposition, Dr. Fahim testified that the entire surgery was supposed to have taken place in the retroperitoneal space. Nothing should ever be in the peritoneal space where the patient's organs, including the sigmoid colon, reside. (Id). Then, as the defendant continued to describe the "typical" operation, he at regular

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points made it clear that the lumbar procedure in question never involved organs such as the sigmoid colon, saying, “There are no organs in our surgery. We don’t see any organs” (Id at 29; Apx at 000025). Defendant went on to explain,

> The peritoneum which is what contains the organs, but the peritoneum is not "see through" or anything, we don't see any organs because we're in the retroperitoneal space and the peritoneum is being retracted anteriorly, and then soft tissue or fat is being retracted superiorly and inferiorly up and down so we can isolate the disc space for the surgery.
>
> Q. In this particular surgery where exactly would the upper sigmoid colon be in relation to where this procedure is being done?
>
> A. In the peritoneum way in front of where the surgery's being done.
>
> Q. When you say "way in front", can you give me a distance in centimeters or inches or what are we talking here?
>
> A. I wouldn't be sure because the peritoneum and its contents is more the domain of the general surgeon, but the sigmoid colon from the disc where we're working on the spine is probably 12 to 15 centimeters away maybe, something like that.
>
> Q. It's nowhere near the surgical field correct?
>
> A. Near the disc, no, nowhere near the disc. (Id at 30; Apx at 000026).

The defendant made this point one final time in emphatic fashion.

> Q. Does the sigmoid colon have to be moved out of the way to get at the disc?
>
> A. We never see the sigmoid colon. We never touch the colon. We work in the retroperitoneum. The sigmoid colon is contained within the peritoneal itself, and that whole peritoneal cavity with all of its contents, none of which are seen is retracted anteriorly.

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> Q. I'm sorry. Retracted anteriorly?
>
> A. Anteriorly, towards the front, towards the patient's belly so to reach the spine.
>
> Q. So the retractor's used to basically push it out of the way. Is that basically what's going on here?
>
> A. After it's dissected out of the way bluntly with going through that fat layer of the retroperitoneum then the retractor is there to, yeah, push it out of the way and to hold it out of the way, correct. (id at 31; Apx at 000026).

Thus, **according to Dr. Fahim, at absolutely no time during this surgical procedure, if done according to the standard of care, should any instrument ever perforate or even touch the sigmoid colon.** To do so would mean that a surgical instrument had to leave the retroperitoneal space, puncture through the peritoneal wall into the peritoneal space, and then come into contact with the sigmoid colon with sufficient force to perforate the colon.

On 12-10-15, three days after her lumbar surgery, Lynda Danhoff developed severe pain and fever, which prompted a CT scan and the discovery of a suspected perforation in her colon. General surgeon, Dr. Iacco, was called in to perform emergency abdominal surgery and he found massive infection and a perforated sigmoid colon. He had to remove 18 centimeters of Lynda's colon and placed her on a wound vac to control the infection before he could go back in and finish his surgery several days later. (Exhibit H, medical records; Apx at 000027).

Plaintiffs thereafter brought the instant lawsuit. (Exhibit I, Complaint; Apx at 000030). In the complaint, Plaintiffs alleged that Defendants negligently caused the sigmoid colon perforation during the lumbar surgery, and then negligently closed Plaintiff back up without realizing that the perforation remained inside, untreated (id at ¶11; Apx at 000032). Plaintiffs retained board certified neurosurgeon Dr. Christopher Koebbe, M.D., to sign the Affidavit of

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Merit (Id; Apx at 000036), and more broadly, to give his expert opinions on the standard of care and the professional negligence of the defendant neurosurgeons. Dr. Koebbe's qualifications are strong, and his credentials are not at issue in this appeal. (Exhibit J, Koebbe CV; Apx at 000039). Dr. Koebbe has performed this exact procedure several times a month over the last several years. (Dep, Dr. Koebbe, Exhibit K at 56-57, 81; Apx at 000047; 000061; 000068). At his deposition, Dr. Koebbe testified unequivocally that, in his opinion, the perforation in Mrs. Danhoff's sigmoid colon occurred during the 12-7-15 operation by an instrument in the hands of one of the defendant surgeons and that it obviously was not discovered at the time of surgery. (Id at 56-57: Apx at 000061).

LITIGATION HISTORY

Defendant Dr. Fahim moved to strike Plaintiffs' expert Dr. Koebbe, and the matter was set for oral argument before the Honorable Nanci J. Grant on November 6, 2019. Note that, during the period between the filing of the complaint and the hearing on the motion, settlement was reached between Plaintiff and all defendants except for Dr. Fahim (and his professional corporation), making him the only defendant remaining in the case, and in this appeal.

Not much was argued at the hearing on the 6th. (Exhibit IL transcript. 11/6/19; Apx at 000083). Instead, the parties reconvened the next week to argue the substance of defendant's motion. (Exhibit M, transcript 11/13/19; Apx at 000089).

The trial court issued its opinion striking the expert later that month. (Exhibit A, Opinion of 11/25/19; Apx at 000001). The trial court first noted that Defendant's motion could only relate to standard of care testimony, since Plaintiffs had named another expert as to causation. (Id at 2; Apx at 000002). Then, after setting forth the relevant authorities, the trial court found Plaintiff's expert unqualified because

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> Nothing was presented to the Court that evidenced Dr. Koebbe relying on any published medical journals for his opinion, nor did he cite to any authority to support his conclusion that the procedure was performed incorrectly, resulting in the perforation….The Michigan Supreme Court has held that experience and background alone are insufficient to establish admissibility and reliability under MRE 702. [*Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010) }. (Id at 3; Apx at 000003).

The court then concluded its opinion by inviting Plaintiffs to file a Motion for Reconsideration, along with any additional supporting materials for Dr. Koebbe's opinion Plaintiffs wished to present. (Id at 4; Apx at 000004).

Plaintiffs took the trial court up on this invitation, and filed their Motion for Reconsideration, which included an affidavit from Dr. Koebbe (Exhibit N; Apx at 000118), to which affidavit was appended several medical journal abstracts supporting the proposition that the instances of a surgeon penetrating the peritoneal space with surgical instruments in this sort of procedure was vanishingly small, (Exhibit O, Dr. Koebbe's proffered medical authority; Apx at 000120), which supported his experience-based opinion that such instances constituted medical negligence. (Dr. Koebbe Affidavit, Ex N, ¶¶10-17; Apx at 000118-119).

The trial court reviewed the proffered materials, then reaffirmed its opinion striking Dr. Koebbe. (Exhibit B, Order Denying Reconsideration; Apx at 000005). The trial court's conclusion is telling: "The Court finds that the article and abstracts do not directly support Dr. Koebbe's opinion, as required by the Michigan Supreme Court holdings in *Edry* and *Elher*." (Id at 3-4; Apx at 000007-8; emphasis added).

THE COURT OF APPEALS OPINIONS

Plaintiffs timely appealed the trial court's rulings. After briefing and oral argument, the Court of Appeals majority issued an opinion upholding the trial court's ruling. (Exhibit C; Apx at 000009). The Court of Appeals majority, despite the trial court accepting Plaintiffs' proffered

material and issuing a substantive opinion based thereupon, divided its opinion into two sections – reviewing the original trial court ruling, and then the trial court opinion after reconsideration. In upholding the trial court's original ruling, the majority stated,

> [a]t the summary dispositions stage, the information before the trial court established that Dr. Koebbe's standard of care opinion was based solely on his own knowledge and experience. As such, Dr. Koebbe's opinion was not based on any methodology other than his bare assertion that he had never heard of such an injury, and therefore, he would conclude that any such injury was caused by malpractice. But plaintiff, and by extension Dr. Koebbe, failed to establish that this opinion was shared by the broader medical community or that it was in any way a reliable method for identifying malpractice. Indeed, and even apart from the application of the Daubert standard, Michigan has long held that the ipse dixit of an expert is insufficient to establish the standard of care in medical malpractice cases. See *Ballance v Dunnington*, 241 Mich 383, 386-387; 217 NW 329 (1928) ("The standard of care, skill, and diligence required of an X-ray operator is not fixed by the ipse dixit of an expert, but by the care, skill, and diligence ordinarily possessed and exercised by others in the same line of practice and work in similar localities."). Furthermore, MRE 702 is not fulfilled by an expert simply having a methodology used to determine his or her expert opinion; rather, MRE 702 requires a showing that "the testimony is the product of reliable principles and methods." MRE 702 (emphasis added). Plaintiffs failed to make that showing. Consequently, at the summary disposition stage the trial court did not abuse its discretion, by concluding that Dr. Koebbe's testimony was inadmissible under MRE 702. (Exhibit C at 7; Apx at 000015).

Then, the majority upheld the trial court's ruling after reconsideration, stating:

> As explained by the trial court, the medical article and abstracts plaintiffs provided did not actually directly support Dr. Koebbe's standard of care opinion that the injury to plaintiff's sigmoid colon during the December 7, 2015 surgery was malpractice per se. Rather, those articles established that such an injury is quite rare. They did not, however, make the connection between rare occurrences in surgery and malpractice on which Dr. Koebbe based his opinion. Similarly, the articles did not address whether bowel injuries were "acceptable" or "unacceptable" complications of XLIF surgeries. Indeed, these articles did not even address medical malpractice or the standard of care; they only collected statistics on

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> the numbers of incidences of such injuries. As such, we do not see how they could possibly support an argument that Dr. Koebbe's standard of care opinion was the product of reliable principles and methods. While Dr. Koebbe used the conclusions from these articles regarding the rarity of sigmoid colon injuries during XLIF surgeries to bolster his standard of care opinion, they failed to establish that Dr. Koebbe used any methodology to form his opinion, or that if he did so such methodology was reliable. (Id at 8; Apx at 000016).

The concurrence was concise, noting that while believing itself to be compelled by the *Elher* standard to concur with the majority, that it believed such a result was fatally flawed:

> I concur in the result, but do so only because under the doctrine of stare decisis, I am bound to follow the decision and reasoning set forth in *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016). Were I not so bound, I would find that the factors set forth in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) do not necessarily apply to an expert's standard of care opinions, but rather only to causation issues. This case presents the precise reason why: where the perforation of the colon during the surgery at issue is admittedly exceedingly rare, it is not unsurprising that there are no articles or medical authority addressing whether the perforation of the colon during that surgery is a breach of the standard of care. That leaves plaintiffs, such as the one here, in the impossible position of attempting to prove that their injuries occurred due to substandard care when no published articles on the specifically -2- incurred injury are available to either prove or disprove that the applicable standard of care was breached. (Concurring opinion, Exhibit D at 1-2; Apx at 000017-18)).

Plaintiffs then applied for leave in this Honorable Court, which, in lieu of granting or denying the application, directed the parties, by Order of February 4, 2022, (Exhibit E; Apx at 000019) to submit a supplemental brief addressing three questions, which are set out in the Statement of Questions Presented, *supra*. After oral argument was had on the application on December 7, 2022, this Court issued its Order of May 26, 2023, granting the application. (Ex V; Apx at 00195). Plaintiffs now submit the following brief on appeal.

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STANDARD OF REVIEW

A trial court grant of summary disposition is reviewed by this Court under the *de novo* standard. *Diamond v Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005). Specific issues regarding the admissibility of expert testimony are left to the sound discretion of the trial court. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). As such, a trial court's decision regarding whether to admit evidence will not be disturbed absent an abuse of discretion. *Meek v Michigan Bell Telephone Co,* 193 Mich App 340, 345; 483 NW2d 407 (1992); *Cleary v Turning Point,* 203 Mich App 208, 210; 512 NW2d 9 (1993). A trial court abuses its discretion in admitting or excluding evidence if its determination falls beyond the principled range of outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *Dykema Gossett, PLLC v Ajluni*, 273 Mich App IS1; 730 NW2d 29 (2006).

LEGAL ARGUMENT

I. THIS COURT'S DECISIONS IN *EDRY V ADELMAN* AND *ELHER V MISRA* DO NOT CORRECTLY DESCRIBE THE ROLE OF SUPPORTING LITERATURE IN DETERMINING THE ADMISSIBILITY OF EXPERT WITNESS TESTIMONY ON THE STANDARD OF CARE IN A MEDICAL MALPRACTICE CASE. AT THE VERY LEAST, LOWER COURTS HAVE INTERPRETED THE *EDRY* AND *ELHER* HOLDINGS TO MEAN THAT A PLAINTIFF EXPERT WITNESS ON THE STANDARD OF CARE IS OBLIGATED TO SUPPORT HIS OR HER OPINION WITH DIRECT LITERATURE.

Under current Michigan law, in order to establish a cause of action for medical malpractice, a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard

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of care. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). In order to succeed in a medical malpractice action, a plaintiff must prove "(1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). Furthermore, to establish the standard of care in a medical malpractice action and that the defendant breached that standard, a plaintiff generally must present expert testimony. *Id.*

Again, as a matter of existing law, the manner in which an expert's opinion is deemed sufficiently reliable to be admissible to the jury is governed under standards first elucidated in *Daubert v Merrill-Dow Pharmaceuticals,* 509 US 579 (1993). The Michigan response to the *Daubert* decision is set out in caselaw, and statutory enactment, and is the principal subject of the instant brief.

However, it has only been 60 years since the decision in *Lince v Monson*, 363 Mich 135; 108 NW2d 845 (1961), which established the foundational rule that generally, expert testimony is required to establish the standard of care, breach thereof, and causation. *Lince* involved a misplaced suture causing complications leading to the need for further surgery. The suture was misplaced during a surgical procedure to remove adhesions and obstructions, which had resulted from a procedure, performed a few months previous, to remove a cystic ovary. The defendant testified that the procedure had been difficult and lengthy, due to the large number of adhesions, as well as other unexpected structures which the doctor then removed. All of the cutting caused significant bleeding, which added to the difficulty of the procedure. Id at 137-138. The matter was submitted to the jury, with the stated factual issue of whether the suture had been misplaced during the earlier ovary surgery, or during the subsrquent adhesion surgery. The jury returned a verdict for plaintiff, despite that "there was no medical testimony

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that defendants' treatment and handling of the case was not in accord with standard and usual practice of skilled doctors in the community." Id at 139.

This Court ruled squarely that the case should not have been submitted to the jury, holding:

> In the ordinary negligence case a question is presented whether an ordinary, careful and prudent person would have done as defendant did under the circumstances. Presumably a jury of 12 persons, drawn from and representing a cross section of the community, is competent to judge that question, on the basis of its own knowledge and experience, and to determine negligence or freedom therefrom accordingly. Sometimes, in such cases, a problem presented is whether the question of defendant's negligence is one of fact for the jury or of law to be decided by the court. That is not the problem here. Rather, it must be determined in this case whether it is competent for a jury of laymen to decide a question concerning professional practice and to make a finding of malpractice without benefit of professional testimony to support it. In a case involving professional service the ordinary layman is not equipped by common knowledge and experience to judge of the skill and competence of that service and determine whether it squares with the standard of such professional practice in the community. For that, the aid of expert testimony from those learned in the profession involved is required. Id at 139-140.

The *Lince* court cited to previous precedent, but an examination of those precedents reveals that none of them stated unequivocally that expert testimony is a requirement in a medical malpractice action. For instance, it cited the holding of *Zotterell v Repp*, 187 Mich 319; 153 NW 692 (1915), but did not note that the *Zotterell* matter involved mixed questions of improper surgery, and whether the patient had consented to the procedure at all. *Zotterell*, at 326. The court similarly cited to *Delahunt v Finton*, 241 Mich 226; 221 NW 168 (1928), but the *Delahunt* court issued its holding in the context of what standard prevailed in a case involving a surgical emergency. Id at 229; *see also, Luka v Lowrie*, 171 Mich 122; 136 NW 1106 (1912).

Thus, *Lince* can be seen as establishing the modern approach of having an expert provide an opinion to the jury, with the jury then determining whether or not to consider that

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opinion as setting the standard of care, breach, and causation. Indeed, by 1981, this Court was confortable in describing the typical malpractice case as the "battle of experts." *Wilson v Stilwill,* 411 Mich 587, 599; 309 NW2d 898 (1981). In the years after *Lince*, this Court had opportunity to provide limited exceptions, such as cases in which the standard of care can be adduced by the testimony of the defendant (*Rice v Jaskolski*, 412 Mich 206; 513 NW2d 893 (1981)) or in which the doctrine of res ipsa loquitur applies (*Jones v Porretta*, 428 Mich 132; 405 NW2d 863 (1987)). Other cases resolved the more general questions of whether a local or national standard should be applied (*Naccarato v Grob*, 384 Mich 245; 180 NW2d 788 (1970); *Francisco v Parchment Medical Clinic*, 407 Mich 325; 285 NW2d 33 (1979)), and whether an expert trained as an M.D. could testify against one trained as a D.O. or vice versa, with the related question of whether a specialist was competent to testify against a general practitioner. (*Siirila v Barrios*, 398 Mich 576; 248 NW2d 171 (1976); *Mazey v Adams*, 191 Mich App 308; 477 NW2d 698 (1991)).

Through it all, however, the standard remained that of a health care professional who had knowledge of the applicable standard of care. No generalized limitation existed as to cross-specialty testimony, or as to degrees of experience. As long as the proffered expert was shown to have familiarity with the standard of care, however such familiarity was acquired, they could be qualified to provide expert testimony in a medical malpractice case. This law is well-summarized in *Birmingham v Vance*, 204 Mich App 418, 421-422; 516 NW2d 95 (1994), a case in which the witness was disqualified as an expert because the expert was a specialist, and did not show himself to be familiar with the local standard of care for a dentist in general practice:

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> The question whether a witness is qualified to testify as an expert is left to the discretion of the trial court. *Mazey, supra*, 191 Mich App at 331; 477 NW2d 698. The standard of care applicable to general practitioners is different from the standard applicable to specialists. *Id.* The standard of care for general practitioners is that of the local community or similar communities, while the standard for a specialist is nationwide. *Id.; Francisco v Parchment Medical Clinic, PC,* 407 Mich 325; 285 NW2d 33 (1979). In order for the witness to be declared an expert, counsel should elicit from the witness the applicable standard and its substance. *Bahr v Harper Grace Hospital*, 198 Mich App at 35; 497 NW2d 526 [1993]. A specialist may testify regarding the standard of care of a general practitioner, provided that the witness has knowledge of the standard of care about which testimony is to be given. *Mazey, supra*, 191 Mich App at 331; 477 NW2d 698. .

Thus, the *Davis-Frye* test, pursuant to the decisions in *People v. Davis,* 343 Mich 348; 72 NW2d 269 (1955) ; and *Frye v. United States, Frye v. United States,* 54 AppDC 46: 293 F 1013 (1923) , never was formally utilized in conjunction with the reported medical malpractice cases of the era. Part of the reason is that the *Davis-Frye* test concerned itself only with "novel" scientific matters. As explained in *Anton v State Farm Mut Ins Co*, 238 Mich App 673, 679; 607 NW2d 123 (1999), "Pursuant to MRE 702, the *Davis–Frye* rule limits the admissibility of novel scientific evidence by requiring the party offering such evidence to demonstrate that it has gained general acceptance in the scientific community." Further, under the *Davis-Frye* test, the role of medical literature never came into play. The only place for an examination of medical literature by the court under *Davis-Frye* was that such examination of literature was regularly cited as a means through which a proferred expert could become familiar with the standard of care as to a specific practice or procedure. See, eg, *Nelson v American Sterilizer Co*, 223 Mich App 485, 491; 566 NW2d 671 (1997).

This court undertook to reconcile the above Michign practice of qualifying expert testimony in medical malpractice cases with the teachings of *Daubert* in *Gilbert v Daimler-Chrysler*, 470 Mich 749; 685 NW2d 391 (2004). In *Gilbert*, (decided a day before what is

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viewed as a companion case in *Craig, supra)* this Court struck down a 21 million dollar verdict in an employment discrimination case. The first several sections of the *Gilbert* opinion detailed the law and standards of remittitur (Id at 763-770), and when a verdict is achieved as a result of stoking the passion and prejudices of the jury (Id at 770-780). Indeed, the Court had already rendered its decision that the matter would have to be reversed and remanded to the trial court (Id at 780) when it undertook to review the law on expert qualification "to provide guidance for the new trial". (Id).

Speaking for a 4-3 majority, Justice Young set out to introduce Daubert concepts into the prior Michigan law of *Davis-Frye*. Noting that MRE 702 had been amended to reflect *Daubert* between the time of the trial in *Gilbert* and the time of the Supreme Court decision, Justice Young concluded that *Daubert*, and amended MRE 702, did not fundamentally change the trial court's gatekeeper role, but merely expanded the sorts of materials upon which the trial court would be permitted to base its opinion:

> It is well-established that the proponent of evidence "bears the burden of establishing relevance and admissibility. At the time this case was tried, the proponent of expert opinion evidence bore the burden of establishing admissibility according to the *Davis–Frye* "general acceptance" standard. MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on "novel" science—is reliable.
>
> Thus, properly understood, the court's gatekeeper role is the same under *Davis–Frye* and *Daubert.* Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded. (Id at 781-782). (footnotes omitted).

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The opinion goes on to detail the necessity of the trial court conducting a searching inquiry, not only into the opinion and methodology of the expert, but the facts and data underlying them.

> 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. Id at 782, (emphasis in original).

Thus, this aspect of the decision in *Gilbert,* is posited as guidance for trial courts not only in relation to the facts relevant to the retrial – whether a social scientist could be qualified to detail the ways that discrimination can provoke damages in a plaintiff - but as to all areas of science (referencing medicine in particular). This test required the trial court to understand and undertake to evaluate conflicting opinions, with the ultimate decision being "whether expert testimony must be excluded". Id at 782.

This framing of the stated goals of *Daubert* gatekeeping placed significant demands on the trial court in terms of being able to not only understand, but also to discern with sophistication, the contrasting opinions of opposing experts, and the potentially differing sets of facts and data upon which they rely. The *Gilbert* decision contained no further guidance as to how this difficult task was to be approached. For instance, it did not note that *Daubert* itself recognized the difficult position trial court's face when fulfilling their scientific gatekeeping function, and noted that "[vigourous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, *supra*, at 596.

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Daubert further recognized the need to balance between two competing concerns regarding the scientific gatekeeping function of trial courts. First, "that abandonment of the 'general acceptance' requirement for admission [would] result in a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions." Id at 595-96. Second, that "in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations." Id at 597. In order to strike an appropriate balance between not admitting junk science and limiting the exclusion of valid scientific opinions, *Daubert* set forth that the trial court's focus should be on the "scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." Id 594-95.

One of the first Court of Appeals cases to come to grips with the theoretical construct set forth in *Gilbert*, and apply it to the mechanics of the gatekeeping process itself was *Chapin v A & L Parts,* 274 Mich App 122; 732 NW2d 573 (2007).

Chapin, like *Gilbert*, is not a medical malpractice case. The issue in *Chapin* was whether asbestos in brake linings could have caused plaintiff, whose employment exposed him to asbestos dust from brake linings, to develop mesothelioma, a cancer known to be caused by asbestos exposure. Defendant's expert, Dr. Goodman, conducted a meta-analysis of all cohort epidemiological studies, and concluded that automotive brake workers were shown not to have developed mesothelioma by these studies. He further testified that any opinions not based on analysis of these major studies, such as the differing opinions of Plaintiff's expert Dr. Lemen, must be unreliable. (Id at 135). For his part, Dr. Lemen acknowledged that the studies referenced by Dr. Goodman failed to show a

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relationship between asbestos-based automobile brake products and mesothelioma. (Id at 134). However, Dr. Lemen's opinion, given that both experts agreed that only exposure to asbestos causes mesothelioma, was that the major studies could not conclusively determine that this brake worker's mesothelioma was **not** caused by exposure to asbestos dust from brake linings. (Id at 136). Instead of focusing on the major studies which were never intended to specifically prove or refute the issue of whether brake workers could develop mesothelioma as a result of exposure to asbestos dust from brake linings, Dr. Lemen based his opinion on all the available data, including case reports. (Id at 136-137).

The Court of Appeals upheld the trial court's finding that Dr. Lemen's opinions were sufficiently reliable to be heard by the jury, stating:

> The fact that two scientists value the available research differently and ascribe different significance to that research does not necessarily make either of their conclusions unreliable. Indeed, science 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. Id at 140. (emphasis in original)

The Defendants applied for leave to appeal to this Court, which denied the application, 478 Mich 916; 733 NW2d 23 (2007). *Chapin* was not cited by either *Edry* or *Elher;* but continues to be cited by lower courts.

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The Legislature responded to *Daubert* by enacting a statute, MCL 600.2955, which states:

> (1) In an action for the death of a person or for injury to a person or property, 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. 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, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
> (b) Whether the opinion and its basis have been subjected to peer review publication.
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
> (d) The known or potential error rate of the opinion and its basis.
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
>
> (2) 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.
>
> (3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

MCL 600.2955 generally reflects the test set forth in *Daubert*, and appropriately focuses the trial court's attention on a multitude of different potential factors which could demonstrate the scientific reliability of an expert's opinion. No single factor set forth in MCL 600.2955 is set

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out as being more important than any other factor which the trial court could consider. Not every factor for the trial court to consider in MCL 600.2955 will be relevant in every case, nor does the statute mandate that every factor, or any particular combination of factors, must favor an expert's opinion for the opinion to be admissible. Similar to *Daubert*, MCL 600.2955 envisions a multifactorial case specific inquiry into whether an expert's opinion is sufficiently reliable to be admissible.

This statute, along with MRE 702, governs the admissibility of expert opinion in Michigan. It enumerates the *Daubert* factors, and requires the trial court to consider each of them. Courts have interpreted the statute as mandating that a trial court indicate that the factors have been considered, but it is a given that not all the factors will apply to the issues present in a particular case. *Elher, supra*, at 26-27, and that the trial court must have discretion in applying the factors in order to determine reliability. *Id* at 25.

Returning to the first question posited by this Court, then, two problems are seen when evaluating the rule set forth in *Edry* and *Elher* regarding admissibility of expert opinion in medical malpractice cases. The first is whether an expert testifying to the standard of care must support his or her opinion in the same fashion as one seeking to testify about causation; the second is whether, in either of these scenarios, a trial court can disqualify an expert witness on the ground that such witness failed to produce direct medical literature in support of his or her opinion.

Edry involved the issue of the survival rate for a given period of time after breast cancer. In *Edry*, the opinion under scrutiny was that of Dr. Barry Singer. As framed by this Court,

> Dr. Barry Singer testified at a deposition as plaintiff's oncology expert. He stated that plaintiff's chances of surviving five years would have been 95 percent if she had been diagnosed in June 2003 and that the delay in diagnosis reduced her five-year survival chance to 20 percent. Dr. Singer acknowledged that the American Joint Cancer Commission (AJCC) manual was authoritative on this subject and reported a 60 percent five-year survival rate for breast

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> cancer patients when the cancer has spread to four or more lymph nodes. Dr. Singer stated, however, that the manual was not applicable to plaintiff's case because the cancer had spread to 16 lymph nodes, and he believed that the more lymph nodes involved, the poorer the chance of survival. During his deposition, Dr. Singer referred to textbooks and journal articles that supported his theory, but plaintiff never produced those authorities to support his testimony.
>
> Defendant's oncology expert, Dr. Joel Appel, testified that plaintiff's chance of survival was 60 percent based on the AJCC manual and that it was medically improper to consider the number of lymph nodes involved as a predictor of a patient's chance of survival. Further, Dr. Appel testified that Dr. Singer's opinion was not based on recognized scientific or medical knowledge, was not generally accepted in the medical community, and could not be substantiated with any medical evidence. *Edry, supra*, at 569.

The trial court in *Edry* found Dr. Singer to be unreliable and the Court of Appeals affirmed. This Court granted leave and upheld the striking of Dr. Singer's opinion regarding how cancer survival rates are to be calculated in cases where the cancer had spread to more than 4 lymph nodes. Addressing the failure of Dr. Singer to produce peer-reviewed literature regarding his opinion, this Court stated:

> Plaintiff failed to provide any support for Dr. Singer's opinion that would demonstrate that it has some basis in fact, that it is the result of reliable principles or methods, or that Dr. Singer applied his methods to the facts of the case in a reliable manner, as required by MRE 702. While peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of any other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under MRE 702. See, generally, *Craig,* 471 Mich at 83-84; 684 NW2d 296; *Daubert [v Merrill-Dow Pharmaceuticals]*, 509 US [579] (1993).

Thus, *Edry* did not establish a rule that all medical opinions in malpractice cases must be supported by peer-reviewed medical literature. Quite the contrary – the Court took pains to note that literature is not always required. It referenced the case before it, and given the totality of the record below, where the defense expert referenced authoritative literature, as opposed

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to a plaintiff expert whose opinions were contradicted by such authoritative literature and by the defense expert, found that Dr. Singer's method of calculating the survival rate was unreliable.

In *Elher*, the reliability of a standard-of-care opinion was at issue. The plaintiff therein had brought a medical malpractice case based on her common bile duct being clipped during an operation to remove her gallbladder. Plaintiff's expert in *Elher* was Dr. Priebe. It was the opinion of Dr. Priebe that clipping the common bile duct was always a breach of the standard of care. Dr. Priebe had no medical literature in support of his opinion, and defense experts had an expert, supported by medical literature, stating the opposite. The trial court struck Dr. Priebe as unreliable. The Court of Appeals, in a split decision, reversed the trial court.

This Court granted leave, and reinstated the trial court's opinion. As to the necessity of literature support, the Court stated:

> We find this Court's decision in *Edry v. Adelman* to be instructive. In *Edry,* this Court concluded that an expert failed to meet the requirements of MRE 702 because his opinion "was not based on reliable principles or methods;" his opinion was contradicted by the opinion of the defendant's expert and published literature on the subject that was admitted into evidence, which even he acknowledged as authoritative; and there was no literature supporting the testimony of plaintiff's expert admitted into evidence. As in *Edry,* Priebe's opinion "was not based on reliable principles or methods," his opinion was contradicted by the opinion of defendant's expert and published literature on the subject that was admitted into evidence, and there was no literature supporting the testimony of plaintiff's expert admitted into evidence. Plaintiff failed to provide any support for Priebe's opinion that would demonstrate that it had some basis in fact and that it was the result of reliable principles or methods. While peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered Priebe's opinion unreliable and inadmissible under MRE 702. *Ehler, supra*, at 28.

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On the surface, the language above quoted does not **always** require a standard-of-care expert to always back his or her opinion with scientific literature. However, the above language has been adopted by lower courts for the proposition that not only is literature required to support an expert's standard-of-care opinion in a medical malpractice case, but also that, for literature to be deemed supportive, it must be directly on point as to the issue presented in the litigation.

In seeking to apply the *Elher**Error! Bookmark not defined.*** language above, in the instant matter, the trial court ruled that the opinions of plaintiffs' expert were unreliable because they were not supported by direct medical literature. The Court of Appeals majority affirmed, again citing *Elher* in support for this proposition. (Exhibit C at 8; Apx at 000016). Other panels of the Court of Appeals have differing holdings on whether a standard-of-care witness is required to cite direct literature in support of a standard-of-care opinion; Compare, e.g., *Estate of Wilson-White v St John Macomb Hosp*, unpub, No 341093, 2019 WL 3432536, dec'd 7/30/2019 (attached as Exhibit P; Apx at 000141), [holding the expert to be qualified] with *Goff v Niver,* unpub, No 343315, 2019 WL 2517861, dec'd 6/18/2019 (attached as Exhibit Q; Apx at 000147) [holding the expert to be unqualified].

While unpublished, the case of *Figurski v Trinity Health*, unpub, No 318115, dec'd 7/28/2016, 2016 WL 9069549 (attached as Exhibit R; Apx at 000153) presents an enlightened discussion of the issue before this Court as it relates to the perceived need for directly supportive literature. In *Figurski,* the Defendant sought to disqualify plaintiff's expert based, in part, on the lack of supporting medical literature. The *Figurski* panel rejected this argument, stating

> The issue in *Elher* was different from the one that confronts us here. In *Elher,* the cause of the plaintiff's injury was not in dispute; instead, the issue was whether the surgeon had breached the standard of

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> care. The expert in *Elher* admitted that his opinion regarding the standard of care was based entirely on his own definition of the standard of care. Under such circumstances, "the concern in relying on [the expert's] personal opinion is that [he] may have held himself to a higher, or different, standard than that practiced by the medical community at large." *Elher,* ___ Mich. ____, slip op, p 16. Moreover, the expert in *Elher* was unable to refute medical literature that was contradictory to his own opinion. In contrast, the expert in the case before us was asked to offer an opinion as to the mechanism of plaintiff's injury. Causation, not standard of care, was at issue. Additionally, **her opinion was based—not only on her own vast personal experience—but on literature that formed the basis for her opinion. She explained that while not one particular individual article supported her theory, a combination of the articles and the information extracted therefrom supported her ultimate opinion.** Therefore, unlike the expert in *Elher,* plaintiff's expert in this case did not merely point to her background and experience in rendering her opinion. Additionally, unlike the defendant in *Elher,* who offered significant evidence of his own to refute the plaintiff's expert's opinion, the defendants in this case did not take that course of action. Instead of presenting their own witnesses, defendants sought only to discredit plaintiff's expert. Id at *4; emphasis added, Apx at 000156.

The Court of Appeals found that, under the circumstances presented by the specific case, the expert should not have been stricken. This Court declined to review the matter, over a dissent by Justice Markman, who would have deferred to the trial court's ruling, under the abuse of discretion standard.

Ordinarily, under the abuse of discretion standard, the trial court is entitled to deference. However, in this narrow area of the law, a trial court applying an incorrect precept of law (such as "*Elher* stands for the proposition that direct medical literature must always be presented in support of a plaintiff's expert's standard-of-care opinion") can issue a thoughtful, principled, lengthy opinion on the admissibility of an expert opinion, that nonetheless oversteps the appropriate bounds of its discretion. Requiring directly supportive literature is not a reasonable exercise of discretion when directly supportive literature may not exist for many standard-of-care opinions, and what constitutes directly supportive literature in a given case is open to its

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own significant interpretation. A trial court cannot reasonably exercise the discretion necessary to evaluate the reliability of expert standard-of-care testimony if it believes it is unreasonably restrained in the factors it is able to consider to assess scientific reliability. The failure to follow the law as written in *Elher* and *Edry* can therefore constitute an abuse of discretion, as was recognized and upheld in *Figurski*. However, despite this, courts continue to misapply *Elher* and *Edry* for the proposition that directly supportive literature is required for a standard-of-care opinion to be admissible.

In the case at bar, the Court of Appeals majority exacerbated the trial court's error. Indeed, the opinion simply cites to the misinterpretation of *Elher* as if it were settled law. Although paying lip service to the concept that an expert could be qualified without the necessity of corroborating literature, the majority quickly pivoted to the idea that literature was required in this case:

> Plaintiffs argue that no case holds that a witness must support his or her opinion with scholarly articles. That is of course correct, because Daubert's list of permissible factors to consider at the gatekeeping stage is non-exhaustive. But the fact that scholarly support for a position is not required is not dispositive; there must be some evidence, beyond the witness's mere say so, that establishes that the opinion is based on reliable principles. However, at the summary disposition stage in this case, Dr. Koebbe's testimony was based entirely on his background and experience. Plaintiffs and Dr. Koebbe failed to support. his standard of care testimony with supporting literature; and they similarly failed to establish that Dr. Koebbe's standard of care opinion was the product of any other reliable principle or methods. As such, his testimony was not admissible under MRE 702. (Exhibit C at 6-7; Apx at 000014-15).

This passage betrays a misunderstanding of "methodology". Methodology is the scientific approach to the issue. Here, Dr. Koebbe testified as to his methodology, which would be standard for an expert in his position. Nothing in the pleadings below finds fault with this methodology, except insofar as it produces a "wrong" conclusion.

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Finally, as noted by the concurring Court of Appeals opinion, many regularly performed medical procedures or rulings and decisions can never be effectively studied. This was discussed by the Court of Appeals in *Goff, supra*, (Apx at 000147) which required a standard-of-care expert to support his opinion with citation to specific literature on the subject of whether delay in diagnosing and treating a plaintiff's rectovaginal tear constituted a breach of the standard of care. *See also Clerc v Chippewa Cty War Mem Hosp*, 267 Mich App 597, 605; 705 NW2d 703 (2005). The way forward is for this Court to rule that all *Daubert* factors set forth in MCL 600.2955 are to be flexibly considered, but only those applicable to the issue involved as to the specific expert testimony under scrutiny. In medical malpractice cases, it must recognize that standard-of-care experts, particularly for procedures which are regularly repeated and not susceptible to formal study, may support their opinions predominantly with citation to their own regular treatment of the medical condition involved. It must provide further guidance that, except perhaps in a case where one party produces specific literature on point, literature directly on point is generally not required in a medical malpractice case.

II. A PLAINTIFF MUST DEMONSTRATE THAT THE EXPERT'S STANDARD-OF-CARE OPINION IS RATIONALLY DERIVED FROM VALID SCIENTIFIC PRINCIPLES, AND CAN DO SO USING ANY REASONABLE FACTORS UNDER THE CIRCUMSTANCES OF A GIVEN CASE, INCLUDING THE EXPERT'S PERSONAL KNOWLEDGE, TRAINING AND EXPERIENCE.

Nothing in Michigan law required that an expert in a medical malpractice case corroborate his or her standard-of-care opinion with direct corroborating literature before *Elher*. As noted above, *Elher* itself arguably did not require corroborating literature for such opinions to be admissible; the majority opinion below could have simply misinterpreted it. To the extent, however, that this misinterpretation has seemingly been followed by lower courts, including the Court of Appeals in this instance, this Court should correct that misinterpretation, by holding

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that direct corroborating literature is not a prerequisite to standard-of-care testimony in a medical malpractice case. Instead, this Court should hold that a plaintiff standard-of-care expert in a medical malpractice case must satisfy the trial court that the proffered opinions are rationally derived from a sound foundation. What that will entail will necessarily be governed by the medical question involved. However, the expert is not required to present direct corroborating literature – even in cases in which such does not exist in order for the opinions to be deemed sufficiently reliable to present to the jury.

As noted above, prior to the decision in *Daubert*, Michigan followed the "*Davis-Frye*" formulation in assessing the admissibility of expert testimony. *Anton v State Farm Ins Co*, 238 Mich App 673; 607 NW2d 123 (1999). In *Anton*, the panel summarized the previous law:

> Pursuant to MRE 702, the *Davis–Frye* rule limits the admissibility of novel scientific evidence by requiring the party offering such evidence to demonstrate that it has gained general acceptance in the scientific community. *People v. McMillan,* 213 Mich.App. 134, 136, 539 N.W.2d 553 (1995); *People v. Haywood,* 209 Mich.App. 217, 221, 530 N.W.2d 497 (1995) . In conducting a *Davis–Frye* inquiry, a trial court is not concerned with the ultimate conclusion of an expert, but rather with the method, process, or basis for the expert's conclusion and whether it is generally accepted or recognized. *Anton* at 678-679.

After *Daubert*, *Nelson v American Sterilizer*, 223 Mich App 485; 566 NW2d 671 (1997) extended the process so that all expert opinions were to be subject to scrutiny, rather than simply those seen as "novel". However, *Nelson* did not require corroborating scientific literature as a prerequisite for the admission of expert testimony.

This Court set forth the Michigan application of the *Daubert* standard in *Craig v Oakwood Hospital, supra.* Yet nothing in *Craig* mandates that corroborating scientific literature be proffered as a prerequisite to the admissibility of expert opinion. Additionally, the legislature enacted MCL 600.2955, but as previously noted, nothing in the statute requires that any

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experts support their opinions with direct medical literature. Instead, the language of the statute clearly identifies the submission of scientific literature as only one factor, among many, to be considered. Expert testimony could not be excluded under the statute solely based upon the lack of literature. Indeed, the majority opinion does not even cite to the statute.

In the instant litigation, the Court of Appeals concurring opinion made the most essential observation. *Daubert*, *Nelson*, *Craig*, and *Edry* all dealt with matters of causation. It was only with *Elher* that this Court discussed the role of corroborating literature in a standard-of-care context. Yet, the *Elher* language regarding the necessity of literature has been adopted uncritically by panels of the Courts of Appeals, such as the majority opinion in the instant case, simply stating that *Elher* requires corroborating literature support for all expert opinions. See, e.g., *Uppleger v McLaren Port Huron Hosp*, unpub, 2020 WL 6253601, Nos 348551 and 349281, dec'd 10/22/2020 (attached as Exhibit S; Apx at 000168); *Mattheson v Schmitt, unpub,* 2019 WL 6245773, No. 349022, dec'd 11/21/2019 (attached as Exhibit T; Apx 000177).

This is not the way *Daubert* has been interpreted by Federal Courts, however. While *Daubert* issues are normally very fact-specific, there have been some general principles adduced therefrom. For instance, a *Daubert* inquiry would not even have been required in the Sixth Circuit; where the rule is set out in *Bajorek-Delater v United States*, 2020 WL 6562255 (ED Mich 2020), (Exhibit U; Apx 000190) as follows:

> Under Rule 702, a district court should allow expert testimony "if (1) the testimony is based upon 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." *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 176 (6th Cir. 2009) ; Fed. R. Evid. 702. Although the moving TPDs request that the Court hold a *Daubert* hearing to determine the admissibility of Dr. Agerson's and Dr. Adams' testimony, they do not raise any objection to their qualifications or their methodology. Therefore, the Court has no basis at this time to convene a *Daubert* hearing.

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To similar effect is the law in the Third Circuit, where the leading case on point is *Schneider v Fried*, 320 F3d 396 (3d Cir 2003). In *Schneider*, the medical question to which the expert spoke was whether it was the standard of care in 1996 to administer a particular drug as a pre-treatment for an angioplasty. (Id at 405). The expert in *Schneider* cited literature, which only indirectly supported his opinions, but relied primarily on his experience and knowledge in the subject procedure. The Third Circuit overturned a District Court opinion striking the expert for lack of specific literature support, saying:

> In the case at bar, Dr. Semigran stated that he based his opinion not only upon the literature, but also upon his own experience as a cardiologist. Although Dr. Semigran had not actually performed angioplasties since mid–1990, at the time he testified, he was treating patients with angina in his capacity as an invasive cardiologist. The record establishes that as an invasive cardiologist, who normally diagnoses heart conditions, Dr. Semigran was routinely present during surgical procedures and regularly advised interventional cardiologists during the course of those procedures. Dr. Semigran also testified that he would consult with interventional cardiologists about which drugs should or should not be given to patients undergoing angioplasties. Thus, we conclude that Dr. Semigran's experience renders his testimony reliable, demonstrates that his testimony is based on "good grounds," and that the Magistrate Judge abused his discretion by excluding it. *See Daubert,* 509 U.S. at 590, 113 S.Ct. 2786 ("Proposed testimony must be supported by appropriate validation—*i.e*., 'good grounds.' ").

The Federal Courts simply do not require direct literature support for the opinions of an otherwise knowledgeable and experienced expert. To similar effect is the state of Wisconsin. A thorough review of *Daubert* principles led the Wisconsin Supreme Court to hold, in *Seifert v Balink,* 372 Wis 2d 525, 562; 888 NW2d 816 (2017), that

> Case law demonstrates, nonetheless, that courts frequently admit experience-based testimony, especially when expert medical evidence is offered. Expert medical opinion based on experience alone, "or experience in conjunction with other knowledge, skill, training or education" may constitute a reliable basis. "In certain

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> fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."

There is no logical reason to demand that standard-of-care testimony in all matters must be corroborated by direct literature as a prerequisite to its admissibility. As such, this Court should rule that, going forward, when evaluating standard-of-care testimony in a medical malpractice case, all factors presented by the expert are to be considered.

Articulating a flexible text under which trial courts should evaluate the scientific reliability of an expert's standard-of-care opinion involves recognizing, first and foremost, "[i]t is within a trial court's discretion how to determine reliability." *Elher*, *supra*, at 24-25. Generally, a party must put forth evidence to support that a proposed expert's testimony is founded on scientifically valid principals. *Daubert*, *supra*, at 597. In exercising its discretion to determine whether the testimony is founded on scientifically valid principals, a trial court should consider any reasonable factors under the circumstances of the case. *Kumho Tire*, *supra*, at 158.

Contrary to what *Edry*, *supra*, at 640, said was "implied**"** by prior case law, neither the presence of supporting literature, nor any other individual factor to assess the reliability of expert testimony, has ever been given primacy of importance in Michigan or Federal case law. Instead, it has consistently been held that there must be flexibility regarding how the *Daubert* gatekeeping function is conducted and what factors are considered in a given case. *Daubert*, *supra*, at 594-95. *Kumho Tire*, *surpa*, at 158.

Edry's departure from the standard set forth in *Daubert* and *Kumho Tire* occurred when it stated that "[t]his Court has implied that, while not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony. *Edry*, *supra*, at 640. This statement elevated literature from one of many factors which a trial court could consider as part of assessing the reliability of a particular expert opinion to the level of an

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"important factor" while not deeming any other factor to be of equal or elevated importance. Labeling literature an important factor restricts the necessary discretion of trial courts regarding "how to determine reliability." *Elher*, *supra*, at 24-25.

What a plaintiff must demonstrate, and what a trial court should consider, in support of an expert's standard-of-care opinion, will necessarily be based on the facts and circumstances of a particular case. This is reflected in this Court's prior recognition that "all the factors in MCL 600.2955 may not be relevant in every case," Id at 26, and "peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702." Id at 27 (emphasis added).

Given the nature of medicine, and noting that the standard of care in particular must continually change as new information and discoveries come to the fore, an individual expert's knowledge, training, and experience, gained through the continuous repetition of a certain procedure, may well be the best method for a plaintiff to demonstrate that the expert's standard-of-care opinion is founded on scientifically valid principles. As recognized in *Elher*, it will sometimes be the case that a trial court considering whether a standard-of-care opinion is admissible under MRE 702 will not be able to rely on whether the basis for the opinion has been subject to scientific testing and replication, because those factors do "not fit the type of opinion at issue in th[e] case." *Elher*, *supra*, at 26.

There may have been a time, under the *Davis-Frye* standard of "general acceptance," that published literature did play an elevated role in demonstrating the admissibility of an expert's opinions. Logically, peer-reviewed publication directly implies "general acceptance" of a "novel" matter, and therefore, in cases involving "novel" matters, published literature could play a particularly important role in demonstrating "general acceptance." However, Michigan no longer applies the *Davis-Frye* standard because MRE 702 was "amended explicitly to

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incorporate *Daubert*'s standards of reliability." *Gilbert*, *supra*, at 781. The amendment of MRE 702, changed "the factors that a court may consider in determining whether expert opinion evidence is admissible." *Id.*

Under the *Daubert* standards of reliability, it is clear that any reasonable factors demonstrating reliability should be considered under the circumstances of the case. *Kumho Tire*, *supra*, at 158. In a medical malpractice case, the reasonable factors which support that an expert's standard-of-care opinion is scientifically reliable could be the expert's training and personal experience. The importance of an expert's knowledge, training, and personal experience to providing a reliable foundation for a standard-of-care opinion in a medical malpractice case is directly reflected in the already existing requirements set forth in MCL 600.2169(1).

Providing trial courts with the discretion to determine the reliability of an of expert's standard-of-care opinion, *Elher*, *supra*, at 24-25, necessitates allowing trial courts to evaluate the reliability of those opinions under any reasonable factors. *Kumho Tire*, *supra*, at 158. In a particular case, it may be that a piece or body of literature will be of great significance to establishing the reliability of an expert's standard-of-care opinion. However, this does not mean that literature is necessary, or even important, every time an expert is offering a standard-of-care opinion. Whether, and to what degree, literature should play a role in assessing the scientific validity of an expert's standard-of-care opinion should be based on the opinion itself, and the facts and circumstances of the particular case. Furthermore, it may be that under a particular set of facts literature is not only unimportant, but it may be unreasonable to rely upon or require literature to establish reliability.

Edry noted that, "[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and,

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therefore, admissible." *Edry*, *supra*, at 642. Even accepting this statement, the converse is also true; there are times, often involving the standard of care, where an expert's experience and background are not only sufficient, but indeed the most sufficient way of demonstrating the expert's opinion is reliable.

A requirement that a plaintiff demonstrate the reliability of an expert's standard-of-care opinion through directly supportive literature, or that places literature in a place of elevated importance regardless of the facts of the case, unreasonably restrains a trial court's ability to assess whether an expert's opinion is reliable under other factors. It is particularly unreasonable in instances where no directly supportive, or contradicting, literature even exists. A court abuses its inherent discretion when it makes a choice outside the range of principled outcomes. *Maldonado*, *supra*, at 388. It would be inherently unreasonable, and outside the range of principled outcomes, for a court to require that a party produce non-existent literature in support of an expert's opinion while at the same time ignoring the great weight of other evidence, and common sense, demonstrating that the expert's opinion is reliable.

This Court should recognize, as the United States Supreme Court did in *Daubert*, that "[m]any factors will bear on the inquiry" of whether "the reasoning or methodology underlying" an expert's standard-of-care testimony is scientifically valid, and that setting forth a "definitive checklist or test" is impossible. *Daubert*, *supra*, at 592-93. It is not something that the United States Supreme Court, or plaintiff, presumes the ability to articulate. *Id.*

Medical literature does not, and never will, provide the legal community with scientific evidence that certain actions constitute a breach of the standard of care. That is just not how medical research operates. To require Plaintiffs to provide such corroboration is not mandated by any case or statute, except for the misinterpretation of *Elher* as requiring <u>direct</u> medical literature corroboration of standard-of-care testimony in medical malpractice cases, which

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results in the routine dismissal of potentially meritorious medical malpractice cases, in contravention of Rule 702 and appropriate *Daubert* review. Instead, this Court should announce a more flexible test, as contemplated by 600.2955 and the Federal and Wisconsin teachings. Furthermore, the Court should specifically clarify that, except under specific unusual circumstances, standard-of-care experts in medical malpractice cases should not be stricken simply because of a lack of directly supportive medical literature.

The test a trial court should apply to assess the scientific validity of a standard-of-care opinion must be flexible, and fit the medical facts of the given case. In certain cases, for example involving frequently repeated procedures, the most important factor for the trial court to consider may well be the expert's knowledge and experience in performing the indicated procedure. If a party establishes an expert's knowledge, experience and skill in a given procedure, and that the expert is basing their standard-of-care testimony primarily on that knowledge and experience, Michigan law under MRE 702 and MCL 600.2955 should be interpreted to allow such testimony in the absence of any evidence which establishes that the expert's knowledge and experience may not be sufficient to make their standard of care opinion reliable in a given case.

III. PLAINTIFF'S PROFFERED STANDARD-OF-CARE EXPERT SHOULD HAVE BEEN QUALIFIED UNDER *DAUBERT* AND *KUMHO TIRE* AS CODIFIED IN MCL 600.2955 ON THE PRESENT RECORD. HOWEVER, THE DECISION OF WHETHER TO HOLD A *DAUBERT* HEARING AT ALL SHOULD BE LEFT TO THE DISCRETION OF THE TRIAL COURT.

Plaintiff's expert, Dr. Koebbe, sat for a deposition in which he detailed his experience in the exact procedure being performed by Dr. Fahim upon Ms. Danhoff. (Exhibit K, Dep, Koebbe, at 82; Apx at 000068). He went into depth and detail as to which instruments are used in the surgery, and which instruments could have caused the perforation. (Id at 54-63; Apx at 000061-63). Then, based on his training and experience, and supported by medical

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literature regarding the rarity of the perforation here, he was able to testify that Dr. Fahim breached the standard of care in conducting the procedure such that it resulted in perforations, and in failing to recognize that complications had occurred post-surgery. (Id at 63-64; 106-107; Apx at 000063, 000074).

On reconsideration, Dr. Koebbe provided an affidavit (Exhibit N; Apx at 000118) along with medical literature (Exhibit O; Apx at 000120) indicating the rarity of the complication. Dr. Koebbe integrated the meaning of the articles into his prior testimony, particularly in relation to the comparative likelihood of other complications of surgery. Specifically, Dr. Koebbe testified, by affidavitt:

> 10. That at my deposition on August 7, 2019, I explained the difference between acceptable known complications of the lumbar procedure performed on Ms. Danhoff and unacceptable known complications that almost always occur as a result of medical negligence.
>
> 11. By way of example I testified regarding the known acceptable complication of transient nerve damage to the anatomical structures which need to be moved to gain access to the lumbar spine.
>
> 12. I also testified regarding the known complication of a bowel injury that was an unacceptable complication of this procedure as this type of injury almost always occurs as a result of medical error.
>
> 13. The medical articles attached as Exhibit 1 [Exhibit _ in appendix] support my standard of care opinions.
>
> 14. These articles looked to the complication rates of various injuries occurring during the type of procedure that Ms. Danhoff underwent utilizing thousands of patients. By way of example one study looked at 2,998 patients, one looked at 13,004 patients, and a third looked at 6,581 patients.
>
> 15. The attached articles found that the incidence of a bowel injury, similar to what happened to Ms. Danhoff, occurred in 0.03%, 0.08%, and 0.05% respectively (3 to 8 bowel injuries for every 10,000 surgeries.

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> 16. The studies also found that the acceptable known risk of transient nerve injury or weakness was between 9% and 21% in the same group of patients which is also consistent with my opinion testimony.
>
> 17. That the articles attached as Exhibit 1 to this Affidavit confirm my standard of care opinion that a bowel injury caused during the type of procedure performed upon Ms. Danhoff is not an acceptable known complication of this procedure but rather is so rare as to only occur as a result of surgical error. (Exhibit N; Apx at 000118-119).

Dr. Koebbe is no mere "professional expert". His credentials are not at issue in this appeal. He satisfies the conditions of MCL 600.2169, in that he is an active practitioner in the same field as Dr. Fahim. He has performed the procedure in question scores of times. The medical literature is integrated into Dr. Koebbe's testimony, so as to explain his standard-of-care testimony that some complications can occur even in the absence of actionable negligence, but that perforating the bowel during this sort of spinal procedure is not. This opinion is based significantly on his training, skill, knowledge and experience, but is supported by the statistical record set out in the medical literature. (Exhibit O; Apx at 120).

On the instant record, then, Dr. Koebbe is just the sort of expert that Michigan law requires. He should have been deemed qualified to render a reliable standard of care opinion in this matter, even under the rule set forth in *Edry* and *Elher*. He would qualify in the Third (*Schneider, supra)* and Sixth (*Bajorek-Delater, supra)* Circuits, and in Wisconsin (*Seifert, supra)*. This Court should rule, in line with these cases, and with the arc of Michigan jurisprudence prior to its misstep in *Edry* (as misinterpreted), that under the standards of *Daubert* and *Kumho Tire*, and in keeping with the language and intent of MRE 702 and MCL 600.2955, that he is qualified under the facts presented to the trial court herein.

The final part of the third question is whether a full *Daubert* hearing is required in this matter. Currently, the question of whether to hold a *Daubert* hearing as to the testimony of an

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expert is left to the discretion of the court. *Lenawee Co v. Wagley,* 301 Mich. App 134, 162; 836 NW2d 193 (2013) . This is also the law in the Sixth Circuit. *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 671–72 (6th Cir. 2010) Again, Plaintiff has shown that under the facts as set forth to the trial court herein, Dr. Koebbe qualifies to gives the opinion that he did. At the same time, Plaintiff concedes that she is advocating the discretion to be left with the trial court, including on the issue of whether a full *Daubert* proceeding is required under the facts of a given case. Given these competing considerations, Plaintiff therefore leaves it to the discretion of this Court, or that of the trial court to which it would be remanded, as to whether a full *Daubert* hearing should be conducted under the facts of this case.

As it relates to standard-of-care testimony in a medical malpractice action, however, what must change is a fundamental mindset of the bench and bar. Justice Young's dicta that the *Daubert* process exists for the purpose of excluding testimony (*Gilbert, supra*) still is echoed in cases as recent as *Wagley, supra,* at 162. This court should adopt and encourage, instead, the role of the gatekeeper envisioned in *Chapin, supra*:

> 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. Id at 140.

RELIEF REQUESTED

There is no reason to demand direct literature support for an expert's standard-of-care opinion in a medical malpractice case. *Daubert* does not accord literature an elevated position, demanding that literature be provided for an otherwise admissible opinion. Neither does MCL 600.2955 or MRE 702. The *Craig* and *Gilbert cases*, in adopting *Daubert* to Michigan, do not contain such a requirement. However, *Edry*, and especially *Elher,* announced the unique

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Michigan rule of requiring direct literature report for an otherwise admissible standard-of-care opinion.

The improper application of the *Elher* rule led to the trial court striking the standard-of-care opinions of Dr. Koebbe, who supported his opinion with reference to his lengthy and direct experience in the procedure in question, coupled with support from the literature (albeit not direct support). It further led to the Court of Appeals affirming the striking of the expert.

The demand for direct medical literature in all standard-of-care cases cannot be squared with the language of *Daubert* and *Kumho Tire*, as adopted into Michigan practice by MRE 702, in *Craig* and *Gilbert*. It has no support in the language of MCL 600.2955. Most importantly, it is contrary to the modern practice of medicine, where, as correctly noted in the concurring opinion of the Court of Appeals, it would be impossible or unethical to do a formal study to test many recognized standards of care.

This Court should adopt the model used in all other jurisdictions, and leave to the trial court gatekeeper discretionary decisions such as what role the medical literature will play in a dispute about an expert's qualifications. The doctrine of demanding direct literature support as a prerequisite for admissibility does damage to cases such as the instant matter, in which a well-qualified expert was not allowed to testify; not for reasons of credentials or methodology, but rather because the opinion he espoused was not directly supported by medical literature. This Court must return Michigan to the fold of proper *Daubert* practice, without an automatic enhancement for the role of literature in all cases, even those where such is clearly not applicable.

For all the above reasons, Plaintiffs-Appellants respectfully request that this Honorable Court reverse the decision of Court of Appeals, and remand with instructions to apply the

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correct legal standard in its adjudication on the admissibility of Dr. Koebbe's opinion regarding the standard of care applicable to the actions of Defendant Doctor Fahim

Respectfully submitted on this 19th day of July 2023.

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STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.212 (B)(3), the above signed counsel for Plaintiff-Appellant hereby certifies that the word count of the word-processing system used to prepare the instant brief indicates that the number of countable words is 13,622.

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PROOF OF SERVICE

Beverly R. Medley, states that on July 19, 2023, she served Plaintiffs-Appellants' Brief on Appeal via upon counsel of record via e-filing with the MI TrueFiling system to their approved e-mail or last known address of record as disclosed on the Notice of Electronic Filing, and via the email address listed below.

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