STATE OF MICHIGAN

COURT OF APPEALS

RICHARD T. CLERC, Personal Representative of the ESTATE OF SARALYN M. CLERC, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED November 14, 2013
v	No. 307915 Chippewa Circuit Court LC No. 01-005641-NH
CHIPPEWA COUNTY WAR MEMORIAL HOSPITAL, and ROBERT BAKER, M.D., Defendants-Appellees/Cross-Appellants.	

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

In this medical malpractice wrongful death case, plaintiff Richard Clerc appeals as of right the trial court's order striking the testimony of his causation expert, Dr. Stephen Veach pursuant to MRE 703, and dismissing the case. Plaintiff also appeals the trial court's order striking the testimony of his economic loss expert Nitin V. Paranjpe, Ph.D. On cross-appeal, defendants Chippewa County War Memorial Hospital and Robert Baker, M.D., appeal the trial court's order denying their motion to strike plaintiff's causation experts, Dr. Veach and Dr. Barry Singer, under MRE 702 and MCL 600.2955 and denying their motion for summary disposition pursuant to MCR 2.116(C)(10). Because we conclude that the trial court abused its discretion by striking both experts, we reverse and remand for further proceedings consistent with this opinion.

This case is before us again after our Supreme Court remanded it to the trial court. The basic factual background was set forth by this Court previously in *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 598-600; 705 NW2d 703 (2005):

> Plaintiff's decedent sought medical treatment for symptoms that were consistent with pneumonia. In July 1997, defendant Robert Baker, M.D., a radiologist, reviewed an x-ray of the decedent's chest and lungs. At that time, Dr. Baker reported no abnormal findings. In February 1998, however, plaintiff's decedent was diagnosed with lung cancer, which claimed her life in March 1999. Plaintiff thereafter filed a medical malpractice wrongful death action against Dr. Baker and Chippewa County War Memorial Hospital, the hospital with which Dr.

Baker was affiliated. Plaintiff primarily alleged that Dr. Baker was negligent in reading and interpreting the results of the July 1997 chest x-ray and that the delay in diagnosing the decedent's lung cancer delayed treatment and caused her death.

During discovery, plaintiff deposed his causation experts, Drs. Stephen Veach and Barry L. Singer. Both doctors are board-certified in medical oncology. According to the doctors' deposition testimony, lung cancer is staged at Stages I through IV for the purposes of treatment and prognosis. Patients with Stage I lung cancer have a five-year survival rate of seventy percent, while patients with Stage II lung cancer have a five-year survival rate of forty percent. Dr. Veach testified that the decedent's lung cancer would have been at either Stage I or Stage II in July 1997. However, he conceded that he could not state with a reasonable degree of certainty how much the decedent's cancer had metastasized in July 1997. Dr. Singer testified that the decedent's lung cancer would have been at either Stage I or Stage II in 1997, but that he "favored" staging the cancer at Stage I at that time. When asked what literature or information he relied on in forming his opinion, Dr. Singer asserted that he was relying on his "general experience" as an oncologist. Dr. Singer conceded that he could not state with a reasonable degree of probability that the decedent's cancer was at Stage I or II in July 1997. However, he stated that he could conclude with a reasonable degree of certainty that if the decedent's cancer had been diagnosed in July 1997, her chances of survival would have been sixty percent. Dr. Singer based his opinion about the decedent's chances of five-year survival on what he called the "weighted averages" of the five-year survival rates for individuals with Stage I or Stage II lung cancer.

Defendants filed separate motions to strike plaintiff's causation experts' testimony, arguing that it was speculative and lacked a reliable scientific basis. Specifically, defendants contended that plaintiff's experts' testimony was inadmissible under MRE 403, MRE 702, and MCL 600.2955. In the alternative, defendant hospital moved for the trial court to conduct a *Davis-Frye* hearing. Defendants also moved for summary disposition under MCR 2.116(C)(10).

The trial court ruled that while plaintiff's experts were qualified, they did not have a scientific basis for asserting that the decedent's cancer was at Stage I or Stage II in July 1997, and it was therefore impossible to determine the stage of the decedent's cancer in July 1997. The trial court characterized as mere "speculation and conjecture" plaintiff's experts' contention that had the decedent's cancer been diagnosed in July 1997, the decedent would have had a greater than fifty percent chance of surviving the cancer. Without plaintiff's experts' testimony, plaintiff was unable to establish that the decedent would have had a greater than fifty percent chance to survive. Therefore, the trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10).

This Court concluded that the trial court did not properly exercise its gatekeeper role under MRE 702, and remanded the case to the trial court to either conduct a *Davis-Frye*[1] evidentiary hearing or a more thorough inquiry under MRE 702. *Id.* at 607. In *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067; 729 NW2d 221 (2007), our Supreme Court remanded the case to the trial court on "a basis different from that articulated by the Court of Appeals," in lieu of granting leave to appeal. The Court ordered the trial court to consider the factors listed in MCL 600.2955 on remand. *Id.*

On remand, the trial court held another hearing regarding defendants' motion to strike Drs. Veach and Singer. Following the hearing, the trial court issued a written opinion reversing its previous decision and denying defendants' motion to strike and motion for summary disposition. The trial court concluded that under MRE 702 and MCL 600.2955, the testimony of plaintiff's causation experts, Drs. Veach and Singer,[2] was based on sufficient factual data and was the product of reliable principles or methods.

The case progressed after the trial court's denial of defendants' motion. Relevant to the issues on appeal, defendants next moved to strike Paranjpe, who was slated to testify as an economic loss expert. Following a hearing on the motion, the trial court issued a written opinion granting defendants' motion to strike Paranjpe. Specifically, the trial court concluded that it would be "inappropriate and prejudicial to permit the jury to hear the testimony" of Paranjpe, and that it would be "error" for it to "attempt to address or correct the deficiencies of Dr. Paranjpe's testimony by some sort of instruction to enable the jury to extrapolate and/or determine the amount of income tax the decedent would have paid on future earnings, had she survived, as well as the amount of 'personal consumption expense' to be deducted."

Next, defendants again moved to strike Dr. Veach as an expert witness. This time, defendants argued that Dr. Veach should be struck because his opinion regarding proximate cause was based on "possible theories and events," and was thus purely speculative. Defendants further argued that because Dr. Veach's opinion testimony would be speculative, it would be confusing and misleading to the jury and would unfairly prejudice defendants. Defendants specifically argued in their motion to strike that "MRE 702, MRE 703, and MCL 600.2169 mandate that an expert's opinion be shown by his proponent and determined by the court, as gatekeeper, to be reliable and based on reliable facts and data before it is admissible." Thus, defendants maintained that pursuant to the aforementioned court rules and statute, Dr. Veach's testimony was not admissible because it was speculative.

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[1] See *People v Davis*, 343 Mich 348, 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46, 293 F 1013 (1923). The *Davis-Frye* test allows the admission of expert testimony regarding novel scientific evidence only if the evidence has gained general acceptance among scientific experts in the field.

[2] Plaintiff later voluntarily removed Dr. Singer from his witness list, and endorsed only Dr. Veach as plaintiff's causation expert for trial.

On November 23, 2011, the trial court held a hearing regarding defendants' new motion to strike Dr. Veach as an expert witness. During the hearing, defendants argued that the motion to strike was brought because examination of Dr. Veach's testimony demonstrated that his testimony failed to "ring the proximate cause bell" because it was speculative, did not constitute opinion testimony based on factual evidence, and the opinions stated by Dr. Veach were not "within a reasonable degree of medical certainty."

The trial court issued its opinion orally from the bench following the parties' arguments. First, the trial court stated that "the critical issue in this case is whether or not the testimony of Dr. Veach can be reconciled with the requirements of [MRE] 703." The trial court found that under MRE 703, the evidence on which the expert's opinion is based must be in the record, and that the opinion cannot be based on "assumptions, speculations, [or] possibilities." The trial court then ruled that Dr. Veach's testimony must be stricken under MRE 703 because it was based upon speculation or possibilities or conjecture, and Dr. Veach himself admitted that his opinions were based upon "what-ifs or conjecture or speculation," and that this basis was not sufficient to present the case to the jury. Following plaintiff's counsel's admission that he could not prove the causation element of his malpractice claim without the testimony of Dr. Veach, the trial court dismissed the case. An order striking Dr. Veach's deposition testimony and dismissing the case for the reasons set forth on the record was subsequently entered (Order, December 16, 2011, lower court file #15).

Plaintiff now appeals the trial court's orders striking Dr. Veach and Paranjpe as experts. Defendants cross-appeal the trial court's order finding Dr. Veach's testimony admissible under MRE 702 and MCL 600.2955.

I. STANDARDS OF REVIEW

"The determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001). We also review for an abuse of discretion a trial court's decision to grant a motion to strike. *Kalaj v Khan*, 295 Mich App 420, 425; 820 NW2d 223 (2012). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of reasonable and principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

We review de novo the proper interpretation of statutes and court rules. *Taylor v Kent Radiology*, 286 Mich App 490, 515; 780 NW2d 900 (2009).

Further, the trial court's order finding that Dr. Veach's testimony was admissible under MRE 702 and MCL 600.2955 also denied defendants' motion for summary disposition under MCR 2.116(C)(10). We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving

party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

II. APPLICABLE LEGAL PRINCIPLES

In *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004), the Court explained the elements a plaintiff must demonstrate in order to establish a cause for medical malpractice:

> (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care.

These elements are codified in MCL 600.2912a. Expert testimony is required to establish the standard of care and to demonstrate a defendant's breach of that standard. *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010). Expert testimony is also required to establish causation. *Teal v Prasad*, 283 Mich App 384, 394; 772 NW2d 57 (2009). The proponent of evidence bears the burden of establishing the admissibility of that evidence. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Relevant in this case, proximate cause must be proved by a preponderance of the evidence. *Craig*, 471 Mich at 86, citing MCL 600.2912a(2) (stating that "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").

