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STATE OF MICHIGAN

IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF

Plaintiffs-Appellants,

v.

DANIEL K. FAHIM, M.D, and 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 Case No. 352648

Oakland County Circuit Court
Case No. 18-166129-NH

AMICUS CURIAE BRIEF OF MICHIGAN STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION

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STATEMENT OF QUESTIONS IDENTIFIED BY THE COURT

In its May 26, 2023 order, this Court directed the parties to address:

(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.

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

(3) Whether the appellants' standard-of-care expert met the standards for determining the reliability of expert testimony and was thus qualified to testify as an expert witness under MRE 702 and MCL 600.2955 or whether a *Daubert* hearing was necessary before making that decision. See *Kumho Tire Corp Ltd v Carmichael*, 526 US 137 (1999); *General Electric Co v Joiner*, 522 US 136 (1997); *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993); *Elher*; *Edry*.

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STATEMENT OF INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY AND AMERICAN MEDICAL ASSOCIATION[1]

Michigan State Medical Society is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

AMA is the largest professional association of physicians, residents, and medical students in the United States. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice and reside in all states, including Michigan. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents and medical students in the United States are represented in the AMA's policy-making process.

MSMS and the AMA file this amicus curiae brief on their own and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

In granting leave to appeal in *Danhoff v Fahim*, this Court directed the parties to address whether this Court's decisions in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), and *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016), correctly describe the role of supporting literature in determining the admissibility of expert testimony on the standard of care in a medical

[1] Pursuant to MCR 7.312(H)(4), amici curiae Michigan State Medical Society and American Medical Association state that neither appellant's counsel nor appellee's counsel authored this brief in whole or in part, or contributed money that was intended to fund the preparation or submission of the brief. Further, no person other than the amici curiae have contributed money intended to fund the preparation and submission of this brief.

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malpractice case, and if not, what a plaintiff must demonstrate to support an expert's standard-of-care opinion. This Court will also address whether the testimony of plaintiffs' standard-of-care expert satisfied the requisite reliability standards under MRE 702 and MCL 600.2955 or whether a *Daubert* hearing was necessary before making that decision.[2]

Amici Curiae believe that *Edry* and *Elher* were correctly decided. Plaintiffs' assertion that courts have interpreted these cases to mean that supporting literature is always required to establish the reliability of expert testimony is belied by the plain language of these opinions and the Court of Appeals decisions that rely upon them. *Edry* and *Elher* acknowledge that literature is one of many factors a court may consider in determining whether expert testimony is sufficiently reliable to be presented to the jury; they do not say that literature is required.

Edry and *Elher* also correctly emphasize that the reliability of an expert's opinion cannot be solely based upon the ipse dixit of the expert. The expert's opinion must be supported by some indicia of reliability and general acceptance that remove the opinion from the realm of speculation and personal belief. If the opinion lacks support in the relevant medical community, is contradicted by the medical literature, is not based upon scientific principles and methodology, or supported by other means, it should not be admitted. The contrary rule that Plaintiffs propose is a stark departure from *Daubert*, which this Court incorporated into the amended MRE 702 and which the Legislature adopted in enacting MCL 600.2955.

These issues are of utmost importance to MSMS, AMA, and their members. MSMS and AMA appreciate the opportunity to present this amicus curiae brief for the Court's consideration.

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[2] Referring to *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993).

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INTRODUCTION

From Plaintiffs' Supplemental Brief and Brief on Appeal, one cannot discern an argument that *Edry* and *Elher* were wrongly decided. Plaintiffs instead argue that subsequent cases have misapplied them. But Plaintiffs provide no example of this. The cases they cite did not misapply *Elher* or *Edry*. There is truly no genuine basis for this Court to depart from those decisions.

Plaintiffs' expert opined that because bowel injuries are rare during XLIF surgery, the occurrence of a bowel injury shows a breach of the standard of care. The literature offered in support of the opinion provided statistics showing the rate of occurrence. But the expert provided nothing other than his own personal belief and experience to close the "yawning analytical gap" between rare occurrences and a breach of the standard of care or to counter the contradictory literature provided by Defendants.

The focus on literature in this case, where no other indicia of reliability was provided to support the methodology of Plaintiffs' expert, does not mean that supporting literature is necessary *in every case*. *Elher*, *Edry* and their progeny already acknowledge that literature is important but not dispositive; they recognize that not all of the *Daubert* factors [which have been incorporated into MRE 702 and MCL 600.2955] must be satisfied, only the relevant and applicable factors. Certainly, no case requires medical literature irrespective of whether reliability has been established through other means.

Plaintiffs advocate for a rule that will save their claim, irrespective of whether it is a good rule, whether it serves Michigan jurisprudence, whether it accords with evidentiary principles that were established well before *Edry* and *Elher*, whether it applies MRE 702 (as amended), and whether it is consistent with the statutory directive of the Legislature. Plaintiffs argue against the reliability gatekeeper safeguard and in favor of a porous rule that allows an expert to testify to his or her subjective theories without having to show that the opinion resulted from an accepted

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methodology, that it relies upon scientific principles, and that it reflects the knowledge and understanding of practitioners within the medical community. This Court has consistently rejected such a rule and should do so now.

In addition, Plaintiffs now seek to substitute their burden of establishing reliability with a presumption of reliability unless proven otherwise, stating:

> The test a trial court should apply to assess the scientific validity of a standard-of-care opinion must be flexible, and fit the medical facts of the given case. In certain cases, for example involving frequently repeated procedures, the most important factor for the trial court to consider may well be the expert's knowledge and experience in performing the indicated procedure. If a party establishes an expert's knowledge, experience and skill in a given procedure, and that *the expert is basing their standard-of-care testimony primarily on that knowledge and experience, Michigan law under MRE 702 and MCL 600.2955 should be interpreted to allow such testimony in the absence of any evidence which establishes that the expert's knowledge and experience may not be sufficient to make their standard of care opinion reliable in a given case*. [Pls' Br. at 36 (emphasis added).]

This Court should reject such a standard, which fails to comply with MRE 702, MCL 600.2955, and Michigan case law.

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ARGUMENT

I. *Edry* and *Elher* Properly State the Role of Medical Literature in Establishing the Reliability of Expert Testimony.

Edry and *Elher* were properly decided. They are faithful to *Daubert* and consistent with Michigan precedent. Lower courts have correctly applied these cases without confusion or difficulty. This Court should not disturb them.

A. *Joiner* and *Kumho* do Not Change the Analysis of the Issues in this Case.

In the Order granting Plaintiffs' Application for Leave to Appeal, this Court requested that the parties brief the same issues that were listed in the MOAA Order. The only difference is the added reference to *General Electric Co v Joiner*, 522 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997), and *Kumho Tire Corp Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999). These cases do not change the required analysis here.

At issue in *Joiner* was the applicable standard of review for a trial court's decision to admit or exclude testimony under *Daubert*, and the Court concluded that the abuse of discretion standard was appropriate. 522 US at 138-139. The plaintiff was a city electrician who had to put his hands into a coolant that contained polychlorinated biphenyls (PCBs) to make repairs. *Id*. at 139. The plaintiff alleged that exposure to PCBs and their derivatives "promoted" his small-cell lung cancer, despite being a smoker and having a family history of lung cancer. *Id*. The district court granted summary judgment to the defendants, finding that the plaintiff's experts failed to show a link between exposure to PCBs and small-cell lung cancer, and their testimony "did not rise above 'subjective belief or unsupported speculation.'" *Id*. at 140. The Eleventh Circuit reversed, holding that "a particularly stringent standard of review" applied to the exclusion of expert testimony. *Id*.

When *Joiner* reached the United States Supreme Court, the Eleventh Circuit was reversed in favor of the District Court decision. The Court noted that in *Daubert*, the Court held that the

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prior test for admissibility set forth in *Frye v United States*, 54 App DC 46; 293 F 1013 (1923), was displaced by the Federal Rules of Evidence, but the gatekeeper role of the trial judge to ensure that all scientific testimony and evidence was reliable remained in place. *Joiner*, 522 US at 142.[3] Considering the evidence presented in *Joiner*, the Court found that the animal studies the expert relied upon were dissimilar to the facts presented in the litigation, and the epidemiological studies relied upon did not show a link between PCBs and lung cancer. *Id*. at 144-146. In response to the plaintiff's argument that under *Daubert*, the focus must be on the principles and methodology and not on the conclusions, the Court stated:

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. [*Id*. at 146 (citation omitted).]

The Court held that the district court did not abuse its discretion in excluding the expert testimony where it concluded that the studies relied upon were not sufficient, individually or in combination, to support the conclusion that exposure to PCBs contributed to the plaintiff's cancer. *Id*. at 146-147. Here, as in *Joiner*, Plaintiffs have been unable to produce any evidence to raise their expert's testimony above "subjective belief or unsupported speculation." Plaintiffs are merely relying on the *ipse dixit* of their proffered expert.

In *Kumho*, 526 US at 141, the Court considered whether *Daubert* applies to the testimony of engineers and other non-scientist experts. The Court concluded that the gatekeeping obligation in *Daubert* applies to all testimony based on technical and other specialized knowledge, and the

[3] *Frye* stated, "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Frye*, 51 App DC at 47.

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court may consider one or more of the *Daubert* factors when doing so would help determine the reliability of the testimony. *Id*. The Court further held that as stated in *Daubert*, "the test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Id*.

At issue was the reliability of the testimony of the plaintiff's expert in tire failure analysis. The plaintiff's tire was made in 1988, had been installed on the minivan some time before the plaintiff bought it in 1993, had been driven on 7,000 miles since the plaintiff purchased the minivan, had a tread depth worn down from 11/32 of an inch to a range of 0-3/32, and had at least two inadequately repaired punctures. *Kumho*, 526 US at 143. Despite this history, the plaintiff's expert concluded that a manufacturing or design defect caused the tire to blow out. *Id*. The expert concluded that if a tire's separation from its inner steel-belted carcass is not caused by overdeflection, which is underinflating the tire or having it carry too much weight, then ordinarily the cause is a defect. *Id*. at 144. The expert further stated that when the tire does not have at least two of four physical signs of overdeflection, he concludes that the separation was caused by a manufacturing or design defect. *Id*. The district court found the expert's testimony unreliable, but the Eleventh Circuit reversed, holding that *Daubert* only applies in the scientific context and not on skill or experience-based observation. *Id*. at 146.

The United States Supreme Court held that the gatekeeping function in *Daubert* and Rule 702 applies to all expert testimony. *Kumho*, 526 US at 147. The Court reiterated that the *Daubert* factors do not constitute a definitive checklist, and they "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id*. at 150 (citation omitted). With respect to experience-based testimony, the Court noted that some of the factors may be used to determine reliability, such as how often the

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methodology has produced erroneous results, or whether the method is generally accepted in the relevant community. *Id*. at 151. "[A] trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Id*. at 152. In *Kumho*, the district court did not doubt the expert's qualifications but found unreliable the methodology employed in analyzing the data obtained through visual inspection and the scientific basis for his analysis. *Id*. at 153. The Supreme Court held that the district court did not abuse its discretion in excluding the testimony, finding no indication in the record that other industry experts use the same test, that there were any articles or papers that validated the expert's approach despite the prevalence of tire testing, or that if the expert was still working for Michelin, he would conclude in a report to his employer that a similar tire was defective. *Id*. at 157-158. The Court noted that although the expert testified that his method was accurate, "'nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Kumho*, 526 US at 157, quoting *Joiner*, 522 US at 146.

Here, the outcome is consistent with *Joiner* and *Kumho*. Plaintiffs have offered nothing more than their proffered expert's speculation that because bowel injuries are rare during XLIF surgery, the occurrence of a bowel injury shows a breach of the standard of care. Under *Daubert*, Rule 702, MCL 600.2955, *Joiner*, and *Kumho*, Plaintiffs must show that their expert's opinion is reliable, whether through supporting literature or other indicia of reliability. Plaintiffs have failed to do so.

B. This Court's Decisions in *Edry* and *Elher* Are Supported by *Daubert* and Longstanding Michigan Precedent.

Edry and *Elher* have their foundation in longstanding evidentiary principles governing expert testimony. In *Marshall v Brown*, 50 Mich 148, 150; 15 NW 55 (1883), this Court recognized

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that an expert "is entitled to speak from the *accepted facts of medical science*," and later explained in *Ballance v Dunnington*, 241 Mich 383, 386-387; 217 NW 329 (1928), that the requisite standard of care "*is not fixed by the ipse dixit of an expert*, but by the care, skill, and diligence ordinarily possessed and exercised by others in the same line of practice and work in similar localities" (emphasis added). See also, *Czajka v Sadowski*, 243 Mich 21, 22; 219 NW 660 (1928), and *Facer v Lewis*, 326 Mich 702, 712; 40 NW 457 (1950), citing *Ballance*.

MRE 702 was amended effective January 1, 2004, "to particularize the kind of gatekeeper inquiry the trial court is required to make," *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 778, n 44; 685 NW2d 391 (2004), and to explicitly "incorporate *Daubert*'s standards of reliability." *Id*. at 781. Under *Daubert*, the proponent of expert testimony generally cannot simply point to an expert's experience and background to argue that the expert's opinion is reliable. This is evident in MRE 702, which now provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[4]

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[4] This Court has adopted stylistic amendments to the Michigan Rules of Evidence, effective January 1, 2024. The amendments "reflect the work of the MRE Committee established by Administrative Order No. 2021-8," which was "tasked with restyling the MREs in an effort to remain as consistent as possible with the 2011 restyling of the Federal Rules of Evidence." Staff Comment to 2023 Amendment. The amended rule provides:

> 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:
>
> (a) the expert's 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;

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In *Gilbert*, this Court explained that the rule "imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Id*. at 780. The reference in MRE 702 "to 'scientific' evidence 'implies a grounding in the methods and procedures of science,' and the rule's reference to 'knowledge' 'connotes more than subjective belief or unsupported speculation.'" *Id*. at 781. *Gilbert* explained that the rule:

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

Irrespective of *Edry* or *Elher*, it is this later aspect of the rule that applies here. While Dr. Koebbe relied upon statistics showing the rarity of colon injuries, he failed to support with anything other than his own say-so, his opinion that a rare injury results from a breach of the standard of care. As the United States Supreme Court explained in *Joiner*, 522 US at 146, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. *A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered*" (emphasis added).

Edry and *Elher* were not the first cases in which the absence of medical literature was a factor in this Court's finding that a medical malpractice expert's opinion lacked the requisite

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> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

There is no substantive change to the rule, and these amendments do not affect the analysis under *Daubert*.

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support to pass muster under MRE 702. In *Craig v Oakwood*, 471 Mich 67; 684 NW2d 296 (2004), this Court evaluated the admissibility of expert testimony under the prior version of MRE 702, which included similar "scientific, technical, or other specialized knowledge" language that continues in the rule today. Quoting the Court of Appeals decision in *Nelson v American Sterilizer Co (On Remand)*,[5] this Court explained that scientific "connotes a grounding in the principles, procedures, and methods of science" while "the word 'knowledge' connotes more than subjective belief or unsupported speculation. The word applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Id*. at 79.[6]

Craig noted that "in determining whether the proposed expert opinion was grounded in a 'recognized' field of scientific, technical, or other specialized knowledge as was required by MRE 702, a trial court was obligated to ensure that the expert opinion was based on accurate and generally accepted methodologies." *Id*. In finding error in the trial court's analysis, this Court relied upon the absence of any evidence (both factual and scientific) to support the theory that the excessive use of a labor-stimulating drug hyperstimulated the mother's uterus, causing the baby's head to pound against his mother's pelvic anatomy and resulting in permanent brain damage. With respect to literature, this Court explained:

> Indeed, the evidence plaintiff offered in support of Dr. Gabriel should have provided sufficient notice to the trial court that his theory lacked general acceptance in the medical community. *For one thing, Dr. Gabriel was unable to cite a single study supporting his traumatic injury theory during a voir dire conducted at trial*. The only authorities he offered for the proposition that excessive amounts of Pitocin may cause cerebral palsy through the traumatic mechanism he described at trial were studies he cited in which Pitocin caused cerebral palsy in animals when given in excessive amounts. These studies did not involve the "bumping and grinding"

[5] 223 Mich App 485, 491; 566 NW2d 671 (1997).

[6] This Court added, "Continuing along these lines, the word 'technical' signifies grounding in a specialized field of knowledge, or a particular 'art, science, or the like.' Similarly, 'specialized' suggests a foundation in a specific field of study or expertise." 471 Mich at 80.

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> mechanism on which Dr. Gabriel's expert testimony relied. In fact, Dr. Gabriel expressly distinguished the mechanism to which he attributed plaintiff's injuries from those at work in the animal studies. It would appear, then, that there was little evidence that Dr. Gabriel's theory was "recognized," much less generally accepted, within pediatric neurology. [*Id*. at 83-84 (emphasis added)]

Edry and *Elher* follow from *Gilbert* and *Craig*. In *Edry*, the Court was asked to decide whether the trial court abused its discretion by excluding the testimony of plaintiff's expert as unreliable. The suit alleged that the defendant OB/GYN breached the standard of care by failing to test for cancer when plaintiff asked him about a lump under her arm in 2003. Defendant told her to check back if the lump increased in size. In 2005, plaintiff was diagnosed with breast cancer that had spread to the lymph nodes. She alleged that the delay required more invasive, severe, and disfiguring treatment and substantially decreased her opportunity for long-term survival. Here is how the Court described the competing expert opinions regarding the impact on plaintiff's survival:

> Dr. Barry Singer testified at a deposition as plaintiff's oncology expert. He stated that plaintiff's chances of surviving five years would have been 95 percent if she had been diagnosed in June 2003 and that the delay in diagnosis reduced her five-year survival chance to 20 percent. Dr. Singer acknowledged that the American Joint Cancer Commission (AJCC) manual was authoritative on this subject and reported a 60 percent five-year survival rate for breast cancer patients when the cancer has spread to four or more lymph nodes. Dr. Singer stated, however, that the manual was not applicable to plaintiff's case because the cancer had spread to 16 lymph nodes, and he believed that the more lymph nodes involved, the poorer the chance of survival. During his deposition, Dr. Singer referred to textbooks and journal articles that supported his theory, but plaintiff never produced those authorities to support his testimony.
>
> Defendant's oncology expert, Dr. Joel Appel, testified that plaintiff's chance of survival was 60 percent based on the AJCC manual and that it was medically improper to consider the number of lymph nodes involved as a predictor of a patient's chance of survival. Further, Dr. Appel testified that Dr. Singer's opinion was not based on recognized scientific or medical knowledge, was not generally accepted in the medical community, and could not be substantiated with any medical evidence. [486 Mich at 637-638]

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In analyzing the admissibility of Dr. Singer's testimony, this Court recited a legal framework that is well-accepted and not subject to debate:

- MRE 702 incorporates the standards of reliability described in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579 (1993), citing to *Gilbert*, 470 Mich at 781, for that proposition. [486 Mich at 639-640]

- *Daubert* requires the trial judge to ensure that scientific evidence "is not only relevant, but reliable." [*Id.* at 640]

- "[W]hile not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony," citing to *Craig*, 471 Mich at 83–84, for the proposition "that the expert's singular reliance on his own hypothetical depiction of an event may have been too speculative and, therefore, inadmissible under MRE 702," and also relying upon *Daubert*, 509 US at 593, for the proposition "that whether there is peer-reviewed and published literature on a theory is a 'pertinent consideration' because 'submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected.'"

These principles are not controversial and were properly applied in *Edry*, where this Court explained that the expert's unsupported opinion was contradicted by published literature which even the expert acknowledged as authoritative:

> Dr. Singer's opinion was not based on reliable principles or methods; his testimony was contradicted by both the defendant's oncology expert's opinion and the published literature on the subject that was admitted into evidence, which even Dr. Singer acknowledged as authoritative. Moreover, no literature was admitted into evidence that supported Dr. Singer's testimony. Although he made general references to textbooks and journals during his deposition, plaintiff failed to produce that literature, even after the court provided plaintiff a sufficient opportunity to do so. Plaintiff eventually provided some literature in support of Dr. Singer's opinion in her motion to set aside the trial court's order, but the material consisted only of printouts from publicly accessible websites that provided general statistics about survival rates of breast cancer patients. The fact that material is publicly available on the Internet is not, alone, an indication that it is unreliable, but these materials were not peer-reviewed and did not directly support Dr. Singer's testimony. 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.

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This Court ultimately concluded that "While peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of any other form of support for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under MRE 702." *Id*. at 640-642, citing *Craig*, 471 Mich at 83–84, and *Daubert,* 509 U.S. at 593–594.[7]

Plaintiffs quote this passage in their Brief on Appeal and admit, "*Edry* did not establish a rule that all medical opinions in malpractice cases must be supported by peer-reviewed medical literature. Quite the contrary – the Court took pains to note that literature is not always required." Pls' Br. at 23. This is clearly not an argument that *Edry* was wrongly decided. Rather, Plaintiffs describe *Edry* with seeming approval, reciting that the Court "referenced the case before it, and given the totality of the record below, where the defense expert referenced authoritative literature, as opposed to a plaintiff expert whose opinions were contradicted by such authoritative literature and by the defense expert, found that Dr. Singer's method of calculating the survival rate was unreliable." *Id*. at 23-24.[8]

Elher also relied upon established principles. In *Elher*, this Court held that plaintiff's expert was properly excluded where he "admitted that his opinion was based on his own personal beliefs,

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[7] This Court further emphasized, "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." 486 Mich at 642.

[8] The *Edry* dissent faulted the majority for failing to consider the additional factors set forth in MCL 600.2955(1) and to further consider whether the testimony was novel and met the criteria for admissibility set forth in MCL 600.2955(2). However, the majority properly noted that "We need not address MCL 600.2955 in this case because an expert witness who is qualified under one statute may be disqualified on other grounds," citing *Woodard v Custer*, 476 Mich 545, 574 n. 17; 719 NW2d 842 (2006), and because Dr. Singer's opinion is inadmissible under MRE 702, "it is unnecessary to consider the admissibility of his opinion under MCL 600.2955." 486 Mich at 642, n 7.

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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 failed to provide any other support for [the expert's] opinion, and defendant submitted contradictory, peer-reviewed medical literature." 499 Mich at 14.

The facts in *Elher* are similar to those alleged in the present case. In *Elher*, the defendant surgeon inadvertently clipped the common bile duct during gall bladder surgery, necessitating emergency surgery to remove the clip and repair the duct. The risk of injury to the common bile duct was mentioned on the consent form signed by plaintiff. The defendant doctor testified that it occurs in 0.5 to 2% of all laparoscopic gallbladder surgeries. However, like Dr. Koebbe in this case, plaintiff's expert testified that, in his opinion, "it is virtually always malpractice to injure the common bile duct during a laparoscopic cholecystectomy, absent extensive inflammation or scarring." *Id*. at 15. This Court said of the expert, "[h]e considered plaintiff's injury in this case to be a breach of the standard of care, but did not provide any supporting authority for his opinion," quoting testimony which established the expert's admission that this was his own definition of the standard of care, there was no medical literature supporting it, he had never discussed it with his colleagues, and he had no idea what their opinions were. *Id*. at 15-16.

As in *Edry,* the principles which led to the result in *Elher* are not controversial.

- "'The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169.'" 499 Mich at 22, quoting *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067; 729 NW2d 221 (2007).

- MRE 702 "requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable." *Id*., quoting *Gilbert*, 470 Mich at 779.

- MRE 702 incorporates the *Daubert* standard requiring the trial court to ensure "that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 499 Mich at 22 (internal quotations omitted).

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- The "lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony" and it is generally insufficient "to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id*. at 22-23 (citing *Edry*).

- MCL 600.2955(1) "requires 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 on by the expert," and considering the seven factors identified in the statute. *Id*. at 23-24.[9]

- "[I]t is within a trial court's discretion how to determine reliability" and not all of the *Daubert* factors may be relevant "in assessing reliability, depending on the nature of the issue, the expert's expertise, and the subject of the expert's testimony." *Id*. at 24-25 (citing to *Kumho*, 526 US at 150).[10]

Based upon these principles, *Elher* concluded that the trial court did not abuse its discretion by relying upon two factors listed in MCL 600.2955 and finding that the expert's opinion was not reliable. This Court first concluded:

> [T]he Court of Appeals erred by concluding that the issue debated by the experts was not studied in peer-reviewed articles and, therefore, that the circuit court

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[9] MCL 600.2955(1) identifies the following factors:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
> (b) Whether the opinion and its basis have been subjected to peer review publication.
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
> (d) The known or potential error rate of the opinion and its basis.
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

[10] The factors identified in MCL 600.2955 are similar to the *Daubert* factors.

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> abused its discretion when it relied on this factor. The majority conceded that the article authored by Way was peer-reviewed. Way concluded, after analyzing 252 operations, that 97% of injuries occur because of misperception and that such misperception errors do not constitute negligence. Thus, the issue being debated has been studied. Plaintiff, however, failed to submit any peer-reviewed medical literature in support of Priebe's opinion, and Priebe admitted that he knew of none. [*Id*. at 25]

This Court also disagreed with the conclusion of the Court of Appeals' majority that there was no widespread acceptance of *any* standard of care statement, concluding that the majority had misinterpreted this factor.

> [T]his factor requires the court to consider "[t]he degree to which the opinion and its basis are generally accepted within the relevant expert community." Priebe admitted that he knew of no one that shared his opinion. While the articles submitted by defendants may have suggested that "purists" in the field agreed with Priebe, there was still no indication regarding the degree of acceptance of his opinion. The majority conceded that there was no evidence regarding whether Priebe's view had general acceptance within the relevant expert community. This was a relevant factor for the circuit court to consider. [*Id*. at 27]

But this Court agreed that all factors in MCL 600.2955 "may not be relevant in every case" and that the trial court erred in relying upon the scientific testing and replication factor because it does not fit the expert's opinion. Nonetheless, plaintiff "merely pointed to Priebe's background and experience in regard to the remaining factors, which is generally not sufficient to argue that an expert's opinion is reliable." *Id*. "Priebe admitted that his opinion was based on his own beliefs, there was no medical literature supporting his opinion, and plaintiff failed to provide any other support for Priebe's opinion." *Id*. at 27-28. Likewise, the opinion did not conform to MRE 702 because, 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." *Id*. at 28. In other words, "Plaintiff failed to provide

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any support for Priebe's opinion that would demonstrate that it had some basis in fact and that it was the result of reliable principles or methods." *Id*.

> 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*.] [11]

Plaintiffs quote the language of *Elher* in their Brief on Appeal and state that "On the surface, the language above quoted does not **always** require a standard of care expert to always back his or her opinion with scientific literature." Pls' Br. at 25. Again, Plaintiffs point to no error in *Elher*. Quite the contrary, Plaintiffs repeatedly acknowledge that medical literature is not always required. See e.g., Pls' Br. at 29-30.[12]

Thus, the answer to this Court's first question – whether *Edry* and *Elher* "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" – should be answered "yes." Plaintiffs certainly provide no basis for a contrary ruling.

C. *Edry* and *Elher* Have Been Properly Applied by Subsequent Courts.

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[11] In *Elher*, this Court thus concluded, "We hold that the circuit court *did not abuse its discretion by concluding that Priebe's background and experience were not sufficient to render his opinion reliable in this case* when Priebe admitted that his opinion was based on his own beliefs, 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 failed to provide any other support for Priebe's opinion, and defendants submitted contradictory peer-reviewed literature." 499 Mich at 28 (emphasis added).

[12] Plaintiffs refer to direct medical literature 37 times in their brief in an apparent attempt to downplay their complete lack of support for their expert's opinions. Whether literature is directly on point is not the standard for reliability. The relevant question is whether the literature supports the expert's opinion such that the court can conclude that the opinion is generally accepted in the relevant community. *Elher*, 499 Mich at 27. Even if Plaintiffs had timely submitted their literature, the trial court and Court of Appeals found that such literature did not support the proffered opinions. The articles merely state that the type of injury at issue is rare but do not connect such rare injury to the standard of care.

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This Court has adhered to *Edry* and *Elher* on multiple occasions. For example, this Court expressly referenced *Edry* and *Elher* in *Walters v Falik*, 501 Mich 938; 904 NW2d 190 (2017). Following a MOAA, and in lieu of granting leave to appeal, this Court reversed the judgment of the Court of Appeals and reinstated the order granting the exclusion of plaintiffs' causation expert. This Court explained:

> The trial court did not abuse its discretion in finding that the plaintiffs' proposed expert witness's opinion was unreliable, especially since the scientific articles presented by the plaintiffs indicated that the etiology of Wegener's granulomatosis ("Wegener's") is unknown and that no study has referred to an association between phosphoric acid and Wegener's. Further, the plaintiff's proposed expert failed to explain why phosphoric acid was analogous to other environmental factors potentially associated with Wegener's. The trial court thus did not abuse its discretion when it held that his testimony was not sufficiently reliable to proceed to the jury because it amounted to speculation. See *Elher v. Misra*, 499 Mich. 11, 878 N.W.2d 790 (2016); *Edry v. Adelman*, 486 Mich. 634, 639, 786 N.W.2d 567 (2010).

Similarly, in *Figurski v Trinity Health-Michigan*, 499 Mich 887; 876 NW2d 574 (2016), this Court vacated sections of the Court of Appeals' opinion and remanded for reconsideration in light of *Elher*.[13] See also, *Hooks v Ferguson*, 499 Mich 982; 882 NW2d 526 (Mem) (2016) (remanding for reconsideration in light of *Elher*); *Tondreay v Sachinder*, 495 Mich 860; 836 NW2d 691 (Mem) (2013) ("While peer-reviewed, published literature is not always necessary to meet the requirements of MRE 702, in this case the lack of supporting literature, combined with the lack of any other form of support for these opinions render the opinions unreliable and inadmissible under MRE 702," citing *Edry*).

Plaintiffs argue that *Edry* and *Elher* have been misapplied, insisting that the language of those cases "has been adopted by lower courts for the proposition that not only is literature required

[13] Plaintiffs describe the *Figurski* opinion on remand as a proper application of *Elher* and *Edry*. See Pls' Br. at 27 ("The failure to follow the law as written in *Elher* and *Edry* constitutes an abuse of discretion, as was recognized and upheld in *Figurski*.").

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to support an expert's standard of care opinion in a medical malpractice case, that supporting literature must be directly on point as to the issue presented in the litigation." Pls' Br. at 25. See also, *id*. at 30 ("Yet, the *Elher* language regarding the necessity of literature has been adopted uncritically by panels of the Courts of Appeals, such as the majority opinion in the instant case [*Danhoff*], simply stating that *Elher* requires corroborating literature support for all expert opinions."). In addition to *Danhoff v Fahim,* unpublished per curiam opinion of the Court of Appeals, issued May 6, 2021 (Docket No. 352648), 2021 WL 1827959, Plaintiffs cite *Uppleger v McLaren Port Huron Hosp*, unpublished per curiam opinion of the Court of Appeals, issued Oct 22, 2020 (Docket Nos. 348551 and 349281), 2020 WL 6253601, and *Matheson v Schmitt*, unpublished per curiam opinion of the Court of Appeals, issued Nov 21, 2019 (Docket No. 347022), 2019 WL 6245773. These cases do not support Plaintiffs' contention. They do not "uncritically" require corroborating literature for all expert opinions.

In *Danhoff*, Plaintiffs allege that Defendant was negligent in perforating Mrs. Danhoff's colon during extreme lateral interbody fusion (XLIF) surgery. Plaintiffs offered Dr. Koebbe as their standard of care expert. The Court of Appeals concluded that the trial court did not abuse its discretion in finding that Dr. Koebbe's testimony failed to satisfy the reliability standard required by *Daubert* and MRE 702. The Court cited *Elher* for the proposition that a "lack of supporting literature, *while not dispositive*, is an important factor in determining the admissibility of expert witness testimony" and that "[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id*. at 4 (emphasis added). The Court further stated:

> [B]oth the US Supreme Court and the Michigan Supreme Court have emphasized that an expert witness's mere say so, or ipse dixit, is insufficient to establish reliability of the proposed testimony. See *Gen Elec. Co. v. Joiner*, 522 U.S. 136, 146; 118 S. Ct. 512; 139 L. Ed. 2d 508 (1997) (noting that "nothing in either

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> *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *Kumho Tire*, 526 U.S. at 137 (same, citing *Joyner*); *Gilbert*, 470 Mich. at 783 (same, citing *Joyner*). [*Id*. at 5]

The Court noted Plaintiffs' argument that "no case holds that a witness must support his or her opinion with scholarly articles" and agreed that this assertion was "of course correct [] because *Daubert*'s list of permissible factors to consider at the gatekeeping stage is non-exhaustive." *Id*. "But the fact that scholarly support for a position is not required is not dispositive," the Court explained, and "there must be some evidence, beyond the witness's mere say so, that establishes that the opinion is based on reliable principles." *Id*. Dr. Koebbe's testimony at the summary disposition stage was "based entirely on his background and experience" and Plaintiffs failed to establish that his opinion was "the product of any other reliable principle or methods." *Id*.

The Court of Appeals noted that upon granting summary disposition in *Danhoff*, the Trial Court invited Plaintiffs to file a motion for reconsideration "if there is a basis for Dr. Koebbe's testimony of which the Court is unaware." *Id*. Plaintiffs moved for reconsideration and provided medical literature to the Court. However, the articles only established that an injury to the sigmoid colon is rare and recited statistics. The articles did not make a connection between rare occurrences in surgery and the existence of malpractice or discuss whether bowel injuries were acceptable or unacceptable complications of the type of surgery performed. As such, they did not support the argument that Dr. Koebbe's standard of care opinion was the product of reliable principles and methods. *Id*. There is no error in this decision. The Court of Appeals correctly analyzed the issue and reached a result consistent with applicable law.

Plaintiffs also argue that the Court misunderstood "methodology," which Plaintiffs define as the "scientific approach to the issue." Plaintiffs argue that Dr. Koebbe "testified to his methodology, which would be standard for an expert in his position." Pls' Br. at 27. Plaintiffs do

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not provide a citation to the point in Dr. Koebbe's testimony where his methodology was explained. Indeed, there was no methodology; Dr. Koebbe merely articulated that bowel injuries are rare and violate the standard of care. As the Court of Appeals explained:

> Dr. Koebbe's opinion was not based on any methodology other than his bare assertion that he had never heard of such an injury, and therefore, he would conclude that any such injury was caused by malpractice. But plaintiff, and by extension Dr. Koebbe, failed to establish that this opinion was shared by the broader medical community or that it was in any way a reliable method for identifying malpractice. Indeed, and even apart from the application of the *Daubert* standard, Michigan has long held that the ipse dixit of an expert is insufficient to establish the standard of care in medical malpractice cases. See *Ballance v. Dunnington*, 241 Mich. 383, 386-387; 217 N.W. 329 (1928) ("The standard of care, skill, and diligence required of an X-ray operator is not fixed by the ipse dixit of an expert, but by the care, skill, and diligence ordinarily possessed and exercised by others in the same line of practice and work in similar localities."). Furthermore, MRE 702 is not fulfilled by an expert simply having *a* methodology used to determine his or her expert opinion; rather, MRE 702 requires a showing that "the testimony is the product of *reliable* principles and methods." MRE 702. [*Id*. at 6 (emphasis in original)]

This analysis is correct. There is no error in the *Danhoff* opinion.

In *Uppleger*, the Court noted that the lack of supporting literature is important but not dispositive. *Id*. at 5. The Court reviewed the literature in detail, including the article plaintiff's expert relied upon, but ultimately concluded that the article did not support the expert's assertion that the defendants' failure to administer t-PA to plaintiff proximately caused plaintiff's injuries. The Court ultimately concluded that "Given the absence of reliable medical literature *or any other support for his opinions*, Dr. Frecker's causation testimony was not based on sufficient facts or data, nor was it the product of reliable principles and methods that were applied reliably to the facts of this case." *Id*. at 8. Citing to *Edry*'s holding that "the lack of supporting literature, combined with the lack of any other form of support for [the expert's] opinion, renders his opinion unreliable and inadmissible under MRE 702" [486 Mich at 641], the Court affirmed exclusion of the expert:

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> The trial court properly exercised its gatekeeper role in determining that Dr. Frecker's causation testimony was unreliable. And there was nothing improper about the trial court considering the testimony of the defense neurology experts, along with the published literature that was provided and the lack of reliable literature supporting Dr. Frecker's opinions, when assessing the reliability of Dr. Frecker's testimony. See *Edry*, 486 Mich. at 640 (holding that the opinion of the plaintiff's expert was unreliable when it was contradicted by both the opinion of the defense expert and the published literature that was admitted into evidence and when no reliable literature was admitted into evidence that supported the opinion of the plaintiff's expert). [*Id.* at 8 (emphasis added)]

Uppleger does not deviate from *Edry* and *Elher*; it follows the lead of those cases in identifying medical literature as a factor in determining reliability. If other indicia of reliability had been provided, the absence of medical literature to support the opinion of plaintiff's expert would not have excluded him. As the Court said, "Given the absence of reliable medical literature *or any other support for his opinions*, Dr. Frecker's causation testimony was not based on sufficient facts or data, nor was it the product of reliable principles and methods that were applied reliably to the facts of this case." *Uppleger*, 2020 WL 6253601, at 8.

Matheson is not a medical malpractice case but rather a child custody dispute involving vaccinations. Nothing in *Matheson* states that peer-review literature is required to establish the reliability of an expert's opinion. The Court simply repeats the general rule articulated in *Edry*:

> The party proffering an expert witness must provide support to indicate that the expert's opinion "has some basis in fact, that it is the result of reliable principles or methods, or that [the proposed expert witness] applied [his or her] methods to the facts of the case in a reliable manner, as required by MRE 702." *Edry*, 486 Mich. at 641. While "peer-reviewed, published literature" is not a predicate for meeting the requirements of MRE 702, the absence of supporting literature, particularly when "combined with the lack of any other form of support for [the proposed expert witness's] opinion," will render the proposed opinion both unreliable and inadmissible under MRE 702. Id. As the *Edry* Court recognized:
>
> > 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. [*Edry*, 486 Mich. at 642.]
>
> [*Matheson,* 2019 WL 6245773 at 12]

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The Court ultimately concluded that the trial court did not err in excluding an expert in the specialized area of "adversomics," which addresses the adverse effects of vaccines and vaccine injuries. But the exclusion did not solely derive from the lack of supporting literature. To the contrary, the Court explained:

> [T]he information presented to the court did not demonstrate that a *Daubert* hearing to consider the factors set forth in that case was even warranted. In other words, noting the dearth of supporting literature on the topic of adversomics that plaintiff presented and the lack of any indication in Dr. Bark's CV, or in her evidentiary hearing testimony, that Dr. Bark had worked extensively in this area, the trial court correctly surmised that plaintiff's attempt "to simply point to an expert's experience and background to argue that [Dr. Bark's] opinion is reliable" was not enough to meet the requirements of MRE 702. *Elher v. Misra*, 499 Mich. 11, 23; 878 N.W.2d 790 (2016). Accordingly, the trial court's decision to limit Dr. Bark's testimony to her experience vaccinating her own patients and to the area of general pediatrics fell within the range of principled outcomes, and therefore did not amount to an abuse of discretion. [*Id*. at 13]

In *Estate of Wilson-White by White v St John Macomb Hosp*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 341093), 2019 WL 3432536, a case Plaintiffs cite in their Brief at 25, the Court of Appeals addressed *Elher* in an effort to determine whether *Elher* constituted a change in the law for the purpose of deciding whether the Court's previous determination regarding the reliability of an expert's testimony was law of the case. *Id*. at 2-3. The Court concluded that *Elher* was based upon precedent and did not change the law.

> Close analysis of the *Elher* decision establishes that it did not create new law. Our Supreme Court relied entirely on existing law, such as *Daubert* and, more particularly *Edry*, the case cited by this Court in its previous decision in this case for analysis whether Dr. Lustgarten's testimony was reliable. In *Elher*, our Supreme Court did not explicitly or implicitly overrule any precedent. Rather, it applied existing precedent to the facts presented. [*Id*. at 7]

In *Goff v Niver*, unpublished per curiam opinion of the Court of Appeals, issued June 18, 2019 (Docket No. 343315), 2019 WL 2517861, which Plaintiffs cite in their Brief at 25, plaintiff's expert testified that the defendant OB-GYN violated the standard of care by failing to diagnose

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and treat at the time of delivery a rectovaginal tear and an anal external sphincter tear and that the ensuing delay was the cause in fact of plaintiff's ongoing impairment. The expert, however, agreed that some women who have the repair surgery immediately fail to fully recover and there is no way to quantify the risk of incomplete recovery; he was relying upon his own experience and expertise, he did not rely upon specific scientific literature or studies, and opined that it would be unethical to conduct such studies because it would be unethical to delay treatment. *Id*. at 4-6. Finding that the testimony was properly excluded, the Court explained:

> Plaintiff argues that there are no studies to support Dein's opinion that the delay in plaintiff's treatment decreased the odds of her fully recovering because to conduct a study where the treatment of patients was delayed would be unethical. Plaintiff argues that she should not be penalized for the non-existence of an unethical study. But in this case, plaintiff did not introduce any data to support Dein's testimony in any regard. For example, Dein testified that the failure to repair the injuries at the time of delivery resulted in increased inflammation, which then made repairing the injuries more difficult. Plaintiff, however, did not present any data to support these underlying propositions. Plaintiff is therefore unable to argue that she has met any of the reliability factors of MCL 600.2955(1).
>
> Generally, it is not sufficient under MRE 702 to rely only upon an expert's experience and background to argue that the expert's opinion is reliable. *Edry*, 486 Mich. at 642. "The whole point of *Daubert [v. Merrell Dow Pharm, Inc*., 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993)] is that experts can't speculate. They need analytically sound bases for their opinions, and it is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Edry*, 486 Mich. at 642 n. 6 (quotation marks and citation omitted). The proponent of evidence bears the burden of establishing its admissibility, and a trial court may only admit expert testimony after it ensures the reliability of the evidence under MRE 702. Here, plaintiff failed to provide scientific support for any aspect of Dein's opinion. Given the authority supporting exclusion of testimony when there is no support for the theory beyond the expert's own opinion, it cannot be said that the trial court's decision was outside the range of reasonable and principled outcomes. [*Id*. at 6]

Khzouz v Mendelson, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2018 (Docket No. 333901), 2018 WL 1308118, shows that medical literature has not been adopted by subsequent courts as an unbending requirement to establish reliability. There, the Court explained there was no literature directly on point and thus the factor was not dispositive:

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> At root, defendants' argument is that because there is no medical literature directly supporting Dr. Hosalkar's opinion, it is unreliable and thus inadmissible. The parties spend a great deal of their respective briefs debating the substance of the medical literature, with both sides inexorably concluding that such literature supports their position. *This ignores the fact that every expert deposed in this case opined that there was no authoritative medical literature that is directly on point. Moreover, defendants ignore the fact that while a lack of supporting literature "is an important factor," it is not dispositive*. See *Elher*, 499 Mich. at 23. In this case, given the experts' consensus that no authoritative literature exists in support of either side's position, plaintiffs cannot be faulted for failing to produce such literature. [*Id*. at 5 (emphasis added)]

In *Hooks v Ferguson (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued Nov 3, 2016 (Docket No. 322872), 2016 WL 6584547, the Court well understood and applied the rule of *Edry* and *Elher*. Like *Elher*, the facts involved the clipping of the common bile duct; the Court excluded plaintiff's expert on the same basis applied by this Court in *Elher*:

> [A]s the trial court also noted, plaintiff failed to submit any evidence, *medical literature or otherwise*, to support Dr. Milewski's standard of care opinion testimony that clipping plaintiff's common bile duct was negligent and not merely a known complication of gallbladder removal surgery. As in the *Elher* case, here, Dr. Milewski relied only on his background, personal experience, and beliefs to support his opinion. Thus, Dr. Milewski's opinion and its basis could not satisfy the other statutory factors set forth in MCL 600.2955. That is, Dr. Milewski's *background, personal experience, and beliefs were insufficient to establish the reliability of his opinion*. See *id*. at 26. The trial court also did not abuse its discretion when it concluded that, for similar reasons, the requirements of MRE 702 were not met, which rendered Dr. Milewski's opinion unreliable and inadmissible. That is, as in *Elher*, Dr. Milewski's opinion was neither shown to be "the result of reliable principles or methods" nor was it supported by medical literature or any other form of support. See *id*. at 27. [*Id*. at 2 (emphasis added)] [14]

So where is this misapplication of *Edry* and *Elher* that, Plaintiff argues, warrants this Court's review? Amici have not discerned it. Plaintiffs have failed to show that *Edry* and *Elher*

[14] Although not precedential, these unpublished cases are discussed to show that contrary to Plaintiff's argument, *Edry* and *Elher* have not been misapplied. They are collectively attached as Exhibit A.

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are routinely misapplied. Rather, the cases show that the role of medical literature, as articulated in *Edry* and *Elher*, has been respected.[15]

D. The Rules Articulated in the Three Jurisdictions Plaintiffs Choose to Address Add Little to the Discussion; In Other Jurisdictions, as in Michigan, Personal Experience Alone Does not Establish Reliability.

Plaintiffs cite three cases from other jurisdictions (the Eastern District of Michigan, Third Circuit, and State of Wisconsin) that ostensibly allow an expert's opinion to be solely based on the expert's personal experience. It is not surprising that some jurisdictions impose less stringent requirements on expert testimony. There are likewise jurisdictions that apply a rule similar to Michigan, requiring objective support to establish the reliability of an expert's opinion.

For example, *Hill v Mills*, 26 So 3d 322 (Miss, 2010), is similar to the *Danhoff* case. In *Hill*, plaintiff's expert agreed "that he could produce no support for his opinion, other than his own personal experience." *Id*. at 332. Defendant's expert, on the other hand, produced literature which contradicted the testimony of plaintiff's expert. *Id*. at 331. Plaintiff argued that her expert's experience "should be enough, and that, in excluding [the expert's] testimony, the trial court applied a standard too rigid and restrictive to comply with *Daubert*." *Id*. at 332. Plaintiff cited a previous Supreme Court decision which held "that peer-reviewed literature is helpful when presented, but that peer-reviewed materials are not an absolute requirement, and their absence does not constitute automatic inadmissibility." *Id*. at 332. Finding that case distinguishable, the Mississippi Supreme Court emphasized "that, when the reliability of an expert's opinion is attacked with credible evidence that the opinion is not accepted within the scientific community,

[15] Further, there is no basis to distinguish between standard of care experts and causation experts. Neither MRE 702 nor MCL 600.2955 make this distinction. Nor has this Court. See *Elher*, applying *Edry* to standard of care testimony. *Daubert* principles apply to all experts. There is no logical basis to exclude standard of care experts from the scrutiny *Daubert* requires.

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the proponent of the opinion under attack should provide at least a minimal defense supporting the reliability of the opinion." *Id.* at 332-333. The Court also stated:

> Were we to hold (as Justice Chandler's separate opinion suggests) that any qualified expert with twenty-five years experience may render any opinion—regardless of how contrary and repugnant that opinion may be to accepted science within the discipline—we would return our courts to the pre-*Daubert* days when trials were tainted by unreliable junk science purchased from professional witnesses. We think the better practice is, when an expert (no matter how qualified) renders an opinion that is attacked as not accepted within the scientific community, the party offering that expert's opinion must, at a minimum, present the trial judge with some evidence indicating that the offered opinion has some degree of acceptance and support within the scientific community. [*Id*. at 331]

Similarly in *Brazil v Khater*, 223 SW3d 418 (Tex App, 2006), plaintiff alleged that the trial court erred in striking his expert because "his qualifications were not disputed and the testimony was relevant and reliable." *Id*. at 419. The expert's opinion was based on his training and experience; he knew of no scientific studies or published literature to support his causation opinion. Affirming the exclusion of the expert, the Texas Court noted that "the fact that the expert's opinion has not been published or evaluated in professional journals does not compel a determination that his opinion is wrong, however, the absence of any review or evaluation by third parties renders his personal opinion unreliable." *Id*. at 421. The Court continued, "Even assuming that Lustbader's opinion based on his personal experience in Washington D.C. is correct, a question we do not decide, the absence of medical literature at this time and general knowledge in the medical community of the procedure recommended by Lustbadfer renders a determination of the foreseeability element of proximate cause speculative." *Id*.

In *Archer v Warren*, 118 SW3d 779, 782 (Tex App, 2003), the Texas Court explained:

> Opinion evidence relied on as proof must be based on more than possibilities, speculation and surmise. See *Schaefer v. Tex. Employers' Ins. Ass'n*, 612 S.W.2d 199, 202–05 (Tex.1980). In evaluating opinion evidence we look to the basis of the expert's opinion, and not the bare opinion alone. A claim cannot stand or fall on the mere ipse dixit of a credentialed witness. See *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex.1999).

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See also, *Burton v CSX Transportation*, *Inc*., 269 SW3d 1, 9 (Ky, 2008), where the Kentucky Supreme Court concluded "where, as here, the expert is highly qualified in relevant specific fields of study; *and the expert's opinions or conclusions are supported by objective sources showing compliance with the scientific method*, 'as practiced by (at least) a recognized minority of scientists in their field[,]' the evidence is sufficiently reliable to be admitted in court so long as it is relevant" (emphasis added).

In any event, Plaintiff's cases are inapposite. In *Seifert v Balink*, 372 Wis 2d 525; 888 NW2d 816 (Wis, 2017), defendant argued that the expert's opinion was not the product of reliable methods because it was based on the expert's personal experiences. Although the Wisconsin statute had been amended to adopt *Daubert*'s reliability standard, prior law applied a "relevancy test" to the admission of expert evidence and "Wisconsin case law had rejected both *Frye*'s 'general acceptance test' and the federal *Daubert* reliability standard." 888 NW2d at 829. The court noted that "the instant case is this court's first occasion to apply" the amended statute. *Id*. at 830. The court's decision relied upon the context of that particular case, including the opinions and methodology used by the particular expert, as well as acknowledgments of the opposing experts; it cannot be extrapolated to this case or any other.

Schneider ex rel Estate of Schneider v Fried, 320 F3d 396 (CA 3, 2003), is also inapposite. In that case, one of the two excluded experts testified "that he was opining about his own personal standard of care and not the standard of care in the medical field," a statement he later attempted to disavow. *Id*. at 398. The court ruled that excluding the expert's testimony was error. The rule applied to the other expert is not unlike Michigan's rule. The court explained, "*Where there are other factors that demonstrate the reliability of the expert's methodology*, an expert opinion should not be excluded simply because there is no literature on point." *Id*. at 406 (emphasis added). This

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is the *Edry* and *Elher* rule. But it was applied differently in *Schneider*, which relied solely upon the expert's "experience" to find "good grounds" for the expert's opinion.

Plaintiff's third case, *Bajorek-Delater v United States*, No. 17-CV-10570, 2020 WL 6562255 (ED Mich, Nov 9, 2020), is an unpublished order denying a motion for summary judgment. The order addresses preliminary expert reports and a request for a *Daubert* hearing. It does not address the issue before this Court. However, another Eastern District of Michigan case has touched upon the question. In *Williams v United States*, 455 F Supp 3d 403 (ED Mich, 2020), the trial court, sitting as the trier of fact, concluded that plaintiff failed to demonstrate a breach of the standard of care or that the asserted breach was the proximate cause of the baby's brachial plexus injury. The Court applied Michigan law and reached a conclusion that is completely consistent with *Edry* and *Elher*. The Court stated:

> The medical literature demonstrates that H.P.'s injury is a type that can occur even when the obstetrician properly manages a shoulder dystocia. Defendant's experts' testimony was consistent with the medical literature admitted at trial and it was based on a fact-specific analysis of the evidence. In contrast, plaintiff's experts' theory was not supported by any reliable medical literature (it was, in fact, contradicted by medical literature they concede is reliable) and they did not base their opinion on the facts of this particular case. [*Id*. at 418-419]

To summarize, the rules of other jurisdictions are interesting, but they go both ways and do not control Michigan law. This Court, in amending MRE 702, and the Legislature, in enacting MCL 600.2955, follow *Daubert*.

E. This Court Should Reject Plaintiffs' Proposed Rule.

Plaintiffs' proposed rule is not precisely defined but apparently has three components. The first and third components state the current law. The second component rejects reliability as the threshold for expert testimony and diverges from *Daubert*.

Plaintiffs first state "The way forward is for this Court to rule that all *Daubert* factors set forth in MCL 600.2955 are to be considered, but only those applicable to the issue involved as to

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the specific expert testimony under scrutiny." Pls' Br. at 28. The current rule already recognizes that not all MCL 600.2955 factors must be considered, only applicable factors. See *Elher*, 499 Mich at 27.

The third component of Plaintiffs' "way forward" rule states, "it [presumably this court] must provide further guidance that, except perhaps in a case where one party produces specific literature on point, literature directly on point is generally not required in a medical malpractice case." Pls' Br. at 28. No further guidance is needed. This Court has repeatedly emphasized that medical peer-reviewed literature is important but not required *if other indicia of reliability* have been presented to support the expert's opinion. See e.g., discussion of *Edry*, *Elher*, and Court of Appeals cases, *supra*.

The second component of Plaintiffs' "way forward" rule is a rejection of *Daubert*'s reliability requirement. Plaintiffs state, "In medical malpractice cases, it [presumably this Court] must recognize that standard of care experts, particularly for procedures which are regularly repeated and not susceptible to formal study, may support their opinions predominantly with citation to their own regular treatment of the medical condition involved." Pls' Br. at 28.

Plaintiffs' proposed rule is untenable. Under the rule, experience is everything and all that is necessary to not only qualify an expert but to also establish *a priori* that the expert's opinion is reliable. These have traditionally been distinct inquiries. An expert's training, experience, board certification, and majority practice are the factors used to determine whether an expert is qualified to render standard of care testimony for or against a particular defendant. See MRE 702 and MCL 600.2169. These are not the factors that determine whether the expert's opinion is sufficiently

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reliable to be presented to a jury.[16] Further, under the rule Plaintiffs propose, an expert would be permitted to pass off as "standard of care" testimony a mere recitation of his or her "own regular treatment" protocol. This is gravely inconsistent with the law in Michigan and has been soundly rejected through decades of Michigan jurisprudence. See, e.g., *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 493; 668 NW2d 402 (2003) ("[T]he standard of care is not based on how a particular health care professional would act."); *Francisco v Manson, Jackson & Kane, Inc*, 145 Mich App 255, 259-260; 377 NW2d 313 (1985) ("Expert testimony in a malpractice case should be based on how a reasonable similarly-situated practitioner would act, not on how the witness himself would act."); *Carbonnell v Bluhm*, 114 Mich App 216, 224; 318 NW2d 659 (1982) ("The measuring standard of care is founded upon how other doctors in that field of medicine would act and not how any particular doctor would act."). The expert's personal practice is not relevant to the liability inquiry. The standard of care, by definition, is the "recognized standard of practice or care within [the defendant's] specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances." MCL 600.2912a(1)(b). The standard of care for a specialist is "'what the ordinary [*Name profession*.] of ordinary learning, judgment or skill would do or would not do under the same or similar

[16] See *Morgan v Bediako*, unpublished opinion of the Court of Appeals, issued December 21, 2010 (Docket No. 293409), 2010 WL 5184831, where the Court rejected the assertion that qualifications were sufficient to establish reliability, stating "we conclude that plaintiff's argument that Dr. Gabriel's opinion should have been deemed to be based on reliable methodology because of his extensive education and experience as well as the fact that he reviewed medical records in arriving at his opinion is without merit. His education and experience relates to his qualifications, and not to whether his testimony is based on reliable principles and methods that he applied reliably to the facts of this case. MRE 702." Although unpublished, this case is cited because it rejects the specific argument Plaintiffs make here. *Morgan* is included with other unpublished cases in Exhibit A.

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circumstances.'" *Albro v Drayer*, 303 Mich App 758, 764; 846 NW2d 70 (2014), quoting M Civ JI 30.01.

Plaintiffs summarize their proposed rule, adding a new requirement that would substitute their burden of establishing reliability with a presumption that the testimony is reliable unless proven otherwise, stating:

> The test a trial court should apply to assess the scientific validity of a standard-of-care opinion must be flexible, and fit the medical facts of the given case. In certain cases, for example involving frequently repeated procedures, the most important factor for the trial court to consider may well be the expert's knowledge and experience in performing the indicated procedure. If a party establishes an expert's knowledge, experience and skill in a given procedure, and that *the expert is basing their standard-of-care testimony primarily on that knowledge and experience, Michigan law under MRE 702 and MCL 600.2955 should be interpreted to allow such testimony in the absence of any evidence which establishes that the expert's knowledge and experience may not be sufficient to make their standard of care opinion reliable in a given case*. [Pls' Br. at 36 (emphasis added).]

This rule would basically replace MRE 702, MCL 600.2955, and the *Daubert* line of case law with a presumption that the testimony of any expert who satisfies the MCL 600.2169 expert witness qualification standards is reliable. This is a shift in the burden of establishing reliability on the expert proffering the opinion to the other side to disprove reliability. Plaintiff is asking this Court to re-write or eliminate MCL 600.2955, which it is not authorized to do.

Contrary to this Court's acceptance of *Daubert* in amending MRE 702 and the Legislature's adoption of *Daubert* in enacting MCL 600.2955, nothing of *Daubert* appears in Plaintiffs' rule. Methodology, general acceptance, reliability, and scientific principles are kicked to the curb. It is ipse dixit, through and through - the rule Plaintiffs need to maintain their case. Certainly, expedience is not a sound basis for reversing decades of Michigan precedent. Adoption of such a rule would signal a return to the era of "unreliable junk science purchased from

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professional witnesses"[17] and undo decades of jurisprudence (and Legislative effort) to ensure the integrity of the judicial process. This Court should reject Plaintiffs' appeal and their proposed rule.

CONCLUSION AND RELIEF REQUESTED

For the above reasons, Amici Curiae Michigan State Medical Society and American Medical Association request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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Dated: November 29, 2023

[17] Quoting *Hill v Mills*, 26 So 2d at 331.

Exhibit A

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2020 WL 6562255
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Emily E. BAJOREK-DELATER, Plaintiff,

v.

UNITED STATES of America, Defendant/Third-Party Plaintiff,

v.

Henry Ford Allegiance Health, Dorothy Brown, D.O., Kristina Sturgill, D.O., Waseem Ullah, M.D., and Harish Rawal, M.D. Third-Party Defendants.

Case No. 17-CV-10570
|
Signed 11/09/2020

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ORDER DENYING THIRD-PARTY DEFENDANTS HENRY FORD ALLEGIANCE HEALTH, BROWN, STURGILL AND RAWAL'S MOTION FOR SUMMARY JUDGMENT [ECF No. 63]

GEORGE CARAM STEEH, UNITED STATES DISTRICT JUDGE

***1** This is a medical malpractice case brought under the Federal Tort Claims Act ("FTCA"). Plaintiff Emily Bajorek-Delater sued the United States of America under the FTCA for the alleged medical malpractice of certain federal employees working at federally funded clinics. The United States was granted leave to file a third-party complaint seeking indemnity, common-law contribution, and statutory contribution against Henry Ford Allegiance Health, Dr. Dorothy Brown, Dr. Kristina Sturgill, Dr. Harish Rawal and Dr. Waseem Ullah (collectively referred to as "third-party defendants" or "TPDs"). Those claims are premised upon the assertion that the TPDs committed medical malpractice under Michigan state law and were, at least in part, a cause of the injuries alleged in plaintiff's original underlying complaint.

The matter is presently before the court on motion for summary judgment filed by Henry Ford Allegiance Health, Dr. Dorothy Brown, Dr. Kristina Sturgill and Dr. Harish Rawal (collectively referred to as "the moving third-party defendants" or "the moving TPDs"). For the reasons stated below, the moving TPD's motion for summary judgment is denied.

FACTUAL BACKGROUND

Plaintiff suffered a permanent spinal cord injury after several doctors at several medical facilities allegedly failed to diagnose and treat a condition known as cauda equina syndrome over the course of several weeks [Complaint, ECF No. 1]. The cauda equina means "the horses tail" of the spinal cord; "where all of the nerve roots at the bottom of the spinal cord ... separate and go down into the bottom of the lumbosacral vertebrae area." (Tucker Dep. at 47:23–48:3). Cauda equina syndrome results from "[t]he impingement of those nerve roots." (*Id.* at 48:4–5); (Roychoudhury Dep. at 168:17–169:6).

The symptoms of cauda equina syndrome are: "[1] Loss of bowel and bladder control and [2] numbness in the groin and saddle area of the perineum, associated with [3] weakness of the lower extremities." (UpToDate, Eval. of Low Back Pain, at 15). Weakness in the lower extremities may include "foot drop," or the inability to lift one's foot. (Tucker Dep. at 64:20–65:22); (Roychoudhury Dep. at 168:17–169:6). "Cauda equina syndrome represents a true surgical emergency where decompression should be performed within 24 hours, and within 12 hours if possible." (UpToDate, Acute Lumbosacral Radiculopathy, at 1).

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The United States represents a primary care physician, Dr. Promita Roychoudhury, who saw plaintiff thirty days before plaintiff had surgery for her condition. The federal clinic's doctor never saw plaintiff again after that visit. Third-party defendant Waseem Ullah, M.D. (not a party to the pending motion), interpreted plaintiff's MRI seventeen days before plaintiff's surgery. Third-party defendants Dorothy Brown, D.O., and Kristina Sturgill, D.O., saw plaintiff seven days before her surgery. Third-party defendant Harish Rawal, M.D., examined plaintiff two days before surgery.

During discovery, plaintiff and her experts alleged that all of these physicians should have referred her for emergency surgery at the time they saw her but did not do so. The Court granted the United States' motion for leave to file a third-party complaint alleging "claims under common law principles of contribution and indemnity and M.C.L. § 600.292[5]a" against Dr. Brown, as well as Henry Ford Allegiance Health, Kristina Sturgill, D.O., Waseem Ullah, M.D., and Harish Rawal, M.D. based on their alleged medical malpractice (ECF No. 27; ECF No. 29).

STANDARD FOR SUMMARY JUDGMENT

***2** Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See Redding v. St. Eward*, 241 F.3d 530, 532 (6th Cir. 2001). The Supreme Court has affirmed the court's use of summary judgment as an integral part of the fair and efficient administration of justice. The procedure is not a disfavored procedural shortcut. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *see also Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995).

The standard for determining whether summary judgment is appropriate is " 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.' " *Amway Distributors Benefits Ass'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The evidence and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Tolan v.* Cotton, 572 U.S. 650, 660 (2014); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Redding*, 241 F.3d at 532 (6th Cir. 2001). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original); *see also National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

If the movant establishes by use of the material specified in Rule 56(c) that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, the opposing party must come forward with "specific facts showing that there is a genuine issue for trial." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 270 (1968); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000). Mere allegations or denials in the non-movant's pleadings will not meet this burden, nor will a mere scintilla of evidence supporting the non-moving party. *Anderson*, 477 U.S. at 248, 252. Rather, there must be evidence on which a jury could reasonably find for the non-movant. *McLean*, 224 F.3d at 800 (*citing Anderson*, 477 U.S. at 252).

ANALYSIS

"Absent waiver, the doctrine of sovereign immunity insulates the government from suit." *Dep't. of the Army v. Blue Fox*, 525 U.S. 255, 260 (1998) (citing *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994)). With the enactment of the FTCA, Congress waived the government's sovereign immunity for certain claims, subject to specific limitations. When an action is brought under the FTCA, the plaintiff must establish a viable claim under the law of the state in which the alleged negligent act or omission took place. *Premo v. United States*, 599 F 3d 540, 545 (6th Cir. 2010).

The alleged negligence in this case occurred in the state of Michigan, therefore Michigan's substantive law of contribution and indemnity, as well as the substantive requirements of Michigan's law regarding medical malpractice, apply to this case.

I. Common Law Indemnification

Common law "indemnification is an equitable doctrine that shifts the entire burden of judgment from one tortfeasor who has been compelled to pay it, to another whose active negligence is the primary cause of the harm." *St.*

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Luke's Hosp. v. Giertz, 458 Mich. 448, 453 (1998). The party seeking indemnification must be free from active negligence. "Whether a party was free from active negligence in an underlying case and thus entitled to common-law indemnification is generally a question of fact for the jury." *Botsford Continuing Care Corp. v. Intelistaf Healthcare, Inc.*, 292 Mich. App. 51, 60–61 (2011).

***3** The moving TPDs contend that plaintiff's underlying complaint alleges active negligence on the part of the United States, so the United States cannot assert a claim for common law indemnity against them. "To hold that a party to a lawsuit should be legally bound by the mere allegations of its opponent, regardless of the facts and circumstances surrounding a case, would constitute nothing less than judicial indifference to notions of fairness and fundamental principles of justice." *Fishbach-Natkin, Inc. v. Shimizu Am. Corp.*, 854 F. Supp. 1294, 1302 (E.D. Mich. 1994). "Thus, in determining whether the party seeking indemnity was actively negligent, a court must review all of the evidence presented, including but not limited to the underlying complaint." *Id.* This determination may not be made by simply looking to the allegations of plaintiff's complaint.

The original underlying complaint in this case pleads alternative theories of negligence, against an employee of a federally funded clinic, as well as against a non-employee of the federally funded clinic, Dr. Brown. When the underlying complaint pleads alternative theories of negligence, a court cannot determine whether a claim for common law indemnity against a third party is valid until the parties obtain a judgment on the issue of active versus passive negligence. *See St. Luke's Hosp.*, 458 Mich. at 450, 454.

There remains an issue of fact whether the United States (Dr. Roychoudhury) was actively negligent in causing the harm alleged by plaintiff. Therefore, the moving TPD's motion for summary judgment on this claim is denied.

II. Common Law Contribution

In 1970, "the Michigan Supreme Court expressly created a common law right to contribution among nonintentional tortfeasors, abolishing the former common law bar against such suits." *Dolinka VanNoord & Co. v. Oppenheimer & Co.*, 891 F. Supp. 1244, 1248 (W.D. Mich. 1995) (citing *Moyses v. Spartan Asphalt Paving Co.*, 383 Mich. 314, 334-35 (Mich. 1970))[1]; *Fed. Sav. & Loan Ins. Corp. v. Quinlan*, 678 F. Supp. 174, 175 (E.D. Mich. 1988) ("In Michigan, the right to contribution is both common law based (citing *Moyses*) and statutorily authorized (citing M.C.L.A. § 600.2925a)."). The cause of action for common law contribution has never been overruled by statute or by the Michigan Supreme Court. *See id.*

1 The Michigan Supreme Court later overruled a portion of the holding in *Moyses*, noting that it only overruled the portion of the *Moyses* opinion dealing with personal jurisdiction, not the portion regarding claims for common law contribution. *See Hapner v. Rolf Brauchli, Inc.*, 273 N.W.2d 822, 829 n.5 (1978).

The moving TPDs argue that there is no longer a common law right to contribution in Michigan and therefore the claim asserted under this theory should be dismissed. In support of their position, the moving TPDs cite to Michigan state appellate law holding that the right to contribution is controlled entirely by statute. *Isabella County v. State*, 181 Mich. App. 99, 103 (1989); *Reurink Bros. Star Silo, Inc. v. Clinton County Rd. Comm'rs*, 161 Mich. App. 67, 70 (1987). However, it is well-settled in Michigan that a state appellate court may not overrule a decision by the Michigan Supreme Court. *Associated Builders & Contractors v. City of Lansing*, 880 N.W.2d 765, 772 (Mich. 2016).

In addition, the United States District Court for both the Eastern and Western Districts of Michigan have rejected the assertion made by the moving TPDs. *See Dolinka*, 891 F. Supp. at 1249 ("neither of th[e] decisions [from] the Court of Appeals provide[d] any discussion of the origins or history of the common law right to contribution in Michigan, nor did [they] refute [their own] other recent decisions which appear to endorse a common law right to contribution."); *Fed. Sav. & Loan Ins. Corp.*, 678 F. Supp. at 175.

***4** The two cases relied on by the moving TPDs do not support their argument. One case involved statutory contribution, but not a claim of common law contribution. The case did not even discuss common law contribution. *Fishbach-Natkin, Inc. v. Shimizu America Corp.*, 854 F.Supp. 1294, 1299 (E.D. Mich. 1994). Nor did the other case discuss common law contribution. *In re Air Crash at Detroit Metro. Airport*, 791 F. Supp. 1204, 1225-26 (E.D. Mich. 1992).

The Court concludes that Michigan does recognize a common law right of contribution among nonintentional tortfeasors. The moving TPDs motion for summary judgment is denied as to this claim.

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III. Statutory Contribution

In the event the United States is found liable in plaintiff's underlying suit, it alleges an entitlement to statutory contribution from the moving TPDs under M.C.L. § 600.2925a due to their alleged medical malpractice. To state a claim for contribution, the United States must first demonstrate a prima facie case of medical malpractice against the moving TPDs. The moving TPDs argue that there is no genuine issue of material fact that they committed medical malpractice because the United States does not have the expert testimony required to support a such a claim against them.

A. Medical Malpractice in Michigan

The elements of a cause of action for medical malpractice have been codified by statute in Michigan. Those elements include:

> [I]n an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice ... [t]he defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

M.C.L. § 600.2912a(1)(b). Expert testimony is required to establish the elements of medical malpractice. *Thomas v. McPherson Community Health Center*, 155 Mich. App. 700, 705 (1986) ("expert testimony is required to establish the applicable standard of conduct, the breach of that standard, and causation."). This is because, in medical malpractice cases, issues of negligence and causation are normally beyond the knowledge of laymen. *Baldwin v. Williams*, 104 Mich. App. 735, 738 (1981).

B. Expert Evidence

The United States submitted expert reports from Dr. Kirk Agerson and Dr. Mark Adams in support of its claims that the moving TPDs committed medical malpractice. In their motion for summary judgment, the moving TPDs argue that the limited scope of testimony offered by these two experts cannot support a finding of medical malpractice.

Under Rule 26, the parties must disclose certain information about their experts during discovery, such as fee schedules, curriculum vitae, publication history, and testimony history. Fed. R. Civ. P. 26(a)(2)(B). An expert's report must also contain a description of the facts the expert relied upon and "a complete statement of all opinions the witness will express" at trial. *Id.*

According to the United States, at trial Dr. Agerson will testify that Dr. Brown and Dr. Sturgill did not comply with the standard of care because plaintiff had clear signs of cauda equina syndrome when they examined her, but their ultimate advice to plaintiff was to keep a neurosurgery appointment several days later. This information is contained in Dr. Agerson's report [ECF No. 66-15]. Dr. Adams will testify that Dr. Rawal violated the standard of care because plaintiff had clear signs of cauda equina syndrome when Dr. Rawal examined her, but he scheduled surgery for two days later, during which time, plaintiff's condition worsened to the point that plaintiff had to return to the emergency room the following morning. Dr. Adams will also testify that, if plaintiff had surgery shortly after Dr. Brown, Dr. Sturgill, or Dr. Rawal examined her, plaintiff would not have suffered her current injuries. Dr. Adams' report contains all of this information [ECF No. 66-19].

***5** Expert witnesses are not restricted to the exact wording of their reports at trial. "[R]ule [26(a)(2)] contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report" at trial. *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006).

Under Rule 702, a district court should allow expert testimony "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 176 (6th Cir. 2009); Fed. R. Evid. 702. Although the moving TPDs request that the Court hold a *Daubert* hearing to determine the admissibility of Dr. Agerson's and Dr. Adams' testimony, they do not raise any objection to their qualifications or their methodology. Therefore, the Court has no basis at this time to convene a *Daubert* hearing.

In addition to offering the testimony of Drs. Agerson and Adams, the United States asserts that it intends to offer several expert witnesses, treating physicians, the medical records, and admissible medical literature to demonstrate that Dr. Brown, Dr. Sturgill, and Dr. Rawal breached the standard

of care. The moving TPDs have not sustained their burden of demonstrating there is no issue of material fact for trial regarding the United States' allegations that they committed medical malpractice.

CONCLUSION

Now therefore, for the reasons stated above,

IT IS HEREBY ORDERED that the moving third-party defendants' motion for summary judgment is DENIED.

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2021 WL 1827959
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Lynda DANHOFF and Daniel Danhoff, Plaintiffs-Appellants,

v.

Daniel K. FAHIM, M.D. and Michigan Head & Spine Institute, Defendants-Appellees,

and

Daniel K. Fahim, M.D., PC, Kenneth P. D'Andrea, D.O., and Wiliam Beaumont Hospital, doing business as Beaumont Hospital-Royal Oak, Defendants.

No. 352648
|
May 6, 2021

OAKLAND CIRCUIT COURT, LC No. 2018-166129-NH

Before: Tukel, P.J., and Servitto and Rick, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice action, plaintiffs Lynda Danhoff and Daniel Danhoff appeal as of right the trial court's order granting summary disposition to defendants Dr. Daniel K. Fahim, M.D. and Michigan Head & Spine Institute.[1] Plaintiffs argue that the trial court erred by concluding that their standard of care expert, Dr. Christopher Koebbe, was not qualified to testify as an expert witness because he failed to satisfy the standards for determining the reliability of expert testimony first established by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993); the basis for the trial court's ruling was that Dr. Koebbe failed to support his opinion with medical journals or other authority to establish his opinion's reliability. We find that the trial court acted within its discretion in ruling Dr. Koebbe's testimony inadmissible, and consequently we affirm the orders of the trial court.

[1] Defendants Daniel K. Fahim, M.D., PC; Dr. Kenneth P. D'Andrea, D.O.; and William Beaumont Hospital, also known as Beaumont Hospital-Royal Oak, were all dismissed from this case. All references to "defendants" will refer to Dr. Daniel K. Fahim, M.D. and Michigan Head & Spine Institute. As Daniel Danhoff's alleged cause of action is derivative of his wife Lynda's claims, all of our references to "plaintiff" refer to Lynda Danhoff.

I. UNDERLYING FACTS

This case arises from a December 7, 2015 surgery on plaintiff's back. Dr. Fahim, a board-certified neurosurgeon, was the lead surgeon. Plaintiff's procedure was to be performed in two separate surgeries; the first surgery, which occurred on December 7, 2015, is the surgery that involved the alleged malpractice in this case. During this surgery, Dr. Fahim operated on plaintiff's L3 and L4 vertebrae.

The December 7, 2015 surgery was a minimally invasive procedure referred to as an "extreme lateral intrabody fusion" (XLIF). During an XLIF procedure, surgeons make an incision on the patient's side and reach the patient's spine by carefully moving fat and muscle out of the way. As explained by Dr. Fahim, the entire procedure should take place in the "retroperitoneal space," which is "an area of fat that is behind the peritoneum." "The peritoneum is what contains all the intraabdominal structures; the intraabdominal organs," including the sigmoid colon, which is the only organ at issue in this case. Instruments called retractors are used to keep the peritoneum space away from the location of the surgery. When done correctly, the sigmoid colon should be about "12 to 15 centimeters away" from the location of the surgery. After reaching the spine, a knife is then used on the relevant disk for the operation on the spine itself. According to Dr. Fahim, the December 7, 2015 surgery "went without complications as far as anyone could tell at the time of the procedure."

Plaintiff experienced pain the day after the December 7 surgery and had a fever that rose to a peak of 102.4 degrees Fahrenheit. Dr. Fahim, however, opined that these were normal symptoms following an XLIF surgery and were not cause for concern. As a result, Dr. Fahim proceeded with the second surgery on December 9, 2015, which took place without issue. The following day, December 10, 2015, the

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location of the incision from the December 7 surgery appeared red. Plaintiff's temperature and blood pressure rose to the extent that she was taken to the intensive care unit (ICU) and a computed tomography (CT) scan was taken; the CT scan revealed "free air and free material outside the colon."

***2** Another surgery, the third, was then performed to rectify the issue. Dr. Anthony Iacco performed this surgery and observed that stool was leaking from plaintiff's sigmoid colon due to a hole in it. Dr. Iacco suctioned up the stool and performed an ostomy to divert stool from plaintiff's sigmoid colon while it healed. During the surgery, Dr. Iacco observed a perforation of plaintiff's sigmoid colon near the incision site from the December 7 surgery. In all, plaintiff required four surgeries in six days to correct the sigmoid colon issue; she was discharged from the hospital on January 6, 2016.

Plaintiffs filed a complaint alleging, in relevant part, that Dr. Fahim committed medical malpractice by puncturing plaintiff's sigmoid colon during the December 7 surgery. According to plaintiffs, Dr. Fahim's actions constituted medical malpractice and Michigan Head & Spine was vicariously liable for its employee, Dr. Fahim. Plaintiffs additionally alleged that Daniel Danhoff suffered the loss of plaintiff's love and affection as a result of Dr. Fahim's malpractice.

Defendants denied the allegations and after discovery moved for summary disposition, arguing that plaintiffs' standard of care expert, Dr. Koebbe, was not qualified because his standard of care opinion was based solely on his experience and background. Plaintiffs responded, arguing that Dr. Koebbe's expert testimony was reliable, but they failed to provide any scholarly authority supporting Dr. Koebbe's testimony. In reply, defendants submitted affidavits from two doctors stating that Dr. Fahim did not breach the standard of care. The trial court granted summary disposition to defendants, but informed plaintiffs it would address the issue on reconsideration if plaintiffs could provide additional authority supporting Dr. Koebbe's standard of care testimony. Plaintiffs moved for reconsideration and submitted an affidavit by Dr. Koebbe and scholarly articles in support, but the trial court nevertheless denied plaintiffs' motion. This appeal followed.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v. Auto Club Ins. Ass'n*, 491 Mich. 200, 205-206; 815 N.W.2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v. Turkelson*, 322 Mich. App. 595, 605; 913 N.W.2d 369 (2018). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v. AEW Capital Mgt., L.L.P.*, 481 Mich. 419, 425; 751 N.W.2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop., Inc. v. Savoy*, 284 Mich. App. 522, 525; 773 N.W.2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v. Midmichigan Med. Ctr.-Gratiot*, 316 Mich. App. 1, 16; 891 N.W.2d 528 (2016). "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v. Square D Co.*, 445 Mich. 153, 162; 516 N.W.2d 475 (1994); see also *Dextrom v. Wexford Co.*, 287 Mich. App. 406, 415; 789 N.W.2d 211 (2010) (a court must draw all reasonable inferences in favor of the nonmoving party).

***3** The moving party has the initial burden to support its claim with documentary evidence, but once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v. Detroit*, 267 Mich. App. 255, 261; 704 N.W.2d 712 (2005). Additionally, if the moving party demonstrates that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present sufficient evidence to dispute that fact. *Lowrey v. LMPS & LMPJ, Inc.*, 500 Mich. 1, 7; 890 N.W.2d 344 (2016).

"The trial court's decision regarding whether an expert witness is qualified is reviewed for an abuse of discretion." *Turbin v. Graesser*, 214 Mich. App. 215, 217-218; 542 N.W.2d 607 (1995). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v. Hayford*, 279 Mich. App.

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324, 325-326; 760 N.W.2d 503 (2008). A decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion, *Barr v. Farm Bureau Gen. Ins. Co.*, 292 Mich. App. 456, 458; 806 N.W.2d 531 (2011), but an erroneous application of the law is by definition an abuse of discretion, *Gay v. Select Specialty Hosp.*, 295 Mich. App. 284, 292; 813 N.W.2d 354 (2012).

Finally, "[t]his Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration." *In re Estate of Moukalled*, 269 Mich. App. 708, 713; 714 N.W.2d 400 (2006). MCR 2.119(F)(3) provides:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

III. ANALYSIS

"A plaintiff in a medical malpractice action must establish (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Elher v. Misra*, 499 Mich. 11, 21; 878 N.W.2d 790 (2016) (citation and quotation marks omitted). In general, "expert testimony is required in a malpractice case in order to establish the applicable standard of care and to demonstrate that the professional breached that standard." *Id.* (citation and quotation marks omitted). But an expert witness is not required "when the professional's breach of the standard of care is so obvious that it is within the common knowledge and experience of an ordinary layperson." *Id.* at 21-22 (citation omitted). Finally, "[t]he proponent of the evidence has the burden of establishing its relevance and admissibility." *Id.* at 22 (citation omitted). "The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169." *Elher*, 499 Mich. at 22 (citation and quotation marks omitted).

MRE 702 incorporates the *Daubert* standard. See *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 781; 685 N.W.2d 391 (2004) (noting that "MRE 702 has ... been amended explicitly to incorporate *Daubert's* standards of reliability."). It provides

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

***4** The trial court's obligation under *Daubert* generally is referred to as "gatekeeping" or the "gatekeeper role." See *Gilbert*, 470 Mich. at 782. MRE 702, as applied to the trial court's discharge of its gatekeeping role, "requires the circuit court to ensure that *each aspect* of an expert witness's testimony, including the underlying data and methodology, is reliable." *Elher*, 499 Mich. at 22 (citation omitted; emphasis added). Reliability for purposes of *Daubert* is a term of art. "The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152; 119 S. Ct. 1167; 143 L. Ed. 2d 238 (1999). "The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 594-595. Furthermore,

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert*, 470 Mich. at 782.]

Thus, we are called on to review whether the trial court abused its discretion in finding that Dr. Koebbe's testimony regarding

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the standard of care failed to establish reliability as *Daubert* defined that term.

Daubert set forth a non-exhaustive list of factors for a trial court to consider in making the reliability determination. The factors include: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error; and (4) the general acceptance of the scientific technique. *Daubert*, 509 U.S. at 593-594.

In considering the medical opinion testimony of an expert in a malpractice case, our Supreme Court has held that "[a] lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Elher*, 499 Mich. at 23 (citation omitted). Furthermore, "[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id.* (citation and quotation marks omitted). Consequently, standard of care experts, such as Dr. Koebbe, generally must base their standard of care expert testimony on something more than their experience and background. See *id.*

The standard of care is a threshold issue that an expert witness must be qualified to testify about before a trial court even considers the expert witness's substantive testimony. See MCL 600.2912a(1). Accordingly, the trial court must first exercise the gatekeeping function regarding the applicable standard of care before determining that the witness is qualified to testify as an expert as to the applicable standard of care. MCL 600.2912a(2); see also *Kumho Tire Co.*, 526 U.S. at 149; citing *Daubert*, 509 U.S. at 590 and 592 (holding that Rule 702 "establishes a standard of evidentiary reliability" which "requires a valid ... connection to the pertinent inquiry as a precondition to admissibility"); *Gilbert*, 470 Mich. at 780 n. 46 (MRE 702 provides that the trial the court's determination of the reliability of expert testimony "is a precondition to admissibility").

Plaintiffs have appealed two separate orders in this case: (1) the trial court's order granting summary disposition to defendants and (2) the trial court's order denying plaintiffs' motion for reconsideration. Because Dr. Koebbe's standard of care testimony was supported by medical literature at the motion for reconsideration stage only, we will address each order separately. See *Pena v. Ingham Co. Rd. Comm.*, 255 Mich. App. 299, 310; 660 N.W.2d 351 (2003) ("[W]e only consider what was properly presented to the trial court before its decision on the motion.").

A. MOTION FOR SUMMARY DISPOSITION

***5** In granting summary disposition, the trial court ruled:

> While 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. The Court finds that Dr. Koebbe's testimony regarding the standard of care is not sufficiently reliable for admission under MRE 702. Dr. Koebbe is Plaintiffs' sole standard of care witness. Without establishing the proper standard of care, Plaintiffs cannot maintain a claim for medical malpractice. *Weymers v. Khera,* 454 Mich. 639, 647 (1997); see also *Locke v. Pachtman,*446 Mich. 216,222 (1994). Therefore, based on the evidence before it, the Court has no choice but to strike Dr. Koebbe's testimony and grant Defendant's Motion.

At the summary disposition phase of the trial court proceedings Dr. Koebbe's standard of care testimony was not supported by any literature. As explained earlier, standard of care opinion testimony must be reliable and "[a] lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Elher*, 499 Mich. at 23 (citation omitted). Furthermore, "[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id.* (citation and quotation marks omitted). Indeed, both the US Supreme Court and the Michigan Supreme Court have emphasized that an expert witness's mere say so, or ipse dixit, is insufficient to establish reliability of the proposed testimony. See *Gen Elec. Co. v. Joiner*, 522 U.S. 136, 146; 118 S. Ct. 512; 139 L. Ed. 2d 508 (1997) (noting that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."); *Kumho Tire*, 526 U.S. at 137 (same, citing *Joyner*); *Gilbert*, 470 Mich. at 783 (same, citing *Joyner*).

Plaintiffs argue that no case holds that a witness must support his or her opinion with scholarly articles. That is of course correct, because *Daubert*'s list of permissible factors

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to consider at the gatekeeping stage is non-exhaustive. But the fact that scholarly support for a position is not required is not dispositive; there must be some evidence, beyond the witness's mere say so, that establishes that the opinion is based on reliable principles. However, at the summary disposition stage in this case, Dr. Koebbe's testimony was based entirely on his background and experience. Plaintiffs and Dr. Koebbe failed to support. his standard of care testimony with supporting literature; and they similarly failed to establish that Dr. Koebbe's standard of care opinion was the product of any other reliable principle or methods. As such, his testimony was not admissible under MRE 702.

In his deposition, Dr. Koebbe testified that perforating the sigmoid colon is an extremely rare complication during XLIF procedures and that, because that type of injury is so rare, "more likely than not, an instrument went awry or something apparent that would, to me, violate the standard of care." Consequently, Dr. Koebbe's standard of care opinion amounted to concluding that the breach of the standard of care was based solely on the unlikelihood of such an injury. Dr. Koebbe's opinion may well be correct, as the trial court noted, as rare injuries during medical procedures are undoubtedly frequently the result of malpractice, and it may even be the case that the more rare a complication, the more likely it was due to malpractice. But Dr. Koebbe's standard of care opinion testimony was based entirely on his and his assumptions in that regard, solely as a result of his own background and experience. Indeed, at his deposition, Dr. Koebbe testified that he conducted a search for relevant medical literature, but only to confirm his preexisting notion that an injury to the sigmoid colon during such surgery is extremely unusual; Dr. Koebbe could not find any medical literature to support his standard of care opinion that *any* injury to the sigmoid colon during such surgery was *ipso facto* outside the standard of care, and in fact his research supported the opposition conclusion—although such injuries are in fact very rare, they are not nonexistent. Even more to the point, no such articles or other supporting methodology were provided to the trial court before it granted summary disposition to defendants.

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

B. MOTION FOR RECONSIDERATION

As noted, the trial court ruled that it had "no choice" at the summary disposition stage but to rule Dr. Koebbe's proposed testimony inadmissible, because there was no basis for finding it reliable. Nonetheless, the trial court went on to invite additional briefing on the topic. The trial court stated, "However, if there is a basis for Dr. Koebbe's testimony of which the Court is unaware, the Plaintiffs are invited to file a motion for reconsideration of this opinion."

Plaintiffs did file additional material with the trial court, consisting of some medical literature. The only fact that literature established however, was that bowel injuries, such as a perforated sigmoid colon, are exceedingly rare in XLIF procedures. Although we address that literature on the merits, as did the trial court, we first pause to note that both the trial court, and this Court, could simply deny the motion because it provided nothing which could not have been provided at the time of the motion for summary disposition. This Court has previously stated that "[w]e find no abuse of discretion in denying a motion [for rehearing] resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Woods v. SLB Prop. Mgt., LLC*, 277 Mich. App. 622, 629-630; 750 N.W.2d 228 (2008) (quotation marks and citation omitted). We agree, but we nevertheless choose to address this issue on the merits.

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As explained by the trial court, the medical article and abstracts plaintiffs provided did not actually directly support Dr. Koebbe's standard of care opinion that the injury to plaintiff's sigmoid colon during the December 7, 2015 surgery was malpractice per se. Rather, those articles established that such an injury is quite rare. They did not, however, make the connection between rare occurrences in surgery and malpractice on which Dr. Koebbe based his opinion. Similarly, the articles did not address whether bowel injuries were "acceptable" or "unacceptable" complications of XLIF surgeries. Indeed, these articles did not even address medical malpractice or the standard of care; they only collected statistics on the numbers of incidences of such injuries. As such, we do not see how they could possibly support an argument that Dr. Koebbe's standard of care opinion was the product of reliable principles and methods. While Dr. Koebbe used the conclusions from these articles regarding the rarity of sigmoid colon injuries during XLIF surgeries to bolster his standard of care opinion, they failed to establish that Dr. Koebbe used any methodology to form his opinion, or that if he did so such methodology was reliable.

Finally, we additionally note that the trial court gave plaintiffs every opportunity to cure the deficiencies in Dr. Koebbe's testimony. Indeed, the trial court even invited plaintiffs to raise the issue on reconsideration and specifically asked plaintiffs to provide documentary support for Dr. Koebbe's standard of care testimony. By doing so, the trial court told plaintiffs what it deemed necessary to make Dr. Koebbe's expert testimony admissible. Nevertheless, plaintiffs still failed to establish that Dr. Koebbe's standard of care testimony was based on reliable methods, and defendant countered it with expert opinions stating that Dr. Kibbe's opinion and methodology were unreliable. Thus, the trial court certainly did not abuse its discretion by denying plaintiffs' motion for reconsideration.

IV. CONCLUSION

***7** For the reasons stated in this opinion, the trial court's orders granting summary disposition to defendants and denying plaintiffs' motion for reconsideration are affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

Servitto, J. (concurring)

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

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

ESTATE OF Bobbie Jean WILSON-WHITE, BY James E. WHITE, Personal Representative, Plaintiff-Appellant,

v.

ST. JOHN MACOMB HOSPITAL, Diagnostic Radiology Consultants, PC, Philip A. Adler, M.D., and Aaron Smith, D.O., Defendants,

and

Tri-County Urologists, PC, and Gregory V. McIntosh, D.O., Defendants-Appellees.

No. 341093
|
July 30, 2019

Macomb Circuit Court, LC No. 2011-004467-NH

Before: Gadola, P.J., and Servitto and Redford, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice case, plaintiff appeals as of right the trial court's November 2017 order granting summary disposition in favor of defendants Tri-County Urologists, P.C. ("Tri-County") and Gregory V. McIntosh, D.O. ("McIntosh") (collectively "defendants"), pursuant to MCR 2.116(C)(10).[1] On appeal, plaintiff also challenges the trial court's August 2017 order in which the court, for the second time, disqualified plaintiff's proffered expert witness, Michael E. Lustgarten, M.D. We reverse and remand for further proceedings.

[1] The circuit court previously granted summary disposition in favor of defendants St. John Macomb Hospital, Philip A. Adler, M.D., and Diagnostic Radiology Consultants, P.C. Plaintiff does not challenge the dismissal of these defendants, who are not parties to this appeal.

I. BACKGROUND

This case is before this Court for the second time. The trial court previously granted summary disposition in favor of defendants in 2013, after ruling that Dr. Lustgarten lacked qualification to testify as an expert on the applicable standard of care. Respecting the previous appeal, this Court reversed that decision and remanded the case to the trial court. *Estate of Bobbie Jean Wilson-White v. St. John Macomb Hosp.*, unpublished per curiam opinion of the Court of Appeals, issued February 19, 2015 (Docket No. 316751), lv. den. 499 Mich. 854 (2016), rec. den. 499 Mich. 931 (2016). The underlying facts are summarized in this Court's previous opinion as follows:

> On April 27, 2009, McIntosh and urology resident Aaron Smith, D.O. ("Smith") [who was dismissed from the action by stipulation and is not a party on appeal] performed a percutaneous nephrolithotripsy ("PCNL") on Bobbie Jean Wilson-White ("Wilson-White") to remove a kidney stone from her right kidney. Approximately four weeks prior to the surgery [on April 2, 2009], Wilson-White had undergone a preoperative blood analysis pursuant to McIntosh's instructions. The analysis indicated a higher-than-normal prothrombin time ("PT") of 16.4, a higher-than-normal activated partial thromboplastin time ("APTT") of 40.1, and a low platelet count of 100. According to plaintiff, these were "clear indicators that [Wilson-White] had a clotting deficiency." It does not appear that McIntosh considered the results of Wilson-White's blood tests before proceeding with the PCNL operation. Wilson-White began to hemorrhage during the surgery. The doctors were able to remove the kidney stone and Wilson-White was placed in a recovery area where she could be closely monitored. She then began to hemorrhage again, required numerous units of blood and blood products, and was taken back into the operating room twice during the course of the night, once to remove her right kidney. She died at 6:30 a.m. on the morning of April 29, 2009. Thereafter, plaintiff filed this medical-malpractice action alleging, among other things, that McIntosh had breached the standard of care by continuing with the PCNL despite the results of the preoperative blood analysis and without consulting a hematologist or obtaining clearance to operate.

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***2** Plaintiff's affidavit of merit was executed by Michael E. Lustgarten, M.D. ("Lustgarten"). During his deposition, Lustgarten opined that McIntosh should have reviewed Wilson-White's laboratory results and obtained a hematologic consultation before conducting the PCNL. Lustgarten testified that, in light of Wilson-White's blood-test results, he would not have performed the surgery without first consulting a hematologist. He opined that Wilson-White "was at high risk for a problem based on the blood work that was obtained." He noted that the procedure was purely elective for Wilson-White, opined that a patient with a platelet count of 100 was "not ... a candidate for a PCNL electively," and testified that "an intelligent urologist would not have gone forward with this case." Lustgarten opined that McIntosh had never reviewed Wilson-White's preoperative laboratory results before conducting the surgery. If McIntosh had reviewed the laboratory results, and had still proceeded with the PCNL, this would not have conformed to "the standard of practice of most urologists" in Lustgarten's opinion. Under examination by defense counsel, Lustgarten admitted that he could not point to any textbook or other medical literature to support the proposition that a PCNL should not be performed on a patient with a PT of 16.4, an APTT of 40.1, and a platelet count of 100. In response to another of defense counsel's questions, Lustgarten stated, "I'm not sure what the standard of practices are." However, Lustgarten later confirmed that he was aware of the standard of care applicable to board-certified urologists performing PCNLs and opined that McIntosh had violated this standard.

After the deposition, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that Lustgarten did not know the standard of care and, therefore, was not qualified under Michigan law to serve as an expert witness. The circuit court granted defendants' motion. [*Id.*, unpub. op. at 1-2].

On appeal, this Court held that the trial court "abused its discretion by striking Lustgarten as an expert witness." *Id.*, unpub. at 6. This Court concluded that Dr. Lustgarten's "deposition testimony was reliable, supported by training and experience, and sufficient to assist the trier of fact" and that Dr. Lustgarten "was qualified to provide expert testimony on the standard of care in this case." *Id.* Accordingly, this Court reversed the trial court's order granting summary disposition and remanded the case to the trial court. *Id.*[2]

2 From this Court's decision, defendants sought review by our Supreme Court. The Court denied their application for leave to appeal on February 2, 2016 and defendants' motion for reconsideration of that order on May 24, 2016. *White v. St. John Macomb Hosp.*, 499 Mich. 854 (2016), rec. den. 499 Mich. 931 (2016).

On remand, defendants continued to challenge the admissibility of Dr. Lustgarten's standard-of-care testimony. Defendants initially argued that our Supreme Court's decision in *Elher v. Misra*, 499 Mich. 11; 878 N.W.2d 790 (2016), which was issued after this Court's previous decision, constituted a change in the law that permitted the trial court to revisit the admissibility of Dr. Lustgarten's testimony.[3] The trial court disagreed. On reconsideration, however, the trial court agreed with defendants that *Craig v. Oakwood Hosp.*, 471 Mich. 67; 684 N.W.2d 296 (2004), required it to hold an evidentiary hearing to reconsider the reliability of Dr. Lustgarten's proposed testimony.[4] At the evidentiary hearing defendants revisited the standard-of-care issue, presented their proposed expert's testimony, and relied on articles that had not been presented before this Court's previous decision. Dr. Lustgarten testified regarding his opinions that the decedent's coagulopathic condition revealed by her blood tests before the surgery required consideration of the constellation of individual abnormal test results before proceeding with the surgery and that McIntosh breached the standard of care applicable to urologists by proceeding with the surgery under the circumstances. The trial court ruled that Dr. Lustgarten lacked qualification to testify. Thereafter, the trial court granted defendants' renewed motion for summary disposition under MCR 2.116(C)(10), finding that, without Dr. Lustgarten's testimony, plaintiff could not present the requisite standard-of-care testimony to support his malpractice claim.

3 Defendants, in their motion for reconsideration before our Supreme Court, argued extensively that *Elher*, which was decided February 8, 2016, required a different result than that reached by this Court. Nonetheless, our Supreme Court denied their motion for reconsideration on May 24, 2016.

4 Before defendants' motion for an evidentiary hearing, the trial court, in accordance with this Court's remand instructions, determined that testimony from Dr. Lustgarten and another physician, Dr. Daniel Spitz, M.D., could be used to support plaintiff's theories of proximate cause. No party has appealed that ruling.

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II. STANDARD OF REVIEW

***3** We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Kennedy v. Great Atlantic & Pacific Tea Co.*, 274 Mich. App. 710, 712; 737 N.W.2d 179 (2007). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is reviewed "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v. Barton Malow Co.*, 480 Mich. 105, 111; 746 N.W.2d 868 (2008), reh. den. 481 Mich. 882 (2008). When opposing a properly asserted and supported motion for summary disposition under MCR 2.116(C)(10), the nonmoving party cannot rely on mere allegations or denials in his or her pleadings to establish a question of fact. See *Quinto v. Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996). Rather, the nonmoving party must present at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v. Rozwood*, 461 Mich. 109, 120-121; 597 N.W.2d 817 (1999), reh. den. 461 Mich. 1205 (1999); *Skinner v. Square D. Co.*, 445 Mich. 153, 161; 516 N.W.2d 475 (1994). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v. AEW Capital Mgt., LLP*, 481 Mich. 419, 425; 751 N.W.2d 8 (2008).

We review for an abuse of discretion a trial court's ruling regarding the qualifications of an expert witness to testify. *Gonzalez v. St. John Hosp. & Med. Ctr.*, 275 Mich. App. 290, 294; 739 N.W.2d 392 (2007). A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled and reasonable outcomes. *Id.* We also review de novo whether and to what extent the law of the case doctrine applies. See *Kasben v. Hoffman*, 278 Mich. App. 466, 470; 751 N.W.2d 520 (2008).

III. ANALYSIS

On appeal, plaintiff raises a number of claims of error, chief among them that the law of the case doctrine precluded the trial court from revisiting this Court's previous determination that Dr. Lustgarten qualified to provide expert testimony on the standard of care in this case. We agree.

Plaintiff, as the proponant of expert testimony, had the burden of establishing its admissibility, including the requirement of reliability. *Edry v. Adelman*, 486 Mich. 634, 639; 786 N.W.2d 567 (2010); *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 789; 685 N.W.2d 391 (2004). As explained in this Court's previous decision, the admissibility of Dr. Lustgarten's testimony required examination of MRE 702, MCL 600.2955, and MCL 600.2169:

> The admissibility of expert testimony on the applicable standard of care in medical-malpractice actions is governed by several different provisions. MRE 702 generally provides for the testimony of experts:
>
> > 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.
>
> MCL 600.2955, which is largely derived from the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594; 113 S.Ct. 2786; 125 L. Ed. 2d 469 (1993), provides in pertinent part:
>
> > (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> ***4** (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

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> (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.
>
> * * *
>
> (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.

In turn, MCL 600.2169 provides in relevant part:

> (2) In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.
>
> (3) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section. [*Wilson-White*, unpub. op. at 3-4.]

At the outset, we note that although defendants' arguments on appeal are couched in terms of Dr. Lustgarten's inability to testify concerning causation, their motion for an evidentiary hearing sought specifically to redetermine whether he should be able to testify about the relevant standard of care on the basis of an alleged change in the law, namely, our Supreme Court's decision in *Elher*, and the presentation of "new" evidence. Moreover, after this Court's decision, the trial court entertained a separate motion for summary disposition concerning causation and, after reconsideration of its earlier order it found that, through the testimony of Dr. Lustgarten and Dr. Spitz, plaintiff had established a question of fact concerning causation as it related to the decision to operate. Defendants have not appealed that decision.

The trial court's August 2, 2017 decision did not discuss Dr. Lustgarten's qualification to testify about proximate cause, but only again determined the issue whether he could testify about the standard of care. Thus, the instant appeal, like this Court's earlier decision, again pertains to the question whether the trial court erred by deciding that Dr. Lustgarten lacked the qualifications to testify about the standard of care. We agree with plaintiff that the law of the case doctrine prohibited the trial court from revisiting the admissibility of Dr. Lustgarten's standard-of-care testimony.

***5** In *Brownlow v. McCall Enterprises, Inc.*, 315 Mich. App. 103, 110-111; 888 N.W.2d 295 (2016) (quotation marks and citations omitted), this Court explained:

> The law of the case doctrine provides that a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue, but only if the facts remain materially the same. The doctrine's purpose is the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing.

A trial court on remand possesses the authority to take any action that is consistent with the opinion of the appellate court. *VanderWall v. Midkiff*, 186 Mich. App. 191, 196; 463 N.W.2d 219 (1990). The purpose of the law of the case doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Ashker v. Ford Motor Co.*, 245 Mich. App. 9, 13; 627 N.W.2d 1 (2001) (citation omitted). Once an appellate court has resolved a legal question and remanded the case for further proceedings, the legal question will not be determined differently in subsequent proceedings in the same case where the facts remain materially the same. *Grievance Administrator v. Lopatin*, 462 Mich. 235, 259; 612 N.W.2d 120 (2000). "[A]s a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Id.* at 260 (citation omitted).

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The law of the case doctrine is not a limit on this Court's power and this Court may under some circumstances disregard it. See *Locricchio v. The Evening News Ass'n*, 438 Mich. 84, 109; 476 N.W.2d 112 (1991). However, this Court has repeatedly held that it is obligated to apply the law of the case doctrine when there has been no material change in the facts or an intervening change in the law. *Duncan v. State*, 300 Mich. App. 176, 188-189; 832 N.W.2d 761 (2013); *Foreman v. Foreman*, 266 Mich. App. 132, 138; 701 N.W.2d 167 (2005); *Reeves v. Cincinnati, Inc. (After Remand)*, 208 Mich. App. 556, 560; 528 N.W.2d 787 (1995). "Even if the prior decision was erroneous, that alone is insufficient to avoid application of the law of the case doctrine." *Duncan*, 300 Mich. App. at 189 (citation omitted).

Initially, contrary to some of defendants' arguments below, this Court's previous decision specifically resolved not only the question of Dr. Lustgarten's qualification as an expert witness, but also found that the basis for his testimony "was reliable, supported by training and experience, and sufficient to assist the trier of fact." *Wilson-White*, unpub. op. at 6. This Court specifically held that Dr. Lustgarten "was qualified to provide expert testimony on the standard of care in this case" under MRE 702, MCL 600.2955, and MCL 600.2169. *Id.* The trial court should have found, as it did initially, that it was bound by this Court's decision.

The essential facts of this case have not changed materially since this Court issued its decision. Nothing new has been presented about the decedent's condition, treatment, or cause of death. Plaintiff's theory of medical malpractice liability and breach of the standard of care also remain the same, although we note that Dr. Lustgarten testified at the evidentiary hearing that other factors in the decedent's chart would also support his opinion.

***6** Among their other arguments below, defendants maintained that the law of the case doctrine did not apply because, after this Court issued its decision, the Michigan Supreme Court decided *Elher*. However, *Elher* does not serve as an "intervening change in the law" permitting the trial court to avoid application of the law of the case doctrine in this case.

In *Elher*, which also involved a medical malpractice claim, the plaintiff offered a standard of care expert and the defendants moved for summary disposition on the ground that the expert failed to meet the requirements of MRE 702 and MCL 600.2955. *Elher*, 499 Mich. at 17. The trial court granted the motion, but this Court reversed. *Id.* at 18. The Supreme Court reversed this Court's decision. It explained that this Court "rejected as irrelevant the three guideposts relied on by the circuit court—the absence of scientific testing and replication, the lack of evidence that [the expert's] opinion and its basis were subjected to peer-reviewed publication, and plaintiff's failure to demonstrate the degree to which [the expert's] opinion and its basis were generally accepted in the relevant expert community." *Id.* at 18-19. In analyzing the issue, our Supreme Court first considered the *Daubert* standard, and noted that, to determine the reliability of a proposed expert's testimony, "[a] lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony" and that " '[u]nder MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible.' " *Id.* at 22, quoting *Edry*, 486 Mich. at 642. The Court found that the plaintiff's expert qualified to testify as an expert because of his extensive qualifications. *Elher*, 499 Mich. at 24. The Court also acknowledged that the *Daubert* factors "may or may not be relevant in assessing reliability, depending on the nature of the issue, the expert's expertise, and the subject of the expert's testimony," and that the United States Supreme Court "has stated that, in some cases, 'the relevant reliability concerns may focus upon personal knowledge or experience[.]' " *Id.* at 24-25, quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150; 119 S.Ct. 1167; 143 L. Ed. 2d 238 (1999).

Our Supreme Court, however, then noted that the United States Supreme Court had held that, even in those cases, reference to the *Daubert* factors could be helpful. *Elher*, 499 Mich. at 25. The Court held that the trial court did not abuse its discretion when it relied on two *Daubert* factors to find that the expert witness's testimony would not be reliable. Our Supreme Court noted that this Court had erred when it determined that the peer-review articles supporting the defendants' position were not in fact peer-reviewed, and thus found that this Court erred when it determined that the trial court could not have relied on the articles in making its determination. *Id.* In contrast, the Court noted that the expert had admitted that he knew of no one who shared his opinion and thus the trial court did not abuse its discretion by relying on the lack of evidence regarding the degree to which the expert's opinion was generally accepted. *Id.* at 26. Although our Supreme Court agreed with this Court that the trial court erred by relying on the lack of scientific testing and replication because the factor lacked relevance, it ultimately agreed with the trial court that the expert's opinion was not "based on

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reliable principles or methods" under MRE 702. Specifically, our Supreme Court held:

> ***7** Plaintiff merely pointed to [the expert's] background and experience in regard to the remaining factors, which is generally not sufficient to argue that an expert's opinion is reliable. [The expert] admitted that his opinion was based on his own beliefs, there was no medical literature supporting his opinion, and plaintiff failed to provide any other support for [the expert's] opinion.
>
> The circuit court also did not abuse its discretion by concluding that [the expert's] testimony was deficient because it did not conform to MRE 702. We find this Court's decision in *Edry v. Adelman* to be instructive. In *Edry*, this Court concluded that an expert failed to meet the requirements of MRE 702 because his opinion "was not based on reliable principles or methods"; his opinion was contradicted by the opinion of the defendant's expert and published literature on the subject that was admitted into evidence, which even he acknowledged as authoritative; and there was no literature supporting the testimony of plaintiff's expert admitted into evidence. As in *Edry*, [the expert'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 [the expert's] opinion that would demonstrate that it had some basis in fact and that it was the result of reliable principles or methods. While peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered [the expert's] opinion unreliable and inadmissible under MRE 702. [*Elher*, 499 Mich. at 27-28 (footnotes omitted).]

Close analysis of the *Elher* decision establishes that it did not create new law. Our Supreme Court relied entirely on existing law, such as *Daubert* and, more particularly *Edry*, the case cited by this Court in its previous decision in this case for analysis whether Dr. Lustgarten's testimony was reliable. In *Elher*, our Supreme Court did not explicitly or implicitly overrule any precedent. Rather, it applied existing precedent to the facts presented. Even if defendants can show that this case is factually similar to *Edry* or *Elher* and that this Court may have erroneously analyzed Dr. Lustgarten's proposed standard of care testimony to determine its reliability and admissibility, the trial court remained bound by this Court's decision. The law of the case doctrine precluded it from revisiting the admissibility of Dr. Lustgarten's expert testimony. *Duncan*, 300 Mich. App. at 189.

Therefore, the trial court erred by revisiting the issue of the admissibility of Dr. Lustgarten's testimony, abused its discretion by thereafter declaring Dr. Lustgarten's expert testimony regarding the applicable standard of care inadmissible, and erred by granting defendants' motion for summary disposition on that basis. Accordingly, we reverse the trial court's orders and remand for further proceedings. Given our holding, it is unnecessary for us to consider plaintiff's other claims of error.

***8** Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Raschelle GOFF, Plaintiff-Appellant,

v.

Karen L. NIVER, M.D., and Northpointe OB/GYN, P.C., Defendants-Appellees.

No. 343315
|
June 18, 2019

St. Clair Circuit Court, LC No. 16-001788-NH

Before: Gadola, P.J., and Boonstra and Swartzle, JJ.

Opinion

Per Curiam.

***1** Plaintiff, Raschelle Goff, appeals as of right the order of the trial court dismissing her claim against defendants, Karen L. Niver, M.D. (Niver) and Northpointe OB/GYN, P.C. (Northpointe). We affirm.

I. FACTS

This case involves a claim of medical malpractice arising out of medical care and treatment provided to plaintiff by Niver and her professional corporation, Northpointe, following the delivery of plaintiff's baby on July 10, 2014. Plaintiff alleges that during the birth of her baby, who at birth weighed 11 pounds, 4 ounces, she suffered three injuries: a second-degree tear in the perineum, a rectovaginal fistula, being a tear from the vagina into the rectum, and a fourth-degree tear of the anterior wall of the external anal sphincter. At the time Niver delivered plaintiff's baby, Niver identified the second-degree tear in the perineum and surgically repaired the tear immediately after the delivery of the baby. Niver testified that she did examine plaintiff for additional injuries, but did not identify any other injury. Plaintiff was discharged from the hospital on July 12, 2014.

On July 17, 2014, plaintiff called Niver, complaining of fever, nausea, vaginal bleeding, diarrhea, and the inability to control her bowels. Niver prescribed antibiotics for plaintiff, but did not examine plaintiff or talk to her personally. On July 19, 2014, plaintiff went to the emergency room at Port Huron Hospital with continuing symptoms. Concerned about the possibility of a fourth-degree tear, doctors at Port Huron Hospital sent plaintiff to the University of Michigan emergency department. There, she was diagnosed with a possible compromised anal sphincter, but was told to follow up with Niver. She saw Niver on July 21, 2014, at which time Niver diagnosed a tear in the external anal sphincter, but did not diagnose a rectovaginal fistula.

On July 31, 2014, plaintiff was seen at University of Michigan Medical Center, where she was diagnosed with a "chronic third-degree laceration," being a "separation of her external anal sphincter." Dr. Dee Ellen Fenner performed surgery to repair the external anal sphincter, and during that surgery confirmed the presence of a suspected rectovaginal fistula. The rectovaginal tear was repaired surgically by Dr. Fenner at University of Michigan Medical Center on August 4, 2014. After the surgeries, plaintiff underwent physical therapy beginning in September 2014. Plaintiff continued to experience fecal leakage and underwent additional surgical procedures in December 2015 and May 2016, but continued to have some bowel control problems and to periodically experience fecal leakage.

Plaintiff brought this action alleging that Niver violated the standard of care by failing to recognize and surgically repair the external sphincter tear and the rectovaginal tear following the delivery. Plaintiff alleged that as a result of the delay in diagnosis and treatment, she now suffers from fecal incontinence and pelvic floor issues. Before the trial court, plaintiff presented Dr. Robert Dein as an expert on the issues of standard of care and causation. Dein opined that Niver's care of plaintiff fell below the standard of care, and that the delay in repairing the tear of the external anal sphincter decreased the likelihood of a successful repair, and thus decreased the likelihood that plaintiff would make a total recovery. Dein testified that his opinion was based upon his own experience and expertise, not upon any specific scientific literature or studies. Plaintiff did not introduce any scientific literature or studies to support Dein's opinion.

***2** Defendants filed a motion in limine seeking to exclude Dein's testimony regarding causation, arguing that plaintiff

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had not presented medical or scientific data to support Dein's opinion that earlier repair of the lacerations would have made a difference in the long-term outcome. The trial court granted defendants' motion in limine, holding that plaintiff had not demonstrated that Dein's opinion regarding causation was based on reliable principles and methods. The trial court noted that plaintiff had not provided any scientific literature or study to support Dein's causation testimony, and Dein could not give reliable foundation for his opinion other than his own experience. The trial court found that Dein's causation testimony therefore was not reliable under MRE 702 and MCL 600.2955(1). The trial court directed defendants to submit a proposed order reflecting the trial court's decision.

Defendants submitted a proposed order under MCR 2.602, and plaintiff objected to the proposed order because it not only excluded Dein's causation testimony, but also dismissed plaintiff's claim in its entirety. Plaintiff, however, did not submit an alternative proposed order, nor did plaintiff notice the hearing on the proposed order and objection as required by MCR 2.602(B)(3)(c). Defendants eventually moved for entry of their proposed order, responding to plaintiff's objections. At a hearing on the motion, the trial court entered defendants' proposed order granting defendants' motion in limine and also dismissing plaintiff's claim. The trial court thereafter denied plaintiff's motion for reconsideration. Plaintiff now appeals to this Court.

II. DISCUSSION

A. MOTION IN LIMINE

Plaintiff contends that the trial court abused its discretion by granting defendants' motion in limine and excluding the testimony of Dr. Dein, plaintiff's expert witness on causation and standard of care. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion in limine, see *Elezovic v. Ford Motor Co.*, 472 Mich. 408, 431; 697 N.W.2d 851 (2005), and similarly reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Edry v. Adelman*, 486 Mich. 634, 639; 786 N.W.2d 567 (2010). An abuse of discretion occurs when the trial court chooses an outcome outside the realm of reasonable and principled outcomes. *Kalaj v. Khan*, 295 Mich. App. 420, 425; 820 N.W.2d 223 (2012). This Court also reviews for an abuse of discretion the trial court's decision regarding the qualification of an expert. *Clerc v. Chippewa Co. War Mem. Hosp.*, 267 Mich. App. 597, 601; 705 N.W.2d 703 (2005). "[A]ny error in the admission or exclusion of evidence will not warrant appellate relief unless refusal to take this action appears ... inconsistent with substantial justice, or affects a substantial right of the [opposing] party." *Craig v. Oakwood Hosp.*, 471 Mich. 67, 76; 684 N.W.2d 296 (2004) (quotation marks and citation omitted).

A medical malpractice claim is one that arises during the course of a professional medical relationship and hinges upon a question of medical judgment. *Lockwood v. Mobile Med. Response, Inc.*, 293 Mich. App. 17, 23; 809 N.W.2d 403 (2011). To establish medical malpractice, the plaintiff bears the burden of proving "(1) the applicable standard of care, (2) a breach of that standard by the defendant, (3) an injury, and (4) proximate causation between the alleged breach of duty and the injury." *Rock v. Crocker*, 499 Mich. 247, 255; 884 N.W.2d 227 (2016). " 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig*, 471 Mich. at 86. A court is required to first determine whether a defendant's negligence was a cause in fact of the plaintiff's injuries before determining whether the defendant's negligence was the legal cause of those injuries. *Ray v. Swager*, 501 Mich. 52, 64; 903 N.W.2d 366 (2017). Proximate cause must be proved by a preponderance of the evidence. *Craig*, 471 Mich. at 86.

***3** To establish cause in fact, the plaintiff must present substantial evidence from which the jury could conclude that, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Weymers v. Khera*, 454 Mich. 639, 647; 563 N.W.2d 647 (1997). A plaintiff establishes cause in fact sufficient to create a genuine issue of material fact if the plaintiff establishes "a logical sequence of cause and effect, notwithstanding the existence of other plausible theories, although other plausible theories may also have evidentiary support." *Patrick v. Turkelson*, 322 Mich. App. 595, 617; 913 N.W.2d 369 (2018) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v. MidMichigan Med. Ctr.-Gratiot*, 316 Mich. App. 1, 16; 891 N.W.2d 528 (2016).

In a medical malpractice action, expert testimony is required to prove causation. *Kalaj*, 295 Mich. App. at 429. The proponent of the expert testimony must establish that the expert is qualified under MCL 600.2169, and also that the

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opinion is reliable under MRE 702 and MCL 600.2955. See *Elher v. Misra*, 499 Mich. 11, 22; 878 N.W.2d 790 (2016). In this case, the parties do not dispute Dein's qualifications, but do dispute whether his opinion on causation was reliable.

MRE 702 requires a trial court to determine that each aspect of a proposed expert witness's testimony, including the underlying principles and methodology, is reliable. *Id.* That rule provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. [MRE 702.]

Our Supreme Court has stated that a lack of supporting medical literature is an important consideration in determining the admissibility of expert witness testimony, but not necessarily dispositive. *Edry*, 486 Mich. at 640. Our Supreme Court has also said, however, that an expert in a medical malpractice lawsuit is expected to justify his or her opinion with authoritative materials supporting the opinion, and that generally, it is not sufficient under MRE 702 to argue that expert testimony is reliable, and therefore admissible, based solely on the expert's experience and background. *Id.* at 642.

In addition to MRE 702, MCL 600.2955 requires the trial court to determine, by examining the expert's opinion and its basis, whether an expert's opinion is reliable and will assist the finder of fact. *Elher*, 499 Mich. at 23. The trial court is required to consider the facts, technique, method, and reasoning upon which the expert relied, considering:

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> ***4** (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 the context of litigation. [MCL 600.2955(1).]

The trial court, as gatekeeper regarding expert testimony, is obligated to ensure that expert testimony is both relevant and reliable, *Edry*, 486 Mich. at 640, by conducting a "searching inquiry." *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 782; 685 N.W.2d 381 (2004). Ultimately, the trial court must rule on the strength of the record presented, see *Edry*, 486 Mich. at 640-642, and it is the burden of the party introducing the expert testimony to demonstrate that the evidence is sufficiently reliable. *Figurski v. Trinity Health-Michigan*, 501 Mich. 1051, 1053; 909 N.W.2d 445 (2018) (MARKMAN, C.J., dissenting). As gatekeeper, the trial court is not required "to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin v. A & L Parts, Inc.*, 274 Mich. App. 122, 127; 732 N.W.2d 578 (2007). However, the trial court must ensure that admitted expert opinion testimony is derived from a sound foundation. *Id.*

In this case, Dr. Dein testified that Niver violated the standard of care by failing to diagnose and treat the rectovaginal tear and the anal external sphincter tear at the time of delivery. Dein further testified that this breach of the standard of care was the cause in fact of plaintiff's ongoing impairment:

> So the goal is to repair tissue before it becomes inflamed. We know that Mrs. Goff by day seven, after delivery, developed a high fever up to 103 degrees. We know that when she was examined by, I believe, Dr. Slay, she called the tissue [friable]. So it was very inflamed tissue. And when you have inflamed tissue, the likelihood of a successful repair is much lower. So the whole issue here is not that there was a hole in her rectum or an injury to the

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sphincter that can happen with a large baby. The issue is that that was not recognized, and by not being recognized, the patient got inflamed and the likelihood of future stool function being normal goes down.

* * *

So the best chance of having long-term normal function is to repair the injuries before intense inflammation sets in. And when you have a rectovaginal fistula, you basically have stool, and more importantly, the bacteria from stool in spaces that are not designed to handle it, such as the vagina. And what happens then is you have an intense inflammatory state and tissue tends to break down.

So had you been – I'm sorry – had the patient had the injuries recognized and been repaired in the delivery room on July 10, 2014, yeah, she still could have had issues down the line, and there's no question that sometimes that happens, but the chances of having normal stool function significantly decreases because she had a – a significant delay in diagnosis.

Dein, however, agreed that some women who have the repair surgery immediately nonetheless fail to fully recover, and that there was no way to quantify the risk of incomplete recovery. In response to questioning, he testified:

***5** Q: ... Where there is a sphincter tear in a female that's birth related, a certain percentage of those women go on to have problems regardless, right?

A: As I stated on direct, yes, that's true.

Q: And there is really no way to quantify, is there, whether or not Mrs. Goff fell into a different category as opposed to somebody who had – a woman who had a fourth-degree sphincter tear as a result of a birth?

A: By quantifying, you mean is there a number we can assign to it?

Q: Exactly.

A: There's no number we can assign to it.

Q: I mean it is – and you may disagree – but it is conceivable that despite this alleged delay in repair, Mrs. Goff could have gone on to have the same problems today totally unrelated to the delay in the repair procedure? [objection]

A: Well, I mean, I think we talked about that on direct, that some women will have continuing problems, but that a delay leading to an intense inflammation is going to increase the risk that that repair will not hold. So, yes, it is possible that she could have had it, but she has reduced her opportunity to have normal function by having the delay in recognition.

Q: And we don't know how much reduction within a reasonable degree of medical certainty?

A: No.

Dein conceded that he was relying solely upon his own experience and expertise as the basis for his opinion, and not upon specific scientific literature or studies. Regarding whether support existed for Dein's testimony that delay in diagnosing and repairing the tears resulted in plaintiff having a lesser chance of full recovery,[1] Dr. Fenner testified that there was no data to support the opinion that a delay of three or four weeks before performing the repair surgery would result in an increased risk of incomplete recovery.

1 Dr. Fenner testified that plaintiff had fully recovered from the rectovaginal fistula and Fenner considered that surgery to have been successful. Her testimony regarding plaintiff's ongoing recovery related to the injury to the external anal sphincter.

Defendants filed a motion in limine to exclude Dein's causation testimony, arguing that it was not reliable because plaintiff had failed to support Dein's opinion with any scientific data. The trial court granted the motion, and held, in relevant part:

Dr. Dein stated that he based his opinion on his personal experience and not on any specific scientific literature or study. He testified that a portion of women who suffer a fourth-degree tear will still go on to have bowel problems in the future, but he believes that the delay in this case reduced Plaintiff's opportunity to have normal bowel function. However, Dr. Dein could not quantify that reduction within a reasonable degree of medical certainty. Further, Plaintiff has not provided any scientific data to support Dr. Dein's opinion. In fact, Dr. Fenner, who performed Plaintiff's repair, stated in her deposition that there is inadequate scientific data to support Dr. Dein's opinion.

The only foundation that Dr. Dein offered for his opinion is that if the repair is not made at the time of delivery, then the

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surrounding tissue will become inflamed and friable. When that happens, Dr. Dein opined, the subsequent repair is much more likely to break down. However, once again, Dr. Dein did not provide any evidence or literature to support his reasoning.

***6** After reviewing Dr. Dein's testimony and examining his opinion and its basis, including the facts, technique, methodology, and reasoning relied on by Dr. Dein, pursuant to MRE 702 and MCL 600.2955(1), this Court finds that Plaintiff has not shown that Dr. Dein's opinion is based on reliable principles and methods. Plaintiff has not provided any scientific literature or study to support Dr. Dein's opinion, and Dr. Dein himself could not give a reliable foundation for his opinion other than his experience. As stated previously, "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.* [*Elher*, 499 Mich.] at 23. There is no testimony to support the finding that Dr. Dein's testimony is the product of reliable principles and methods. Therefore, this Court finds that Dr. Dein's causation testimony is not reliable pursuant to MRE 702 and MCL 600.2955(1) and will not assist the trier of fact.

Trial courts are in the best position to conduct the searching inquiry into the reliability of expert testimony, and this Court will not overturn the trial court's ruling to exclude or admit expert testimony absent an abuse of the trial court's discretion. *Figurski*, 501 Mich. at 1053 (MARKMAN, C.J., dissenting), citing *Craig*, 471 Mich. at 76. Here, a review of the record indicates that the trial court was acting within its reasonable discretion when it excluded the testimony of Dr. Dein. The trial court considered the factors set forth in MCL 600.2955(1), and determined that Dein did not present any scientific literature or studies to support his opinion that the alleged delay in diagnosing and repairing plaintiff's injuries negatively affected her ability to completely recover.

Plaintiff argues that there are no studies to support Dein's opinion that the delay in plaintiff's treatment decreased the odds of her fully recovering because to conduct a study where the treatment of patients was delayed would be unethical. Plaintiff argues that she should not be penalized for the non-existence of an unethical study.[2] But in this case, plaintiff did not introduce any data to support Dein's testimony in any regard. For example, Dein testified that the failure to repair the injuries at the time of delivery resulted in increased inflammation, which then made repairing the injuries more difficult. Plaintiff, however, did not present any data to support these underlying propositions. Plaintiff is therefore unable to argue that she has met any of the reliability factors of MCL 600.2955(1).

2 Plaintiff presupposes that the only way to create the data would be to delay medical treatment to some women who need the surgery, overlooking the possibility that some women might have had medical treatment delayed incidentally, as was potentially true in the case of plaintiff's care, and thus their cases could be studied. In fact, Dr. Fenner's testimony suggested that some data did exist regarding women whose repair surgery was delayed for as long as 10 to 30 years, and she opined that in those cases, the chance of full recovery was not as great as compared with patients who had the surgical repair immediately. There is no suggestion that the study referenced was unethical or that patients were intentionally denied treatment.

Generally, it is not sufficient under MRE 702 to rely only upon an expert's experience and background to argue that the expert's opinion is reliable. *Edry*, 486 Mich. at 642. "The whole point of *Daubert* [*v. Merrell Dow Pharm, Inc.*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993)] is that experts can't speculate. They need analytically sound bases for their opinions, and it is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Edry*, 486 Mich. at 642 n. 6 (quotation marks and citation omitted). The proponent of evidence bears the burden of establishing its admissibility, and a trial court may only admit expert testimony after it ensures the reliability of the evidence under MRE 702. Here, plaintiff failed to provide scientific support for any aspect of Dein's opinion. Given the authority supporting exclusion of testimony when there is no support for the theory beyond the expert's own opinion, it cannot be said that the trial court's decision was outside the range of reasonable and principled outcomes.

B. DISMISSAL OF CLAIM

***7** Plaintiff next contends that the trial court erred in dismissing the entirety of her complaint. We review de novo a trial court's decision to grant or deny a motion to dismiss. *Mouzon v. Achievable Visions*, 308 Mich. App. 415, 418; 864 N.W.2d 606 (2014).

After the trial court issued its opinion granting defendants' motion in limine, plaintiff objected to the proposed order

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submitted by defendants that included language dismissing her claim in its entirety. Plaintiff argued that she should be allowed to proceed on a claim for damages she incurred before her injuries were properly treated. The trial court noted that plaintiff had waived her objection to the proposed order because she had not followed the proper procedure for objecting. The trial court also determined that the proposed order properly reflected the trial court's ruling.

Plaintiff now contends that the trial court erred in dismissing the entirety of her claim and that she should be permitted to proceed on a claim for damages for the period between when her injury occurred and when she obtained proper medical care. Plaintiff argues that the evidence before the trial court supported a claim for damages for this period. A review of the complaint, however, demonstrates that plaintiff did not specifically allege damages for that period. Although the complaint does reference past pain, suffering, wage loss and medical expenses, the complaint does so in the context of seeking damages for ongoing pain and disability related to her incomplete recovery.

Because plaintiff's complaint did not specifically seek the damages she now wishes to seek, it appears that essentially plaintiff wanted to amend her complaint in the face of dismissal. Yet plaintiff never submitted a motion to amend the complaint in the trial court. At the time of dismissal in this case, plaintiff required leave of the trial court to amend her complaint. MCR 2.118(A)(2) provides that leave to amend "shall be freely given when justice so requires." The trial court must then give a particularized reason for denying leave, such as undue delay, bad faith, or dilatory motive, repeated failures to cure deficiencies after allowed amendment, undue prejudice, or futility. *Miller v. Chapman Contracting*, 477 Mich. 102, 105; 730 N.W.2d 462 (2007). Further, if a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), the trial court is required to give the parties an opportunity to amend their pleadings unless it would be futile to do so. *Jawad A. Shah, MD, PC v. State Farm Mut. Auto. Ins. Co.*, 324 Mich. App. 182, 209; 920 N.W.2d 148 (2018).

In this case, in the face of the proposed order of dismissal, plaintiff could have sought leave to amend her complaint. However, although a plaintiff may have a right to amend a complaint under MCR 2.116(C)(I)(5), that court rule does not require the trial court to "sua sponte offer plaintiff an opportunity to amend." *Kloian v. Schwartz*, 272 Mich. App. 232, 242; 725 N.W.2d 671 (2006). Plaintiff in this case objected to the proposed order of dismissal, but did not seek leave to amend her complaint. The trial court therefore did not err in dismissing plaintiff's claim, absent a motion by plaintiff to amend the complaint to include the claim she now raises on appeal.

***8** Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Shante HOOKS, Plaintiff–Appellant,

v.

Lorenzo FERGUSON, M.D., and St. John Health d/b/a St. John Providence Hospital, Defendants–Appellees.

Docket No. 322872.
|
Nov. 3, 2016.

Oakland Circuit Court; LC No.2013–132522–NH.

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

ON REMAND

Opinion

PER CURIAM.

***1** This case is before us on remand from our Supreme Court for reconsideration in light of its decision in *Elher v. Misra,* 499 Mich. 11; 878 NW2d 790 (2016), a decision addressing the exclusion of expert witness testimony in a similar medical malpractice case. On reconsideration, we must conclude that the trial court in this case properly struck plaintiff's expert witness and granted summary disposition in defendants' favor; accordingly, we affirm.

The relevant facts were set forth in our prior opinion and included, in brief, that plaintiff's common bile duct was improperly clipped during her laparoscopic gallbladder removal surgery. At issue was whether clipping the common bile duct violated the standard of care or was merely a known complication of that surgery. Plaintiff's expert witness, Dr. Leonard Milewski, testified in his deposition that clipping the common bile duct violated the standard of care. Defendants filed a motion to strike Dr. Milewski as an expert witness on the ground that his opinion testimony failed to meet the requirements of MRE 702 and MCL 600.2955 and, thus, was unreliable and inadmissible. The trial court agreed, adopting defendants' arguments and noting, in brief, that none of the statutory requirements were met, that the standard of care articulated by Dr. Milewski was not supported by the scientific community or relevant literature, and that it constituted an "infallibility standard." Accordingly, the trial court granted defendants' motion to strike Dr. Milewski as an expert witness, as well as defendants' motion for summary disposition under MCR 2.116(C)(8) and (C)(10). On appeal, plaintiff argued that the trial court abused its discretion when it struck Dr. Milewski as her expert witness, and this Court agreed. In reaching our decision, we relied on the holding in *Elher v. Misra,* 308 Mich.App 276; 870 NW2d 335 (2014), a case with almost identical facts and proposed expert testimony, but that case was subsequently reversed, *Elher,* 499 Mich. at 14, resulting in this remand.

In *Elher,* the plaintiff's proposed expert opined that "it is virtually always malpractice to injure the common bile duct during a laparoscopic cholecystectomy, absent extensive inflammation or scarring." *Id.* at 15. But that expert provided no supporting authority for his opinion. *Id.* The issue our Supreme Court considered in *Elher* was whether the plaintiff's expert's opinion "was sufficiently reliable under the principles articulated in MRE 702 and by the Legislature in MCL 600.2955." *Id.* at 24. And the Court reiterated that "it is within a trial court's discretion how to determine reliability." *Id.* at 25.

The *Elher* Court then concluded that the trial court did not abuse its discretion by relying on two of the factors listed in MCL 600.2955 to conclude that the plaintiff's expert's opinion was not reliable. *Id.* The first factor, as noted by the *Elher* Court, was that defendants had submitted a peer-reviewed article which concluded that 97% of such injuries occurred because of misperception errors and not medical negligence; however, the plaintiff submitted no peer-reviewed literature in support of her expert's opinion and none were known. *Id.* The second factor was "the degree to which [the plaintiff's expert's] opinion was generally accepted." *Id.* In that regard, the plaintiff's expert "admitted that he knew of no one that shared his opinion." *Id.* at 26.

***2** The *Elher* Court acknowledged that not all factors in MCL 600.2955 may be considered relevant in a particular case and, in that case, "the scientific testing and replication factor" was not applicable. *Id.* However, the plaintiff's

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reliance on the proposed expert's background and personal experience, alone, in regard to the other factors was not sufficient to establish that his opinion was reliable. *Id.* The plaintiff's expert admitted that his opinion was based on his own beliefs and there was no medical literature or other support for his opinion. *Id.* Further, the *Elher* Court held, the plaintiff's expert's testimony did not meet the requirements of MRE 702, and was thus unreliable and inadmissible, because his opinion: (1) was not "the result of reliable principles or methods," (2) was not supported by literature on the subject and had no other form of support, and (3) was contradicted by the opinion of defendant's expert as well as published literature. *Id.* at 27.

As in the *Elher* case, here, plaintiff had argued that Dr. Milewski's expert opinion was reliable and admissible primarily because: (1) Dr. Milewski had extensive training and experience in performing the same surgery; (2) supporting medical literature is not a requirement for an expert's opinion to be admissible; and (3) the medical literature provided by defendants was unpersuasive, did not conflict with Dr. Milewski's opinion, or was inadmissible. The trial court struck Dr. Milewski as an expert witness after concluding that the requirements of MRE 702 were not met, and neither were any of the factors set forth in MCL 600.2955. In particular, the trial court noted that Dr. Milewski's opinion regarding the standard of care was (1) unsupported by the literature on the subject, (2) constituted an "infallibility standard," and (3) was not subjected to or supported by scientific testing, peer review, the existence of generally accepted standards, a known error rate, or general acceptance within the relevant expert community. In light of the *Elher* holding, we cannot conclude that the trial court abused its discretion. See *Elher,* 499 Mich. at 21.

In this case, as was true in the *Elher* case, the trial court abused its discretion by concluding that "the scientific testing and replication factor" in MCL 600.2955(1)(a) was applicable under the circumstances of this case; it was not relevant. See *id.* at 26. But, as the trial court also noted, plaintiff failed to submit any evidence, medical literature or otherwise, to support Dr. Milewski's standard of care opinion testimony that clipping plaintiff's common bile duct was negligent and not merely a known complication of gallbladder removal surgery. As in the *Elher* case, here, Dr. Milewski relied only on his background, personal experience, and beliefs to support his opinion. Thus, Dr. Milewski's opinion and its basis could not satisfy the other statutory factors set forth in MCL 600.2955. That is, Dr. Milewski's background, personal experience, and beliefs were insufficient to establish the reliability of his opinion. See *id.* at 26. The trial court also did not abuse its discretion when it concluded that, for similar reasons, the requirements of MRE 702 were not met, which rendered Dr. Milewski's opinion unreliable and inadmissible. That is, as in *Elher,* Dr. Milewski's opinion was neither shown to be "the result of reliable principles or methods" nor was it supported by medical literature or any other form of support. See *id.* at 27. Accordingly, we must affirm the trial court's decisions to strike Dr. Milewski as plaintiff's expert witness and grant defendants' motion for summary disposition.

***3** In her original appeal brief, plaintiff had also argued that the trial court abused its discretion when it denied her request for a hearing in accordance with *Daubert v. Merrell Dow Pharm, Inc.,* 509 U.S. 579; 113 S Ct 2786; 125 L.Ed.2d 469 (1993), and when it denied her request to amend her witness list. It was not necessary to address those issues in our prior opinion but, in light of our decision on remand, we consider them now. Both challenges are reviewed for an abuse of discretion. See *People v. Unger,* 278 Mich.App 210, 216–217; 749 NW2d 272 (2008); *Tisbury v. Armstrong,* 194 Mich.App 19, 20; 486 NW2d 51 (1991).

> [A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*People v. Babcock,* 469 Mich. 247, 269; 666 NW2d 231 (2003) (citations omitted); see also *Maldonado v. Ford Motor Co.,* 476 Mich. 372, 388; 719 NW2d 809 (2006).]

First, a *Daubert* hearing is generally held to determine the reliability of the scientific data upon which an expert relied, i.e., to determine "whether the opinion is rationally derived from a sound foundation." *Chapin v. A L Parts, Inc.,* 274 Mich.App 122, 139; 732 NW2d 578 (2007); see also *Gilbert v. DaimlerChrysler Corp.,* 470 Mich. 749, 779; 685 NW2d 391 (2004). In this case, plaintiff's expert's opinion was not derived from any identifiable scientific data; rather, it was derived from his background, personal experience, and beliefs. Accordingly, the trial court denied plaintiff's request for a *Daubert* hearing, concluding that it was not necessary because Dr. Milewski's deposition testimony was

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"very thorough and [had] fully explored and exhaustively addressed these issues." In light of the record, the trial court's decision did not fall outside the range of reasonable and principled outcomes. See *Maldonado,* 476 Mich. at 388.

Second, plaintiff moved to amend her witness list to add a new expert but discovery was closed—following several discovery deadline adjournments, the trial date was about two months away, and plaintiff failed to identify the new proposed expert. Defendants opposed the amendment, arguing in part that plaintiff failed to demonstrate the necessary good cause under MCR 2.401(I)(2), and that they would be severely prejudiced by such amendment at such a late stage of the proceedings. The trial court agreed with defendants, holding that plaintiff had "not shown good cause for the tardiness of naming a yet to be disclosed expert or disclosing any related opinions." The fact that plaintiff's expert witness was struck did not constitute good cause or a reasonable excuse. And the fact that plaintiff still failed to name her proposed new expert further made the motion untenable. Moreover, the trial court held, the prejudice in this matter was palpable because discovery would have to be reopened for a substantial period of time, another case evaluation would have to be conducted, new motions in limine and dispositive motions would have to be permitted, and the trial date would have to be adjourned by months. The trial court ultimately concluded that plaintiff's motion was untimely, as well as unwarranted, and the granting of it would severely prejudice defendants; thus, the motion was denied.

***4** On appeal, plaintiff argues that the trial court's denial of her motion resulted in an unnecessarily harsh result—the dismissal of her case, and that defendants would not be prejudiced if she was allowed to name a new expert. But plaintiff's reliance on the case of *Duray Dev., LLC v. Perrin,* 288 Mich.App 143; 792 NW2d 749 (2010), in support of her claim that there was "good cause" to amend her witness list is misplaced because that case involved discovery sanctions, not a motion to amend a witness list. *Id.* at 164. It is clear that the trial court's decision to deny plaintiff's motion to amend her witness list was a result that fell within the range of reasonable and principled outcomes, *Maldonado,* 476 Mich. at 388, considering that the case was essentially ready for trial and, as the trial court noted, granting the motion would result "in basically restarting the case."

Accordingly, the trial court did not abuse its discretion when it denied plaintiff's request for a *Daubert* hearing and when it denied her request to amend her witness list.

Affirmed.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Victor KHZOUZ and Amal Khzouz, Plaintiffs–Appellees,

v.

Stephen MENDELSON, MD, and Mendelson Orthopedics, PC, Defendants–Appellants.

No. 333901
|
March 13, 2018

Wayne Circuit Court, LC No. 14–009384–NH

Before: M. J. Kelly, P.J., and Jansen and Meter, JJ.

Opinion

Per Curiam.

***1** In this medical malpractice case, defendants, Stephen Mendelson, M.D., and his practice, Mendelson Orthopedics, P.C., appeal by leave granted[1] the trial court's order granting partial summary disposition in favor of plaintiffs, and denying defendants' motion in limine to preclude certain expert testimony as scientifically unreliable. We reverse and remand for further proceedings consistent with this opinion.

1 *Victor Khzouz v. Stephen Mendelson MD*, unpublished order of the Court of Appeals, entered November 29, 2016 (Docket No. 333901).

I. FACTUAL BACKGROUND

This case arises out of post-surgical treatment that plaintiff[2] received from defendant Dr. Mendelson, a board-certified orthopedic surgeon, following arthroscopic knee surgery in August 2012. During the procedure, Dr. Mendelson inserted a "pain pump" in plaintiff's knee. The parties dispute whether the pain pump was placed subcutaneously (i.e., under the skin) or intraarticularly (i.e., within the joint). Anesthesia (called bupivacaine) from the pump apparently managed plaintiff's pain effectively following the surgery until the pump was removed. At that point, however, plaintiff's pain increased dramatically. A subsequent MRI revealed that plaintiff had lost a significant amount of cartilage in his knee, and plaintiff eventually sought treatment from a different physician.

2 References to plaintiff in the singular denote plaintiff Victor Khzouz.

Plaintiff sued defendants for medical malpractice. He alleged that bupivacaine from the pain pump had caused a condition called chondrolysis, causing the cartilage in plaintiff's knee to rapidly deteriorate. Plaintiff further alleged that Dr. Mendelson's use of the pain pump fell below the applicable standard of care.

During discovery, the parties deposed five experts. Defendants' experts included Dr. Mendelson, Dr. John Denzin, and Dr. Roland Brandt. Plaintiff's included Dr. Harish Hosalkar and Dr. George Pappas.

Following discovery, the parties filed motions that essentially attacked the other side's experts. Defendants filed a motion in limine seeking to preclude "unreliable" testimony of plaintiff's experts, while plaintiff filed a motion for partial summary disposition, arguing that there was no genuine issue of material fact whether Dr. Mendelson breached the applicable standard of care by inserting the pain pump. In support of their respective motions, the parties presented several pieces of medical literature for the trial court's consideration. The literature in question concerns pain pumps used following arthroscopic shoulder surgery or intraarticularly, and it does not squarely address subcutaneous placement of a bupivacaine pain pump following arthroscopic knee surgery.

Ultimately, the trial court ruled in plaintiffs' favor with regard to both their motion for partial summary disposition and defendants' motion in limine challenging the reliability (and thus the admissibility) of the testimony of Dr. Pappas and Dr. Hosalkar. Plaintiffs sought and were granted interlocutory review in this Court.

II. STANDARDS OF REVIEW

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***2** This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Heaton v. Benton Constr. Co.*, 286 Mich. App. 528, 531; 780 N.W.2d 618 (2009). The trial court granted plaintiffs partial summary disposition under MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher v. Miotke*, 300 Mich. App. 132, 139–140; 832 N.W.2d 266 (2013) (quotations marks and citations omitted).]

"Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill–Marks v. Midmichigan Med. Ctr.–Gratiot*, 316 Mich. App. 1, 16; 891 N.W.2d 528 (2016). "This Court is liberal in finding genuine issues of material fact." *Jimkoski v. Shupe*, 282 Mich. App. 1, 5; 763 N.W.2d 1 (2008).

On the other hand, this Court reviews for an abuse of discretion the circuit court's *Daubert*[3] determination (i.e., its decision whether to exclude expert evidence for lack of scientific reliability). *Elher v. Misra*, 499 Mich. 11, 21; 878 N.W.2d 790 (2016). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes," and "[t]he admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion." *Id.* "We review de novo questions of law underlying evidentiary rulings, including the interpretation of statutes and court rules." *Id.*

3 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579; 113 S. Ct. 2786; 125 L.Ed. 2d 469 (1993).

III. ANALYSIS

Defendants argue that the trial court erred in several distinct and yet closely interrelated ways. They further argue that the trial court's errors warrant reversal. We agree.

"In a medical malpractice case, the plaintiff bears the burden of proving (1) the applicable standard of care, (2) a breach of that standard by the defendant, (3) an injury, and (4) proximate causation between the alleged breach of duty and the injury." *Rock v. Crocker*, 499 Mich. 247, 255; 884 N.W.2d 227 (2016). At issue here are the first two elements, and as a general rule, "[e]xpert testimony is required in medical malpractice cases to establish the applicable standard of care and to demonstrate that the defendant somehow breached that standard." *Birmingham v. Vance*, 204 Mich. App. 418, 421; 516 N.W.2d 95 (1994).[4] A defendant physician may be qualified to offer expert testimony, including expert testimony regarding the applicable standard of care. *Rice v. Jaskolski*, 412 Mich. 206, 212; 313 N.W.2d 893 (1981).

4 Such expert testimony is unnecessary "when the lack of professional care is so manifest that it would be within the common knowledge and experience of the ordinary layman...." *Sullivan v. Russell*, 417 Mich. 398, 407; 338 N.W.2d 181 (1983) (quotation marks and citation omitted).

***3** For these purposes, "a 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified," and "a 'specialist' is somebody who can potentially become board certified." *Woodard v. Custer*, 476 Mich. 545, 561; 719 N.W.2d 842 (2006). Given that Dr. Mendelson was board-certified in orthopedic surgery at the time he utilized the pain pump at issue in this case, the parties agree that he qualifies as an orthopedic specialist. Consequently, he is held to a different standard of care than a general practitioner. See MCL 600.2912a(1); *Cox v. Bd. of Hosp. Managers for City of Flint*, 467 Mich. 1, 17 n. 17; 651 N.W.2d 356 (2002). The applicable standard is enumerated by MCL 600.2912a(1), which provides, in pertinent part:

> [I]n an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> * * *
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances....

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Although this standard for specialists is sometimes referred to as a "national" standard of care, see, e.g., *Jalaba v. Borovoy*, 206 Mich. App. 17, 22; 520 N.W.2d 349 (1994), that is a misnomer, *Cox*, 467 Mich. at 17 n. 17. As explained in *Cox*:

> The term "national," ... is not an accurate description of the statutory standard of care for specialists. The plain language of subsection (b) states that the standard of care is that "within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances." Under the plain language of the statute, then, the standard of care for both general practitioners and specialists refers to the community. [*Id.* (citation omitted).]

Turning to the facts of this case, we agree with defendants that the trial court's analysis was erroneous in several fundamental ways. First, the trial court erred by failing to consider and decide whether the challenged testimony of plaintiffs' experts was substantively admissible *before* considering it for purposes of summary disposition under MCR 2.116(C)(10). See MCR 2.116(G)(6); *Maiden v. Rozwood*, 461 Mich. 109, 121; 597 N.W.2d 817 (1999) ("[t]he reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the *substantively admissible* evidence actually proffered") (emphasis added). In other words, the trial court was incorrect when it reasoned that its summary disposition ruling rendered defendants' *Daubert* motion "moot". On the contrary, the substantive admissibility of such testimony was a key part of the summary disposition analysis—one the trial court neglected. Further, "a question is not moot if it will continue to affect a [party] in some collateral way," *In re Dodge Estate*, 162 Mich. App. 573, 584; 413 N.W.2d 449 (1987), and defendants' *Daubert* challenge had implications extending beyond summary disposition; as a motion in limine, it was aimed at precluding admission of the challenged expert testimony at *trial.*

Second, the trial court applied an incorrect legal standard to determine the applicable standard of care, erroneously relying on the pertinent model jury instruction, M. Civ. JI 30.01,[5] rather than the language of the statute that sets forth the applicable standard of care for specialists, MCL 600.2912a(1). Although model jury instructions "are *intended* to accurately state applicable law," they do not constitute legal authority. *Moore v. City of Detroit*, 252 Mich. App. 384, 387; 652 N.W.2d 688 (2002) (emphasis added). Conversely, it is well-settled that MCL 600.2912a(1) *does* authoritatively "set[ ] forth the standards of care for general practitioners and specialists." *Cox*, 467 Mich. at 16. Therefore, when considering the applicable standard of care for purposes of summary disposition, the trial court should have relied on the actual language of MCL 600.2912a(1), not the model jury instruction's attempt to paraphrase that statute for lay jurors.

5 M. Civ. JI 30.01 provides:

> When I use the words "professional negligence" or "malpractice" with respect to the defendant's conduct, I mean the failure to do something which a [*name profession*] of ordinary learning, judgment or skill in [this community or a similar one / [*name particular specialty*]] would do, or the doing of something which a [*name profession / name particular specialty]* of ordinary learning, judgment or skill would not do, under the same or similar circumstances you find to exist in this case.
>
> It is for you to decide, based upon the evidence, what the ordinary [*name profession / name particular specialty*] of ordinary learning, judgment or skill would do or would not do under the same or similar circumstances.

***4** Third, the trial court erred by determining that it could not consider medical literature as *Daubert* evidence. "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." *Edry v. Adelman*, 486 Mich. 634, 642; 786 N.W.2d 567 (2010). "[T]he whole point of *Daubert* is that experts can't speculate. They need analytically sound bases for their opinions, and it is axiomatic that an expert, no matter how good his credentials, is not permitted to speculate." *Id.* at 642 n. 6 (quotation marks, citations, and brackets omitted). "[W]hile not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." *Id.* at 640. Likewise, as our Supreme Court has explained several times, pursuant to MCL 600.2955(1) a court *must* consider the peer-reviewed medical literature cited by the parties when entertaining a *Daubert* challenge. *Elher*, 499 Mich. at 28. Scholarly publications, peer-reviewed studies, and FDA publications are all "examples of objective and verifiable evidence[.]" *Krohn v. Home–Owners Ins. Co.*, 490 Mich. 145, 178; 802 N.W.2d 281 (2011). By holding otherwise, the trial court erred. And because its error in that regard formed part of the foundation for its ruling concerning the reliability of the challenged testimony (i.e., its admissibility under MRE 702 and MCL 600.2955(1)), the resulting ruling was "necessarily an abuse of discretion." See *Elher*, 499 Mich. at 21.

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Nevertheless, the trial court's several errors do not necessarily warrant reversal of its ruling regarding summary disposition. "This Court will not reverse a trial court's order of summary disposition when the right result was reached for the wrong reason." *Forest Hills Coop. v. City of Ann Arbor*, 305 Mich. App. 572, 615; 854 N.W.2d 172 (2014). Accordingly, plenary de novo review is required to determine whether the trial court ultimately reached the correct result.

A. SUBSTANTIVE ADMISSIBILITY OF THE CHALLENGED EXPERT TESTIMONY

As explained in *Rock*, 499 Mich. at 260, "[a] physician who testifies regarding the standard of care at issue must satisfy the requirements of MCL 600.2169(1)." Pursuant to MCL 600.2169(2), when

> determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony.

In the instant case, we agree with defendants that the trial court erred by considering Dr. Pappas's standard-of-care testimony for purposes of summary disposition. Under MCL 600.2169(1)(a), an expert witness may only offer testimony regarding the applicable standard of care for a specialist if the proposed expert was board-certified in the same specialty "at the time of the occurrence that is the basis for the claim or action." *Rock*, 499 Mich. at 262. Aside from Dr. Pappas's deposition transcript, plaintiffs cite no evidence regarding his qualifications as an expert. Although Dr. Pappas discussed orthopedic surgery at length during his deposition, he was neither asked nor did he testify whether he was board-certified in orthopedics or any other specialty, let alone whether he was board-certified at the time the surgery in this case was performed. Accordingly, plaintiffs failed to establish that Dr. Pappas's testimony concerning the applicable standard of care in this matter was substantively admissible, and it thus cannot be considered for purposes of this analysis.

However we disagree with defendants' contention that the trial court erred by considering Dr. Hosalkar's standard-of-care testimony for purposes of MCR 2.116(C)(10). To begin with, plaintiffs produced substantively admissible evidence establishing that Dr. Hosalkar was qualified under MCL 600.2169(1). Specifically, they produced his deposition testimony that he was board-certified in orthopedic surgery on the date in question and had devoted a majority of his professional time to the clinical practice of orthopedic surgery in the year preceding plaintiff's surgery, practicing "mainly" orthopedics during that timeframe.

***5** Furthermore, on this record we cannot conclude that Dr. Hosalkar's testimony was substantively inadmissible under *Daubert*. In concert, MRE 702 and MCL 600.2955(1) "govern the inquiry into whether expert evidence is scientifically reliable." *Chapin v. A & L Parts, Inc.*, 274 Mich. App. 122, 127; 732 N.W.2d 578 (2007). MRE 702 provides:

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

On the other hand, MCL 600.2955(1) provides, in pertinent part:

> In an action ... for injury to a person ..., a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.

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(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

"[A]ll the factors in MCL 600.2955 may not be relevant in every case." *Elher*, 499 Mich. at 27. Additionally, "the trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes." *Chapin*, 274 Mich. App. at 127. Rather, an expert opinion may be reliable even if it "is not shared by all others in the field or ... there exists some conflicting evidence supporting and opposing the opinion[.]" *Id.* Put differently, "as long as the opinion is rationally derived from a sound foundation," it is admissible. *Id.* "Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Wischmeyer v. Schanz*, 449 Mich. 469, 480; 536 N.W.2d 760 (1995).

At root, defendants' argument is that because there is no medical literature directly supporting Dr. Hosalkar's opinion, it is unreliable and thus inadmissible. The parties spend a great deal of their respective briefs debating the substance of the medical literature, with both sides inexorably concluding that such literature supports their position. This ignores the fact that every expert deposed in this case opined that there was no authoritative medical literature that is directly on point. Moreover, defendants ignore the fact that while a lack of supporting literature "is an important factor," it is not dispositive. See *Elher*, 499 Mich. at 23. In this case, given the experts' consensus that no authoritative literature exists in support of either side's position, plaintiffs cannot be faulted for failing to produce such literature.

***6** Also, we disagree with defendants' assertion that the cited medical literature does not offer any support for Dr. Hosalkar's standard-of-care testimony. Collectively, such literature establishes that, beginning in at least 2009, there was a growing concern within the orthopedic community that the intraarticular use of bupivacaine pain pumps was unsafe. Although such literature may not *directly* support every aspect of Dr. Hosalkar's standard-of-care testimony, it lends credence to his opinion that, at the time in question here, the use of a bupivacaine pain pump following arthroscopic knee surgery—whether intraarticularly or subcutaneously—fell below the recognized standard of practice or care for board-certified orthopedic surgeons. At a minimum, the literature shows that Dr. Hosalkar's opinion was rooted in hard science, not merely speculation about effects that bupivacaine *might* have.

In sum, we discern no reason that Dr. Hosalkar's standard-of-care testimony would be inadmissible at trial. Hence, it is substantively admissible, and it may be considered for purposes of our ensuing summary disposition analysis.

B. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

Considering all of the substantively admissible record evidence in the light most favorable to defendants, as the nonmoving parties, we conclude that partial summary disposition in plaintiffs' favor is unwarranted. Several genuine issues of material fact remain with regard to the applicable standard of care and whether Dr. Mendelson breached it.

Indeed, in their brief on appeal, plaintiffs inadvertently acknowledge one such genuine issue of material fact, asserting that "there is a question of fact as to whether the pain pump at issue was placed intra-articularly or subcutaneously." Plaintiffs are correct. Although Dr. Mendelson testified unequivocally that the pain pump was placed subcutaneously, and that he had "*never* inserted a pain pump intraarticularly," there is circumstantial evidence suggesting that his testimony in that regard might be either mistaken or intentionally false. (Emphasis added.) From such evidence, and in light of the evidence that it was widely known that intraarticular placement of a pain pump was associated with chondrolysis, a rational juror could infer that Dr. Mendelson's testimony regarding the placement of the pain pump was either mistaken or intentionally false. Hence, a genuine issue of material

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fact remains whether the pump was placed intraarticularly or subcutaneously.

Additionally, as several of the expert witnesses noted, even assuming that the pain pump *was* placed subcutaneously, there is a dearth of evidence about where, exactly, it was placed under plaintiff's skin. Accordingly, there is no evidence of how proximate the pain pump was to the site of plaintiff's arthroscopy. Consequently, there are at least two issues of fact with regard to where the pain pump was placed, and those factual disputes are decidedly material. Without a factual determination of what Dr. Mendelson actually did, and how he did it, it cannot be determined whether his conduct violated the applicable standard of care.

Finally, and contrary to the trial court's conclusion, there is a genuine dispute regarding the applicable standard of care. Dr. Mendelson opined that based on the existing literature when plaintiff's surgery was performed in 2012, it would not have been a violation of the standard of care for an orthopedic surgeon to place a bupivacaine pain pump intraarticularly following knee arthroscopy. Likewise, Dr. Denzin expressed the opinion that whether the intraarticular use of a Bupivacaine pain pump constituted a deviation from the standard of care at that time depended on the unique circumstances of the given case, noting that doing so might have been appropriate "if there was some reason to think that [plaintiff's] pain problem would have been excessive[.]" Dr. Denzin further testified that although subcutaneous placement of a pain pump following arthroscopic surgery is unnecessary "most of the time," every patient is unique. From such testimony, a reasonable juror could conclude that either intraarticular or subcutaneous placement of a bupivacaine pain pump accorded with the applicable standard of care under the circumstances of this case.

***7** We recognize that both Dr. Mendelson and Dr. Denzin made other statements that are arguably inconsistent with their standard-of-care testimony, and Dr. Hosalkar vigorously disagreed with their opinions. But "doubts pertaining to credibility, or an opposing party's disagreement with an expert's opinion or interpretation of facts, present issues regarding the weight to be given the testimony, and not its admissibility." *Surman v. Surman*, 277 Mich. App. 287, 309; 745 N.W.2d 802 (2007). "The extent of a witness's expertise is usually for the jury to decide." *Id.* Accordingly, for these purposes, it is improper to gauge the credibility of the expert witnesses. See *Bank of America, NA v. Fidelity Nat'l Title Ins. Co.*, 316 Mich. App. 480, 512; 892 N.W.2d 467 (2016) ("A trial court may not weigh evidence when ruling on a summary disposition motion, or make credibility determinations.") (citations omitted). Given the conflicting testimony from qualified experts in this case, it must be left for the trier of fact to decide which expert or experts to believe.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Lori MATHESON, also known as Lori Ann Schmitt, Plaintiff-Appellant,

v.

Michael SCHMITT, Defendant-Appellee.

No. 347022
|
November 21, 2019

Oakland Circuit Court, LC No. 2015-831539-DM

Before: Cameron, P.J., and Cavanagh and Shapiro, JJ.

Opinion

Per Curiam.

***1** In this child custody dispute, plaintiff appeals as of right the trial court's opinion and order, following an evidentiary hearing, in which the trial court (1) ordered the mandatory vaccination of the parties' minor child, (2) ordered the parties to select a new, mutually agreeable pediatrician for the child, and (3) modified defendant's parenting time. We affirm, but remand for the limited purpose of allowing the trial court to confirm what vaccinations are now recommended for the minor child by her pediatrician before the child begins the course of vaccinations.

I. BACKGROUND

This appeal arises from disputes between plaintiff and defendant concerning the scope of defendant's parenting time, the pediatrician for the child, and whether to vaccinate the child. The parties married on June 1, 2013, but separated while plaintiff was pregnant with the child, who was born in 2015. Following arbitration, a judgment of divorce was entered on April 14, 2016. The judgment provided that the parties were to share joint legal custody of the child, but that plaintiff would have primary physical custody of the child. The judgment also provided that defendant would not have overnight parenting time with the child until she reached the age of 13 months, and that defendant's parenting time with the child would gradually increase as she became older.

In February 2017, defendant filed a motion seeking makeup parenting time and requesting that the trial court order that the child be vaccinated, given that plaintiff was refusing to allow the child to be vaccinated. An extensive evidentiary hearing was held, initially before a referee and then before the trial court. As relevant to this appeal, in December 2018, the trial court ruled (1) it was in the child's best interests to be vaccinated, (2) the parties were to choose a new pediatrician for the child who was agreeable to each of them, and (3) defendant's parenting time with the child should be expanded. This appeal followed.

II. STANDARDS OF REVIEW

As recognized in *Lieberman v. Orr*, 319 Mich. App. 68, 76-77; 900 N.W.2d 130 (2017), this Court is required to affirm custody orders on appeal unless the trial court's factual findings do not accord with the great weight of the evidence, the trial court committed clear error in ruling on a significant issue, or the trial court's ruling was an abuse of discretion. As explained in *Lieberman*:

> The great weight of the evidence standard applies to all findings of fact. A trial court's findings regarding the existence of an established custodial environment and regarding each custody factor should be affirmed unless the evidence clearly preponderates in the opposite direction. An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions. Questions of law are reviewed for clear legal error. A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. [*Id.* at 77 (citation omitted).]

In child custody proceedings, the trial court abuses its discretion when its decision "is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler v. Simmons-Butler*, 308 Mich. App. 195, 201; 863 N.W.2d 677 (2014) (citation and quotation marks omitted). " 'A trial court commits clear legal error when it incorrectly chooses, interprets or applies the law.' " *Lieberman*, 319 Mich. App. at 77, quoting *Corporan v. Henton*, 282 Mich. App. 599, 605; 766 N.W.2d 903 (2009).

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III. MODIFICATION OF PARENTING TIME

***2** Plaintiff first argues that the trial court erred by finding that proper cause or a change of circumstances supported modification of defendant's parenting time, and by applying a preponderance-of-the-evidence standard to find that a modification of parenting time was in the child's best interests. We disagree.

A. RELEVANT LEGAL STANDARDS

In *Luna v. Regnier*, 326 Mich. App. 173, 179-180; 930 N.W.2d 410 (2018), this Court noted that when deciding a dispute concerning a child's parenting-time schedule, the child's best interests should guide the court's inquiry and ultimate decision. A strong presumption exists that the child's best interests are served by fostering a strong relationship with both parents. *Id.* at 180, citing MCL 722.27a(1). Because this issue originated with defendant's request to modify parenting time, the trial court was first required to determine whether there was proper cause or a change of circumstances to warrant consideration of defendant's request to modify parenting time. MCL 722.27(1)(c).

In addition, when a court considers a parent's request to modify parenting time, the court must determine whether the child has an established custodial environment with one or both parents. *Marik v. Marik*, 325 Mich. App. 353, 360, 367; 925 N.W.2d 885 (2018). This is because MCL 722.27(1)(c) precludes the trial court from modifying an existing judgment or order impacting parenting time "so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." This statutory language is consistent with the legal framework outlined in *Vodvarka v. Grasmeyer*, 259 Mich. App. 499, 508-509; 675 N.W.2d 847 (2003), in which this Court recognized that, consistent with MCL 722.27(1)(c), a trial court may not modify a custody order without first concluding that a change of circumstances or proper cause exists, and that the child's established custodial environment could not be altered without a showing, by clear and convincing evidence, that it serves the child's best interests. However, in *Shade v. Wright*, 291 Mich. App. 17, 25-26; 805 N.W.2d 1 (2010), this Court concluded that the definitions of "proper cause" and "change in circumstances" as clarified in *Vodvarka* are not controlling in the context of a case involving the modification of parenting time unless the modification in parenting time will alter the child's established custodial environment. Put simply, "[i]f a change in parenting time results in a change in the established custodial environment, then the *Vodvarka* framework is appropriate." *Id.* at 27. As explained in *Marik*, 325 Mich. App. at 361:

> "The established custodial environment is the environment in which over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." [*Pierron v. Pierron* (*Pierron II*), 486 Mich. 81, 85-86; 782 N.W.2d 480 (2010) (quotation marks and citation omitted in original)]. "An established custodial environment may exist in more than one home and can be established as a result of a temporary custody order, in violation of a custody order, or in the absence of a custody order." [*Pierron v. Pierron*, 282 Mich. App. 222, 244; 765 N.W.2d 345 (2009) (*Pierron I*), aff'd 486 Mich. 81 (2010) (quotation marks and citations omitted in original)]. An important decision affecting a child's welfare does not necessarily mean the established custodial environment has been modified. *Pierron II*, 486 Mich. at 86. There is only a change to the established custodial environment if parenting-time adjustments change "whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort ...." *Id.*

***3** Conversely, when a child's established custodial environment is not disrupted, a more flexible and expansive definition of "proper cause" or a "change in circumstances" will be employed. *Shade*, 291 Mich. App. at 27-28. In *Shade*, the child at issue was "growing up[,]" entering high school, and had encountered a changing academic and extracurricular schedule. The Court held that such changes would not meet the *Vodvarka* standard of a change in circumstances, but they did constitute proper cause or a change of circumstances to warrant a modification in parenting time, as long as the child's established custodial environment was not disrupted. *Id.* at 29-30. More recently, in *Marik*, this Court quoted with approval the following portion of this Court's decision in *Kaeb v. Kaeb*, 309 Mich. App. 556, 570-571; 873 N.W.2d 319 (2015), discussing the impact that normal changes in a child's life may have on parenting time:

> A condition that was in the child's best interests when the child was in elementary school might not be in the child's best interests after he or she reaches high school. Even ordinary changes in the parties' behavior, status, or living conditions might justify a trial court in finding that

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> a previously imposed condition is no longer in the child's best interests. We conclude that "proper cause" should be construed according to its ordinary understanding when applied to a request to change a condition on parenting time; that is, a party establishes proper cause to revisit the condition if he or she demonstrates that there is an appropriate ground for taking legal action. [*Marik*, 325 Mich. App. at 368 (citations omitted in original).]

Once the party seeking modification demonstrates proper cause or a change in circumstances under the governing legal framework, the trial court must then decide if the proposed modification serves the child's best interests. *Lieberman*, 319 Mich. App. at 83. The trial court undertakes this inquiry by considering "the appropriate best-interest factors." *Id.* First, a court must discern the correct burden of proof. For example, if the child's established custodial environment is not altered, " 'the movant must prove by a preponderance of the evidence that the change is in the best interests of the child.' " *Id.* at 84, quoting *Shade*, 291 Mich. App. at 23. On the other hand, if the child's established custodial environment will be altered, to the extent a modification in parenting time would be tantamount to a change in custody, *Vodvarka* will apply, and it must be demonstrated, by clear and convincing evidence, that the change in parenting time is in the child's best interests. *Id.* at 83-84. After the correct burden of proof is identified, the court must then weigh the best-interest factors.

> Both the statutory best interest factors in the Child Custody Act [(CCA), MCL 722.21 *et seq*.,], MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a([7]), are relevant to parenting time decisions. *Custody decisions require findings under all of the best interest factors, but parenting time decisions may be made with findings on only the contested issues.* [*Lieberman*, 319 Mich. App. at 84, quoting *Shade*, 291 Mich. App. at 31-32 (emphasis and alteration in original).]

B. APPLICATION

1. WAIVER OF OBJECTIONS TO THE MODIFICATION OF PARENTING TIME

Preliminarily, defendant argues that plaintiff effectively waived any objections to the modification in parenting time during her testimony at the evidentiary hearing, and that to allow her to now challenge the trial court's modification of parenting time would violate "the longstanding rule against a party harboring error as an appellate parachute." *Polkton Charter Twp. v. Pellegrom*, 265 Mich. App. 88, 96; 693 N.W.2d 170 (2005) (citation and quotation marks omitted). Having reviewed the challenged portion of plaintiff's testimony, as well as other pertinent portions of the record, we disagree with defendant's contention.

***4** To the extent that plaintiff's testimony could be viewed as a concession to a modification in parenting time, plaintiff's comments were limited to the referee's recommendation concerning parenting time, which increased defendant's overnight visits with the child from two to four every two weeks. In contrast, the trial court's order increased defendant's parenting time from two nights to five nights every two weeks. Also, plaintiff claimed that the child had an established custodial environment only with plaintiff, a position she maintains on appeal. Additionally, the thrust of plaintiff's arguments on appeal focus on (1) the trial court's determination that an established custodial environment existed with both parties, (2) whether normal life changes amounted to proper cause or a change of circumstances to support modification of parenting time, and (3) the trial court's decision to apply the *Shade* legal framework in determining whether a modification of parenting time was warranted. Put simply, to the extent the trial court increased the modification of parenting time beyond what the referee had recommended, plaintiff did not concede these issues in the trial court. Therefore, we reject defendant's argument that plaintiff effectively waived any challenge to the modification of parenting time as ordered by the trial court.

2. ESTABLISHED CUSTODIAL ENVIRONMENT

In the factual context of deciding whether mandatory vaccinations were in the child's best interests, the trial court initially concluded that the child had an established custodial environment with both plaintiff and defendant, and factored this finding into its analysis of parenting time. Specifically, the trial court reasoned that a modification of parenting time would not disrupt the child's established custodial environment.

On appeal, plaintiff first challenges the trial court's use of the legal framework articulated in *Shade*, arguing that because defendant's proposed change in parenting time disrupted the child's established custodial environment with plaintiff, the court should have relied on the *Vodvarka* framework. Plaintiff also asserts that because the child resided with plaintiff most

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of the time, the child's "established custodial environment existed with [plaintiff] alone." Plaintiff's arguments are not persuasive.

The trial court found that the child had an established custodial environment with both plaintiff and defendant. This finding is supported by the record. Defendant testified that he makes sure to spend all of his allotted parenting time with the child, the child is always happy to see him, and he brings her snacks, a change of clothes, and a pair of shoes. When he and the child are together, they will go to church, visit friends, and he recently took her canoeing. Defendant also testified that he attends all of the child's medical appointments. Defendant stated that the child loves spending time with him, that she is a great eater when she is with him, and she enjoys trying new foods such as peanut butter and honey sandwiches, yogurt, apple sauce, and any meat. Defendant explained that he had been teaching the child her letters, colors, and numbers. Defendant explained that his reason for seeking increased parenting time was so that the child would not have to wait until every other week to see him. According to defendant, he has a flexible work schedule and is able to set his schedule around taking care of the child.

Plaintiff testified that as of June 2017, she was still breastfeeding the child, and did not provide breast milk to defendant because she had done so once before and he had dumped it out. Plaintiff also testified that she uses the technique of redirecting to discipline the child. Plaintiff claimed that she also has a flexible work schedule that she can plan around the child's schedule. To the extent that defendant's motion for additional parenting time sought a 50/50 split of parenting time, plaintiff expressed reservations about such an arrangement, given that the parties could not communicate effectively for the child.

Because there was evidence that the child looked to both parents for "guidance, discipline, the necessities of life, and parental comfort," MCL 722.27(1)(c), the trial court's finding that the child had an established custodial environment with both parents is not against the great weight of the evidence. Consequently, the trial court properly relied on the preponderance-of-the-evidence standard to determine the child's best interests with regard to the proposed modification in parenting time, given that the proposed change—while it would increase the amount of time that the child spent with defendant—would not disrupt her established custodial environment with both parents. That is, she would still look to *both* plaintiff and defendant for guidance, discipline, and to meet her needs. See *Lieberman*, 319 Mich. App. at 81; *Shade*, 291 Mich. App. at 27; see also *Marik*, 325 Mich. App. at 361 (recognizing that an established custodial environment is disrupted only if the modification in parenting time alters "to whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort.") (Quotation marks and citation omitted.). Accordingly, the trial court did not use an inappropriate burden of proof in determining whether to modify parenting time.

3. NORMAL LIFE CHANGES

***5** Plaintiff also argues that the trial court erred by solely relying on "normal life changes" as the foundation for its decision to modify defendant's parenting time. In *Shade*, however, this Court made it clear that under particular circumstances, the fact that a minor child is growing up and has changes in his or her needs and academic and extracurricular schedules may "constitute proper cause or [a] change of circumstances sufficient to modify parenting time[,]" even though such changes may not warrant a change in custody under *Vodvarka*, as long as the child's established custodial environment is not disrupted. *Shade*, 291 Mich. at 29. The trial court in this case did not err by finding that the life changes in the child's life warranted a modification of parenting time, given that at the time the parties' divorce judgment was entered, the child was only nine months old and was dependent on plaintiff's breastfeeding for nutrition. This Court has interpreted a change of circumstances in the context of parenting time modifications somewhat broadly. Recently, in *Marik*, this Court held that a defendant's remarriage and the new relationships the minor children were forging with members of their new stepfamily were enough "to meet the initial threshold of a change of circumstances to consider a [parenting time modification] request." *Marik*, 325 Mich. App. at 369; see also *Kaeb*, 309 Mich. App. at 570-571 (recognizing that under circumstances in which the defendant sought to remove a condition on parenting time, such action would generally not disrupt the established custodial environment "or alter the frequency or duration of parenting time[,]" and therefore a "lesser, more flexible, understanding of 'proper cause' or 'change in circumstances' should apply[.]").

We acknowledge that the parties' divorce judgment provides for a graduated increase in defendant's parenting time as the child aged.[1] However, the child was an infant when the judgment was entered, she likely was not as socially

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interactive with defendant at that point, and now she is a more independent preschooler, able to eat solid foods, and is not dependent solely on plaintiff to meet her nutrition needs. Defendant was not precluded from seeking an adjustment in his parenting time as the child's nutritional needs and dependency on her mother changed. Under these circumstances, plaintiff has not established that the trial court's reliance on the *Shade* legal framework, rather than that of *Vodvarka*, amounted to clear legal error. *Lieberman*, 319 Mich. App. at 77. Plaintiff confines her argument to challenging the trial court's determination that defendant met the threshold under *Shade* to consider a modification of parenting time. Plaintiff does not otherwise challenge the trial court's weighing of the best-interest factors or the court's ultimate determination that a modification in parenting time was in the child's best interests. Accordingly, we affirm the trial court's modification of defendant's parenting time.

1 Plaintiff cites *Rettig v. Rettig*, 322 Mich. App. 750, 757; 912 N.W.2d 877 (2018), in support of her implied argument that because the parties agreed to a graduated increase in parenting time for defendant in the judgment of divorce, defendant could not seek a modification of parenting time. In *Rettig*, the defendant argued that the trial court erred by not making a factual finding concerning the minor child's established custodial environment, and this Court rejected that argument as "nonsensical" because the parties had entered into an agreement regarding the minor child's custody that was the foundation for the parties' judgment of divorce. *Id.* at 752, 757-758.

IV. VACCINATIONS

Plaintiff next argues that the trial court erred by concluding that vaccinating the child was in her best interests. We disagree.

A. RELEVANT LEGAL STANDARDS

Before addressing plaintiff's arguments, it is first necessary to address the legal framework that the trial court was required to follow when ruling on the issue of the child's vaccinations. Although plaintiff alleges at the outset that the issue whether to vaccinate the child should have been left to her discretion alone, the parties' judgment of divorce expressly provides that the parties share joint legal custody of the child. In *Shulick v. Richards*, 273 Mich. App. 320, 327; 729 N.W.2d 533 (2006), this Court, quoting MCL 722.26a(7)(b), the statute addressing joint custody, recognized that "[m]edical and educational decisions are clearly 'important decisions affecting the welfare of ... children." Accordingly, because the parties share joint legal custody of the child, the question whether to vaccinate the child implicates a significant medical decision. However, the parties could not agree on this issue so it was appropriate to seek judicial intervention. See *Lombardo v. Lombardo*, 202 Mich. App. 151, 159; 507 N.W.2d 788 (1993).

***6** In *Marik*, this Court recognized that where parties share joint legal custody and they cannot agree on a significant decision impacting the child, the responsibility will shift to the trial court to resolve the issue in accordance with the child's best interests. *Marik*, 325 Mich. App. at 360. The court must first decide, as a threshold matter, if an established custodial environment exists. If the proposed change will alter to whom the child looks to meet the child's needs for guidance, discipline, parental comfort and life's necessities, the proponent of the change is required to demonstrate, by clear and convincing evidence, that the proposed change is in the child's best interests. *Id.* at 361. As discussed earlier, the trial court did not err by holding that the child had an established custodial environment with both plaintiff and defendant. Thus, the trial court correctly followed this legal framework, and it also found that the question whether to vaccinate the child did not have any bearing on who she would look to for guidance, parental comfort, discipline and for the provision of the necessities of life. Accordingly, the trial court appropriately adhered to a preponderance-of-the-evidence standard in determining whether the proposed vaccinations were in the child's best interests. Further, the court properly determined that an evaluation of the child's best interests required it to weigh the factors set forth in MCL 722.23. See *Marik*, 325 Mich. App. at 362.

In determining the child's best interests, the trial court found that the factors set forth in MCL 722.23(b), (c), and (*l*) were particularly relevant. The court also considered the remaining factors in MCL 722.23, but found that they were not relevant to its decision concerning whether vaccinations were in the child's best interests. The court concluded it was in the child's best interests to be vaccinated, finding that vaccination would protect her from a host of potential serious diseases, and the evidence did not establish that any vaccinations would be harmful to the child, or that vaccination was otherwise against the child's best interests. The court noted the lack of evidence from an immunologist or other qualified physician

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to indicate that the child was, in fact, predisposed to injury or would likely incur an autoimmune disorder as a result of being vaccinated.

B. APPLICATION

1. WHETHER THE CHILD'S PHYSICAL HEALTH CONTRAINDICATES VACCINATION

Initially, we address plaintiff's argument that vaccination of the child was not in her best interests because vaccinations were medically contraindicated.

In support of her argument, plaintiff relies on testimony from the child's pediatrician, Dr. Todd Marcus, who stated that a child's potential predisposition to an adverse reaction from a vaccine can be gleaned from reviewing the child's family medical history. Plaintiff asserts that the child's family's medical history includes ailments such as lupus, rheumatoid arthritis, psoriasis, and other autoimmune disorders, and therefore, the child would be predisposed to developing rheumatoid arthritis from her vaccinations. Dr. Marcus later clarified that he was only aware of the child's alleged predisposition to rheumatoid arthritis because of her family history and that genetic testing had been performed. Dr. Marcus subsequently testified that there is not a specific test that can identify a predisposition to rheumatoid arthritis, and that he had based his earlier opinion on the genetic testing already performed on the child and the child's family history. When the trial court asked Dr. Marcus, "Does a medical test exist" to predict a child's predisposition to injuries arising from vaccines, Dr. Marcus responded that such a test does not exist.

While plaintiff is now claiming that the trial court erroneously determined that vaccination of the child was in her best interests, the evidence presented did not indicate that the child would likely suffer any harm from being vaccinated, or that the benefits of protecting her from disease were outweighed by any potential adverse effects. We acknowledge that plaintiff presented evidence that vaccines can have adverse effects. For example, as relevant to plaintiff's child and her family's medical history, a vaccine-injury table submitted by plaintiff indicated that vaccines that carry the rubella virus, such as the measles, mumps, and rubella (MMR) vaccine, or the measles, mumps, rubella, and varicella (MMRV) vaccine, have a potential adverse effect of causing chronic arthritis. Similarly, vaccines containing the measles virus have a potential adverse effect of causing idiopathic thrombocytopenic purpura (ITP), a medical condition that plaintiff has. Moreover, the Hepatitis B information sheet distributed by the Centers for Disease Control and Prevention (CDC) also acknowledges that vaccines carry a "remote chance" of causing serious injury or death. Similarly, the diphtheria, tetanus, and pertussis (DTaP) vaccine can potentially cause seizures on a long-term basis, as well as permanent brain damage. Also, the package insert for Recombivax HB, a vaccine to protect against Hepatitis B, contains a laundry list of potential adverse reactions, ranging from fatigue and headache to dysuria and hypotension. Likewise, the product insert form for Engerix B, another vaccine for Hepatitis B, also warns of potential adverse effects such as lymphadenopathy, upper respiratory tract illness, and anorexia. Additionally, the product insert for the MMR vaccine indicates that the vaccine may have an adverse reaction of causing thrombocytopenia, and a variety of other serious ailments, such as encephalitis and encephalopathy.

***7** In sum, the fact that vaccines can potentially cause very serious adverse effects is not in dispute, and the child's family history of autoimmune disorders is also not a point of contention.[2] But the dispositive issues are not whether vaccines can potentially cause adverse effects, or whether the vaccine manufacturing industry and pharmaceutical companies are unduly influencing governmental regulatory agencies. Instead, what is at issue is whether the administration of vaccinations is in the child's best interests, taking into account her physical health. Even accepting as valid and accurate plaintiff's contention that the child bears some predisposition to incurring an autoimmune disorder because of her family history, this attenuated risk, in and of itself, simply does not outweigh the significant benefits that would inure to the child by protecting her from the threat of serious and life-endangering diseases in the population. Put another way, the threat of harm to the child by exposing her to vaccines that could potentially trigger an autoimmune disorder is speculative, and the record does not otherwise demonstrate that the child would be put at risk of harm by receiving vaccinations.

2 At the evidentiary hearing, plaintiff called several family members as witnesses to establish that the family has a history of autoimmune disorders.

Significantly, both Dr. Teresa Holtrop, M.D., and Dr. Marcus testified that they recommend that children receive the vaccinations suggested by the CDC and the state of Michigan. Notably, Dr. Holtrop, even being familiar with

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the child's family history of autoimmune disorders, highly recommended that the child be vaccinated. Conversely, Dr. Toni Bark, M.D., plaintiff' expert witness, had not personally evaluated the child and, while familiar with her medical records and her family history, testified generally about *potential* adverse reactions to vaccines and notably did not provide any substantive evidence, aside from possibilities and speculation, that the child would be harmed by the administration of vaccines. In contrast, Dr. Holtrop's testimony established that it was medically necessary for the child to be vaccinated. Specifically, Dr. Holtrop noted that whooping cough is at "epidemic proportions" in Michigan and that it can lead to pneumonia, and even death, for a child. According to Dr. Holtrop, the American Academy of Pediatrics (AAP) recommends that all children be vaccinated, and Dr. Holtrop shared the dire and life-changing situations she has personally observed when children did not receive vaccinations and suffered from vaccine-preventable diseases. Therefore, while plaintiff presented evidence of (1) her family's history of autoimmune disorders, (2) the serious *potential* risks of vaccines, and (3) the workings of the vaccine manufacturing industry as well as the existence of undue influence pharmaceutical companies may have on the AAP and the CDC, plaintiff did not present evidence of a clear, uncontroverted, and certain link between the administration of a vaccine and the real likelihood and potential of injury to the child. Plaintiff maintains that had Dr. Bark been permitted to testify concerning the medical records of the child and her family, "[Dr. Bark] would have expressly opined [that the child] should not be vaccinated based upon her genetic predisposition." Even if Dr. Bark had shared such an opinion of a potential adverse reaction to the child related to her family's history of autoimmune disorders, this opinion, in and of itself, would essentially have been be grounded in conjecture, not certainty, and therefore would be of limited value in evaluating whether the child was actually likely to suffer injury because of a vaccine to the extent that the potential risk of administering vaccines to her outweighed the established benefits.

In the words of the trial court, plaintiff did not present persuasive evidence establishing that "[the child] will be harmed by any particular vaccination and/or that any particular vaccination is otherwise contrary to [the child's] best interests." Significantly, the trial court afforded plaintiff ample opportunity to secure the services of a qualified immunologist or other qualified physician to (1) review the results of the medical testing that was conducted on the child, (2) to perform additional testing, and (3) confirm that the child *was in fact* predisposed to injury or death if she were vaccinated. Plaintiff did not take advantage of these opportunities. In sum, because the record does not contain evidence establishing that (1) the child would *in fact* likely suffer harm from being vaccinated, and (2) that any alleged risk of harm outweighed the clear benefits to the child of being protected from life-threatening diseases, defendant met his burden of establishing, by a preponderance of the evidence, that vaccination was in the child's best interests.

2. PLAINTIFF'S RELIGIOUS BELIEFS

***8** Plaintiff also argues that the trial court erred by failing to consider her sincere religious objections to vaccinations. More specifically, plaintiff alleges that the trial court "was in no position to weigh the sincerity or judge the acceptability of [plaintiff's] religious beliefs, or reduce those beliefs as being [subordinate] to [defendant's]." We disagree.

In *In re Deng*, 314 Mich. App. 615, 627; 887 N.W.2d 445 (2016), this Court recognized that the Public Health Code (PHC), MCL 333.1101 *et seq*., contains a statutory scheme that governs the administration of vaccines in Michigan. While MCL 333.9205, MCL 333.9208(1), and MCL 333.9211(1) place certain requirements on parents to vaccinate their children within certain age periods or by the time a child is enrolled in school, MCL 333.9215(2) also allows a parent to seek an exemption from the vaccine requirements on the basis of "religious convictions or other objection[s] to immunization." Accordingly, under the provisions of the PHC, plaintiff would be able to seek an exemption from vaccines for the child on the basis of her religious beliefs. In this case, however, defendant shares joint legal custody of the child and does not share plaintiff's alleged religious objections to vaccinations. In this context, under the CCA, because the parties are unable to agree on an important matter impacting the child's welfare, it was appropriate for the trial court to decide the matter in the child's best interests. See *Pierron II*, 486 Mich. at 85.

Plaintiff appears to argue that by ordering the child to be vaccinated, the trial court has undermined plaintiff's religious freedom. This Court has recognized the importance of a party's religious freedom, as well as the interplay between that religious freedom and the right to raise one's child in the manner one sees fit. *In re Deng*, 314 Mich. App. at 622 (recognizing that religious freedom and the right to raise one's child are "fundamental rights" that are instrumental in the

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pursuit of happiness in a free society). However, while the statutory scheme of the PHC would allow plaintiff to exempt the child from the mandatory vaccination requirements for children on the basis of plaintiff's religious beliefs, the PHC is not controlling here. The trial court was not considering this dispute under the provisions of the PHC, but rather under the provisions of the CCA, which gave the court jurisdiction to address, consider, and decide matters related to the child's legal custody and best interests where the parties with joint legal custody over the child were unable to agree. See MCL 722.23 (setting forth the factors to be considered in evaluating a child's best interests); MCL 722.27(1)(c) and (e) (recognizing the trial court's authority to modify or amend its orders or judgments in a child custody case, or "to [t]ake any other action considered to be necessary in a particular child custody dispute"); *Pierron II*, 486 Mich. at 85.[3]

3 In a different factual context, in which the respondent mother in a child protective proceeding objected to the vaccinations of her children, this Court held that her "right to direct the care, custody and control of [her children]" yielded to the state's "legitimate interest in protecting the moral, emotional, mental and physical welfare" of the minor children. *In re Deng*, 314 Mich. App. at 623 (quotation marks and citation omitted). Because the trial court's authority to order the vaccinations of the minor children stemmed from its statutory authority under the Juvenile Code, MCL 712A.1 *et seq*., and the Juvenile Code did not include any provision that restricted the court's authority to enter a dispositional order concerning vaccines because a parent objected to the vaccinations, this Court affirmed the trial court's order requiring the vaccinations of the children over the respondent's religious objections. *Id.* at 619, 629.

***9** We note, however, that contrary to plaintiff's assertion on appeal, the record indicates that the trial court gave plaintiff great latitude in raising and explaining her religious objections to vaccines. Further, the trial court did not ignore plaintiff's expressed religious beliefs in its evaluation of the child's best interests. In its written ruling, the trial court specifically observed that plaintiff had strong religious objections to the use of vaccines because "some vaccines are cultured in aborted fetal cells" and also contain animal blood, and that plaintiff objected specifically to the MMR, polio, Hepatitis A, and flu vaccines because of her religious beliefs. In addition to considering plaintiff's ample testimony on the subject, in its weighing of the best-interest factors, the trial court duly considered plaintiff's objections to vaccines when considering factor (b) "[t]he capacity and disposition of the parties ... to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). However, the trial court ultimately did not find that plaintiff's testimony on the subject of her religious objections rendered this factor "more or less favorable to either party." Additionally, the record does not support plaintiff's contention that the trial court "weigh[ed] the sincerity or judge[d] the acceptability of [plaintiff's] religious beliefs," or subordinated plaintiff's beliefs to defendant's. Instead, the record shows that the trial court gave serious consideration to such important matters as it weighed the child's best interests, but ultimately determined that plaintiff's religious objections to vaccines did not outweigh its determination that vaccinating the child was in her best interests.

In sum, the trial court did not err by determining that it was within the child's best interests to be vaccinated.

3. REMAND

Although we are affirming the trial court's order requiring that the child be vaccinated, we note that almost a year has passed since the trial court entered its written opinion and order in December 2018, requiring that the child be vaccinated as recommended by the state of Michigan. The child is now four years old. At the time the trial court entered its opinion and order, it noted that the child would require the following vaccinations to become current with what is recommended for her age:

> [The child] would need the following vaccines to become current: three doses of polio, one dose of MMR, two doses of varicella, two doses of Hep A, one dose of HiB, and one dose of prevnar.

To the extent that the trial court ordered the child to receive "the beginning phase of any and all State-recommended vaccinations," including "rotavirus, DTaP, Hib, HepB, polio, MMR, varicella, HepA, the flu, and PCV13[,]" we remand this case to the trial court to allow it to confirm what vaccinations the child now requires at her age. On remand, the trial court is directed to enter an order requiring defendant to produce a letter from the child's current pediatrician, within 21 days of entry of this Court's decision, addressing (1) any vaccinations the child has already received, (2) the dates any vaccinations were administered, and (3) the vaccinations that are recommended for the child as of the date of entry of this Court's opinion. Once the trial court receives such documentation from the child's pediatrician, within 7 days the court shall enter an order directing that the child be vaccinated

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in conformance with the pediatrician's recommendations, and the trial court's order should further provide that the course of vaccination must begin within 21 days of the trial court's order.

V. SELECTION OF A NEW PEDIATRICIAN

Plaintiff next argues that the trial court erred by ordering the parties to select a new, mutually agreeable pediatrician for the child. We disagree.

A. RELEVANT LEGAL STANDARDS

Plaintiff relies on the following language in the divorce judgment in support of her argument that she has sole authority to select a pediatrician for the child:

> *Plaintiff mother will be the primary parent responsible for* [the child's] *ordinary health care needs.* If [the child] is scheduled for any type of health care appointment, Defendant father is to be notified in writing of the appointment at least 48 hours in advanced [sic] of the appointment, and he shall be entitled to participate in the appointment with the health care provider. If an emergency occurs and immediate health care intervention is necessary, then the parent having parenting time shall notify the other parent as soon as the emergency exists. [Emphasis added.]

We disagree with plaintiff's reliance on this provision. The divorce judgment also awarded the parties joint legal custody of the child and further provided that if the parties could not agree on "major policy decisions relating to the *health*, education and welfare of [the child], they will, on notice to the other parent, seek the assistance of a qualified family counselor or mediator."

***10** The statute governing joint custody, MCL 722.26a, provides, in pertinent part:

> (7) As used in this section, "joint custody" means an order of the court in which 1 or both of the following is specified:
>
> * * *
>
> (b) *That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.* [Emphasis added.]

In *Shulick*, 273 Mich. App. at 327, this Court, quoting MCL 722.26a(7)(b), recognized that "[m]edical and educational decisions are clearly 'important decisions affecting the welfare of' ... children." The selection of a pediatrician for the child is a significant decision that affects her welfare as contemplated by MCL 722.26a(7). Therefore, because the parties shared joint legal custody of the child, the selection of a pediatrician was an important matter impacting the child's health and well-being, and the parties were unable to agree on the choice of a pediatrician, the trial court properly intervened to determine whether the selection of a new pediatrician was in the child's best interests. See *Shulick*, 273 Mich. App. at 329; see also *Bowers v. VanderMeulen-Bowers*, 278 Mich. App. 287, 296; 750 N.W.2d 597 (2008).

B. APPLICATION

Because the parties could not agree on whether Dr. Marcus should continue to treat the child, the trial court weighed the statutory best-interest factors set forth in MCL 722.23. The court concluded that most of the factors were not relevant to this issue, but held that factor (c), addressing the parties' ability to provide the child with medical care, weighed in favor of both parties because the record confirmed that both plaintiff and defendant were regular attendees at the child's medical appointments, they were both capable of seeking medical care for the child, and they were "both invested in the quality of medical care that [the child] receives." Considering factor (h), "[t]he home, school, and community record of the child," the trial court found that this factor did not weigh in favor of either party, because neither one of them lived near Dr. Marcus's office. Weighing factor (*l*), "[a]ny other factors considered by the court to be relevant[,]" the trial court noted the acrimonious relationship between Dr. Marcus and defendant, which included defendant posting negative comments on Dr. Marcus's Facebook page and Dr. Marcus filing a complaint against defendant with Child Protective Services (CPS). Recognizing the importance of both plaintiff and defendant sharing an "amicable and trustworthy relationship" with the child's pediatrician, the trial court expressed concern regarding the "undue friction" that existed between defendant and Dr. Marcus. The court ultimately concluded that the selection of a new pediatrician would serve the child's best interests. The trial court's decision resulted from a proper exercise of its discretion and is supported by the record.

According to Dr. Marcus, defendant attended the child's medical appointments, but did not inquire about anything, including the issue of immunizing the child. Dr. Marcus also

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related how defendant had posted negative comments on Dr. Marcus's Facebook in which defendant complained about Dr. Marcus's professionalism and promptness. In addition, Dr. Marcus admitted reporting defendant to CPS after plaintiff showed him a video in which defendant allowed the child to walk barefoot in a parking lot. Dr. Marcus acknowledged that he subsequently examined the child and did not see any physical harm to her from walking in the parking lot.

***11** Defendant testified that plaintiff chose Dr. Marcus as the child's pediatrician without his input, although defendant conceded that he did not suggest any other pediatricians to plaintiff. Defendant described Dr. Marcus as "very unprofessional[,]" with a "violent personality," and complained that he always runs an hour to two hours late to his appointments. Moreover, defendant stated that Dr. Marcus's office is not between either his home or plaintiff's home. Defendant had also reviewed negative postings from other patients on Dr. Marcus's Facebook page.

Conversely, plaintiff testified that she selected Dr. Marcus as the child's pediatrician because he had been the pediatrician for plaintiff's two older children, who had been seeing Dr. Marcus since 2006. Plaintiff acknowledged that she selected Dr. Marcus as the child's pediatrician without defendant's involvement. According to plaintiff, Dr. Marcus's office is about 17 minutes away from plaintiff's home, but it is convenient for her because her sister lives nearby and she can drop her older children off with her sister when she attends the child's medical appointments without them.

Under the circumstances, the trial court's decision to order the parties to select a new, mutually agreeable pediatrician was an appropriate exercise of its discretion. The evidence showed that defendant regularly attended the child's medical appointments, but that defendant and Dr. Marcus, rather than having a productive professional relationship, had one fraught with conflict, anger, and acrimony. Additionally, the record supports the trial court's conclusion that plaintiff initially selected Dr. Marcus without defendant's input and involvement. The trial court's determination that the parties would not be able to work collaboratively with Dr. Marcus to "ensure that [the child's] health and well-being are given the highest priority" is legally sound and grounded in the evidence. Accordingly, we are unable to conclude that the trial court's decision "is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias[ ]" that it would amount to an abuse of discretion. *Butler*, 308 Mich. App. at 201 (citation and quotation marks omitted).

VI. EXPERT WITNESS TESTIMONY

In her last issue, plaintiff argues that the trial court erred by restricting the scope of Dr. Bark's expert testimony. We disagree.

A. STANDARD OF REVIEW

This Court reviews the trial court's decision regarding the admissibility of expert testimony under MRE 702 for an abuse of discretion. *Edry v. Adelman*, 486 Mich. 634, 639; 786 N.W.2d 567 (2010). When the trial court chooses a result falling "outside the range of reasonable and principled outcomes[,]" it abuses its discretion. *Sabbagh v. Hamilton Psych Servs, PLC*, — Mich. App. ——, ——; — N.W.2d —— (2019) (Docket Nos. 342150, 343204); slip op. at 15-16.

B. RELEVANT LEGAL STANDARDS

MRE 702 provides, in pertinent part:

> 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.

In *Gilbert v. DaimlerChrysler Corp*, 470 Mich. 749, 779, 780; 685 N.W.2d 391 (2004), our Supreme Court emphasized that the trial court's role as a gatekeeper under MRE 702 necessitates that the trial court confirm that each aspect of a proposed expert witness's testimony is indeed reliable. Noting that the most recent amendment of MRE 702 in January 2004 had incorporated the standards of reliability articulated in *Daubert v. Merrell Dow Pharm, Inc*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993), and supplanted the "general acceptance" standard set forth in *People v. Davis*, 343 Mich. 348; 72 N.W.2d 269 (1955), and *Frye v. United States*, 54

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App. DC 46; 293 F 1013 (1923), the *Gilbert* Court stated, in pertinent part:

> ***12** Thus, properly understood, the court's gatekeeper role is the same under *Davis-Frye* and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded. [*Gilbert*, 470 Mich. at 782.]

The trial court's role as a gatekeeper requires it to undertake a "searching inquiry," not limited to the data underlying the expert testimony, "but also of the manner in which the expert interprets and extrapolates from those data." *Id.* The party seeking to admit evidence under MRE 702 must satisfy the preconditions established in the rule of evidence. *Id.* at 789.

The party proffering an expert witness must provide support to indicate that the expert's opinion "has some basis in fact, that it is the result of reliable principles or methods, or that [the proposed expert witness] applied [his or her] methods to the facts of the case in a reliable manner, as required by MRE 702." *Edry*, 486 Mich. at 641. While "peer-reviewed, published literature" is not a predicate for meeting the requirements of MRE 702, the absence of supporting literature, particularly when "combined with the lack of any other form of support for [the proposed expert witness's] opinion," will render the proposed opinion both unreliable and inadmissible under MRE 702. *Id.* As the *Edry* Court recognized:

> 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. [*Edry*, 486 Mich. at 642.]

C. PROCEDURE IN THE TRIAL COURT

On the second day of the evidentiary hearing before the trial court, plaintiff called as a witness Dr. Bark, an Illinois physician with a Bachelor's Degree in psychology, a doctorate degree in medicine from Rush College in Chicago, and a Master's Degree in Medical Disaster Management from Boston University. Dr. Bark is board-certified as a general physician and surgeon, and has extensive experience in pediatric medicine, including running a pediatric emergency room and serving as an attending physician in a neonatal intensive care unit. Dr. Bark also has a background in integrative care, homeopathy, nutrition and rubology, and, while in private practice also worked part time in a hospital emergency room. Dr. Bark teaches at the University of Chicago on matters involving alternative care, she has served on the adjunct faculty at Boston University, and she possesses certifications relevant to "the interplay between the environment and exposure to environmental toxins and health[,]" including a Leadership in Environmental and Energy Design (LEED) certification. Dr. Bark was vice-president of the American Institute of Homeopathy, and is also a member of Physicians for Informed Consent.

With regard to publications, Dr. Bark testified that she contributed to a chapter in a book written by a law professor at New York University School of Law, Mary Holland, entitled *Policy Without Reason*, which addresses the flu shot requirement for healthcare workers. Dr. Bark has also coproduced a film, *Bought*, which addresses corruption in regulatory agencies, and she has been interviewed for a film on genetically modified organisms, as well as one addressing vaccine conflict-of-interest issues. Dr. Bark also collaborated with other medical professionals on a paper addressing the review data of Merck, a pharmaceutical company, for the drug Gardasil, its death rates, and its "systemic autoimmune rates." However, Dr. Bark conceded that the paper was not listed on her curriculum vitae (CV). Dr. Bark had lectured on unspecified topics at two different conferences on immunology in the spring of 2017, one in Spokane, Washington, and the other at an unspecified location in Ohio. Dr. Bark had also appeared before various state senate health committees regarding pending legislation seeking to reduce exemptions to vaccine requirements.

***13** Dr. Bark testified that she has a specialty in adversomics, which is a term "coined by Gregory Poland, one of the most famous vaccinologists who works at [the] Mayo Clinic[.]" According to Dr. Bark, it is a field of medicine in which "people ... study vaccine injury and write about vaccine injury[.]" Dr. Bark elaborated that she has vaccinated "thousands of children[ ]" in her practice, and further clarified that adversomics "is the field of looking at adverse events to vaccines based on reactions, based on genetic predisposition and epigenetic predisposition[,]" which is something that she does every day in her practice and has been doing for years. Dr. Bark also testified that there are "a lot of conflicts of interest in what the CDC is putting out versus what the reality is, and the literature." When the trial court questioned Dr.

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Bark about her work in pediatrics, more specifically in the area of adversomics, inquiring what would qualify her to testify as an expert witness in adversomics, Dr. Bark testified that she sees many vaccine-injured adults and children in her practice, she has worked with lawyers in the federal vaccine court, and she has written one peer-reviewed article with other collaborators at the University of British Columbia, but she could not recall the journal in which it was published. The article was written in 2014, but it was not listed on Dr. Bark's CV. The trial court ruled that Dr. Bark's qualifications as an expert witness under MRE 702 would be limited to her personal experience with vaccines in her general pediatric practice.

D. APPLICATION

The trial court did not abuse its discretion by concluding that plaintiff had not met the requirements of MRE 702 to offer Dr. Bark's proposed testimony in the area of adversomics, which addresses the adverse effects of vaccines and vaccine injuries. Initially, Dr. Bark's testimony did not reflect that she was in fact "qualified ... by knowledge, skill, experience, training or education" to testify regarding adversomics or the broader subject of vaccine injuries and the adverse impacts of vaccines. MRE 702. We acknowledge that Dr. Bark (1) had treated and vaccinated thousands of children in her practice, (2) was interviewed for a film regarding conflict-of-interest issues pertaining to vaccines, (3) collaborated with other medical professionals concerning the physical effects of the drug Gardasil, and (4) had lectured on unspecified topics at immunology conferences in the time period shortly before the evidentiary hearing. While Dr. Bark testified that she possesses a specialty in adversomics, the record does not indicate that plaintiff produced information that would allow the trial court to competently conclude that adversomics, and Dr. Bark's testimony regarding that area of medicine, "is the product of reliable principles and methods[.]" MRE 702. The trial court was also placed in the position of being asked to rule on Dr. Bark's qualifications without being able to discern whether her testimony was "based on sufficient ... data[.]" MRE 702. Moreover, a review of Dr. Bark's CV, while revealing her extensive educational and professional background in pediatric medicine, and her interest and work with vaccine-related topics, does not likewise indicate that she has been educated in, or worked professionally in, the specific and specialized area of adversomics for which plaintiff sought to qualify her as an expert. Dr. Bark's CV likewise does not otherwise indicate that she possesses specialized knowledge and expertise with regard to the more general subjects of vaccine injuries and the adverse effects of vaccines. The only mention in her CV of vaccines are (1) a documentary series called "Vaccines Revealed" that Dr. Bark was interviewed for, (2) a documentary series called "The Truth of Vaccines" in which Dr. Bark participated as an interviewee, and, (3) a lecture that she gave in February 2012 concerning the ethics of vaccine policies.

Notably, on the basis of a close review of Dr. Bark's testimony during the evidentiary hearing before the trial court, as well as her CV, we are unable to discern exactly what comprises the specialty of adversomics, and what specialized knowledge Dr. Bark could offer the trier of fact in these proceedings. The trial court was obviously concerned about the reliability of Dr. Bark's proposed testimony in the area of adversomics, vaccine injuries, and the adverse impact of vaccines in a case in which the potential adverse effects of vaccines on the child were hotly contested and formed the crux of the dispute between the parties. As the United States Supreme Court, interpreting FRE 702, the federal counterpart to MRE 702, recognized in *Daubert*, in determining whether scientific knowledge is such that it will assist the trier of fact in understanding or determining a fact in dispute, a trial court must undertake "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can properly be applied to the facts in issue." *Daubert*, 509 US at 592-593. In making this determination, trial courts may consider whether the methodology has been tested, whether the theory at issue has been evaluated by peer review and publication, as well as whether a known or potential rate of error exists. *Id.* at 593-594. While the trial court here did not conduct a *Daubert* hearing, the decision whether to hold this hearing is within the trial court's discretion. *Lenawee Co. v. Wagley*, 301 Mich. App. 134, 162; 836 N.W.2d 193 (2013). The trial court likely did not do so because plaintiff did not even provide defendant with notice of her intention to offer Dr. Bark as an expert in the specialized area of adversomics, but also because the information presented to the court did not demonstrate that a *Daubert* hearing to consider the factors set forth in that case was even warranted. In other words, noting the dearth of supporting literature on the topic of adversomics that plaintiff presented and the lack of any indication in Dr. Bark's CV, or in her evidentiary hearing testimony, that Dr. Bark had worked extensively in this area, the trial court correctly surmised that plaintiff's attempt "to simply point to an expert's experience and background to argue that [Dr. Bark's] opinion is reliable" was not enough to meet the requirements of

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MRE 702. *Elher v. Misra*, 499 Mich. 11, 23; 878 N.W.2d 790 (2016). Accordingly, the trial court's decision to limit Dr. Bark's testimony to her experience vaccinating her own patients and to the area of general pediatrics fell within the range of principled outcomes, and therefore did not amount to an abuse of discretion. See *Edry*, 486 Mich. at 639; *Sabbagh*, —— Mich. App. at ——; slip op. at 15-16.

VII. CONCLUSION

***14** We conclude that the trial court did not err by (1) finding that it was within the minor child's best interests to be vaccinated, and ordering that she be vaccinated in accordance with state recommendations, (2) ordering the parties to select a new, mutually agreeable pediatrician for the child, and (3) modifying defendant's parenting time. Accordingly, we affirm the trial court's order, but remand for further proceedings consistent with our instructions in Section IV(B)(3) of this opinion.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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2010 WL 5184831
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Alexis MORGAN, a Minor, by her conservator, Rhonda Jo Morgan, Plaintiff–Appellant,

v.

Alfred K. BEDIAKO, M.D., Hillsdale Obstetrics & Gynecology, P.C., and Hillsdale Community Health Center, Defendants–Appellees.

Docket No. 293409.
|
Dec. 21, 2010.

Hillsdale Circuit Court; LC No. 08–000557–NH.

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals as of right the trial court's order granting defendants summary disposition. We affirm.

The trial court excluded the causation testimony of Dr. Ronald C. Gabriel, M.D. and because of the lack of causation testimony, the trial court granted summary disposition in favor of defendants. Plaintiff argues that the causation opinion of Ronald C. Gabriel, M.D. was the product of reliable methodology as demonstrated by the articles upon which he relied. In addition, Dr. Gabriel's opinion should have been deemed reliable and based on proper methodology because of his extensive education and experience as well as the fact that he reviewed medical records in arriving at his opinion. Hence, plaintiff argues that the exclusion of Dr. Gabriel's testimony was an abuse of discretion. We disagree.

"We review "a trial court's decision to admit or exclude evidence for an abuse of discretion." *Craig v. Oakwood Hosp.,* 471 Mich. 67, 76, 684 N.W.2d 296 (2004). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Kostin Estate,* 278 Mich.App. 47, 51, 748 N.W.2d 583 (2008). We also review de novo a trial court's decision to grant summary disposition. *Coblentz v. Novi,* 475 Mich. 558, 567, 719 N.W.2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v. Auto–Owners Ins.,* 458 Mich. 288, 294, 582 N.W.2d 776 (1998). Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz,* 475 Mich. at 567–568, 719 N.W.2d 73. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz,* 475 Mich. at 568, 719 N.W.2d 73.

The Court in *Wischmeyer v. Schanz,* 449 Mich. 469, 484, 536 N.W.2d 760 (1995), provided the elements of a medical malpractice cause of action as follows:

> In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal. [Footnote omitted.]

Causation in medical malpractice cases has been codified in MCL 600.2912a(2), which provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.

***2** See also *Craig,* 471 Mich. at 86, 684 N.W.2d 296. In a medical malpractice case, "expert testimony is required to establish ... causation." *Thomas v. McPherson Community Health Ctr.,* 155 Mich.App. 700, 705, 400 N.W.2d 629 (1986). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,

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> 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.

See also MCL 600.2955.

"MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Gilbert v. DaimlerChrysler Corp.,* 470 Mich. 749, 780, 685 N.W.2d 391 (2004). This obligation of the trial court is referred to as the gatekeeper's role. *Id.* at 779–780, 685 N.W.2d 391. "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.' " *Id.* at 780, 685 N.W.2d 391. Consequently, "the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Id.* at 782, 685 N.W.2d 391. Hence, "junk science" must be excluded from evidence. *Id.* "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id.* Furthermore, reliability is considered to be the "cornerstone requirement of MRE 702." *Edry v. Adelman,* 486 Mich. 634, 640, 786 N.W.2d 567 (2010).

We conclude that the trial court did not abuse its discretion when it excluded Dr. Gabriel's causation testimony because such testimony was not reliable. MRE 702; *Craig,* 471 Mich. at 76, 684 N.W.2d 296. Dr. Gabriel relied on six articles in forming his opinion. We find no error in the trial court's conclusion that there was no peer review or scientific study corroborating or testing the theory on which Dr. Gabriel's opinion was based. As noted by the trial court, Dr. Gabriel appeared to be simply "taking bits and pieces of these studies, forming a theory, which has yet to be subjected to peer review or published." Additionally, we conclude that plaintiff's argument that Dr. Gabriel's opinion should have been deemed to be based on reliable methodology because of his extensive education and experience as well as the fact that he reviewed medical records in arriving at his opinion is without merit. His education and experience relates to his qualifications, and not to whether his testimony is based on reliable principles and methods that he applied reliably to the facts of this case. MRE 702. The trial court did not abuse its discretion by excluding Dr. Gabriel's testimony. *Craig,* 471 Mich. at 76, 684 N.W.2d 296. And, the trial court properly granted defendants summary disposition because plaintiff could not prove causation. *Coblentz,* 475 Mich. at 567–568, 719 N.W.2d 73; *Craig,* 471 Mich. at 85, 684 N.W.2d 296.

***3** Plaintiff also argues that it was error requiring reversal for the trial court to determine that the expert's opinion was too speculative without first holding a hearing to determine whether his theory has received general scientific acceptance. In this case, plaintiff does not cite anything in particular that would be provided at an evidentiary hearing that was not considered by the trial court when it conducted a hearing on the motion. Rather, plaintiff merely indicates that an evidentiary hearing should have been conducted in order to "let qualified experts in obstetrics and gynecology, neonatologists, and neurologists explain to the circuit court how the technology available can be used to evidence the damage that is occurring to the fetus." Moreover, it is clear that the trial court provided a thoughtful analysis, which included reviewing and discussing the deposition testimony of Dr. Gabriel, the articles upon which Dr. Gabriel's opinion relied, and the applicable law in this area. Hence, we find that the trial court sufficiently considered the issue and performed a "searching inquiry" before striking Dr. Gabriel's testimony and thus the trial court did not abuse its discretion by striking Dr. Gabriel's testimony without first conducting an evidentiary hearing. MRE 702. See also *Clerc v. Chippewa Co. War Mem. Hosp.,* 267 Mich.App. 597, 705 N.W.2d 703 (2005), where this Court held that a trial court must not exclude expert testimony under MRE 702 unless it first holds an evidentiary hearing or conducts a "searching inquiry" under MRE 702.

In addition, plaintiff argues that a genuine issue of material fact existed as to whether the injury was a natural and probable consequence of the breach of the standard of care specified by plaintiff's liability experts. We find that this argument is without merit. Plaintiff's only causation expert was properly excluded. Therefore, defendants were entitled to summary disposition regardless whether there was a genuine issue of material fact as to an alleged breach of the standard of care. See *Craig,* 471 Mich. at 85, 684 N.W.2d 296, where the Michigan Supreme Court indicated that judgment in defendants' favor is proper when the causation element of a medical malpractice claim cannot be established.

Plaintiff also argues that the testimony of Ronald Zack, M.D. relating to the standard of care and Robert B. Ancell, M.D. relating to the loss of future earning capacity should not have been excluded. These issues are moot given our resolution

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that summary disposition was proper. See *Clinton Township v. Mt. Clemens,* 171 Mich.App. 288, 291–292, 429 N.W.2d 656 (1988) ("An issue is moot when an event occurs which renders it impossible for the reviewing court to grant relief."); also see *School Dist. v. Kent County Tax Allocation Bd.,* 415 Mich. 381, 390, 330 N.W.2d 7 (1982) ("[A]s a general rule, this Court will not entertain moot issues or decide moot cases.").

Affirmed.

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2020 WL 6253601
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Dennis UPPLEGER and Kathy Uppleger, Plaintiffs-Appellants,

v.

MCLAREN PORT HURON, Nalini Samuel, M.D., individually and doing business as Blue Water Neurology Clinic, PC, Devprakash Samuel, M.D.,[1] Aubrey Jozefiak, R.N., Melissa Cook, R.N., Michelle Francisco, R.N., and Catherine Fournier, R.N., Defendants-Appellees.

1 It appears that defendant Devprakash Samuel, M.D. ("Dr. D. Samuel") was, along with his sister, defendant Nalini Samuel, M.D. ("Dr. N. Samuel"), doing business as Blue Water Neurology Clinic, PC ("Blue Water"), although the captions below and on appeal do not identify Dr. D. Samuel as doing business as Blue Water, while Dr. N. Samuel is so identified in the captions. Dr. D. Samuel practiced neurological medicine with Dr. N. Samuel, who was dismissed by stipulation early in the litigation because she was not involved in the medical treatment in this case. The later order granting summary disposition to Dr. D. Samuel was titled as an order of dismissal of Dr. D. Samuel and Blue Water, and the appellate briefing indicates that the attorney representing Dr. D. Samuel also purports to represent Blue Water, even though Blue Water is apparently not a separate legal entity.

Nos. 348551; 348928
|
October 22, 2020

St. Clair Circuit Court, LC No. 17-000559-NH

Before: Beckering, P.J., and Fort Hood and Shapiro, JJ.

Opinion

Per Curiam.

***1** These consolidated appeals arise from the same medical malpractice case. In Docket No. 348551, plaintiffs, Dennis and Kathy Uppleger, appeal as of right the trial court's order granting summary disposition to defendants Devprakash Samuel, M.D. ("Dr. D. Samuel"), and Blue Water Neurology Clinic, PC ("Blue Water"). In Docket No. 348928, plaintiffs appeal as of right the trial court's amended order granting summary disposition to defendants McLaren Port Huron ("MPH"), Aubrey Jozefiak, R.N., Melissa Cook, R.N., Michelle Francisco, R.N., and Catherine Fournier, R.N. (referred to collectively as "the McLaren defendants"), and they also challenge the trial court's earlier denial of their motion to compel discovery.[2] This Court consolidated the appeals.[3] The trial court dismissed plaintiffs' case on the ground that they failed to create a genuine issue of material fact as to whether any of the defendants' alleged negligence proximately caused plaintiffs' injuries. After a careful review of the record evidence in the light most favorable to plaintiffs, we affirm the trial court's rulings.

2 Jozefiak, Cook, Francisco, and Fournier will sometimes be referred to collectively as "defendant-nurses," but we will use the term "the McLaren defendants" when referring to MPH and defendant-nurses.

3 *Uppleger v. McLaren Port Huron*, unpublished order of the Court of Appeals, entered May 28, 2019 (Docket Nos. 348551 and 348928).

I. RELEVANT FACTS AND PROCEEDINGS

On Sunday, August 2, 2015, Mr. Uppleger presented to the MPH emergency department with signs and symptoms of a transient ischemic attack (TIA)[4], which may be a warning sign of a future stroke.[5] An emergency department physician examined Mr. Uppleger and ordered a CT of his brain. He also ordered the continuation of aspirin administration, which Mr. Uppleger had taken before his arrival. The CT scan showed no evidence of an acute hemorrhage or mass effect. Mr. Uppleger was kept for observation. Defendant-nurses provided care to Mr. Uppleger at various times during his stay at MPH. A neurology consultation request was sent to defendant Nalini Samuel, M.D. ("Dr. N. Samuel") at 2:03 p.m. Dr. N. Samuel had an informal arrangement with her brother, Dr. D. Samuel,

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who was also a neurologist, whereby Dr. D. Samuel would carry their pagers and decide whether to handle a consultation request himself or refer it to Dr. N. Samuel, and Dr. D. Samuel handled this consultation request himself.

4 The trial court provided definitions of the medical terminology relevant to this case, the accuracy of which the parties do not contest, and which we will requote here. A TIA as "a temporary blockage of blood flow to the brain that does not result in permanent damage. Symptoms can last for up to 24 hours, but are usually gone in an hour."

5 The trial court defined a stroke as "a cerebral vascular accident. It is caused by a blood clot stopping blood going through a vessel in the brain or a bleed in the brain. High blood pressure, high cholesterol and smoking are factors that can result in [a] stroke."

***2** While Mr. Uppleger was in the MPH emergency department his National Institutes of Health Stroke Scale (NIHSS) score was found to be 0 (on a scale of 0 to 42) at 10:50 a.m., 11:50 a.m., 1:00 p.m., 2:00 p.m., and 3:00 p.m.[6] Shortly before 6:30 p.m., Mr. Uppleger was transferred to the MPH observation unit. His NIHSS score was determined to be 0 at 7:02 p.m. and at 8:00 p.m. Between 8:00 p.m. and 8:48 p.m., Dr. Ponon Kumar, M.D., an internal medicine physician at MPH, physically examined Mr. Uppleger in the observation unit, took a detailed history of his condition, and wrote in the chart that a neurological evaluation and neurological checks would be conducted.

6 The trial court explained:

> The NIH [s]troke [s]cale is a systematic assessment tool that provides a quantitative measure of stroke-related neurological deficits. The scale ranges from 0-42 and consists of different elements that evaluate specific abilities including consciousness, vision, facial palsy, motor strength, sensory and speech. The scale has three major purposes: 1) It evaluates the severity of the stroke; 2) it helps determine the appropriateness of the treatment; and 3) it predicts patient outcome.

At 10:20 p.m., Mr. Uppleger experienced a severe headache as well as numbness in his left leg. Nurse Jozefiak called a "code stroke" because of these worsening symptoms. A "code stroke" team arrived to evaluate Mr. Uppleger. Jozefiak paged Dr. D. Samuel to inform him of Mr. Uppleger's worsening symptoms. Another CT scan of Mr. Uppleger's head was conducted. At 11:13 p.m., the radiologist wrote that this CT scan showed no significant changes from the CT scan performed earlier that day and that there was no evidence of an acute hemorrhage in the brain.

At 11:00 p.m., Mr. Uppleger was transferred to the MPH "select care" or "step down" unit, where Cook was his attending nurse. His NIHSS score was found to be 1 at 11:02 p.m. and was again determined to be 1 shortly after midnight.

At 12:09 a.m. on Monday, August 3, 2015, Cook spoke by telephone with Dr. D. Samuel about Mr. Uppleger's condition. Dr. D. Samuel did not provide any new orders at that time. Shortly after 3:00 a.m., Mr. Uppleger began experiencing "left sided drifting of [his] upper and lower extremities," meaning that he could not "control his left side very well." At 3:59 a.m., Dr. D. Samuel was paged regarding this new onset of central nervous system symptoms. The chart indicates that he did not respond to the page. According to the chart, he was paged an additional six times between 4:00 a.m. and 5:00 a.m., but each time he failed to respond.[7] Mr. Uppleger's NIHSS score, however, remained at a 3 at 3:02 a.m., 5:02 a.m., 6:32 a.m., and 9:02 a.m.[8]

7 Defense expert Dr. William Leuchter, M.D. agreed that failing to respond to a page is a violation of the standard of care. Also, Mrs. Uppleger testified that when she asked Dr. D. Samuel why he did not respond to the pages, he told her he had not received any pages and suggested that she should have taken her husband to a different hospital. Were we faced with evaluating the standard of care and whether plaintiffs created a material question of fact on whether Dr. D. Samuel breached the standard of care for not timely showing up to evaluate Mr. Uppleger despite repeated calls and updates from the hospital, this case would clearly go to a jury on that valid question. However, that is not the issue before us.

8 Plaintiffs do not take issue with the accuracy of the NIHSS ratings assigned to Mr. Uppleger at various times throughout his stay at MPH.

At 8:00 a.m., Dr. D. Samuel examined Mr. Uppleger and concluded that he had likely suffered "an acute right posterior cerebral artery infarct" and recommended that he "undergo a[n] MRI of the brain for further evaluation of acute stroke." However, Mr. and Mrs. Uppleger told Dr. Kumar that they wanted Mr. Uppleger to be transferred to William Beaumont Hospital ("Beaumont") in Royal Oak, Michigan, for further stroke evaluation and treatment. Mr. Uppleger's NIHSS score remained at a 3 until he was transported to Beaumont by helicopter at around noon.

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***3** At Beaumont, healthcare providers determined that Mr. Uppleger's NIHSS score at that time was 10. In assessing proper treatment, his care providers concluded that he was not a candidate for an interventional procedure called a thrombectomy or for the administration of a drug called alteplase, also known as tissue plasminogen activator ("t-PA").[9] On August 5, 2015, Mr. Uppleger's NIHSS score had fallen to 5 and his condition was improving, even though no interventional procedure was performed and no t-PA was administered.

9 The trial court explained that t-PA "is an injectable drug that is used to treat conditions caused by arterial blood clots including strokes. The most serious side effect of t-PA is bleeding into the brain (intracranial hemorrhage) or fatal bleeding."

Plaintiffs filed this action alleging, as relevant to these appeals, medical malpractice on the part of Dr. D. Samuel, nursing malpractice on the part of defendant-nurses, and vicarious liability and direct liability claims against MPH. Mrs. Uppleger asserted a loss of consortium claim. Plaintiffs further alleged that various statutory provisions characterized by plaintiffs as tort reform legislation were unconstitutional.

During the discovery process, plaintiffs filed a motion to compel discovery regarding various documents and information, including MPH's internal rules and regulations regarding the supervision and training of nurses, information regarding MPH's certification as a primary stroke center, and deposition testimony from defendant-nurses on these matters. The trial court denied the motion to compel.

Later, the McLaren defendants filed a motion for summary disposition asserting that plaintiffs could not demonstrate a genuine issue of material fact on the causation element of their malpractice claims. The McLaren defendants also sought dismissal of plaintiffs' constitutional claim and Mrs. Uppleger's loss of consortium claim. Dr. D. Samuel and Blue Water likewise moved for summary disposition on the ground that plaintiffs could not demonstrate a genuine issue of material fact on causation, and they joined the McLaren defendants' request for dismissal of plaintiffs' constitutional claim. Plaintiffs opposed the motion, and the parties filed extensive briefing. After a hearing, the trial court took the matters under advisement. The trial court later issued a written opinion granting both motions for summary disposition, followed by orders of dismissal.

II. ANALYSIS

A. SUMMARY DISPOSITION

In both appeals, plaintiffs argue that the trial court erred in granting summary disposition to defendants on the medical and nursing malpractice claims. Plaintiffs contend that they demonstrated a genuine issue of material fact on the causation element of their malpractice claims.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *El-Khalil v. Oakwood Healthcare, Inc.*, 504 Mich. 152, 159; 934 N.W.2d 665 (2019). A motion under MCR 2.116(C)(10) tests whether a claim is factually sufficient. *Id.* at 160.

> When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*Id.* (quotation marks and citations omitted).]

To the extent that this issue implicates the trial court's exercise of its gatekeeper function with respect to the admissibility of expert testimony, it involves the review of an evidentiary determination. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v. Adelman*, 486 Mich. 634, 639; 786 N.W.2d 567 (2010) (citation omitted). "[T]he proponent of evidence bears the burden of establishing relevance and admissibility." *Id.* (quotation marks, ellipsis, and citation omitted).

> ***4** The plaintiff in a medical malpractice action bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal. Although nurses do not engage in the practice of medicine, the Legislature has made malpractice actions available against any licensed healthcare professional, including nurses. [*Cox v. Hartman*, 322 Mich. App. 292, 299-300; 911 N.W.2d 219 (2017) (quotation marks and citation omitted).]

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The basic elements of a medical malpractice claim apply to a nursing malpractice claim, although the standard of care applicable to nurses differs from that applicable to physicians. See *Cox ex rel. Cox v. Flint Bd. of Hosp. Managers*, 467 Mich. 1, 5, 10-12, 21-22; 651 N.W.2d 356 (2002). Also, "[a] hospital may be 1) directly liable for malpractice, through claims of negligence in supervision of staff physicians as well as selection and retention of medical staff, or 2) vicariously liable for the negligence of its agents." *Id.* at 11.[10]

10 The trial court implicitly treated plaintiffs' direct liability claim against MPH as sounding in medical malpractice by granting summary disposition to all defendants on the basis of plaintiffs' failure to demonstrate a genuine issue of material fact on the element of causation that is part of a malpractice claim. Plaintiffs make no argument on appeal that the trial court erred in treating the direct liability claim against MPH as sounding in medical malpractice. In any event, we discern no error in the trial court's implicit determination on this point.

MCL 600.2912a(2) provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

"Proximate cause is a question for the jury to decide unless reasonable minds could not differ regarding the issue." *Lockridge v. Oakwood Hosp.*, 285 Mich. App. 678, 684; 777 N.W.2d 511 (2009). "To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause." *Weymers v. Khera*, 454 Mich. 639, 647; 563 N.W.2d 647 (1997).

To show factual causation, "the plaintiff must present *substantial evidence* from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Badalamenti v. William Beaumont Hosp.-Troy*, 237 Mich. App. 278, 285; 602 N.W.2d 854 (1999) (quotation marks and citation omitted).

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. [*Weymers*, 454 Mich. at 648 (quotation marks and citation omitted).]

That is, a plaintiff's circumstantial proofs must facilitate reasonable inferences of causation rather than mere speculation. *Badalamenti*, 237 Mich. App. at 285. "[A] plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Craig ex rel. Craig v. Oakwood Hosp.*, 471 Mich. 67, 87; 684 N.W.2d 296 (2004). Although the evidence need not negate all other possible causes, it must "exclude other reasonable hypotheses with a fair amount of certainty." *Id.* at 88 (quotation marks and citation omitted).

***5** "Legal or proximate cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for them." *Lockridge*, 285 Mich. App. at 684. That is, legal cause requires a plaintiff to "show that it was foreseeable that the defendant's conduct may create a risk of harm to the victim, and that the result of that conduct and intervening causes were foreseeable." *Id.* (quotation marks, brackets, ellipsis, and citation omitted).

In medical malpractice actions, "[e]xpert testimony is required to establish the standard of care and a breach of that standard, as well as causation." *Kalaj v. Khan*, 295 Mich. App. 420, 429; 820 N.W.2d 223 (2012) (citations omitted). "The proponent of expert testimony in a medical malpractice case must satisfy the court that the expert is qualified under MRE 702, MCL 600.2955 and MCL 600.2169." *Elher v. Misra*, 499 Mich. 11, 22; 878 N.W.2d 790 (2016).[11]

11 In *Elher*, our Supreme Court noted that "MCL 600.2169 relates to the expert's license and qualifications and is not in dispute in this case." *Elher*, 499 Mich. at 22 n. 12. Likewise, in the instant case, there is no dispute regarding the requirements of MCL 600.2169.

MRE 702 provides:

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

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of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"This rule requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable." *Elher*, 499 Mich. at 22. "A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Id.* at 23. "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.* (quotation marks and citation omitted). Further, "[t]he reliability of the expert's testimony is to be determined by the *judge* in advance of its admission—not by the jury at the conclusion of the trial by evaluating the testimony of competing expert witnesses." *Tobin v. Providence Hosp.*, 244 Mich. App. 626, 651; 624 N.W.2d 548 (2001).

If an expert's opinion is inadmissible under MRE 702, then it is unnecessary to consider whether the expert's opinion is admissible under MCL 600.2955. *Edry*, 486 Mich. at 642 n. 7.

Plaintiffs claimed that malpractice on the part of Dr. D. Samuel and the McLaren defendants caused Mr. Uppleger's stroke-related injuries to occur or worsen because he should have received more timely neurological evaluation and treatment, including the administration of t-PA or the performance of a thrombectomy.[12] In support of this contention, plaintiffs relied on the testimony of their neurology expert, Dr. David Frecker. But as the trial court found, plaintiffs needed to prove that Mr. Uppleger was a candidate for t-PA or a thrombectomy, and that, if such treatment had been provided, he would have had a greater than 50% chance of achieving a better outcome. Plaintiffs were unable to provide such proof.

12 Plaintiffs also alleged that a drug called heparin should have been administered, but plaintiffs have effectively abandoned that argument on appeal and have identified no evidence that Mr. Uppleger was an appropriate candidate for heparin or that it would have made a difference in his condition.

***6** In support of their motions for summary disposition, defendants presented the deposition testimony of neurologist Dr. Seemant Chaturvedi, M.D. Dr. Chaturvedi testified that t-PA is usually administered to patients who have an NIHSS score higher than 5 and that, under Food and Drug Administration (FDA) guidelines, a low NIHSS score is a relative contraindication for the administration of t-PA. The undisputed medical records in this case show that Mr. Uppleger's NIHSS score never rose higher than 3 while at MPH; the administration of t-PA was thus not indicated. Dr. Chaturvedi further testified that t-PA works in only a fraction of patients; it is effective for only about one out of three patients. Dr. Chaturvedi's testimony on this point regarding the limited effectiveness of t-PA was consistent with medical literature provided by Dr. D. Samuel and Blue Water. Dr. Chaturvedi also testified that Mr. Uppleger was "[d]efinitely not" a candidate for a thrombectomy (also sometimes referred to as an embolectomy by the expert witnesses and the parties in this case) "[b]ecause embolectomy is done for people with large vessel occlusion and, typically, the internal carotid/middle cerebral artery, and so his stroke was not in one of those two vessels, so he wasn't a candidate for a thrombectomy." Dr. Chaturvedi's testimony found support in the 2013 American Heart Association and American Stroke Association Early Management Guidelines, which indicated that thrombectomy was an appropriate treatment for an occlusion of the middle cerebral artery.[13]

13 The 2013 guidelines were current at the time of Mr. Uppleger's treatment. The 2018 guidelines, which updated the 2013 guidelines, indicate that thrombectomy is appropriate for an occlusion of the internal carotid artery or the proximal middle cerebral artery when a patient has an NIHSS score of 6 or higher.

Dr. William M. Leuchter, M.D., another defense neurology expert, testified that he would not have administered t-PA to Mr. Uppleger when his NIHSS score rose to a 3 beginning at 3:02 a.m. on August 3, 2015. Dr. Leuchter explained that Mr. Uppleger's NIHSS score "wasn't above four or five. And that's a relative contraindication [for the administration of t-PA], based upon the [National Institute of Neurological Disorders and Stroke, i.e. "NINDS"] criteria." Dr. Leuchter noted the current medical view is that aspirin is more effective and less risky than t-PA in treating minor strokes, generally defined as an NIHSS of 5 or less, because aspirin carries no risk of hemorrhage, whereas t-PA does in fact carry such a risk. Minor stroke patients with an NIHSS score of 3 should not be given t-PA because of the risk of cerebral hemorrhage from the use of t-PA. Dr. Leuchter's testimony in this regard is in general accordance with medical literature provided by Dr. D. Samuel and Blue Water.

Dr. Leuchter further explained that "the use of thrombectomy, by and large, is, from a standard of care perspective, limited to

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internal carotid artery and main stem middle cerebral arteries, proximal middle cerebral arteries." Dr. Leuchter continued:

> The right posterior cerebral artery [where Mr. Uppleger's occlusion occurred] would be a medium size vessel, which would not be amenable to sticking a catheter all the way up to the posterior cerebral artery and the posterior circulation. So I don't believe, if you look up the 2018 criteria, it's even mentioned in the guidelines for thrombectomy.

In short, a thrombectomy in that area would be "[t]oo risky. Sticking a catheter up the basal artery, there's a markedly increased risk of death. The risk mitigates the usage of it. Plus the vessel is too small to get at."

As noted, in opposition to defendants' motions for summary disposition, plaintiffs presented the testimony of Dr. Frecker. Dr. Frecker testified that t-PA should have been administered even though Mr. Uppleger's NIHSS score was lower than 5, at which time arrangements would have to be made simultaneously to transfer him to a hospital equipped to deal with and manage "the most feared complications of t-PA, which is intracranial hemorrhage," and that Mr. Uppleger would have had a greater than 50% chance of achieving a better outcome if he had been treated with t-PA. Dr. Frecker's testimony is dependent on a 2008 medical journal article that the parties and witnesses have referred to as "the Zivin article," based on the name of one of its authors.[14]

14 The article is titled *Review of Tissue Plasminogen Activator, Ischemic Stroke, and Potential Legal Issues*, and it was published in the journal, Archives of Neurology. In addition to the Zivin article, Dr. Frecker relies on a 1995 article published in the New England Journal of Medicine titled *Tissue Plasminogen Activator for Acute Ischemic Stroke*, which reviewed the work of the stroke study group established by the National Institute of Neurological Disorders (NINDS), and a 1997 article titled *Generalized Efficacy of t-PA for Acute Stroke: Subgroup Analysis of NINDS t-PA Stroke Trial.* But neither article supports Dr. Frecker's opinions as to either the applicability or the efficacy level with respect to administering t-PA to Mr. Uppleger given his presenting condition while at MPH. The NINDS study arose after an initial pilot study showed that t-PA was beneficial when administered within three hours of the onset of a stroke. The NINDS study had two parts. Part I measured the benefits of t-PA after 24 hours. Part II measured the benefits of t-PA after 90 days. The results were that there was no significant effect at 24 hours, and that after 90 days benefit was shown in 30% of patients. This was not at or above the more-likely-than-not level required to establish proximate causation. Indeed, the measure of a "favorable outcome" after 24 hours was a decrease in the NIHSS score of 4 or more points, which suggests that t-PA was administered only to those with an NIHSS score of at least 4. But it is an undisputed fact in this case that Mr. Uppleger's NIHSS score never rose above 3 while at MPH.
Notably, the Zivin article arrives at its conclusions after conducting a statistical reanalysis (or in the words of Dr. Frecker, a "reconstruction") of the 1995 NINDS study, which the trial court in the instant case deemed methodologically flawed, and which Dr. Frecker admitted was "way beyond my understanding of statistics, using paranalysis." For the reasons explained in this opinion, we conclude that the trial court did not abuse its discretion in deeming the Zivin article materially flawed, and thus excluding Dr. Frecker's causation testimony due to the lack of reliable supporting authority for his causation opinion.

***7** Dr. D. Samuel and Blue Water submitted to the trial court testimony that Dr. Chaturvedi had provided regarding the Zivin article on August 23, 2018, in a hearing in another case. In that testimony, Dr. Chaturvedi explained that the Zivin article, which claimed that approximately 58% of patients who receive t-PA will achieve a better outcome, utilized a methodology that no other study of stroke trials published in high profile journals has used. The Zivin article failed to explain why approximately 100 patients, who were part of the original study analyzed in the Zivin article, were excluded from the calculations used in the Zivin article. Further, Dr. Chaturvedi explained, the Zivin article used a "concept of establishing pairs and then breaking the tie by looking at the NIH score," which is a concept that has "never really been done in any other analysis over the last 25 years and so I think that is evidence that the mainstream stroke community doesn't really view this as a proper way to analyze the data." Also, multiple respected neurologists have written letters to the editor of the journal that published the Zivin article, noting that the data used in the article were wrong and that t-PA benefits only a minority of patients.

Dr. Chaturvedi likewise testified in the instant case about the flaws in the Zivin article:

> I mean, the major weaknesses are they didn't use the entire data set from the original study. So the original study had 624 patients. In their analysis they do not include all 624 patients.
>
> And also the methodology that they used was very unusual, and I have not seen this methodology used in any

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publication since then. And so that sort of implies that it has not gained acceptance within the neurology or the stroke community.

And then, finally, most papers have—scientific papers and peer-reviewed journals have a methods section, and they don't really even provide a methods section for the reader to review.

And so I think this paper has those major shortcomings.

Dr. Leuchter expressed similar criticisms of the Zivin article:

Q. ... Do you believe the [Zivin article's] indication that the treatment with [t-PA] rapidly after ischemic stroke onset can produce complete recovery more often than not?

A. Is that within the 50 percent or not?

Q. Yes.

A. No. I disagree with that.

Q. Do you agree or disagree, overall the probability of [t-PA] treatment was superior was 57.3 percent?

A. Right. I disagree with that. In fact, I have a lot of disagreement with this article in general.

Q. Do you agree with the article's conclusion that, hence, from the several ways of examining the data, the majority of patients with acute stroke treated with intravenous [t-PA] had a complete recovery or are improved by [t-PA] treatment?

A. I vehemently disagree with that statement.

Dr. Leuchter explained that the Zivin article "is fraught with a lot of methodological errors that everybody who I know of has trouble digesting in this article." Dr. Leuchter noted that the Zivin article "wasn't an initial research paper, it was a review article reviewing the NINDS data, and the mathematical methodology involved I don't quite understand and neither does anybody else." When asked if the Zivin article had any applicability to Mr. Uppleger's condition or the treatment that should have been afforded to him, Dr. Leuchter responded: "No. His NIH[SS] score was three, it has no applicability at all."

Overall, the trial court acted in a principled manner by concluding that the Zivin article did not constitute reliable medical literature supporting Dr. Frecker's causation testimony in the case before us.[15] The Zivin article urged more widespread use of t-PA in the treatment of ischemic stroke. The article indicated that only a small fraction of patients who could benefit from t-PA were being given the drug, either because doctors were unaware of the drug's benefits or were being overly conservative because of its proven risks. This continued underuse of t-PA with eligible patients, according to the article, could expose physicians to lawsuits arising from a physician's failure to properly inform patients of their treatment options or to use t-PA where appropriate. Given the criticisms of the article's methodology, one wonders whether the methodological choices made were geared to serve the article's purpose.

15 Although not binding on us, we note that a lower federal court has upheld the exclusion of proposed expert testimony that was predicated on the Zivin article. See *Smith v. Bubak*, 643 F.3d 1137, 1142 (C.A. 8, 2011) (upholding the exclusion of expert testimony predicated on the Zivin article and stating that, although the Zivin article "does indicate that [t-PA] causes some stroke patients to improve, this result does not reveal whether giving a patient [t-PA] will more likely than not cause a stroke patient to improve, which is the material inquiry under a traditional proximate cause regime[ ]").

***8** More significant for purposes of this appeal is that, although the Zivin article showed that the underlying study had 58 patients with NIH stroke scale scores of 5 or below, whether any of these patients were among the nearly 100 patients excluded from the article's reanalysis of the data cannot be determined. Even if they were included, they were excluded from the article's key point. The article noted that a "more clinically meaningful way to look at the data restricts the analysis to patients with a baseline NIH [stroke scale score] in the range of 5 to 24." The authors identified this group as the most likely to benefit from or to suffer harm from treatment with t-PA. Of those with NIH stroke scale scores between 5 and 24, 58.6% of those treated with t-PA experienced results better than patients who were given a placebo. Although the Zivin article asserts that t-PA treatment can result in beneficial outcomes to the majority of eligible patients, it does not show that a patient with an NIH stroke scale score of less than 5 falls within that majority. Accordingly, the Zivin article does not support Dr. Frecker's assertion that defendants' failure to administer t-PA to Mr. Uppleger, whose NIH stroke score while at MPH never rose above 3, proximately caused his injuries.

Given the absence of reliable medical literature or any other support for his opinions, Dr. Frecker's causation testimony

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was not based on sufficient facts or data, nor was it the product of reliable principles and methods that were applied reliably to the facts of this case. Dr. Frecker's testimony was thus inadmissible under MRE 702. See *Edry*, 486 Mich. at 641 (holding that "the lack of supporting literature, combined with the lack of any other form of support for [the expert's] opinion, renders his opinion unreliable and inadmissible under MRE 702[ ]").[16]

16 While making a fleeting reference to the thrombectomy issue in their brief on appeal, plaintiffs otherwise focus exclusively on the t-PA administration claim; thus, it appears they have abandoned the thrombectomy claim. In any event, Dr. Frecker did not testify that Mr. Uppleger was a candidate for a thrombectomy or that, under the circumstances presented here, a thrombectomy would have resulted in a greater than 50% opportunity to achieve a better result. Asked at his deposition what the latest time period was at MPH when Mr. Uppleger could have received t-PA that might have produced a full recovery, Dr. Frecker replied, "the proper answer could include, in the right setting, other treatment modalities, including thrombectomy and oxygenation, blood pressure control, and many other things that could and would have been done either simultaneously with t-PA or, say, if t-PA had failed." This quotation suggests that Dr. Frecker did not envision thrombectomy as an appropriate treatment apart from the administration of t-PA, unless t-PA failed. Further, Dr. Frecker never opined that the "right setting" existed for performing a thrombectomy on Mr. Uppleger. Quite the contrary. In an affidavit in response to the testimony of the defense experts, Dr. Frecker stated that the particular vessel involved in Mr. Uppleger's stroke was a small vessel, not a medium-sized one, as the defense experts had contended. In light of the AHA/ASA guidelines, Dr. Frecker's position that Mr. Uppleger's occlusion was in a small vessel is even more inconsistent with the notion that Mr. Uppleger would be a likely candidate for a thrombectomy.

Contrary to plaintiffs' argument, the trial court did not usurp the jury's role of assessing the credibility of conflicting expert opinions. As noted earlier, "[t]he reliability of the expert's testimony is to be determined by the *judge* in advance of its admission—not by the jury at the conclusion of the trial by evaluating the testimony of competing expert witnesses." *Tobin*, 244 Mich. App. at 651. The trial court properly exercised its gatekeeper role in determining that Dr. Frecker's causation testimony was unreliable. And there was nothing improper about the trial court considering the testimony of the defense neurology experts, along with the published literature that was provided and the lack of reliable literature supporting Dr. Frecker's opinions, when assessing the reliability of Dr. Frecker's testimony. See *Edry*, 486 Mich. at 640 (holding that the opinion of the plaintiff's expert was unreliable when it was contradicted by both the opinion of the defense expert and the published literature that was admitted into evidence and when no reliable literature was admitted into evidence that supported the opinion of the plaintiff's expert).

***9** Plaintiffs thereby failed to provide admissible expert testimony on factual causation as required to support their medical and nursing malpractice claims. *Kalaj*, 295 Mich. App. at 429. The trial court thus properly granted summary disposition to defendants because plaintiffs failed to demonstrate a genuine issue of material fact on the element of causation. See *Dykes v. William Beaumont Hosp.*, 246 Mich. App. 471, 478; 633 N.W.2d 440 (2001) (summary disposition for the defendant was proper because the deposition testimony of the plaintiff's sole expert witness failed to establish causation).

Given that plaintiffs failed to demonstrate a genuine issue of material fact regarding factual causation, it is unnecessary to consider legal causation. See *Ray v. Swager*, 501 Mich. 52, 71 n. 42; 903 N.W.2d 366 (2017) (when factual causation cannot be established, it is unnecessary to analyze legal causation). Anyway, for the same reasons that plaintiffs cannot establish factual causation, they also cannot establish legal causation. As noted, "[l]egal or proximate cause normally involves examining the foreseeability of consequences and whether a defendant should be held legally responsible for them." *Lockridge*, 285 Mich. App. at 684. It was not foreseeable that defendants' conduct would create a risk of harm to Mr. Uppleger because, as explained earlier, Mr. Uppleger was not a candidate for t-PA or a thrombectomy and, in any event, there was no reliable expert testimony that such treatment would more likely than not have made a difference in his outcome. Accordingly, for all of these reasons, the trial court properly granted summary disposition to defendants given plaintiffs' failure to demonstrate a genuine issue of material fact on causation.

Because the trial court's decision should be affirmed and there is no reason to remand the case for further proceedings, it is unnecessary to consider plaintiffs' argument that the case should be reassigned to a different trial judge on remand. Nor need we consider the McLaren defendants' argument that the trial court correctly dismissed Mrs. Uppleger's loss of consortium claim or defendants' argument that the

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trial court properly dismissed plaintiffs' constitutional claim. Plaintiffs fail to present any discernable appellate argument challenging the trial court's rulings on those issues and have thus abandoned any contention that the trial court erred in those rulings. *Seifeddine v. Jaber*, 327 Mich. App. 514, 520; 934 N.W.2d 64 (2019). And because the trial court properly granted summary disposition to defendants on the basis of plaintiffs' failure to demonstrate a genuine issue of material fact on causation, it is unnecessary to address defendants' arguments that summary disposition was proper on various alternative grounds.

B. DISCOVERY

In Docket No. 348928, plaintiffs also contend that the trial court erred in denying their motion to compel discovery. We disagree.

A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Cabrera v. Ekema*, 265 Mich. App. 402, 406; 695 N.W.2d 78 (2005). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Augustine v. Allstate Ins. Co.*, 292 Mich. App. 408, 419; 807 N.W.2d 77 (2011).

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Id.* (quotation marks and citation omitted). "However, Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions. Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition." *Id.* at 419-420 (quotation marks, brackets, and citations omitted).

***10** Plaintiffs contend that they are entitled to documents and information concerning MPH's certification as a primary stroke center as well as MPH's internal rules, regulations, policies, and procedures concerning the training and supervision of nurses. Plaintiffs also assert entitlement to depose defendant-nurses regarding MPH's internal policies and procedures. Plaintiffs' argument lacks merit because they have not shown that the information and documents requested are relevant to any element of their claims in this case.

A hospital's internal rules, regulations, and policies may not be used to establish the applicable standard of care or breach of that standard. *Zdrojewski v. Murphy*, 254 Mich. App. 50, 62; 657 N.W.2d 721 (2002); *Gallagher v. Detroit-Macomb Hosp. Ass'n*, 171 Mich. App. 761, 765-768; 431 N.W.2d 90 (1988). Rather, expert testimony is required to satisfy these elements in a malpractice case. *Kalaj*, 295 Mich. App. at 429; *Decker v. Rochowiak*, 287 Mich. App. 666, 686; 791 N.W.2d 507 (2010). Plaintiffs have not shown that MPH's internal rules, regulations, and policies were relevant to the subject matter of this case. Although plaintiffs correctly note that the rules of an external agency such as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) differ from a hospital's internal rules and policies, *Zdrojewski*, 254 Mich. App. at 62-63, plaintiffs have not shown how the JCAHO rules are relevant or why those rules of an external agency could only be obtained from the McLaren defendants or are properly the subject of a motion to compel discovery from the McLaren defendants. Plaintiffs have likewise not shown how any documents or information concerning MPH's certification as a primary stroke center would be relevant to any element of a malpractice claim. And because plaintiffs have not shown that any documents or information regarding these matters is subject to discovery, they have also failed to establish entitlement to ask defendant-nurses about these matters at deposition. Overall, plaintiffs have not established that the denial of their motion to compel discovery fell outside the range of reasonable and principled outcomes.

Affirmed.

Shapiro, J. (concurring).
I concur in the result only.

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