STATE OF MICHIGAN

COURT OF APPEALS

BETHANY BRABANT, Conservator of the Estate of MELISSA BRABANT, a Minor, and the Estate of DAVID BRABANT, a Minor,

Plaintiff-Appellant/Cross Appellee,

v

ST. JOHN RIVER DISTRICT HOSPITAL, f/k/a RIVER DISTRICT HOSPITAL,

Defendant-Appellee/Cross Appellant,

and

MICHAEL PRIEBE, M.D., and RONALD ERICK BATTIATA, M.D.,

Defendants-Appellees.

UNPUBLISHED
December 20, 2005

No. 263168
St. Clair Circuit Court
LC No. 02-001060-NH

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Plaintiff, as conservator of the estates of her twin minor children, brought this medical malpractice action against defendants St. John River District Hospital ("St. John"), Michael Priebe, M.D., and Ronald Erick Battiata, M.D., alleging that the twins' neurological problems and mental retardation were caused by defendants' delay in performing a Caesarian section ("C-section") to deliver the twins. The trial court struck the testimony of Dr. Ronald Gabriel, plaintiff's sole expert witness on causation, and then granted defendants' motions for summary disposition under MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

Plaintiff's pregnancy involved the high-risk factors of maternal obesity, pregnancy-induced hypertension, and twin gestation. Plaintiff's membranes ruptured (in layperson's terms, "her water broke"), when she was in the thirty-sixth or thirty-seventh week of gestation, but she did not go into labor. The twins had to be delivered by C-section because they were in the breach position. Plaintiff's personal physician consulted an obstetrician, Dr. Gordon Daugherty, and asked him to perform the C-section. Dr. Daugherty did not perform the C-section until

several hours after plaintiff's membranes ruptured. Plaintiff alleges that the twins' mental retardation and her son's seizure disorder were caused by the delay in performing the C-section.

Plaintiff's sole expert witness on causation was Dr. Ronald Gabriel, M.D., a pediatric neurologist. Dr. Gabriel opined that the twins suffered perinatal "watershed ischemia in certain portions of the watershed which resulted in depression of birth and a variety of neonatal abnormalities" (also described as "perinatal hypoxic ischemia watershed injury"). In other words, the "watershed" area is the last area of the brain to receive blood flow, and that by the time the blood flow reached this area of the children's brains, there was no longer sufficient oxygen in the blood to adequately oxygenate the watershed area. Dr. Gabriel stated that the delay in performing the C-section resulted in this reduced oxygen delivery, and caused the twins' neurological problems. However, he also stated that the children had already suffered neurological injury even before plaintiff arrived at the hospital, because the prenatal risk factors of maternal obesity, twin gestation, and pregnancy-induced hypertension all contributed to the reduction of oxygen delivery to the brain.

Defendants moved in limine to exclude Dr. Gabriel's testimony on the ground that his theories were not generally recognized and accepted in the relevant scientific community. The trial court denied their motions, because plaintiff produced a bibliography for Dr. Gabriel's research that purportedly cited scholarly literature that corroborated his theory. Subsequently, Dr. Gabriel acknowledged in a de bene esse deposition that the articles did not corroborate his theory that the delay in performing the C-section aggravated the problems already caused by the prenatal risk factors and contributed to the twins' mental retardation. Dr. Gabriel explained that he cited the articles only because they contained information on reduced blood and oxygen flow to the watershed area.

Defendants subsequently moved to strike Dr. Gabriel's testimony under MRE 702 and MCL 600.2912a. The trial court granted their motions, stating that it was now clear that the bibliography did not actually demonstrate that Dr. Gabriel's theories were recognized in the scientific community. Without Dr. Gabriel's testimony, plaintiff could not prove the causation element of her medical malpractice claim. Accordingly, the trial court subsequently granted defendants' motions for summary disposition under MCR 2.116(C)(10).

This Court reviews de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10) and (G)(4); *Kraft, supra* at 540.

Here, summary disposition was predicated on the trial court's decision to strike Dr. Gabriel's expert testimony. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). The interpretation of a rule of evidence is a question of law that is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

The trial court granted summary disposition for defendants because its decision to exclude Dr. Gabriel's testimony left plaintiff without an expert witness to testify on the causation element of her medical malpractice claim. To establish a claim for medical malpractice, a plaintiff must prove: (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. *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). Generally, expert testimony is required in medical malpractice cases. *Id*. To satisfy the causation element, the plaintiff must show that but for the defendant's actions, the injury would not have occurred, and that the consequences of the defendant's actions were foreseeable. *Craig*, *supra* at 86-87. It is not sufficient for the plaintiff to show that the defendant may have caused the injuries; rather, she must set forth "specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Id*. at 87. The plaintiff need not negate other possible causes of the injury, but the evidence must exclude other reasonable hypotheses with a fair amount of certainty. *Id*. at 87-88.

Plaintiff intended to prove causation by calling Dr. Gabriel to testify that the delayed C-section caused decreased blood flow to the watershed area of the brain, and that this in turn aggravated the neurological injury that the twins had already suffered from the three adverse prenatal factors. When the trial court excluded Dr. Gabriel's testimony, plaintiff was left without proof of causation, and there was no longer a genuine issue of material fact on this element. Accordingly, the propriety of the trial court's summary disposition decision depends on the propriety of its evidentiary decision.

Plaintiff contends that the trial court's evidentiary decision was erroneously based on a former version of MRE 702 and on the *Davis-Frye*[1] test for determining the admissibility of scientific evidence. Plaintiff argues that the current version of MRE 702 supplants the *Davis-Frye* test with the test set forth in *Daubert v Merrill Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and omits the requirement that expert testimony be based on recognized scientific knowledge.

The previous version of MRE 702 stated:

> If the court determines that recognized 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.

The *Davis-Frye* test derived from our Supreme Court's holding in *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), that expert opinion based on novel scientific techniques is admissible only if the underlying methodology is generally accepted within the scientific community. *Craig*, *supra* at 80. "[I]n determining whether the proposed expert opinion was grounded in a 'recognized' field of scientific, technical, or other specialized knowledge as was required by

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

MRE 702, a trial court was obligated to ensure that the expert opinion was based on accurate and generally accepted methodologies." *Id*.

In *Daubert, supra* at 592-593, the United States Supreme Court held that general acceptance of a scientific theory was not a necessary precondition to the admissibility of scientific evidence under FRE 702, as long as "the reasoning or methodology underlying the testimony is scientifically valid" and applicable to the facts in issue. The Court stated that a trial court determining the admissibility of an expert's testimony may consider whether the theory has been tested, whether it has been subjected to peer review and publication, and whether the theory has been generally accepted within a relevant scientific community. *Id*. at 592-594; see, also, *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 149-150; 119 S Ct 1167; 143 L Ed 2d 238 (1999). The Court in *Daubert* summarized its holding by stating that general acceptance was "not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially FRE 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert, supra* at 485.

MRE 702 was amended, effective January 1, 2004, and would apply if this case proceeded to trial. See *People v Stanaway*, 446 Mich 643, 692-693 n 51; 521 NW2d 557 (1994). MRE 702 now provides:

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

Plaintiff argues that the amended version of MRE 702 omits the requirement that the expert's opinion be based on "recognized" knowledge, and that the trial court therefore erred in excluding Dr. Gabriel's testimony on the ground that it presented a novel theory. Plaintiff contends that the amended version of MRE 702 conforms Michigan's rule to FRE 702, and replaces the *Davis-Frye* test with the test set forth in *Daubert, supra*. The staff comment to MRE 702 states:

> [T]he amendment . . . conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words "the court determines that" after the word "If" at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert*[, *supra*, 509 US 579.] The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.

In *People v Coy*, 258 Mich App 1, 10 n 3; 669 NW2d 831 (2003), this Court noted that it was "bound to continue utilizing the *Davis-Frye* test until the Michigan Supreme Court indicates a contrary position." In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391

(2004), our Supreme Court stated in dicta that the amendment of MRE 702 "explicitly" incorporated the *Daubert* standards. Discussing how MRE 702 was amended to conform the Michigan rule to FRE 702 and *Daubert*, the Court stated:

> It is well-established that the proponent of evidence "bears the burden of establishing relevance and admissibility." At the time this case was tried, the proponent of expert opinion evidence bore the burden of establishing admissibility according to the *Davis-Frye* "general acceptance" standard. MRE 702 has since been amended explicitly to incorporate *Daubert's* standards of reliability. But this modification of MRE 702 changes only the factors that a court may consider in determining whether expert opinion evidence is admissible. It has not altered the court's fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on "novel" science—is reliable.
>
> Thus, properly understood, the court's gatekeeper role is the same under *Davis-Frye* and *Daubert*. Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability. In other words, both tests require courts to exclude junk science; *Daubert* simply allows courts to consider more than just "general acceptance" in determining whether expert testimony must be excluded.
>
> This gatekeeper role applies to *all stages* of expert analysis. 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*, *supra* at 781-782.]