III. ADMISSION OF DR. VEACH'S TESTIMONY UNDER MRE 702 AND MCL 600.2955

On cross-appeal, defendants argue that the trial court erred by denying their motion to strike Dr. Veach pursuant to MRE 702 and MCL 600.2955, and consequently, denying their motion for summary disposition under MCR 2.116(C)(10).[3]

The admissibility of scientific or expert testimony is governed by MCL 600.2955, which provides in pertinent part:

> (1) 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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[3] We address the cross-appeal issue whether the trial court erred by finding that Dr. Veach's testimony was reliable and thus, admissible, under MRE 702 and MCL 600.2955, first because analysis of whether Dr. Veach's testimony was purely speculative depends on the reliability of the science on which his opinion is based.

> (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. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (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 of the context of litigation.

Also relevant to the admissibility of an expert's testimony is MRE 702, which 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.

Finally, MCL 600.2169(2) requires that in an action alleging medical malpractice, the trial court shall evaluate, at a minimum the proposed expert's education and professional training, the area of specialization of the expert, the length of time the expert has engaged in active clinical practice or instruction, and the relevancy of the expert's testimony.

The proponent of evidence bears the burden of establishing the admissibility of that evidence. *Gilbert*, 470 Mich at 781. A trial 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. The Court explained that a trial court's gatekeeper role

> applies to *all stages* of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it 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. [*Id.* (emphasis in original).]

Moreover in *Clerc*, 477 Mich at 1068, the Court noted that in order to fulfill its gatekeeper role, a trial court "shall" consider the factors set forth by MCL 600.2955. In that case, the Court remanded the case back to the trial court because the trial court failed to "consider the range of indices of reliability listed in MCL 600.2955," and instead focused only on plaintiff's failure to present specific studies on the growth rate of untreated cancer. *Id.* Accordingly, specific analysis of all the statutory factors is required.

In this case, affidavits executed by Dr. Veach, Dr. Singer, and Dr. Perry and depositions of the three doctors were entered into the record in support of the reliability of the expert testimony. Moreover, copies of several publications discussing cancer staging, diagnosis, and treatment were also admitted into the trial court record. In its written opinion, the trial court specifically noted that its decision was based on the deposition testimony, affidavits, and articles, and it concluded that

> the testimony of Dr. Veach . . . regarding what stage the decedent's cancer was in July 1997, and the respective survival rates as testified to, are based on sufficient factual data and the product of reliable principles or methods as required in MRE 702.
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> The court further finds based upon the foregoing, and the testimony of Dr. Michael Perry, plaintiff's methodology expert, that "backward staging" of lung cancer does not constitute a novel scientific principle. However, consideration of the factors set forth under MCL 600.2955 establishes plaintiff's causation expert testimony regarding "backward staging" of decedent's cancer to July 1997 was supported by medical and scientific evidence data. Plaintiff's causation and methodology experts explained the basis for the propriety of engaging in "backward staging," which included the doctors' individual knowledge and experience, the general knowledge in the scientific community, the type of cancer, the decedent's individual medical presentation as well as additional relevant factors. Further, the testimony of plaintiff's experts determined that the decedent's lung cancer in July 1997 was no greater than Stage II, and that Dr. Baker failed to recognize the presence of the cancer at that point.
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> Specifically, the court finds the expert opinions of Dr. Veach . . . and the bases for those opinions have been subject to peer review publication, are consistent with accepted standards governing the application and interpretation of Dr. Veach's . . . methodology and is generally accepted within the relevant expert community and is reliable.
>
> Accordingly, defendants' motion to strike causation testimony and for summary disposition pursuant to MCR 2.116(C)(10) is denied.

Review of the record in this case demonstrates that there was evidence to support the trial court's conclusions regarding the reliability of Dr. Veach's expert opinion. Specifically, the evidence demonstrated that Dr. Veach's opinion was supported by peer reviewed publications, and was based on generally accepted methodology that is used among oncologists in the practice of treating patients. Thus, §§ 2955(1)(b), (e), (f), and (g) favor admissibility.

While there have been no scientific tests, and thus there is no known potential error rate, relevant to §§ 2955(1)(a) and (d), Dr. Singer explained in his deposition that there has been "no control study" regarding the growth of lung cancer because no one would diagnose a patient with lung cancer and then not treat that patient. Thus, Dr. Singer explained that there will never be a study where you find someone with Stage I cancer and simply watch it progress to Stage IIIB. This Court specifically acknowledged the difficulty of studying this type of methodology when this case was first before us. We observed that

> there are unique complications with establishing the reliability of this type of testimony because conducting a medical or scientific study on this subject would require cancer patients to do the unthinkable: volunteer to participate in a study in which their cancer would be left untreated so that doctors could then track the progression and staging of their cancer. No patient would volunteer for such a study, and no ethical medical or scientific study would ask cancer patients to submit to such a study. [*Clerc*, 267 Mich App at 605.]

Moreover, it is not necessary for proffered testimony to satisfy all seven § 2955(1) factors in order to be admissible. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 137-138; 732 NW2d 578 (2007). See also *In re Noecker*, 472 Mich 1, 11-12; 691 NW2d 440 (2005) (holding that an expert was qualified to testify under MRE 702 without satisfying every statutory factor). In *People v Unger*, 278 Mich App 210, 220; 749 NW2d 272 (2008), this Court recognized that the absence of medical or scientific literature to support an expert's conclusions did not require the conclusion that the expert's opinion was unrealizable, inadmissible, or based on junk science because "not every particular factual circumstance can be the subject of peer-reviewed writing." Similarly, in this case, the lack of scientific studies regarding backwards staging is not fatal to the reliability of the methodology because backwards staging does not lend itself to scientific studies, as recognized in *Clerc*, 267 Mich App at 605.

Regarding § 2955(1)(c), there was no testimony specifically regarding generally accepted standards governing the application and interpretation of the methodology. However, because every factor need not apply or favor admissibility in order for a court to determine that an expert's opinion is reliable, the absence of evidence regarding this factor is not fatal to the admissibility of Dr. Veach's testimony. *Chapin*, 274 Mich App at 137-138.

The evidence similarly supports admissibility under the MRE 702 criteria. First, Dr. Veach's testimony is based on sufficient facts or data because it is based on Dr. Veach's personal examination of the decedent, his review of her medical records, and his knowledge and experience as a certified oncologist. Second, Dr. Veach's testimony is the product of reliable principles and methods because, as discussed *supra*, backwards staging of cancer is a generally accepted methodology supported by medical literature and relied upon by oncologists in their treatment of patients. Third, there is no evidence that suggests Dr. Veach failed to apply the

principles and methods reliably to the facts of the case. Both Dr. Singer and Dr. Perry agreed with Dr. Veach that the decedent's cancer was at Stage I or Stage II in July 1997.

Finally, under MCL 600.2169(2), there is no dispute that Dr. Veach has appropriate education and professional training, that he has actively engaged in clinical practice, or that his testimony is relevant. In his affidavit, Dr. Veach stated that he was a licensed physician board certified in internal medicine and oncology. He stated his primary interest is lung cancer, and submitted his curriculum vitae indicating his education, employment, honors, awards, memberships, committee appointments, editorial positions, licenses, board certifications, and publications. He further stated that he is a member of the Sloan-Kettering Cancer Center and clinical director of the Memorial Sloan-Kettering International Center.

Therefore, we conclude that the trial court did not abuse its discretion by holding that Dr. Veach's testimony was admissible under MCL 600.2955, MRE 702, and MCL 600.2169. Accordingly, the trial court properly denied defendants' motions to strike and for summary disposition.

IV. EXCLUSION OF DR. VEACH'S TESTIMONY UNDER MRE 703

On direct appeal, plaintiff first argues that the trial court erred by granting defendants' motion to strike Dr. Veach pursuant to MRE 703 and/or because Dr. Veach's testimony relies on speculation and fails to establish proximate cause.

MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

This Court has held that "MRE 703 does not preclude an expert from basing an opinion on the expert's personal knowledge." *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 735; 761 NW2d 454 (2008). In *Morales*, this Court held that the testimony of a registered nurse was not barred by MRE 703 because the nurse's testimony was based on her "own direct, personal knowledge." *Id.* at 733. The nurse testified that she had more than 20 years' experience in the relevant area, and that she had personally reviewed the plaintiff's care needs. She further testified that she had personal experience with how much home health care agencies generally charge. *Id.* at 734. Thus, this Court held that her expert testimony satisfied the requirements of MRE 703. *Id.* at 735.

The parties also argue that Dr. Veach's testimony was properly stricken, and dismissal of the case was consequently proper, because his testimony was too speculative to establish proximate cause. "'Proximate cause' is a legal term of art that incorporates both cause in fact and legal cause." *Craig*, 471 Mich at 86. Pertinent here, the *Craig* Court explained:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the

> foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.
>
> As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries.
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> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause. [*Id.* at 86-87.]

Said differently, to establish proximate cause the "plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994), quoting *Mulholland v DEC Int'l Corp*, 432 Mich 395, 416 n 18; 443 NW2d 340 (1989), quoting Prosser & Keeton, Torts (5th ed), § 41, p 269.

The amount of evidence required to demonstrate causation has been discussed in depth by this Court and our Supreme Court. For example, in *Skinner*, the Court held that a mere possibility is not sufficient, and "when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." 445 Mich at 165. Similarly, this Court has explained that to prove causation, "expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury." *Teal*, 283 Mich App at 394 (quotation marks and citation omitted). "Instead, plaintiffs must set forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Id.* at 394-395 (quotation marks and citation omitted). Expert testimony must be supported by facts in evidence, and while the evidence need not negate all other possible causes, the causation evidence must exclude other reasonable hypotheses with a fair amount of certainty." *Id.* at 395.

In this case, Dr. Veach was deposed in February 2003 in anticipation of a trial. He testified that he examined the decedent on one occasion in April 1998 after she scheduled an evaluation at the Sloan-Kettering Cancer Center, where Dr. Veach was employed. Dr. Veach testified that he was provided with all of the decedent's medical records for review, including records from physician evaluations, pathological materials, films, CT scans, and x-rays. After meeting with the decedent and reviewing all the materials, Dr. Veach concluded that she had non-small cell carcinoma of the lung, and that she was at Stage IIIB. Dr. Veach explained that this type of cancer is "staged" for purposes of treatment and prognosis as I, II, III, and IV. Dr. Veach testified that after reviewing all the records, including the reports and x-ray records, he believed that the decedent's cancer was present in July of 1997. Dr. Veach explained that because the patient was not recovering from her pneumonia, a chest x-ray and a CT scan should have been performed, especially when chest x-rays showed an abnormality but did not show any particular change. Dr. Veach explained that a CT scan would have shown an abnormality in the lung area that the chest x-ray showed, and that from there, because cancer cannot be diagnosed based on a CT scan, a bronchoscopy would be performed to diagnose the cancer. Dr. Veach

testified that in July 1997, the cancer would have been at Stage I or II. He explained that the difference between the stages was the size, and the "only evidence that we have was a very small nodule which could have been Stage I." He explained that in general among all patients, the five-year survival rate for Stage I cancer is 70 percent and that the survival rate for Stage II cancer is 40 percent. (Veach Dep, 40-42.) Dr. Veach testified that in his opinion, regardless of whether the decedent had Stage I or Stage II cancer, if she had been diagnosed with cancer in July 1997 she would have had a "good chance of surviving" because of the type of cancer she had and the fact that her tumor "may have grown very slowly." When specifically asked for a percentage of survival chances for the decedent had the July 1997 x-ray been properly read and the cancer diagnosed sooner, Dr. Veach said "at least a 60 to 70 percent chance of survival." (Veach Dep, 44-45.)

On cross-examination, Dr. Veach gave the following testimony that defendants now claim mandates the conclusion that his opinion was based on speculation and, accordingly, is not admissible:

> Q. You cannot say, sir, within a reasonable degree of medical certainty what a CT Scan in July 1997 would have shown can you?
>
> A. There was no CT Scan.
>
> Q. Right, so you can't say what it would have shown had it been done?
>
> A. I can suppose what it would have shown, but its supposition.

Later, Dr. Veach gave additional testimony during his cross-examination that defendants seize upon as proof of the inadmissibility of his expert opinion:

> Q. You can't say, sir, with any reasonable degree of medical certainty, what stage of cancer Saralyn Clerc would have had in July of 1997.
>
> A. Is that a question?
>
> Q. Yes, that's my question. You can't say that within a reasonable degree of medical certainty?
>
> A. I can say with a reasonable degree of medical certainty that she had a limited disease in July, much more limited than she had in March of 1998.
>
> Q. But you can't say – you can't quantify the difference between that period how much metastasis did she have in July of 1997 within a reasonable degree of medical certainty.
>
> A. One can't say.

Plaintiff's theory of malpractice is that Dr. Baker's failure to properly read the chest x-ray performed on July 7, 1997, postponed the diagnosis of cancer until a time when the decedent's life could not be saved.. It is not disputed that the July 1997 x-ray actually showed

the presence of infiltrate, contrary to Dr. Baker's finding at the time. The decedent's treating physician testified that he relied on Dr. Baker's report regarding the x-ray, and that if he had known that infiltrate was present at that time he "most likely" would have ordered a high resolution CT scan. Further, when the decedent came back with further complaints and another x-ray was performed and accurately read to note the presence of infiltrate, the appropriate tests leading to a diagnosis of cancer were in fact conducted. Specifically, a CT scan was performed leading to a bronchoscopy, and then a high resolution CT scan and another bronchoscopy, then another round of x-rays and CT scans, and a third bronchoscopy in February 1998, after which the decedent's cancer was finally diagnosed.

In light of the above evidence, we conclude at the outset that Dr. Veach's testimony clearly satisfied the requirements of MRE 703 because Dr. Veach's opinion and inferences were based on facts and data that were or would be admitted into evidence. Dr. Veach specifically testified that his opinions were based on his review of the decedent's medical records as well as his own examination of the decedent. He also based his opinions and inferences on his personal knowledge and experience. An expert's personal knowledge and experience is a proper basis for the expert's opinion. *Morales*, 279 Mich App at 735. The fact that Dr. Veach cannot conclude with certainty what a CT scan would have shown if one had been performed in July 1997 does not render his testimony inadmissible; rather, this fact merely relates to the credibility of his testimony. See *Craig*, 471 Mich at 89-90. Thus, the trial court's reliance on MRE 703 as a basis for exclusion of the testimony was a misapplication of the court rule and constituted legal error.

However, we recognize that the bulk of the parties' arguments in the trial court and on appeal address whether Dr. Veach's testimony was legally sufficient to establish causation. While defendants did not move for summary disposition on the ground that plaintiff failed to prove causation as a matter of law because his expert's opinion was based purely on speculation, that is essentially the argument that was made to the trial court and the argument that defendants reiterate on appeal. The trial court's opinion also recognized the fact that the real issue seemed to be whether Dr. Veach's expert testimony could legally establish causation because the trial court stated that it was relying on Michigan common law barring speculative expert causation testimony to support its exclusion of Dr. Veach's testimony and dismissal of the case. Thus, we will consider whether the trial court erred by concluding that Dr. Veach's testimony was too speculative to establish causation and dismissing the case.

It is well-recognized that a causation expert's opinion may not be based purely on speculation, conjecture, or supposition. See, e.g., *Craig*, 471 Mich at 93 ("Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence); *Teal*, 283 Mich App at 392-394 (holding the plaintiff failed to establish causation because causation evidence was based on speculation regarding the decedent's death). Defendants argue that this line of cases supports their position that Dr. Veach's testimony was based only on speculation and properly struck by the trial court. Specifically, defendants cite *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278; 602 NW2d 854 (1999) and *Skinner*, 445 Mich 153 as requiring the conclusion that Dr. Veach's opinion testimony is speculative and thus, inadmissible. We disagree because Dr. Veach's testimony is distinguishable from the expert testimony considered in those cases.

In *Badalamenti*, 237 Mich App at 284-285, the plaintiff's claim was that the defendant's negligent failure to diagnose and treat the plaintiff for cardiogenic shock caused the plaintiff's injuries. The plaintiff's causation expert testified there were three measurements necessary for a diagnosis of cardiogenic shock, and agreed that the plaintiff's measurements for two out of the three were within the normal range. *Id.* at 287. The plaintiff's expert further testified that his opinion was based on his "skepticism" of the tests performed by the plaintiff's treating physician and his unwillingness to accept the treating physician's finding that the wall function of the plaintiff's heart was nearly normal. *Id.* at 287. However, the plaintiff's expert acknowledged that if, "contrary to his skepticism," the test results showing normal heart wall motion were accurate, he would agree that there was no cardiogenic shock. *Id.* at 288. The plaintiff's treating physician also testified, and his testimony reinforced his findings at the time he treated the plaintiff. *Id.* at 287-288. This Court held that the plaintiff's expert "had no reasonable basis in evidence to support his opinion" that the plaintiff's left heart wall function was damaged, and that this opinion was pertinent to the conclusion that the plaintiff should have been diagnosed with cardiogenic shock. *Id.* at 288. Rather, the plaintiff's expert admitted that his opinion was based on his "skepticism and disparagement" of the treating physician's findings. *Id.* This Court concluded that such testimony "was legally insufficient to support [the plaintiff's expert's] opinion, through which plaintiff's liability theory was presented, that plaintiff was in cardiogenic shock on March 16." *Id.* at 288-289. This Court noted that the expert specifically acknowledged that on the basis of the information in the record, a competent cardiologist could logically conclude that the plaintiff did not have cardiogenic shock. *Id.* at 289. Thus, this Court concluded that the defendants were entitled to entry of a judgment notwithstanding the verdict because the plaintiff failed to present substantial, legally sufficient evidence to establish causation. *Id.*

In *Craig*, 471 Mich at 88, a medical malpractice case, the Court discussed the facts of *Skinner*, 445 Mich 153, a product liability case, to explain the basis required for a causation expert's testimony. The Court explained:

> In *Skinner*, for example, we held that the plaintiff failed to show that the defendant's negligence caused the decedent's electrocution. *Skinner* was a product liability action in which the plaintiff claimed that the decedent was killed because an electrical switch manufactured by the defendant had malfunctioned. The plaintiff's decedent had built a tumbling machine that was used to wash metal parts, and had used the defendant's switch to turn the machine on and off. Wires from the defendant's switch were attached to the tumbling machine with alligator clips. Immediately before his death, the plaintiff's decedent was found with both alligator clips in his hands while electricity coursed through his body.
>
> In order to find that a flaw in the defendant's product was a cause in fact of that electrocution, the jury would have had to conclude, in effect, that the decedent had disconnected the alligator clips and that the machine had somehow been activated again, despite being disconnected from its power source. Not only was this scenario implausible, but there was no evidence to rule out the possibility that the decedent had been electrocuted because he had mistakenly touched wires he knew to be live. There was no evidence to support the plaintiff's theory of causation. Consequently, we concluded that the trial court had properly granted

> summary disposition to the defendant. [*Craig*, 471 Mich at 88-89 (footnotes omitted).]

The Court in *Craig* also discussed *Mulholland*, 432 Mich 395, as a "useful factual counterpoint to *Skinner*." *Craig*, 471 Mich at 89. In *Mulholland*, an expert in agriculture and dairy provided testimony regarding the plaintiff's theory that a milking system built by the defendants was the cause of the plaintiff's milk cows' mastitis. *Mulholland*, 432 Mich at 399. The expert testified that the mastitis was due to an improper configuration of the milking system, and that once the plaintiff reconfigured the system as he suggested the mastitis decreased and milk production increased. *Id.* at 400. The Court held that the trial court improperly granted a directed verdict in favor of the defendant because the expert testimony was based on the expert's "direct observation of the milking machinery, its use on the plaintiff's herd, and teat inflammation in the plaintiff's herd following milking." *Id.* at 413. Thus, the Court concluded that "a jury could have reasonably concluded, on the basis of this testimony, that the milking machinery caused mastitis." *Craig*, 471 Mich at 89, discussing *Mulholland*, 432 Mich at 412. The Court in *Craig* explained that while the expert's testimony "did not rule out every other potential cause of mastitis, this fact merely related to the credibility of his testimony; his opinion was nevertheless admissible and sufficient to support a finding of causation." 471 Mich at 89-90.

Contrary to defendants' arguments, Dr. Veach's opinion is not speculative like the experts' opinions in *Badalamenti* and *Skinner*. In this case, Dr. Veach's opinion was based on his review of the decedent's medical records, his examination of the decedent, and his education and experience. Further, Dr. Veach relied on the "backwards staging" methodology to arrive at his opinion regarding the stage of the decedent's cancer in July 1997. Finally, he relied on his expertise in oncology, and lung cancer specifically, to conclude that the decedent had a much greater chance of survival had she been diagnosed at that time. The backwards staging methodology is reliable, as discussed *supra*, and Dr. Veach's reliance on his personal experience, background, and education is acceptable. *Morales*, 279 Mich App at 735. Thus, Dr. Veach did not rely merely on speculation or conjecture to arrive at his opinion; rather, his opinion constituted "a reasonable inference of a logical sequence of cause and effect." *Teal*, 283 Mich App at 392, quoting *Craig*, 471 Mich at 87, quoting *Skinner*, 445 Mich at 174.

Specifically, *Badalamenti* is distinguishable because in that case the expert's opinion was based entirely on the expert's disagreement with the factual findings of the treating physician. *Badalamenti*, 237 Mich App at 289. Thus, the expert's opinion was premised on "facts" that were contrary to the actual facts of the case. *Id.* In this case, Dr. Veach's opinion does not conflict with any evidence and is premised on reliable methodology.

Regarding *Skinner*, the Court found that the plaintiffs failed to produce any evidence from which a jury could reasonably conclude that the wires on the machine were unhooked when the decedent began using the machine before the accident and the plaintiffs failed to produce any proof from which it could be inferred that the machine would have been turned on after the wires

were unhooked.[4] *Skinner*, 445 Mich at 172. Further, the evidence submitted in *Skinner* tended to demonstrate that the wires and clips probably would have been connected. *Id.* While the plaintiffs' proffered scenario was a possibility, it was at best equally as probable as other theories. *Id.* at 172-173. Moreover, the expert's opinion regarding factual causation was based entirely on hypothetical situations, not on any facts in the record. *Id.* at 173. In this case, unlike the case in *Skinner*, Dr. Veach's opinion was based on facts in evidence, specifically, on the decedent's medical records and his personal examination of her lung cancer. Moreover, Dr. Veach's opinion regarding the stage and progression of the decedent's cancer is not based purely on a hypothetical situation, rather it is based on scientific methodology and his personal experience and education regarding the progression and staging of lung cancer. While Dr. Veach candidly acknowledged he could not say with absolute certainty what stage the cancer was in at the time the x-ray was misread, this uncertainty relates to the credibility of his opinion, not its admissibility. *Craig*, 471 Mich at 89-90. Accordingly, we conclude that the trial court abused its discretion by striking Dr. Veach's testimony and dismissing the case.

V. ORDER STRIKING PARANJPE UNDER MRE 702 AND MCL 600.2955

Next, plaintiff argues that the trial court erred by granting defendants' motion to strike Paranjpe under MRE 702 and MCL 600.2955. We agree.

At the outset, we note the purpose of MRE 702 is to ensure that only reliable scientific evidence is admitted; thus, analysis under MRE 702 considers only the principles and methodology behind the expert's conclusions. *Gilbert*, 470 Mich at 779-783. Specifically, the Court explained that the gatekeeper role of courts regarding MRE 702 requires a "searching inquiry" regarding both the reliability of the data underlying expert testimony and the "manner in which the expert interprets and extrapolates from those data." *Id.* at 782. Thus, an expert's opinion must rest on data viewed as legitimate in the context of a particular area of expertise and the expert's opinion must express conclusions that were reached through reliable principles and methodology. *Id.*

In this case, the trial court did not analyze the underlying methodology behind Paranjpe's conclusions regarding the decedent's future earnings. However it did cite and quote MCL 600.2955, MRE 702, and *Gilbert*, 470 Mich at 779-783. Nevertheless, the trial court's opinion does not specifically address the requirements set forth by MRE 702 nor does it analyze the factors set forth by MCL 600.2955. Our Supreme Court made clear in *Clerc*, 477 Mich at 1068, that in order to fulfill its gatekeeper role, a trial court "shall" consider the factors set forth by MCL 600.2955. Indeed, the Court remanded this case back to the trial court because the trial court failed to "consider the range of indices of reliability listed in MCL 600.2955," and instead focused only on plaintiff's failure to present specific studies on the growth rate of untreated cancer. *Id.* Accordingly, specific analysis of all the statutory factors is required and the trial court's failure, yet again, to analyze the statutory factors before ordering an expert struck pursuant to MRE 702 would necessitate remand.

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[4] The plaintiffs' theory relied on showing that the machine was turned off, that its wires were unhooked, and that it was then turned back on. *Skinner*, 445 Mich at 172.

Moreover, we note that defendants did not challenge the reliability of the principles and methodology on which Paranjpe based his expert opinion regarding the decedent's future earnings and the trial court did not engage in an MRE 702 analysis. Thus, while the motion to strike was styled as a motion brought under MRE 702, the parties and the trial court actually relied on principles of reliability and prejudice addressed by MRE 401, 402, and 403. This point is particularly obvious when the reasoning set forth by the trial court in its opinion striking Paranjpe is considered. The trial court's opinion striking Paranjpe focused on its conclusion that Paranjpe's testimony was not relevant to the damages available to the plaintiff under the wrongful death statute, and accordingly, would be "inappropriate and prejudicial." Thus, the trial court was apparently more focused on the principles set forth by MRE 401, 402, and 403. Accordingly, we will consider the relevancy and potential prejudice of Paranjpe's expert testimony.

MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides that all relevant evidence is admissible unless specifically prohibited by another rule of law, and all evidence that is not relevant is not admissible. MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The wrongful death act provides in relevant part:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. [MCL 600.2922(6).]

Neither this Court nor our Supreme Court has specifically considered what factors are relevant to determining loss of financial support. However, in *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 653-654; 761 NW2d 414 (2008), this Court noted that our Supreme Court has issued numerous rulings expressing an expansive interpretation of the damages available under the wrongful death act, and noted that the Court, in interpreting the survivor benefits provisions of the no-fault act, found guidance by reference to MCL 600.2922 in *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 560-561; 302 NW2d 537 (1981). The Court observed that "wrongful death act damages focus upon the financial loss actually incurred by survivors as a result of their decedent's death." *Thorn*, 281 Mich App at 654, quoting *Miller*, 410 Mich at 561. The Court in *Miller* went on to state that "[c]ertainly, the deceased's wage or salary income is almost always a significant factor in calculating the actual financial loss incurred by the survivors." *Miller*, 410 Mich at 561.

Plaintiff does not dispute that Paranjpe's testimony was in regard to the decedent's future earnings, not loss of financial support. Plaintiff also does not dispute that loss of financial

support, not the decedent's future earnings, is the proper type of damages recoverable under the wrongful death act. However, plaintiff argues that establishing the decedent's future earnings is necessary to determine the loss of financial support; thus, testimony regarding the decedent's future earnings is relevant to the damages recoverable under the wrongful death act. We agree. Expert testimony regarding the decedent's future earnings is certainly relevant to the loss of financial support determination because the decedent's income is a necessary component in the calculation of the survivors' lost financial support. Moreover, the probative value of this testimony is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence regarding the decedent's future earnings is extremely probative in regard to the survivors' lost financial support, and a proper jury instruction could remove any potential confusion or prejudice by explaining that the decedent's future earnings are merely one consideration in the calculation of lost financial support. Michigan law has consistently recognized that evidence regarding damages that contribute to a total amount recoverable is admissible even if that evidence itself does not establish the complete amount of damages legally available. See, e.g., *Miller*, 410 Mich at 561 (holding that "the deceased's wage or salary income is almost always a significant factor in calculating the actual financial loss incurred by the survivors"); *Brown v Oestman*, 362 Mich 614, 618; 107 NW2d 837 (1961) (permitting evidence of the decedent's monthly earnings to prove loss of support and maintenance under the wrongful death act despite the fact that "[n]o attempt was made to prove how much of [the decedent's] earnings were expended for his family's support and maintenance"); *Walker v McGraw*, 279 Mich 97, 102-103; 271 NW 570 (1937) (upholding damages without deduction for the decedent's personal consumption upon evidence of the decedent's loss of earnings). Accordingly, we conclude that the trial court abused its discretion by striking Paranjpe.[5]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra

[5] Further, we note that Paranjpe's deposition indicates that he was prepared to testify to both the decedent's future earnings and the loss in household services suffered by her survivors. Defendants did not challenge the admissibility of Paranjpe's testimony regarding household services, and the trial court did not consider the admissibility of that testimony. Assuming expert testimony regarding household services is admissible, it was improper to completely strike Paranjpe as a witness upon finding a portion of his proffered testimony inadmissible.