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STATE OF MICHIGAN
IN THE SUPREME COURT

LYNDA DANHOFF and DANIEL DANHOFF, Plaintiffs-Appellants, v. DANIEL K. FAHIM, M.D., MICHIGAN HEAD & SPINE INSTITUTE Defendant-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 Docket No. 163120 Court of Appeals No. 352648 Lower Court No. 18-166129-NH

AMICUS CURIAE BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business organization. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region in the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Michigan Chamber of Commerce (the "Michigan Chamber") is the leading voice of business in Michigan. The Michigan Chamber advocates for job providers in the legislative and legal forums and represents approximately 5,000 employers, trade associations, and local chambers of commerce of all sizes and types in every county of the state. The Michigan Chamber's member firms employ over 1 million Michiganders. The Michigan Chamber members, who are often subjects to civil litigation, have a direct interest in seeing the trial courts fulfill their evidentiary gatekeeping role to ensure admissible expert testimony is both reliable and relevant to the issues being litigated.

The Chambers' members, who are frequently the targets of litigation premised on expert testimony, rely on the ability of trial courts to serve as gatekeepers and exclude unreliable expert testimony. They accordingly have a strong interest in the

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interpretation of MRE 702 and MCL 600.2955, which govern the admissibility of such testimony in Michigan.

Here, the trial court and the Court of Appeals correctly held Plaintiffs to the evidentiary burden established by Michigan precedent and reinforced by recent and forthcoming amendments to MRE 702. In doing so, the lower courts rightly recognized that more is required from a standard-of-care expert than his own say-so or *ipse dixit* opinion.

When unreliable testimony is admitted, members of the Chambers—and every other litigant—are exposed to additional risk of substantial verdicts or coercive settlements that are not warranted by the merits of the case. Such is the very result that Plaintiffs seek from this Court: to permit the admission of standard-of-care expert testimony on nothing more than the unadorned say-so of their expert. If permitted, that result would undermine the important gatekeeping role for the courts of this State. The Chambers are uniquely positioned to provide this Court with insight into why affirming the lower courts' interpretation of *Edry* and *Elher*—and rejecting Plaintiffs' proposed interpretation—is essential to protecting the welfare of Michigan's businesses and consumers.

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INTRODUCTION[1]

The trial court excluded the opinion of a proffered expert whose "only foundation . . . was his experience and background." *Danhoff v Fahim, MD*, unpublished opinion of the Michigan Circuit Court, issued November 25, 2019 (Docket No. 2018-166129), 2019 WL 12383192, p *2.[2] That was a proper exercise of a trial court's gatekeeping function—and what this Court should expect from trial courts. This Court should endorse the trial court's analysis, reiterate the importance of a proper gatekeeping standard, and affirm the trial court's exercise of its discretion.

In this medical malpractice case, Plaintiffs' standard-of-care expert opinion is founded on nothing more than the expert's own say-so. He assumes that because a bowel injury happened after surgery, it must have been caused by the surgery. And he assumes that if the injury was caused by the surgery, then the surgeon must have done something wrong. Stacking assumption atop assumption is no methodology at all, and certainly not a reliable one. Plaintiffs' expert likewise provides no factual foundation for who caused the injury (the surgeon or his resident), what tool caused it, when it occurred during the procedure, how it happened, or what a reasonably careful surgeon would have done differently. See Defts' Resp to Pls' Br on Appeal at 9; Defts' Br on Appeal at 14–15. He also does not consider, much less rebut, the

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[1] In accordance with MCR 7.312(H)(5), the U.S. Chamber and Michigan Chamber disclose that their counsel is the sole author of this brief. Neither party nor their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Unpublished cases are attached as Exhibit A.

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contrary evidence: the surgeon could at all times see where he was operating, and he did not go near the bowel; there was no infection at the surgery site; and the bowel perforation was diagnosed as diverticulitis-related. *Id.* at 10–15. Nor did the standard-of-care expert dispute that the injury is a known risk for the procedure, a risk recognized in the scant literature Plaintiffs offered in attempting to revive his opinion on reconsideration. *Id.* at 1, 6. Indeed, the injury is a risk that Plaintiff Ms. Danhoff was warned of and acknowledged in consenting to the surgery, and a risk she would take again if confronted with the same decision. *Id.* at 42.

This case presents an opportunity for the Court to underscore the importance of expert gatekeeping. As trials have become more complex, expert testimony has become increasingly important. Yet in recent years, this increasing importance has been met with increased leniency from courts, including in Michigan, who interpret the lack of a reliable foundation as bearing on weight rather than admissibility. These trends spell disaster for businesses, who are often the targets of litigation (and eyepopping verdicts) premised on nothing but a single expert's *ipse dixit*.

Recognizing that courts across the country are failing to satisfy their gatekeeping duties, the U.S. Supreme Court recently approved amendments to FRE 702 to reinforce the existing standard and remind courts of their vital gatekeeping role. Michigan courts, which enforce the same burdens of admissibility as FRE 702, have issued the same kinds of lenient decisions that the federal rule amendments are attempting to correct. This Court should follow the U.S. Supreme Court's lead and, as it did in clarifying FRE 702, confirm here that the proponent of expert testimony

must satisfy the requirements of Michigan's Rule 702 by a preponderance of the evidence.

The lower court properly understood the trial court's gatekeeping role here. A medical-malpractice plaintiff must not only show that an injury happened after surgery, but that it happened because of medical negligence. To do that, the plaintiff needs an expert to say what that standard of care is for the surgery, and how that standard was breached during this particular surgery.

The premise of Plaintiffs' argument to the contrary is flawed: *Edry* and *Elher* do not "require a standard-of-care expert to always back his or her opinion with scientific literature." Pls' Br on Appeal at 24. Nevertheless, Plaintiffs imply with unattributed quotation marks that the lower courts interpreted *Elher* to "stand[] for the proposition that direct medical literature must always be presented in support of a plaintiff's expert's standard-of-care opinion" and thus considered themselves "unreasonably restrained in the factors it is able to consider to assess scientific reliability." *Id*. at 26–27. Actual quotes from the lower court opinions show otherwise. The trial court cited *Edry* for the proposition that "experience and background alone are insufficient[.]" *Id*. at 9 (quoting *Danhoff*, unpub op of Mich Cir Ct at p *2). And the Court of Appeals held that "of course" "no case holds that a witness must support his or her opinion with scholarly articles[,]" *id*. at 27 (quoting *Danhoff v Fahim*, unpublished opinion of the Court of Appeals, issued May 6, 2021 (Docket No. 352648), 2021 WL 1827959, at p *5), and that trial court did not abuse its discretion here because the expert's opinion "was not based on any methodology other than his bare

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assertion that he had never heard of any such injury, and therefore, he would conclude that any such injury was caused by malpractice." *Id.* at 10 (quoting *Danhoff*, unpub op of Mich App at p *6).

The reality is, as Plaintiffs recognize, even under *Edry* and *Elher*, "[a] balanced reading of MRE 702 and MCL 600.2955, provides the trial court sufficient discretion to evaluate which factors are significant given the medical issues[.]" *Id.* at 2. Here, the trial court properly exercised that discretion.

At the time he offered his testimony, Plaintiffs' expert relied solely upon his experience performing thirty or forty similar surgeries in which a bowel injury had not occurred. See Defts' Br on Appeal at 1. His opinion failed to deal with possible alternative causes (like diverticulitis), *id.* at 13, and inconsistent facts (like a lack of infection at the surgical site), *id.* at 23. And even when invited by the trial court to offer support for his say-so opinion that "a bowel injury is an 'unacceptable' complication of the surgery, and can only result from surgical error[,]" *Danhoff v Fahim*, unpublished opinion of the Michigan Circuit Court, issued January 21, 2020 (Docket No. 2018-166129), 2020 WL 10056391, at p *2, he proffered literature that demonstrates that a bowel injury is a known, albeit "very rare complication." *Id.* at 1. Those materials are "silent as to whether a bowel injury is an 'acceptable' or 'unacceptable' complication" and "certainly do not state that a bowel injury must be or is usually the result of a breach of the standard of care." *Id.* at 2. The expert's opinion that the bowel injury must nevertheless have been due to a violation of the standard of care would create strict liability for rare complications, even those

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disclosed and acknowledged by the patient. Because the trial court properly found that "experience and background" were all Plaintiffs' expert offered, and properly recognized that "experience and background alone are insufficient to establish reliability and admissibility under MRE 702[,]" *Danhoff*, unpub op of Mich Cir Ct at p *2, the trial court was well within its discretion to exclude Plaintiff's expert's opinion.

Plaintiffs hardly argue that their expert meets the existing gatekeeping standards under MRE 702. Rather, they ask the Court to "endorse[] a more flexible test" for standard-of-care testimony in a medical malpractice case. See Pls' Br on Appeal at 3. Plaintiffs argue that in medical malpractice cases, courts should allow "standard-of-care experts" to "support their opinions predominantly with citation to their own regular treatment of the medical condition involved." *Id.* at 28; *see also id.* at 36 (arguing that Michigan law "should be interpreted to allow" testimony based on "an expert's knowledge, experience and skill in a given procedure"). In addition, Plaintiffs ask the Court to shift the burden to Defendants to produce "evidence which establishes that the expert's knowledge and experience may not be sufficient to make their standard of care opinion reliable[.]" *Id.* This standard would essentially amount to a new *res ipsa* in medical malpractice cases where, so long as one doctor says he hasn't personally seen an adverse consequence, a jury would be entitled to conclude that adverse consequence must have been caused by a breach of the standard of care.

The Court should reject Plaintiffs' invitation to upset Michigan law, lower the expert admissibility standard, and shift burdens to defendants to *disprove* negligence.

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Such a weakened standard on a large scale would wreak havoc on Michigan businesses. And, notwithstanding Plaintiffs' parade of horribles, a plaintiff's inability to bring a case where they cannot prove that a defendant committed a wrong is not reason to abandon the gatekeeping obligation of trial courts. To the extent the Court agrees with Plaintiffs that something unique about medical malpractice standard-of-care opinions warrants a weakened standard of admissibility, the Court should make clear that the trial courts retain their rigorous gatekeeping role in evaluating the reliability of other expert evidence, as they have for decades.

ARGUMENT

Plaintiffs seek a rule that—at least for a standard-of-care expert in the medical-malpractice context—would allow an expert to inform a jury, based only on his not having experienced an adverse consequence personally, that the adverse consequence must mean someone was negligent. In this era of increasingly complex cases, increasingly lenient admission of expert testimony, and increasingly high awards, this Court should reject Plaintiffs' invitation. Lowering the bar and shifting the burdens to Defendants to show the unreliability of expert testimony is the wrong tack. This Court should instead underscore the importance of a trial court's gatekeeping role and affirm.

I. This Court should underscore the strong gatekeeping role provided in MRE 702.

MRE 702, following FRE 702, defines the requirements for admissibility of expert testimony and tasks trial courts with acting as gatekeepers. To admit expert

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testimony, the court must "determine[]" that the witness is qualified to offer each opinion, and that each opinion is relevant and reliable:

> 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.[3] This Court, nearly twenty years ago, recognized that MRE 702 "impose[s] 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 NW2d 391 (2004). The rule "particularize[s] the kind of gatekeeper inquiry the trial court is required to make." *Id*. at 779 n 44. The Michigan Legislature bolstered this rule by codifying trial

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[3] This Court recently adopted amendments to certain rules of evidence, including MRE 702. See Michigan Court Order No. 0034 (2023). The amendments are effective January 1, 2024. See *id.* The revised MRE 702 permits a trial court to admit opinion testimony only *if* the court finds it relevant and reliable:

> 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;
>
> (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.

Id.

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courts' obligation to exclude junk science and enumerating seven factors to consider before admitting an expert opinion. See MCL 600.2955.

Sound judicial policy concerns underlie strong adherence to the trial court's gatekeeping function. Modern trials are becoming more complex, and expert testimony is often necessary for a jury to reach an informed conclusion. See, e.g., *People v VanderVliet*, 444 Mich 52, 87; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); 2 Mich Ct Rules Prac. Evid., § 702.4 (4th ed, Sept 2023). In the medical-malpractice context, it is long-settled that expert testimony is necessary to establish the standard of care. See *Sullivan v Russell*, 417 Mich 398, 407; 338 NW2d 181 (1983).

Although trials more frequently include expert witnesses, juries are less capable than judges of critically examining the testimony of experts, in part because they may mistakenly assume that the judge has endorsed an expert's opinion simply by virtue of letting them in the courtroom.[4] Given this inherent risk, MRE 702 (like its federal counterpart) task the trial court with conducting a rigorous expert reliability evaluation, The Court of Appeals has recognized this court's "warning" that trial courts' "insufficient inquiry" into whether the expert offers a "reliable application of reliable methods to the specific facts of a case" could result in the admission of junk science. *Ketterman v City of Detroit*, unpublished opinion of the Court of Appeals, issued May 16, 2006 (Docket No. 258323), 2006 WL 1328846, p *5

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[4] See Bornstein & Greene, *The Jury Under Fire: Myth, Controversy, and Reform* (Oxford University Press, 2017), pp 131–35; Saks & Wissler, *Legal and Psychological Bases of Expert Testimony: Surveys of the Law and of Jurors,* 2 Behav Scis & L 435 (1984); Shuman et al, *An Empirical Examination of the Use of Expert Witnesses in the Courts*, 34 Jurimetrics J 193 (1994).

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(discussing *Gilbert*, 470 Mich at 783). If a court permits "'analytical gap[s]' between data and opinions given by experts," that "might let in testimony that could 'serve as a Trojan horse that facilitates the surreptitious advance of . . . spurious, unreliable opinions.'" *Id.* (citation omitted; alteration in original). In accord, this Court has instructed courts to "vigilantly play the gatekeeper role to prevent just this from happening[.]" *Id.*; accord *Gilbert*, 470 Mich at 782 (stating that MRE 702 "require[s] courts to exclude junk science"); *People v Hubbard*, 209 Mich App 234, 242 n 2; 530 NW2d 130 (1995) ("'Junk science' has no place in our courtroom.").

Despite the gatekeeping mandate of Rule 702, and contrary to the premise of Plaintiffs' appeal, trial courts across the country have become more lenient in admitting expert testimony, drifting from *Daubert* and sidestepping their gatekeeping role. Rather than "determining" whether expert testimony meets the requirements of Rule 702, courts are taking their gatekeeping guidance from outdated authority that employs a more permissive standard. See Bernstein & Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm & Mary L Rev 1, 19–25 (2015).

Federal cases are sadly rife with misapprehensions of FRE 702's similar gatekeeping function, with many cases holding that objections to the sufficiency of an expert's basis are questions of weight, rather than admissibility.[5] Following this tide

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[5] See Bayer Corp, *Amending Federal Rule of Evidence 702* (Sept 30, 2020) (discussing more than 200 rulings issued since January 2015 including erroneous law quoting erroneous language from *Loudermill v Dow Chem Co*, 863 F2d 566, 570 (CA 8, 1988)), available at <https://perma.cc/JXD9-NM6C>; see also Ford Motor Co,

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of leniency, some courts have drifted so far as to hold that an expert's experience *alone* can satisfy reliability standards under FRE 702, despite the repeated rejection of *ipse dixit* testimony and the Advisory Committee's explicit guidance that something more is required than an expert's say-so. See e.g., *Irizarry-Pagan v Metro Santurce, Inc*, report and recommendation of the United States District Court for the District of Puerto Rico, issued August 8, 2022 (Docket No. 18-1532), 2022 WL 4243567, at *4 , report and recommendation adopted 2022 WL 3909158 ("personal experience alone may be sufficient"); but see FRE 702 (advisory committee's note to 2000 amendment) ("If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.").[6] Decisions like this threaten to abrogate the gatekeeping function, abandoning the post without worry as to who or what might come through the gate.

Amending Federal Rule of Evidence 702 (Sept 26, 2020) (discussing problematic rulings rooted, in part in pre-*Daubert* caselaw within the Fourth Circuit), available at <https://perma.cc/A3Y4-A6WP>.

[6] Michigan courts have not been immune from this drift See, e.g., *Mackenzie v Koziarski*, unpublished opinion of the Court of Appeals, issued March 22, 2011 (Docket No. 289234), 2011 WL 1004174, p *9 (reversing trial court which neglected its gatekeeping obligation where a party raised issues as to both qualifications as an expert and methodology but the trial court only addressed qualifications and failed to address the reliability of the expert's testimony).

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II. This Court has faithfully followed the federal rules, which reinforce the trial court's gatekeeping role.

Accepting Plaintiffs' position would also mark a break from federal evidentiary practice that this Court has not historically made. The Michigan Rules of Evidence have repeatedly and diligently followed in the footsteps of their federal counterparts. Thus, while the recent federal rule amendments do not control the issues in this case, their importance should not be understated. This Court should not part ways with its precedent or with nationwide evidentiary standards on the record presented here—with an expert who unabashedly hung his hat on nothing more than his say-so to be cloaked with the imprimatur of an expert on the relevant standard-of-care question.

In 1973, the United States Supreme Court adopted the Federal Rules of Evidence, including FRE 702. Five years later, this Court followed suit, promulgating the Michigan Rules of Evidence and MRE 702. At the time of its adoption, MRE 702 differed from FRE 702 by only a single word. See MRE 702 (staff comment to 1978 adoption).

After the United States Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993), FRE 702 was amended to further "affirm[] the trial court's role as gatekeeper and provide[] some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." FRE 702 (advisory committee's note to 2000 amendment). Again, in lockstep with the federal rules, Michigan updated MRE 702 to incorporate *Daubert*'s gatekeeping mandate. See *Gilbert*, 470 Mich at 781; MRE 702 (staff comment to 2004 amendment). In enshrining the trial court's gatekeeping function, this Court retained

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the words "if the court determines," to "emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration." MRE 702 (staff comment to 2004 amendment).

Since then, the United States Supreme Court has clarified FRE 702 twice. In 2011, the rule was amended as part of a "restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules." FRE 702 (advisory committee's notes to 2011 amendment).

And in 2023, the United States Supreme Court amended FRE 702 to reinforce the rule's existing gatekeeping obligation: "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility[,]" which is "an incorrect application of Rules 702 and 104(a)." Advisory Committee on Rules of Practice and Procedure, *Summary of Proposed New and Amended Federal Rules of Procedure* (Oct 19, 2022), p 228.[7] The Advisory Committee noted that renewed adherence to judicial gatekeeping responsibilities is vital "because just as jurors may be unable . . . to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support." *Id.* at p 244. To correct the misapplication of FRE 702, the new amendments insert a "more likely than not" evidentiary standard directly into the

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[7] Available at <https://perma.cc/P4CE-95FX>.

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text of the rule to encourage courts to maintain their gatekeeping duties. See *id.* at p 228.

Following suit, on September 20, 2023, this Court adopted amendments to MRE 702 to capture the changes made to FRE 702 over the last 20 years and to reconfirm existing law. See Michigan Court Order 0034 (2023); see also, id. (staff comment to 2023 amendment) (amending MRE 702 "in an effort to remain as consistent as possible with the 2011 restyling of the Federal Rules of Evidence."). Though these amendments do not mirror the December 2023 federal amendments in their entirety, they do support the same overarching theme: under the *existing* Rule 702, questions of *weight* are decided by the jury whereas questions of *admissibility* are questions for the court.

The principles underlying the recent amendments to both FRE 702 and MRE 702 bear directly upon the issues here. Plaintiffs' permissive interpretation of expert admissibility rules would contravene what the FRE 702 amendments make clear: renewed adherence to the gatekeeping obligation of trial courts, not a retreat therefrom, is what modern trial practice demands. This is a case of proper expert gatekeeping, and this Court should take the opportunity to affirm the gatekeeping role provided in MRE 702 and to ensure the reliability of expert testimony at trial.

III. This Court should affirm the trial court's proper exercise of discretion in holding Plaintiffs to their MRE 702 burden.

With the above principles in mind, in evaluating Plaintiffs' standard-of-care expert, the trial court correctly held Plaintiffs to their evidentiary burden, as stated in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), and *Elher v Misra*, 499 Mich

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11; 878 NW2d 790 (2016). That is, the trial court properly undertook its duty to ensure that Plaintiffs' expert opinion was "sufficiently reliable under the principles articulated in MRE 702 and by the Legislature in MCL 600.2955." *Danhoff v Fahim, MD*, unpublished order and opinion of the Michigan Circuit Court, issued November 25, 2019 (Docket No. 2018-166129), 2019 WL 12383192, at p *2.

In applying MRE 702, the trial court found that it had "no choice" but to strike Plaintiffs' standard-of-care expert's testimony, because it was based on nothing more than the expert's mere *ipse dixit*. *Id.* at p *2–3 ("The only foundation laid as to the reliability of Dr. Koebbe's testimony was his experience and background, and his own opinion as to how he would have performed the surgery."). This decision fully squares with history leading to and intent of MRE 702.

In affirming the trial court's decision, the Court of Appeals properly acknowledged the trial court's important discretionary role as gatekeeper of expert testimony:

> The trial court's obligation under *Daubert* generally is referred to as "gatekeeping" or the "gatekeeper role." 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.

Danhoff v Fahim, unpublished opinion of the Court of Appeals, issued May 6, 2021 (Docket No. 352648), 2021 WL 1827959, p *4 (citations omitted). Citing *Elher,* the appellate court held that Plaintiffs' standard-of-care expert—absent *any* demonstration that his opinion was the product of other reliable principles or methods—failed to meet his MRE 702 burden. *Id.* at p *5 ("Plaintiffs and Dr. Koebbe failed to support. [sic] his standard of care testimony with supporting literature; and

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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.").

Edry and *Elher* are well within this gatekeeping tradition and capture the role of supporting literature in determining the admissibility of standard-of-care expert witness testimony in medical malpractice cases. The "supporting literature" line of cases first originated with *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 84; 684 NW2d 296 (2004), where the court held that the plaintiff's expert testimony was "too speculative under MRE 702[.]" While the *Craig* Court noted the lack of supporting medical literature to justify the expert's opinion, the decisive factor was the expert's "failure to root his causal theory in anything but his own hypothetical depiction of female anatomy[.]" *Id.*

Six years after *Craig*, this Court further underscored the critical gatekeeping function in *Edry*, stating that, "*while not dispositive*, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." 486 Mich at 640 (emphasis added). Not once, but twice, *Edry* acknowledged that supporting literature is not the end-all-be-all for a trial court's admissibility determination: "While peer-reviewed, published literature *is not always a necessary or sufficient method* of meeting the requirements of MRE 702 . . . the lack of supporting literature, *combined with the lack of any other form of support* . . . renders [an expert's] opinion unreliable and inadmissible under MRE 702." *Id.* at 641–642 (emphasis added). This Court echoed this very principle again six years later in *Elher*.

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See *Elher*, 499 Mich at 23 (noting that "[a] lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony.").

Time and again, courts applying this straightforward principle have acknowledged that literature is simply one factor to consider when determining reliability of expert testimony.[8] The lower courts in this case agree that MRE 702 is a flexible standard and that its "list of permissible factors to consider at the gatekeeping stage is non-exhaustive." *Danhoff*, unpub op of Mich App at p *5.

Plaintiffs' straw man of a "stringent literature requirement" is convenient to attack, but it is neither the rule nor the result of *Edry* and *Elher*. In fact, Plaintiffs read *Edry* and *Elher* the same as Defendants do. They admit that both cases acknowledge the gatekeeping role of the courts and neither "require[s] a standard of care expert to always back his or her opinion with scientific literature." Pls' Supp

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[8] Plaintiffs insist that trial courts read *Edry* and *Elher* as imposing a stringent literature requirement for expert admissibility. The caselaw reveals that, as in this case, experts are being excluded for *ipse dixit* opinions after trial courts consider both the absence of literature *and* other supporting indicia of reliability. See, e.g., *Hooks v Ferguson*, unpublished opinion of the Court of Appeals, issued Nov 3, 2016 (Docket No. 322872), 2016 WL 6584547, p *2 ("[P]laintiff failed to submit any evidence, medical literature *or otherwise*, to support [their expert's] standard of care opinion testimony") (emphasis added); *Uppleger v McLaren Port Huron*, unpublished opinion of the Court of Appeals, issued Oct 22, 2020 (Docket No. 348551), 2020 WL 6253601, p *8 (finding expert testimony unreliable due to "the absence of reliable medical literature *or any other support*") (emphasis added); *Mallory v Beaumont Health Sys*, unpublished opinion of the Court of Appeals, issued Dec 22, 2020 (Docket No. 350263), 2020 WL 7636560, p *8 (finding expert testimony unreliable because the expert failed to identify *"any other basis"* for his opinion besides his experience and background) (emphasis added).

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Brief at 18. Instead, *Edry* and *Elher* stand for the uncontroversial proposition that there must be *something* more than mere expert opinion regarding standard of care—whether that be literature or one of the other factors provided in MCL 600.2955.

Given that MCL 600.2955 enumerates six other factors that trial courts may assess when evaluating the basis for expert testimony, there was no shortage of opportunity for Plaintiffs to meet their MRE 702 burden. Despite this, Plaintiffs' expert could only muster a few abstracts and one article confirming that bowel injury is a rare but known risk of surgery. Defts' Br on Appeal at 1. But, as the trial court found, the materials were "silent as to whether a bowel injury is an 'acceptable' or 'unacceptable complication'" and "certainly do not state that a bowel injury must be or usually is the result of a breach of the standard of care." *Danhoff*, unpub op of Mich Cir Ct at p *2 (denying reconsideration).[9]. Plaintiffs' expert relied exclusively on the logical fallacy that because an injury occurred after surgery, someone must have done something wrong during the surgery.[10] If followed, this logic would demote the court from being the gatekeeper of expert admissibility to a crossing guard.

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[9] While supporting literature in a medical malpractice case is certainly not a legal requirement, it is good sense. Medical treatment is complex and susceptible to highly individualized outcomes depending on an individual's physical condition and reaction to treatment. This is why patients are advised of rare risks and asked to provide consent for those risks. Plaintiffs' here weaponize these warnings by arguing that a known but rare risk must always stem from a breach in the standard of care. Medical literature can cut against this faulty logic by showing what the standard of care actually is, how the particular risk actually occurs, and when, if at all, the risk may occur when the standard of care is followed.

[10] This opinion is a form of the faulty *post hoc ergo propter hoc* logic. See, e.g., *West v Gen Motors Corp*, 469 Mich 177, 186 n 12; 665 NW2d 468 (2003) ("Relying merely

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IV. This Court should reject Plaintiffs' invitation to lower the standard for expert admissibility, even in the medical-malpractice, standard-of-care context.

Plaintiffs do not argue that their expert meets the existing standard under *Edry*, *Elher*, or MRE 702. Instead, what Plaintiffs ask for is a new lower standard for medical standard-of-care opinions.[11] See Pls' Br on Appeal at 4, 18. This would mark a complete retreat from the particularized reliability standards of MRE 702 and MCL 600.2955 at a time when the United States Supreme Court, through the amendments to FRE 702, is reinforcing those standards.

Plaintiffs' proffered standard essentially amounts to a new *res ipsa* for medical malpractice standard of care opinions. Here, the expert personally performed thirty to forty surgeries and none of his patients experienced the same injury, so he opines

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on a temporal relationship is a form of engaging in the 'logical fallacy of *post hoc ergo propter hoc* (after this, therefore in consequence of this)' reasoning.") (citation omitted); *Bernardi v Rock*, unpublished opinion of the Court of Appeals, issued June 18, 2020 (Docket No. 347134), 2020 WL 3399570, p *11 ("Courts must remain wary of *post hoc ergo propter hoc* reasoning. Stated otherwise, showing only a temporal relationship is generally insufficient to establish a causal relationship.") (citations omitted).

[11] This is also the rule that *amicus curiae*, the Michigan Association for Justice ("MAJ"), seeks. See MAJ Amicus Br at 11–12. To wrangle FRE 702's gatekeeping mandate to conform with an *ipse dixit* standard, MAJ quotes FRE 702's advisory committee notes to the 2000 amendment: "Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony." FRE 702 (advisory committee's note to 2000 amendment). MAJ fails to quote the next paragraph which reads, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* This is perfectly in accordance with *Edry*, *Elher*, and MRE 702. Mere *ipse dixit* is insufficient.

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that *every* incident of this kind is likely a breach of some standard of care. But under Michigan law, *res ipsa* requires evidence, i.e., *proof* that the event at issue is of a kind that ordinarily does not occur in the absence of negligence, and that it was caused by an agency within the exclusive control of the defendant. See, e.g., *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987) (acknowledging that Michigan *res ipsa* is based on a showing of circumstantial evidence). Here, rather than provide that proof, the expert's opinion merely *assumes* it. Worse yet, he assumes it twice. First, the expert assumes that the injury was caused by the surgery (as opposed to the alternative proposed cause of diverticulitis), and then, without explaining what went wrong in the surgery, the expert assumes the injury was caused by whatever went wrong. Such assumption-piling *ipse dixit* is the very sort that MRE 702's gatekeeping function is designed to exclude from trial.

Michigan courts have long acknowledged that mere *ipse dixit* is not enough, even in standard-of-care opinions. "[I]t 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; *Elher*, 499 Mich at 23 (same); see also *Ballance v Dunnington*, 241 Mich 383, 386–87; 217 NW 329 (1928) (acknowledging that the 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.").

Overturning the trial court's decision would take Michigan further away from the text and intent of MRE 702. Such a result ought to be avoided. "While the exercise

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of th[e] gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Gilbert*, 470 Mich at 780. Given this Court's efforts to "remain as consistent as possible with the federal rules," and the Supreme Court's attempted restoration of FRE 702's gatekeeping function, this Court should decline Plaintiffs' invitation to lower the standard for expert admissibility. Administrative Order No. 2021-8, (2021).

In all, affirming the trial court's decision creates no absolute mandate that supporting literature be provided, even in a medical malpractice case. It simply re-affirms the proper evidentiary standard under MRE 702 requiring indicia or reliability beyond the expert's personal experience. Overturning the trial court's decision and adopting Plaintiffs' proposed standard-of-care exception would unwind established precedent as to the admissibility of experts, abandon this Court's gatekeeping duty, and put Michigan decisively on the stray path that the FRE 702 and MRE 702 amendments aim to correct.

V. It is essential to the welfare of Michigan businesses and consumers that trial courts fulfill their gatekeeping duties as the Legislature prescribed.

Embracing Plaintiffs' interpretation of expert testimony admissibility invites dangerous consequences for Michigan businesses, particularly if that interpretation is expanded to all expert testimony contexts. If the courts open the gates to unreliable and assumption-based expert testimony, Michigan businesses will be significantly disadvantaged in the face of increased frequency of lawsuits and substantial verdicts. Expert testimony is often the linchpin for tort claims seeking sizable monetary damages. With MRE 702's strong gatekeeping function, businesses have assurance

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that such claims may proceed only if grounded in sound science. Without such protection, however, business owners may see no option but to settle rather than take their chances with a jury, even when there are real doubts about the science involved. See Berger, *The Admissibility of Expert Testimony*, *Reference Manual on Scientific Evidence* (Federal Judicial Center: 3d ed 2011), p 19 ("[A]n inability by the defendant to exclude plaintiffs' experts undoubtedly affects the willingness of the defendant to negotiate a settlement."). In turn, rising litigation costs and the risk of satisfying massive unjustified jury verdicts will force businesses to pass those costs onto consumers. At worst, it may discourage businesses from coming to Michigan in the first place and force existing businesses to relocate to other jurisdictions, depriving the State of jobs and tax revenue.[12]

Failure to apply MRE 702's safeguards will also "limit the number of products available to . . . consumer[s]," because businesses may pull "safe, valuable products" from the market rather than risk unpredictable litigation. Price & Gates Kelly, *Junk Science in the Courtroom: Causes, Effects and Controls*, 19 Hamline L Rev 395, 398 (1996); see also, Schwartz & Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L Rev 217, 224–26 (2006). Even the potential of an unfounded jury award based on unreliable expert testimony could "improperly force" a business to abandon a beneficial product that is, in fact,

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[12] The threat that companies may flee from the state to avoid increased liability is not speculative. One need only look to insurance companies' recent flight from California and Florida to avoid "high-risk, high-loss markets[.]" Gall, *Why Insurance Companies are Pulling Out of California and Florida, and How to Fix Some of the Underlying Problems* (June 7, 2023), available at <https://perma.cc/R5QD-9GTX>.

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completely sound. Hon. Stephen Breyer, *Introduction, Reference Manual on Scientific Evidence* (Federal Judicial Center, 3d ed 2011), p 4; US Chamber Institute For Legal Reform, *Fact or Fiction: Ensuring the Integrity of Expert Testimony* (Feb 2021), p 27 ("When courts do not demand that experts . . . support their conclusions with sound scientific evidence, they present an opportunity for unwarranted mass tort litigation that imposes defense costs and liability that can drive products from the market.").[13] If businesses are forced to turn to these options, consumers will face higher costs, fewer choices in-store, and waning employment prospects.

The associated burdens with abandoning MRE 702's gatekeeping function will disproportionately fall on small businesses, who are more likely to litigate in state court. Lawsuits involving large corporations are relatively more likely to raise issues of federal law or involve parties in different states. In such cases, business defendants may rely on federal courts to screen out frivolous lawsuits based upon speculative science. However, small businesses with primarily local operations must look to Michigan courts for protection. For a small business, the costs of defending a questionable lawsuit through trial can be ruinous. The tort liability price tag for small businesses in 2008 alone was $105.4 billion. See U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Businesses* (July 2010), p 9.[14] Additionally, small business owners do not have in-house counsel to handle litigation and, in many cases, lack both the resources needed to hire an attorney and the time and energy

[13] Available at < https://perma.cc/Q446-EBGF>.
[14] Available at <https://perma.cc/DS4U-W7TZ>.

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required to fight a lawsuit. Thus, even if a small business defendant is convinced that a plaintiff's expert claims are frivolous, it may have no choice but to settle.

This case provides the Court an opportunity to confront this issue and reconfirm the standard for expert admissibility in Michigan that provides its businesses with fair and accurate determinations of legal liability based upon sound and reliable scientific testimony.

CONCLUSION

Given the important function of MRE 702, the recent and forthcoming amendments to both the Federal and Michigan Rules of Evidence, and the welfare of Michigan businesses, this Court should reinforce the strong gatekeeping role provided by MRE 702 and reject Plaintiffs' *ipse dixit* standard. For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the at-issue trial court and Court of Appeals decisions.

Respectfully submitted,

Dated: December 8, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.305(A) and MCR 7.212(B). The document contains 6,935 words, one-inch page margins, the font is Century Schoolbook, and the text is 12-point type and double-spaced (except block quotations and footnotes which are single-spaced).

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2023, I electronically filed the foregoing papers with the Clerk of the Court using the Odyssey File and Serve system, which will send notification of such filing to all counsel of record and/or a copy will be sent via first class U.S. Mail to all counsel not listed on the Odyssey service list.

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Exhibit A

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2020 WL 3399570
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Michael H. BERNARDI, Plaintiff-Appellant,
v.
Tonya Melynda ROCK, Defendant-Appellee.

No. 347134
|
June 18, 2020

Lapeer Circuit Court, LC No. 17-051096-NI

Before: Gleicher, P.J., and Gadola and Letica, JJ.

Opinion

Per Curiam.

***1** In this automobile-negligence action, plaintiff, Michael Bernardi, appeals as of right the trial court's order granting defendant Tonya Rock's motion for summary disposition under MCR 2.116(C)(10). In particular, the trial court determined that the expert's opinion that the accident caused plaintiff's herniated disc was unreliable, and, without it, there was no evidence of causation. We affirm.

I. BACKGROUND

On September 9, 2014, defendant was driving a Jeep Grand Cherokee Laredo behind plaintiff, who was operating a school bus transporting five middle schoolers. Plaintiff was wearing a shoulder harness and lap belt and had just come to a stop. Defendant testified that she had been following the bus when she looked down, swept some crumbs off her lap, and looked back up to see the stopped bus. Defendant slammed on her brakes, but nevertheless "slid into the back of" the bus.

At that point, plaintiff testified that he was leaning forward to grab the park brake with his right hand to pull it, but was uncertain whether he actually grabbed the park brake. Defendant described the impact as "[j]ust tap[ping] the [bus's] bumper" and testified that her air bags did not deploy. Plaintiff, who is 5' 8" and, at that time, weighed approximately 245 pounds, described feeling the impact "a little bit," explaining "[i]t's a heavy bus." Plaintiff's foot moved off the brake, and the bus, that was in neutral, rolled forward, "maybe ten feet or so" before plaintiff stopped it. After engaging the parking brake and determining that no one on the bus was injured, plaintiff testified that he contacted his supervisor and remained in his seat. Plaintiff felt "okay" and was "not in any discomfort."

Although plaintiff testified that he did not speak to defendant or look at the back of the bus, defendant testified that plaintiff left the bus, told her "he was fine," "walked around the bus, and pointed out that there wasn't even a scratch on the [bus's] bumper."

The Undersheriff, who responded to the scene, confirmed that there was no visible damage to the bus, assessing it as zero in his report. If the Undersheriff had seen a single scratch, he would have scored the damage as a one. However, the Undersheriff rated the damage to the SUV as two, meaning that there was damage to the hood that would require repair. The later repair bill was $3,580.83 as the Jeep had damage to its front grille and hood. The Undersheriff also specifically asked plaintiff if he was injured and plaintiff replied that he was not.

Plaintiff's supervisor arrived and completed the route before returning plaintiff to the garage. Per policy, plaintiff was sent to a clinic for a urinalysis screening and drug test.

Thereafter, plaintiff returned to the garage and provided a written statement, explaining that he had "heard tires" before the bus was "hit in the rear by [a] car." Plaintiff reported that there was "[n]o damage to [the] bus" and "no inj[u]ries."

Plaintiff clocked out and went home "feeling fine." The next morning, however, plaintiff "couldn't get out of bed." Plaintiff nevertheless went to work and guided another driver through his route for two- and one-half hours before he went to the hospital at his supervisor's direction after reporting his back pain to her. At the hospital, plaintiff reported pain in his right buttocks and down his right leg almost to the area behind his right knee. An x-ray was ordered and the resultant report revealed degenerative disc disease, including at L3-L4 and L4-L5 levels. Plaintiff was diagnosed with a right sciatica and lumbar gluteal myositis, and prescribed medication.

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***2** After a few weeks, plaintiff sought help from his primary care physician, who referred him to Dr. Geoffrey Seidel, a specialist in physical medicine and rehabilitation. On October 24, 2014, more than six weeks after the accident, plaintiff first saw Dr. Seidel, who noted that plaintiff was limping and ordered a CT without contrast dye. The written result accompanying the CT noted a history of "[m]otor vehicle collision." It also revealed that plaintiff had a ruptured disc at L4-L5 of his spine with a large extrusion of the disc material. Additionally, plaintiff suffered from chronic degeneration in his spine along with nerve damage due to his age (sixty), arthritis, obesity, and diabetes.

Dr. Seidel referred plaintiff to Dr. Sidhu, a surgeon. On November 14, 2014, Dr. Sidhu reviewed Dr. Seidel's CT images, which he opined "were somewhat fuzzy"[1] with certain detail being "relatively poor." At that point, plaintiff had not engaged in physical therapy and an MRI could not be performed because plaintiff had metal in his eye from an earlier employment injury. Dr. Sidhu ordered a CT with dye contrast. It revealed that plaintiff suffered from severe stenosis, a narrowing of the spaces within his spine, at L3-L4 and L4-L5, with near complete occlusion of the dural sac. Dr. Sidhu agreed that plaintiff also had a herniated disc.

In January 2015, Dr. Sidhu performed a "[b]ilateral decompressive laminectomy with partial facetectomy L3, L4, L5 with severe [spinal] stenosis with excision of herniated disc at L4-L5[.]" Plaintiff engaged in physical therapy, but ultimately underwent a second surgery, a spinal fusion, in November 2017.

In the interim, plaintiff sued defendant, alleging that he had suffered a serious impairment of body function as a result of the 2014 accident, and that, even if he had a pre-existing condition, defendant's negligence had aggravated it. After engaging in discovery, defendant filed a motion for summary disposition under MCR 2.116(C)(10), contending that there was no genuine issue of material fact regarding plaintiff's ability to establish that this accident caused plaintiff's injuries as well as a serious impairment of an important body function. Defendant noted that plaintiff had been involved in an earlier separate rear-end accident about a month before this incident —a fact that plaintiff had failed to disclose to his various treating and examining physicians. Moreover, in reviewing the respective damage to the bus and SUV, defendant's expert accident reconstructionist opined that the maximum impact-induced velocity change was 2 to 3.7 mph. "Impact tests using human subjects indicate[d] that velocity changes within this range are below levels associated with injuries." And "[t]his energy exchange would result in a maximum g-force of only 0.9 to 1.7 g for the" bus. According to defense counsel, such g-forces were less than those involved in a sneeze or cough. Defendant also submitted the opinion of Dr. Roth, a physiatrist like Dr. Seidel, who had evaluated plaintiff as part of an independent medical examination (IME) for plaintiff's workers' compensation claim and determined that plaintiff's lower back pain resulted from his pre-existing, long-term diabetes, not the September 2014 accident.

Plaintiff's response detailed his 35-year career with Ford Motor Company, including his time as a hi-lo driver before he retired in 2009. In 2011, plaintiff began his part-time position as a school bus driver and worked until the day after this accident. Plaintiff conceded that he initially believed that he was uninjured; however, "as his adrenaline wore off,"[2] he awoke in pain. Plaintiff asserted that his "medical records clearly establish that his injuries and treatment stem[med] from" this accident. In part, plaintiff attached a letter from Dr. Seidel to plaintiff's primary-care physician and copied to his surgeon, stating: "I consider this disc herniation to be work[-]related." Plaintiff rejected defendant's contention that plaintiff's earlier August 2014 accident caused his current injuries. Plaintiff explained that the August accident occurred when his sedan was rear-ended while it waited in a line to enter the county fairground. Plaintiff claimed to be traveling at less than 5 mph, and, although the later repair bill was $777.24, plaintiff testified that he was uninjured. Regarding Dr. Roth's IME, plaintiff noted that all of his medical bills were paid pursuant to his claim under the workers' compensation act[3] and that his request for Social Security disability (SSD) benefits[4] was approved as of the day after the accident.[5] Moreover, plaintiff asserted that defendant was legally responsible even if plaintiff's physical condition had predisposed him to injury as a result of this accident.

***3** Defendant responded that plaintiff's medical records confirmed degenerative or arthritic damage in plaintiff's spine and evidenced nothing more than plaintiff's complaints after the accident. There was no admissible medical or expert opinion that plaintiff's actual injury was caused by the accident rather than by plaintiff's degenerative condition.

At the hearing on defendant's motion, the trial court rejected defendant's claim that there was evidence that plaintiff's injuries arose from the earlier accident as opposed to this accident. The circuit court also reasoned that temporal

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connection alone could not establish a causal relationship and that plaintiff's reliance on the SSD determination did not aid him because it did not connect his injury to this accident. But Dr. Seidel's referral letter indicated that Dr. Seidel considered plaintiff's herniated disc to be "work-related," and "when viewed in the light most favorable to plaintiff, [it] would be some evidence to support a finding of causation if the opinion would be admissible at trial." Because the circuit court needed additional information underlying Dr. Seidel's conclusion, it afforded plaintiff the opportunity to demonstrate that Dr. Seidel's opinion testimony was admissible evidence.

The attorneys then deposed Dr. Seidel, who had practiced for 26 years and saw approximately 850 patients annually, and met with plaintiff three times. As already mentioned, plaintiff's initial visit was on October 24, over six weeks after the accident. Plaintiff reported that there was a concern that he had "a pinched nerve in his back" and had not improved. Plaintiff was limping and reported a history of "trauma," being rear-ended while driving a bus. Although plaintiff had no immediate pain, he "developed lower back pain over the next few hours[.]" Plaintiff reported never "having a problem like this before." Dr. Seidel thought that "there might have been an underlying non-trauma related peripheral neuropathy, the tips of the nerves not working as well as they should, and that there was obesity."

Although Dr. Seidel would have preferred to conduct an MRI of plaintiff's lumbar spine, it was not possible because of the metal that plaintiff had in his eye. Dr. Seidel also thought that a herniated disc was a possibility so he ordered a CT scan of plaintiff's lower back and scheduled an electromyography (EMG) to evaluate plaintiff for nerve damage. Dr. Seidel did not document and had no independent recollection of reviewing plaintiff's earlier hospital x-ray.

The following week, Dr. Seidel performed the EMG and a nerve conduction velocity test. This testing confirmed that the tips of plaintiff's nerves were not working well. Dr. Seidel diagnosed peripheral neuropathy,[6] but could not explain the absence of plaintiff's H reflexes from that condition. Instead, Dr. Seidel thought it might "be consistent with lumbar spinal stenosis for potential disc herniation in [plaintiff's] lumbar spine."

Although Dr. Seidel was not a radiologist, in his review of plaintiff's CT scan, he suspected that there was disc material at L5-S1. Moreover, Dr. Seidel described "a large disc herniation" at L4-L5.

The following week, plaintiff was not improving as expected. Dr. Seidel then sent a letter to plaintiff's primary care physician with a copy to Dr. Sidhu, referring plaintiff to the latter for a surgical consultation. Therein, Dr. Seidel stated that he considered plaintiff's "disc herniation to be work-related."

***4** During his deposition, Dr. Seidel opined that with a reasonable degree of medical certainty, plaintiff's herniated disc was caused by the accident in light of plaintiff's history, including plaintiff's report of "a bus/auto accident trauma event,"[7] and plaintiff's lack of prior symptoms. Dr. Seidel recognized that plaintiff's pre-existing arthritis was "not work-trauma related," but concluded that plaintiff's disc herniation was "work-related trauma related." In particular, Dr. Seidel testified that he "documented, a very large disc protrusion" and "[t]hat's not something I typically see in lumbar spinal stenosis cases, and there was trauma related to that."

Dr. Seidel was "aware that there was no substantial damage done to the physical structure of the bus." If witnesses to the accident had reported little to no physical damage to the bus, this fact would not alter Dr. Seidel's opinion because "cars hitting buses lose[.]"

Dr. Seidel further explained that in his "experience dealing with bus drivers is that they are not restrained[.]" When plaintiff's counsel informed Dr. Seidel that plaintiff had earlier testified that "he was leaning forward and attempting to pull the parking brake of the bus,"[8] Dr. Seidel opined that plaintiff then "had more of a distance translation of the torso versus the lower half of the body."

Dr. Seidel was not surprised that plaintiff did not seek medical attention until the next morning. Dr. Seidel explained that it was "common for patients to be sore and think that they are going to get better." So "long as they can move around, they don't seek immediate care." And "[m]uscle spasm tends to come on in the hours after." "[M]any people are shaken up and sore, and they don't always go in that day." Furthermore, "[d]isc herniations are not immediate." Instead, one has "to create a crack or fissure in the disc and then, over the ensuing days, the disc material works its way out of the crack or the gap."[9]

Before rendering his opinion, Dr. Seidel never reviewed plaintiff's prior medical records, including any pre-accident

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imaging or pain complaints. Plaintiff also failed to disclose his earlier rear-end accident to Dr. Seidel. If plaintiff had done so, Dr. Seidel would have made additional inquiries, but, given that the reported damage from the August accident was minimal, Dr. Seidel did not "think a significant injury occurred during that" accident. Dr. Seidel further testified that the prior accident was inconsequential because plaintiff did not "bring it up." With the history provided by plaintiff and given that "individuals can herniate discs with low-velocity trauma," Dr. Seidel's opinion regarding causation did not change.

Dr. Seidel added that "[d]isc herniations are known to occur without trauma" and "[t]hey are known to occur with trauma." Whether the low-velocity impact described by defendant's expert "in an elderly male with underlying arthritic change is more at risk for disc herniation, it appears it is." Dr. Seidel recognized that "[t]he literature says to have post[-]traumatic disc herniation requires breakage of bone and separation of the disc from the bone[.]" However, there is "no study [pertaining to the low-velocity impact described by defendant's expert] in [plaintiff's] age group, to say whether it causes or doesn't cause disc herniation." Likewise, with g forces, "disc herniations occur at various forces in various individuals." Dr. Seidel analogized to warning signs posted at Cedar Point that caution individuals with arthritis or spinal problems about boarding rides with up to 3 or 4 g forces "because they get injuries to their spine by going on those rides." Dr. Seidel then opined that "the elderly are more at risk for g-force changes and disc herniations than younger people."

***5** Asked whether coughing or sneezing could have caused plaintiff's spinal issues, Dr. Seidel responded:

> I don't know. I just said to you that coughing or sneezing is something that some people say is associated with disc herniation. Some people say putting their child in a car seat can do the same thing.

In any event, even factoring in the police report's description of the accident and defendant's expert's determination regarding the low-velocity impact involved, Dr. Seidel's opinion remained unchanged based on plaintiff's history, his examination, and his review of the CT images without contrast dye.

When further asked to opine regarding Dr. Sidhu's post-surgery conclusion that plaintiff's disc herniation was chronic in nature [10] and not the result of the accident, the following exchange ensued between Dr. Seidel and defense counsel:

> *A.* You are giving me a hypothetical, and I don't know that information. So at this moment, I am not deferring to Dr. Sidhu regarding the disc herniation.
>
> *Q.* My question is, if Dr. Sidhu were to state that, would you have any evidence to dispute that?
>
> *A.* At this moment, I would say I would like to look at the CT scan and then make my decision about it before giving you an answer.
>
> *Q.* So you would not be able to testify today as to any evidence that you have to dispute that scenario?
>
> * * *
>
> *A.* I said that I looked at this disc herniation on a CT scan on the day I looked at it, and I felt it was post[-]traumatic and due to the accident and I made that statement.
>
> Now I did not spend time and describe the details of what it looked like at that moment, and I don't recall the details of what it looked like at that moment. [11]
>
> I am not going to defer to Dr. Sidhu, who is looking at different aspects of what the disc is in the operating view. I will respect what Dr. Sidhu has to say and I will consider it, but I'm not deferring to him.
>
> *Q.* I am not asking you to defer to him. I am just asking if there was anything that you can state today for us, ... if there is anything that you know or you have seen that could dispute the fact that the disc herniation was something more chronic in nature?
>
> *A.* I have no answer for you, and you have asked this several times. So I don't have any more information. [Deposition of Dr. Geoffrey K. Seidel, dated October 12, 2018, pp. 35-37.]

Thereafter, the parties filed supplemental briefs. Plaintiff relied upon Dr. Seidel's deposition testimony to establish a causal effect from this accident to his disc herniation

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or aggravation of his previously asymptomatic spinal degeneration.

***6** At the continued hearing, the circuit court again reviewed the facts and applicable law. It granted defendant's motion for summary disposition, ruling:

> Dr. Seidel stated in his deposition that his opinion was based on the medical history he received from the Plaintiff that [he] had never experienced symptoms of a ruptured disc prior to the bus collision and only began experiencing these painful symptoms after this event. Again[,] that's from his deposition pages 8 and 11. Plaintiff did not disclose any details about the crash, he only told his doctor that he was -- that there was a collision. The Plaintiff did not tell Dr. Seidel that he had been in an earlier collision one month[ ] prior to the bus crash. Dr. Seidel said that if he had known about the earlier crash, he would have asked some follow-up questions, but it is unlikely that it would have changed his opinion. Dr. Seidel further stated that he assumed the force of the collision was fairly significant because regardless of whether the bus showed vehicle damage, the smaller vehicle showed damage. He also assumed that the bus driver was probably not restrained in the seat and that because the driver was leaning forward, he had more of a distance translation of the torso versus the lower half of the body. That's at page 13. This is contrary to the established fact that the driver [plaintiff] was belted into his seat. The other assumptions are speculative as there is no evidence that the force of the impact caused the Plaintiff's body to physically move other than his foot slipped off the brake. And that's [plaintiff's] dep[osition], page 16.
>
> Dr. Seidel also stated that the extent of the disc protrusion he observed was typical of trauma-related injury and it was not unusual for symptoms to develop some time after the injury because 'disc herniations are not immediate. You have to create a crack or a fissure, in the disc and then over ensuing days the disc material works it[ ]s way out of the crack or gap.' Again, that's at pages 14 and 21. He also stated that 'disc herniation can occur with or without the trauma and can occur with minor trauma such as a cough, sneeze, or lifting a small child.' Again, pages 27 and 30. He further stated that he is aware of medical literature that says 'to have post[-]traumatic disc herniation requires breakage of bone and separation of the disc from the bone,' and Plaintiff did not have any fractures or torn ligaments. However, he said he was not aware of whether any of these studies considered the case of a 60-year-old man with arthritis in his back like the Plaintiff. He said 'it appears an elderly man with arthritic changes is more susceptible to this kind of injury,[']' but he was not aware of any medical literature specific to the Plaintiff's circumstances.
>
> Dr. Seidel is undoubtedly a highly qualified expert in his field who conducted a thorough and methodical examination of the Plaintiff. However, because his understanding of the nature of the collision was based on incomplete information and inaccurate or speculative assumptions not supported by the record and because there is a lack of published research supporting the proposition that the Plaintiff was unusually susceptible to suffering disc herniation in a low-speed rear end collision without spinal fracture, this Court cannot find the opinion sufficiently reliable to assist the trier of fact in this case. Excluding this evidence, Plaintiff's remaining evidence does not establish a causal link between the bus crash and the injury causing impairment of a body function.

***7** The circuit court entered an order granting defendant's motion for summary disposition and for dismissal with prejudice and without costs.

Plaintiff appeals.

II. STANDARD OF REVIEW

We review a trial court's grant of summary disposition de novo. *Planet Bingo, LLC v. VKGS, LLC*, 319 Mich. App. 308, 319; 900 N.W.2d 680 (2017). Summary disposition may be granted under MCR 2.116(C)(10) only "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Dancey v. Travelers Prop. Cas. Co. of America*, 288 Mich. App. 1, 7; 792 N.W.2d 372 (2010) (quotation marks and citation omitted). In determining whether a genuine issue of material fact exists, the trial court considers "the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties ...." *Joseph v. Auto Club Ins. Ass'n*, 491 Mich. 200, 206; 815 N.W.2d 412 (2012). These materials are considered only to the extent that they are admissible in evidence. *Nuculovic v. Hill*, 287 Mich. 58, 62; 783 N.W.2d 124 (2010); MCR 2.116(G)(6). "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." *Dancey*, 288 Mich. App.

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at 8 (quotation marks and citation omitted). In any event, " '[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.' " *Southfield Ed. Ass'n v. Bd. of Ed. of Southfield Pub. Schs.*, 320 Mich. App. 353, 374; 909 N.W.2d 1 (2017), quoting *Gleason v. Dep't of Transp.*, 256 Mich. App. 1, 3; 662 N.W.2d 822 (2003).

III. ANALYSIS

A. CAUSATION

The no-fault insurance act, MCL 500.3101 *et seq.*, imposes a threshold injury requirement for recovery in third-party automobile negligence actions.[12] A plaintiff must demonstrate that because of a defendant's ownership, maintenance, or use of a motor vehicle, the plaintiff has suffered "death, serious impairment of a body function, or permanent serious disfigurement." MCL 500.3135(1). " 'Serious impairment of a body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(5). To demonstrate a serious impairment of body function, a plaintiff must show: "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *McCormick v. Carrier*, 487 Mich. 180, 191; 795 N.W.2d 517 (2010). As to the first prong, a plaintiff must show that injuries resulting from the accident were "evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id.* "[T]he aggravation or triggering of a preexisting condition can constitute a compensable injury." *Fisher v. Blankenship*, 286 Mich. App. 54, 64; 777 N.W.2d 469 (2009). See also *Wilkinson v. Lee*, 463 Mich. 388, 395; 617 N.W.2d 305 (2000) ("Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition."). Likewise, a degenerative condition can be exacerbated by subsequent injury such that it constitutes an impairment of a bodily function. *Washington v. Van Buren County Road Com'n*, 155 Mich. App. 527, 529-530; 400 N.W.2d 668 (1986). The question here is whether plaintiff suffered an aggravation or a triggering of the symptoms associated with the preexisting condition because of the accident. *Fisher*, 286 Mich. App. at 63.

***8** "Causation is an issue that is typically reserved for the trier of fact unless there is no dispute of material fact." *Patrick v. Turkelson*, 322 Mich. App. 595, 616; 913 N.W.2d 369 (2018) (citation omitted). Although our courts are cognizant that motions for summary disposition "implicate considerations of the jury's role to decide questions of material fact[,] ... litigants do not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess." *Skinner v. Square D Co.*, 445 Mich. 153, 174; 516 N.W.2d 475 (1994).

" 'To establish proximate cause, the plaintiff must prove the existence of both cause in fact and legal cause.' " *Patrick*, 322 Mich. App. at 616, quoting *Weymers v. Khera*, 454 Mich. 639, 647; 563 N.W.2d 647 (1997). "To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inference of causation, not mere speculation." *Skinner*, 445 Mich. at 164. Our Supreme Court has explained "the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:

> 'As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.' " [*Id.* at 164, quoting *Kaminski v. Grand Trunk W.R. Co.*, 347 Mich. 417, 422; 79 N.W.2d 899 (1956).]

"[A]t a minimum, a causation theory must have some basis in established fact." *Id.* at 164. "[A] basis in only slight evidence is not enough." *Id.* It is not "sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as any other theory." *Id.* Instead, "the plaintiff must present substantial evidence from which a jury may conclude

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that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165.

In this case, plaintiff asserts that the circuit court erred in granting summary disposition on the causation question after it determined Dr. Seidel's opinion that this accident caused plaintiff's disc herniation was unreliable.

Initially, plaintiff mentions his award of SSD benefits and his workers' compensation settlement, which presumably support a causal connection. The circuit court, however, rejected plaintiff's reliance on the outcome of the separate SSD legal proceeding as it neither involved a determination that this accident caused plaintiff's herniated disc or his aggravated his back condition. We agree.[13] The same is true of plaintiff's worker's compensation settlement. Cf. *Chouman v. Home Owners Ins. Co.*, 293 Mich. App. 434, 438-439; 810 N.W.2d 88 (2011) (recognizing that "settlements may be motivated by a great many possible considerations unrelated to the substantive merits of a claim.").

Plaintiff also contends that our recent decision in *Patrick* controls the outcome here. It does not.

In *Patrick*, the defendant's vehicle turned into the driver's side of the plaintiff's vehicle, where the plaintiff was seated. *Patrick*, 322 Mich. App. at 599. Multiple air bags deployed within the plaintiff's vehicle; one of them struck the left side of the plaintiff's face, including her ear. *Id.* The plaintiff described the sound of those "air bags as an 'explosion.' " In the aftermath of the accident, the plaintiff "was examined in the emergency room where she reported experiencing sharp pain in her left ear, ringing in both ears, and a headache." *Id.* The plaintiff sought professional evaluation, including with a doctor specializing "in otology and neurotology who treat[ed] patients with ear disorders and hearing loss." *Id.* at 599-600. The doctor "testified that peer-reviewed scientific literature includes reports of hearing loss and tinnitus following air bag deployment due to the sound generated." *Id.* at 601. The plaintiff testified about continued hearing loss in her left ear and its detrimental impact on her life. *Id.* at 602.

***9** The *Patrick* plaintiff sued the driver of the other car, who moved for summary disposition, contending that she had not suffered a serious impairment of body function and could not prove causation. *Id.* at 604. The circuit court granted the defendant's motion because the plaintiff failed to establish a serious impairment of body function and did not reach the causation question. *Id.* This Court reversed, concluding that the evidence was sufficient to present a jury the question of the serious impairment issue. *Id.* at 607-615. Even though the circuit court had not addressed the parties' causation arguments, this Court did so because the defendant argued, as an alternate ground for affirmance, that causation was lacking. *Id.* at 615-616. Recognizing "that hearing loss can occur as part of the aging process" and that the plaintiff had had no pre-accident hearing test, this Court concluded that, viewing the evidence in the light most favorable to the plaintiff, her lack of pre-accident hearing issues and her doctor's testimony about "peer-reviewed literature" created a jury question on causation. *Id.* at 619.

In this case, on the other hand, Dr. Seidel readily admitted that there was no scientific literature supporting his conclusion that a low-impact accident caused plaintiff's disc herniation. This alone distinguishes *Patrick*. And Dr. Seidel recognized that there was arthritic degeneration of plaintiff's spine that, in his opinion, was not attributable to this accident. Dr. Seidel admitted that he did not know if he would be able to sort out which of plaintiff's injuries were attributable to this accident with review of the CT images he obtained, while also maintaining his opinion that the large protrusion of disc material resulted from trauma. And when asked what fact he would point to in order to dispute Dr. Sidhu's opinion that plaintiff's disc herniation was more chronic in nature, Dr. Seidel had "no answer," saying that he had answered the question several times. Finally, while recognizing that disc herniation occurs without any trauma at all, Dr. Seidel remained steadfast in his opinion that plaintiff's disc herniation resulted from this accident, even assuming it had been a low-impact bump, given plaintiff's age and self-reported history of no prior back problems.

Plaintiff is correct that here, as in *Patrick*, there were no pre-accident images of plaintiff's spine.[14] 322 Mich. App. at 619. In direct contrast to *Patrick*, however, plaintiff here did not immediately report an injury and did not believe that he struck his body on any part inside the bus. Plaintiff did not lose consciousness, suffered no bruising, repeatedly reported being uninjured, and felt "okay" after the accident. Plaintiff testified that he only felt the impact a "little bit" because the bus was "heavy." And, when specifically asked whether he

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"physically move[d] at all as a result of the impact," plaintiff's sole response was that his "foot came off the brake pedal" and that the bus rolled forward a few feet. After going to the clinic, not for any injury, but for a mandatory drug and urine test, plaintiff arrived home and continued to feel "fine." It was not until the following morning that plaintiff felt back pain.

Importantly, Dr. Seidel testified that disc herniation occurs with and without trauma. In fact, Dr. Seidel recognized that disc herniation could be caused by every day activities, like coughing, sneezing, or placing a child into a car.

In light of these potential alternatives, we turn to the next question—the propriety of the circuit court's ruling that Dr. Seidel's testimony regarding causation was inadmissible.

B. ADMISSIBILITY OF EXPERT TESTIMONY

***10** We review for an abuse of discretion a circuit court's decision regarding the admission of evidence. *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 falling outside the range of principled outcomes." *Id.* " '[T]he proponent of the evidence bears the burden of establishing ... admissibility[.]' " *Id.*, quoting *People v. Crawford*, 458 Mich. 376, 386 n. 6; 582 N.W.2d 785 (1998).

MRE 702 governs the admissibility of expert witness testimony. *Edry*, 486 Mich. at 639. 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.

MRE 702 incorporates standards of reliability derived from *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993). *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 781; 685 N.W.2d 391 (2004). "[T]he rule's reference to 'knowledge' 'connotes more than subjective belief or unsupported speculation.' " *Gilbert*, 470 Mich. at 781, quoting *Daubert*, 509 U.S. at 590. Indeed, "[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id.* at 782.

"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. "A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Elher v. Misra*, 499 Mich. 11, 23; 878 N.W.2d 790 (2016).

In addition to considering MRE 702 in determining the reliability of an expert's testimony, the trial court must consider MCL 600.2955(1). "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[.]" *Elher*, 499 Mich. at 23. MCL 600.2955(1) sets forth the following factors to be considered in making this determination:

> (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.

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(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.

***11** (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation. [MCL 600.2955(1)(a) through (g).]

Even so, not every factor identified in MCL 600.2955 is relevant to every case. *Elher*, 499 Mich. at 27.

Where a plaintiff relies upon the testimony of an expert to prove factual causation, " 'there must be facts in evidence to support the opinion testimony of an expert.' " *Skinner*, 445 Mich. at 173, quoting *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 411; 442 N.W.2d 340 (1989). "It is axiomatic in logic and in science that correlation is not causation." *Craig v. Oakwood Hosp.*, 471 Mich. 67, 93; 684 N.W.2d 296 (2004). Courts must remain wary of *post hoc ergo propter hoc* reasoning. *Lowery v. Enbridge Energy Limited Partnership*, 500 Mich. 1034; 898 N.W.2d 906 (2017) (where an expert testified that an oil spill caused the plaintiff's injury because it followed the spill and the plaintiff had not had any problem before the spill, the circuit court properly granted summary disposition). Stated otherwise, showing only a temporal relationship is generally insufficient to establish a causal relationship. See *e.g.*, *West v. Gen. Motors Corp.*, 469 Mich. 177, 186; 665 N.W.2d 468 (2003).

Plaintiff first argues that the circuit court misapplied MRE 702 and MCL 600.2955 because Dr. Seidel's experience, knowledge, and expertise rendered his testimony reliable. But, as already mentioned, "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" under MRE 702. *Edry*, 486 Mich. at 642. Furthermore, the "lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony." *Elher*, 499 at 23. Here, despite Dr. Seidel's credentials, which were recognized by the circuit court, Dr. Seidel's conclusion was unsupported by peer-reviewed medical literature.

And even as plaintiff recognizes that a temporal connection alone is insufficient to establish causation, he asserts that his history of asymptomatic back pain and Dr. Seidel's later medical testing confirm the existence of a herniated disc or back pain, or both, shortly after the accident. Again, the fact that there is an injury or aggravation after an accident does not establish that the accident caused either. *Lowery*, 500 Mich. at 1034; *Craig*, 471 Mich. at 93; *West*, 469 Mich. at 186.

Plaintiff further asserts that it was the circuit court, not Dr. Seidel, that misconstrued the facts underlying this accident. But the circuit court began by appropriately recognizing that Dr. Seidel's opinion regarding causation was rooted in plaintiff's self-reported history that he had no back pain before the accident with the onset of symptoms commencing the next morning. Regarding plaintiff's history, the circuit court noted that plaintiff did not go into detail about the accident and this was confirmed during Dr. Seidel's deposition. The circuit court also referenced plaintiff's failure to mention his involvement in the August 2014 accident, which would have prompted some follow-up questions, but, ultimately, not changed Dr. Seidel's opinion regarding causation.

***12** The circuit court also indicated that Dr. Seidel assumed that the force involved in the instant accident was fairly significant because defendant's vehicle had damage. While Dr. Seidel testified that vehicles involved in accidents with buses "lose and they show the damage," we agree that review of the record reveals no assumption on Dr. Seidel's part that a fairly significant force was involved in this accident due to the damage to defendant's Jeep. Regardless, review of Dr. Seidel's testimony reveals that he questioned the veracity of the defendant's accident reconstruction regarding the g forces involved in this accident as well as the estimated impact velocity change of 2 to 3.7 mph to plaintiff's bus from this accident. And, despite Dr. Seidel's testimony that plaintiff simply disclosed the fact that he had been in an accident without sharing additional details, Dr. Seidel also testified that "[t]he only history I have is that he was in a bus/auto accident trauma event" and "[t]he history was that there was trauma driving a bus on 9-10-14 [sic September 9, 2014], hit from behind[.]" Plaintiff's initial CT scan, ordered by Dr. Seidel, also reflects a history that plaintiff was in a "[m]otor vehicle

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collision." All of this suggests that Dr. Seidel believed that significant force was involved in this accident.

The circuit court next mentioned Dr. Seidel's assumption that plaintiff was unrestrained when the accident occurred. We agree that the record reflects that Dr. Seidel initially, and incorrectly, assumed that plaintiff was unrestrained because, in Dr. Seidel's experience "dealing with bus drivers ..., they are not restrained." With that assumption, Dr. Seidel opined "there may have been a translation of [plaintiff's] body over a distance when the accident occurred." Before Dr. Seidel's deposition, however, plaintiff's counsel informed Dr. Seidel that plaintiff had earlier testified that he "was leaning forward and attempting to pull the parking brake of the bus." [15] Confronted with this scenario, Dr. Seidel opined that plaintiff "had more of a distance translation of the torso versus the lower half of the body." Dr. Seidel later recognized that "he did not have [the] specifics of [plaintiff's] body position" as part of plaintiff's history and learned of plaintiff's actual body position just before he was deposed.

The circuit court determined that Dr. Seidel's assumptions about how plaintiff's injury occurred—plaintiff was unrestrained and leaning forward, resulting in a distance translation of the torso versus the lower half of plaintiff's body—were "contrary to the established fact that the [plaintiff] was belted into his seat." Plaintiff contends that Dr. Seidel, not the circuit court, better understood plaintiff's position during the accident. But plaintiff testified that he was wearing a shoulder harness and lap belt; the Undersheriff's testimony along with the police report confirmed this fact. Plaintiff also testified that he was leaning forward, and, as the circuit court rightly recognized, plaintiff testified the only movement caused by the accident was his foot moving off the brake. Plaintiff described no other physical movement of his body as he was seated in the driver's seat, leaning forward while restrained by his shoulder belt. Plaintiff never reported being flung forward or backward due to the impact or injured in any manner. As such, the circuit court determined that Dr. Seidel's assumption that plaintiff otherwise suffered trauma to his body, including his back, that caused a herniated disc was speculative. *Skinner*, 445 Mich. at 173, quoting *Mulholland*, 432 Mich. at 411 (stating that when a plaintiff relies upon the testimony of an expert to prove factual causation, " 'there must be facts in evidence to support the opinion testimony of an expert' "). [16]

***13** Plaintiff also argues that the circuit court elevated the lack of medical literature to "a litmus test" for the admission of expert medical testimony. We disagree. The circuit court appropriately relied upon the lack of literature as a factor in addition to Dr. Seidel's incorrect assumptions or speculation about the facts surrounding this accident, namely that plaintiff was unrestrained and that trauma occurred. *Elher*, 499 Mich. at 23.

Accordingly, we conclude that the circuit court did not abuse its discretion in excluding Dr. Seidel's testimony and opinion regarding causation or in granting summary disposition. And because plaintiff otherwise failed to produce admissible evidence to create a material question of fact to demonstrate that his herniated disc or aggravation of his degenerative spinal conditions was causally related to the accident, the trial court properly granted defendant summary disposition.

Indeed, even if the circuit court had abused its discretion in excluding Dr. Seidel's opinion regarding causation, this record demonstrates that defendant would nevertheless be entitled to summary disposition. Dr. Seidel candidly recognized that plaintiff's herniated disc could have resulted from trauma or no trauma at all. Because a litigant does "not have any right to submit an evidentiary record to the jury that would allow the jury to do nothing more than guess," *Skinner*, 445 Mich. at 174, we conclude that summary disposition was appropriate on this alternate ground as well. *Southfield Ed. Ass'n*, 320 Mich. App. at 374, quoting *Gleason*, 256 Mich. App. at 3.

Affirmed.

Gleicher, P.J. (dissenting).

Let's say you were trying to hang a picture and you hit your thumb with the hammer. The blow was somewhat glancing and not terribly hard, but you have arthritis and the thumb throbbed for a few minutes. Ice helped. The next day the pain was excruciating, so you visited your family doctor. He recommended Advil and immobilization. The pain persisted and you saw a specialist. An x-ray revealed a fracture. The specialist told you the hammer blow likely did it. He explained that the "temporal connection" between the hammer blow and your pain was a compelling fact.

Would a reasonable person agree that you probably broke your thumb with the hammer? Would a reasonable person

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find the specialist's opinion that the hammer blow caused the fracture "speculative?" Would a reasonable person be "guessing" by concluding that the hammer trauma broke the bone? Maybe your arthritis made your thumb more susceptible to breaking. Maybe a previous injury to the thumb weakened the surrounding ligaments. But the specialist's opinion hardly qualifies as unreliable, hypothetical, or built on thin air.

This case is about an equally clear-cut cause-and-effect relationship. Unfortunately, the majority has tied itself up in legal knots trying to avoid the obvious—that a specialist's causation opinion predicated in part on a patient's report of recent trauma is sufficiently buttressed by "facts" and is the product of reliable principles and methods. Because the majority has misapplied the legal standards governing expert testimony, I respectfully dissent.

I

Plaintiff Michael Bernardi drove a school bus for the Lapeer Community Schools. Late one afternoon he stopped the bus to drop off a student, shifting into neutral. Bernardi had one foot on the brake pedal and reached with his right arm to pull the "park brake" into place before opening the bus door. While looking down at her lap, defendant Tonya Rock hit the back of the school bus with her Jeep Laredo. She estimated that she was traveling 20 miles per hour when she saw the bus and applied her brakes. On impact, Bernardi's foot came off the brake pedal and the bus rolled "ten feet or so." The Jeep sustained about $3,500 in damage.

***14** Bernardi denied any injury at the scene. The next morning, however, he felt "terrible" and could not get out of bed. Pain radiated down the back of his leg and into one buttock. He saw a physician who prescribed rest and pain medication. Bernardi never had back pain before. During his 60-plus years of life, he had never consulted a doctor for a back problem or received any back-pain treatment, despite having spent 35 of those years in an auto plant working as a hi-lo driver. This evidence is unrefuted.

Over the next six weeks, conservative medical therapy did not alleviate Bernardi's unrelenting back pain, which at times radiated into his foot. His family doctor referred him to Dr. Geoffrey Seidel, a board-certified specialist in Physical Medicine and Rehabilitation. Dr. Seidel obtained a history from Bernardi, and learned that the back pain began less than 24 hours after an accident in which the bus Bernardi was driving was struck from behind. On examination, Dr. Seidel noted that Bernardi had "an antalgic gait, a positive Trendelenburg on the right." Dr. Seidel explained that this meant that Bernardi exhibited a right-sided limp and that pain or weakness caused the gait alteration. Dr. Seidel further noted "hypersensitivity in the L5 nerve root distribution." Dr. Seidel's "impression[ ]" was that Bernardi had sustained a "work-related bus driving accident" and had "low back pain" and "right lumbar radicular symptoms."

Dr. Seidel ordered a CT scan of Bernardi's spine that revealed evidence of chronic spinal stenosis as well as a disc herniation. At the L4-L5 level, the radiologist identified a "[l]arge central/left paracentral disc extrusion with superior migration of disc material resulting in moderate-to-severe central canal stenosis and mass effect upon the cauda equina." The radiologist's impression was "[l]arge disc extrusion at L4-L5 with superior migration of disc material in impingement of the cauda equina."

In other words, Bernardi had long-standing degenerative disease of his back, as well as a ruptured disk, and the disk material was close to an important nerve bundle. This case is about the etiology of the ruptured disk. Dr. Seidel testified that the "very large disc protrusion" seen on the scan was "not something I typically see in lumbar spinal stenosis cases, and there was trauma related to that." The defense contends that the timing of Bernardi's pain was a mere coincidence, the cause of the herniation was his underlying spinal stenosis, and that the accident the day before the symptoms began had nothing to do with it.

Dr. Seidel treated Bernardi's back pain conservatively. When it did not improve, Dr. Seidel referred Bernardi to a surgeon. Dr. Seidel's referral letter noted: "I consider this disc herniation to be work related."

After reviewing Bernardi's CT scan, the surgeon confirmed the presence of a herniated disc. He performed a laminectomy and removed the disk fragments. Despite the surgery and physical therapy, Bernardi did not obtain much relief. He consulted other physicians who agreed that he was disabled due to his back pain and associated neurological symptoms. Additional back surgery was recommended. Bernardi then filed this third-party no-fault action against Rock. He underwent spinal fusion surgery while this case was pending.

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II

The circuit court granted summary disposition to Rock, ruling that Dr. Seidel's testimony linking the accident and Bernardi's herniated disk was inadmissible because it was "unreliable" under MRE 702. The majority affirms, holding that the trial court did not abuse its discretion because Dr. Seidel's testimony was "unsupported by peer-reviewed medical literature," a "temporal connection alone is insufficient to establish causation," and Dr. Seidel erroneously assumed that Bernardi had not been wearing a seat belt at the time of the accident. The circuit court "appropriately" relied on these facts, the majority holds, to exclude Dr. Seidel's testimony.

***15** The majority and the circuit court have misapplied MRE 702, and in so doing the circuit court abused its discretion. Dr. Seidel is an exceptionally well qualified specialist in spinal disease. His expert opinion rested on a solid factual foundation consisting of Bernardi's medical history, his physical examination, and the results of several objective radiologic and electrophysiological tests. Dr. Seidel employed differential diagnosis analysis in reaching his causation opinion, a methodology universally used by physicians to determine the etiology of a patient's disease. "In the medical context, differential diagnosis is a common method of analysis, and federal courts have regularly found it reliable under *Daubert*." [1] *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1237 (C.A. 10, 2004). The reasons offered by the circuit court for excluding Dr. Seidel's testimony (and affirmed by the majority) are either irrelevant to the inquiry or go to the weight of his testimony, not its admissibility.

"MRE 702 incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert*[.]" *Elher v. Misra*, 499 Mich. 11, 22; 878 N.W.2d 790 (2016). A circuit court's gatekeeping function focuses on an examination of the expert's *methodology* and the principles animating it. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993). The reliability standard "entails a preliminary assessment of whether the reasoning or methodology is scientifically valid." *Id.* 592-593. Reliability depends "solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

MRE 702 focuses on four aspects of an expert's proposed testimony: (1) whether the expert is qualified to testify "by knowledge, skill, experience, training, or education," (2) whether the proposed testimony "is based on sufficient facts or data;" (3) whether "the testimony is the product of reliable principles and methods," and (4) whether "the witness has applied the principles and methods reliably to the facts of the case." Dr. Seidel's testimony fulfills these requirements. The circuit court's decision to the contrary, echoed by the majority, confuses the task of assessing *reliability* with the job of the jury—weighing the evidence and deciding which side should prevail. Whether the expert is persuasive is not a legal question. Nor does the existence of evidence that might challenge the soundness of the expert's ultimate conclusion render the opinion legally inadmissible.

Dr. Seidel's expert qualifications are rock solid. He is board certified in Physical Medicine and Rehabilitation and achieved an additional board certification from the American Academy of Neuromuscular and Electrodiagnostic Medicine. He has practiced in these fields for more than a quarter century, and serves as a clinical professor in the medical schools of both Michigan State and Wayne State Universities. Dr. Seidel is the medical director of the spine clinic at Henry Ford Macomb Hospital. His regular practice includes patients with brain and spinal injuries, stroke, and musculoskeletal problems. He also reads the radiologic studies he orders and performs and interprets his own electrodiagnostic studies. Dr. Seidel is fully qualified to give an expert opinion in this case. The defense has not offered a physician witness in opposition to Dr. Seidel.

Dr. Seidel testified that he formed his opinion that trauma —the bus accident—caused Bernardi's disk herniation based on Bernardi's history, his physical examination, and the objective studies he reviewed (a CT scan and an EMG). Bernardi reported that he never experienced back pain before being involved in the accident underlying this case. He did not report any other trauma that might have caused the rupture. [2] Within 24 hours of the bus accident, he experienced debilitating back pain. He saw a physician and reported the pain within that same time frame. When Dr. Seidel examined Bernardi he considered several possible diagnoses, but suspected a disc herniation, as the symptoms had been triggered by trauma and Bernardi exhibited objective signs of that condition: he limped and had a positive Trendelenburg sign. Dr. Seidel investigated this potential diagnosis by personally performing an EMG. He also reviewed the images of Bernardi's CT scan. This data confirmed "there was

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an anatomical abnormality that was correlating [with] the symptoms that were down his leg." Dr. Seidel testified:

> ***16** Based upon the timing, I consider the anatomical findings on the CT scan image to correlate with the timing of onset of symptoms. And I have the benefit of physical exam findings, electrodiagnostic exam findings that I interpreted all in real time to say, in my view, this is all related to that incident.

The "facts or data" considered by Dr. Seidel were unquestionably sufficient under MRE 702 to form a medical opinion regarding the causation of disease, fulfilling the second aspect of MRE 702. The same type of facts or data are routinely relied upon by physicians; the defense has not suggested that any *relevant* facts were missing.

Based on Bernardi's history, physical examination, and his review of the studies, Dr. Seidel concluded that Bernardi's pain was caused by the ruptured disk, which in turn was caused by trauma. Contrary to the majority's view, there was nothing "speculative" or "unreliable" about this methodology. Dr. Bernardi engaged in the differential diagnosis method. This method represents "a *standard* diagnostic tool used by medical professionals to diagnose the most likely cause or causes of illness, injury and disease." *Glaser v. Thompson Med. Co., Inc.*, 32 F.3d 969, 978 (C.A. 6, 1994) (emphasis added). "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (C.A. 4, 1999). "[T]he overwhelming majority of the courts of appeals that have addressed the issue have held that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong of the Rule 702 inquiry." *Id.* at 263. See also *People v. McKewen*, 326 Mich. App. 342, 351; 926 N.W.2d 888 (2018) (characterizing differential diagnosis as "a well-recognized process"); *Alder v. Bayer Corp., AGFA Div.*, 2002 UT 115; 61 P.3d 1068, 1084 (2002) ("[D]ifferential diagnosis is one of the oldest and most widely used and recognized of all the methods. Historically and even presently, in many instances, differential diagnosis has been the only method available."). Because the differential diagnosis method is regularly used by physicians to determine the cause of a patient's disease, Dr. Seidel's testimony is "the product of reliable principles and methods," fulfilling the third prong of MRE 702.

Contrary to the majority's suggestion that Bernardi's "self-reported history" of pain rendered it suspect, Dr. Seidel's reliance on a patient's history is unobjectionable evidentially and legally.

> A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, *the taking of medical histories*, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely. [*Hardyman v. Norfolk & Western R. Co.*, 243 F.3d 255, 260-261 (C.A. 6, 2001) (quotation marks and citation omitted, emphasis added).]

***17** Physicians rely on medical histories as a matter of course. No evidence supports that Bernardi's history was inaccurate. No law supports that Dr. Seidel's reliance on that history was improper or rendered his opinion unreliable.

Dr. Seidel formulated a causation opinion by applying the differential diagnostic method used by doctors who diagnose and treat back pain. The patient's history revealed no pain before the accident, and extreme, debilitating back pain within 24 hours afterward. The physical examination and objective diagnostic studies revealed the presence of a ruptured disk. These facts, taken together, are sufficient to serve as the foundation for a medical opinion. No evidence suggests that Dr. Seidel applied the differential diagnosis method improperly. No evidence suggests that the central premise of Dr. Seidel's opinion—that trauma can rupture an intervertebral disc—is incorrect scientifically. Accordingly, his methodology was inherently reliable. MRE 702 requires nothing more than this showing.

It bears emphasis that ruptured disks are not rare, and that trauma is a well-recognized cause of disk rupture. A cursory review of Michigan caselaw confirms these facts, and reflects that even small forces can cause a disc rupture. See, e.g., *Samhoun v. Greenfield Constr. Co., Inc.*, 163 Mich. App. 34, 37; 413 N.W.2d 723 (1987) (twisting to avoid being hit

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by a piece of steel); *Adas v. Ames Color-File*, 160 Mich. App. 297, 299; 407 N.W.2d 640 (1987) (disc ruptured while moving a filing unit); *Woods v. Sears, Roebuck & Co.*, 135 Mich. App. 500, 505; 353 N.W.2d 894 (1984) (disc ruptured by a fall at work; symptoms did not emerge until five months after the fall).

So how did we get here? Why is there any dispute at all about the reliability of Dr. Seidel's opinion? While it is true that Bernardi had preexisting spinal stenosis, no one disputes that the degenerative changes in Bernardi's back were, until the accident, entirely asymptomatic. The spinal changes never restricted Bernardi's activities, and he never so much as took an Advil to treat his degenerative spinal disease. The aggravation of a preexisting condition can create a compensable injury under the no-fault act, as the majority concedes. See *Fisher v. Blankenship*, 286 Mich. App. 54, 63; 777 N.W. 2d 469 (2009).

The defense contends that the bus accident was too minor to generate the forces required to rupture a disk. What evidence did the defense present on this score, you might ask? Good question. Rock presented no testimony from a physician disputing Dr. Seidel.[3] None. The defense presented no peer-reviewed literature calling Dr. Seidel's opinion into question. None. Rather, the defense relied on the report of an accident reconstructionist, John Bethea, who concluded that the forces involved in the accident were minimal. He estimated the bus's velocity changed "approximately 2.0 to 3.7 mph" due to the impact, and opined that "[i]mpact tests using human subjects indicate that velocity changes within this range are below levels associated with injuries."

***18** Bethea's qualifications are unknown; they are not described in the report or the record. Bethea's report states that he was not provided with Bernardi's medical records. He averred that his conclusions were "given within a reasonable degree of *engineering* probability and certainty;" obviously, as a nonphysician, Bethea is unqualified to render medical opinions of any sort, much less regarding causation. He cited no literature or other support for his opinion that the velocity change he believed to have been involved in the accident was insufficient to cause Bernardi's ruptured disk.

Bethea's report was not accompanied by an affidavit and therefore should not have been considered by the circuit court. See MCR 2.116(G)(6). But even ignoring that defect, the report is not admissible regarding *medical* causation, as it does not come close to satisfying the requirements of MRE 702. The circuit court's consideration of this report as causation evidence, standing alone, qualifies as an abuse of discretion. As a gatekeeper under MRE 702, the circuit court was charged with screening expert qualifications as well as the reliability of expert opinion, regardless of which side offered it. Bethea, an engineer who never reviewed a single page of Bernardi's medical record, is patently unqualified to testify regarding the causation of Bernardi's ruptured disc. See *Gilbert v. DaimlerChrysler Corp.*, 470 Mich. 749, 788; 685 N.W.2d 391 (2004) ("In order for Mr. Hnat to provide an admissible opinion interpreting medical records for purposes other than those related to the expertise of social workers, plaintiff bore the burden of showing that Mr. Hnat was qualified by knowledge, skill, experience, training, or education in medicine. Given the absence of such evidence, plaintiff failed to carry the burden of establishing the admissibility of Mr. Hnat's medical opinions, regardless of the admissibility of the records that ostensibly informed this opinion."). The circuit court not only considered Bethea's report as medical causation evidence, it *relied* on it to exclude Dr. Seidel's opinion. I cannot conceive of a more obvious *Daubert* error.

Given that the defense presented no admissible evidence calling Dr. Seidel's testimony into question, a *Daubert* analysis was unnecessary and inappropriate. While judges should act as gatekeepers when presented with potentially questionable scientific evidence, there was nothing questionable, novel, or shaky about Dr. Seidel's methodology. His was a medical opinion drawn from a patient's history, physical exam, and imaging studies—routine practice, not "junk science." Dr. Seidel was presented with a reason for the disc rupture—trauma—that all recognize as a potential cause. The defense proposition that the trauma was too slight to cause a herniation might have opened the door to a *Daubert* inquiry had it been accompanied by any admissible medical evidence—but it was not.

In a post-*Daubert* opinion, the United States Supreme Court observed that in ordinary cases, a gatekeeping inquiry may be unnecessary because "the reliability of an expert's methods is properly taken for granted." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152; 119 S. Ct. 1167; 143 L. Ed. 2d 238 (1999). This is precisely such a case. The defense offered no scientific basis calling into question the reliability of Dr. Seidel's causation opinion other than that the impact was relatively small, and that Dr. Seidel initially believed

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(incorrectly) that Bernardi had not been wearing a seat belt. [4] Dr. Seidel was well aware of the circumstances surrounding the impact, including that the bus sustained no damage. Nevertheless, he held steadfast to his opinion, explaining that even a small force, such as a cough or a sneeze, can rupture a disk. No admissible evidence contradicted this. He emphasized that the history of a trauma, combined with the timing of Bernardi's severe symptoms, cemented his view that the two were linked. There is nothing novel, unreliable, unscientific, or improperly speculative about this opinion.

***19** The objective of the requirements encapsulated in MRE 702 "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*, 526 U.S. at 152. The *Daubert* factors "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 (quotation marks omitted). "[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. When confronted with a challenge to the admission of expert testimony, the overarching question is not "whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation." *People v. Unger*, 278 Mich. App. 210, 217; 749 N.W.2d 272 (2008) (quotation marks and citation omitted).

Dr. Seidel's opinion was reasonable on its face, and was supported methodologically. That is enough to allow its admission. The additional reasons offered by the circuit court and the majority for rejecting it, discussed below, lack legal merit.

III

The majority asserts that Dr. Seidel's testimony qualified as unreliable under MRE 702 because Dr. Seidel failed to produce any peer-reviewed literature supporting his opinion, and because "a temporal connection alone is insufficient to establish causation[.]" The majority misunderstands the law.

Dr. Seidel testified that he was unaware of any peer-reviewed literature on the question of how much trauma is necessary to rupture a disc. When confronted with Bethea's opinion that a low-velocity accident such as this one could not cause "the damage to Mr. Bernardi's spine that he is alleging in this accident," Dr. Seidel responded:

> Disc herniations are known to occur without trauma. They are known to occur with trauma.
>
> There is no literature describing how much velocity is required to herniate a disc in this situation. *There is no literature that supports that.*
>
> So whether a 2.0 to 3.7 velocity change in an elderly male with underlying arthritic change is more at risk for disc herniation, it appears it is.

Dr. Seidel also clarified:

> Disc herniations are not immediate. You have to create a crack or a fissure in the disc and then, over ensuing days, the disc material works its way out of the crack or the gap.
>
> > I don't see anything unusual about this scenario. [Emphasis added.]

The defense offered no literature—peer-reviewed or otherwise—contradicting Dr. Seidel's statement that the medical literature does not address the subject in dispute. The only evidence before the circuit court is that no such peer-reviewed evidence exists. Absent evidence that published literature speaks to the subject, it was an abuse of discretion for the circuit court to have required Dr. Seidel to produce any.

Daubert itself contradicts the circuit court's view. "Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability .... Some propositions, moreover, are too particular, too new, or of too limited interest to be published." *Daubert*, 509 U.S. at 593 (citations omitted). The United States Supreme Court reemphasized this point in *Kumho*:

> *Daubert* ... made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability

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> of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. [*Kumho*, 526 U.S. at 152.][5]

***20** Our Supreme Court has made the same point. In *Edry v. Adelman*, 486 Mich. 634, 641; 786 N.W.2d 567 (2010), the Court observed that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702[.]" In that case, "the lack of supporting literature, combined with the lack of any other form of support" for the expert's opinion rendered it unreliable and inadmissible. *Id.* However, in *Edry*, the challenged expert's opinion "was contradicted by both the defendant's oncology expert's opinion *and the published literature on the subject that was admitted into evidence*[.]" *Id.* at 640 (emphasis added). "Moreover," the Supreme Court continued, "no literature was admitted into evidence that supported [the challenged expert's] testimony." *Id.*

Requiring literature when no evidence that such literature exists is an abuse of discretion. "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." *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 406 (C.A. 3, 2003). See also *Dickenson v. Cardiac & Thoracic Surgery of Eastern Tenn., P.C.*, 388 F.3d 976, 980 (C.A. 6, 2004) ("The district court appears to have relied most heavily upon its supposition that a 'purported expert must demonstrate a familiarity with accepted medical literature or published standards in these other areas of specialization in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evidence 702.' This is an erroneous statement of the law. No authority was cited by the district court in support of its above-quoted statement regarding Rule 702, nor have we found any."). If there is literature describing the forces required to herniate a disc in a patient with spinal stenosis, why didn't the defense produce it? No caselaw supports that imaginary literature may suffice to exclude an otherwise admissible expert opinion.

The circuit court and the majority also gravely err by rejecting the evidentiary importance of the temporal connection between the accident and the emergence of Bernardi's symptoms. Citing *Lowery v. Enbridge Energy Ltd. Partnership*, 500 Mich. 1034; 898 N.W.2d 906 (2017), the majority scolds that "[c]ourts must remain wary of *post hoc ergo propter hoc* reasoning." Continuing in the same vein and citing *West v. Gen. Motors Corp.*, 469 Mich. 177, 186; 665 N.W.2d 468 (2003), the majority asserts that "showing only a temporal relationship is generally insufficient to establish a causal relationship."

The majority's cut-and-paste approach to jurisprudence elides the facts of *this* case and perverts the role of the "temporal relationship" principle. *Lowery* is a toxic tort case, and *West* presented an employment discrimination claim. Neither involved trauma. The "temporal relationship" rubric served different purposes in those case contexts, as a basic review of the cases reveals.

In *Lowery*, the plaintiff alleged that exposure to oil fumes caused vomiting which led, weeks later, to the rupture of his gastric artery. *Lowery v. Enbridge Energy Ltd. Partnership*, unpublished opinion of the Court of Appeals, issued April, 2, 2015 (Docket No. 319199), slip op. at 1. The plaintiff's medical expert had not actually examined the plaintiff, and instead relied only on medical records before offering a causation opinion. *Id.* at 1-2. But the records "and the testimony of plaintiff's treating surgeon indicate that plaintiff did not mention oil fumes at the time of treatment." *Id.* at 1. Critically, the plaintiff failed to produce any evidence that his theory of causation was biologically plausible. The *only* evidence he could point to was that the vomiting started after the exposure. The Supreme Court held that slim reed inadequate, and equivalent to conjecture. *Lowery*, 500 Mich. 1034.

***21** *Lowery* has no bearing on this case. In *Lowery*, no scientific evidence was presented linking the toxic exposure and the claimed injury. Here, there is no dispute about the fact that trauma can rupture an intervertebral disc. The scientific relationship between trauma and Bernardi's injury is well established—the defense has not claimed otherwise. That symptoms of a disc rupture emerged shortly after the accident provides powerful evidence that the two *are* related, and Dr.

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Seidel's reliance on temporal proximity as one strand of his medical opinion was neither inappropriate nor scientifically irrational. [6]

In *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 158 (C.A. 3, 1999), the Court explained that a "strong temporal relationship" that is part of "a standard differential diagnosis" represents a sufficient methodology under *Daubert.* The Court continued:

> A number of courts, including our own, have looked favorably on medical testimony that relies heavily on a temporal relationship between an illness and a causal event. See, e.g., *Zuchowicz v. United States*, 140 F.3d 381, 385 (C.A. 2, 1998); *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (C.A. 3, 1997). The temporal relationship will often be (only) one factor, and how much weight it provides for the overall determination of whether an expert has "good grounds" for his or her conclusion will differ depending on the strength of that relationship. For example, if there was a minor oil spill on the Hudson River on the same day that Heller began experiencing her symptoms in West Chester, Pennsylvania, and she recovered around the time the oil was cleaned up, a proper differential diagnosis and temporal analysis by a well-qualified physician such as Dr. Papano could not possibly lead to the conclusion that the oil spill caused Heller's illness.... *Conversely, "if a person were doused with chemical X and immediately thereafter developed symptom Y, the need for published literature showing a correlation between the two may be lessened.*" [*Id.* at 154 (emphasis added, final citation omitted).]

The majority opinion rests on a fundamentally incorrect premise: that because Dr. Seidel's causation opinion correlates the timing of Bernardi's symptoms with the trauma, it is legally unreliable. No caselaw supports that extreme position. And as my thumb example demonstrates, the majority's view lacks common sense, too.

Dr. Seidel was justified in relying on the temporal relationship between the accident and Bernardi's disc rupture as one element of his differential diagnosis. The circuit court abused its discretion by finding otherwise. [7]

IV

***22** The circuit court cited, and the majority relies on, a plethora of facts which have no bearing on the legal issue at the center of this case: whether the data and methodology underlying Dr. Seidel's opinion testimony were reliable. Before reviewing those facts, it bears mention that MRE 702 appoints the circuit court as a gatekeeper, not a fact finder. The circuit court's gatekeeping role does not extend to resolving disputed fact questions. "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusions based on that analysis are factual matters to be determined by the trier of fact, or, where appropriate, on summary judgment." *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (C.A. 7, 2000). When credible, qualified experts disagree, a litigant is entitled to have the jury, not the trial court, decide which expert to believe. *Dorn v. Burlington Northern Santa Fe R. R. Co.*, 397 F.3d 1183, 1196 (C.A. 9, 2005).

Part of the *Daubert* inquiry involves an evaluation of whether the data utilized in the expert's methodology is reliable. But this does not mean that a circuit court may pick and choose which underlying—and disputed—*case* facts it chooses to believe. The distinction between disputed case facts and the data underlying an expert's opinion is at the heart of one of the majority's analytical errors.

In the *Daubert* realm, the "data" underlying an expert's opinion generally are derived from studies of a relationship between a toxic exposure and a disease. See, e.g., *Chapin v. A & L Parts, Inc.*, 274 Mich. App. 122; 732 N.W.2d 578 (2007) (involving epidemiological statistics concerning exposure to brake dust and the development of mesothelioma); *Nelson v. American Sterilizer Co.*, 223 Mich. App. 485; 566 N.W.2d 671 (1997) (involving animal studies examining whether low-level, chronic exposure to a chemical used to sterilize heat and moisture sensitive medical equipment can cause liver disease). The numbers and statistics involved in those studies —the "data" in *Daubert* parlance—directly related to the reliability of an expert's opinion. As discussed at length in *Nelson*, animal studies may not relate to human experience with a toxin, or may generate a wide range of results. [8] When exposure to a chemical is alleged to have caused an injury, the proof depends on studies containing data that establish the association, the necessary dose, and the time frame over which exposure is required. Without such data, an expert

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considering a toxic tort claim would have no reliable basis on which to form an opinion.

The "facts" relied on by the circuit court and the majority to bar Dr. Seidel's testimony bear no relationship to the "facts or data" referred to in MRE 702. For example, the majority spills considerable ink discussing a prior accident in which Bernardi was involved and whether Bernardi was wearing a seat belt at the time of the bus accident, and highlighting Bethea's averment that the accident was a "low-energy transfer event." These *case* facts are not relevant to the question presented under MRE 702, and the majority's discussion of them highlights the majority's misapprehension of the gatekeeping role. [9]

***23** The circuit court found that Bernardi's alleged failure to inform Dr. Seidel of an earlier fender-bender type accident was a factor that rendered Dr. Seidel's opinion inadmissible because it was based on "incomplete information." Bernardi testified that the earlier accident was minor and caused no physical consequences. No evidence contradicted these facts. The prior accident was irrelevant to Dr. Seidel and is irrelevant to this case. The circuit court's claim that Bernardi's failure to share information about a nonevent with Dr. Seidel undercut the reliability of Dr. Seidel's opinion is, for lack of a better word, nonsensical.

The seat belt issue is yet another example of the majority's failure to understand the difference between a fact relevant to an expert's credibility and "fact or data" calling into question the reliability of an expert's opinion. Dr. Seidel admitted that he presumed, incorrectly, that Bernardi had not been belted in at the time of the accident. But he also explained that the "distance translation" that may have contributed to the herniation occurred when Bernardi leaned forward to set the parking brake—a fact that no one contested:

> *Q.* If you were to hear from witnesses that this was an accident that didn't cause much, oiff any, damage to the bus, would that change your opinion?
>
> *A.* No. Buses are huge. And the vehicles that hit the buses lose and they show the damage, and the buses don't.
>
> My experience dealing with bus drivers is that they are not restrained. They have a large area in which they operate physically.
>
> So there may have been a translation of his body over a distance when the accident occurred.
>
> *Q.* During Mr. Bernardi's deposition, he explained to us that the accident occurred while he was leaning forward and attempting to pull the parking brake of the bus.
>
> Does that come into your medical analysis in any way?
>
> *A.* If that was the case, then he had more of a distance translation of the torso versus the lower half of the body.

Dr. Seidel's opinion that the accident caused the herniation was not premised on the incorrect assumption that Bernardi was unbelted. He stated that there "may" have been a "distance translation" if Bernardi was unbelted, and that there was "more" of a distance translation due to Bernardi's act of reaching for the brake when Rock's car struck the bus. The majority unfairly and inaccurately mischaracterizes this testimony as reflecting an opinion that Bernardi was "flung forward or backward due to the impact." Dr. Seidel never said anything of the kind, or even hinted at such a mechanism. His misperception about the seat belt was fodder for cross-examination, not a ground for the exclusion of his testimony. Under MRE 702, a trial court's gatekeeping function focuses on an examination of an expert's methodology. "A *Daubert* inquiry is not designed to have the district judge take the place of the jury to decide ultimate issues of credibility and accuracy." *Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (C.A. 7, 2012).

Citing Bethea's estimate of the forces involved in the accident, the majority again misstates the facts and draws a blatantly incorrect conclusion. The majority accurately recounts that the circuit court offered as one ground for disallowing Dr. Seidel's testimony that Dr. Seidel had inaccurately assumed that the forces involved in the accident were fairly significant. The majority concedes that "[w]hile Dr. Seidel testified that vehicles involved in accidents with buses 'lose and they show the damage,' we agree that *review of the record reveals no assumption on Dr. Seidel's part that a fairly significant force was involved in this accident due to the damage to defendant's Jeep.*" (Emphasis added.) Yet four sentences later, citing evidence that Dr. Seidel was aware that Bernardi had been in an accident, the majority states: "All of this suggests that Dr. Seidel believed that significant force was involved in this accident."

***24** Aside from the fact that the majority manages to completely contradict itself in a single paragraph, the majority is wrong. As the majority initially admitted, Dr. Seidel knew perfectly well that this was a low-impact collision. He

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addressed this issue in his deposition by pointing out that a cough or a sneeze can herniate a disc. He added that an "elderly male with underlying arthritic change" is at increased risk of a traumatic herniation, and that carnival rides exerting low g-forces routinely carry "warnings that say, if anyone has arthritis or problems with their spine, they should not go on those rides. And that's because they get injuries to their spine by going on those rides." The claim that Dr. Seidel overlooked the collision facts or ignored them is utterly disingenuous, yet another reason the circuit court abused its discretion.

Dr. Seidel's testimony rested on a sound and reliable scientific foundation. That some case facts might undercut the believability of that opinion did not render it inadmissible. The circuit court and the majority have displaced the role of the jury searching out and relying on facts irrelevant to a proper inquiry under MRE 702.

V

Finally, the majority has also misconstrued and misapplied basic proximate cause principles. Citing *Skinner v. Square D Co.*, 445 Mich. 153; 516 N.W.2d 475 (1994), the majority holds that Bernardi's causation proofs are too "speculative" to go to a jury. This case is a far, far cry from *Skinner*.

At the time of his death, the decedent in *Skinner* had been operating an electric metal "tumbling machine" of his own design and manufacture. *Id.* at 157. The plaintiffs theorized that defendant Square D Company defectively designed a switch that the decedent had incorporated in his tumbling machine such that the switch sometimes malfunctioned. *Id.* at 158. Because no one witnessed the decedent's accident, no direct evidence demonstrated any relationship between the switch and the decedent's electrocution. The plaintiffs' case against Square D was entirely circumstantial, predicated on a mere assumption that the Square D switch had played a role in the decedent's death. *Id.* at 163. Some of the physical evidence directly contradicted the hypothetical accident scenario proposed by the plaintiffs. *Id.* at 171-172. Square D maintained that even assuming the presence of a defect in its switch, the plaintiffs' circumstantial proofs failed to demonstrate that the decedent "was misled by the switch when he was fatally electrocuted." *Id.* at 158. The Supreme Court agreed, concluding that the record contained no direct or circumstantial evidence from which a reasonable jury could infer the mechanism of the decedent's electrocution or whether the switch contributed to the accident. The Court emphasized in *Skinner* that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164.

This is not a *Skinner* case by any stretch of the imagination. In *Skinner*, no one saw the accident, and the electrocuted plaintiff could not describe the circumstances surrounding the accident. A defective switch was but one of many possible explanations for what had happened. No such factual vacuums exist in this case. There is no dispute that there was an accident with an impact strong enough to propel a large school bus forward some 10 feet. There is no dispute that Bernardi had no back pain before the accident. There is no dispute that Bernardi woke up the next day in terrible pain. There is no dispute that a herniated disc was discovered shortly thereafter. There is no dispute that trauma can cause a herniated disc. Here, the expert's testimony derives from an established differential diagnosis founded on facts combined with recognized scientific principles, not speculation. *Skinner* is inapposite.

***25** The majority ignores a powerful strand of caselaw that *is* directly applicable to cases such as this. In *Kaminski v. Grand Trunk Western R. Co.*, 347 Mich. 417, 422; 79 N.W.2d 899 (1956), our Supreme Court explained that "if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." (Quotation marks and citation omitted.) More recently, in *Wilkinson v. Lee*, 463 Mich. 388; 617 N.W.2d 305 (2000), the Court addressed causation in a factual situation not unlike this one. In *Wilkinson*, as here, the plaintiff's vehicle was struck from behind. *Id.* at 389. The crash was more serious in that case, but the plaintiff's symptoms developed far more slowly. Two years after the accident, the plaintiff was diagnosed with a brain tumor. His physicians testified that the trauma could have precipitated or accelerated the plaintiff's symptoms from the tumor. *Id.* at 390. This Court found evidence of proximate cause lacking, but the Supreme Court reversed. The Supreme Court held, "Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition. The medical testimony at trial would clearly

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have permitted the jury to conclude that the trauma caused by the accident precipitated the symptoms." *Id.* at 395.

Here as in *Wilkinson*, there was nothing "speculative" about the medical testimony. The Supreme Court observed in *Wilkinson* that the plaintiff's brain tumor "made him more vulnerable to adverse consequences from head trauma than the average person." *Id.* at 397. The Court held that based on the physicians' testimony linking the accident and the symptoms, "the issue of proximate cause was properly submitted to the jury." *Id.* at 398. It is hardly unreasonable or "speculative" to accept that an older man with preexisting spinal disease would be more susceptible to spinal injury, and that even a relatively low-impact collision could set in motion the physiological events precipitating a disc rupture. The evidence created a question of fact regarding the causation of Bernardi's herniated disc. I would reverse the circuit court and remand for trial on the merits.

All Citations

Not Reported in N.W. Rptr., 2020 WL 3399570

Footnotes

1 Dr. Seidel later conceded that the images were fuzzy.

2 This was plaintiff's counsel's description, not plaintiff's deposition testimony.

3 Plaintiff testified that he settled his workers' compensation claim.

4 The SSD determination was governed by a rule that factored in the claimant's age, educational level, and the investment required to readjust the claimant's employment. Plaintiff's impairments included his spine disorders (primary), reconstructive surgery of a weight-bearing joint (secondary), and diabetes mellitus (other).

5 Plaintiff testified that he was awarded disability back to the date of the accident (plus an additional five months); however, the paperwork related to the disability determination reflects the "established onset date" was the day after the accident.

6 Peripheral neuropathy is the result of damage to the nerves outside the spinal cord (peripheral nerves). One of its most common causes is diabetes, which plaintiff had.

7 When Dr. Seidel was later asked if he would be surprised to know that the five others on the bus "didn't even feel an impact," Dr. Seidel responded: "I don't know that fact." Dr. Seidel then testified that plaintiff "just told me there was an accident. He didn't tell me any other details about that." Dr. Seidel later repeated that plaintiff "said he was in an accident[.]" Dr. Seidel believed that plaintiff was not "someone that was embellishing or exaggerating .... And [Dr. Seidel] felt that [plaintiff] was credible in his report."

8 Plaintiff's counsel had disclosed this information to Dr. Seidel before Dr. Seidel's deposition began.

Plaintiff's deposition testimony was that he was leaning forward to grab the park brake with his right hand to pull it; however, plaintiff was uncertain whether he had actually grabbed the park brake.

9 Plaintiff's back pain appeared the next morning, not days later.

10 Dr. Sidhu's post-operative note was "[l]umbar spinal stenosis, L3-L [sic? 4], L4-5 with herniated disc at L4-5 with severe stenosis and impending cauda equnia."

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11 When questioned as to whether he would be able to review the CT images and "state whether or not [his individual findings were] related to the ... accident," Dr. Seidel responded: "Well, I would be able to review [the CT scan], and consider what my answer would be. I wouldn't know if I could meet the criteria you are outlining in your statement." Dr. Seidel explained that, in part, his inability to do so was due to the potential limitations of CT images.

12 The no-fault act was amended effective June 11, 2019; however, we rely on the pre-amendment version in effect during the course of these proceedings in deciding this case.

13 See footnote 4.

14 On appeal, defendant contends that plaintiff "neglected" to inform Dr. Seidel that plaintiff had "had an x-ray of his lumbar spine just several years prior due to back pain." While there is some indication in the record that plaintiff's former long-time employer failed to timely respond to defendant's subpoena for records, defendant's contention is unsupported by citation to the record, and we find no such mention of this x-ray in the record. MCR 7.210(A)(1). Therefore, we decline to consider this information.

15 See footnote 8.

16 It appears that Dr. Seidel's testimony may have led to the circuit court to conclude that evidence of a broken bone was required before a trauma-related disc herniation. Important to this point is that the x-ray taken the morning after the accident revealed that plaintiff suffered no broken bones.

During Dr. Seidel's deposition, he testified that plaintiff did not break any bones or tear any ligaments. And, in the course of addressing whether any literature supported Dr. Seidel's opinion that a low-impact trauma could cause a herniated disc, Dr. Seidel volunteered that "[t]he literature says to have post[-]traumatic disc herniation requires breakage of bone and separation of the disc from the bone[.]" Throughout his deposition, Dr. Seidel repeatedly characterized plaintiff's disc herniation as trauma or trauma-related or post-traumatic.

On appeal, plaintiff attaches a peer-reviewed article, that was not part of the record below and cannot be considered by this Court. *Sherman v. Sea Ray Boats, Inc.*, 251 Mich. App. 41, 56; 649 N.W.2d 783 (2002); see also MCR 7.210(A)(1). Based on this article, plaintiff explains that Dr. Seidel was referencing literature pertaining to a lumbar disc herniation involving endplate junction failure, not an annulus fibrosus failure, which occurred here.

To the extent that the circuit court relied upon Dr. Seidel's testimony, its determination regarding the admissibility of Dr. Seidel's causation opinion did not depend solely on this point. Thus, the circuit court reached the right result, albeit, in part, for a wrong reason. *Southfield Ed. Ass'n*, 320 Mich. App. at 374, quoting *Gleason*, 256 Mich. App. at 3.

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

2 As discussed below, the record contains no evidence that the minor accident predating the bus accident, mentioned by the majority and cited by the circuit court, caused any injury or damage to Bernardi or anyone else. Bernardi did not experience pain or even consult a physician after that accident. This minor accident is a quintessential red herring, a diversion utterly without relevance.

3 Dr. Roth, the defense physician who examined Bernardi, rendered an opinion focused on Bernardi's current condition, not the cause of the herniated disc, and concluding that he had made a full recovery. The omission of a causation opinion speaks volumes.

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4 As discussed below, the seat belt issue is another red herring.

5 Here, the larger problem is not "interest" in the subject matter, but likely the difficulty in studying the effects of varying levels of trauma in human subjects, especially those with preexisting spinal disease.

6 The majority's unthinking rejection of the importance of the temporal relationship between the trauma and Bernardi's symptoms raises an interesting question. If the timing is irrelevant, the majority's position means that the relationship between the disc rupture and the accident was purely coincidental. A man who had never had a single moment of back pain, had never received treatment or consultation for back pain, suddenly ruptured a disc. That this occurred without any relationship to the undisputed trauma he endured the day before is not only remarkable, but incredible. The defense's insistence that the previous accident may have caused it—an accident involving far less force—only highlights the illogical nature of the majority's "temporal proximity" reasoning.

7 The majority's citation to *West v. Gen. Motors Corp.*, 469 Mich. 177; 665 N.W.2d 468 (2003), as support for its "temporal relationship" holding is similarly thoughtless. In *West* and many other employment cases, direct evidence of discrimination is nonexistent and causation proof depends on the plaintiff's ability to create an inference of causation. Plaintiffs sometimes cite the timing of an adverse employment event as evidence of an illegal motive. But in those cases, too, causation may be properly inferred if an adverse employment action occurs shortly after an employee threatens to report or experiences illegal conduct. *West* itself specifically cites a case in which a "close temporal relationship supported the plaintiff's claim[.]" *West*, 469 Mich. at 186. See, e.g., *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 386 (C.A. 10, 1984) ("With respect to a causal connection between the protected activity and the adverse employment action, the evidence shows that Liniger fired Love within two hours of receiving her memo containing a raise request and a copy of the Equal Pay Act."). Timing can also work inferentially against a plaintiff. See *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 137 (C.A. 2, 2000) ("Case law teaches that where the termination occurs within a relatively short time after the hiring there is a strong inference that discrimination was not a motivating factor in the employment decision."). The majority's one-size-fits-all "temporal relationship" reasoning does not apply in employment cases, either.

8 In *Nelson v. American Sterilizer Co.*, 223 Mich. App. 485, 497; 566 N.W.2d 671 (1997), this Court held:

> These findings demonstrate, when viewed together, that different species react differently to exposure to EtO, with some species evidencing adverse effects at lower exposure levels than other species. The lack of capacity for the mouse and rat models to predict how even the guinea pig, rabbit, and monkey models would respond to EtO exposure necessarily undercuts confidence that the mouse and rat models will predict accurately how humans will respond to EtO exposure.

9 The majority's misguided effort to discredit Dr. Seidel's testimony is epitomized by its mention that the CT images were "fuzzy," implying that the images did not actually reveal the herniation. The surgeon who operated on Bernardi noted that the CT scan confirmed a herniated disc at L4-L5, and that he found a ruptured disc during surgery. No evidence supports that the CT scan was misread. Why does its alleged "fuzziness" matter?

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2019 WL 12383192 (Mich.Cir.Ct.) (Trial Order)
Circuit Court of Michigan.
Oakland County

Lynda DANHOFF and Daniel Danhoff, Plaintiffs,

v.

Daniel K. FAHIM, M.D., Daniel K. Fahim, M.D, P.C., Kenneth P. D'Andrea, D.O., William Beaumont Hospital d/b/a Beaumont Hospital - Royal Oak, and Michigan Head and Spine Institute, jointly and severally, Defendants.

No. 2018-166129-NH.
November 25, 2019.

Order and Opinion

Nanci J. Grant, Judge.

***1** At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 25th day of November, 2019.

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Defendants Daniel K. Fahim and Michigan Head & Spine Institute's Motions for Summary Disposition. Defendants filed a Motion for Summary Disposition as to the issue of causation as well as a Motion for Summary Disposition as to the issue of the standard of care. Plaintiffs oppose the Motions. The Court denies Defendants' Motion as to Causation, and grants Defendant's Motion as to the Standard of Care.

In their Motion as to causation, Defendants argue that Plaintiff's expert, Dr. Koebbe, did not establish causation. "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." *Wischmeyer v Schanz*, 449 Mich 469, 484 (1995). "Failure to prove any one of these elements is fatal." *Id.* To establish the element of causation, a plaintiff must prove the existence of both cause in fact and legal or proximate causation. *Weymers v Khera*, 454 Mich 639, 647 (1997). Cause in fact requires substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, plaintiff's injuries would not have occurred. *Id.* at 647-48.

It is well established that expert testimony is required to establish causation in an action for medical malpractice. *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705 (1986). Such opinions are admissible, however, only if the trial court finds that they satisfy the requirements of MRE 702 and MCL 600.2955. See *Id.*

Defendants filed this Motion on September 5, 2019 along with a Motion to Strike Plaintiffs' purported causation expert, Dr. Bader Cassin. Defendants argued that, to the extent that Dr. Koebbe was giving causation testimony, such testimony is inadmissible under MRE 702 and MCL 600.2955. However, in their Responses to Defendants' Motions, Plaintiffs stated that Dr. Koebbe is not providing causation testimony; instead, Dr. Cassin will be providing causation testimony. Defendants attempted to argue that they would be prejudiced by Dr. Cassin's testimony because Dr. Cassin was not identified by Plaintiffs until August 12, 2019, and a deposition was not scheduled until September 10, 2019, days before case evaluation.

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The Court notes that Defendants canceled Dr. Cassin's September 10th deposition and chose to file a motion and claim prejudice, despite the fact that the parties never explored a first adjournment of the scheduling order. The Court found that Defendants were not prejudiced in any way, and denied their Motion to Strike Dr. Cassin. See Opinion and Order dated November 13, 2019. Therefore, the Court denies Defendants' Motion for Summary Disposition as to causation because there is a genuine issue of material fact with respect to Dr. Cassin's proposed causation testimony.

***2** As to their Motion Regarding Standard of Care, Defendants argue that they are entitled to summary disposition on the element of standard of care. Defendants argue that Plaintiffs failed to establish the standard of care because Plaintiff's standard of care expert's testimony is not reliable and admissible under MRE 702. MCL 600.2955 sets forth a list of factors which determine whether expert opinion testimony is reliable and admissible under MRE 702. These factors are largely like the factors in *Danbert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579 (1993). These factors include whether the opinion is generally accepted in the field and whether the basis for the opinion is reliable. "Under *Daubert*, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Edry v Adelman*, 486 Mich 634, 639-640 (2010) citing Daubert, 509 US 597 at 589. A lack of supporting literature, while not dispositive, is an important factor in determining the admissibility of expert witness testimony. *Id.* at 640. "Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id.* at 642. Regarding expert testimony, the question for the court is always whether the opinion is sufficiently reliable under the principles articulated in MRE 702 and by the Legislature in MCL 600.2955. *Elher v Misra*, 499 Mich 11, 24 (2016).

The Michigan Supreme Court has held:

> Under MRE 702, the trial court had an independent obligation to review *all* expert opinion testimony in order to ensure that the opinion testimony … was rendered by a 'qualified expert,' that the testimony would 'assist the trier of fact,' and, under the rules of evidence in effect during this trial, that the opinion testimony was rooted in 'recognized' scientific or technical principles. These obligations applied irrespective of the type of expert opinion testimony offered by the parties.

Craig ex rel Craig v Oakwood Hosp, 471 Mich 67, 82 (2004). Standard of care testimony must also meet the admissibility requirements of MRE 702 and MCL 600.2955. See *Elher*, 499 Mich 11 at 28.

Based on the foregoing caselaw, this Court must determine if Dr. Koebbe's standard-of-care testimony is rooted in recognized scientific or technical principles in order to deem it admissible. After reviewing the deposition and the parties' pleadings, the Court finds that Plaintiffs did not present any foundation as to the reliability and admissibility of Dr. Koebbe's standard of care testimony as required by MRE 702 and MCL 500.2955. Nothing was presented to the Court that evidenced Dr. Koebbe relying on any published medical journals for his opinion nor did he cite to any authority to support his conclusion that the procedure was performed incorrectly, resulting in the perforation. While he did testify that he reviewed some publications to confirm the rarity of bowel injuries during the procedure, he failed to name these publications and did not present them at his deposition. The only foundation laid as to the reliability of Dr. Koebbe's testimony was his experience and background, and his own opinion as to how he would have performed the surgery. The Michigan Supreme Court has held that experience and background alone are insufficient to establish reliability and admissibility under MRE 702. *Edry*, 486 Mich 634 at 639-640. The Court also notes that Dr. Koebbe failed to cite to any established procedure or authority as to the proper way in which an attending physician must supervise a resident physician. Again, he simply pointed to his background and experience.

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.

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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).

***3** Therefore, based on the evidence before it, the Court has no choice but to strike Dr. Koebbe's testimony and grant Defendant's Motion. 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.

Defendants' Motion is granted.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

<<signature>>

NANCI J. GRANT, Circuit Court Judge

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KeyCite Yellow Flag - Negative Treatment
Appeal Granted by Danhoff v. Fahim, Mich., May 26, 2023

2021 WL 1827959
Only the Westlaw citation is currently available.

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.

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 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

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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. 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

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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,

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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 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

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> 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 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

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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.

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;

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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.

All Citations

Not Reported in N.W. Rptr., 2021 WL 1827959

Footnotes

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.

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2020 WL 10056391 (Mich.Cir.Ct.) (Trial Order)
Circuit Court of Michigan.
Oakland County

Lynda DANHOFF and Daniel Danhoff, Plaintiffs,

v.

Daniel K. FAHIM, M.D., Daniel K. Fahim, M.D., P.C., Kenneth P. D'Andrea, D.O, William Beaumont Hospital d/b/a Beaumont Hospital -Royal Oak, and Michigan Head and Spine Institute, jointly and severally, Defendants.

No. 2018-166129-NH.
January 21, 2020.

Order and Opinion

Nanci J. Grant, Circuit Court Judge.

***1** At a session of said Court, held in the Courthouse in the City of Pontiac, County of Oakland, State of Michigan on the 21st day of January, 2020

PRESENT: HONORABLE NANCI J. GRANT, CIRCUIT JUDGE

This matter is before the Court on Plaintiffs' Motion for Reconsideration of the Court's November 25, 2019 Opinion and Order granting summary disposition in favor of Defendants. For the following reasons, Plaintiffs' Motion is denied.

Pursuant to MCR 2.119(F)(3), the Court may reconsider its prior ruling if the Court finds that it committed palpable error. On November 25, 2019, the Court granted Defendants' Motion for Summary Disposition, finding that Plaintiffs failed to demonstrate that their standard of care expert's testimony was reliable and admissible under MRE 702. Specifically, the Court found that Plaintiffs failed to demonstrate that their standard of care expert, Dr. Koebbe, supported his opinion with peer-reviewed, published articles, finding instead that Dr. Koebbe's opinion was based solely on his experience and background. "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 (2010). Regarding expert testimony, the question for the court is always whether the opinion is sufficiently reliable under the principles articulated in MRE 702 and by the Legislature in MCL 600.2955. *Elher v Misra*, 499 Mich 11, 24 (2016). Expert standard of care testimony is subject to the reliability analysis under MRE 702 and MCL 600.2955. *Id.*

The Court invited Plaintiffs to file this motion and provide the Court with sufficient support for Dr. Koebbe's testimony. Plaintiffs offered an affidavit from Dr. Koebbe which included three abstracts and one published article. The Court finds the published article most persuasive. The article, published in the Journal of Nueroscience, discusses various complications observed when performing the XLIF surgery. The article demonstrates that a bowel injury, such as the one found in Lynda Danhoff, is a very rare complication of the XLIF surgery, occurring between .05-3.8% of the time. The three abstracts attached to Plaintiffs' motion also demonstrate that a bowel injury is a rare complication of the surgery. Dr. Koebbe's affidavit states that the article and abstracts support his opinion that a bowel injury is an "unacceptable" complication, and so rare as to only occur as a result of surgical error.

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

The *Edry* defendant filed a motion for summary disposition stating that the plaintiff's oncology expert's testimony was not reliable or admissible under MRE 702. *Id.* at 638. Instead of granting the motion, the trial court issued an order barring the expert's testimony. The defendant then filed a motion to dismiss the complaint, arguing that without the expert's testimony, the plaintiff could not establish a prima facie case for medical malpractice. Simultaneously, the plaintiff filed a motion to set aside the court's order, and provided the trial court with some articles which plaintiff argued supported her expert's testimony. *Id.* at 638-39. The trial court denied the plaintiff's motion and granted the defendant's motion, dismissing the case. *Id.* The plaintiff appealed, and the Michigan Supreme Court ultimately held as follows:

> ***2** 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.

Id. at 640-641. In directly addressing the dissent, the *Edry* Court also stated:

> And, regardless of the peer-reviewed status of these materials, the dissent fails to acknowledge that these materials do not directly support Dr. Singer's testimony, and plaintiff never explained how or even whether Dr. Singer used the information to formulate his opinion.

Id. at n 4.

Further, the Michigan Supreme Court in *Ehler*, supra, held that a trial court did not abuse its discretion when it barred expert testimony on the basis that the plaintiff failed to establish that the expert's opinion was generally accepted within the relevant expert community. *Ehler*, 499 Mich 11 at 27. Much like in our case, in *Ehler*, the plaintiff's standard of care witness testified that it was always a breach of the standard of care to clip a bile duct during gallbladder surgery. The *Ehler* defendants established that clipping the bile duct was a known complication of the surgery. *Id.* at 17. The trial court ultimately concluded that the plaintiff's expert had not demonstrated that his opinion was widely held and accepted among experts in that surgical field. *Id.* at 18. The Michigan Supreme Court ultimately upheld the trial court's ruling, holding as follows:

> 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.

The Court finds that based on the article and the abstracts attached, Plaintiffs again failed to demonstrate that Dr. Koebbe's testimony is admissible pursuant to MRE 702. The Court finds that the article and abstracts do not directly support Dr. Koebbe's opinion, as required by the Michigan Supreme Court holdings in *Edry* and *Ehler.* Dr. Koebbe's opinion is that a bowel injury is

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an “unacceptable” complication of the surgery, and can only result from surgical error. The article and the abstracts, however, are silent as to whether a bowel injury is an “acceptable” or “unacceptable” complication of the XLIF surgery, and they certainly do not state that a bowel injury must be or is usually the result of a breach of the standard of care. Expert testimony must be directly supported by reliable principles and methods, and be generally supported by the relevant community of experts. *Edry*, supra, at 640-641; see also *Ehler*, supra, at 27.

While Plaintiffs presented support for Dr. Koebbe's contention that the complication is rare, Plaintiffs failed to demonstrate the reliability of Dr. Koebbe's opinion that the occurrence of the complication is the result of a breach of the standard of care, as required by MRE 702, MCL 600.2955, and caselaw. Therefore, the Court finds no palpable error. MCR 2.119(F)(3). Plaintiffs' Motion is denied.

IT IS SO ORDERED.

<<signature>>

***3** NANCI J. GRANT, Circuit Court Judge

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2016 WL 6584547
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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.,*

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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 "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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2022 WL 3909158
Only the Westlaw citation is currently available.
United States District Court, D. Puerto Rico.

Brenda M. IRIZARRY-PAGAN, et al., Plaintiffs,

v.

METRO SANTURCE, INC., et al., Defendants.

CIVIL NO. 18-1532 (JAG)

|

Signed August 31, 2022

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MEMORANDUM AND ORDER

GARCIA-GREGORY, D.J.

***1** Pending before the Court is Defendants' Joint Motion *in Limine* to Exclude the Opinions and Testimony of Dr. Ian Cummings (the "Motion"), Docket No. 91; Plaintiffs' Response in Opposition, Docket No. 103; Defendants' Joint Reply, Docket No. 128; and Plaintiffs' Supplemental Motion, Docket No. 132. The Motion was referred to U.S. Magistrate Judge Bruce J. McGiverin for a Report and Recommendation ("R&R") solely as to the issue of whether Dr. Cumming's opinions should be excluded pursuant to *Daubert*. Docket No. 140. The Magistrate Judge recommended granting the Motion in part. Docket No. 149. Defendants filed a timely Objection. Docket No. 150. After considering Defendants' Objection and conducting a *de novo* review of the record, the Court finds that the R&R is supported by both the record and the law. Accordingly, the Court **ADOPTS** the Magistrate Judge's R&R and **GRANTS IN PART** Defendants' Motion.

STANDARD OF REVIEW

Courts must conduct a *de novo* review of such parts of an R&R to which specific, written objections have been made. Fed. R. Civ. P. 72(b). "Local Rule 72(d) further provides that such objections 'shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection.' " *Velez-Padro v. Thermo King de P.R., Inc.*, 465 F.3d 31, 32 (1st Cir. 2006) (quoting L. Cv. R. 72(d)). "Conclusory objections that do not direct the reviewing court to the issues in controversy do not comply with Rule 72(b)." *Id.* Upon review of objections properly made, courts may "accept, reject or modify, in whole or in part, the findings or recommendations" of the magistrate judge. L. Cv. R. 72(d).

DISCUSSION

The Court agrees with the Magistrate Judge's conclusion that, pursuant to *Martinez v. United States*, 33 F.4th 20 (2022), Dr. Cummings sufficiently explained how certain deviations from the applicable standard of care caused the damages claimed in this case. Defendants' reliance on *Lopez-Ramirez v. Toledo-Gonzalez*, 32 F.4th 87 (1st Cir. 2022) is inapposite. In that case, the First Circuit found that the district court did not abuse its discretion in excluding an expert opinion because the report suffered from several deficiencies that warranted

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exclusion under *Daubert* and the plaintiffs did not "develop any contention that [the expert's] deposition testimony – which, we note, the District Court also considered but found 'equally unhelpful' – bridges the 'analytical gap' that the District Court identified between [the expert's] stated opinion in his report that there had been a deviation from the standard of care and the basis for that opinion." *Id.* at 96. Such is not the case here, where the Magistrate Judge, as will be discussed below, found that certain deficiencies in Dr. Cumming's report were cured by his deposition testimony. [1]

First, Dr. Cummings repeatedly referred to the applicable standard of care throughout his deposition when opining on aspects of the patient's treatment. *See Martinez*, 33 F.4th at 29 ("[A]n expert's references ... to the 'prevailing medical standard' have been found, when read in context, to constitute a satisfactory statement of the national standard of care.") (cleaned up). Moreover, Dr. Cummings received a subpoena *duces tecum* requesting, *inter alia*,

> ***2** Any and all reports, drafts of reports, documents, notes, photographs, videos, drawings or other materials generated by, relied upon or reviewed by the deponent in reaching his conclusions, opinions or mental impressions in the present case.
>
> Any and all publications, medical literature, treatises, articles, journals, texts, abstracts, seminar materials, documentation, reference items, regulations, statutes or other materials in which the deponent relied on, used, consulted, reviewed or referenced in coming to his conclusions, opinions, or mental impressions.
>
> All other documents not referred to above upon which the deponent relied on in preparing his report in this case.

Docket No. 103-2. As requested, Dr. Cummings brought all these documents to the deposition, documents that included the medical literature outlining the applicable standard of care on which he relied to reach his opinions. Docket No. 103 at 4-5. Plaintiffs' counsel then sent Defendants a list of the guidelines and articles reviewed by Dr. Cummings "[i]n attention to the above referenced *duces tecum* requests." Docket No. 91-4. While it is true that the letter states that these materials were "reviewed by Dr. Cummings in preparation for his deposition testimony," it also states that the letter was in response to the subpoena, whereby Defendants notified their intent to depose Dr. Cummings regarding his expert report and requested all materials relied upon to reach his conclusions. *See id.*; Docket No. 103-2. It is therefore clear that the list included the materials relied upon by the expert to reach the opinions in his report. As such, Dr. Cummings' expertise, stated familiarity with the applicable standards of care, references to the standard of care throughout his depositions, and reliance on materials outlining the applicable standard of care are sufficient to find that he adequately put forth the national standard of care.

Second, the Court agrees that Dr. Cummings sufficiently established causation as to the following alleged deviations from the standard of care: Dr. Marrero, Dr. Maldonado, and Dr. Cabrera's alleged failure to admit the patient to telemetry or the ICU; Hospital Pavia's alleged failure to initiate a "code blue" emergency response based on an allegedly invalid DNR; and Dr. Marrero, Dr. Maldonado, Dr. Cabrera, Dr. Rodriguez, Dr. Perez, and Dr. Garcia's alleged failure to sufficiently consider that CHF was contributing to the patient's medical issues. Docket No. 149 at 16-18. In his report, Dr. Cummings concluded that Dr. Marrero, Dr. Maldonado, and Dr. Cabrera deviated from the standard of care by failing to admit the patient to telemetry or the ICU. Docket No. 91-1 at 10-11. Then, in his deposition, he explained that in a monitored setting, such as the ICU, there is a "higher level of care" and complications suffered by the patient "would have been recognized immediately and responded to." Docket No. 132-2 at 69-71. As to the invalid DNR, Dr. Cummings explained that the hospital treated the patient as a DNR and, thus, "deprived her of the opportunity to survive" by "do[ing] nothing." Docket No. 132-2 at 112-15. Finally, Dr. Cumming's report opines that Dr. Marrero, Dr. Maldonado, Dr. Cabrera, Dr. Rodriguez, Dr. Perez, and Dr. Garcia deviated from the standard of care by failing "to sufficiently consider CHF as the cause of the patient's hypercarbia and respiratory distress and instead diagnosing chronic respiratory failure as the cause." Docket No. 91-1 at 10-13. He explained, at his deposition, how these actions caused the damages claimed:

> ***3** If early on there had been more attention paid to the patient's abnormal electrocardiography, and if the Troponin had been drawn and the MD had been drawn as Dr. Ayala had initially intended, and if the BNP had been repeated sequentially, then they would, I think, have recognized that this patient had a cardiac issue rather than pure pulmonary issue. They were

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> treating her as a pure pulmonary issue, and ... they actually overly diuresed her and made her profoundly alkalotic, which by itself – highly alkalotic states carry their own mortality. So they actually, in some part, they well have caused her death, in part at least, by over diureses of her[sic], such that she became profoundly alkalotic ... And also they, in so doing, failed to attend to the real fact that she had probably cardiac decompensation ... [which] was what was really in progress and it was avoidable. And they sat there for – how many days without an EKG at all. They sat there for eight days from the arrival to the 3rd BNP test. She sat nine days from the third EKG to the fourth EKG. There was plenty of time, lost opportunities abound in this case where she could have been salvaged. And there were a number of times when they passed by immediate opportunities. Like she had bleeding, reversal of anticoagulation, posterior wall MI, syncope after bleeding on the toilet. These are all things that should have been responded to.

Docket No. 132-2 at 239-242. Considering both his expert report and his deposition testimony, Dr. Cummings explained how he believes the aforementioned deviations from the standard of care contributed to the patient's death.

"There is an important difference between what is *unreliable* support and what a trier of fact may conclude is *insufficient* support for an expert's conclusion." *Milward v. Acuity Specialty Prod. Grp., Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). Several of Defendants' objections, *see* Docket No. 150 at 9-10, "speak to the probative weight of the testimony, not to its admissibility." *Martinez*, 33 F.4th at 33 (citation omitted); *see* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.") (citation omitted); *Crowe v. Marchand*, 506 F.3d 13, 18 (1st Cir. 2007) ("Objections of this type, which question the factual underpinnings of an expert's investigation, often go to the weight of the proffered testimony, not to its admissibility.") (citations omitted). [2]

For these reasons, the Court **ADOPTS** the Magistrate Judge's R&R, **GRANTS IN PART** Defendants' Motion, and **EXCLUDES** all opinions and testimony not specifically addressed above. *See* Docket No. 149 at 18.

IT IS SO ORDERED.

All Citations

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Footnotes

1 In addressing a *Daubert* challenge, the Court can consider the contents of the expert report as well as deposition testimony. *See* *Martinez*, 33 F.4th at 28-30.

2 The Court also notes that, other than addressing a lack of causation as to the alleged failure to admit the patient to telemetry or an ICU setting, Defendants fail to make specific objections as to the remaining opinions regarding causation the Magistrate Judge recommended be permitted. Docket No. 150 at 9-10.

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2006 WL 1328846
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Ray Donald KETTERMAN, Personal Representative of the Estate of Raymond Lee Ketterman, Deceased, Plaintiff-Appellant,
v.
CITY OF DETROIT and Dennis David Malcolm, Defendants-Appellees.

Docket No. 258323.
|
May 16, 2006.

Wayne Circuit Court; LC No. 03-310417-NI.

Before: SCHUETTE, P.J. and BANDSTRA and COOPER, JJ.

[UNPUBLISHED]

PER CURIAM.

***1** Plaintiff appeals as of right a judgment of no cause of action in this wrongful death suit. We vacate the judgment and remand for a new trial.

Plaintiff's decedent, Raymond Lee Ketterman (decedent), was a pedestrian who was struck by a bus near the intersection of Grand River and Woodward Avenues in Detroit and died four days later from the injuries incurred in the accident. Plaintiff filed a wrongful death suit against the City of Detroit and the driver of the bus. Both defendants claimed governmental immunity from tort liability under MCL 691.1401 *et seq.* The jury found that the driver had been negligent but not grossly negligent,[1] and that decedent had been 60 percent at fault[2] in the accident, thus precluding any recovery by plaintiff. Plaintiff appeals.

Plaintiff raises two issues on appeal, both related to the trial court's inclusion of the testimony of William Larkin, District Superintendent of Road Management and Safety for the City of Detroit Department of Transportation ("DOT"). Larkin is also the primary accident investigator for the DOT. Before trial, plaintiff's counsel brought a motion in limine to exclude Larkin's testimony where defense counsel intended to introduce it as expert testimony as to the point of impact of the accident and as to the victim's posture at the time of impact, arguing that Larkin was not qualified as an expert to address accident reconstruction or to draw conclusions as to the victim's posture based on the victim's injuries. The trial court heard oral arguments and denied the motion. As to the first issue, the trial court stated: "I think he's got a lot of experience and should be allowed to testify." As to the second, the court said "I'm going to allow the opinion as," and was at that point cut off by defense counsel, who said "Thank you, your honor." The hearing went on to address other matters not relevant to this appeal. Plaintiff argues on appeal that the inclusion of this testimony was error rising to the level of abuse of discretion resulting in substantial unfair prejudice to plaintiff.

Appellate courts 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 NW2d 296 (2004). Specifically, this Court reviews decisions "regarding the qualification of an expert witness for an abuse of discretion." *Clerc v. Chippewa War Mem Hosp,* 267 Mich.App 597, 601; 705 NW2d 703 (2005). Notwithstanding the deferential standard of appellate review, a trial court may neither abandon its role as a gatekeeper under MRE 702 to ensure that expert testimony is reliable, nor perform that function inadequately. *Gilbert v. DaimlerChrysler Corp,* 470 Mich. 749, 780; 685 NW2d 391 (2004). An abuse of discretion exists when "an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Franzel v. Kerr Mfg Co,* 234 Mich.App 600, 620; 600 NW2d 66 (1999) (citation omitted). But an error in the admission 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, supra,* p 76 (quotation marks and citation omitted). The proponent of the evidence bears the burden of establishing its admissibility. *Gilbert, supra,* p 781.

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***2** Effective January 1, 2004, MRE 702 was amended "to particularize" the trial court's gatekeeper duty. *Gilbert, supra,* p 780 n 44. As amended, 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. [MRE 702 (emphases added).]

A trial court must ensure that all expert opinion testimony, regardless of whether it is based on novel science, is reliable. *Gilbert, supra,* p 781. "MRE 702 requires a trial court to insure that each aspect of an expert opinion's proffered testimony-*including the data underlying the expert's theories and the methodologies by which the expert draws conclusions from that data*-is reliable." *Id.,* p 779 (emphasis added). "Reference in MRE 702 to 'scientific' evidence implies a grounding in the methods and procedures of science, and its reference to 'knowledge' connotes more than subjective belief or unsupported speculation." *Id.,* p 781 (citations omitted).

Similarly, MCL 600.2955 provides criteria for expert testimony in actions for death and other injuries. MCL 600.2955 provides that "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." MCL 600.2955(1). "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...." MCL 600.2955(1). Providing further guidance, the statute adds that the court "shall consider" a list of factors similar to the *Daubert* indicia of reliability. See *Gilbert, supra,* p 781. ("MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability.")

We find that here the trial court did not fulfill its gatekeeper function in the hearing on the motion in limine to exclude the testimony. The trial court heard defense counsel's listing of Larkin's on-the-job training and catalog of attended courses in accident investigation, and seemed essentially to end the inquiry there. While Larkin's background may well qualify him as an expert in the area of accident investigation as a general matter, we find that this inquiry was insufficient to establish that Larkin was qualified to testify as an expert on the specific facts of this accident. An expert may be qualified "by knowledge, skill, experience, training, or education," but still must have applied a reliable method to sufficient facts of the case at hand to be qualified to testify. MRE 702.

***3** Plaintiff first argues that Larkin was not qualified to testify as an expert witness on the point of impact[3] in the accident. At the hearing on the motion to exclude the witness, Defendant explained that Larkin used a method known as "coning," where any items held by a victim of an impact with a vehicle will fly from the victim's hand and land in a particular pattern. The pattern is the result of the kinetic energy transferred from the vehicle to the victim to the items. An expert applying the coning method may determine the point of impact by viewing the pattern and estimating the speed of the vehicle. The trial court did not inquire into or examine whether coning has been subjected to scientific replication or peer review publication, or any of the other criteria required by MCL 600.2955(1). Neither defendant during the motion hearing nor Larkin during the trial ever explained precisely how coning is used to calculate point of impact; i.e., the location of the collision. Defendant merely argued: "You might think of it as a shotgun pattern. If you observe where it lands, you can draw lines back to where [the person] was hit and ... *every accident reconstructionist will tell you that."* But Larkin is not an accident reconstructionist.

Even if coning had been adequately vetted as a method, the court did not fairly assess Larkin's application of the method to the facts in this case. During the hearing on the motion, plaintiff reviewed Larkin's deposition testimony that he had supervised the work of the accident investigators and officers at the scene, rather than taking photos or measurements himself, or preparing field sketches of relevant evidence such as the pattern of the victim's personal items on the ground.[4] Plaintiff noted that Larkin had in fact stated that he "didn't do an actual accident investigation" himself. During Larkin's deposition and at trial, plaintiff questioned Larkin as to when he had arrived at the scene of the accident, and Larkin estimated it was ten or fifteen minutes after the

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accident occurred. Larkin admitted that he had no way of knowing whether EMS technicians or others had moved any of the items that were the basis of the coning pattern used to determine point of impact. Larkin admitted he had no way of knowing how fast the bus was moving, but stated he was not concerned about it because he felt that speed was not an issue in this accident. He admitted the bus had been moved (backed up) when the EMS technicians arrived on the scene so that they could provide medical assistance to the victim, but since this happened before Larkin arrived on the scene, he could not know the exact placement of the bus when the driver stopped. All of these are relevant factors in establishing whether Larkin was in possession of sufficient facts to reliably apply a reliable method of assessing the scene to determine point of impact. [5]

During the hearing on the motion in limine to exclude Larkin's testimony as to point of impact, the trial court did not address these factual and methodological concerns validly raised by plaintiff; we therefore find Larkin's trial testimony on this point was somewhat speculative and its reliability unproven. The testimony directly affected plaintiff's substantial rights because fault in this case turned largely on where plaintiff's decedent had entered the street: if in the bounds of the crosswalk, [6] less negligence could be attributed to decedent. Defendant asserts on appeal that because Larkin's testimony established the same point of impact as that of another expert witness, Mr. Wing, [7] any error in admitting the testimony was harmless. However in this case the jury's finding that decedent had been 60% at fault suggests a nearly even balancing of the contradictory testimony of the eyewitness as against the expert witnesses, and implies that the one legitimate expert witness's testimony was unfairly bolstered by Larkin's testimony. Essentially, because it was such a close call, the inclusion of Larkin's testimony likely did deprive plaintiff of substantial rights. Failure to exclude the testimony therefore rises to the level of abuse of discretion.

***4** Plaintiff also argues that the trial court abused its discretion in allowing Larkin to opine, based on injury biomechanics, that decedent was bent down at the time of the collision. We hold that Larkin lacked expertise sufficient to opine about decedent's posture at the point of impact. Larkin is not a medical doctor. Larkin admitted that aside from the medical examiner's report, he did not review any of decedent's medical records or any depositions. The trial court never examined what methodology Larkin used to arrive at the conclusion that the injury to decedent's leg indicated that he was bending over. The trial court made no statement at the time of its ruling on the motion in limine regarding why Larkin's injury biomechanics opinion would be allowed. The trial court provided no analysis of Larkin's qualifications to offer an injury-biomechanical opinion, the factual basis for the opinion, or the methodology for forming the opinion.

In his deposition, when asked what training allowed him to offer his injury biomechanics opinion, Larkin replied: "I believe in the intermediate class there is a course that is taught specifically about pedestrian accidents and pedestrian injuries...." Larkin did not provide specifics about what his training in injury biomechanics involved. Larkin admitted that, aside from the one intermediate course about pedestrian accidents, he did not have any medical training that would allow him to offer this opinion. A single course in pedestrian accidents does not seem to us to be a substantial qualification to offer a key opinion in this case. As with the point of impact testimony, this testimony directly affected plaintiff's substantial rights because fault in this case turned largely on the care plaintiff's decedent had exercised in crossing the street: had he walked straight across without stopping or bending down, less negligence would likely be attributable to the victim.

Larkin's opinion directly contradicted the testimony of an eyewitness to the accident. At trial plaintiff asked Larkin about the testimony of witness Jackson, who plaintiff alleged had testified that the victim was not bent over, but had "put his hands up on the front windshield of the bus." [8] Larkin's response was "[e]yewitness testimony is suspect." Larkin added that no physical evidence supported the eyewitness testimony, such as finger or hand prints on the windshield. "This Court has held that an expert's opinion is objectionable ... where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation." *Badalamenti v. William Beaumont Hosp.*, 237 Mich.App 278, 286; 602 NW2d 854 (1999).

Although Larkin mentioned the lack of physical evidence as supporting his conclusion, he admitted that the conclusion was based on his assessment of the twisting injury to the victim's knee, which he opined could happen only if the victim had been bent over with his weight primarily on his left leg. When plaintiff put this scenario to defendant's expert pathologist as a hypothetical, the doctor replied that it is more likely for the left knee to have been injured as it was if it had

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been bearing more weight than the right at the time of impact, but specifically stated this is not a certain conclusion. The doctor stated "[t]here is no determinant there to state so," and "I cannot draw a conclusion on the basis of that."

***5** We find that the trial court at the hearing on the motion in limine to exclude his testimony did not properly qualify Larkin as an expert to testify as to the victim's posture (i.e., standing up or bent over), and we note that because the testimony significantly affected the trial's outcome, the error rises to the level of abuse of discretion. Defendant again asserts that because this testimony is corroborated by that of expert witness Wing, any error was harmless. Again, given the closeness of the case, we must disagree. While the jury weighed the eyewitness testimony against the contradictory expert witness testimony, a second expert corroborating the first might well serve as the tipping point.

Our Supreme Court in *Gilbert* spoke of "analytical gap[s]" between data and opinions given by experts, warning that insufficient inquiry into an expert's qualification to testify based on reliable application of reliable methods to the specific facts of a case might let in testimony that could "serve as a Trojan horse that facilitates the surreptitious advance of ... spurious, unreliable opinions." *Gilbert, supra,* p. 783. The trial court must vigilantly play the gatekeeper role to prevent just this from happening, and here the trial court did not do so.

We vacate the trial court's judgment and remand for a new trial. We do not retain jurisdiction.

All Citations

Not Reported in N.W.2d, 2006 WL 1328846

Footnotes

1 MCL § 691.1407(2)(c) protects a government employee whose "conduct does not amount to gross negligence that is the proximate cause of the injury or damage."

2 Per MCL § 600.2959, a party more than 50 percent at fault may not recover; per MCR 500.3515(2)(b), noneconomic loss "damages shall not be assessed in favor of a party who is more than 50% at fault."

3 Point of impact in this context specifically means the precise location in the street where the vehicle made contact with the victim. It is noteworthy that at trial Larkin repeatedly confused the phrase "point of impact" as it relates to the location of the collision on the street and as it relates to the point on the front of the bus that struck the victim (i.e., whether the windshield, the lower part of the grille, etc.).

4 Measurements and photos or field sketches are critical reference material here because coning establishes point of impact by the measure of the placement of the victim's personal items in relation to the location of the victim and the vehicle, with the speed of the vehicle at the time of the accident also being a factor.

5 Larkin testified that he based the decision in part on the lack of other physical evidence that one would expect to find if the point of impact had been further south than he estimated, here meaning inside the crosswalk rather than some 40 feet north of it as Larkin alleged. This evidence or the lack of it is not relevant to the issue of whether Larkin was properly qualified as an expert on the coning effect of this particular accident and what it means as to point of impact.

6 The crosswalk at this intersection is not plainly marked with painted lines, but is apparently identified by a brick pathway embedded in the street.

7 This witness was an accident reconstructionist, qualified apparently by a master's degree in mechanical engineering, a week of training at Northwestern University, and by serving as an expert witness at many trials.

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8 Ms. Jackson did not testify live at trial, but her video deposition was shown to the jury with some segments redacted. In Ms. Jackson's deposition, plaintiff's counsel asked “[b]ased on what you observed at that intersection, was Mr. Ketterman somehow hidden, or obstructed, or difficult to view?” Ms. Jackson responded “I don't think so. The man was tall. You couldn't help but see him.” In describing the accident, Ms. Jackson stated that “Mr. Ketterman put his hands up like this, and the bus just went over him.” When asked whether the victim had at any time bent over, the witness said he had not. Ms. Jackson also stated that the victim was in the cross-walk, not 40 feet north of it as suggested by Mr. Larkin. Although the witness told plaintiff's counsel that the victim had not bent down at any time in the cross-walk, later in the deposition, when asked by defense counsel if the victim had dropped anything in the street, the witness stated “[h]e bent down to pick up something ... and got right back up.” She repeated several times though that he was definitely standing up when the bus hit him.

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2011 WL 1004174
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Carol MACKENZIE, Personal Representative of the Estate of Therel B. Kuzma, Plaintiff–Appellant/Cross–Appellee,
v.
John D. KOZIARSKI, M.D., F.A.C.S., Family Surgical Services, P.C., Family Surgical Care, P.C., and XYZ Unknown Corporation, Defendants–Appellees/Cross–Appellants.

Docket No. 289234.
|
March 22, 2011.

Calhoun Circuit Court; LC No. 03–001783–NH.

Before HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

Opinion

PER CURIAM.

***1** In this medical malpractice action, plaintiff appeals as of the right the trial court's order granting defendants' motion for directed verdict. We reverse the order granting defendants' motion for directed verdict, vacate the order denying defendants' motion in limine to strike, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Therel Kuzma was a 70–year–old woman who suffered, among numerous health problems, from a recurrent incisional hernia on her abdominal wall. On October 3, 2000, defendant John D. Koziarski, M.D., performed outpatient laparoscopic surgery on Kuzma to repair the hernia. Two days later, Kuzma appeared at the emergency room with complaints of breathing difficulty. She was admitted to the intensive care unit, where she became hypotensive and increasingly septic. The following day, Koziarski performed exploratory surgery. He discovered a hole in Kuzma's bowel, which he repaired. However, Kuzma's condition deteriorated. Following a third surgery, Kuzma died on October 29, 2000.

Plaintiff sued defendants for medical malpractice. The essence of the complaint was that, given Kuzma's numerous health issues, Koziarski breached the standard of care when he performed a laparoscopic procedure to repair Kuzma's hernia. In the affidavit of merit, John D. Corbitt, Jr., M.D., averred that had Koziarski chosen "a proper procedure" to repair Kuzma's hernia, he would not have perforated the bowel which resulted in the complications leading to Kuzma's death.

Approximately one month before trial, the parties signed the following stipulation regarding the negligence theory that plaintiff would present at trial:

> IT IS HEREBY STIPULATED ... that the only theory upon which plaintiff will proceed at the time of trial is plaintiff's theory that it was professionally negligent for John D. Koziarski, MD, ... to recommend and perform the October 3, 2000 incisional hernia repair laparoscopically as opposed to via an open approach, and that he should have performed said procedure via an open approach....

Plaintiff's counsel presented this theory to the jury during opening argument. Counsel, admitting that Kuzma needed surgery to repair the hernia, stated that the "one single medical issue" was whether the hernia repair should have been done laparoscopically or in an open procedure. Counsel further stated that the case was not about whether Koziarski was negligent in perforating Kuzma's bowel, as bowel perforation was a known complication of an incisional hernia repair. Counsel argued that the standard of care required Koziarski to repair Kuzma's hernia in an open procedure because a perforated bowel would have been discovered and fixed in the procedure.

Corbitt, who was plaintiff's only expert witness, testified that Koziarski perforated Kuzma's bowel during the laparoscopic procedure to repair the hernia. The perforation, which was not discovered for several days, allowed contaminates to

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leak from Kuzma's small intestine into her abdominal cavity. Corbitt opined that the injury to Kuzma's bowel led to her death.

***2** Corbitt admitted that bowel perforation is a known complication of a surgery, whether done openly or laparoscopically, to repair a hernia. He was not claiming that Koziarski violated the standard of care in perforating Kuzma's bowel. Rather, it was his opinion that Koziarski breached the standard of care when he opted to repair the hernia in a laparoscopic procedure rather than in an open procedure. According to Corbitt, because of Kuzma's health issues, any complication from the surgery, whether laparoscopic or open, would put Kuzma "in a huge amount of trouble" and that any type of infection would "be overwhelming." In his opinion, Kuzma had about a 50 percent chance of surviving any complication.

Corbitt testified that a bowel perforation was less likely to occur when a hernia is repaired in an open procedure than when repaired in a laparoscopic procedure. Moreover, Corbitt claimed that if the bowel is perforated in an open procedure, the injury is easily recognized and can be fixed. He admitted that if the bowel is injured in an open procedure, there can be complications, such as a wound infection. However, Corbitt testified that those complications would not have included peritonitis, which is the spillage of bowel contents into the abdominal cavity. According to Corbitt, it was more likely than not that any complication that Kuzma would have suffered from a perforated bowel in an open procedure would not have been fatal.

Corbitt testified that the risk of bowel perforation in a laparoscopic repair was less than five percent, and he was sure that the risk in an open repair was much less. However, Corbitt stated that the risk for bowel perforation in a laparoscopic repair is five percent "in the general literature." He claimed that because Kuzma had extensive abdominal adhesions, the risk of bowel perforation in a laparoscopic procedure was greater. Corbitt would "bet" that 90 percent of bowel injuries in laparoscopic procedures were to patients who had abdominal adhesions. Nonetheless, Corbitt stated that he did not know the risk of Kuzma's bowel being perforated. When asked if the risk was greater than 10 percent, Corbitt stated that he would not give a percentage. He merely stated that the increased risk should have played a role in determining whether Kuzma's hernia should have been repaired in an open or laparoscopic procedure.

After plaintiff rested, defendants moved for a directed verdict. They claimed that the case was "a classic lost opportunity to survive" case, explaining that plaintiff's claim was not that Koziarski was negligent in performing the laparoscopic hernia repair, but that Kuzma was denied a better chance to survive when Koziarski recommended the laparoscopic procedure. Defendants argued that plaintiff had not shown that Kuzma lost an opportunity that exceeded 50 percent, where plaintiff claimed that Kuzma would not have died absent the bowel perforation and Corbitt testified that there was only a five percent chance of a bowel perforation in a laparoscopic procedure. In response, plaintiff claimed that Corbitt's testimony that it was more likely than not that any complications that Kuzma would have suffered in an open procedure would not have been fatal satisfied the 50 percent requirement.

***3** The trial court granted defendants' motion for directed verdict. It stated that the phrase "more likely than not" was not sufficient to satisfy the requirements for a lost opportunity claim, where case law required specific percentages. The trial court noted that specific percentages showing that Kuzma lost an opportunity greater than 50 percent were not testified to by Corbitt.

II. DIRECTED VERDICT

On appeal, plaintiff argues that her claim is a traditional claim of medical malpractice, rather than a claim for lost opportunity. We agree.

We note that plaintiff's counsel, in responding to defendants' motion for directed verdict, never responded to defendants' assertion that plaintiff's claim was a classic lost opportunity claim. Counsel never argued to the trial court that plaintiff's claim was one of traditional medical malpractice. Generally, an issue that is not raised before, addressed, or decided by the trial court is not properly preserved for appellate review. *Polkton Charter Twp v. Pellegrom,* 265 Mich.App 88, 95; 693 NW2d 170 (2005). Thus, the issue whether plaintiff's malpractice claim is one for traditional malpractice rather than one for lost opportunity is not preserved for our review, and we need not address it. *Id.* However, because the issue presents a question of law and the facts necessary for its resolution have been presented, we will ignore the preservation requirements. *Detroit Leasing Co v. Detroit,* 269 Mich.App 233, 237–238; 713 NW2d 269 (2005).

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We review de novo a trial court's decision on a motion for directed verdict. *Sniecinski v. Blue Cross & Blue Shield of Mich,* 469 Mich. 124, 131; 666 NW2d 186 (2003). "We review all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed." *Silberstein v. Pro–Golf of America, Inc,* 278 Mich.App 446, 455; 750 NW2d 615 (2008).

In a claim for medical malpractice, a plaintiff must establish (1) the standard of care, (2) a breach of that standard, (3) an injury, and (4) proximate causation between the breach and the injury. *Lanigan v. Huron Valley Hosp, Inc,* 282 Mich.App 558, 565; 766 NW2d 896 (2009). MCL 600.2912a governs the standard of proof in medical malpractice cases. *O'Neal v. St John Hosp & Med Ctr,* 487 Mich. 485, 494; 791 NW2d 853 (2010) (opinion by HATHAWAY, J.). Subsection (2) of the statute 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%.

The second sentence of MCL 600.2912a(2) only applies to loss of opportunity claims; it does not apply to traditional medical malpractice claims. *O'Neal,* 487 Mich. at 498, 506 (opinion by HATHAWAY, J.), 508 (opinion by CAVANAGH, J.); see also *Taylor v. Kent Radiology, PC,* 286 Mich.App 490, 506; 780 NW2d 900 (2009) ("[W]hether the second sentence of MCL 600.2912a(2) applies depends on the nature of the claims brought by the plaintiff; if the plaintiff only brought a traditional medical malpractice claim, the second sentence of MCL 600.2912a(2) will not apply and the plaintiff will be left with the traditional burden of proof.").

***4** A cause of action for lost opportunity is a claim separate and distinct from a claim for traditional medical malpractice. *Taylor,* 286 Mich.App at 506. The plaintiff's claim is one for traditional malpractice where the plaintiff asserts that the defendant's negligence more probably than not caused the injury. *Stone v. Williamson,* 482 Mich. 144, 152–153; 753 NW2d 106 (2008) (opinion by TAYLOR, C.J.). "[A] plaintiff need not rely on the lost opportunity cause of action when the plaintiff can show by a preponderance of the evidence that the medical malpractice caused a specific physical harm." *Taylor,* 286 Mich.App at 506. A plaintiff has a claim for lost opportunity where he or she "cannot prove that a defendant's actions were the cause of his injuries, but can prove that the defendant's actions deprived him of a chance to avoid those injuries." *Stone,* 482 Mich. at 152 (opinion by TAYLOR, C.J.) (quotation marks and internal citation omitted).

This Court has looked to a plaintiff's complaint to determine whether the plaintiff has pleaded a claim of traditional medical malpractice or a claim for loss of opportunity. *Taylor,* 286 Mich.App at 507–510; *Ykimoff v. W A Foote Mem Hosp,* 285 Mich.App 80, 99; 776 NW2d 114 (2009). In *O'Neal,* 487 Mich. at 506, Justice HATHAWAY wrote, "[T]he second sentence of § 2912a(2) applies only to medical malpractice cases that plead loss of opportunity and not to those that plead traditional medical malpractice[.]"

Here, plaintiff's complaint did not contain one reference to a lost opportunity to achieve a better result. See *Taylor,* 286 Mich.App at 508. While plaintiff did not include an allegation regarding causation in the malpractice count specific to Koziarski, she did allege that "[a]s a direct result of said acts of negligence of defendants ... KUZMA died on October 29, 2000, as a result of post-surgical complications." Similarly, in the affidavit of merit, Corbitt averred that Koziarski's decision to repair Kuzma's hernia laparoscopically rather than in an open procedure violated the standard of care for a patient such as plaintiff and that, to a degree of medical certainty, Kuzma died as a result from the complications originating from the laparoscopic procedure. Accordingly, we conclude that plaintiff pleaded a traditional medical malpractice claim.

However, pleadings do not automatically dictate the nature of the claim. Courts should look beyond a plaintiff's label to determine the true nature of an asserted claim. *Tenneco, Inc v. Amerisure Mut Ins Co,* 281 Mich.App 429, 457; 761 NW2d 846 (2008); see also *O'Neal,* 487 Mich. at 527

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(MARKMAN, J., concurring) (being bound by the plaintiff's choice of label puts form over substance). "The gravamen of an action is determined by reading the claim as a whole." *Aldred v. O'Hara–Bruce,* 184 Mich.App 488, 490; 458 NW2d 671 (1990). Accordingly, we will examine plaintiff's claim as a whole.

***5** In doing so, we find instructive the Supreme Court's reversal of this Court's decision in *Compton v. Pass (On Remand),* unpublished opinion per curiam of the Court of Appeals, issued March 5, 2009 (Docket No. 260362).

In *Compton,* this Court was tasked by the Supreme Court with determining whether the plaintiff's claim constituted a lost opportunity claim. The *Compton* plaintiff had breast cancer. She alleged that the defendants surgically removed at least 18 of her right axillary lymph nodes as part of a clinical trial without obtaining her informed consent. She further alleged that, had she been properly informed, she would have opted not to participate in the clinical trial and would have chosen to undergo a sentinel node removal. She claimed that as a result of the defendants' failure to provide her with informed consent, she suffered permanent axillary cording and lymphedema. This Court held that plaintiff's claim was one for lost opportunity. It explained:

> At the outset, we recognize that this is an informed consent case, not a case based on breach of the standard of care for performing the axillary lymph node dissection itself. Moreover, the consent in this had to do with an informed choice between two possible surgeries, as opposed to informed consent regarding whether to have a procedure at all.
>
> ... Since [the plaintiff] suffered injury, the analysis turns on proximate cause. In other words, if plaintiff suffered an injury as the result of a procedure to which the plaintiff did not consent, and would not have had surgery at all if adequately informed, the plaintiff would have a traditional malpractice case, i .e., the plaintiff could show that the defendant's action—the surgery itself—more probably than not caused the injury. However, the plaintiff alleges that she would have had a less invasive surgery if adequately informed, which carried the same risk of injury but in significantly fewer cases.
>
> It is undisputed that plaintiff was being treated for breast cancer and the plaintiff's complaint indicates that foregoing all surgery was never a contemplated option. Rather, the practical choice was between the two surgeries. Thus, the question becomes whether it was more probable than not that plaintiff would have suffered lymphedema and axillary cording from the axillary node dissection surgery, but not from the sentinel node dissection surgery. In other words, the issue is whether, by not being advised that there was an alternative with fewer risk, plaintiff lost an opportunity for a less invasive surgery with a potentially better result. In our opinion, this is a classic lost opportunity case[.] [*Id.* at 6.]

As already stated, the Supreme Court reversed. *Compton v. Pass,* 485 Mich. 920; 773 NW2d 664 (2009). It held that this Court "erred in analyzing [the] case under the lost-opportunity standard set forth in MCL 600.2912a(2)." *Id.* at 921. According to the Supreme Court, "the evidence [was] sufficient to allow a fact-finder to find that the alleged breach of the standard of care caused the plaintiff to suffer physical injury ... that more probably than not was proximately caused by the negligence of the defendants. As a result, the requirements of the first sentence of MCL 600.2912a(2) are satisfied, and this is a claim of traditional malpractice." *Id.*

***6** The facts in the present case are not identical to those in *Compton;* the present case does not involve informed consent. But the facts of the two cases are similar. Like *Compton,* the present case does not involve a breach of the standard of care in performing the surgery itself. It involves the practical choice between two surgeries which carried a risk of the same injury. Plaintiff recognizes that a perforated bowel is a complication in any surgery, whether open or laparoscopic, to repair an incisional hernia. However, plaintiff claims that had Kuzma's hernia been repaired in an open procedure, rather than done laparoscopically, the chances of Kuzma's bowel being perforated were smaller and any complications from a perforated bowel would not have been fatal. Thus, it could be said, like it was in *Compton,* that the issue in the present case is whether plaintiff, by having her hernia repaired laparoscopically, lost an opportunity for a better result if her bowel was perforated. Given the similarities between the present case and *Compton,* and the Supreme Court's disagreement with this Court's characterization of *Compton* as a "classic lost opportunity case," we conclude that plaintiff's claim is not one for lost opportunity.

In conclusion, defendant was not entitled to a directed verdict on the basis that plaintiff's claim was a "classic lost opportunity to survive" case. Plaintiff pleaded her claim as one for traditional medical malpractice. In addition, the Supreme Court's reversal of this Court's decision in *Compton*

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leads us to conclude that plaintiff's claim is not one for lost opportunity. We reverse the order granting a directed verdict to defendants. [1]

III. CROSS–APPEAL

On cross-appeal, defendants raise issues regarding the qualifications and admissibility of Corbitt's expert testimony, and of the admissibility of standard mortality tables. Because these issues are relevant in case of retrial, we address them.

A. EXPERT TESTIMONY

Defendants argue that the trial court erred in failing to strike Corbitt's testimony. According to defendants, Corbitt was not qualified to testify as an expert witness because he was unfamiliar with the laparoscopic procedure performed by Koziarski and he did not have any medical literature to support his opinions.

"The determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v. Providence Hosp,* 244 Mich.App 626, 654; 624 NW2d 548 (2001). An abuse of discretion occurs when a trial court selects a decision that is outside the range of reasonable and principled outcomes. *Maldonado v. Ford Motor Co,* 476 Mich. 372, 388; 719 NW2d 809 (2006).

Corbitt, who was board certified in general surgery, testified that he had been practicing medicine for over 30 years. He had no formal training in laparoscopic surgeries; the surgeries were not taught when he was in medical school or was a resident. However, he was "certainly in on the early parts of laparoscopic surgeries and had a great deal to do with teaching laparoscopic surgery." Until recently, laparoscopic procedures were not taught in medical school, and physicians learned the procedures from him and others who had developed them. He was the course director or a faculty member of numerous laparoscopic surgery symposiums where laparoscopic procedures were taught. He was affiliated with several "laparo endoscopic" associations, served on the editorial board of numerous publications related to laparoscopic surgery, and authored several articles on laparoscopic surgery. He has a couple patents pending on laparoscopic surgery devices or tools.

***7** Corbitt testified that he has probably performed less than 30 laparoscopic incisional hernia repairs. He was not performing the surgery in 2000, and could not remember the last time he had performed the procedure. He does not discuss laparoscopic incisional hernia repairs with patients, and if a patient is interested in the surgery, he refers the patient to one of his partners. [2] Corbitt's specialty was inguinal hernia repairs, and Corbitt explained that the two procedures were closely related and the concept of each surgery was the same. Corbitt did not have any literature to support his opinions that the risk of a bowel perforation was less in an open procedure than in a laparoscopic procedure or that a perforated bowel can be recognized and fixed in an open procedure. His opinions were supported by 30–plus years of experience.

Defendants moved in limine to strike Corbitt as an expert witness. Defendants argued that Corbitt was not qualified to give expert testimony under MRE 702 and MCL 600.2169 because Corbitt did not perform laparoscopic incisional hernia repairs in 2000 and could not remember the last time he had performed the procedure. They further argued that Corbitt's opinions were not reliable under MRE 702 and MCL 600.2955 because Corbitt failed to support his opinions with current literature. The trial court denied defendants' motion. It noted that Corbitt was board certified in the same specialty as Koziarski, and that defendant's arguments concerned the "weight," as opposed to the admissibility, of Corbitt's testimony. [3]

In a medical malpractice action, the plaintiff must prove that "in light of the state of the art existing at the time of the alleged malpractice" the defendant failed to provide the plaintiff the recognized standard of practice or care and that, as a result, the plaintiff suffered an injury. MCL 600.2912a(1). Expert testimony is required to establish the standard of care and a breach of that standard, *Decker v. Rochowiak,* 287 Mich.App 666, 685; 791 NW2d 507 (2010), as well as causation, *Teal v. Prasad,* 283 Mich.App 384, 394; 772 NW2d 57 (2009). The proponent of expert testimony must establish that the expert is qualified under MRE 702, MCL 600.2955, and MCL 600.2169. *Clerc v. Chippewa Co War Mem Hosp,* 477 Mich. 1067; 729 NW2d 221 (2007).

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We reject defendants' argument that Corbitt was not qualified under MCL 600.2169. MCL 600.2169(1)(a) provides:

> If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

Both Koziarski and Corbitt are general surgeons. In addition, Corbitt, like Koziarski, is board certified in general surgery. The requirements of MCL 600.2169(1)(a) are satisfied. See *Woodard v. Custer,* 476 Mich. 545, 561–562; 719 NW2d 842 (2006).

***8** However, MCL 600.2169 "does not limit the power of the trial court to disqualify an expert witness on [other] grounds[.]" MCL 600.2169(3). "In an action alleging medical malpractice, the provisions of [MCL 600.2955] are in addition to, and do not otherwise affect, the criteria for expert testimony provided in [MCL 600.2169]." MCL 600.2955(3). MCL 600.2955, along with MRE 702, governs the inquiry whether expert testimony is reliable. *Chapin v. A & L Parts, Inc,* 274 Mich.App 122, 127; 732 NW2d 578 (2007) (opinion by DAVIS, J.). A trial court " 'must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' " *Edry v. Adelman,* 486 Mich. 634, 640; 786 NW2d 567 (2010), quoting *Daubert v. Merrell Dow Pharm, Inc,* 509 U.S. 579, 589; 113 S Ct 2786; 125 L.Ed.2d 469 (1993).

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.

"The admission of expert testimony requires that (1) the witness be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Surman v. Surman,* 277 Mich.App 287, 308; 745 NW2d 802 (2007). "The party presenting the expert bears the burden of persuading the trial court that the expert has the necessary qualifications and specialized knowledge that will aid the fact-finder in understanding the evidence or determining a fact in issue." *Id.*

MCL 600.2955(1) provides:

> 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, techniques, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

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

***9** (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community....

(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. [Emphasis added.]

The word "shall" constitutes mandatory conduct. *Burton v. Reed City Hosp Corp,* 471 Mich. 745, 752; 691 NW2d 424 (2005).

The trial court, in ruling on defendants' motion in limine to strike, failed to address the reliability of Corbitt's testimony. It failed to consider any of the factors listed in MCL 600.2955(1) even though defendants had requested it, pursuant to its "gatekeeper role under MRE 702 and MCL 600.2955," to "consider all the previously identified factors or requirements to determine if Plaintiff, the proponent of the expert testimony, has satisfied the necessary requirements." "While the exercise of th[e] gatekeeper role is within a court's discretion, a trial judge may neither abandon this obligation nor perform the function inadequately." *Gilbert v. DaimlerChrysler Corp,* 470 Mich. 749, 780; 685 NW2d 391 (2004) (quotation marks omitted). Here, the trial court made absolutely no inquiry, let alone a searching inquiry, of the reliability of Corbitt's testimony. *Gonzalez v. St John Hosp & Med Ctr (On Reconsideration),* 275 Mich.App 290, 305–306; 739 NW2d 392 (2007). Accordingly, we vacate the order denying defendants' motion in limine to strike and remand for a determination on the reliability of Corbitt's testimony prior to any retrial.

B. MORTALITY TABLES

Defendants allege that the trial court erred in taking judicial notice of plaintiff's proffered mortality tables. We disagree.

The taking of judicial notice is discretionary. *Freed v. Salas,* 286 Mich.App 300, 341; 780 NW2d 844 (2009), citing MRE 201(c). Thus, we review a trial court's decision on a request to take judicial notice of facts for an abuse of discretion. *Id.*

The trial court took judicial notice of the "United States Life Tables, 2000," which plaintiff proffered to establish Kuzma's life expectancy. Where, as here, a decedent's life expectancy is at issue, mortality tables are admissible. *Little v. Bousfield & Co,* 165 Mich. 654, 656; 131 NW 63 (1911). On appeal, defendants cite comments from the model civil jury instructions to support their position that the trial court erroneously admitted the "Life Tables" because the parties did not stipulate to their admission.[4] However, there is no such requirement. Mortality tables are controlling "in the absence of evidence tending to show that the deceased had a probability of life greater or less than is shown by the tables." *Id.* Accordingly, the trial court did not abuse its discretion in taking judicial notice of the mortality tables proffered by plaintiff.

***10** We note that the only testimony regarding Kuzma's life expectancy came from Corbitt, and the testimony was not entirely unfavorable for defendants. Significantly, Corbitt's testimony suggested that Kuzma had outlived her life expectancy. Even where expert testimony suggests that the deceased's life expectancy was shortened by medical conditions, mortality tables may be considered to determine life expectancy. See *Rickwalt v. Richfield Lakes Corp,* 246 Mich.App 450, 463; 633 NW2d 418 (2001).

Reversed in part, vacated in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., (concurring).

I concur in result only in the majority's conclusion that plaintiff's claim is one of traditional malpractice, not lost opportunity, and that the requirements of MCL 600.2912a(2) are satisfied. As noted by the majority, plaintiff pled a traditional malpractice claim. He pursued discovery on a traditional malpractice theory. And he presented at trial an expert witness who testified that defendants' negligence more probably than not caused plaintiff's decedent Therel B. Kuzma's death. It was not until defendants moved for a directed verdict at trial, claiming that plaintiff was pursuing a "classic lost opportunity to survive" claim and had failed to prove that Kuzma lost an opportunity that was greater than 50 percent, that plaintiff's counsel implicitly accepted such characterization of his case.[1]

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Plaintiff's theory of the case is that defendant John D. Koziarski, M.D.'s negligent decision to perform a laparoscopic rather than an open incisional hernia repair more probably than not caused Kuzma's death by way of a foreseeable complication that Kuzma was not healthy enough to endure. Plaintiff's expert witness, John Corbitt, Jr., M.D., testified at trial by way of a de benne esse deposition that had Kuzma undergone an open laparoscopic incisional hernia repair, she would not have developed sepsis and died.[2] As such, Kuzma's injury was not the loss of an opportunity to avoid physical harm or the loss of an opportunity for a more favorable result; rather, she suffered the physical harm in that death resulted from the alleged negligence. Although the majority relies on the Supreme Court's recent order in *Compton v. Pass,* 485 Mich. 920; 773 NW2d 664 (2009), to conclude that because plaintiff's case is similar to *Compton,* it is not one of lost opportunity, I write separately to note that abundant case law supports the conclusion that plaintiff's claim is one of traditional malpractice because plaintiff is alleging that defendants' negligence more probably than not caused the injury—Kuzma's death. See, e.g., *Stone,* 482 Mich. at 164 (six justices concluded that the plaintiff's claim was one of traditional malpractice, not lost opportunity, where he alleged that the defendant radiologist's negligence in failing to diagnose his abdominal aortic aneurysm deprived him of an opportunity to undergo elective repair surgery, which more likely than not caused all the harm he suffered due to the eventual rupture of the aneurysm); *O'Neal,* 487 Mich. at 489 (four justices concluded that the plaintiff presented a traditional malpractice claim when he alleged that the defendant's misdiagnosis of his sickle cell anemia deprived him of proper treatment, which led to his suffering a disabling stroke; the plaintiff's experts testified that had the plaintiff received the necessary treatment, the stroke more probably than not would have been avoided); *Velez v. Tuma,* 283 Mich.App 396, 399, 403–405; 770 NW2d 89 (2009) (the plaintiff presented a traditional malpractice claim where she alleged that the defendant's failure to timely and properly diagnose her acute vascular insufficiency "resulted in an actual, physical injury—the loss of her left leg below the knee," which requires more-probable-than-not causation); *Shivers v. Schmiege,* 285 Mich.App 636, 640; 776 NW2d 669 (2009) (the plaintiff, who underwent bladder removal surgery due to bleeding, pled a traditional malpractice case where he claimed that the defendant's negligence in failing to timely respond to developing post-operative complications caused him to suffer significant neurological deficits; the Court noted: "This case is even less a 'lost opportunity' case than *Stone,* because there, had the plaintiff not sought medical treatment at all, the aneurysm ... would have ruptured and likely would have killed him. Here, had plaintiff not sought medical treatment, he would have had bloody urine and functional arms."); and *Ykimoff v. Foote Mem Hosp,* 285 Mich.App 80, 99–100; 776 NW2d 114 (2009) (the plaintiff's claim was one of traditional malpractice where he alleged that the defendant's failure to properly monitor and timely respond to the development of a post-operative blood clot in the graft site following an aortofemoral bypass graft more probably than not caused his injuries involving continued difficulty using his legs).

***11** In *Taylor v. Kent Radiology PC,* 286 Mich.App 490, 506; 780 NW2d 900 (2009), this Court aptly summarized the law with respect to MCL 600.2912a(2) by stating that "a plaintiff need not rely on the lost opportunity cause of action when the plaintiff can show by a preponderance of the evidence that the medical malpractice caused a specific physical harm." In this case, Dr. Corbitt testified that Dr. Koziarski's decision to perform a laparoscopic instead of an open incisional hernia repair surgery more probably than not caused Kuzma's death. As such, plaintiff was not required to present evidence concerning the degree by which defendants' malpractice affected Kuzma's opportunity for a better outcome. See *Taylor,* 286 Mich. at 510. Instead, plaintiff only had to prove by a preponderance of the evidence that Dr. Koziarski's decision to perform a laparoscopic instead of an open incisional hernia repair proximately caused Kuzma's death. See *id.* As addressed above, Dr. Corbitt testified accordingly. As such, the trial court erred in granting defendants' motion for a directed verdict, requiring reversal.

Further, I concur in the majority's conclusion that the trial court abused its discretion in denying defendants' motion in limine to strike Dr. Corbitt as a witness without first complying with the requirements of his gatekeeping role as set forth in *Clerc v. Chippewa Co War Mem Hosp,* 477 Mich. 1067; 729 NW2d 221 (2007), although I believe the court's decision was harmless given Dr. Corbitt's de benne esse deposition testimony, wherein he testified at length to his qualifications and the basis of his opinions. Dr. Corbitt's de benne esse deposition was taken on August 11, 2008. Defendants filed their motion to strike Dr. Corbitt as a witness on August 19, 2008, arguing that: 1) Dr. Corbitt was not qualified to testify regarding laparoscopic incisional hernia repair in accordance with the requirements of MRE 702 and

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MCL 600.2169; and 2) the literature Dr. Corbitt produced in support of his opinion regarding the increased risk of infection when performing a laparoscopic as compared to an open incisional hernia repair was nothing more than a "throw-away piece" he obtained from the internet, and therefore, his testimony on this issue did not meet the requirements and factors listed in MRE 702 and MCL 600.2955. In support of their motion, defendants attached only a few select portions of Dr. Corbitt's deposition transcript. As the majority points out, defendants filed their motion the day before trial began, leaving plaintiff without a chance to file a written response. On August 20, 2008, before the jury was brought in and sworn, the trial court addressed several motions filed by defendants, including the motion to strike Dr. Corbitt. Plaintiff started to argue in opposition to the motion when the trial court interrupted, verified that Dr. Corbitt was board certified, and denied the motion, with only cursory reference to MRE 702 and 705, and no reference to either MCL 600.2169 or MCL 600.2955. There is no indication in the record that Dr. Corbitt's de benne esse deposition had been filed with the court or reviewed by the judge prior to his ruling on defendants' motion.

***12** Our Supreme Court in *Clerc,* 477 Mich. at 1067–1068, set forth the obligations of a proponent of expert testimony, as well as the trial court's gatekeeper role, as follows:

> 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. The court's gatekeeper role under 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 [an] 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.
>
> Consistent with this role, the court "shall" consider all of the factors listed in MCL 600.2955(1). If applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved general scientific acceptance among impartial and disinterested experts in the field. [Citation omitted.]

"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 v. A & L Parts, Inc,* 274 Mich.App 122, 127; 732 NW2d 578 (2007) (opinion by DAVIS, J.). Rather, "[a]n evidentiary hearing under MRE 702 and MCL 600.2955 is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science." *Id.* at 139. An expert's opinion is not necessarily "unreliable" if it is not shared by all others in the field or if there exists some conflicting evidence.[3] *Id.* at 127. A "trial court does not abuse its discretion by nevertheless admitting [an] expert opinion, as long as the opinion is rationally derived from a sound foundation." *Id.* The exercise of the trial court's "gatekeeper role" is within its discretion, but the trial court may not abandon its obligation or perform the function inadequately. *Gilbert,* 470 Mich. at 780.

Based on my review of Dr. Corbitt's de benne esse deposition, I would find that Dr. Corbitt was qualified to testify in this case and that his opinion testimony regarding there being an increased incidence of infection when performing a laparoscopic versus an open incisional hernia repair was the product of reliable principles and methods that were applied reliably to the facts of this case in accordance with MRE 702 and passed muster under MCL 600.2955(1).[4] That said, because it does not appear that the trial court had any of the information it needed to adequately perform its gatekeeping function at the time of its ruling, e.g., Dr. Corbitt's deposition testimony, I concur that the trial court abused its discretion. On remand, the trial court must comply with *Clerc.* It should be noted that while defendants have every right to demand that the trial court perform its gatekeeping role with respect to plaintiff's expert, defendants' experts are subject to the same scrutiny.

***13** Finally, and for the reasons set forth in the majority opinion, I agree that the trial court did not abuse its discretion in taking judicial notice of plaintiff's proffered mortality tables.

All Citations

Not Reported in N.W.2d, 2011 WL 1004174

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Footnotes

1 We do not address the alternative argument raised by defendants that even if plaintiff's claim was one for traditional medical malpractice, they are entitled to a directed verdict because Corbitt's testimony failed to establish that more probably than not Kuzma's death was caused by Koziarski's alleged negligence. This argument, which was first presented on appeal, may be presented to the trial court on remand.

2 Corbitt had developed a new method of repairing incisional hernias in an open surgery, and he preferred using that method.

3 Defendants filed their motion in limine to strike the day before trial began, leaving plaintiff without the opportunity to respond in writing. Defense counsel orally argued the motion the first day of trial and the trial court, for whatever reason, decided the motion without hearing arguments from plaintiff.

4 The comments to M Civ JI 53.01 and 53.02 both provide that "[t]he mortality table that was part of MCL 500.834 was deleted by 1994 PA 226" and "[i]n the absence of a stipulation as to the mortality table to be used, testimony may be necessary."

1 It should be noted that the applicable statute, MCL 600.2912a(2) (quoted in full in the majority opinion), has had a long and tortuous history in our courts as it pertains to efforts to discern the meaning and proper application of the second sentence in subsection (2) pertaining to lost opportunity cases. The Supreme Court first interpreted the meaning of the statutory language in *Fulton v. William Beaumont Hosp,* 253 Mich.App 70; 655 NW2d 569 (2002), which was later followed by *Stone v. Williamson,* 482 Mich. 144; 753 NW2d 106 (2008), and *O'Neal v. St. John Hosp,* 487 Mich. 485; 791 NW2d 853 (2010), wherein a majority of justices have stated, albeit in dicta, that *Fulton* was wrongly decided. While a majority of justices have agreed on what constitutes a traditional malpractice claim, i.e., more-probable-than-not causation of an injury, they cannot come to a consensus on whether and when a lost opportunity claim exists. Given the continued uncertainty as to whether there remains a cause of action for lost opportunity claims, and the fact that the pertinent cases addressing the difference between a traditional malpractice claim and a lost opportunity claim were issued after the August 2008 trial in this case, plaintiff's apparent confusion at the time of trial is certainly understandable.

2 More specifically, Dr. Corbitt testified that Dr. Koziarski was negligent in choosing to perform a laparoscopic instead of an open incisional hernia repair surgery in this "very, very high risk patient with multiple medical problems," which included abdominal adhesions. According to Dr. Corbitt, a laparoscopic procedure both increases the risk of a bowel perforation and makes it harder to detect such complication, which when undetected leads to peritonitis (an infection due to the spillage of contaminates from the small intestine into the abdominal cavity) causing sepsis (a blood infection) and death. Kuzma was not healthy enough to survive sepsis. Had Dr. Koziarski chosen to perform an open procedure, the risk of Kuzma sustaining a bowel perforation would have decreased, and if it did occur, it could more readily have been detected and corrected at the time of surgery, eliminating Kuzma's chances of developing sepsis. As a result of defendants' negligence, Kuzma underwent a laparoscopic surgery wherein she sustained a bowel perforation and died due to the resulting infection. Dr. Corbitt testified that had Kuzma undergone an open procedure she "certainly would not have" developed the infection that caused her death.

3 Assuming the expert testimony passes the gatekeeper's threshold admissibility inquiry, an opposing party's disagreement with an expert's opinion or interpretation of the facts is directed to the weight to be given the testimony and not its admissibility. *Bouverette v. Westinghouse Electric Corp,* 245 Mich.App 391, 401;

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628 NW2d 86 (2001); see also *Gilbert v. DaimlerChrysler Corp,* 470 Mich. 749, 788–789; 685 NW2d 391 (2004) ("[I]n some circumstances, an expert's qualifications pertain to weight rather than to the admissibility of the expert's opinion.").

4 Contrary to defendants' argument, Dr. Corbitt can still be qualified under MCL 600.2955(1) even if he did not produce a peer reviewed publication as described in MCL 600.2955(1)(b). While the trial court must consider all seven factors enumerated in MCL 600.2955(1), "the statute does not require that each and every one of those seven factors must favor the proffered testimony." *Chapin,* 274 Mich.App at 137.

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2020 WL 7636560
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Catherine MALLORY and LaBaron Mallory, Plaintiffs-Appellants,
v.
BEAUMONT HEALTH SYSTEM, doing business as Beaumont Royal Oak Hospital, Dr. Artin Bastani, M.D., Lindsey Sarnovsky, CRNA, and Janice E. Wolff, CRNA, Defendants-Appellees.

No. 350263
|
December 22, 2020

Oakland Circuit Court, LC No. 2018-164572-NH

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

Opinion

Per Curiam.

***1** In this medical malpractice action, plaintiffs appeal as of right following the trial court's order granting a motion for a directed verdict in favor of defendants,[1] Beaumont Health System, Lindsey Sarnovsky,[2] and Dr. Artin Bastani. We affirm.

I. FACTS

In November 2015, plaintiff Catherine Mallory[3] was admitted to defendant Beaumont Hospital as an outpatient to undergo a medical procedure. Before this procedure, Mallory was evaluated by an anesthesiologist, defendant Bastani, and it was decided that the "anesthesia plan" for the procedure would be "general anesthesia with endotracheal intubation." Mallory signed a consent form that warned the anesthesia procedure came with risks to her "vocal cords" and also with the risk of "hoarseness."

Dr. Bastani was present during the induction of anesthesia for Mallory. After "induction of anesthesia," Mallory's intubation was performed by Sarnovsky, a certified registered nurse anesthetist (CRNA). Dr. Bastani supervised Mallory's intubation, and he testified during his deposition that there "was only one attempt" at the procedure and that he did not recall any trauma or difficulty during that single attempt."

After the procedure, Mallory woke up in the recovery room experiencing soreness in her throat beyond what she expected. The soreness did not subside after the procedure, and eventually Mallory was diagnosed by Dr. Glendon Gardner with "left vocal cord scarring."

Subsequently, plaintiffs commenced this cause action. Ultimately, the trial court granted defendants' motions to strike the testimony of plaintiffs' standard-of-care witnesses, denied plaintiffs' motion for leave to amend their witness list before trial, and granted defendants' motion for a directed verdict. This appeal followed.

II. DR. WEINGARTEN

Plaintiffs first argue on appeal that the trial court erred when it granted Bastani's motion to strike the testimony of their physician expert witness Dr. Alexander Weingarten. We disagree.

"We review a trial court's decision on a motion in limine for an abuse of discretion." *Bellevue Ventures, Inc. v. Morang-Kelly Investment, Inc.*, 302 Mich. App. 59, 63; 836 N.W.2d 898 (2013) "A trial court's rulings concerning the qualifications of proposed expert witnesses are reviewed for an abuse of discretion." *Rock v. Crocker*, 499 Mich. 247, 260; 884 N.W.2d 227 (2016). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v. Custer*, 476 Mich. 545, 557; 719 N.W.2d 842 (2006). Questions of law "underlying evidentiary rulings, including the interpretation of statutes and court rules," are reviewed de novo. *Elher v. Misra*, 499 Mich. 11, 21; 878 N.W.2d 790 (2016).

***2** "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

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injury." *Wischmeyer v. Schanz*, 449 Mich. 469, 484; 536 N.W.2d 760 (1995). "Failure to prove any one of these elements is fatal." *Wiley v. Henry Ford Cottage Hosp.*, 257 Mich. App. 488, 492; 668 N.W.2d 402 (2003). "Expert testimony is required to establish the applicable standard of care and to demonstrate that the defendant breached that standard." *Gonzalez v. St. John Hosp. & Med. Ctr.*, 275 Mich. App. 290, 294; 739 N.W.2d 392 (2007).

MCL 600.2169(1) provides, in relevant part, as follows:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c),[4] during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

In *Woodard*, the Michigan Supreme Court explained that a " 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified.' " *Woodard*, 476 Mich. at 561. Relatedly, a " 'subspecialty' is a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty." *Id.* at 562. "A subspecialty, although a more particularized specialty, is nevertheless a specialty," and therefore, "if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action." *Id.*

Plaintiffs retained Dr. Weingarten as an expert witness to offer standard-of-care testimony in support of their claim of medical malpractice against Dr. Bastani. Dr. Weingarten authored an affidavit of merit that was attached to plaintiffs' complaint, in which he stated that he "devoted more than 50% of [his] professional time to either or both of ... [t]he active clinical practice of Anesthesiology," or instructing "students in an accredited health professional school or accredited residency or clinical research program in Anesthesiology."

***3** Dr. Bastani testified that he was a board-certified anesthesiologist, and that the medical specialty he spent the majority of his time practicing was anesthesiology. While Bastani also testified that he was board certified in the subspecialty of critical care, he only practiced critical care "six weeks a year," and there was no evidence that Bastani was practicing critical care when he treated Mallory.

Dr. Weingarten testified that he was board certified in the practice of anesthesiology and the medical subspecialty of pain management. He estimated that he generally worked between 80 to 100 hours each week. When he was asked how many of his weekly work hours were devoted to his practice of pain management, Dr. Weingarten explained, "Well, right now, I guess probably around 80 to 85 percent when I am not doing—you know, basically I am doing a majority of my pain management. And I do some office space anesthesia ...." According to Dr. Weingarten, he had spent approximately 80 percent of his professional time practicing pain management since "about 2007, 2008."

According to Dr. Weingarten, the common procedures he performed during his pain management practice included "lumbar epidural injections, whether interlaminar or transforaminal," which constituted the majority of the procedures, and he also performed "trigger point injections," "facet blocks," "radio frequency ablation," "sympathetic

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blocks," "spinal cord simulator trials," "percutaneous diskectomies," and "some plate rich plasma, occasional stem cell injections." He last practiced as a member of an anesthesia group providing anesthesia to hospital patients in 2017, and this practice occupied between "5 to 8 percent" of his weekly professional time. When he was asked if his scope of work as an expert witness reached beyond standard-of-care issues, Dr. Weingarten replied, "I don't believe so."

Dr. Weingarten testified that as of the date of the deposition he had "medical students and residents ... fairly frequently come through [his] office," and he taught "them about pain management." He previously trained anesthesiology residents at the Nassau University Medical Center, but that program disbanded in 2010.

Dr. Bastani filed a motion to strike Dr. Weingarten's testimony on the ground that he was unqualified to offer expert testimony under MCL 600.2169 in light of his deposition testimony that he spent the majority of his professional time practicing pain management, where the medical specialty relevant to plaintiffs' malpractice claim against Dr. Bastani was anesthesiology. In their response, plaintiffs argued that Dr. Weingarten was qualified to offer expert testimony because he taught medical students anesthesiology even though he also testified that he spent a significant amount of his professional time practicing the subspecialty of pain management. Plaintiffs also argued that there was conflicting evidence regarding the extent of time Dr. Weingarten spent practicing, respectively, pain management and anesthesiology, given the contents of Dr. Weingarten's affidavit of merit, and therefore the trial court should weigh the evidence and consider the substantial overlap between the practice of pain management and anesthesiology. Plaintiffs alternatively contended that even if Weingarten was not qualified to offer standard of care testimony, he was nonetheless qualified to offer causation testimony.

During the hearing on the motion to strike Dr. Weingarten's testimony, the trial court acknowledged that there was a conflict between the affidavit of merit and Dr. Weingarten's deposition testimony. But the court noted that Dr. Weingarten's testimony came after the affidavit of merit, and that he "clearly admit[ted] and concede[d] that 80 to 85 percent of his time" was spent on a specialty other than anesthesiology. And the trial court stated that even when viewing the "vague reference to teaching" in the light most favorable to plaintiffs, that reference did not "overcome the fact there [was] an insufficient amount of time" to "meet the majority of time threshold" given Dr. Weingarten's other testimony.