We conclude from this discussion in *Gilbert* that MRE 702 incorporates the *Daubert* test into the Michigan Rules of Evidence, and replaces the requirement of general recognition with a requirement of scientific reliability, i.e., "reached through reliable principles and methodology." Furthermore, plaintiff, as the proponent of this evidence, bears the burden of establishing its admissibility under MRE 702.

The admissibility of scientific expert testimony is also governed by MCL 600.2955(1), which 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.

The trial court correctly found that plaintiff failed to establish the burdens imposed by MRE 702 and MCL 600.2955(1). In response to defendants' first set of motions in limine, plaintiff argued that Dr. Gabriel's opinion was reliable because it was consistent with the articles cited in the bibliography for the article he was working on. The trial court denied the motions in limine for that reason. However, when defendants questioned Dr. Gabriel about the article in his de bene esse deposition, he essentially conceded that the literature cited in the bibliography does not support his theory. Dr. Gabriel subsequently modified his concession by testifying that the article by Jeffrey Perlman corroborated his statements that the watershed area of the brain is susceptible to injury because it is the last area to receive blood, but he admitted that the article did not apply this information to the factual scenario presented in this case, i.e., it did not corroborate his theory that the delayed delivery caused the reduced circulation, which in turn worsened the twins' neurological injuries. Plaintiff never produced any other published material that corroborated Dr. Gabriel's theory of how the twins were injured as a result of the delay in performing the C-section. Indeed, plaintiff tacitly concedes that Dr. Gabriel's theory was not generally accepted, but maintains that this does not matter under the current version of MRE 702 and the *Daubert* test, a position we reject.

Plaintiff argues that Dr. Gabriel's opinion was scientifically reliable because it was based on his review of the medical records, fetal monitor strips, and MRIs, and on his own experience as a pediatric neurologist. However, the medical data pertains to the facts or data underlying the medical opinion, not the principles and methods on which Dr. Gabriel relied to interpret this data and arrive at his conclusion. Similarly, Dr. Gabriel's experience relates to his qualifications as an expert, not the reliability of his conclusion. Plaintiff has never identified what principles and methods Dr. Gabriel utilized to reach his conclusion that the twins' injuries are causally connected to anything that happened between plaintiff's arrival at the hospital and the

performance of the C-section. Dr. Gabriel referred to his own research article, but the article was not completed. Consequently, plaintiff cannot show that Dr. Gabriel's theory has been tested, subjected to peer review and publication, or is generally accepted within a relevant scientific community. *Daubert, supra* at 592-594.

Plaintiff argues that the trial court should not have granted defendants' motion to strike Dr. Gabriel's testimony without first holding an evidentiary hearing. But in the trial court plaintiff admitted, both in her brief and in the hearing on the motion, that "A Daubert Hearing is not required in every case when requested by a party who is challenging the admissibility of testimony by an opposing party's expert witness." In *Clerc v Chippewa Cty War Mem Hosp*, 267 Mich App 597; 705 NW2d 703 (2005), this Court recently held that a trial court must not exclude expert testimony under MRE 702 unless it first holds an evidentiary hearing or conducts a "searching inquiry" under MRE 702. In the instant case, we believe that the trial court conducted a sufficiently "searching inquiry" in its review of the motions in limine and the motions to strike Dr. Gabriel's testimony. The trial court was initially satisfied that plaintiff carried her burden by producing the bibliography. But when Dr. Gabriel's own testimony disclaimed the corroborative value of the bibliography, the trial court examined the matter more closely and determined that his opinions were not generally accepted. Plaintiff has had the opportunity throughout this case to show that Dr. Gabriel's testimony was generally recognized or met some other indicia of reliability under MRE 702, but has not attempted to do so. Indeed, plaintiff does not argue on appeal that she can satisfy MRE 702's reliability requirement. Instead, she maintains that Dr. Gabriel's testimony is reliable because he is a qualified expert, and because his opinion is based on reliable data. Neither of these arguments address the core question here, namely, whether Dr. Gabriel's methods for interpreting that data are reliable. Under these circumstances, we conclude that an evidentiary hearing would be futile, and that the trial court satisfied its obligations under MRE 702.

In light of our decision, it is unnecessary to address the alternative grounds for affirmance raised by St. John's on cross appeal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio