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STATE OF MICHIGAN

IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

And

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

Defendants.

Supreme Court Case No: 163120

Court of Appeals No: 352648

Oakland County Circuit
Case No: 18-166129-NH

*denotes dismissed from the case

PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The principal issues in this case all revolve around whether a trial court, acting as a gatekeeper, has the discretion to require specific literature supporting a plaintiff expert's standard-of-care opinion in a medical malpractice case. The trial court so ruled, and the Court of Appeals majority affirmed on that basis.

Defendants have now filed their brief on appeal. It argues that the above outcomes are not only mandated by the decisions in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), and *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016), but also as the appropriate test to apply in medical malpractice cases. Defendants include a lengthy section on all the things the plaintiff's attorney could have done, as opposed to taking the trial court at its word, and providing literature support when requested to do so. Defendants cite to the Federal experience as supporting this argument. Defendants also include a section surmising how the coming effective date of amendment of FRE and MRE 702 will buttress their argument that the trial court has the discretion to require direct literature support prior to allowing a plaintiff's expert to testify as to the medical malpractice standard of care.

None of these arguments make valid points, and many of them are irrelevant to the issue facing this Court. First, Defendants cite no support for the proposition that Michigan jurisprudence somehow requires an additional level of protection for

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Michigan health care providers above and beyond the elaborate statutory scheme already in place. (Section I). The federal cases allow a trial court to qualify a standard-of-care expert based solely on knowledge and experience, in the appropriate case. (Section II). The amendment of FRE 702 is not designed to alter or affect the trial court's discretion to fit the standards for qualification, including when to use literature as a determining factor, and when literature is not even required at all. (Section III).

This Court has, by granting leave and by setting forth the questions to be answered in its order, has positioned itself to correct the language in *Edry* and *Ehler* seeming to allow a trial court to demand specific literature support before qualifying a plaintiff's standard-of-care expert in a medical malpractice case. Plaintiff's previously submitted brief sets out why this result is unprecedented under previous Michigan law,. It set out the inconsistent rulings which will continue, as long as some lower courts apply the literature requirement rigorously, and others interpret it as merely one means to qualify an expert. It showed that Michigan law, were it to affirm the test applied by the trial court and Court of Appeals majority in this matter, would be out of step with Federal law and practice, as well as those of many states.

Instead, this Court should take the opportunity to clarify that a trial court does not have the discretion to impose a blanket literature requirement when serving

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its gatekeeper function in assessing the qualifications of a proffered plaintiff's standard-of-care expert. The trial court should be armed with the understanding that, in appropriate cases, it has the discretion to choose which of the factors set out in MCL 600.2955, including, again in the appropriate case, qualifying such expert on knowledge, skill and experience alone. As set out in more detail in Plaintiff's previously submitted Brief on Appeal, tis is the appropriate test in *Daubert* hearings on standard-of-care experts in medical malpractice cases. As applied to the instant case, Dr. Koebbe is qualified to present the opinion he did, based on his lengthy experience, but also based on his use of literature to show why the incident in question, which Defendant doctor agrees should never happen, cannot be an "unavoidable consequence of surgery".

I. DEFENDANTS'-APPELLEES' BRIEF ON APPEAL HIGHLIGHTS EXACTLY WHY *EDRY* AND *ELHER*, OR SOME TRIAL COURTS' APPLICATION OF *EDRY* AND *ELHER*, HAVE RESULTED IN AN INCORRECT STANDARD BEING APPLIED TO THE ADMISSIBLILY OF EXPERT TESTIMONY REGARDING THE STANDARD OF CARE IN MEDICAL NEGLICENCE CASES

In this Court's Order dated May 26, 2023, the parties were first asked to address the question of "(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[.]" **(**Order May 26,

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2023**,** Ex V, Appx p 195 **)** Despite their arguments to the contrary, Defendants' brief on appeal highlights why this Court's decisions in *Edry* and *Elher* either did not correctly describe the role of supporting literature, or have been misinterpreted by trial courts trying to apply their standards.

Defendants' brief references *In re Paoli R.R. Yard PCB Litig*, 35 F3d 717 (3d Cir. 1994), regarding the appropriate standard a trial court should apply when assessing whether a piece of testimony meets the evidentiary requirement of reliability. In *In re Paoli*, the 3rd Circuit noted that:

> When there is a serious question of reliability of evidence, it is appropriate for the court to exercise to some degree an evidentiary screening function…This does not mean that plaintiffs have to prove their case twice—they 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.

Id. at 743–44 (emphasis added) (original citations omitted). Here, the trial court's Order and Opinion denying Plaintiff's Motion for Reconsideration reveals that the standard being applied as result of *Edry* and *Elher*, or the current interpretation of *Edry* and *Elher*, in medical malpractice cases to assess the reliability of expert testimony is often no longer a preponderance of the evidence. In this case, the trial court noted:

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> The Court is bound by precedent. The Michigan Supreme Court in *Edry,* supra, was extremely clear in its holding that expert testimony must be directly supported by reliable principles and methods in order to meet the admissibility requirements set forth in MRE 702 and MCL 600.2955. *Edry*, 486 Mich 634 at 640-641. The facts of this case are analogous to the facts in *Edry*.

(Opinion and Order – 1/21/2020, Ex B, Appx p 6 **)** (emphasis added) While the trial court referenced "reliable principles and methods" the only evidence of reliability the trial court indicated it could consider was literature. The trial court noted that:

> the Court finds that Plaintiffs did not present any foundation as to the reliability and admissibility of Dr. Koebbe's standard of care testimony as required by MRE 702 and MCL 500.2955. Nothing was presented to the Court that evidenced Dr. Koebbe relying on any published medical journals for his opinion nor did he cite to any authority to support his conclusion that the procedure was performed incorrectly, resulting in the perforation.

(Order and Opinion – 11/25/2019, Ex A, Appx p 1) A requirement that there must be literature "directly support[ing]" an expert's opinion for that opinion to be sufficiently reliable is contrary to the notion that a plaintiff must demonstrate that the opinion is reliable by a preponderance of the evidence. A requirement that there be literature "directly" supporting the expert's testimony is equivalent to the trial court requiring that the plaintiff prove that the expert's opinion is sufficiently reliable beyond all reasonable doubt.

In this case, the trial court also noted that, "[t]he Michigan Supreme Court has held that experience and background alone are insufficient to establish

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reliability and admissibility under MRE 702. *Edry*, 486 Mich 634 at 639-640." (emphasis added) **(**Id.**)** This application of *Edry*, that literature is the only sufficient method by which a party can demonstrate the reliability of expert testimony, entirely ignores this Court's clear holding that, "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702." *Edry v Adelman*, 486 Mich 634, 641; 786 NW2d 567 (2010). Indeed, Defendants are in agreement, as they state in their brief, "[702], nor any other court rules, statute or case law holds that literature is a requirement for an expert's opinions to be valid." **(Def Brief at pg. 46)** Despite this, the trial court's application of *Edry* and *Elher* shows that trial courts are applying *Edry* and *Elher* as requiring literature to show reliability, because it is believed that *Edry* and *Elher* have deemed all other sources of possible foundation insufficient.

In this case, the trial court provided another example of how *Edry* and *Elher* have wrongly skewed how courts view the potential admission of expert testimony. Based on its application of *Edry* and *Elher*, the trial court in this case noted that, "[w]hile the Court recognizes that, practically, there may have been a breach of the standard of care, the law requires that expert testimony have a basis in recognized scientific or technical principles." **(**Id.**)** Because the trial court perceived that it could only view published literature as evidence of recognized scientific or technical principles, it believed it was forced to deny practical reality

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– that there may have been a breach of the standard of care. The trial court acknowledged that Dr. Koebbe's opinions regarding the standard of care made practical sense, and yet found that the opinions were not reasonably derived from a sound foundation. While an admissible opinion should not be purely the *ipse dixit* of the expert, *General Electric Co v Joiner,* 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997), an expert offering an opinion that makes practical sense based on their years of knowledge, training, and experience, is not offering an opinion based solely on *ipse dixit*. Instead, the question should become whether that knowledge, training, and experience reasonably form a basis for the opinion sufficient to demonstrate that opinion is reliable by a preponderance standard.

In an attempt to persuade this Court that the existing status quo, where as demonstrated in this case, courts find an expert opinion practical and founded on the expert's knowledge and experience, but still unreliable, Defendants make a plea that "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." (Def. Brief at 44) Apparently, Defendants have conveniently forgotten that plaintiffs in medical malpractice cases are already subject to a whole host of statutory procedural requirements that other plaintiffs, who may have suffered the exact same injuries,

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do not have to comply with to seek civil justice. *See* MCL 600.2169, MCL 600.2912a-d.

There is no foundation for an argument that there is, or should be, a higher evidentiary standard for reliability placed on expert opinions in medical malpractice cases. There is no reason why an expert's opinion in a medical malpractice case should be held to a different standard regarding reliability from an attorney acting as an expert in a legal malpractice case or an accountant acting as an expert in an accounting malpractice case. Furthermore, medical malpractice cases in Michigan already cannot be "vague and supported" despite Defendants' assertions to the contrary. (Def. Brief at 44) A plaintiff in a medical malpractice case is already required to prove the elements of their case through expert testimony. "Generally, expert testimony is required in medical malpractice cases." *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). Furthermore, a medical malpractice plaintiff must obtain an affidavit of meritorious claim from a qualified expert. MCL 600.2912d.

Michigan medical malpractice defendants are well protected from vague and unsupported claims. The legislature has made sure of it. Defendants-Appellees unfounded scare tactics should not serve as a basis for how this Court should guide trial courts to apply the Michigan Rules of Evidence and Michigan statutory law when evaluating the reliability of expert testimony.

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II. FEDERAL COURTS DO NOT REQUIRE LITERATURE FOR STANDARD-OF-CARE EXPERTS IN MEDICAL MALPRACTICE CASES. INDEED, IN THE APPROPRIATE CASE, FEDERAL COURTS ROUTINELY QULAIFY SUCH EXPERTS ON THE BASIS OF KNOWLEDGE AND EXPERIENCE ALONE

Throughout Defendants' Brief runs a current of distaste bordering on repugnance for the notion that a trial court would consider qualifying an expert on knowledge and experience alone. Defendants repeatedly cite to *Daubert v Merrill Dow*, 509 US 579 (1993) and *Kumho Tire v Carmichael*, 526 US 137 (1999) as providing the template for the trial court's gatekeeper role in qualifying expert witnesses. Yet the Federal experience has not resulted in a requirement for literature in medical malpractice cases; indeed, experts are regularly qualified based on knowledge and experience alone.

One such recent case is *Greene v Board of Regents of University System of Georgia*, 2023 WL 5837501 (SD Ga 2023) (Ex X) That court, in qualifying a medical malpractice standard-of-care expert, summarized the federal standard:

> While experts frequently base their opinions on professional research or literature, "[t]here is no inherent requirement that a medical expert cite or reference independent studies that support [his or] her conclusions." *Smith v. Bama Urgent Med., Inc*., No. 7:08-CV-1546-RDP, 2011 WL 8635359, at *4 (N.D. Ala. July 20, 2011). Additionally, "[n]either *Daubert* nor its progeny preclude experience-based testimony." *Colony Ins. Co. v. Coca-Cola Co.*, 239 F.R.D. 666, 674 (N.D. Ga. 2007) (citing *Kumho,* 526 U.S. at 151). Indeed, the advisory committee notes to the 2000 amendments to Rule 702 clarify that "an expert may be qualified on the basis of experience," and "experience alone—or experience in conjunction with other knowledge, skill, training or education—may ... provide a sufficient foundation for expert

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> testimony." Fed. R. Evid. 702, advisory committee's notes to 2000 amendment. Therefore, "[a] district court may decide that ... expert testimony is reliable based upon personal knowledge or experience." *Am. Gen. Life Ins. Co. v. Schoenthal Fam., LLC*, 555 F.3d 1331, 1338 (11th Cir. 2009) (internal quotations omitted).
> However, "[i]f the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.' " Frazier, 387 F.3d at 1261 (quoting Fed. R. Evid. 702, advisory committee's notes to 2000 amendment). " 'Presenting a summary of a proffered expert's testimony in the form of conclusory statements devoid of factual or analytical support is simply not enough' to carry the proponent's burden." *Green*, 2022 WL 966864, at *5 (quoting Cook ex rel. *Est. of Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1113 (11th Cir. 2005)); see also Frazier, 387 F.3d at 1261 ("If admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong."). Accordingly, the Court must decide whether Fowlkes and Horn's respective training, experience, and education provide adequate support for their standard of care and causation opinions.

Other federal courts echo this standard. *See, eg, Mobius v Quest Diagnostics*, 2023 WL 5314557 (WDNY 2023) at *9 [applying 2d Circuit law] (Ex Z); *Collins v United States*, 2023 WL 2394638 (ED Ky 2023) [6th Circuit law] (Ex W); *Stanley v United States*, 2022 WL 16553273 (WD Wash 2022) [9th Circuit law] (Ex AA). One such case, *Irizarry-Pagan v Metro Santurce*, 2022 WL 4243567, *4 (DPR 2022) [applying 1st Circuit law] (Ex Y), sets out the appropriate use of literature in qualifying a plaintiff's standard-of-care expert in a medical malpractice case:

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Defendants correctly note that merely demonstrating that an **expert** has experience does not render every opinion and statement by that **expert** reliable. Defendants also state that establishing that a given **standard of care** is applicable nationally is done by referencing a published standard, discussion of the described course of treatment with practitioners at seminars or conventions, or through presentation of relevant data. These are indeed ways in which an **expert** could establish a national **standard of care**, but as Plaintiffs note, this list is not exhaustive; an **expert** does not describe a national **standard of care** by merely stating what he would have done differently, but he does not necessarily need to adhere strictly to the three categories cited by Defendants in establishing a national standard either. *See Vargas-Alicea v. Cont'l Cas. Co.*, 15-CV-1941 (PAD), 2020 WL 3470325, at *3 (D.P.R. June 25, 2020). An **expert** also need not mention or produce medical literature when identifying a **standard of care** in her report, as Federal Rules of Evidence 703 and 705 place the full burden of exploration of the facts and assumptions underlying the testimony of an **expert** witness squarely on the shoulders of opposing counsel's cross-examination. *See Toucet v. Mar. Overseas Corp.*, 991 F.2d 5, 10 (1st Cir. 1993) (citing *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980)); *Vargas-Alicea*, 2020 WL 3470325 at *5. As a result, Dr. Cummings need not necessarily cite literature or a published standard in demonstrating that he has relevant expertise here; instead, his personal experience **alone** may be sufficient. *See, e.g.*, *Delgado v. Dorado Health Inc.*, 14-CV-1735 (PAD), 2016 WL 4742257, at *4 (D.P.R. Sept. 2, 2016) (report and recommendation subsequently adopted in 2016 WL 4742259) (noting that experience **alone** can be sufficient to establish that an **expert** is **qualified** to offer opinions regarding **standards of care** under Fed. R. Evid. 702). The sufficiency of Dr. Cummings's personal experience has not actually been challenged here, and regardless, Dr. Cummings appears to have sufficiently established that he has relevant expertise through deposition testimony and other means. *See generally, e.g.*, Dkt. 55-4 (deposition testimony outlining Dr. Cummings's extensive expertise in relevant areas in some detail).

Inf the federal standards set forth above were applied in this case, Dr. Koebbe's explanation alone as to why he is of the opinion that entering the

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peritoneal space with a surgical instrument cannot be an "unavoidable risk of surgery" would have been sufficient to allow a trial court to qualify his testimony as within Daubert standards. The fact that Dr. Koebbe cited literature, and used it appropriately to support his opinion, removes it from a "experience-only" analysis. However, the use of a "stringent literature" test, as Defendants support, is inconsistent with the flexible approach practiced throughout the Federal system. It should not be continued in Michigan. Instead this Court should clarify and/or supersede the troublesome language from Edry and Eljer, relied upon by the lower courts herein, to adopt a flexible standard in keeping with the federal experience, and supported by the actual language of MRE 702 and MCL 600,2955.

In applying the above standard, Dr. Koebbe's explanation alone as to why he is of the opinion that entering the peritoneal space with a surgical instrument cannot be an "unavoidable risk of surgery" would have been sufficient to allow a trial court to qualify his testimony as within Daubert standards. The fact that Dr. Koebbe cited literature, and used it appropriately to support his opinion, removes it from a "experience-only" analysis. However, the use of a "stringent literature" test, as Defendants support, is inconsistent with the flexible approach practiced throughout the Federal system. It should not be continued in Michigan.

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III. THE AMENDMENT OF RULE 702 HAS NO DIRECT APPLICATION TO THE INSTSANT CASE. FYRTHER, THE PROPOSED AMENDMENT IS NOT INTENDED TO AFFECT THE FLEXIBLE APPROACH TO QUALIFYING A STANDARD-OF-CARE EXPERT IN A MEDICAL MALPRACTICE CASE.

Defendants' brief also posits that the amendment to FRE 702 and MRE 702, to become effective on December 1, 2023 has some effect on the disposition of this case. In reviewing the events of the case, clearly the amendment cannot apply. However, inasmuch as this Court may set policy for future cases, the substance of the amendment must be addressed.

Plainly put, the amendment is intended to clarify the standard of admissibility regarding an expert's opinion. This is specifically referenced as applying principally to forensic experts in civil and criminal cases. The Advisory Committee concluded by summarizing what the amendment did not do.

> 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. Advisory Committee notes to 2023 amendments.

Thus, the language of amended FRE 702, as explained by the Advisory Committee notes, will not affect the means through which a gatekeeper trial court assesses the expert's methodology and resulting opinions. Although the Michigan experience will likely diverge from that of Federal Courts, at this juncture, with

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nothing in the language of the rule, or the committee notes interpreting it, there is no basis to hypothesize that some future interpretation of MRE 702 will allow the gatekeeper to impose a literature requirement to all medical malpractice experts testifying as to the applicable standard of care.

CONCLUSION

For all the above reasons, this Court should reverse the Court of Appeals decision, and remand this matter to the trial court with appropriate instructions.

Respectfully Submitted,

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Dated: November 21, 2023

STATEMENT OF COUNTABLE WORDS

Pursuant to MCR 7.212 (B)(3), the above signed counsel for Plaintiff-Appellant hereby certifies that the word count of the word-processing system used to prepare the instant brief indicates that the number of countable words is 3,535.

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PROOF OF SERVICE

Beverly R. Medley, states that on November 21, 2023, she served Plaintiffs-Appellants' Reply Brief via upon counsel of record via e-filing with the MI TrueFiling system to their approved e-mail or last known address of record as disclosed on the Notice of Electronic Filing, and via the email address listed below.

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