***4** The trial court also rejected plaintiffs' contention regarding overlap between specialties, on the ground that "the authority cited very plainly reveals that subspecialties do not permit the determination of an overlap to eviscerate the timing requirements." Ultimately, the trial court noted that Dr. Weingarten testified that he was only providing an opinion on standard of care, and therefore allowing Dr. Weingarten to testify regarding causation "would be trial by ambush" and otherwise "dubious in light of the fact he would not be able to testify as a standard of care expert." The trial court subsequently entered an order granting the motion to strike.

Plaintiffs argue that the trial court erred because Bastani contended that Weingarten spent the majority of his professional time practicing pain management, but that Bastani's motion failed to address Dr. Weingarten's testimony that he taught medical students anesthesiology. Curiously, plaintiffs' appellate argument does not directly address the trial court's rejection of this argument. Indeed, as discussed above, the trial court ruled that "the vague reference to teaching" failed to overcome Dr. Weingarten's unequivocal testimony that he spent the majority of his time practicing pain management.

Regardless, closer examination of Dr. Weingarten's testimony reveals that he had "medical students and residents come through [his] office," and that he "teach[es] them about pain management." Therefore, that portion of Dr. Weingarten's testimony only reinforces that he spent the majority of his time involved in the practice of pain management and not anesthesiology. Dr. Weingarten also explained that as of April 2018 he had a "current appointment at New York Medical College through the Department of Pharmacology," and that he previously was an instructor for an anesthesiology residency program that disbanded in 2010. Given that the relevant time period is the year preceding Mallory's intubation, these teaching activities are irrelevant because they fall outside of that time range.

Plaintiffs contend that even if Dr. Weingarten's testimony established that he spent the majority of his time practicing pain management, such testimony conflicted with his affidavit of merit in which he indicated he spent the majority of his time practicing anesthesiology. Plaintiffs offer no explanation why Dr. Weingarten's affidavit of merit should

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be afforded the same weight as his unequivocal and more detailed deposition testimony.

This Court has rejected attempts by a party "to contrive factual issues by relying on an affidavit when unfavorable deposition testimony shows that the assertion in the affidavit is unfounded," even when the affidavit in question was an affidavit of merit authored before the unfavorable deposition. *Dykes v. William Beaumont Hosp.*, 246 Mich. App. 471, 481-482; 633 N.W.2d 440 (2001) (quotation marks and citation omitted). Therefore, plaintiffs have not demonstrated that the trial court erred in how it dealt with the conflict between Dr. Weingarten's testimony and affidavit of merit.

Plaintiffs nonetheless argue that the conflict between Dr. Weingarten's testimony and the affidavit of merit provided the trial court an opportunity to consider the overlap between pain management and anesthesiology. Plaintiffs explain that their "overlap" analysis is based on an unpublished, per curiam opinion of this Court.

We have reviewed the decision relied upon by plaintiffs [5] and note that it does not create or endorse an "overlap" analysis when considering conflicting evidence regarding which medical specialty an expert witness spent the majority of his or her professional time practicing. Rather, in that decision this Court merely noted indications that the defendant's expert witness practiced orthopedic surgery largely in the context of sports medicine. Thus, plaintiffs' reliance on that decision is wholly misplaced.

***5** Regardless, Dr. Weingarten did not offer any contradictory testimony regarding which specialty he spent the majority of his professional time practicing. And despite plaintiffs' contention regarding the overlap between pain medicine and anesthesiology, Dr. Weingarten listed the common procedures he performed as a pain management physician, and his list did not include intubations.

Plaintiffs contended in their statement of questions presented that that trial court erred when it disqualified Dr. Weingarten from offering causation testimony, but plaintiffs' brief on appeal contains no further developed argument or any legal authorities in support of their contention. Similarly, plaintiffs' reply brief contains no discussion of plaintiffs' contention regarding the barring of Dr. Weingarten as a causation witness. "A party may not simply announce a position and leave it to this Court to make the party's arguments and search for authority to support the party's position." *Seifeddine v. Jaber*, 327 Mich. App. 514, 519-520; 934 N.W.2d 64 (2019). "Failure to adequately brief an issue constitutes abandonment." *Id.* at 520. Plaintiffs have abandoned this contention by failing to brief it.

Plaintiffs assert that *Woodard* was wrongly decided, with the result that "overqualified" expert witnesses are prevented from offering testimony. However, plaintiffs also correctly concede that "this Court does not have the power to overrule or modify *Woodard* in any meaningful way." Therefore, this Court need not address plaintiffs' assertions further.

III. NURSE BUETTNER

Plaintiffs argue that the trial court erred when it granted Beaumont's motion to strike the testimony of their CRNA expert witness, Neil Buettner. We disagree.

"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." *Clerc v. Chippewa Co. War Mem. Hosp.*, 477 Mich. 1067, 1067; 729 N.W.2d 221 (2007). MRE 702 states as follows:

> 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 "incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v. Merrell Dow Pharm., Inc.*, [509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993)], in order to interpret the equivalent federal rule of evidence," and, under *Daubert*, "the trial judge

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must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable ....” *Elher*, 499 Mich. at 22 (quotation marks and citation omitted). Thus, 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.* Or, in other words, “MRE 702 requires trial judges to act as gatekeepers who must exclude unreliable expert testimony.” *Lenawee Co. v. Wagley*, 301 Mich. App. 134, 162; 836 N.W.2d 193 (2013) (quotation marks omitted).

“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). “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.

***6** “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[.]” *Ehler v. Misra*, 499 Mich. 11, 23; 878 N.W.2d 790 (2016). MCL 600.2955(1) provides that a trial court “shall consider” the following factors when it makes this determination:

> (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.

However, not every factor may be relevant to the determination in every case. *Ehler*, 499 Mich. at 27. And, ultimately, “it is within a trial court's discretion how to determine reliability.” *Id.* at 25.

“Expert testimony is necessary to establish the standard of care because the ordinary layperson is not equipped by common knowledge and experience to judge the skill and competence of the service and determine whether it meets the standard of practice in the community.” *Wiley*, 257 Mich. App. at 492. “Although nurses are licensed healthcare professionals, they do not engage in the practice of medicine.” *Decker v. Rochowiak*, 287 Mich. App. 666, 686; 791 N.W.2d 507 (2010). Thus, “the standards of care for general practitioners and specialists do not apply to nurses,” and instead “the common-law standard of care applies to malpractice actions against nurses.” *Id.*

“ ‘[T]he applicable standard of care is the skill and care ordinarily possessed and exercised by practitioners of the profession in the same or similar localities.’ ” *Id.*, quoting *Cox ex rel. Cox v. Bd. of Hosp. Managers*, 467 Mich. 1, 21-22; 651 N.W.2d 356 (2002) (alteration in the original). “A nonlocal expert may be qualified to testify if he or she demonstrates a familiarity with the standard of care in an area similar to the community in which the defendant practiced.” *Decker*, 287 Mich. App. at 686.

Plaintiffs retained Buettner to offer expert testimony in support of their malpractice claims against Beaumont relating to defendant Sarnovsky's intubation of Mallory. Buettner testified that he was first certified as a CRNA in 1987, and had approximately 33 years of experience. Asked if the standard of care for a CRNA was a local or national one, he replied that, “generally speaking, it's probably a national standard,” that he “testified in some jurisdictions in which they had a local standard,” but that he could not “tell the difference in terms of things that [he] was opining on.” Buettner had no opinion whether plaintiffs’ claims implicated a local or national standard of care.

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***7** Buettner did not agree that an injury to the vocal cords could occur when a CRNA complied with the standard of care for intubating and extubating a patient. Asked if a patient could sustain an injury from intubation in the absence of malpractice, he replied, "No."

Buettner stated that "if you injure the vocal cords, that is a breach of the standard of care," and agreed that it was "impossible to use proper technique during intubation or extubation, comply with the standard of care and still get a vocal cord injury." Buettner stated that he did not have any literature that supported his opinion, but also that he was not aware of any literature stating that an injury during intubation or extubation could occur absent malpractice. Buettner did not do any research or speak with any of his colleagues relating to his opinion, and could offer no support for his position other than his "personal practice," including his understanding that "hoarseness" was usually "a short-term issue" because only "one percent or two percent of patients" experienced hoarseness following intubation that lasts longer than a week. He believed that malpractice occurred when there was "visual evidence" of an "injury or scarring to the vocal cord."

When asked "[w]hy is it not possible to have a vocal cord injury and have the CRNA comply with the standard of care," Buettner replied that "based on [his] training, education, and experience, [he] can sit here and opine, and [he] just know[s] it's a breach of the standard of care to injure the vocal cords and that it should be a never event."

Beaumont filed a motion to strike Buettner's testimony on the grounds that he did not satisfy the requirements imposed by MRE 702 and MCL 600.2955, because the only support he offered for his opinion was his personal experience, and because he did not know if his opinion that vocal cord injury caused by intubation would only occur during a breach of the standard of care was accepted among CRNAs generally. Beaumont also contended that Buettner's opinion was unreliable because his testimony showed that he was unfamiliar with the local standard of care, and because his testimony that the intubation at issue was traumatic lacked evidentiary support and contradicted Dr. Bastani's testimony that Mallory's intubation occurred without incident.

Plaintiffs answered that Buettner's expert opinion was reliable given his extensive education, training, and experience working in cities similar to Royal Oak. Plaintiffs also argued that Buettner's testimony regarding the traumatic intubation was consistent with the other evidence that showed that Mallory's scar occurred when she was intubated in 2015.

The trial court held that Buettner's opinion fell "well short of the standards that are required [by] MRE 701 through 703" and that Buettner's opinion was "not well-grounded" or "reliable." The court explained that there was no need for an evidentiary hearing because of "the very thorough analysis both in the motion, but also in the testimony" where Buettner made several "very vivid, clear, unequivocal admissions with regard to the source of his opinion, which reveal[ed] the unreliability of it." Therefore, the trial court granted the motion to strike on the basis of Buettner's testimony "and for the other reasons articulated in the motion."

***8** Plaintiffs contend that the trial court erred because Buettner's opinion was reliable in light of his education, training, and experience. Yet it is generally insufficient to rely on a proposed expert's experience and background to establish the reliability of his or her opinion. *Edry*, 486 Mich. at 642. Plaintiffs do not identify any other basis for Buettner's opinion. Our Supreme Court has explained that the concern in relying on an expert witness's personal opinion is that the expert witness "may have held himself to a higher, or different standard than that practiced by the medical community at large." *Ehler*, 499 Mich. at 28. Plaintiffs' reiteration that Buettner's opinion was supported solely by his education and experience does not show that the trial court erred when it ruled that Buettner's opinion was unreliable.

Plaintiffs also argue that Beaumont improperly argued that Buettner's description of Mallory's intubation as traumatic contradicted record evidence on the ground that some of Mallory's medical records indicated that the intubation was indeed traumatic. We note that plaintiffs' argument is based on records of an assessment of Mallory performed by Dr. Glendon Gardner, but that those records were not attached to plaintiffs' response to Beaumont's motion to strike Buettner or otherwise presented to the trial court at that time, and, therefore, those records were not part of the lower court record when the trial court granted the motion to strike.

"This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v. Sea Ray Boats, Inc.*, 251 Mich. App. 41, 56; 649 N.W.2d 783 (2002). Accordingly, plaintiffs' reliance on Dr. Gardner's assessment for any purpose on appeal is unavailing.

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Plaintiffs assert that Buettner was qualified to offer standard-of-care testimony regardless of whether it pertained to a local or national standard. In *Decker*, this Court held that an expert witness was qualified to offer such testimony despite having testified that a national standard of care governed the defendant's actions, because the expert explained how the same standard applied locally and nationally given the commonplace nature of the procedures at issue. *Decker*, 287 Mich. at 686-687.

As noted, Buettner admitted that he did not know if plaintiffs' claims involved a local or national standard of care, but supposed generally that it was a national standard, and added that when he "testified in some jurisdictions in which they had a local standard" he could not "tell the difference in terms of things that [he] was opining on." Thus, Buettner did not testify to any similarities between national and local standards of care regarding intubations, but merely reported that he personally could not tell the difference when he testified in jurisdictions that recognized local standards. Therefore, plaintiffs have not shown that the trial court erred when it accepted Beaumont's argument that Buettner was unfamiliar with the relevant standard of care.

IV. LEAVE TO AMEND WITNESS LIST

Finally, plaintiffs argue that the trial court erred when it denied their motion for leave to amend their witness list before trial. We disagree.

"This Court reviews for an abuse of discretion a trial court's decision whether to allow a party to add an expert witness." *Cox v. Hartman*, 322 Mich. App. 292, 312; 911 N.W.2d 219 (2017).

"Witness lists are an element of discovery." *Grubor Enterprises, Inc. v. Kortidis*, 201 Mich. App. 625, 628; 506 N.W.2d 614 (1993). "The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial." *Id.* "The purpose of witness lists is to avoid trial by surprise." *Id.* (quotation marks and citation omitted).

***9** MCR 2.401(I) provides as follows:

> (1) No later than the time directed by the court ..., the parties shall file and serve witness lists. The witness list must include:
>
> (a) the name of each witness, and the witness' address, if known; however, records custodians whose testimony would be limited to providing the foundation for the admission of records may be identified generally;
>
> (b) whether the witness is an expert, and the field of expertise.
>
> (2) The court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown.
>
> (3) This subrule does not prevent a party from obtaining an earlier disclosure of witness information by other discovery means as provided in these rules.

"Once a party has failed to file a witness list in accordance with the scheduling order, it is within the trial court's discretion to impose sanctions against that party." *Duray Dev., LLC v. Perrin*, 288 Mich. App. 143, 164; 792 N.W.2d 749 (2010). "These sanctions may preclude the party from calling witnesses." *Id.* "Disallowing a party to call witnesses can be a severe punishment, equivalent to a dismissal." *Id.* However, " '[t]he mere fact that a witness list was not timely filed does not, in and of itself, justify the imposition of such a sanction.' " *Id.* at 166 n. 53, quoting *Dean v. Tucker*, 182 Mich. App. 27, 32; 451 N.W.2d 571 (1990). Additionally, Michigan policy favors "the meritorious determination of issues." *Tisbury v. Armstrong*, 194 Mich. App. 19, 21; 486 N.W.2d 51 (1991).

Thus, the " 'record should reflect that the trial court gave careful consideration to the factors involved and considered all of its options in determining what sanction was just and proper in the context of the case before it.' " *Duray Dev.*, 288 Mich. App. at 165, quoting *Dean*, 182 Mich. App. at 32. In *Duray Dev.*, this Court reiterated the nonexhaustive *Dean* factors, which trial courts should consider before sanctioning a party:

> "(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the defendant; (4) actual notice to the defendant of

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> the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff's engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect[;] and (8) whether a lesser sanction would better serve the interests of justice. This list should not be considered exhaustive." [*Duray Dev.*, 288 Mich. App. at 165, quoting *Dean*, 182 Mich. App. at 32-33 (alteration in the original).]

"The court should also evaluate other options before concluding that a drastic sanction is warranted." *Mink v. Masters*, 204 Mich. App. 242, 244; 514 N.W.2d 235 (1994). This Court has held that a trial court's failure to consider other sanctions "on the record before concluding that dismissal of the complaint was warranted constituted error." *Thorne v. Bell*, 206 Mich. App. 625, 635; 522 N.W.2d 711 (1994).

***10** "Where the sanction is the barring of an expert witness resulting in the dismissal of the plaintiff's action, the sanction should be exercised cautiously." *Dean*, 182 Mich. App. at 32. In *Thorne*, this Court held that the plaintiffs' violation of the trial court's scheduling order by failing to timely file witness and exhibit lists did not justify dismissal of the action, in part because the record did not indicate "a history of recalcitrance or deliberate noncompliance with discovery orders, which typically precedes the imposition of such a harsh sanction." *Thorne*, 206 Mich. App. at 633-634. Yet, where the lateness of the disclosure of a witness prevents pertinent discovery from being conducted, barring the witness may be proper. See *Kalamazoo Oil Co. v. Boerman*, 242 Mich. App. 75, 90-91; 618 N.W.2d 66 (2000) (disallowing expert testimony from a late-disclosed expert because the opposing party "had no chance to conduct any discovery of the expert and ... it would be unfair to require [the party] to prepare on such short notice").

After the trial court granted the motions striking Dr. Weingarten and Buettner, plaintiffs filed a motion for leave to amend their witness list to add two experts to replace the stricken ones, arguing that plaintiffs' claims would fail without expert testimony, that because denying their motion would be tantamount to a dismissal of their claims this required consideration of the *Dean* factors, and that public policy supported resolution of their claims on their merits.

The trial court denied the motion on the grounds that they filed it approximately six weeks before trial, where discovery had "long since closed," case evaluation was conducted, the filing deadline for dispositive motions had passed, and "trial preparation [was] underway." The court observed that plaintiffs essentially wanted a "redo" after their expert witnesses were stricken even though plaintiffs' "case was built around" those witnesses, and that such a redo would result in palpable prejudice to defendants because defendants would be unable to properly investigate, depose, and evaluate the new experts before trial.

The trial court also considered the *Dean* factors, and found that they weighed in favor of denying plaintiffs' motion. The court found that plaintiffs' failure to disclose their new expert witnesses was "the result of the culpable negligence" of plaintiffs, there would be significant prejudice to defendants, plaintiffs provided actual notice of the new witnesses "just weeks before trial," plaintiffs "squandered approximately 7 weeks between the initial rulings striking the experts" before they filed their motion, plaintiffs "obstructed discovery in the past and [were] ordered to allow" defendants "to conduct discovery on [their] fact witnesses,"[6] and that granting the motion would result in either substantial delay or prejudice to defendants.

Plaintiffs assert that the trial court was responsible for their need to file an amended witness list because the court granted defendants' motions to strike plaintiffs' experts, which were de facto motions for summary disposition filed past the deadline for dispositive motions. "Courts are not bound by a party's choice of labels because this would effectively elevate form over substance." *Jawad A. Shah, M.D., PC v. State Farm Mut. Auto. Ins. Co.*, 324 Mich. App. 182, 204; 920 N.W.2d 148, 161 (2018) (quotation marks and citation omitted).

The trial court's scheduling order required that all dispositive motions be filed no later than April 5, 2019, and that all motions in limine be filed no later than July 31, 2019, and it set the trial date as September 3, 2019. Defendants filed their respective motions to strike plaintiffs' experts in May 2019. When plaintiffs argued that Bastani's motion to strike was nothing more than an untimely de facto motion for summary disposition, the trial court held that the motion was a timely motion in limine that contained no reference to MCR 2.116 or prayers for dismissal.

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***11** Plaintiffs argue on appeal that, because the effect of the trial court's granting of the motions to strike was dismissal of their claims, those motions were necessarily untimely motions for summary disposition. Plaintiffs' thus base their argument on the effect of the motions, rather than their substance, which pertained to only the qualifications and reliability of the proposed experts. Because both motions were properly filed within the terms of the scheduling order, we are not persuaded by plaintiffs' characterization of them as untimely dispositive motions. "There is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.' " *Greathouse v. Rhodes*, 465 Mich. 885, 885; 636 N.W.2d 138 (2001). It was plaintiffs' responsibility to ensure their expert witnesses were qualified. *Clerc*, 477 Mich. at 1067. Moreover, plaintiffs' problems with establishing their experts' qualifications should have been foreseeable to plaintiffs. See *Rock*, 499 Mich. at 267 (MCL 600.2169(1)(a) "allows a plaintiff to ensure that an expert is qualified well in advance of the time of the testimony"). Plaintiffs' attempt to place the blame for their expert witness woes on the trial court is thus misplaced.

Plaintiffs additionally urge this Court to independently apply the *Dean* factors, even though the trial court actually fulfilled its obligation to do so, and explained its findings in a written opinion and order. Regardless, plaintiffs argue on appeal that the *Dean* factors weighed in favor of granting their motion to amend.

First, plaintiffs do not address whether their violation was willful or accidental, but they do assert that the trial court's "tardy rulings" created plaintiffs' "emergency." But, as discussed above, the trial court's rulings on defendants' timely motions to strike were proper under the trial court's scheduling order. And the trial court itself found that plaintiffs' motion for leave to file an amended witness list was "the result of the culpable negligence" of plaintiffs.

Second, plaintiffs argue that they fully complied with discovery in the trial court, yet the court found that plaintiffs "obstructed discovery in the past and [were] ordered to allow" defendants "to conduct discovery on [plaintiffs'] fact witnesses." Plaintiffs do not address the trial court's finding in their brief on appeal, and the trial court's finding was supported by the record.

Third, plaintiffs assert that defendants would not have been prejudiced if the trial court granted plaintiffs' motion because the court could have allowed defendants time to perform discovery on plaintiffs' new experts. Plaintiffs once again do not address the trial court's finding that defendants would be significantly prejudiced where plaintiffs' disclosure of their new witnesses would occur months after the close of discovery and "a few weeks before trial," and where defendants "would be required to swallow whole the testimony" of the new experts as the result of the lack of time investigate the veracity of the positions of the new witnesses. The trial court also astutely observed that plaintiffs essentially requested a "redo" of the proceedings in response to plaintiffs' "self-inflicted wounds."

And fourth, plaintiffs contend that they provided notice to defendants on the day before case evaluation that they might offer additional expert witnesses, and that they took prompt steps to do so after Dr. Weingarten and Buettner were disqualified. The trial court entered orders granting the motions to strike on May 22, 2019, and May 29, 2019, but plaintiffs waited until July 9, 2019, to file their motion for leave to amend their witness list. Thus, the record supports the trial court's finding that plaintiffs "did not attempt to cure the defect" caused by the loss of their expert witnesses "until the eve of trial," having "squandered approximately 7 weeks between the initial rulings" and their filing of the motion to amend.

While not addressed by plaintiffs on appeal, the trial court also contemplated the lesser sanction of reopening discovery and adjourning the trial, but it found that would "lead to the dilatory and uneconomical determination of the action because it, in essence, would add months of delay and expense to the case without necessarily any corresponding improvement of the substantial rights of the parties," and it would "encourage parties to flaunt the scheduling orders of the court with no concomitant sanction." Given the foregoing, plaintiffs have not shown that the trial court erred by denying their motion for leave to amend their witness list.

***12** Affirmed.

Shapiro, J. (concurring in part and dissenting in part).

I concur as to the dismissal of defendant Dr. Bastani and respectfully dissent as to the dismissal of defendant Certified Registered Nurse Anesthetist (CRNA) Sarnovsky.

I concur as to Dr. Bastani because the caselaw requires me to do so. However, for the same reasons stated in Judge

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GLEICHER's dissent in *Higgins v. Traill*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 343664), I urge the Supreme Court to reconsider and clarify the rule governing medical expert matching. It has been 25 years since the medical malpractice statute was adopted and it is time we had a rule that can be readily understood and applied, particularly given the evolving nature of medical subspecialties. See e.g., *Jilek v. Stockson*, 289 Mich. App. 291, 296-305; 796 N.W.2d 267 (2010), rev'd 490 Mich. 961 (2011).

As to the case against the CRNA, certain facts are not disputed, at least for purposes of her motion for summary disposition. Plaintiff Catherine Mallory had a normal voice before undergoing surgery in which the CRNA performed the intubation. It is uncontested that following the surgery the plaintiff awoke with a substantial loss of her voice and has never recovered. Post-operative tests have revealed that the voice loss was the result of an injury to plaintiff's vocal chords and such an injury could only have occurred during the surgery given her normal voice before and the immediate post-operative damage.

As part of the anesthesia procedure, the CRNA intubated plaintiff at the outset of surgery. She did so using a "glidescope," which contains a camera that allows the anesthetist to view the intubation on a screen in real time and so perform the procedure with a full view of the relevant anatomy. The glidescope is a rigid instrument. Plaintiffs' CRNA expert testified that it violates the standard of care for the anesthetist to strike the vocal cords with the glidescope while performing the intubation. When asked how the CRNA violated the standard of care in this case, the expert testified: "[S]he failed to properly direct the tip of the endotracheal tube between the cords. She didn't use proper care with this rigid stylette and endotracheal tube and ended up injuring the left vocal cord.... You're supposed to put it ... between the cords ... [and] she had it offline."

In her deposition defendant CRNA stated that the standard of care is "to perform intubation ... as gently and deliberately as possible as to minimize any risk of injury." However, when asked how the instrument could have caused damage to the vocal cords if the intubation was performed properly, she stated that she did not want to speculate.

The trial court concluded that the expert's testimony did not meet the relevant evidentiary standard because he failed to cite supporting medical literature and instead relied on his 33 years of practice as a CRNA and his experience in performing about 200 intubations each year. However, it does not require medical literature to conclude that normal anatomical structures should not be permanently damaged during intubation absent unusual circumstances or a necessary trade-off in treatment. The CRNA defendant has not asserted that the injury to plaintiff's vocal cords occurred because of an unforeseen anatomical variation or a need to perform the intubation in an emergency setting or some other reason that explains why the structure was damaged. Further, it is highly unlikely that studies of this question have been or could be done since (a) it would be unethical to conduct a study in which a physician purposely strikes the vocal chords of operative patients; and (b) there is no central repository of information concerning when and why vocal cords are struck during intubation. [1] Perhaps what is more significant is the lack of any medical literature in the record suggesting that the vocal cords can be scarred as a result of an atraumatic intubation. As plaintiff's M.D. expert, Dr. Weingarten, noted in his deposition: "I have not seen any study that supports scarring on the vocal cord resulting from ... a known atraumatic intubation." On the other hand, Dr. Weingarten stated that he is aware of "plenty of reports of trauma to the vocal cords when it is known that the trauma caused the vocal cord injury leading to scarring."

***13** For these reasons, I would reverse the dismissal of the suit against the CRNA defendant.

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Footnotes

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1 The trial court entered a stipulated order dismissing plaintiffs' claims against defendant Janice E. Wolff, CRNA, a nurse employed by Beaumont Health System.

2 For convenience, we collectively refer to Beaumont Health System and Sarnovsky as "Beaumont" in light of their substantial identity of interest and common representation below and on appeal.

3 Because Catherine Mallory is the patient alleging medical malpractice, and plaintiff LaBaron Mallory has only a derivative claim, references to "Mallory" in this opinion will refer to Catherine.

4 Subdivision (c) comes into play "[i]f the party against whom or on whose behalf the testimony is offered is a general practitioner ...."

5 *Turkish v. William Beaumont Hosp.*, unpublished per curiam opinion of the Court of Appeals, issued December 13, 2018 (Docket No. 339522). "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, such opinions may be consulted as persuasive authority. See *Hicks v. EPI Printers, Inc.*, 267 Mich. App. 79, 87 n. 1; 702 N.W.2d 883 (2005).

6 Dr. Bastani filed a motion to strike plaintiffs' fact witnesses on the ground that plaintiffs failed to provide them for deposition before the close of discovery. The trial court responded by denying Bastani's motion, but also ordering plaintiffs to answer interrogatories within seven days, and that the "outstanding depositions" of plaintiffs' fact witnesses be completed by the end of May 2019.

1 Indeed, in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993), the Supreme Court acknowledged that "[s]ome propositions ... are too particular ... or of too limited interest to be published."

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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.

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.

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, 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.

***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.

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.

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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]

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.

***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.

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

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> 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).]

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]

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

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> 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]

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.

"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.

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***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]

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 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]

***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

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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 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.

***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.

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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 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]

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 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.

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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.

All Citations

Not Reported in N.W. Rptr., 2020 WL 6253601

Footnotes

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

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representing Dr. D. Samuel also purports to represent Blue Water, even though Blue Water is apparently not a separate legal entity.

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).

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."

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.

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.

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."

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.

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.

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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.

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.

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.

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[ ]").

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.

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