STATE OF MICHIGAN

COURT OF APPEALS

ALEXIS MORGAN, a Minor, by her conservator, RHONDA JO MORGAN,

Plaintiff-Appellant,

v

ALFRED K. BEDIAKO, M.D., HILLSDALE OBSTETRICS & GYNECOLOGY, P.C., and HILLSDALE COMMUNITY HEALTH CENTER,

Defendants-Appellees.

UNPUBLISHED
December 21, 2010

No. 293409
Hillsdale Circuit Court
LC No. 08-000557-NH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants summary disposition. We affirm.

The trial court excluded the causation testimony of Dr. Ronald C. Gabriel, M.D. and because of the lack of causation testimony, the trial court granted summary disposition in favor of defendants. Plaintiff argues that the causation opinion of Ronald C. Gabriel, M.D. was the product of reliable methodology as demonstrated by the articles upon which he relied. In addition, Dr. Gabriel's opinion should have been deemed reliable and based on proper methodology because of his extensive education and experience as well as the fact that he reviewed medical records in arriving at his opinion. Hence, plaintiff argues that the exclusion of Dr. Gabriel's testimony was an abuse of discretion. We disagree.

"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). An abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes. *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). We also review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual

sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568.

The Court in *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995), provided the elements of a medical malpractice cause of action as follows:

> In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal. [Footnote omitted.]

Causation in medical malpractice cases has been codified in MCL 600.2912a(2), which provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants.

See also *Craig*, 471 Mich at 86. In a medical malpractice case, "expert testimony is required to establish . . . causation." *Thomas v McPherson Community Health Ctr*, 155 Mich App 700, 705; 400 NW2d 629 (1986). 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.

See also MCL 600.2955.

"MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). This obligation of the trial court is referred to as the gatekeeper's role. *Id*. at 779-780. "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.'" *Id*. at 780. Consequently, "the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Id*. at 782. Hence, "junk science" must be excluded from evidence. *Id*. "Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Id*. Furthermore, reliability is considered to be the "cornerstone requirement of MRE 702." *Edry v Adelman*, 486 Mich 634, 640; 786 NW2d 567 (2010).

We conclude that the trial court did not abuse its discretion when it excluded Dr. Gabriel's causation testimony because such testimony was not reliable. MRE 702; *Craig*, 471 Mich at 76. Dr. Gabriel relied on six articles in forming his opinion. We find no error in the trial court's conclusion that there was no peer review or scientific study corroborating or testing the theory on which Dr. Gabriel's opinion was based. As noted by the trial court, Dr. Gabriel appeared to be simply "taking bits and pieces of these studies, forming a theory, which has yet to be subjected to peer review or published." Additionally, we conclude that plaintiff's argument that Dr. Gabriel's opinion should have been deemed to be based on reliable methodology because of his extensive education and experience as well as the fact that he reviewed medical records in arriving at his opinion is without merit. His education and experience relates to his qualifications, and not to whether his testimony is based on reliable principles and methods that he applied reliably to the facts of this case. MRE 702. The trial court did not abuse its discretion by excluding Dr. Gabriel's testimony. *Craig*, 471 Mich at 76. And, the trial court properly granted defendants summary disposition because plaintiff could not prove causation. *Coblentz*, 475 Mich at 567-568; *Craig*, 471 Mich at 85.

Plaintiff also argues that it was error requiring reversal for the trial court to determine that the expert's opinion was too speculative without first holding a hearing to determine whether his theory has received general scientific acceptance. In this case, plaintiff does not cite anything in particular that would be provided at an evidentiary hearing that was not considered by the trial court when it conducted a hearing on the motion. Rather, plaintiff merely indicates that an evidentiary hearing should have been conducted in order to "let qualified experts in obstetrics and gynecology, neonatologists, and neurologists explain to the circuit court how the technology available can be used to evidence the damage that is occurring to the fetus." Moreover, it is clear that the trial court provided a thoughtful analysis, which included reviewing and discussing the deposition testimony of Dr. Gabriel, the articles upon which Dr. Gabriel's opinion relied, and the applicable law in this area. Hence, we find that the trial court sufficiently considered the issue and performed a "searching inquiry" before striking Dr. Gabriel's testimony and thus the trial court did not abuse its discretion by striking Dr. Gabriel's testimony without first conducting an evidentiary hearing. MRE 702. See also *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597; 705 NW2d 703 (2005), where this Court 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 addition, plaintiff argues that a genuine issue of material fact existed as to whether the injury was a natural and probable consequence of the breach of the standard of care specified by plaintiff's liability experts. We find that this argument is without merit. Plaintiff's only causation expert was properly excluded. Therefore, defendants were entitled to summary disposition regardless whether there was a genuine issue of material fact as to an alleged breach of the standard of care. See *Craig*, 471 Mich at 85, where the Michigan Supreme Court indicated that judgment in defendants' favor is proper when the causation element of a medical malpractice claim cannot be established.

Plaintiff also argues that the testimony of Ronald Zack, M.D. relating to the standard of care and Robert B. Ancell, M.D. relating to the loss of future earning capacity should not have been excluded. These issues are moot given our resolution that summary disposition was proper. See *Clinton Township v Mt Clemens*, 171 Mich App 288, 291-292; 429 NW2d 656 (1988) ("An

issue is moot when an event occurs which renders it impossible for the reviewing court to grant relief."); also see *School Dist v Kent County Tax Allocation Bd*, 415 Mich 381, 390; 330 NW2d 7 (1982) ("[A]s a general rule, this Court will not entertain moot issues or decide moot cases.").

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens