RECEIVED by MSC 11/1/2023 2:17:39 PM

STATE OF MICHIGAN
IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF,

Plaintiffs-Appellants,

Supreme Court Case No. 163120

Court of Appeals No. 352648

vs.

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

Lower Court No. 2018-166129-NH
(Oakland County Circuit Court)

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,

*denotes dismissed from the case

Defendants.
_____/

DEFENDANTS-APPELLEES' BRIEF ON APPEAL
STATEMENT OF COUNTABLE WORDS
PROOF OF SERVICE

Respectfully Submitted,

SAURBIER LAW FIRM, P.C.

By: /s/Scott A. Saurbier
Scott A. Saurbier (P19914)
Stacey J McDaniel (P77672)
Attorneys for Defendants-Appellees
400 Maple Park Boulevard, Suite 402
St. Clair Shores, MI 48081
(586) 447-3727

Dated: November 1, 2023

RECEIVED by MSC 11/1/2023 2:17:39 PM

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED v

STATEMENT OF BASIS OF JURISDICTION vii

INTRODUCTION 1

STATEMENT OF FACTS 4

I. Factual Background 4

a. Danhoffs seek out Dr. Fahim for treatment, and Dr. Fahim obtains the informed consent including the benefits and potential risks of XLIF procedures 4

b. Dr. Fahim performs the first and second stages of the XLIF procedure successfully 7

c. Mrs. Danhoff's long-standing diverticulitis causes a rupture in her sigmoid colon as documented by pathology 10

d. Danhoffs filed suit and hire Dr. Koebbe to opine that Dr. Fahim breached the standard of care 14

II. Procedural History for Summary Disposition and Denial of Reconsideration 15

a. The Michigan Court of Appeals Affirmed the Trial Court's Exercise of Discretion 21

b. After a Mini Oral Argument on Appeal, This Court Granted Leave 22

ARGUMENT 24

I. In Answer to the Supreme Court's Question (1) Whether This Court's decision in *Edry v* Adelman, 486 Mich 634 (2010) and *Elher v Misra*, 499 Mich 11 (2016), Correctly Describe the Role of Supporting the Literature in Determining the Admissibility of Expert Witness Testimony on the Standard of Care in a Medical Malpractice Case 24

a. *Edry v Adelman*, 486 Mich 634 (2010) 24

b. *Elher v Misra*, 499 Mich 11 (2016) 26

RECEIVED by MSC 11/1/2023 2:17:39 PM

II. In Answer to the Supreme Court's Question (2) if not, what a Plaintiff Must Demonstrate to Support an Expert's Standard of care Opinion'' and Question (3) how an expert should Meet the Standards of Reliability Under MRE 702 and MCL 600.2955 and Precedents of *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993); *General Electric Co v Joiner*, 522 US 136 (1997); *Kumho Tire Corp Ltd v Carmichael*, 526 US 137 (1999); *Elher; Edry* and Whether a *Daubert* Hearing was Necessary Before Making That Decision. 30

a. The standards for admissibility of expert testimony, under both MRE 702 and MCL 600.2955, are properly described in the precedents of *Daubert, Kumho Tire, Elher, and Edry,* require a reliable foundation for every expert opinion 30

III. The Options A Plaintiff Could Use To Demonstrate Reliability Of Opinion Testimony Apart From Supporting Literature While Acknowledging the Court's Decisions in *Edry v Adelman, supra* and *Elher v Misra, supra* Correctly Describe the Role of Supporting Literature in Determining the Admissibility of Expert Standard of Care Expert Testimony 38

IV. Case Law Cited by Plaintiffs-Appellants is Not Current and Not Relevant to this Court's Analysis 40

V. The Amendment to FRE 702 Effective December 1, 2013 Enabled this Court to Mirror the Change in MRE 702 on September 20, 2023 Effective January 1, 2024 44

RELIEF REQUESTED 50

RECEIVED by MSC 11/1/2023 2:17:39 PM

INDEX OF AUTHORITIES

Page

CASES:

Bourjaily v United States, 483 US 171 (1987) 47

Chapin v A & L Parts, Inc, 274 Mich App 122, 139 (2007).....15, 37

Craig v Oakwood Hospital, 471 Mich 67 (2004).....15, 25

Delahut v Finton, 241 Mich 226; 221 NW 168 (1928) 40

Daubert v Merrell Dow Pharms, Inc, 509 US 579 (1993) ..... passim

Edry v Adelman, 486 Mich 634 (2010) ..... passim

Elher v Misra, 499 Mich 11 (2016) ..... passim

Frye v United States, 293 F 1013 (DC Cir, 1923*)* 30, 31, 32, 37

General Electric Co v Joiner, 522 US 136 (1997) 3, 15, 30, 33

Gilbert v DaimlerChrysler Corp, 470 Mich 749 (2004).....25, 37

Huddleston v United States, 485 US 681 (1988) 46

In re Paoli R.R. Yard PCB Litigation, 35 F3d 717 (3d Cir 1994).....48

Jones v Porretta, 428 Mich 132 (1987) 43, 44

Kumho Tire Co v Carmichael, 526 US 137 (1999)..... passim

Lince v Monson, 363 Mich 135 (1961).....40, 41, 42

Luka v Lowrie, 171 Mich 122 (1912) 40

Nelson v American Sterilizer Company, 223 Mich App 485 (1997) 15

Sardis v Overhead Door Corporation 10 F4th 268 (2021) 45

Skinner v Square D, 445 Mich 153; 516 NW2d 475 (1994).....15

People v Unger, 278 Mich App (2008).....37

Wilson v Stillwill, 411 Mich 587 (1981) 43

Zotterell v Repp, 187 Mich 319 (1915).....40, 42

STATUTES:

MCL 600.2169 .....26, 30

MCL 600.2955 ..... passim

RULES:

FRE 702 .....3, 37, 44, 46, 47

MRE 104 .....32, 48

MRE 702 ..... passim

MRE 703 .....30, 32

RECEIVED by MSC 11/1/2023 2:17:39 PM

RECEIVED by MSC 11/1/2023 2:17:39 PM

STATEMENT OF QUESTIONS PRESENTED

1. **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-Appellees argue: Yes
   The Trial Court answered: Yes
   The Court of Appeals answered: Yes

2. **If *Edry v Adelman* and *Elher v Misra* do not correctly describe the role of supporting literature in determining the admissibility of expert witness testimony, what must a plaintiff 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-Appellees answer: *Edry* and *Elher* properly describe the requirement of reliability for an expert's opinion under Michigan law, and the consistent application of the role of supporting literature for the past 30 years is only one of many factors in determining expert witness reliability.

   The Trial Court answered: The law requires that expert testimony be reliable and have a basis in recognized scientific or technical principles. Education and experience may qualify an individual as an expert, but that expert's opinion must then be accepted within the relevant expert community or criterion within MRE 702, MCL 600.2955, MCL 600.2169 and case law to be considered reliable and admissible. *Ipse dixit* testimony is not acceptable. The support of peer review articles or literature is not dispositive but only one factor in determining the reliability and admissibility of expert testimony. Dr. Koebbe failed to produce anything other than his own *ipse dixit* personal opinion that Dr. Fahim breached the standard of care.

   The Court of Appeals answered: *Edry* and *Elher* both properly describe the role of supporting literature as a criterion, among others, that may be important in supporting a reliable theory of testimony, acknowledging it may not always be available and is not a requirement to support an opinion, under the assumption that the opinion is supported by other criterion found in MRE 702, MCL 600.2955 and MCL 600.2169 or other supportive information established through *Daubert*, *Kumbo Tire,* or other Federal or Michigan cases. A background of education and experience only qualifies an individual to provide an opinion, but that expert's opinion must then be based upon reliable principles and methodology or support from the medical community. An expert may not only rely upon *ipse dixit* conclusions.

RECEIVED by MSC 11/1/2023 2:17:39 PM

3. **Whether Plaintiffs-Appellants' standard of care expert met the standards for reliable expert testimony and was 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 was qualified. No *Daubert* inquiry is required in this case but in future cases the trial courts should use discretion when considering a *Daubert* hearing.

Defendants-Appellees answer: These are two separate questions. An expert may be qualified by education or training and here Dr. Koebbe was qualified as a board-certified neurosurgeon. But thereafter, the trial court gatekeeper, must determine if the opinion rendered was reliable and admissible based on the facts of the case. The plaintiffs did not present any proof at the summary disposition stage that their expert's opinion was based upon generally accepted standards; or interpretation of a methodology or technique; or showing that the opinion and its basis were generally accepted within the relevant medical community; or that experts in the same field would rely upon the same basis to reach the same type of opinion; or that the opinion or methodology would be relied upon by experts outside the context of the litigation. Dr. Koebbe provided no information except his own personal *ipse dixit* opinion which did not meet standards of reliability. The trial court judge is the gatekeeper of reliability and must make this determination on a more likely than not basis.

The Trial Court answered: No. Plaintiffs failed to demonstrate that their expert supported his opinions with any information suggested by MRE 702 or MCL 600.2955 including, but not limited to any peer-reviewed or published articles. Rather, the expert only stated his opinion based upon his education and experience of doing 30-40 cases. When the trial court gatekeeper invited a rehearing to provide any information, including published materials in plaintiffs' motion for reconsideration, the plaintiffs offered abstracts and one unpublished article that did not support Dr. Koebbe's opinions. Plaintiffs failed to show their expert could support his opinions based upon reliable principles and methods generally supported by the relevant community of experts.

The Court of Appeals answered: No. The plaintiffs' expert's opinion was not qualified as determined by the gatekeeper and a Daubert hearing was unnecessary because the expert repeatedly relied upon his opinions and experience without anything more than that.

RECEIVED by MSC 11/1/2023 2:17:39 PM

STATEMENT OF BASIS OF JURISDICTION

Defendants-Appellees agree with the Statement of Basis of Jurisdiction as provided by Plaintiffs-Appellees.

RECEIVED by MSC 11/1/2023 2:17:39 PM

INTRODUCTION

Plaintiff-Appellant Lynda Danhoff (often referred to as "Mrs. Danhoff") had back surgery on December 7, 2015, and three days afterward was found to have two sigmoid bowel holes near the rectum leaking fecal matter, causing an abdominal infection. She sued her surgeon, Defendant-Appellee Dr. Fahim (hereinafter referred to as Dr. Fahim), claiming this occurred because he violated the standard of care for Danhoff's back surgery known worldwide as an Extreme Lateral Interbody Fusion or "XLIF" surgery. In support, she hired a neurosurgery expert, Christopher Koebbe, MD (hereinafter referred to as "Dr. Koebbe"), who stated that he had personally performed 30 or 40 XLIF surgeries (Appendix 75b, dep of Koebbe p 82)[1] and, during those surgeries, there had been no bowel-perforation complications. **(**Appendix 70b dep of Dr. Koebbe p 64). He testified that Dr. Fahim violated the standard of care because although the complication is known, it is rare. (Appendix 66b, 69b, 77b-78b, dep of Dr. Koebbe pp 48, 63, 92-95). The perforation(s) were caused by an instrument. (Appendix 69b, 78b, 82b-83b, dep of Dr. Koebbe pp 59, 93, 109, 115).

The only support for Dr. Koebbe's conclusion was his own experience. (Appendix 69b, 72b-73b, dep of Dr. Koebbe pp 63-64, 75). When invited by the trial court to offer any further any further support for his conclusion, he had none. The trial court found his opinion under MRE 702 was not reliable, but offered an opportunity for a rehearing to produce any evidence to support his opinion. On rehearing, Dr. Koebbe produced literature from Japan and Europe recognizing that bowel-perforations are a known, rare complication with an XLIF surgery, but he provided no support to say when a bowel perforation complication occurs there is any wrongdoing.

[1] Defendants-Appellees refer to Appendix to Brief on Appeal filed on July 8, 2021 and Appendix to Supplemental Brief filed on May 26, 2022.

RECEIVED by MSC 11/1/2023 2:17:39 PM

Dr. Koebbe could not say that any of the techniques utilized during the XLIF surgery violated the standard of care, when or how the sigmoid colon opened or any specific thing Dr. Fahim supposedly did wrong during the surgery. (Appendix 76b, 87b-88b, dep of Dr. Koebbe pp 88, 130, 132, 134). The trial court held Dr. Koebbe, though a qualified neurosurgeon, failed to support his standard of care opinion with any reliable foundation, and excluded his opinion. The Michigan Court of Appeals affirmed. This Court should, too.

In granting leave, the Supreme Court asked three questions. The answers to those questions, individually and collectively, require affirmance.

First, the Court asked whether *Edry v Adelman*, 486 Mich 634 (2010) and *Elher v Misra*, 499 Mich 11 (2016) correctly describe the role of supporting literature. Those cases get it right, noting there is no requirement to furnish supporting literature although it is one way, among others, for supporting a conclusion. *Edry* and *Elher* state literature is just one way to meet the burden of showing a reliable foundation for an opinion in an individual case. See *Edry*, 486 Mich at 641; E*lher,* 499 Mich at 19. Both cases rely on and discuss long-standing case law including the oft-mentioned *Daubert v Merrell Dow Pharms, Inc*, 509 US 579 (1993), other supporting federal case law and Michigan case law that will be further discussed within this brief. Importantly, MCL 600.2955, shortly after *Daubert* effective March 28, 1996 adopts and provides a list of suggestions for an expert to follow, apart from a supporting peer review publication that can be used to confirm reliability of an opinion. Dr. Koebbe was unable to utilize any of these various suggestions.

This Court specifically requests a discussion and comparison of MRE 702, MCL 600.2955 and proceeding case law, which will be detailed in this brief. But none of the preceding guidance

RECEIVED by MSC 11/1/2023 2:17:39 PM

or suggestion found in *Edry*, *Elher*, *Daubert*, *Kumho*[2], *Joiner*[3], MRE 702, MCL 600.2955 or suggestions in similar precedent or suggestions by the Court were followed by Dr. Koebbe or Danhoff.

Second, this brief responds to this Court's question of how an expert witness can support expert witness testimony without supporting literature.

Third, the adjacent question in this Court's May 26, 2023 Order regarding whether a *Daubert* hearing was necessary before the trial judge excluded Dr. Koebbe was guided by the several years of discussion within the Federal Judiciary Conference Committee on Rules of Practice and Procedure, resulting in FRE 702 changes adopted December 1, 2023 to clarify the role of trial gatekeepers, and MRE 702 was amended by this court September 20, 2023 effective January 1, 2024.

But when asking whether Danhoff's standard-of-care expert Dr. Koebbe met any of the standards for determining the reliability of expert testimony and was thus qualified to render an opinion or whether a *Daubert* hearing was necessary before making that decision, the answers are emphatically no and no.

Neither Danhoff nor Dr. Koebbe was able to present any reliable support for Dr. Koebbe's, *ipse dixit* (it is because I say so) opinion of negligence. There were many opportunities available for qualification and none could be provided.

Danhoff's arguments on the requirement of literature continue to fail as a matter of law and this Court should uphold the lower courts' rulings which dismissed this case in its entirety.

[2] *Kumho Tire Co. v Carmichael*, 526 US 137 (1999).
[3] *General Electric Co* v *Joiner*, 522 US 136 (1997).

RECEIVED by MSC 11/1/2023 2:17:39 PM

STATEMENT OF FACTS

I. Factual Background.

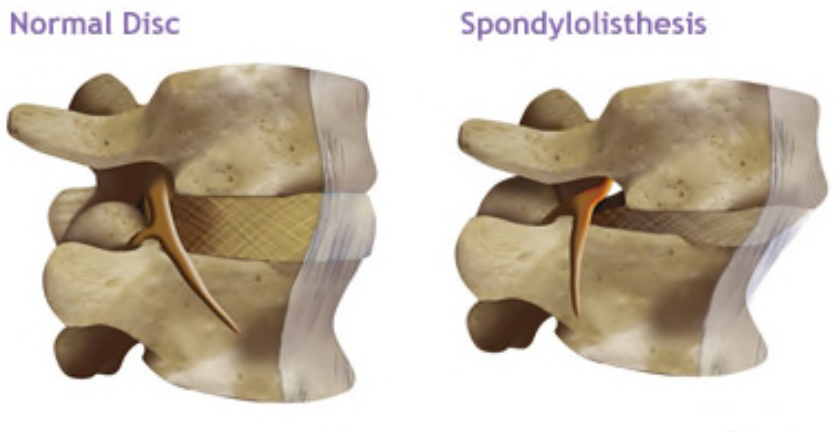
a. Danhoffs seek out Dr. Fahim for treatment, and Dr. Fahim obtains the informed consent including the benefits and potential risks of XLIF procedures.

On February 22, 2015, Lynda Danhoff injured her back working as a grocery produce manager, resulting in a Worker's Compensation case, then Social Security Disability as she not only could not work outside of the home, but could not assist her husband in any way caring for their 20 acre property. She could no longer do routine activities of daily living such as vacuuming, laundry, going up and down stairs, or assisting with outdoor activities such as snow shoveling, power cutting the grass, attending to the vegetable and flower garden, being intimate with her husband or other pleasurable activities. (Appendix 193b-194b, dep of L. Danhoff pp 63-64, 66).

She underwent conservative treatments of physical therapy and had 30 injections into her back from a pain management physician Dr. James McKenzie. This only made her pain worse with such severe pain radiating down her legs that she could do little more than make a cup of coffee.

Dr. McKenzie in Grayling, Michigan referred her to Dr. Fahim, (Appendix 188b, dep of L. Danhoff p 41) whom she and her husband met for a surgical consultation on November 5, 2015, bringing with them a recent MRI that they all reviewed. (Appendix 188b-189b, dep of L Danhoff pp 44-45). Dr. Fahim pointed out the likely reason for her disabling back pain and bilateral lower extremity radiculopathy symptoms could be seen at the L3- L4 and L4-L5 area of the spine showing spondylolisthesis, a condition where one vertebra has slipped forward over another due to degeneration and causing nerve impingement. (Appendix 247b, dep of Dr. Fahim p 18).

RECEIVED by MSC 11/1/2023 2:17:39 PM



Dr. Fahim recommended and explained the details of what is known worldwide as an Extreme Lateral Interbody Fusion ("XLIF"), a minimally disruptive surgical procedure performed through the side of the body for a disc replacement. Two days thereafter another minimally invasive surgery would occur through the back adding screws and rods for stabilization until final healing (fusion) of the disk occurred. (Appendix 189b, dep of L Danhoff p 57 and Appendix 247b, dep of Dr. Fahim p 18).

During XLIF, x-ray (fluoroscopy) and nerve monitoring technology, is continuously used guiding the surgeon through a tissue tunnel slightly wider than a finger to the damaged disc. XLIF surgery through the patient's side allows access to the spinal column, avoiding any major nerves in the area between the incision and the spinal column avoiding risks of vascular and/or neural injury compared to traditional approaches. Below is an illustration of the patient positioning for the XLIF procedure:

RECEIVED by MSC 11/1/2023 2:17:39 PM



Dr. Fahim also discussed the various risks, benefits, and alternatives of the XLIF surgery with the Danhoffs. This included injury or perforation to the bowels or other intra-abdominal organs resulting in the possible need for further surgery or death. (highlighted in Appendix 171b, Dr. Fahim Consent).

After completing this discussion and answering all of the Danhoffs' questions to their full satisfaction, Mrs. Danoff asked Dr. Fahim to proceed with this intervention.

Bowel perforation is a known complication for an XLIF procedure recognized worldwide. Danhoff's expert Dr. Koebbe recognizes the risk, has no criticism over the informed consent provided by Dr. Fahim (Appendix 80b, dep of Dr. Koebbe, p 104) and provides the same type of consent:

Q So do you tell a patient, we covered some of this, but a risk is having a bowel, bladder sexual dysfunction? Are all abuse potential risks of the procedure?

A Yes.

(Appendix 80b, dep of Dr. Koebbe, pp 101-102).

RECEIVED by MSC 11/1/2023 2:17:39 PM

Q And would it be appropriate within the standard of care to tell the patient that there is a risk of injury to the bowels or other intra-abdominal organs resulting in infection or death?

A Yes.

(Appendix 80b, dep of Dr. Koebbe pp 101-102

b. Dr. Fahim performs the first and second stages of the XLIF procedure successfully.

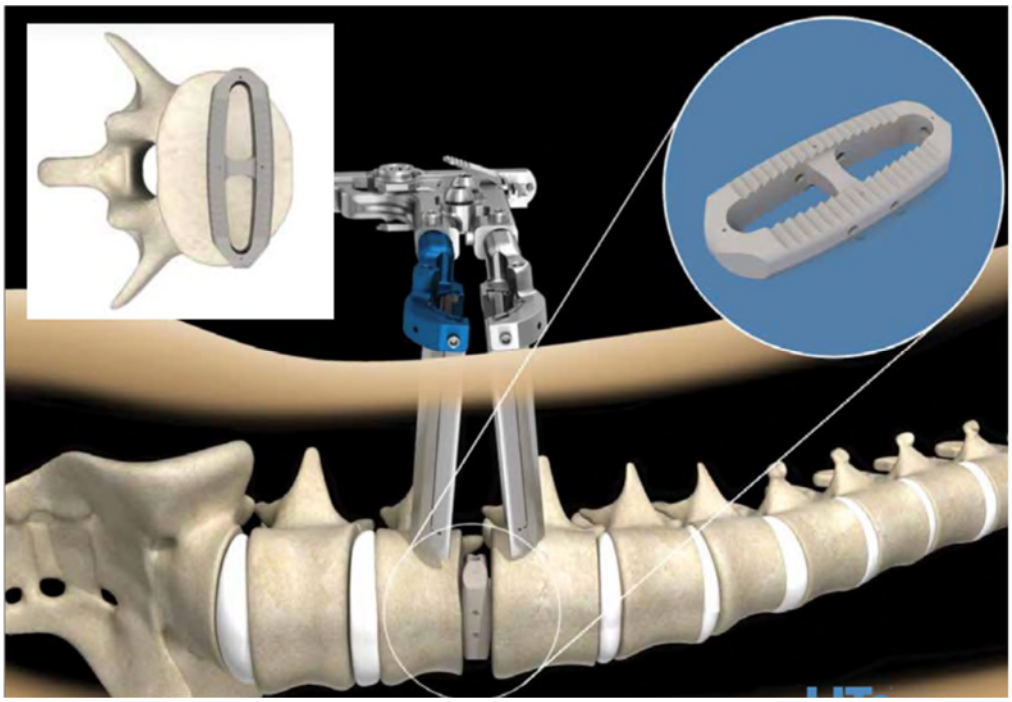
The importance of reciting the details of the XLIF surgery is understanding that the surgeon always had a continuous view of where he was, through x-ray (fluoroscopy- AP and lateral – front and side views), that was used multiple times) and nerve monitoring (EMG), always providing Dr. Fahim with real-time visible information relative to the location of his instruments. (Appendix 250b, dep of Dr. Fahim p 29).

XLIF starts with cutting a small skin incision about the size of paperclip. (*No further cutting takes place until actual work on the diseased disc begins*.) There are no organs in the working area and a working tunnel was immediately formed by Dr. Fahim using his fingers and verified by continuous real-time x-ray (fluoroscopy) going to the damaged disc. (Appendix 250b, dep of Dr. Fahim p 26).

The XLIF tunnel is on one side of the abdominal wall which contains no organs (sometimes called the retroperitoneum). The other side of the abdominal wall is the abdomen which contains organs including the bowel, kidney, ureters (sometimes called the peritoneum). The abdomen/peritoneum is where Dr. Koebbe speculates Dr. Fahim mistakenly perforated the sigmoid colon (by the rectum) with instruments. (Appendix 68b, 78b, 82b-83b, dep of Dr. Koebbe pp 53, 93, 109, 115).

RECEIVED by MSC 11/1/2023 2:17:39 PM

After opening the skin surface, inserting his finger as a guide, Dr. Fahim placed a small retractor down to the damaged disc (to hold the working tunnel open). Larger retractors were then threaded over the small retractor enlarging the working tunnel to allow removal and replacement of the damaged disc. Lighted retractors were then used to assist in visualization of the repair. The surgical record verifies continual use of x-ray verifying the surgery and instruments were in the correct area as well as verification at the correct disc between L3 – L4 was properly repaired. (Appendix 287b-289b, Dr. Fahim Stage II Operative Note, 12/7/15).

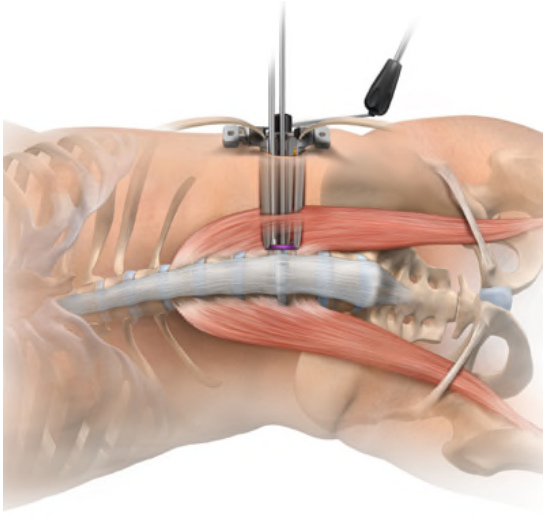


Dr. Fahim was always inside the retroperitoneum and could visually see, confirm, and feel, as well as documented by x-ray, that he was always correctly in the retroperitoneum area and never in the peritoneum containing all of the body organs, including the bowel. (Appendix 251b, 252b, 254b, dep of Dr. Fahim pp 30-31, 36, 44).

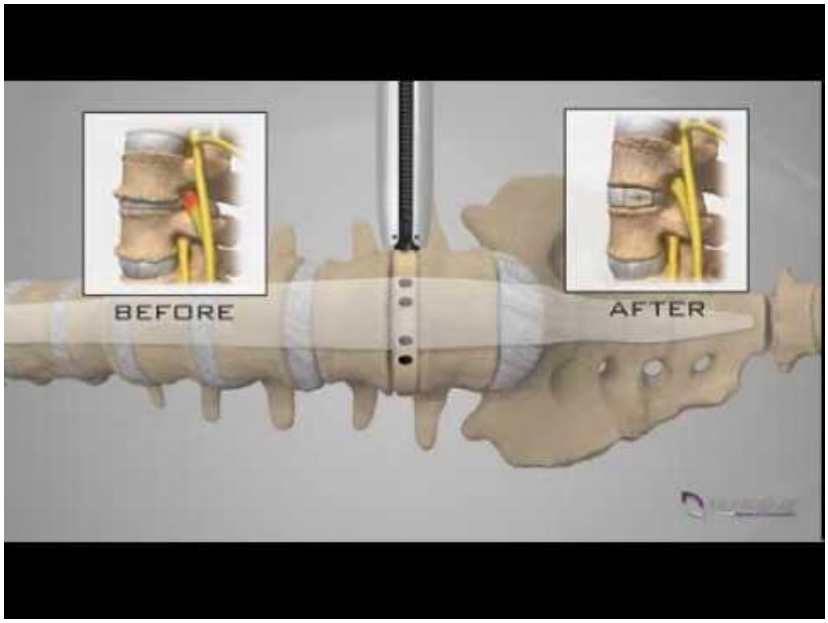
Dr. Fahim then removed the diseased disc to reduce the pressure on the spinal cord and nerve root. An implant was then placed into the disc space to restore the proper disc height and provide support while bone grows between the vertebral bodies during the fusion (bone-healing)

RECEIVED by MSC 11/1/2023 2:17:39 PM

process. These actions were confirmed multiple times by fluoroscopy and nerve detection electronics. No organs are in the retroperitoneal surgical area. Dr. Fahim was never near or touching the bowel. The site of operation ultimately appears as follows:



The XLIF® technique uses the XLP™ plate to achieve effective fixation through a single approach.



Once this first stage was completed, Dr. Fahim slowly moved out of the operating site, constantly inspecting for any signs of bleeding or other complications that could possibly be seen

RECEIVED by MSC 11/1/2023 2:17:39 PM

during exit from the repair site. Dr. Fahim appropriately documented his entire procedure in his operative note, reporting no observed issues. (Appendix 254b, dep of Dr. Fahim p 43 and Appendix 279b-282b, Dr. Fahim Stage I Operative Note).

The operation was successful, immediately alleviating all the disabling pain Danhoff had pre-surgery with the determination that likely nothing had to be done with the L4-L5 space because the L3-L4 surgery alleviated all pain.

Stage II of the operation took place on December 9, 2015 where for stabilization Dr. Fahim attached screws and rods to the vertebrae allowing the Stage I surgery to heal while the bone fused in the appropriate position. Stage II was neither near the retroperitoneum nor the peritoneum. This was completed without incident. (Appendix 287b-289b, Dr. Fahim Stage II Operative Note).

c. Mrs. Danhoff's long-standing diverticulitis causes a rupture in her sigmoid colon as documented by pathology.

Mrs. Danhoff knew she had diverticulitis for over 10 years prior to the surgery and this condition tends to worsen with age. (Appendix 187b-289b, dep of L. Danhoff, pp 39-40).

Diverticula occur when naturally weak places inside the colon give way to pressure and push outward creating small marble-sized bulging pouches.

Diverticula



RECEIVED by MSC 11/1/2023 2:17:39 PM

They are most often found in the lower part of the large intestine, such as the sigmoid colon. Mrs. Danhoff had this condition.

Diverticulitis Found In Sigmoid Colon



Diverticulitis occurs when one or more of the pouches become inflamed or infected. When a small tear in this weakened diverticula ruptures or perforates, it allows fecal matter to escape into the abdominal area causing an infection which is a medical emergency.

On December 10, 2015, Danhoff's vital signs changed, she was quickly sent for a CT and chest x-ray, placed on broad spectrum antibiotics and taken to surgery for an exploratory laparotomy. When the abdomen was opened, surgeon Anthony Iacco MD was met with a large rush of stool, suctioning several times before he could gain control of the stool flow. When further proceeding he was again met with a second rush of stool. He elected to remove 18 cm (approximately 7.1 inches) of the diseased sigmoid colon. (Appendix 298b-299b, Pathology Report).

The 18 cm of sigmoid colon was examined by the hospital pathologist diagnosing diverticulitis with diverticular rupture in two areas of the sigmoid colon with mural abscess and necrosis (tissue death) with colonic perforation.

RECEIVED by MSC 11/1/2023 2:17:39 PM

DIAGNOSIS:
COLON (SIGMOID), SEGMENTAL RESECTION
--- DIVERTICULITIS WITH DIVERTICULAR RUPTURE, MURAL ABSCESS AND NECROSIS WITH COLONIC PERFORATION
--- RESECTION MARGINS APPEAR VIABLE

Within this 18 cm of diseased sigmoid colon, the pathologist also described 5-6 other representative diverticula, plus an additional 7 other representative markedly edematous (swollen) areas of tissue. (Appendix 298b-299b, Pathology Report).

Dr. Fahim knew and reconfirmed that at all times he was properly in the retroperitoneum and not the peritoneum by feel, repeated AP and lateral fluoroscopy, and direct visualization of the spine utilizing light sources and magnification techniques. Had he been anywhere in the peritoneum at any time or piercing the sigmoid colon by the rectum with instruments, this would have been obvious through the fluoroscopy techniques and direct visualization. (If a breach of the bowel occurred, it would also immediately be detected by strong odor).

Dr. Fahim testified that the area of surgery is nowhere near the sigmoid colon:

Q What about the retractors themselves? They're used to hold all the organs and muscle and anatomy aside so you have a clear surgical site, correct?

A Well, that's not exactly correct. There are no organs in our surgery. We see – all we're in is fat. There's some muscle being retracted in one direction which is posteriorly, that's the iliopsoas muscle. 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.

RECEIVED by MSC 11/1/2023 2:17:39 PM

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 surgeon, but the sigmoid colon from the disc where we're working on the spine is probably 12 to 15 centimeters[4] away maybe, something like that.

Q It's nowhere near the surgical field, correct?

A Near the disc, no, nowhere near the disc.

(Appendix, 250b-251b, Dep Dr. Fahim pp 29-30).

Dr. Koebbe agrees that chronic diverticulitis can spontaneously perforate and states:

Q So do diverticula or diverticulosis ever spontaneously rupture?

A My understanding is yes. That can occur.

Q Do you know why or under what circumstances that can occur?

A My understanding is that it tends to happen in folks who have chronic diverticulitis where the inflammation on the wall of the colon obviously leads to a perforation at some point.

(Appendix 71b, dep Dr. Koebbe p 65).

Dr. Koebbe admitted during questioning that a patient in a severely constipated state with diverticulitis could have a thinning wall of the colon (Appendix 72b-73b, dep Dr. Koebbe pp 72-76), that blood flow would be lessened to the damaged tissue, that after surgery, it would be

[4] 12-15 cm from the sigmoid colon to the L3 disc operative area is approximately 4.7-5.9 inches

RECEIVED by MSC 11/1/2023 2:17:39 PM

possible that subsequent necrosis could take place leading to rupture (Appendix 82b, dep Dr. Koebbe p110-111), leading to a conflict in his opinion that the bowel hole was caused by a surgical instrument.

Mrs. Danhoff upon awakening from anesthesia was delighted that her long-standing back pain had been cured and remains cured to this day.

The spine and spinal repair area of L3 – L4 was never infected. There was no infectious track from the necrotic diverticular rupture to the area of surgery. The surgical instruments Dr. Koebbe hypothetically speculated pierced the sigmoid colon and entered into its fecal matter never carried infectious bacteria to the operative surgical area and the operative area never became infected.

d. Danhoffs filed suit and hire Dr. Koebbe to opine that Dr. Fahim breached the standard of care.

On June 5, 2018, the Danhoffs filed suit supported by an Affidavit of Merit from their neurosurgeon Christopher Koebbe MD.

Dr. Koebbe graduated from his residency in neurological surgery in 2006 and was certified by the American Board of Neurological Surgery in June, 2010. He was qualified to testify.

Dr. Koebbe testified that Dr. Fahim must have somehow perforated the bowel during Stage I of the XLIF procedure and admitted his opinion was based on assumption and not specific facts related to the case, but his opinion never changed because a perforation was found, there must have been some kind of negligence. (Appendix 66b-68b, dep Dr. Koebbe pp 45-46, 52-53 and 55).

Dr. Koebbe could not point to any specific facts as to when or how Dr. Fahim committed malpractice. (Appendix 70b, 78b, 81b, 87b-88b, dep Dr. Koebbe pp 63, 95, 105, 130, 132, 134).

RECEIVED by MSC 11/1/2023 2:17:39 PM

Dr. Koebbe only testified that a bowel injury was rare during an XLIF surgery and thus that it would only happen if there was negligence. (Appendix 66b-67b, 77b-78b, dep Dr. Koebbe pp 48-49, 92-95).

Dr. Koebbe also admitted he could not opine as to whether this was a perforation caused by Dr. Fahim's instruments or some other underlying inflammatory bowel issue such as diverticulitis as he is not an expert in diverticulitis and will not be able to opine as to the pathology report findings that Danhoff had a diverticular rupture. (Appendix 82b, dep of Dr. Koebbe p 110).

II. Procedural History for Summary Disposition and Denial of Reconsideration.

Dr. Koebbe's deposition was taken August 7, 2019. Dr. Koebbe concluded Dr. Fahim was negligent because there was a bowel perforation and bowel perforations with an XLIF are extremely rare. (Appendix 66b, 78b, dep Dr. Koebbe pp 47-48, 93-95).

Dr. Fahim soon filed his motion for summary disposition heard on October 16, 2019. In granting that motion, and after argument, the trial court held here was no reliable proof to show that Dr. Fahim's surgery was negligent or proximately caused Danhoff's injury. Citations in support included MRE 702, MCL 600.2955 and underlying case law was provided to show the legal requirements and failure of Danhoff to produce reliable information or specialized knowledge to support Dr. Koebbe's *ipse dixit* conclusions. The trial court relied on the following cases to support its holding: The citations included: *Daubert v Merrell Dow Pharms, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *Kumho Tire Co. v Carmichael*, 526 US 137, 119 S Ct 1167, 143 L Ed 2d 238 (1999) and *General Electric Co v Joiner*, 522 US 136 (1997), *Craig v Oakwood Hospital*, 471 Mich. 67, 86 (2004), *Skinner v Square D*, 445 Mich 153, 162 (1994), *Nelson v American Sterilizer Company*, 223 Mich App 485 (1997) and *Chapin v A & L Parts Inc.*, 274 Mich App at 139 (2007).

RECEIVED by MSC 11/1/2023 2:17:39 PM

At the hearing on 10/23/19, the trial court, acting within its gatekeeper function, provided Danhoff every opportunity to prove her case and belabored the fact that Danhoff's expert simply had not shown support for his opinions. The trial court read Dr. Koebbe's deposition and repeatedly referenced the requirements of MRE 702 to Danhoff's attorney, cited *Edry v Aleman* in reference to the necessary reliability of an expert opinion, and repeatedly stated it was generally not sufficient to simply point to an expert's experience and background to argue that the expert opinion was reliable and therefore admissible. The trial court specifically referred to the deficiencies in Dr. Koebbe's opinion and sought reliable sources behind his personal opinions, noting that Dr. Koebbe testified:

- That if there is a bowel injury as a result of spinal fusion surgery, "more often than not" there was some sort of breach of the standard of care. (Appendix 6b, 10/23/19 transcript).

- That a bowel injury is a risk involved in spinal fusion surgery and he (Dr. Koebbe) informs his own patients about the risk. (Appendix 6b, 10/23/19 transcript).

- Plaintiff's attorney Cook stated that "in certain situations it can be a known complication that's acceptable" and "in certain situations known complications unacceptable, it's malpractice." (Appendix 7b, 10/23/19 transcript).

- The court pointed out that Dr. Koebbe testified hypothetically there can be "bowel injury without a breach of the standard of care." (Appendix 8b, 10/23/19 transcript and Appendix 82b, dep of Dr. Koebbe p 110).

- The court pointed to *Edry*, a 2010 case quoting that was "generally not sufficient to simply point to an expert's experience and background to argue that expert opinion is reliable and therefore admissible"; the court referenced studies and literature, but referenced MRE 702 notes <u>there must be "something more than just this is the work I do and therefore I am an expert.</u>" (Appendix 9b-11b, 10/23/19 transcript and Appendix 70b dep of Dr. Koebbe p 63-64).

- The trial court noted Dr. Koebbe did not support his opinions with any articles or books (*as Dr. Koebbe testified they did not support his theories)* and added that he did not have "anything" that supported what he was saying. (Appendix 11b, 10/23/19 transcript).

RECEIVED by MSC 11/1/2023 2:17:39 PM

- With argument from the Danhoff attorney, the trial court referred him to the *Edry* case and MRE 702 and asked the open-ended question that other than Dr. Koebbe's own opinion what he based the standard of care on, asking this twice ((Appendix 12b, 10/23/19 transcript), adding there has to be something that says beyond his experience and finding he did not have any of that. (Appendix 13b, 10/23/19 transcript).

- Dr. Koebbe did not know whether a nick was made by an instrument or whether it was diverticular disease; Danhoff had no reliable opinion to state it was a violation of the standard of practice.

- Dr. Koebbe assumed that the instruments used during the Stage I procedure appears that the instrument went in one side of the colon and out the other but then admitted his testimony was in direct controversy with the record, which does not indicate the colon was pierced through one end and out the other, but only showed a perforation on one side.

The trial court over and over again indicated to Danhoff to provide something/anything and gave Danhoff every opportunity to prove her case and belabored the fact that Danhoff's expert simply had not shown support for his opinions. A summary sampling of the discussion follows:

> THE COURT: There's--there's a case, *Edry v Adelman*, 468 Michigan 634, 2010 case where it's talking about 702. And isn't it generally not sufficient to simply point to an expert's experience and background to argue that their expert opinion is reliable and therefore admissible?
>
> I mean, don't -- doesn't it have to be more than that? He has to say these are the studies, these are the periodicals, the literature. Something more than just this is the work I do and therefore I'm an expert because this is the work I do and this is my opinion and you don't need to go any further.
>
> MR. COOK: No. I mean, he has more than that, your Honor.
>
> THE COURT: Well, I didn't -- I thought I read during his deposition that he was kind of vague, that he had looked at some things. But he didn't bring anything with him to the deposition, he couldn't actually cite anything.
>
> THE COURT: Yes. And I just read to you a case and the cite -- and the statute.
>
> THE COURT: So other than his own opinion, what did he base the standard of care on?
>
> MR. COOK: He based it on his own opinions and experience.

RECEIVED by MSC 11/1/2023 2:17:39 PM

> THE COURT: Other than his own opinion, what did he base his standard of care on?
>
> MR. COOK: He did not bring anything with him, a peer-review article.
>
> MR. COOK: Sure.
>
> THE COURT:…… There has got to be something that says beyond his experience. Did he do any of that?
>
> MR. COOK: At the time of the deposition, I don't think so.
>
> THE COURT: So that's a no.
>
> MR. COOK: No, not that I'm aware of.
>
> THE COURT: Okay. All right. (Appendix 9b-13b, 10/23/19 transcript).

The trial court issued an order November 25, 2019 finding Dr. Koebbe's opinion was not reliable for admission under MRE 702 or followed the suggestive factors listed under MCL 600.2955. At the end of the opinion Judge Grant invited Danhoff to file a motion for reconsideration for Dr. Koebbe's opinion.

Danhoff did just that on 11/13/19. But despite all of the suggestions from the court, both on oral argument, the opinion, the outline of ideas set forth in MCL 600.2955 and all of the case precedent, Danhoff could not find any support for Dr. Koebbe's *ipse dixit* theory and this was why Dr. Koebbe was dismissed. **Danhoff continues to tell this Court that the reason Dr. Koebbe was stricken solely because he had no supportive literature in support of his opinions.** Rather, *Edry, Elher* and earlier case law all state that peer review publications on an issue may not be available and is not the *sole* guiding criterion that can be used to substantiate the basis for an expert's opinion. For example, just reading MCL 600.2955 provides additional non-limiting guidelines for supporting an expert including, apart from any literature reference, providing:

> 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 experts who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market

RECEIVED by MSC 11/1/2023 2:17:39 PM

> Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the same type of opinion being proffered
>
> Whether the opinion or methodology is relied upon by experts outside of the context of litigation.
>
> An expert can present a novel methodology for scientific evidence only if it achieves general scientific acceptance among impartial experts in the field.
>
> MCL 600.2955 (emphasis added).

During the Motion for Reconsideration, none of this information was/could have been provided. Instead Danhoff submitted another affidavit by Dr. Koebbe, along with an unpublished article and three abstract opinions.

Even Dr. Koebbe's affidavit was inconclusive. When talking about unacceptable complications occurring in this case, Dr. Koebbe was still could not report his opinion that bowel perforation during XLIF was always negligence, but instead stated bowel perforations "almost always" occur as a result of medical negligence. (Appendix 301b-302b, Dr. Koebbe Affidavit dated December 1, 2019) He offered no explanation for how he determined Ms. Danhoff's perforation was negligence, as opposed to, for example, diverticulitis.

The literature Dr. Koebbe attached entitled, "*Visceral, vascular, and wound complications following over 13,000 lateral interbody visions: a survey study and literature review from the European Spine Journal" (2015)* contained an interesting comment under "Methods," going toward Dr. Koebbe's credibility to even testify, indicating "a study was conducted by experienced (more than 100 case experience) MIS-LIF surgeons active in the society of lateral axis surgery (Esco LAS) to collect data on wound infections and visceral and vascular injuries." (Appendix 304b-324b, Total Dr. Koebbe Literature Presented) Dr. Koebbe, at the time of his testimony had conducted only 30 to 40 XLIF surgeries-none at the time of the Danhoff surgery – and would not

RECEIVED by MSC 11/1/2023 2:17:39 PM

have been considered an expert under this study. (Appendix 75b, dep of Dr. Koebbe p 82). In contrast Dr. Fahim had done hundreds of XLIF surgery (Appendix 247b, dep of Dr. Fahim pp 15-16) and was/is recognized as a national teaching expert. (Appendix 247b, dep of Dr. Fahim pp 14-15; and Appendix 61b, dep of Dr. Koebbe p 25).

What was not included were any supporting affidavits from any of the tens of thousands of board-certified neurosurgeons in this country who might agree with Dr. Koebbe's *ipse dixit* opinions. The documents provided merely discussed the fact that bowel perforation is a rare surgical complication and added *nothing* to support the foundation of Dr. Koebbe's opinions.

The total number of articles Dr. Koebbe presented referred to approximately 16,000 XLIF cases around the world that show rare, but consistent bowel damage occurs. **(**Appendix 304b-324b, Total Dr. Koebbe Literature Presented) There was no comment on whether such complication occurred in accordance with the standard of care or in violation of the standard of care. There were multiple neurosurgical authors involved with these articles regarding complications, plus a lengthy bibliography of physicians familiar with the XLIF procedure and complications. Any number of these physicians could have been contacted by email or otherwise in an effort to obtain support for his opinion. Perhaps he did this? And likely no one shared his opinion.

By contrast on behalf of Dr. Fahim, affidavits were obtained from two board certified neurosurgeons from within the relevant expert community to analyze and comment on the methodology and technique of the surgery done and whether the opinion of Dr. Koebbe was reliable, whether these experts would rely on the same basis as Dr. Koebbe to reach the same opinion he proffered, with both adamantly disagreeing with all aspects of Dr. Koebbe's testimony. (Appendix 164b-167b, Steven Rapp, MD Affidavit and Appendix 160b-163b, Frank LaMarca, MD Affidavit).

RECEIVED by MSC 11/1/2023 2:17:39 PM

Dr. Koebbe had this same opportunity to find support for his opinion from experts within the relevant community to find support for his opinion. Obviously, he could not.

The trial court's order noted the parallels found in *Edry* to Dr. Koebbe's testimony. Judge Grant found that even after the second hearing opportunity, Danhoff failed to demonstrate the reliability of Dr. Koebbe's opinion that the occurrence of the complication was a result of the breach of the standard of care, as required by MRE 702, MCL 600.2955 and case law. The court found no palpable error in its first Opinion.

Dr. Koebbe's affidavit says the injury was an unacceptable complication. But even Dr. Koebbe admitted that he warns his own patients of this rare complication before surgery. The trial court remained unconvinced in its gatekeeper role that Dr. Koebbe had a qualified and reliable opinion. The appellate court upheld summary disposition.

In a thorough opinion the trial court used the application of information found in *Edry, Elher,* MRE 702 and MCL 600.2955 to support it's reasoning as to why Danhoff failed to demonstrate the reliability of her expert.

a. The Michigan Court of Appeals Affirmed the Trial Court's Exercise of Discretion.

Danhoff filed her application for leave to the Michigan Court of Appeals which affirmed the trial court's ruling in a 2-1 opinion. To paraphrase the majority opinion, the Court of Appeals found Dr. Koebbe was not a reliable expert and adopted the reasons as set forth in the trial court's reasoning. The court considered the non-exhaustive *Daubert* and MCL 600.2955 list when deliberating whether the lower court abused its discretion in finding that Dr. Koebbe's testimony failed to establish reliability. The Court of Appeals noted the Supreme Court's long existing standard that holds, "a lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." Experience and background alone to

RECEIVED by MSC 11/1/2023 2:17:39 PM

argue that an expert's opinions are reliable does not suffice. (Appendix 49b, Court of Appeals Order Affirming, p 5 and *Elher*, 499 Mich at 23).

b. After a Mini Oral Argument on Appeal, This Court Granted Leave.

Now, before this Court, Danhoff continues to claim that her case was dismissed because she failed to provide literature which is simply untrue. Literature is but one of many factors as to what she could have done to qualify her expert before the court. Dr. Fahim has never advanced the argument that Dr. Koebbe was unqualified because of his lack of literature or peer review articles. Simply put, Dr. Koebbe's opinion is unqualified because his opinions are entirely *ipse dixit* and do not pass muster under decades-old Michigan and national law. Dr. Koebbe produced no support for his opinion. Dr. Koebbe did not go to the neurosurgery community as Dr. Fahim did to procure supportive affidavits from other neurosurgeons that would support his preposterous opinions.

Dr. Koebbe's conclusion that the hole later found in the sigmoid colon was caused by negligent instrumentation could not be supported by any neurosurgeon familiar with this procedure for these reasons:

Steven Rapp MD is a neurosurgeon within the relevant expert community and an impartial disinterested expert who provided an affidavit saying that Dr. Koebbe's unsupported theories that Dr. Fahim was negligent solely upon the fact Danhoff suffered a known complication, the bowel injury, is completely speculative, scientifically unreliable, and not an opinion shared or generally accepted within the neurosurgery community. These injuries can and do happen absent negligence, despite the best monitoring and surgical techniques. (Appendix 164b-167b, Steven Rapp, MD Affidavit).

Frank LaMarca MD is another neurosurgeon who supported Dr. Fahim with a signed affidavit on his behalf averring there were no standard of care breaches. He also noted that bowel

RECEIVED by MSC 11/1/2023 2:17:39 PM

perforations are rare and known complications of a lateral lumbar interbody fusion, but that an opening may be unavoidable, and it is not a departure from the standard of care to not immediately detect a possible puncture upon completion of the procedure given reduced visibility in the area. (Appendix 160b-163b, Frank LaMarca, MD Affidavit).

> The XLIF procedure has been accepted worldwide because it presents a lower complication rate than the anterior approach which requires a separate general surgeon to go through the abdomen pushing away intruding blood vessels, nerves and organs before a neurosurgeon can begin to work on the damaged disc; similarly, the complication rate going through the posterior back to get to the spine also has a higher complication rate than the XLIF procedure;
>
> Dr. Fahim is a highly experienced neurosurgeon working with the XLIF procedure, teaches XLIF throughout the country and internationally, and at all times methodically followed the appropriate procedure as described in his operative report;
>
> Dr. Koebbe does not know when some sort of opening in the sigmoid colon occurred, how the opening occurred, whether this was a microscopic opening that later increased in size, what the size of the opening was, when or why the opening event occurred – only concluding that it had to be due to negligence. Theoretically, even a dilator or retractor being properly used could have been related to a small opening in the peritoneum that would have occurred with all actions being within the standard of practice and yet being impossible to notice;
>
> No one could say exactly when or how the opening in the bowel occurred, except Dr. Fahim who testified that, "I would think it would be very hard to have an instrument go through the peritoneum and through the sigmoid colon and not be able to see that on surgery. That would be very unlikely." (Appendix 257b, dep of Dr. Fahim p 54).

Danhoff reported significant improvement in her back and leg pain after the surgeries, never had an infection at the surgical site and did not require any further care on her spine after Dr. Fahim operated. (Appendix 259b, dep of Dr. Fahim p 65).

RECEIVED by MSC 11/1/2023 2:17:39 PM

ARGUMENT

I. In Answer to the Supreme Court's Question (1) Whether This Court's decision in Edry v Adelman, 486 Mich 634 (2010) and Elher v Misra, 499 Mich 11 (2016), Correctly Describe the Role of Supporting the Literature in Determining the Admissibility of Expert Witness Testimony on the Standard of Care in a Medical Malpractice Case.

In short, the answer is yes as discussed looking at each case individually, and in conjunction with national precedent which will be commented on subsequently.

It is important to briefly discuss the backgrounds of each case to show why this is correct.

a. *Edry v Adelman*, 486 Mich 634 (2010).

In *Edry,* the Michigan Supreme Court agreed with both the Michigan Court of Appeals and the trial court in excluding the patient's expert testimony of Dr. Barry Singer under MRE 702. Briefly, in June 2003 Edry brought a 3 mm lump under her arm to the attention of her OB/GYN Adelman, followed by a diagnosis of invasive breast cancer in 2005 spreading to 16 lymph nodes.

Edry alleged through Dr. Singer that her long-term survival was substantially diminished by the delay in diagnosis and treatment subjected her to more invasive medical treatment. Dr. Singer testified that he believed that the more lymph nodes involved, the poorer the chance of survival. As with Dr. Koebbe here, Dr. Singer referred to textbooks and journal articles that supported his theory, but never produced those authorities to support his testimony. He also acknowledged the American Joint Cancer Commission (AJCC) manual was authoritative on the subject, but agreed it disagreed with his opinion.

The defendants' oncology expert, Dr. Joel Appel, testified that, based on the AJCC manual, it was medically improper to consider the number of lymph nodes involved as a predictor of a patient's chance of survival. He 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.

RECEIVED by MSC 11/1/2023 2:17:39 PM

After a hearing on the issue, the trial court entered an order that barred Dr. Singer from testifying at trial. The Supreme Court made several notable statements, including the incorporation of the standards of reliability that the United States Supreme Court described to interpret the equivalent Federal Rules of Evidence in *Daubert v Merrell Dow Pharm* and *Gilbert v Daimler Chrysler Corporation.*

Edry, also following the longstanding Daubert decision, endorsed several points where this court now seeks comments:

- W]hile not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony…" *Edry*, 486 Mich at 640.
- "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 (as in Danhoff) unreliable and inadmissible under MRE 702." (Cites to *Craig* and *Daubert* omitted. *Id*. at 641.
- "Under 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, therefore, admissible." *Id*. at 642.
- "[T]he whole point of *Daubert* is that experts can't 'speculate.' They need analytically sound bases for their opinions," and "[i]t is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Id*. at 642 n 6.

RECEIVED by MSC 11/1/2023 2:17:39 PM

- The court provided a second hearing to produce any support of Dr. Singer's conclusion and when nothing was forthcoming, dismissed the *Edry* case, (as was the same procedure in Danhoff). *Id*. at 642.
- "Moreover, plaintiff never provided an affidavit explaining how Dr. Singer used the information from the websites to formulate his opinion or whether Dr. Singer ever even reviewed the articles." *Id*. at 641 (as with Dr. Koebbe here).
- "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." *Id*. (as with Dr. Koebbe here).

b. *Elher v Misra*, 499 Mich 11 (2016).

