STATE OF MICHIGAN

COURT OF APPEALS

EUGENE KARVONEN,

Plaintiff-Appellant,

v

CHARLES R. GREEN, PA-C, UP-NORTH DERMATOLOGY, PLLC, and BOYNE COUNTRY URGENT CARE, PC, d/b/a FAMILY & DERMATOLOGY HEALTH CARE,

Defendants-Appellees.

UNPUBLISHED
May 23, 2024

No. 362748
Otsego Circuit Court
LC No. 20-018184-NH

Before: SWARTZLE, P.J., and SERVITTO and GARRETT, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff, Eugene Karvonen, appeals as of right the trial court order granting summary disposition in favor of defendants, Charles R. Green, P.A.-C and Up-North Dermatology, PLLC under MCR 2.116(C)(10). The order also dismissed plaintiff's vicarious liability claims against defendant Boyne Country Urgent Care, PC, d/b/a Family & Dermatology Health Care. We affirm.

I. BACKGROUND

On October 26, 2017, plaintiff saw his family doctor about a lesion on his forehead. Plaintiff's doctor noted that the lesion was likely cancer, and referred him to see defendant Charles R. Green ("Green") at Up-North Dermatology. Plaintiff presented at Up-North Dermatology the same day and defendant Green, a certified physician's assistant, and the resident agent of Up-North Dermatology, observed and documented a red sore on plaintiff's left temple. Based on the

appearance of the lesion, Green diagnosed it as basal cell carcinoma.[1] Green and plaintiff dispute much of the remaining facts.

Green testified at his deposition that he offered to remove the lesion at the October 2017 appointment, and plaintiff told him under no circumstances was Green removing it. Green prescribed Aldara[2] cream to treat the lesion and also took a specimen of the lesion to send out for a biopsy. Plaintiff testified at his deposition that Green gave him the prescription cream to put on the lesion because Green said it was too big to surgically remove. Plaintiff was scheduled to return on December 12, 2017.

The biopsy results were sent to Up-North Dermatology on November 2, 2017, and revealed that the lesion was an invasive squamous cell carcinoma.[3] There is no dispute that plaintiff was not advised of the biopsy results in November 2017. Instead, plaintiff returned on his previously scheduled follow-up appointment on December 12, 2017. Green testified at his deposition that at the appointment, he told plaintiff that the invasive squamous cell cancer was more serious than basal cell carcinoma. According to Green, plaintiff again said he was not going to have the lesion removed. Green, knowing plaintiff was going to Florida for the next few months, asked if plaintiff had a surgeon in Florida because the lesion had to be removed. Plaintiff still refused surgery.

The chart notes from the December appointment indicate that plaintiff had basal cell carcinoma (even though the results of the biopsy were that he actually had invasive squamous cell carcinoma). The notes further indicate that plaintiff "refused surgery at this time, wants to try topical for now, risk of [patient] eye involvement reviewed with [patient]" and "per [patient] don't want any [treatment]." The plan on the December 12, 2017 chart note was to continue the Aldara and follow up in three months.

However, according to plaintiff, Green confirmed at the December 2017 appointment that plaintiff had basal cell carcinoma and recommended plaintiff continue with the topical Aldara

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[1] Basal cell carcinoma is a type of skin cancer that grows slowly, is generally curable, and causes minimal damage when caught and treated early. *Basal Cell Carcinoma Overview: The Most Common Skin Cancer*, Skin Cancer Foundation, available at <https://www.skincancer.org/skin-cancer-information/basal-cell-carcinoma> (accessed April 25, 2024).

[2] "Aldara is an immune response modifier used to treat actinic keratosis (a condition caused by too much sun exposure) on the face and scalp. Aldara (for the skin) is also used to treat a minor form of skin cancer called superficial basal cell carcinoma, when surgery would not be an appropriate treatment." Entringer, *Aldara*, Drugs.com, available at <https://www.drugs.com/aldara.html> (accessed April 25, 2024).

[3] Squamous cell carcinoma is a common type of skin cancer. "Squamous cell carcinoma of the skin is usually not life-threatening. But if it is not treated, squamous cell carcinoma of the skin can grow large or spread to other parts of the body. The growth of the cancer can cause serious complications." *Squamous Cell Carcinoma of the Skin*, Mayo Clinic, available at <https://www.mayoclinic.org/diseases-conditions/squamous-cell-carcinoma/symptoms-causes/syc-20352480> (accessed April 25, 2024).

cream and follow up in three months. Plaintiff testified at his deposition that Green never showed him the biopsy results at the December 2017 appointment.

Plaintiff next went to Up-North Dermatology on March 26, 2018. Up-North Dermatology's chart notes from that appointment still incorrectly indicated that plaintiff was suffering from basal cell carcinoma. Under the "Plan" section of the notes, it was indicated that there would be no follow up; that plaintiff "refused any [treatment] at this time"; Green reviewed the risk that plaintiff could lose his eye or; ear; and the risk of death with plaintiff, and plaintiff said he understood; plaintiff was advised to go to U of M; and plaintiff "will decide what he wants to do later." The lesion was noted to have grown. Green testified at his deposition that despite what the chart reads, he told plaintiff and his wife that plaintiff had invasive squamous cell carcinoma.

Plaintiff asserted that at the March 26, 2018 appointment, Green stated plaintiff needed to go to the U of M emergency room, because trying to get an appointment for surgery would take too long and plaintiff was going to lose a quarter of his face. Plaintiff stated that Green finally gave him the biopsy results and plaintiff learned for the first time he had invasive squamous cell carcinoma.

Plaintiff went to U of M Hospital on April 2, 2018 for evaluation of the temple lesion. On May 3, 2018, plaintiff underwent extensive surgery to remove the lesion and surrounding tissue, which included the removal of plaintiff's left eye. Plaintiff has continued treating at U of M since, including undergoing multiple surgeries to remove a significant portion of his left skull and part of the left side of his face due to the invasive squamous cell carcinoma.

Plaintiff filed suit against Up-North Dermatology and Green on April 28, 2020, alleging that Green was negligent in failing to timely diagnose and treat the squamous cell carcinoma. Plaintiff alleged that Green breached the applicable standards of care for physician assistants in several ways, including that he failed to contact plaintiff when the biopsy results were received, continued to diagnose basal cell carcinoma when plaintiff was suffering from invasive squamous cell carcinoma, and let plaintiff travel to Florida for three months knowing that he had invasive squamous cell carcinoma. Plaintiff also named Boyne Country Urgent Care, d/b/a Family and Dermatology Health ("Boyne Country") care as a defendant, alleging that Green was an agent/employee of Up-North Dermatology, and/or Boyne Country and that Up-North Dermatology and Boyne Country were vicariously liable for Green's negligence.[4] Plaintiff contended that as a direct and proximate result of defendants' negligence, his invasive squamous cell carcinoma went undiagnosed and untreated for almost five months, during which time it expanded rapidly into his left eye and skull and required massive surgical procedures. Plaintiff alleged that if he had been diagnosed earlier and referred to U of M Hospital in early November 2017, the lesion would likely have been fully addressed using limited radiation and minimal surgical excision.

[4] Plaintiff also named Richard Mansfield, DO as a defendant. The claims against Mansfield were dismissed by stipulation and are not part of this appeal.

Green and Up-North Dermatology moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff provided no admissible evidence to support the causation prong of his medical malpractice claim and plaintiff's action must therefore be dismissed. Specifically, Green and Up-North Dermatology argued that plaintiff's only named expert was physician assistant James Worry ("Worry"), who is not qualified to offer testimony concerning whether earlier intervention would have made a difference in plaintiff's outcome. Green and Up-North Dermatology further argued that even if Worry was qualified to offer such testimony, all of his testimony was mere speculation and guesswork. Lacking the required expert testimony on the issue of causation, Green and Up-North Dermatology asserted plaintiff's lawsuit must be dismissed. Boyne Country concurred in the motion.

Plaintiff responded that Green relied heavily on an unpublished opinion, which has no precedential value. Plaintiff further responded that the statutory provision relied upon by Green, MCL 600.2912a, does not apply to physician assistants, and that the curriculum vitae ("CV") of Green and Worry were compatible. Plaintiff stated that defendants took very limited portions of Worry's deposition testimony out of context to contend that he is not qualified as an expert witness in this matter and that not only did Worry's testimony, as a whole, show that he can, and did testify as to causation, if there were any questions concerning the qualifications of Worry, plaintiff had no objection to a *Daubert*[5] hearing.

The trial court held a *Daubert* hearing, at which Worry was the only witness to testify. The trial court issued an opinion and order after the conclusion of the *Daubert* hearing, concluding that plaintiff had not sustained his burden of showing that Worry possessed the required expertise as to causation to be permitted to testify as an expert. The trial court further determined, "because Plaintiff cannot offer Worry as an expert as to causation, his medical malpractice claim fails as a matter of law because causation issues in medical malpractice cases are beyond a layperson's understanding." The trial court thus granted Up-North Dermatology and Green's motion for summary disposition and dismissed plaintiff's complaint against them. It also dismissed plaintiff's claims against Boyne Country Urgent Care, given that those claims were based on vicarious liability.

II. STANDARDS OF REVIEW

This Court reviews the qualifications of a witness as an expert and the admissibility of the testimony of that witness for an abuse of discretion. *Lenawee Co v Wagley*, 301 Mich App 134, 161; 836 NW2d 193 (2013). "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 NW2d 567 (2010) (citation omitted). "[A]dmitting evidence that is inadmissible as a matter of law constitutes an abuse of discretion." *Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007). A trial court's decision to grant or deny summary disposition is reviewed de novo. *Henry Ford Health Sys v Everest Nat'l Ins Co*, 326 Mich App 398, 402; 927 NW2d 717 (2018).

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

III. ANALYSIS

On appeal, plaintiff contends the trial court erred in finding that Worry was not qualified to provide the expert testimony necessary to support his malpractice action. According to plaintiff, Worry only needed to demonstrate that he is qualified to provide expert testimony as to whether or not Green should have referred plaintiff for a certain early intervention procedure on November 2, 2017, when he first received the results of the biopsy. We disagree.

To establish a medical malpractice claim, a 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." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003). "Failure to prove any one of these elements is fatal." *Id*.

"Proximate cause" is a legal term of art that incorporates cause in fact and legal cause. *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004). As explained in *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994):

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. [Citations omitted.]

The *Craig* Court further explained:

> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause. [*Craig*, 471 Mich at 87.]

Notably, a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. *Id*.

> Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. And while [t]he evidence need not negate all other possible causes, this Court has consistently required that the evidence exclude other reasonable hypotheses with a fair amount of certainty. [*Id.* at 87-88 (citations and quotation marks omitted).]

The *Craig* Court then noted that testimony which only establishes a correlation between conduct and injury is not sufficient to establish cause in fact because "[i]t is axiomatic in logic and in science that correlation is not causation." *Id.* at 93. Therefore, a plaintiff cannot establish causation if the connection made between the defendant's negligent conduct and the plaintiff's

injuries is speculative or merely possible. *Id.* And, "[a]s a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Id*. at 87.

Expert testimony is required in medical malpractice cases to establish causation. *Teal v Prasad*, 283 Mich App 384, 394; 772 NW2d 57 (2009). Such expert witness testimony is governed by both statute and court rule. 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, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

MRE 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;

(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.

MRE 702 "requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." *Wagley*, 301 Mich App at 162 (citations omitted). The trial court often does so, as the trial court did in this case, by holding an evidentiary hearing under *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

The purpose of a *Daubert* hearing is to filter out unreliable expert evidence. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007). As this Court explained;

> An evidentiary hearing under MRE 702 and MCL 600.2955 is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science. The courts are not in the business of resolving scientific disputes. The only proper role of a trial court at a *Daubert* hearing is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*Id*.; (emphasis in original)]

In determining the qualifications of an expert witness in an action alleging medical malpractice, the court must evaluate at least all of the following:

> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.
>
> (d) The relevancy of the expert witness's testimony. [*Craig*, 471 Mich 78-79, quoting MCL600.2169(2).]

In this medical malpractice matter, plaintiff was required to establish the applicable standard of care, breach of that standard of care by Green, injury, and proximate causation between Green's alleged breach and plaintiff's injury. *Wiley*, 257 Mich App at 492. Specifically, plaintiff must show, through expert testimony, that but for Green's alleged conduct, plaintiff's injury of losing his eye and having part of his face removed due to invasive squamous cell carcinoma would not have occurred. Plaintiff sought to have Worry testify as his expert witness concerning

causation.[6] We agree with the trial court that Worry provided no admissible testimony concerning causation.

At the *Daubert* hearing, Worry testified that a photo from plaintiff's first visit to Green on October 26, 2017, shows plaintiff had a fairly large raised lesion with a rolled border on his temple. Worry testified that while he could not tell the exact depth to which the cancer had penetrated into plaintiff's skin from the photo, he could tell that the cancer was at least into the deeper layer of the skin. At his deposition, Worry similarly testified that the cancer had penetrated "into the deep dermis, perhaps to the subcutaneous layer." Worry continued, however, "I can't tell you that, having not examined him in person." Thus, Worry provided no definitive testimony that plaintiff's cancer was at a specific penetration level at his first appointment with Green.

Worry testified that a photograph from defendant's follow up appointment with Green on December 12, 2017, showed that the lesion appeared to have enlarged and its borders seemed slightly altered. Worry testified that by the December 12, 2017 follow-up appointment, given the siz; and location of the lesion and that the biopsy showed invasive squamous cell carcinoma, the lesion required the skill of a surgeon. Worry testified that he would have considered plaintiff a candidate for Moh's surgery[7] or plastic surgery. However, Worry also testified that physician assistants cannot perform Moh's surgery, and when a patient is referred to a surgeon, the surgeon ultimately decides whether to perform the surgery or not. Worry further testified that a Moh's surgeon would not know how deep cancer had penetrated until he or she started performing the surgery. Again, then, Worry could provide no testimony concerning how deep plaintiff's cancer was in December 2017.

Worry testified that any surgical intervention would have removed the lesion in December 2017, and if the surgery would have been sooner rather than later, more likely than not the outcome would have been more favorable for plaintiff. Notably, however, Worry also testified, "I cannot say at that point whether the cancer had invaded to what specific depth, the microscopic measurement, but I can say that the cancerous tumor of the skin and potentially some of the bone[,] most surgeons will operate on the bone as well. It could have (inaudible) and most likely would have been successful based upon the size of the lesion in the photograph." Worry's statement that if surgery had been performed on plaintiff in December 2017, his outcome would have been more favorable is undercut by his testimony that he had no idea how deep the cancer had penetrated at that time. It is also undercut by his testimony that he did not know the doubling rate for invasive squamous cell carcinoma.

Worry further testified that without the Moh's surgery or any surgery in December 2017, the timeline, photos, and written description of the lesion shows that the lesion grew and progressed. Worry also admitted, however, that there is no specific time period in which to say the lesion grew a specific amount (i.e., "the lesion grew x millimeters in x days"). There was

[6] Whether Worry is qualified to provide standard-of-care testimony is not at issue.

[7] Worry explained that Moh's surgery is where a surgeon removes small slices of tissue, layer by layer around the cancer and, while the patient is still present, looks at the tissue under a microscope to make sure all of the cancer has been removed.

involvement of the bone in plaintiff's surgery that occurred on May 3, 2018 so, as Worry acknowledged "there was at least local advancement into the bone" at the time of surgery. However, according to Worry, there is not a lot of cushion or fat in the area where plaintiff's lesion was located. Worry testified that there is only about two to three millimeters of tissue between the epidermis and the bone in that area.

Worry acknowledged plaintiff's U of M Hospital records, wherein the doctor indicated upon review of scans that the cancer had invaded plaintiff's bone along the orbital rim and the doctor thought the tumor extended through the temporalis muscle. In other words, the tumor was deep into tissue, other than plaintiff's skin when he saw the U of M doctors. Worry admitted that he did not know when the cancer invaded the tissue around plaintiff's eye and opined no one would know an exact date. At his deposition, when asked specifically when the cancer invaded plaintiff's eye, Worry stated, "I don't know that." Worry testified at his deposition that without having a series of scans, no one could say with certainty when the cancer invaded plaintiff's eye. Worry testified that the longer time passes the more chance cancer has to destroy tissue and the fact that tissue is lost as time passes is universal. Thus, Worry's opinion that if surgery had been performed on plaintiff in December 2017 his outcome would have been more favorable, appears to be based on the general premise that the longer you wait to treat cancerous lesions the longer the cancer has to expand and spread.

As noted by the trial court, this general premise does not equate with causation testimony. Worry did not provide testimony indicating plaintiff's cancer invaded his tissue, particularly his eye, and the bone near his eye, by any degree between December 2017 and March 2018. Worry testified that the lesion, by outward appearance in photographs, had grown during that time period, but provided no testimony that in December 2017 the cancer was definitively only skin deep and progressed into his eye and bone by March 2018. As stated in *Craig*, 471 Mich at 93, a plaintiff cannot establish causation if the connection made between the defendant's negligent conduct and the plaintiff's injuries is speculative or merely possible, and Worry's testimony fits squarely into the speculative category.

The trial court considered MCL 600.2955, and fully evaluated the factors set out in *Craig*, 471 Mich 78, in rendering its decision, and we find no errors in its conclusions. The trial court determined under factor (a), the educational, and professional training of the expert witness, that Worry had significant education, training, and experience to address skin cancers as long as the cancer only required local anesthetic and did not require surgery. As pointed out by the trial court, Worry also acknowledged that he would have referred plaintiff to a surgeon upon receiving his biopsy results because he did not have the training or experience to address plaintiff's cancer in the manner needed. And while Worry consistently stated that at some point between plaintiff's initial visit with Green and his March 2018 appointment with Green, the cancer had invaded into his eye, Worry acknowledged that his opinion was based upon photographs alone and that no one could say for sure when the cancer actually invaded plaintiff's eye.

Concerning *Craig* factor (b), *id.*, the area of specialization of the expert witness, the trial court properly concluded that as a physician assistant, Worry could not perform the Moh's surgery that he stated would have been successful on plaintiff's cancer had it been performed in December 2017. Thus, Worry's specialization does not extend to plaintiff's cancer treatment.

Craig factor (c), *id.*, the length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty did not really come into play in this matter. As to *Craig* factor (d), *id.* at 79, the relevancy of the expert witness's testimony, the trial court aptly found that the weakness in Worry's proffered testimony lay with whether his testimony could help a lay juror to understand plaintiff's theory of causation in this case. In this case, to find defendants liable, the jury must find that "but for" the delay in diagnosis or referral for surgical intervention, the squamous cell carcinoma would not have expanded into plaintiff's eye and bone. Since Worry could not testify as to when the cancer invaded plaintiff's eye and bone (it may have already spread to that stage upon initial presentation to Green), his testimony would not be helpful to the jury in making this decision. Moreover, because Worry acknowledged that he would not have treated the lesion himself but would have instead referred plaintiff to a surgeon (i.e., he was not qualified to treat the lesion himself), Worry's testimony regarding surgical treatment options and their success is not based upon reliable information.

The above being true, the trial court correctly found that Worry's testimony is not admissible as expert testimony on the issue of causation. Because failure to prove proximate causation between Green's alleged breach and the injury is fatal to plaintiff's claim, *Wiley*, 257 Mich App at 492, summary disposition was appropriate in Green and Up-North Dermatology's favor under MCR 2.116(C)(10). Dismissal of plaintiff's claims against defendant Boyne Country was likewise appropriate, those claims having been based on vicarious liability.

Affirmed.

/s/ Brock A. Swartzle
/s/ Deborah A. Servitto
/s/ Kristina Robinson Garrett