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STATE OF MICHIGAN

COURT OF APPEALS

GEQUITA SHIVERS, Guardian of D'MARRIUS SHIVERS, a Minor and Legally Incapacitated Person,

Plaintiff-Appellant,

v

COVENANT HEALTHCARE SYSTEM, COVENANT MEDICAL CENTER, INC., VALLEY OB-GYN CLINIC, P.C., JULIA WALTER, M.D., ANGIE DOMINGO, M.D., TAMMY LONG, R.N., TAMMY KIME-MCINERNY, N.N.P., TAMERA GRAHAM, N.N.P., and SAGINAW COOPERATIVE HOSPITALS, INC., also known as SYNERGY MEDICAL EDUCATION ALLIANCE,

Defendants-Appellees.

FOR PUBLICATION
November 18, 2021
9:15 a.m.

No. 351638
Saginaw Circuit Court
LC No. 16-031348-NH

GEQUITA SHIVERS, Guardian of D'MARRIUS SHIVERS, a Minor and Legally Incapacitated Person,

Plaintiff-Appellee,

v

COVENANT HEALTHCARE SYSTEM, COVENANT MEDICAL CENTER, INC., VALLEY OB-GYN CLINIC, P.C., JULIA WALTER, M.D., ANGIE DOMINGO, M.D., TAMMY LONG, R.N., TAMMY KIME-MCINERNY, N.N.P., and TAMERA GRAHAM, N.N.P.,

Defendants-Appellants,

No. 351795
Saginaw Circuit Court
LC No. 16-031348-NH

and

SAGINAW COOPERATIVE HOSPITALS, INC., also known as SYNERGY MEDICAL EDUCATION ALLIANCE,

Defendant.

GEQUITA SHIVERS, Guardian of D'MARRIUS SHIVERS, a Minor and Legally Incapacitated Person,

Plaintiff-Appellee,

v

No. 351863
Saginaw Circuit Court
LC No. 16-031348-NH

COVENANT HEALTHCARE SYSTEM, COVENANT MEDICAL CENTER, INC., VALLEY OB-GYN CLINIC, P.C., JULIA WALTER, M.D., ANGIE DOMINGO, M.D., TAMMY LONG, R.N., TAMMY KIME-MCINERNY, N.N.P., and TAMERA GRAHAM, N.N.P.,

Defendants,

and

SAGINAW COOPERATIVE HOSPITALS, INC., also known as SYNERGY MEDICAL EDUCATION ALLIANCE,

Defendant-Appellant.

Before: SAWYER, P.J., and BOONSTRA and RICK, JJ.

PER CURIAM.

In Docket No. 351638, plaintiff appeals by delayed leave granted from the trial court's orders granting defendants' motion in limine to exclude the testimony and related report of plaintiff's life care planning expert and to amend plaintiff's witness list. In Docket No. 351795, the Covenant defendants appeal by leave granted the trial court's order denying their motions in limine to limit the testimony of plaintiff's causation experts and their motions for summary disposition under MCR 2.116(C)(10). Finally, in Docket No. 351863, defendant Synergy appeals by leave granted the same order being appealed in Docket No. 351795. We affirm in part, reverse in part, and remand.

This is a complicated medical malpractice case. Generally, plaintiff's complaint alleged that D'Marrius Shivers suffered "significant neurological injury, developmental and or cognitive delays, including cerebral palsy," as a result of negligence during the prenatal, labor and delivery, and postnatal time periods. Plaintiff alleged that D'Marrius's damages included physical pain and suffering, disability, mental anguish, fright and shock, denial of everyday social pleasures and enjoyments, embarrassment, humiliation and mortification, loss of good health, disfigurement, disability, and impaired function resulting from the injury to his neurological and respiratory systems with the attendant complications, reasonable cost of necessary medical care and treatment and attendant care for 24 hours a day, seven days a week, loss of future earning capacity, and the possibility of "each and every one of these elements of damage in the future."

Plaintiff alleged multiple acts of negligence, during the prenatal period, labor and delivery, as well as the postnatal period. In these interlocutory appeals, the parties allege various errors by the trial court with respect to rulings on whether particular witnesses should be allowed to testify at trial, as well as whether defendants are entitled to summary disposition.

Turning first to plaintiff's appeal, the primary issue is the trial court's ruling that plaintiff's life care planning expert, Kathleen Pouch, would not be permitted to testify regarding her expert opinion because it was based upon hearsay, in particular "the out-of-court statements of Dr. Ayyangar." A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). "The admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion." *Id*. To the extent a trial court's decision relies on factual findings, this Court reviews those factual findings for clear error, meaning it defers to the trial court unless definitely and firmly convinced the trial court made a mistake. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). This Court otherwise reviews de novo the trial court's determinations of law; but any factual findings made by the trial court in support of its decision are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion. *Id*. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Elher*, 499 Mich at 21 (quotation marks and citation omitted). This Court reviews de novo the interpretation and application of court rules. *In re DMK*, 289 Mich App 246, 253; 796 NW2d 129 (2010).

The trial court's ruling was based upon MRE 703, which requires that the facts underlying an expert's opinion be in evidence. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 732; 761 NW2d 454 (2008). 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 hereafter.

"This rule permits an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011) (quotation marks omitted).

Our issue with the trial court's holding is that it arose out of a pretrial motion in limine. Each of plaintiff's lay and expert witness lists,[1] beginning with the preliminary list through the fifth amended witness list, specifically included Dr. Ayyangar as a lay witness as one of the "[a]gents, employees, representatives, doctors, nurses, interns, residents, and/or health practitioners . . . from U of M Physical Medicine Rehab." With respect to expert witnesses, plaintiff "reserve[d] the right to obtain expert medical testimony from any and all of plaintiff's or plaintiff's children's treating physicians, nurses, therapists or any other healthcare provider regarding issues of standard of care, causation and damages." Dr. Ayyangar was D'Marrius's treating physiatrist. In her response to defendants' motions in limine, plaintiff stated that she was in the process of scheduling Dr. Ayyangar for testimony, either at trial or via *de bene esse* deposition. The deposition was taken on June 26, 2019. At the hearing on the motions in limine, plaintiff's counsel told the trial court that Dr. Ayyangar would be testifying at trial and that Pouch would not need to testify as to the doctor's hearsay statements. To the extent that the trial court could find Dr. Ayyangar qualified to testify as to D'Marrius's future needs, the facts or data upon which Pouch based her opinion would be in evidence.

Under these circumstances, the trial court erred by finding that Pouch's testimony as to D'Marrius's future treatment and needs was precluded on the ground that her opinion was based on inadmissible hearsay that would not be in evidence at trial. MRE 703 specifically states that the evidence upon which expert testimony is based can be admitted either before or after the expert testifies. Under MRE 703, the trial court had discretion to deny defendants' motions in limine and to allow Pouch to offer expert testimony as to D'Marrius's future needs, subject to the condition that the factual bases of her opinion be admitted in evidence.[2] The trial court's decision to preclude Pouch's testimony with respect to D'Marrius's future needs was premature in light of plaintiff's counsel's offer of proof because she did not have an opportunity to present at trial the testimony of Dr. Ayyangar to lay a foundation for the admission of Pouch's testimony and life care plan. Until plaintiff puts Dr. Ayyangar on the stand to testify regarding the facts establishing a foundation for the admission of Pouch's testimony and life care plan, the court could not make a ruling as to admissibility and therefore could not make a ruling as to whether or not Pouch's expert testimony will be allowed. The trial court made an error of law in its application of MRE 703 under these circumstances and, therefore, abused its discretion by granting defendants' motions in limine and precluding Pouch's testimony and life care plan on the ground that Dr. Ayyangar's testimony would not be in evidence.

The trial court's ruling also concluded that the cost data included in Pouch's report was based upon hearsay. But as with Pouch's testimony and life care plan with respect to D'Marrius's future needs, defendants' motions in limine were essentially motions to exclude evidence that had not yet been offered or introduced. In light of Pouch's deposition testimony summarized above,

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[1] Plaintiff's lay and expert witness lists included hundreds of witnesses.

[2] In the event that Dr. Ayyangar's testimony did not provide a foundation for all of Pouch's opinions—for example, if Dr. Ayyangar was not qualified to offer an opinion as to D'Marrius's future neurological needs and her testimony could not provide a foundation for Pouch's opinion that D'Marrius would require "X" number of appointments with a neurologist, defendants could raise the issue via objection at that time.

it is not clear whether Pouch's expert opinion and life care plan as to costs would be admissible, admissible in part, or inadmissible at trial; it is not clear whether any of the costs were based on Pouch's personal knowledge, or whether the facts or data upon which Pouch based her opinion on costs would be in evidence. For the reasons discussed previously, defendants' motions in limine were premature and the trial court abused its discretion by finding that the facts supporting Pouch's opinion and life care plan would not be in evidence, and by granting the motion instead of waiting until trial to consider specific objections to the evidence.

We need not address plaintiff's second issue, whether the trial court erred in denying plaintiff's motion to amend her witness list as it is premised on this Court concluding that the trial court correctly excluded Pouch's testimony.

We turn to defendants' arguments that the trial court erred in granting plaintiff's motion for clarification regarding the trial court's ruling on motions in limine to limit the testimony of plaintiff's experts regarding causation theories that defendants characterize as being speculative. We disagree.

This Court reviews a trial court's decision to grant or deny a motion for reconsideration for an abuse of discretion. *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019). This Court also reviews for an abuse of discretion a trial court's ruling on a motion to exclude expert testimony. See *Gay v Select Specialty Hosp*, 295 Mich App 284, 290; 813 NW2d 354 (2012).

Here, the trial court said that its September 23, 2019 oral ruling to strike the testimony of Dr. Snead and Dr. Crawford was based on an understanding that the doctors could not establish a causal connection between D'Marrius's injuries and the alleged negligence of those defendants involved in the labor and delivery and postnatal periods. The trial court said that a reexamination of the testimony led it to a different conclusion. The trial court did not abuse its discretion by revisiting the issue under these circumstances. *Macomb Co Dep't of Human Services v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014).

Defendants argue that the trial court erred by finding that Dr. Snead's and Dr. Crawford's testimony supported plaintiff's theory that D'Marrius suffered additional injuries to his brain as a result of negligence that allegedly occurred during the labor and delivery and postnatal periods.[3] They contend that both doctors said that it would be pure speculation to suggest what, if any, degree of brain damage occurred at any time after Gequita went to the hospital, and that Dr.

[3] Defendants argue that the trial court erred by relying on the *de bene esse* deposition testimony of plaintiff's expert radiologist, Dr. Patrick Barnes. Defendants acknowledge that Dr. Barnes identified separate cortical and thalamus injuries, but they contend that Dr. Barnes admitted that he could not determine the date that either of the injuries occurred. *Id*. The trial court's opinion indicates that the court would have made the same decision regarding the testimony of Dr. Snead and Dr. Crawford regardless of any testimony from Dr. Barnes. The trial court only referenced Dr. Barnes's testimony in a footnote to demonstrate factual support for the premise that D'Marrius sustained brain injuries in two separate regions of the brain.

Crawford could not state that the alleged intervention that should have been provided at the hospital would have changed D'Marrius's condition or need for subsequent care.

In this case, Dr. Snead testified that the injury to D'Marrius's thalamus occurred 10 to 40 minutes before D'Marrius was born:

> [M]y reading of the MRI brain scan done on the eighth day of life, there was signal changes in the thalamus, which is the neuroradiological signature of an acute near-total hypoxic-ischemic brain injury which occurs, by definition, some people say ten to 30 minutes before delivery, others say ten to 40 minutes. So, within that timeframe approximate to delivery, this child had an acute near-total hypoxic-ischemic brain injury which caused the child's thalamus to be injured.

Given the undisputed evidence that Gequita was in the labor and delivery unit for at least four hours before D'Marrius was born, Dr. Snead's testimony was sufficient to support the theory that an injury occurred on October 9 during the labor and delivery period.

Similarly, Dr. Crawford testified that additional injury occurred during the postnatal period at the hospital. The following exchange occurred between counsel for defendants who are no longer involved in this case and Dr. Crawford:

> *Q.* To the extent that D'Marrius requires supportive care, attendant care, supervisory care, can we agree that he was going to require that before his mom came to Covenant Hospital?
>
> * * *
>
> *A.* I can't say that the extent to which he was damaged was entirely present before [Gequita] came to the hospital. I think there was an evolution of additional damage. Certainly, he had a normal head circumference at birth, and he acquired microencephaly, I think, from the events around the time of birth. *So there is a layer of additional damage that happens to him right around the time of birth and into the neonatal period.* [Emphasis added.]

Dr. Crawford testified that D'Marrius's neurologic injury probably worsened from the time Gequita arrived at the hospital until D'Marrius was born. The following exchange occurred between counsel for the Covenant defendants and Dr. Crawford:

> *Q.* Can you parse out the degree of neurologic injury, if any, the youngster sustained from the time mom presented at two o'clock in the morning on October the 9th to the time of the youngster's delivery?
>
> *A.* It would appear that it got worse[.]

Dr. Crawford acknowledged that she could not specifically identify which injuries occurred during the postnatal period, but stated that injury more than likely occurred during that time period.

Defendants contend that Dr. Crawford admitted that it would be speculative to opine whether D'Marrius's needs would be different if he had received different care. This contention is not wholly accurate. When the Covenant defendants' counsel asked Dr. Crawford whether injuries that occurred during the labor and delivery and postnatal periods on October 9 altered D'Marrius's needs, Dr. Crawford said that it would be "somewhat" speculative to testify regarding changes in needs, as follows:

> *Q*. Whether it would have changed any need in terms of this child's subsequent care and/or intervention, would you agree with me that would also be speculative for you?
>
> *A*. Somewhat.

Counsel did not further question Dr. Crawford. Dr. Crawford's inability to conclude with certainty that D'Marrius's needs would differ as a result of the injuries sustained during the labor and delivery and postnatal periods would not render her testimony inadmissible. Rather, this fact would merely relate to the credibility of her testimony. See *Craig v Oakland Hosp*, 471 Mich 67, 89-90; 684 NW2d 296 (2004).

Indeed, Dr. Crawford said that the fetus had crossed the injury threshold for brain damage before Gequita arrived at the hospital, but that "the extent to which it evolved, I think, is something that was not present at the time that [Gequita] came to the hospital and would have been lessened with immediate deliver[y], resuscitation and transfusion." Additionally, taken together, Dr. Snead's and Dr. Crawford's testimony differentiated between the effects of a thalamus injury and the effects of a cortical injury. Dr. Snead testified about a thalamus injury:

> [T]he thalamus is hugely important because it's basically the gatekeeper of every sensation that comes to your brain. Whether it's vision, hearing, smell, taste, it's all filtered through the thalamus and delivered to appropriate cortical regions where it's perceived. And the thalamus also has a memory function and it also has a function involving executive function, so the thalamus is really the gatekeeper and core of the brain function.
>
> And, in a child like this, the more the thalamus is injured, the greater the neurological disability, particularly in terms of cognition.

Dr. Crawford described the effects of a cortical injury by describing injury to the frontal lobe. She testified that an injury to the frontal lobe causes "executive function abnormalities, problems with behavior, attention, hyperactivity, lack of inhibition or inability to inhibit behavior."

Here, Dr. Snead and Dr. Crawford formed their opinions on the basis of facts of record, and have drawn reasonable inferences from the evidence. Dr. Snead and Dr. Crawford identified separate injuries to the thalamus and the cortex that occurred on October 9, 2007, and they explained the differing impairments from each type of injury. Their combined testimony provided a reasonable basis for the conclusion that it is more likely than not that the conduct of defendants was a cause in fact of the injury to D'Marrius's thalamus during the labor and delivery period and of an additional injury to his cortex during the postnatal period. Therefore, a jury would not be left to speculate concerning the cause of D'Marrius's brain injuries during these periods. Under

these circumstances, the trial court's decision to allow the causation testimony of Dr. Snead and Dr. Crawford was not outside the range of principled outcomes.[4]

Next, defendants argue that the trial court erred in denying their motions for summary disposition. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 531; 937 NW2d 380 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). When deciding a motion for summary disposition brought pursuant to MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. See MCR 2.116(G)(5); *Joseph*, 491 Mich at 206. It must draw all reasonable inferences in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendants' arguments on this issue are essentially the same as the previous issue. That is, their entitlement to summary disposition is based upon their argument that the trial court should have excluded the testimony of Dr. Snead and Dr. Crawford with respect to causation. Having concluded that the trial court did not err in eventually concluding that that testimony was admissible, we likewise conclude that the trial court did not err in denying summary disposition.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, no party having prevailed in full.

/s/ David H. Sawyer
/s/ Mark T. Boonstra
/s/ Michelle M. Rick

[4] It will be up to the jury to determine if and to what extent the alleged negligence during the labor and delivery and postnatal periods resulted in the damages claimed.