The facts in *Elher* parallel those in *Edry* and the list of notable precedent this Court has inquired about (summarized later) that occurred encompassing similar facts and mirrored here.

Elher underwent a laparoscopic cholecystectomy and defendant Misra inadvertently clipped the common bile duct due to lack of depth perception from the laparoscope resulting in Elher having to undergo emergency surgery to remove the clip and repair the duct.

The starting point for the relevant analysis in *Elher v Edry* is that the proponent of the evidence has the burden of establishing its relevance and admissibility under MRE 702, MCL 600.2955 and MCL 600.2169. See *Elher*, 499 Mich at 22.

Paralleling the facts in *Edry* (and those at issue here), Elher had only one standard of care expert. This was Dr. Paul Priebe, a board-certified general surgeon and professor at Case Western University who testified as his key opinion that:

- "[I]t is virtually always malpractice to injure [during the surgery] the common bile

RECEIVED by MSC 11/1/2023 2:17:39 PM

duct during a laparoscopic cholecystectomy, absent extensive inflammation or scarring." *Id*. at 15.

- Dr. Priebe "did not provide any supporting authority for his opinion." *Id*.
- Dr. Priebe provided no supporting medical literature and claimed medical literature did not discuss the standard of care. *Id*. at 25.
- The Court confirmed that "a lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Id*. at 23.
- Dr. Priebe was asked whether the host of colleagues of his, national and local would disagree with his opinion about being a breach of the standard of care and only responded that they were entitled to their opinion. *Id*. at 16.
- Dr. Priebe was asked to cite one current general surgery colleague at Case Western University who agreed with his position and stated he had no idea what their opinions were. *Id*.
- The defendants replied by filing affidavits of several experts and a least one peer-reviewed publication supporting their opinions that clipping the common bile duct is a known potential complication of a laparoscopic cholecystectomy because of the lack of depth perception on the two-dimensional video monitor. *Id*. at 17.

The Supreme Court affirmed the trial courts opinion that Dr. Priebe's opinion was not reliable even though he was qualified to testify as an expert given his extensive experience.

As in *Edry*, the *Elher* court also found that it is within a trial court's discretion to decide how to determine reliability in a given case, and all the enumerated factors for determining reliability listed in MCL 600.2955 may not be relevant in every case. *Id*. at 25–27.

RECEIVED by MSC 11/1/2023 2:17:39 PM

The trial court did not abuse its discretion by relying on two of the statutory factors: (i) whether the opinion and its basis have been subjected to peer review publication (it had as presented by the defendants in the case from at least one peer-reviewed publication supporting opinions that clipping the common bile duct is a known as a potential complication of laparoscopic cholecystectomy because of the lack of depth perception on the two-dimensional video monitor and also defendants filing affidavits from several experts supporting this position; and (ii) Dr. Priebe produced no supporting opinions from other experts in the field;

- Dr. Priebe produced no other evidence establishing the reliability of his opinion;
- Dr. Priebe did not follow any of the suggestions set forth in MRE 702, any of the non-inclusive suggestions in MCL 600.2955 or any of the suggestions are examples set forth in the earlier cases of *Daubert*, *Kumho*, *Joiner*, or *Edry*.
- Dr. Priebe ignored the repeated statements from this Supreme Court, the United States Supreme Court and other precedential setting courts that require that a witness not only be qualified as an expert but have additional verification to show that the opinion being rendered is reliable and not merely "it is because I say so" (*ipse dixit).*
- In response, defendants filed additional affidavits from experts and peer-reviewed publications contradicting Dr. Priebe's opinion. More specifically stated:
    - Before surgery Dr. Misra discussed the risks and benefits of the surgery and Elher signed a consent form (as in Danhoff) that specifically mentioned a risk of injury to the common bile duct.

RECEIVED by MSC 11/1/2023 2:17:39 PM

- There was no evidence regarding the degree to which his opinion was generally accepted within the relevant article community.

This Court ultimately found there was no abuse of discretion because Dr. Priebe's opinion was not reliable. *Elher v. Misra*, 499 Mich 11, 25-26. There was nothing that showed the degree to which his opinion was generally accepted, admitted he knew of no one who shared his opinion, his opinion was not based on reliable principles or methods, there was no peer-reviewed literature supporting his opinion, his opinion was contradicted by other experts and published literature admitted into evidence and there was nothing showing his opinions basis in fact and reliable principles or methods provided

The Court also pointed to MCL 600.2955(1) requiring the court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied upon the expert and by considering the seven additional factors expressly set forth in MCL 600.2955.

The Court referenced that *Daubert* factors (the MCL 600.2955 factors) can be helpful even if all the factors may not necessarily apply in determining the reliability of scientific testimony. It is within a trial court's discretion how to determine reliability. See *Elher*, 499 Mich at 25.

The *Elher* court pointed to *Edry's* reflection on Dr. Priebe's opinion*:*

> 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 a 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.

Id. at 28.

RECEIVED by MSC 11/1/2023 2:17:39 PM

In conclusion, this Court found that the trial court did not abuse its discretion by excluding plaintiffs expert medical testimony under MRE 702 as plaintiff merely pointed to Priebe's experience and background to argue that his opinion was reliable and, therefore, admissible, but plaintiffs expert was required to present more than his own personal beliefs, opinions, credentials and the number of procedures he had performed. There was no evidence that his opinion was generally accepted within the relevant expert community, there was no peer-reviewed medical literature supporting his opinion, plaintiff did not provide any other support for Priebe's opinion and defendants submitted contradictory information. *Elher*, 499 Mich at 14-18.

II In Answer to the Supreme Court's Question (2) if not, what a Plaintiff Must Demonstrate to Support an Expert's Standard of care Opinion'' and Question (3) how an expert should Meet the Standards of Reliability Under MRE 702 and MCL 600.2955 and Precedents of *Daubert v Merrell Dow Pharm, Inc, 509 US 579* (1993); *General Electric Co v Joiner,* 522 US 136 (1997); *Kumho Tire Corp Ltd v Carmichael,* 526 US 137 (1999); *Elher; Edry* and Whether a *Daubert Hearing* was Necessary Before Making That Decision.

a. The standards for admissibility of expert testimony, under both MRE 702 and MCL 600.2955, are properly described in the precedents of *Daubert, Kumho Tire, Elher, and Edry,* require a reliable foundation for every expert opinion.

Through the years, this Court has followed thoughtful national precedent to ensure an expert witness may only provide opinion testimony if there is a reliable basis, whether supported by scientific literature or adopted by other experts in the same field. The case chronology below outlines some of the key influential decisions leading to the reliable rationale behind MRE 702, MRE 703, the legislative enactments of MCL 600.2955, MCL 600.2169 and the case determinations of *Edry* and *Elher.*

For most of the 20th century, the admissibility of expert and scientific testimony in courts throughout the country was governed by the standard announced in *Frye v United States,* 293 F 1013 (DC Cir, 1923). The *Frye* court established what came to be known as the "general

RECEIVED by MSC 11/1/2023 2:17:39 PM

acceptance" test, under which a novel scientific technique was admissible in evidence only if the methodology upon which the opinion was based was "sufficiently established to have gained general acceptance in the particular field in which it belongs." It did not make the trial judge a gatekeeper for all expert opinion testimony.

In 1993 the U.S. Supreme Court held that the adoption of Federal Rule of Evidence 702 abrogated the Frye rule (although it included its intent).

Of importance, next came the still oft-cited case of *Daubert*. A detailed discussion considered whether expert opinions were admissible to show that defendant's drug Benedictine caused birth defects. It was a benchmark tutorial of how to present reliable testimony without scientific literature to support the expert's opinion. Daubert's expert had no supportive literature; no analysis had been published or subjected to peer review while Merrell Dow presented 30 published studies involving over 130,000 patients denying Daubert's theory; Daubert had no supporting studies. But Daubert presented testimony of eight experts with their own impressive credentials supporting, based on test tube evidence and live animal studies, that there was a link between the chemicals within Benedictine and birth defect malformations.

When considering among various aspects of reliability, the *Daubert* court noted "another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility…. In some instances well-grounded, but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. *Daubert* at 593

> "The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology in which an opinion is premised." *Daubert*, 593 – 594.

RECEIVED by MSC 11/1/2023 2:17:39 PM

The *Daubert* court noted that the Frye rule did not survive the enactment of the Federal Rules of Evidence 702 and 703. The court further stated:

> "it stresses that the subject of the expert's testimony must be scientific…. knowledge, and points out that scientific implies a grounding in the methods and procedures of science "knowledge" connotes more than the subject belief or unsupported speculation." Further "proposed testimony, must be supported by 'appropriate validation.'

The court concluded by pointing to the gatekeeping responsibility of the trial court in deciding the questions of the admissibility of expert testimony. The *Daubert* court stated

> "the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimonies underlying reasoning or methodology is successfully valid and properly can be applied to the facts in issue.

On March 28, 1996, from the issues raised by the *Daubert* progeny, the Michigan legislature enacted MCL 600.2955, stating the list was a flexible one and its focus must be solely on principles and methodology, not conclusions that they generate setting forth: Under MCL 600.2955:

> … 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 it 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

RECEIVED by MSC 11/1/2023 2:17:39 PM

> 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 it is 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.

Then *General Electric Co v Joiner*, 522 US 136 (1997) came down. After an electrician's job with a city required him to work with electrical transformers and often had to stick his hands and arms into fluid contaminated with polychlorinated biphenyls (PCBs) that were considered hazardous to human health (and banned for production and sale in 1978), he was diagnosed with small cell lung cancer and brought a products liability action, claiming exposure to polychlorinated biphenyls (PCBs), furans, and dioxins produced by the company caused his cancer.

Joiner had been a smoker for eight years, his parents were both smokers and there was a history of lung cancer in his family. Joiner's experts testified that PCBs alone can promote cancer

RECEIVED by MSC 11/1/2023 2:17:39 PM

and that furans and dioxins can also promote cancer and opined that because of this exposure, such exposure was likely responsible for Joiner's cancer.

Joiner presented four epidemiological studies in mice in support, but the District Court gatekeeper (as here) agreed that the studies did not support the contention that exposure to PCBs contributed to the cancer, noting in the studies that the infant mice tested with PCBs had highly concentrated, massive doses of PCBs injected directly into their stomach's, Joiner's exposure and concentration was much smaller and the cancer the mice developed was alveologenic adenomas while Joiner developed small-cell carcinomas. No study demonstrated that adult mice developed cancer after being exposed to PCBs and no study demonstrated the PCBs lead to cancer in any other species. The District Court concluded that the four epidemiological studies were not a sufficient basis for the experts opinions as the studies were so dissimilar to the facts presented in litigation, that the District Court trial judge, as gatekeeper, believed the test were so dissimilar that testimony of Joiner's experts did not rise above subjective belief or unsupported speculation. But the Court of Appeals held that the District Court erred in excluding the testimony of Joiner's expert witnesses and reversed contending error for "a particularly stringent standard of review" in light of the Daubert doctrine. GE appealed to the US Supreme Court for review of the expert testimony ruling only.

Justice William Rehnquist in the U.S. Supreme Court framed the question as to what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under Daubert.

In reversing the ruling on that issue, the U.S. Supreme Court held that the proper standard of review was abuse of discretion and it was within the district court's discretion to exclude

RECEIVED by MSC 11/1/2023 2:17:39 PM

unreliable expert testimony. The decision noted that the trial court, in its gatekeeper role, reviewed the four studies one by one and found they were not relevant.

A trial judge, acting as "gatekeeper," must "ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable and it was within the District Court's discretion to conclude that the four studies upon which the Joiner experts relied were not sufficient to support their conclusions that Joiner's exposure to PCBs contributed to his cancer.

There is nothing in either Daubert or the Federal Rules of Evidence requiring a District Court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

Kumho Tire Co. v Carmichael, 526 US 137 (1999) came to the Supreme Court on the tire makers appeal from the Court of Appeals which reversed the district court's decision to exclude the testimony of Carmichael's tire expert because the expert relied on experience-based observations instead of the application of scientific principles.

The facts of the case show that in 1993 the rear tire of a minivan driven by Patrick Carmichael blew out with one passenger dying and others being severely injured. Plaintiffs rested their case in significant part upon disposition testimony provided by their expert in tire failure analysis, Dennis Carlson. There was much technical information provided regarding tire-making with which everyone agreed. But the background facts showed the tire was made in 1988 and was installed before Carmichael bought the used minivan in March 1993, and thereafter drove the van approximately 7000 additional miles in the 2 months he had owned it. Carlson noted that the tires tread depth was 11/32 inches when new, but had been worn down to depths that ranged from 3/32 to some parts of the tire where there was no tread at all. Additionally, the tire tread had at least 2

RECEIVED by MSC 11/1/2023 2:17:39 PM

punctures which had been inadequately repaired. *Kumho Tire Co. v Carmichael*, 526 US 137, 143, 144-145.

Expert Carlson concluded that a manufacturing defect caused the tire tread to separate from its steel-belted carcass prior to the accident causing the blowout, but was forced to concede that some of the basis for his conclusion such as under inflation of the tire, physical signs of deterioration, marks on the tires rim holes caused him to concede that there were inconsistencies in his testimony, but claimed they were not significant. Kumho Tire challenged Carlson's testimony on the grounds that his methodology failed Rule 702's reliability requirement in several different ways.

The Supreme Court noted that "Daubert makes it clear that the factors it mentions do not constitute a "definite checklist or test" and that the gatekeeping inquiry must be tied to the facts of a particular case."

The district court did not doubt Carlson's qualifications which included a Master's degree in mechanical engineering, 10 years working at Michelin America and testimony as a tire failure consultant in other tort cases. However, it excluded the testimony of Carlson despite those qualifications because it found unreliable the methodology employed by the expert in analyzing the data obtained in his visual inspection and the scientific basis, if any, in the several hours he looked at the tire before his deposition.

The issue was whether this expert could reliably determine the cause of this tire separation. One of the comments included "we have found no indication in the record that other experts in the industry use Carlson's 2-factor test or that tire experts such as Carlson normally make the very fine distinctions about, say the symmetry of comparatively greater shoulder tread wear that were necessary, on Carlson's own theory, to support his conclusions.

RECEIVED by MSC 11/1/2023 2:17:39 PM

Several Justices joined, noting that they endorsed the trial court's discretion in choosing the manner of testing expert reliability and

> "it is not a discretion to abandon the gatekeeping function inadequately. Rather it is discretion to choose among reasonable means of excluding expertise that is fausse and science that is junky."

Then MRE 702 was amended effective January 1, 2004, to conform to the FRE 702 and its emphasis that trial judges act as "gatekeepers" who must exclude unreliable expert testimony.

In *Gilbert v DaimlerChrysler Corp*., 470 Mich 749 (2004), the Supreme Court clarified the standards governing expert testimony under Rule 702. The Court explained that MRE 702 does not alter the Frye test's requirement that a court ensure that expert testimony is reliable. Rather, MRE 702 "changes only the factors that a court may consider in determining whether expert opinion evidence is admissible." The Court also explained that the Daubert standard "simply allows courts to consider more than just 'general acceptance' in determining whether expert testimony must be excluded." The Supreme Court also admonished the trial courts to vigorously enforce this gate keeping requirement. The Court noted that 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." The Court further explained that MRE 702 requires that expert testimony be based on specialized knowledge.

"[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." *Daubert*, at 590. Rather, the trial court is tasked with filtering out unreliable expert evidence. "The inquiry is into whether the opinion is rationally derived from a sound foundation." *Chapin*, 274 Mich App at 139. "The standard focuses on the scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony." *People v Unger*, 278 Mich App; 749

RECEIVED by MSC 11/1/2023 2:17:39 PM

NW2d 272 (2008) at 217-218. An expert's testimony meets the *Daubert* standard when the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho,* supra.

Then followed *Edry* in 2010 and *Elher* in 2016 which closely matched the guiding case precedents and only reliable opinion testimony as further outlined in MRE 702 and MCL 600.2955. *Elher, Edry* and now Danhoff carefully excluded *ipse dixit* testimony (as did their precedents) as unreliable because there was no reliable expert support for from any source in the relevant expert community.

III. The Options a Plaintiff Could Use To Demonstrate Reliability Of Opinion Testimony Apart From Supporting Literature While Acknowledging the Court's Decisions in *Edry v Adelman, supra* and *Elher v Misra, supra* Correctly Describe the Role of Supporting Literature in Determining the Admissibility of Expert Standard of Care Expert Testimony.

- Thoroughly investigating the expert through vetting before making a decision to go forward on the key issues; not assuming a board certification equals a reliable opinion;
- Utilizing the six-month NOI period for analysis and vetting;
- Detailing the initial Affidavit of Merit from the experts point of view and only editing by the attorney to make sure MRE 702 is covered;
- Utilize a literature search and its bibliography to contact potential experts involved in the field nationwide and communicate to determine if their opinions support the issue or opinion of the expert chosen;
- Has the opinion and its basis have been subjected to scientific testing and replication;
- Has the theory been tested and is there a known potential rate of error;

RECEIVED by MSC 11/1/2023 2:17:39 PM

- Are there existing standards that serve as a basis for reliable opinion;
- Submit the expert opinion to each suggestion found in MCL 600.2955;
- Is the basis of the opinion reliable and whether experts in the same field who are impartial and disinterested would reach the same type of opinion being proffered under the circumstances
- Has the expert developed their opinions expressly for the purpose of testifying;
- Does the opinion disagree with the underlying medical records or published professional standards?
- Determine the CLE training sessions, certification sessions and contact the trainers to determine whether there is support for the opinion sought to offer.
- Can the expert appropriately account for appropriate alternative explanations;
- Somehow (Danhoff example) obtain an opinion to show how a surgical instrument being continuously monitored by fluoroscope and staying in the retroperitoneal work tunnel for removal and replacement of the L3 disc could have unknowingly moved approximately 5 inches out of the retroperitoneum, gone into the diseased diverticular sigmoid colon, perforated it, became infected with fecal matter, then returned approximately 5 inches to surgically repair the L3 disc without ever causing an infection of the surgical area.
- Is this an opinion the expert would publish or present to a national audience of experts outside of his paid litigation consulting?
- Find even one expert among all of the similar board certified experts registered within this country, gainfully employed and doing this procedure in the free market to agree with the opinion.

RECEIVED by MSC 11/1/2023 2:17:39 PM

- Has a novel theory achieved general scientific acceptance among impartial and disinterested experts in the field.
- There must be supporting affidavits for the expert's methodology and opinions to agree with the experts personal *ipse dixit* testimony.
- Presenting any lectures he or others have given on the topic of XLIF procedures and bowel perforation injuries.
- Advising of any seminars where he heard other neurosurgeons or specialists opine on these issues in support of his theories and contact them.
- Understand unsupported *ipse dixit* opinions are on reliable.

IV. Case Law Cited by Plaintiffs-Appellants is Not Current and Not Relevant to this Court's Analysis.

On pages 12-16 of plaintiff-appellant's brief they cite 10 cases in support of why they believe *Edry* and *Elher* do not correctly describe the role of supporting literature regarding expert testimony in medical malpractice, but the cases span from 1915 – 1994 and do not describe existing law from the current century which is germane to this analysis.

The 1961 case *Lince v Monson,* 363 Mich 135 is cited in which referenced earlier cases from 1915 (*Zotterell v Repp,* 187 Mich 319), 1928 (*Delahut v Finton,* 241 226), and 1912 (*Luka v Lowrie,* 171 Mich 122) and why those cases did not support the notion of expert testimony requirement for a medical malpractice case. The Michigan Supreme Court in Lince ruled that "common knowledge and the experience of ordinary laymen do not equip them {the jury} to give the answer without the aid of expert testimony." The facts of this case involved an abdominal surgery where a stitch was placed in an area with reduced visibility, blocking Lince's ureter. This was not discovered until a second surgery where it was determined that the injury occurred during the first surgery. Expert testimony showed the defendant physicians used the usual and ordinary

RECEIVED by MSC 11/1/2023 2:17:39 PM

practice and that evidence of the suture in the ureter was not evidence of improper practice or unusual. There was no medical testimony at trial that defendants treatment was not in accord with the standard of practice of skilled doctors in the community. *Lince* argued that laymen, not experts, could determine that a suture in the ureter was common knowledge of negligence and, thus, expert testimony was not needed.

The 1961 *Lince* decision stood for the concept that expert testimony was needed for those learned in such matters and that ordinary rules for determining negligence could not prevail. Specifically, the court said:

> Careless professional practice must not be made immune from redress at law. This is imperative for the protection of the public. That same consideration, however, dictates that no legal barriers be erected against a doctor's proceeding, in emergency or otherwise, as his judgment directs and skills permit, for saving the life or health of the patient, without fear that his professional judgment and action shall be subjected to the test of unlearned lay judgment without the guidance of professional testimony as to compliance with professional standards and practice in the community.

Lince, Id. was a novel decision 63 years ago, but the law has evolved since that time which sets additional guidelines to support a medical malpractice action when it comes to experts. *Lince, Id.* does not support plaintiff-appellant's argument which requires the additional inquiry of showing *why* the expert's opinion is reliable. *Daubert, Edry* and *Elher* fulfilled the criteria for the gatekeeper to determine the credibility and reliability of experts. There is no additional analysis needed and no new tests the courts need to establish. Simply, experts must be properly vetted prior to the commencement of a medical malpractice case to ensure their opinions pass muster. Plaintiffs' counsel is responsible for selecting and retaining and appropriate expert to file an Affidavit of Merit supporting why the standard of care was breached and basing those opinions off of more than his own say so. Similarly, the defense is required to properly vet his expert to

RECEIVED by MSC 11/1/2023 2:17:39 PM

counter the opposition and the same criterion applies to defense experts to show their reliability and credibility.

Danhoff seems to be taking the same position as the plaintiff in the *Lince* court. In *Lince,* plaintiff argued that her suture in her ureter was such that a common layman could determine negligence had occurred, therefore, no expert testimony was needed. Here, Danhoff seems to take the same approach and say that evidence of her bowel perforation during the lumbar fusion was also negligence that an ordinary layman could determine without medical testimony. Clearly, the testimony of Dr. Koebbe is unsupported and *ipse dixit*. Dr. Koebbe would render nothing to a jury in support of his theories because there is no support for his opinions. Danhoff would merely be asking the jury, laymen, to decide if there was a breach of the standard of care because she was injured during a surgery even though her expert cannot support how this was a breach.

Danhoff referenced the 1915 *Zotterell, supra* case, appropriately advising that it did not speak directly as to expert requirements in medical malpractice. A review of that case yields an interesting and common sense rationale worth noting, specifically:

> The difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and all the law demands is that he bring and apply to the case in hand that degree of skill, care, knowledge, and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances and the bare fact that full recovery does not result, or that a surgical operation is not entirely successful, is not in itself evidence of negligence.

In the instant case, adopting the *Zotterell* rationale, simply because Danhoff sustained an injury during surgery is not evidence in and of itself, medical malpractice. Indeed, she testified that if she had to do it all over again she would undergo the surgery because it did, in fact, improve her back pain, albeit she suffered a perforated bowel. Dr. Koebbe only testified that a bowel injury was rare during an XLIF surgery and would only happen if there was negligence but he could not

RECEIVED by MSC 11/1/2023 2:17:39 PM

point to any specific facts as to when or how Dr. Fahim committed malpractice. Dr. Koebbe also admitted he could not opine as to whether this was a perforation caused by Dr. Fahim's instruments or some other underlying inflammatory bowel issue such as diverticulitis. He also admitted the pathology report does not indicate anywhere that there were defects that would support his opinion and admitted the bowel perforations were much larger than any instrument being used during this surgery.

Danhoff cites the *Wilson v Stillwill*, 411 Mich 587 (1981) to opine that it is a battle of the experts in a medical malpractice case where an orthopedic doctor operated on Wilson's arm, an infection developed, and Wilson's arm was left paralyzed. This case cites a helpful snippet of law for Dr. Fahim that said:

> "The mere occurrence of a post-operative infection is not a situation which gives rise to an inference of negligence when no more has been shown than the facts that an infection has occurred and that an infection is rare."

This is on point with Danhoff's bowel perforation because Dr. Koebbe does not show anything more than the fact it happened during Danhoff's lumbar surgery and that it is a rare event, like the physicians in *Wilson*. There are also known complications with any surgery and Dr. Koebbe does not support his opinions other than by saying that a negligent event occurred which should not have occurred. The Wilson court did not address any expert witness criteria and is not supportive to Danhoff's case.

Danhoff cites *Jones v Porretta* (1987) in her history of expert case law in medical malpractice cases which accurately states when res ipsa loquitor applies. That case also rightly held that:

> In a normal professional negligence case, a bad result, of itself, is not evidence of negligence sufficient to raise an issue for the jury. This does not mean that a bad result cannot be presented by plaintiffs as part of their evidence of negligence, but, rather, that, standing alone, it is not adequate to create an issue for the jury.

RECEIVED by MSC 11/1/2023 2:17:39 PM

> **Something more is required** ***(Emphasis added),*** be it the common knowledge that the injury does not ordinarily occur without negligence or expert testimony to that effect.

Jones is a 1987 case that required, even then, that an expert must have "something more" than a say so, hunch, or guess that malpractice occurred. Dr. Koebbe possesses no such requirement in his belief that Dr. Fahim breached the standard of care.

In summation, the additional cases cited by Plaintiff-Appellants do not support their argument why the court should disrupt well settled case law concerning medical malpractice expert reliability criterion. Danhoff simply did not vet her expert and even though she was given more than one bite at the apple to rehabilitate her expert, he continued to fail to provide any scientific or MCL 600.2955 reliability for his opinions. Danhoff's failure to support her case should not eradicate existing Michigan law and change the basic and simple qualifications an expert must meet to testify before a jury. Moreover, there are significant public policy considerations if the courts are going to permit plaintiffs to file vague and unsupported medical malpractice cases which will most certainly cause physicians to leave this state. Physicians deserve protection from the courts as plaintiffs do and current case law should be maintained and applied which require litigants to support their allegations with the necessary expert reliability. If they choose not to do so, their case lacks merit and should rightfully be dismissed. The trial court dismissed this case. The appellate court affirmed. This court should follow stare decisis and also affirm the lower courts' decisions holding that Dr. Koebbe was unqualified to give expert testimony.

V. The Amendment of FRE 702 Effective December 1, 2023 Enabled this Court to Mirror the Change in MRE 702 on September 20, 2023 Effective January 1, 2024.

This change reemphasized the trial court's responsibility of stringently determining the factors of reliable expert testimony.

RECEIVED by MSC 11/1/2023 2:17:39 PM

After eight years of deliberation, the US Judicial Conference Advisory Committee on Evidence Rules unanimously approved amendments to Federal Rule Of Evidence 702, then approved by the Judicial Conferences Standing Committee and the US Supreme Court. The amendment will go into effect December 1, 2023. This was adopted by the Michigan Supreme Court September 20, 2023 and will be enacted January 1,2024.

The amendment clarifies the court's role in the gatekeeping process, rather than substantively altering it. A June 7, 2022 Committee Note explains that the amendments are necessary because, when applying a Daubert "many courts have held that the critical question of the sufficiency of an expert's basis, and the application of the experts methodology, are questions of weight and not admissibility" and thus questions for jury. "These rulings are," the committee declares, "an incorrect application of rule 702," which governs expert testimony in particular, "in 104 (a)," which covers the admissibility of testimony generally.

As amended, rule 702 (d) seeks to resolve any lingering confusion on the issue by clearly empowering the court to pass judgment on the reliability of the conclusions that an expert has drawn from his or her methodology. Courts that have failed to properly apply Rule 702 in the past, have often relied on a mistaken understanding of the role of the judge and the role of the jury and issues of expert admissibility. As the advisory committee explained, "when it comes to making preliminary determinations about admissibility, the judge is and always has been a factfinder."

Some courts are already carefully applying this language as seen in *Sardis v Overhead Door Corporation* 10 F4th 268 (2021) where the District Court erred in failing to strike a doctor's testimony under Daubert because he failed to satisfy FRE 702's gatekeeping requirement and risked exposing jurors to a dubious scientific testimony that could ultimately sway their verdict.

RECEIVED by MSC 11/1/2023 2:17:39 PM

FRE 702 is not being changed per se, rather, it clarifies that plaintiff has the burden of proof to qualify her expert as reliable. The amendment, nor any other court rules, statute or case law holds that literature is a requirement for an expert's opinions to be valid.

Danhoff continues to misstate this in her briefings. The simple facts of this case is that Danhoff's expert relied solely upon his education and experience, nothing more, to support standard of care opinions. But he did not take the additional step of supporting why this qualifies him as having a reliable opinion. Danhoff did not meet the reliability component to convince either the Trial Court or Michigan Court of Appeals that her expert passed muster under well-settled law.

Upcoming changes to Federal Rule of Evidence 702 (as highlighted):

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
>
> a) The expert' scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> b) The testimony is based on sufficient facts or data;
>
> c) The testimony is the product of reliable principles and methods; and
>
> d) The ~~expert has reliably applied~~ expert's opinion reflect a reliable application of the principles and methods to the facts of the case.

The "more likely than not" standard is "substantively identical to "preponderance of the evidence, according to the Advisory Committee. One of the reasons the Standing Committee approved the amendments is that the language is not viewed as a change in the Rule, but a necessary clarification of the existing standard. "This does not change the law at all," said United

RECEIVED by MSC 11/1/2023 2:17:39 PM

States District Judge Patrick Shiltz of Minnesota, who chairs the Advisory Committee on Evidence Rules and supported the amendment. "It simply makes it clearer."

MRE 702 is similar to the pending FRE 702 amended changes and says:

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

FRE 702 has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is *more likely than not* that the proffered testimony meets the admissibility requirements set forth in the rule. This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. See *Bourjaily v United States*, 483 US 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *Huddleston v United States*, 485 US 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the evidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702.

"[P]roponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to

RECEIVED by MSC 11/1/2023 2:17:39 PM

Rule 702, quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F3d 717, 744 (3d Cir. 1994). Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue.

Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

This amendment does not bar testimony that comports with substantive law requiring opinions to a particular degree of certainty. Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

Lastly, there is some comment that the bar's reference to the "Daubert standard" may be misleading and more properly the bar should reference Rule 702 as the standard for admissibility of expert evidence.

RECEIVED by MSC 11/1/2023 2:17:39 PM

RELIEF REQUESTED

Dr. Fahim asks this Court to affirm the lower court rulings upholding summary disposition. The applicable case law in Michigan already defines expert witness admissibility requirements. None of the court rules, statutes, case law, nor any court in this case have every indicated that it was a requirement for Danhoff's expert to rely upon literature to qualify an expert opinion. The case law and statutes provide an exhaustive open-ended list of what experts may rely upon when formulating reliable expert opinions and existing law should continue to be followed.

Respectfully Submitted,

SAURBIER LAW FIRM, P.C.

By: /s/Scott A. Saurbier
Scott A. Saurbier (P19914)
Stacey J McDaniel (P77672)
Attorneys for Defendants-Appellees
400 Maple Park Boulevard, Suite 402
St. Clair Shores, MI 48081
(586) 447-3727

Dated: November 1, 2023

STATEMENT OF COUNTABLE WORDS

As required by MCR 7.212 (B)(3) I certify that this document contains 15,121 words.

Respectfully Submitted,

SAURBIER LAW FIRM, P.C.

By: /s/Scott A. Saurbier
Scott A. Saurbier (P19914)
Stacey J McDaniel (P77672)
Attorneys for Defendants-Appellees
400 Maple Park Boulevard, Suite 402
St. Clair Shores, MI 48081
(586) 447-3727

Dated: November 1, 2023

RECEIVED by MSC 11/1/2023 2:17:39 PM

PROOF OF SERVICE

The undersigned certifies that on a copy of the foregoing documents were served upon the attorneys of record in the above cause by way of:

X E-FILING/E-SERVING

same to them at their respective email addresses via the Court's Electronic Filing System. I declare that the statements above are true to the best of my knowledge and belief.

/s/Scott A. Saurbier
Scott A. Saurbier