

STATE OF MICHIGAN
COURT OF APPEALS

MIRANDA MOCK by her Next Friend JODIE
MOCK, and JODIE MOCK, Individually,

UNPUBLISHED
November 20, 2008

Plaintiffs-Appellants,

v

No. 280269
Muskegon Circuit Court
LC No. 05-044020-NH

HACKLEY HOSPITAL,

Defendant/Cross-Plaintiff/Third-
Party Plaintiff-Appellee,

HARBORWOOD FAMILY MEDICINE,

Defendant,

and

DAVID VANWINKLE, M.D.,

Defendant/Cross-Defendant/Third-
Party Defendant-Appellee.

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs, Miranda Mock (Miranda), by her mother Jodie Mock (Mock) acting as next friend, and Mock in her individual capacity, appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendants Hackley Hospital and David Van Winkle, M.D. Because we conclude that plaintiffs' causation expert testified to one mechanism of injury and the trial court did not abuse its discretion in concluding that the expert's causation theory was not reliable, we affirm.

I

Mock was admitted to Hackley Hospital on May 20, 2000, at approximately 6:00 a.m. At 11:00 a.m., dilation of Mock's cervix was at 6 centimeters. With Mock's cervix still dilated at 6 centimeters at 1:45 p.m., Van Winkle started Mock on Pitocin to augment labor. Mock's cervix did not fully dilate to 10 centimeters until 10:15 p.m., and Miranda was born at 10:20 p.m.

Miranda suffers from cerebral palsy. Plaintiffs allege that Van Winkle failed to comply with the applicable standard of care when at 3:45 pm., after Mock had been on Pitocin for two hours without a change in dilation, he failed to consult with an obstetrician, which caused a delay in the delivery of Miranda.

Plaintiffs' sole causation expert was Ronald Gabriel, M.D., a pediatric neurologist. In a deposition, Gabriel opined that abnormal uterine forces, caused by the Pitocin, increased the pressure in Miranda's brain, which resulted in intracranial bleeding in the subarachnoid and subdural spaces of the brain and reduced blood flow to the watershed region of the brain. Defendants moved in limine to exclude Gabriel's testimony on the grounds that Gabriel's theory was not scientifically reliable and was based on insufficient facts and data. The trial court denied the motion in limine without prejudice, but granted defendants' alternative motion for an evidentiary hearing to determine the reliability of Gabriel's theory.

At the hearing, which followed Gabriel's de bene esse deposition, the trial court asked defendants why, when "most of the doctors have conceded" that compressive forces on the fetal brain during labor and delivery can cause brain damage, it should grant the motion in limine. Defendants replied that the evidence submitted did not support Gabriel's theory that abnormal labor pressures, specifically abnormal uterine pressures, can cause compression of the fetal brain resulting in cerebral palsy. Defendants never contested that, according to the medical literature submitted by plaintiff and the testimony of their experts, certain compressive forces on the fetal brain, such as those exerted by the use of forceps and those arising in cases of cephalopelvic disproportion, may cause brain damage resulting in cerebral palsy. Thus, the issue confronted by the trial court was whether plaintiffs established that this medical literature and expert testimony supported Gabriel's theory that the abnormal uterine pressures can cause brain damage resulting in cerebral palsy.

After hearing further arguments by the parties, the trial court, upon noting that it had reviewed the medical literature and the deposition testimony submitted by the parties, concluded that based on the factors contained in MCL 600.2955(1) Gabriel's theory of causation was not reliable.¹ Accordingly, the trial court granted defendants' motion in limine. Because plaintiffs could not prove the causation element of their malpractice claim without the testimony of Gabriel, the trial court also granted summary disposition under MCR 2.116(C)(10) to defendants.

II

On appeal, plaintiffs claim the trial court abused its discretion by failing to properly perform its gatekeeping function under MRE 702 when it concluded that Gabriel's theory was not reliable. Specifically, plaintiffs maintain that Gabriel's theory is reliable because the medical literature supports the theory that abnormal uterine forces can lead to cerebral palsy and defense experts have acknowledged the same. Plaintiffs also claim that the trial court, in granting summary disposition to defendants, failed to recognize that Gabriel identified three mechanisms of injury causing Miranda's cerebral palsy.

¹ The trial court found that Gabriel's testimony was based on sufficient facts or data.

A

We review de novo a trial court's decision on a motion for summary disposition. *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004). A motion for summary disposition made under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006).

The trial court's grant of summary disposition to defendants was based on its decision to exclude Gabriel's causation testimony. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B

To establish a medical malpractice claim, a plaintiff must prove: (1) the applicable standard of care; (2) the defendant breached the standard of care; (3) the plaintiff was injured; and (4) the plaintiff's injuries were the proximate result of the defendant's breach of the standard of care. *Craig, supra* at 86. To establish proximate causation, the plaintiff must prove that "but for" the defendant's actions, the plaintiff's injury would not have occurred and that the consequences of the defendant's actions were foreseeable. *Id.* at 86-87. A medical malpractice plaintiff must provide expert testimony to establish proximate causation. *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006).

1

We first address plaintiffs' claim that Gabriel identified three mechanisms of injury, and because defendants did not make any challenge to the first mechanism, the stretching and tearing of blood vessels in Miranda's brain, the trial court erred in not allowing the case to proceed to trial on the theory that the stretching and tearing of the blood vessels caused Miranda's cerebral palsy.

At his de bene esse deposition, Gabriel opined that Miranda's cerebral palsy was caused by "abnormal compressive forces" on Miranda's brain. According to Gabriel, these abnormal forces, the result of "the high uterine pressures, the prolonged period of labor," caused "three separate mechanisms of action": (1) the stretching and tearing of blood vessels in Miranda's brain, resulting in bleeding in the brain; (2) high venous pressure in the brain; and (3) reduced blood flow from the heart to the brain. Contrary to plaintiff's assertion, Gabriel opined there was only one mechanism of injury, the abnormal compressive forces. These forces then brought about "three separate mechanisms of action" on Miranda's brain. In other words, the stretching and tearing of blood vessels was not a separate mechanism of injury, but rather was an effect of the abnormal compressive forces on Miranda's brain. Accordingly, we reject plaintiffs' contention that Gabriel testified to three separate mechanisms of injury.

2

We now turn to plaintiffs' claim that the trial court erred in concluding that Gabriel's causation theory that Miranda's cerebral palsy was caused by abnormal uterine forces during labor was unreliable.

The admission of expert testimony is governed by MRE 702 and MCL 600.2955. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). MRE 702 provides:

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

MRE 702 imposes on a trial court the obligation to ensure that any expert testimony admitted at trial is reliable. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). A trial court may not "abandon" this gatekeeping function, nor may it perform this function "inadequately." *Id.* (citations and quotation omitted).

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. . . .
- (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
- (g) Whether the opinion or methodology is relied upon by experts outside the context of litigation.

The proponent of expert testimony in a medical malpractice case has the burden of establishing that the expert is qualified under MRE 702 and MCL 600.2955. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007).

Here, plaintiffs did not present the trial court with any scientific studies showing that abnormal compressive forces, specifically abnormal uterine pressures, during labor can cause compression of the brain resulting in cerebral palsy.² In his de bene esse deposition, Gabriel admitted that he had not completed a statistical study of his own patients regarding any correlation between abnormal uterine forces during labor and cerebral palsy. Gabriel also stated that he was not aware of any retrospective evaluation of data to determine the level of uterine contractions, in both frequency and duration, associated with traumatic injury to the fetal brain. However, Gabriel testified that, given the advancements in obstetrical care in the past few decades, any study to support his theory of causation could not be ethically or legally done.³ Nonetheless, Gabriel stated that his causation theory was widely accepted in the medical community⁴ and supported by the medical literature. He identified four medical articles that he believed were representative of the medical literature supporting his theory of causation. The articles recognized that compressive forces on the fetal brain may cause brain damage resulting in cerebral palsy.

Harry Chugani, M.D., also a pediatric neurologist and defendants' causation expert, testified that Gabriel's theory was speculation and not accepted among pediatric neurologists. Chugani further testified that none of the four articles identified by Gabriel as being representative of the medical literature supporting his theory actually supported the theory. According to Chugani, two of the articles, one by John V. Kelly, M.D, and the other by Timothy J. Kriewall, M.D., were opinion or review articles; the articles did not present scientific data, nor were the articles subject to peer review. Chugani admitted that the other two articles, one by Leif Svenningsen, M.D., and the other by Andreas Rempen, M.D., were scientific studies, but claimed the articles had no relevance to Gabriel's theory because neither study was concerned with abnormal uterine forces. Rather, the articles were concerned with whether the amount of pressure exerted on the fetal brain during labor and delivery could be measured and how to accurately measure the pressure.

In their depositions, other experts retained by defendants were asked about Gabriel's theory that abnormal uterine pressures can cause brain damage resulting in cerebral palsy. Gary Trock, M.D., a pediatric neurologist, stated that he did not subscribe to Gabriel's theory. Edgar

² At the time of Gabriel's de bene esse deposition, he was in the process of writing two articles on his causation theory, but neither article was ready for publication or distribution.

³ Defendants' causation expert agreed with Gabriel that a study to determine whether abnormal uterine forces could result in compression to the fetal brain causing cerebral palsy would not be ethical.

⁴ Gabriel testified that he had discussed his causation theory with a number of physicians and that "[a]ll of them" agreed with the theory. For privacy reasons, Gabriel would not reveal the names of the physicians with whom he had consulted.

Beaumont, M.D., a neonatologist, had never encountered Gabriel's theory before reading Gabriel's deposition. Patrick Barnes, M.D., a pediatric neuroradiologist, stated that, "[i]n some situations," it "is certainly possible" for uterine pressures to cause irreversible brain damage.⁵

The record of the evidentiary hearing establishes that the trial court was aware of its gatekeeping function. Before concluding that Gabriel's theory regarding the causation of Miranda's cerebral palsy was not reliable, the trial court went through a detailed analysis of the factors set forth in MCL 600.2955(1), finding that the answer to each factor was "no." In its analysis of the factors, the trial court made it clear that it had read the testimony of Gabriel and Chugani, along with the testimony of the other deposed experts, and the four articles Gabriel indicated were representative of the medical literature supporting his theory.⁶ Regarding the articles, it concluded that the Kelly and Kriewall articles were "opinion pieces," rather than scientific studies, and that the Svenningsen and Rempen articles did not support Gabriel's theory of causation.⁷ The trial court found that the only evidence supporting Gabriel's theory was Gabriel's two unpublished articles. While the trial court noted that a study to test Gabriel's theory would break ethical boundaries, it concluded that plaintiffs presented no evidence to push Gabriel's theory beyond a possibility. The trial court clearly did not abandon its gatekeeping function, nor can it be said the court inadequately performed this function. *Gilbert, supra* at 780.

We have reviewed the parties' arguments, the lower court record, the materials submitted by the parties on appeal, and the relevant case law. We find nothing to support a conclusion that the trial court, having adequately performed its gatekeeping function, abused its discretion in concluding that Gabriel's theory of causation, that abnormal uterine pressures can cause brain damage resulting in cerebral palsy, was not reliable. Plaintiff, in arguing that the trial court should have answered the factors of MCL 600.2955(1) in the affirmative, points, in a conclusory manner, to the submitted medical literature and the testimony of the parties' experts. However, given that none of the articles relied upon by Gabriel as supporting his theory and none of the defense experts stated that abnormal uterine pressures, alone, can be considered analogous to circumstances known to cause brain damage leading to cerebral palsy, such as cephalopelvic disproportion and the use of forceps, the trial court's conclusion that Gabriel's theory was not reliable was within the range of principled outcomes. Accordingly, we affirm the trial court's order granting defendants' motion in limine. Given our resolution of the issue, we need not address the parties' arguments regarding whether Gabriel's theory was based on sufficient facts or data.

⁵ Barnes, however, clarified his remarks by commenting that, in the present case, he did not see what he had observed in cases of "obstetrical injury."

⁶ The trial court also clearly stated that it had read all the journal articles submitted by plaintiff in response to defendants' motion in limine.

⁷ The trial court noted that the Svenningsen and Rempen articles, which involved normal labor pressures, concluded that more work needed to be done to determine when labor pressures may have harmful effects on the fetal brain.

Because plaintiff is left without any expert testimony to establish proximate causation, a requirement in medical malpractice cases, *Pennington, supra*, we also affirm the trial court's order granting summary disposition to defendants.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot