STATE OF MICHIGAN

COURT OF APPEALS

ROSEMARY SMOTER and DAVID SMOTER, Plaintiffs-Appellants, v NANCY Z. LOCKHART, M.D., HURON VALLEY HOSPITAL, INC., d/b/a HURON VALLEY-SINAI HOSPITAL, HURON VALLEY-SINAI HOSPITAL QUICK CARE and DMC HOSPITAL PARTNERSHIP, Defendants-Appellees.	UNPUBLISHED August 4, 2009 No. 283986 Oakland Circuit Court LC No. 2006-075431-NH

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's dismissal of their cause of action. On appeal, plaintiffs argue that the trial court abused its discretion when it excluded the testimony of plaintiffs' expert witnesses on the question of proximate cause. We affirm.

This case arises out of an injury sustained by plaintiff, Rosemary Smoter, while working on her Alpaca ranch. Smoter's lower left leg was pinned between a golf cart and a gate, causing a "crush-type injury." Defendant, Nancy Z. Lockhart, M.D., examined Smoter in the emergency room and, after determining that there were no bone fractures, applied a splint and told Smoter to visit her primary physician in three or four days. Smoter subsequently developed nerve damage – reflex sympathetic disorder (RSD) – in which her leg is persistently swollen and painful to even light touch. Plaintiffs, Smoter and her husband, sued Lockhart and the hospital, alleging that Lockhart negligently placed an inappropriately rigid splint on Smoter's leg, causing her RSD.

On appeal, Smoter argues that the trial court improperly excluded the testimony of their two expert witnesses on the subject of causation. A trial court's decision to exclude or admit evidence is reviewed for an abuse of discretion. *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234 (2008). A trial court abuses its discretion where its decision falls outside the range of principled outcomes. *Id*. Interpretations of court rules are questions of law that are reviewed de novo. *Reed v Reed,* 265 Mich App 131, 164; 693 NW2d 825 (2005).

MRE 702 regulates the admission of testimony by experts. An expert who is qualified may testify in the form of an opinion 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." MRE 702. Further, MCL 600.2955 governs the admission of "scientific or expert opinion or evidence." The statute requires that proffered opinion testimony be "reliable and [] assist the trier of fact" in order to be admissible. MCL 600.2955(1). Further, the trial court must examine the basis for the expert's opinion, including the "facts, technique, methodology, and reasoning relied upon by the expert." *Id*. Finally, MCL 600.2955(1) also provides seven factors that the trial court should consider in making this determination.

It is the trial court's responsibility to act as a gatekeeper of expert testimony and ensure that any such testimony meets these criteria. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004); see also *People v Yost*, 278 Mich App 341, 393-394; 749 NW2d 753 (2008). The proponent of the evidence has the burden of demonstrating that the expert's testimony satisfies these criteria. *Gilbert, supra* at 780.

In this case, there is no dispute regarding the qualifications of the proffered witnesses; they are both highly qualified physicians. MRE 702. Further, there is no dispute that the witnesses' opinions were based on the facts and data of the case. MRE 702(1). The issue in this case is whether the witnesses provided reliable principles and methods with which to base their opinions on causation. MRE 702(2) and (3). Our Supreme Court addressed this issue squarely in *Gilbert, supra*:

> [I]t 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.
>
> *Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation*. [*Gilbert, supra* at 782 (internal citations omitted; emphasis added).]

Defendants argued, and the trial court agreed, that neither witness proffered *any* principles or methodology, reliable or not, through which they reached their ultimate conclusions with respect to causation. Both witnesses acknowledged that Smoter's nerve damage *could* have been caused by either the original crush injury *or* by an inappropriately rigid splint after the injury. When asked on what basis he thought that it was "more likely than not" that the nerve damage was a result of the splint, John Dale Dunn, an emergency medicine physician, testified:

> [M]y opinion has to be based upon my analysis that says, [it is] unlikely that the breakdown of the skin that occurred in the center of the hematoma[1] is due

[1] Smoter developed a hematoma in her ankle that eventually broke through the skin. The (continued…)

> to the injury as much as the fact that this [splint] was putting too much pressure on her ankle.
>
> * * *
>
> I think that's the reasonable way to look at this case if nobody comments on the skin being damaged in a way that would alert them to the possibility of a penetrating injury or the potential for a joint-space compromise from the break of the skin.
>
> * * *
>
> So, if the examination was done properly by [Lockhart] and she makes no comment about the skin being damaged, I think it's reasonable to say that it wasn't. [Footnote added.]

In sum, Dunn is stating that, as a matter of logic, if Lockhart did not observe a hematoma compromising the integrity of the skin at the time of her examination, then such a hematoma must have occurred later, as a result of the splint. This is, in turn, evidence that the splint was causing too much pressure and, therefore, must have caused the nerve damage as well.

Nothing in Dunn's testimony reveals what methods or principles he applied to reach this conclusion. He stated that it is possible for a hematoma to be caused by a crush injury but to be initially invisible, and that a crush injury can cause, by itself, nerve damage, but concluded that, in this case, the presence of the hematoma after the splint was removed demonstrates that the splint caused the nerve damage. Further, in response to the direct question, "And why do you have that opinion?," Dunn stated, "[B]ecause I think that's the reasonable way to look at this case."

Plaintiffs have failed to demonstrate that Dunn applied any principles or methodology apart from his experience and intuition as a doctor. See *People v Unger*, 278 Mich App 210, 217-218; 749 NW2d 272 (2008) ("An expert's opinion is admissible if it is based on the 'methods and procedures of science' rather than 'subjective belief or unsupported speculation.' " (quoting *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 469 [1993]). We conclude that the trial court did not abuse its discretion when it concluded that Dunn did not present any evidence that his opinion regarding causation was based on "reliable principles and methods." MRE 702.[2]

Similarly, Mark D'Esposito, a neurologist, was asked a very direct question regarding the basis of his opinion: "Between the splint and the accident, what do you base your opinion on that it was the splint that's more likely than not the cause of the RSD?" D'Esposito responded:

(…continued)

hematoma was apparently first visible when her primary physician removed the splint.

[2] We further note that it is unnecessary to consider the statutory factors regarding the *reliability* of the basis of the witness's opinion when the basis, itself, has not been presented.

> I believe that the hematoma developed after the initial injury and while she had the splint on, and that it was the hematoma, the expansion of the hematoma and its inability to expand and its compression on a nerve and soft tissue that led to further injury, which is more likely the trigger of the RSD.

In response to a follow up question regarding whether his conclusion would be different if the hematoma had been present from the original injury, he responded:

> Because of the mechanism I just talked about was several days of compression of soft tissue and nerve by a hematoma, which would be more, there would be more compression if the hematoma was restricted in how it could expand, as opposed to if there wasn't a cast and the hematoma could contract, or at least the skin would have some room to expand.

Elsewhere, D'Esposito testified that a crush injury could cause a hematoma that led to nerve damage without the introduction of a splint. He further testified that a hematoma could have been present but invisible at the time the splint was applied. Finally, he testified that the mechanism by which RSD develops is not well understood. Nevertheless when asked directly on what he based his opinion regarding the development of RSD *in this case*, he simply restated his opinion. He provided no principles or methodology establishing *how* he formed this opinion. Thus, we conclude that the trial court also did not abuse its discretion when it excluded D'Esposito's testimony.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello