

STATE OF MICHIGAN
COURT OF APPEALS

TRACY EDRY,

Plaintiff-Appellant,

v

MARC ADELMAN and MARC ADELMAN,
D.O., P.C.,

Defendants-Appellees.

UNPUBLISHED

December 23, 2008

No. 279676

Oakland Circuit Court

LC No. 2005-070853-NH

Before: Zahra, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing her medical malpractice claim “for failure to meet the burden of proof.” We affirm.

I. Facts

In February 2005, plaintiff was diagnosed with breast cancer. Plaintiff subsequently filed this medical malpractice action, alleging that defendant Dr. Marc Adelman, an Obstetrician/Gynecologist (OB/GYN), committed malpractice by failing to diagnose the cancer or order further testing after a small three-millimeter node was detected on plaintiff’s breast during an examination in June 2003. Plaintiff alleged that the delay in diagnosing and treating her condition resulted in a decrease of her opportunity to survive and subjected her to more extensive and invasive medical treatment.

Plaintiff’s oncology expert, Dr. Barry Singer, testified that plaintiff’s survival rate would have been 95 percent if she had been diagnosed in June 2003, but had decreased to less than 20 percent by the time she was actually diagnosed. Conversely, defendants’ expert, Dr. Joel Appel, relying on data published by the American Joint Cancer Commissions (AJCC), testified that plaintiff had a 60 percent chance of survival when she was diagnosed in February 2005. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that Dr. Singer’s testimony did not refute the reliability of the AJCC survival statistics, and that Dr. Singer’s testimony that plaintiff’s chance of survival had decreased to less than 20 percent was not sufficiently reliable to be admitted under MRE 702. Accordingly, defendants argued, plaintiff failed to show a greater than 50 percent loss of the opportunity to survive, as required by MCL 600.2912a(2).

Following a hearing, the trial court determined that Dr. Singer's testimony that plaintiff had less than a 20 percent chance of survival at the time of diagnosis was not sufficiently supported in the scientific community to be reliable under MRE 702. The court did not expressly grant defendants' motion for summary disposition, but entered an order providing that Dr. Singer would not be permitted to testify at trial. Defendants subsequently filed a motion to dismiss, arguing that, without Dr. Singer's testimony, plaintiff could not meet her burden of proving medical malpractice. The trial court granted defendants' motion.

II. Loss of Opportunity

On appeal, plaintiff argues that the trial court erroneously dismissed her complaint, because Dr. Singer's expert testimony was sufficiently reliable under MRE 702 to create an issue of fact with respect to whether she sustained a greater than 50 percent loss of the opportunity to survive under MCL 600.2912a(2).

Initially, the parties disagree on the appropriate standard of review. Although plaintiff argues that the trial court dismissed this case on summary disposition pursuant to MCR 2.116(C)(10), defendants argue that it was dismissed for reasons other than summary disposition and, therefore, the trial court's decision should be reviewed for an abuse of discretion. The record discloses that the trial court originally ruled, in response to defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(10), that plaintiff's expert, Dr. Singer, would not be permitted to testify at trial, but refused to state whether it was granting defendants' motion for summary disposition. Ultimately, the trial court relied on its determination that Dr. Singer's testimony was not admissible and dismissed plaintiff's complaint because it found that plaintiff failed to set forth evidentiary support to meet the burden of proof. The abuse of discretion standard cited by defendant is based on dismissals as a sanction for a party's failure to comply with a court's order, which is not what occurred here. See *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). Rather, the trial court referred to plaintiff's failure to establish evidentiary support for her claim as the basis for dismissal. We therefore conclude that the trial court's decision should be reviewed under MCR 2.116(C)(10), which tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

This issue also involves the admissibility of expert testimony under MRE 702. A trial court's decision regarding the admissibility of expert testimony under MRE 702 is reviewed for an abuse of discretion. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). As explained in *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), the abuse of discretion standard is more deferential than de novo review. The standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. *Id.* When the trial court selects one of these principled outcomes, it has not abused its discretion. *Id.*

MCL 600.2912a(2) provides, in pertinent part:

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%.

This statute was enacted in response to our Supreme Court's decision in *Falcon v Mem Hosp*, 436 Mich 443; 462 NW2d 44 (1990), which first recognized the "lost opportunity" doctrine. *Stone v Williamson*, 482 Mich 144, 187, 193; 753 NW2d 106 (2008) (Markman J., concurring); *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 529-530; 687 NW2d 143 (2004). Under the statute, a plaintiff must show that the loss of the opportunity to survive or achieve a better result exceeds 50 percent. *Fulton v William Beaumont Hosp*, 253 Mich App 70, 83; 655 NW2d 569 (2002).

The parties' experts agreed that plaintiff would have had a 95 percent chance of survival if she had been diagnosed in June 2003. The only evidence supporting a finding that plaintiff sustained the loss of an opportunity to survive that was greater than 50 percent was Dr. Singer's testimony that plaintiff's chance of survival had decreased to less than 20 percent by the time she was actually diagnosed. But in order for evidence to establish a genuine issue of material fact to preclude summary disposition under MCR 2.116(C)(10), the evidence must be substantively admissible. MCR 2.116(G)(6). Plaintiff argues that the trial court erred in determining that Dr. Singer's testimony was not sufficiently reliable to be admissible under MRE 702.

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 party offering the evidence bears the burden of demonstrating its acceptance in the medical community. *SPECT Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 578; 633 NW2d 461 (2001). As the Court explained in *SPECT Imaging, id.* at 578-579, the trial court is required to:

determine the evidentiary reliability or trustworthiness of the facts and data underlying an expert's testimony before that testimony may be admitted. To determine whether the requisite standard of reliability has been met, the court must determine whether the proposed testimony is derived from recognized [medical] knowledge. To be derived from recognized [medical] knowledge, the proposed testimony must contain inferences or assertions, the source of which rests in an application of [medical] methods. Additionally, the inferences or assertions must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature. This is not to say, however, that the subject of the [medical] testimony must be known to a certainty.

As long as the basic methodology and principles employed by an expert to reach a conclusion are sound and create a trustworthy foundation for the conclusion reached, the expert testimony is admissible no matter how novel. [Quoting *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-491; 566 NW2d 671 (1997).]

The trial court shall undertake the threshold determination whether, under *Davis-Frye*,¹ it has been demonstrated that the evidence has gained general acceptance in the medical community. *SPECT Imaging, supra* at 579.

In this case, Dr. Singer's testimony clearly contradicted the AACJ standards. Additionally, defendants' expert, Dr. Appel, testified that it was medically improper to simply use the number of positive lymph nodes, as Dr. Singer had done, to assess the chance of survival. Dr. Appel also claimed that Dr. Singer's opinion that plaintiff had less than a 20 percent chance of survival due to the number of positive lymph nodes was not based on any scientific, technical, or specialized knowledge, was not generally accepted within the scientific community, and could not be substantiated by any medical evidence. At his deposition, Dr. Singer testified that his opinion was supported by the medical literature. Plaintiff was given an opportunity to submit the articles that Dr. Singer claimed supported his opinion, but never did so. Instead, plaintiff presented generalized Internet articles that did not clearly support Dr. Singer's testimony. In particular, none of the articles that plaintiff submitted indicated that a person with plaintiff's pathology (i.e., tumor size and number of positive nodes) had less than a 20 percent chance of survival. For these reasons, the trial court did not abuse its discretion in determining that Dr. Singer's testimony was not shown to be sufficiently accepted in the scientific community to be reliable and, therefore, was not admissible. Without Dr. Singer's testimony, plaintiff had no other evidence showing that she sustained a loss of the opportunity to survive that was greater than 50 percent.

Furthermore, plaintiff's claim premised on the loss of an opportunity to survive fails for a different reason. In *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 62; 631 NW2d 686 (2001), the Court concluded that "a living plaintiff may not recover for loss of an opportunity to survive on the basis of a decrease in her chances of long-term survival." The facts in *Wickens* are similar to those presented here. In *Wickens*, the plaintiff's expert opined that the defendants' one-year delay in diagnosing breast cancer caused the plaintiff to suffer a reduction in her chances of surviving another ten years. The Court held that the first sentence of MCL 600.2912a(2) "expressly limits recovery to injuries that have already been suffered and more probably than not were caused by the defendant's malpractice." *Wickens, supra* at 60. Because the plaintiff survived, she had not suffered a loss of an opportunity to survive. *Id.*

For these reasons, the trial court properly dismissed plaintiff's malpractice claim to the extent that it was based on the loss of an opportunity to survive.

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

Plaintiff additionally argues that, even if the trial court properly dismissed her lost opportunity claim, it erred in dismissing her entire complaint because she also alleged that the delayed diagnosis required her to undergo increased medical treatment.

Although the surviving plaintiff in *Wickens* was not allowed to pursue a claim for loss of an opportunity to survive, the Supreme Court held that the plaintiff's claim that she suffered more invasive medical treatment caused by a delay in diagnosis could proceed because that claim was not premised on her decreased chances of long-term survival. *Wickens, supra* at 61-62. In this case, however, plaintiff failed to establish a genuine issue of material fact with respect to the additional treatment aspect of her claim.

Plaintiff's complaint alleged that an earlier diagnosis "would have prevented the need for the extensive chemotherapy, radiation and the mastectomy that she has undergone." As defendants argued at the trial court level, only an oncologist would be qualified to offer an opinion on the treatment options for cancer, including the impact of any delay with respect to those options.² Dr. Singer was plaintiff's only oncology expert. Although plaintiff argued that Dr. Singer was qualified to offer testimony on the subject of additional treatment, she offered nothing to indicate what that testimony might be. Dr. Singer never testified in his deposition that plaintiff was required to undergo additional treatment because of the delay in diagnosis, and Dr. Singer's affidavit of merit is similarly silent on this issue. To the extent that Dr. Singer had an opinion to offer on this subject, plaintiff could have presented that opinion in the form of an affidavit, but she did not do so, nor did she offer anything else indicating either that Dr. Singer was prepared to testify that the delay in diagnosis required her to undergo additional treatment, or what that testimony might be.

Without a showing of evidentiary support for the additional treatment aspect of plaintiff's claim, there was no basis for the trial court to conclude either that Dr. Singer had admissible testimony to offer, or that a genuine issue of material fact existed to preclude summary disposition under MCR 2.116(C)(10). Accordingly, the trial court did not err in dismissing plaintiff's complaint in its entirety.

Affirmed.

/s/ Brian K. Zahra
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly

² Both of plaintiff's ob/gyn experts deferred any opinion on the growth rate of her cancer to an oncologist.