STATE OF MICHIGAN

COURT OF APPEALS

ALICIA FLEMING, Minor, by her Conservator, LORA MOORE

Plaintiff-Appellant,

v

SUSAN RICE,

Defendant,

and

BOTSFORD GENERAL HOPSITAL, VANCE D. POWELL, JR., D.O., JAMES D. SPENCER, D.O., and RICHARD HERMAN, D.O.,

Defendants-Appellees.

UNPUBLISHED
June 2, 2009

No. 283816
Oakland Circuit Court
LC Nos. 2006-072140-NH; 2005-069020-NH

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition, premised on the trial court's determination that the testimony of plaintiff's causation expert was inadmissible in this medical malpractice action, because that testimony was too speculative and was without sufficient scientific basis as to when plaintiff's alleged injury occurred relative to the timing of plaintiff's birth. We affirm.

Plaintiff's mother went to Botsford General Hospital on September 24, 1990 at approximately 10:30 p.m., complaining of contractions and possible "leaking fluid"; she was kept for observation and monitoring. The next morning, a biophysical profile was conducted by ultrasound. It was scored at 6 out of 10, with no fetal breathing and no fetal tone evident. Plaintiff's mother was admitted to labor and delivery for monitoring and to "see if she [would go] into spontaneous active labor or if cervical changes occur." Nonstress tests were conducted in the morning and in the afternoon, and both were read as reassuring as to fetal condition. A repeat biophysical profile was scheduled for the following morning. Fetal monitoring strips and nurses' notes document instances of prolonged contractions followed by decelerations in fetal heart tones during the afternoon of September 25th. Throughout the night, the fetal heart monitor continued to show late decelerations, and plaintiff's mother complained of no fetal movement after 10:00 p.m.

At 8:55 a.m. on September 26th, the repeat biophysical profile was performed; it was scored 4 out of 10, with no fetal breathing, no fetal tone and no fetal motion evident. At 12:15 p.m., plaintiff was delivered via cesarean section. Plaintiff suffered tremors during her neonatal admission, but otherwise appeared to be a typical newborn. She required no specialized treatment following her birth. However, at six months of age plaintiff was diagnosed with a seizure disorder; later, plaintiff was also diagnosed with cerebral palsy. Plaintiff alleges that defendants breached the standard of care by failing to deliver her upon initial consultation following the first biophysical profile and that this breach caused her neurological injury.

Plaintiff's sole causation expert, Dr. Ronald Gabriel, testified at deposition that plaintiff suffered a neurological injury, resulting in her development of a seizure disorder and cerebral palsy, during the period from 12 to 24 hours preceding her birth. Defendants moved for summary disposition, challenging the scientific basis for Gabriel's timing of the alleged injury.[1] The trial court excluded Gabriel's testimony, finding that it was too speculative and that it lacked sufficient scientific basis to be admissible. Plaintiff was thus left without an expert to testify to causation, and, consequently, the trial court granted defendants' motion for summary disposition.

Plaintiff argues that the trial court abused its discretion by excluding Gabriel's testimony, and therefore, that summary disposition should not have been granted. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). The trial court's decision to grant defendants' motion for summary disposition resulted from its decision to exclude Gabriel's testimony. This Court reviews 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); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

To establish medical malpractice, a plaintiff must prove the following elements: (1) the applicable standard of care, (2) breach of that standard, (3) injury, and (4) proximate causation between the alleged breach and the injury. *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997). To establish proximate cause, plaintiff must prove the existence of both cause in fact and legal cause. *Id*., citing *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To prove cause in fact, plaintiff must present substantial evidence from which a jury

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[1] This was defendants' second motion for summary disposition. The first, challenging plaintiff's ability to establish proximate cause because Gabriel's testimony indicated that the injury could have occurred before the defendants were called to attend to plaintiff's mother, was denied. Defendants assert that the trial court's decision on this motion was in error, and that this serves as an alternative ground for affirmance. Because we conclude that the trial court did not abuse its discretion by excluding Gabriel's testimony, we need not address the trial court's earlier decision.

may conclude that more likely than not, but for defendants' conduct, plaintiff's injuries would not have occurred. *Weymers*, *supra* at 647-648; see also, *Craig*, *supra* at 86-87. It is not sufficient for plaintiff to show that defendants may have caused her injury. Instead, she must "set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Craig*, *supra* at 87; *Skinner*, *supra* at 174. And, while "'[t]he evidence need not negate all other possible causes,'" it "'must exclude other reasonable hypotheses with a fair amount of certainty.'" *Id.* at 166, quoting 75A Am Jur 2d, Negligence, § 461, p 442

MRE 702 and MCL 600.2955 govern the admission of expert testimony. *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 thus 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). Similarly, 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:
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> (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 and that the expert's opinion is reliable. *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1067; 729 NW2d 221 (2007).

Gabriel testified during his deposition that plaintiff's alleged neurological injury probably occurred during a window of time from 12 to 24 hours before her birth. Gabriel seemingly relied primarily on fetal heart rate monitoring, biophysical profiles and placental pathology to reach this conclusion. However, plaintiff did not present, and Gabriel could not cite, any scientific support for the proposition that those measures permit timing of an intrapartum neurological insult, especially considering that plaintiff's newborn condition did not demonstrate significant neurological deficits.

Plaintiff repeatedly points to Gabriel's reliance on generally accepted methods of monitoring fetal well-being as establishing the reliability of his conclusion that she suffered a neurological injury in the period leading up to her birth. Plaintiff asserts that, if these measures were not meaningful for predicting fetal compromise, they would not be used for that purpose. There is no dispute that these measures are widely used for evaluating or tracking intrauterine fetal well-being. However, plaintiff offers nothing to support Gabriel's assertion that a decline in fetal well-being as evidenced by these measures, such as and to the extent indicated here, provides a scientifically reliable basis for timing a neurological injury.

Defendants presented the trial court with literature indicating that there is no scientific basis for relying on fetal heart rate monitoring or biophysical profiles as predictive of a neurological injury resulting in cerebral palsy, as well as reporting that most cases of cerebral palsy result from developmental abnormalities, metabolic abnormalities, autoimmune and coagulation defects, infection, trauma, or some combination of these factors, and not from intrapartum hypoxia. Plaintiff offered nothing to refute this, or to otherwise indicate that, based on scientifically reliable principles and methods applied to the underlying data, intrauterine hypoxia-ischemia during the 12 to 24 hours preceding plaintiff's birth was the most likely cause of her cerebral palsy. Indeed, the literature supplied by plaintiff agreed that a majority of cases of cerebral palsy are caused by factors that occur before the onset of labor and, more broadly, that most of the problems that lead to stillbirth, brain damage, seizure disorders and cerebral palsy are not intrapartum problems, but have already occurred by the time a patient comes in to labor and delivery. Literature submitted by plaintiff noted further that, with regard to biophysical profile scores, hypoxemia is the least likely reason for the absence of a particular activity. Additionally, Gabriel admitted that not all fetuses that demonstrate the fetal heart rate patterns or biophysical profiles exhibited by plaintiff suffer permanent neurological injury. And, he could point to no accepted scientific principles or methodology, nor to support in scientific literature, for the notion that measures of fetal well-being provide a reliable scientific basis for timing intrauterine neurological injury.

There is no dispute that Gabriel based his opinion on data obtained from generally accepted measures of fetal well-being. However, plaintiff has offered nothing to support the assertion that Gabriel's conclusion resulted from the application of scientifically reliable principles or methods to that data. Instead, Gabriel opined that, because plaintiff suffered some

type of neurological injury resulting in the development of a seizure disorder and mild cerebral palsy, the period of time preceding her birth presented a "legitimate" or "likely" window of time in which to postulate, retrospectively, that the injury "probably" occurred. As our Supreme Court has explained, speculation "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Skinner*, *supra* at 164. Plaintiff does not point to anything in the record, or otherwise, that suggests that Gabriel's opinion as to the timing of her alleged injury is anything other than speculation, consistent with known facts, but not deducible from them. Therefore, we find that the trial court's decision to exclude Gabriel's testimony was within the range of principled outcomes, and consequently, was not an abuse of discretion. *Woodard*, *supra* at 557; *Maldonado*, *supra* at 388. Further, because plaintiff was left without expert testimony to establish causation, the trial court did not err in granting summary disposition to defendants.

We affirm.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio