

STATE OF MICHIGAN
COURT OF APPEALS

ANTHONY M. LONGHINI and KATHLEEN M.
LONGHINI,

UNPUBLISHED
April 29, 2004

Plaintiffs-Appellants,

v

No. 243124
Kent Circuit Court
LC No. 99-010899-NH

MICHIGAN MEDICAL, P.C., MICHIGAN
MEDICAL SPECIALISTS, P.C., GRAHAM
BARNETT, M.D., BUTTERWORTH HOSPITAL,
and BUTTERWORTH HEALTH
CORPORATION, d/b/a/ SPECTRUM HEALTH
MED CENTER,

Defendants-Appellees.

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal as of right from a judgment of no cause of action entered by the trial court following a jury trial. We affirm.

Plaintiff Anthony Longhini first saw defendant Barnett in 1997 because he was suffering from a frequency of urination, along with urgency and significant terminal dribbling, and occasional post-micturitional incontinence. On December 10, 1997, plaintiff¹ underwent a transurethral resection of the prostate, or what is referred to as the “TURP” procedure. However, after this procedure, plaintiff was still experiencing problems. On May 22, 1998, plaintiff had the TURP procedure done a second time. Plaintiff experienced continuing and more severe incontinence problems, and he went to the Mayo Clinic. At the Mayo Clinic, it was determined that plaintiff’s external sphincter muscle was not present, and plaintiffs subsequently alleged that this was due to defendant Barnett’s “inappropriate cutting” during the TURP procedure. Plaintiffs filed suit alleging negligence and malpractice. The case proceeded to trial, and the jury found that defendant Barnett was not professionally negligent when he performed surgery on plaintiff.

¹ Reference to “plaintiff” in the singular in this opinion refers to Mr. Longhini.

Besides maintaining that the injury could not have been caused by Dr. Barnett's resection in light of the physical evidence, defendants theorized that a possible cause of plaintiff's sphincter injury was the heat/electrical charge generated by the Vaportrode loop, which was used in the TURP procedure.² Defendants maintained that the heat or current could have caused an irritative injury to the nerve of the external sphincter, resulting in it remaining open and unable to restrict. Plaintiffs filed a motion in limine to preclude defendants from offering into evidence any testimony relating to this theory. Plaintiffs argued that defendants' theory was not based on scientific fact and was not supported by any medical literature or other peer-review documentation. The trial court denied plaintiffs' motion on the basis that this theory was not an opinion as to what happened, but merely an explanation as to what might have happened. The trial court also reasoned that this theory was a conclusion derived from recognized scientific principles of conduction of heat and electricity.

On appeal, plaintiffs contend that the trial court erred in denying their motion in limine. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). "We review a trial court's decision regarding the admissibility of expert witness testimony for an abuse of discretion." *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002).

We initially reject any suggestion that, because defendants' theory of causation merely constituted an explanation as to what might have happened, as opposed to a conclusive opinion of causation, testimony regarding the theory was necessarily admissible. Although the heat/electrical charge theory can be viewed as an "explanation" of what might have occurred in the realm of possibilities, it nonetheless constituted a scientific or medical opinion on causation with respect to Mr. Longhini's injury. We also reject any assertion that a defendant in a malpractice action has a lower threshold to overcome in interjecting opinion testimony as a defense. The rules of evidence regarding expert testimony, MRE 702-707, and the relevant statute, MCL 600.2955, apply equally regardless whether one is a plaintiff or defendant and regardless whether one is presenting a conclusive theory of causation or possible theory of causation; there is no language creating a distinction, nor should there be a distinction. Without the gatekeeper aspect of the rules of evidence and the statutory provision being applied to a defendant's medical or scientific theories, the defendant could literally flood the courtroom with unsupportable theories and possibilities predicated on questionable science, thereby muddying the jury's ability to reach the appropriate result on the basis of recognized and reliable science.

MRE 702 provides:

² Plaintiffs indicate, consistent with the evidence, that the Vaportrode is a resectoscopic instrument that is inserted into the urethra opening and slid to the area of blockage in the prostate. The device consists of a camera and light to visualize the walls of the urethra, and of an insulated tube, out of the end of which a small wire loop can be projected. This wire loop is heated by an electrical current. The loop is used to cut away the tissue of the enlarged prostate impinging the urethra. The heat of the wire assists in cauterizing the area being cut to reduce bleeding and irritation.

If the court determines that recognized 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.

MRE 702 governs the admissibility of expert testimony, and creates a three-part test. *Wentworth, supra* at 563. “First, the expert must be qualified. Second, the evidence must provide the trier of fact a better understanding of the evidence or assist in determining a fact in issue. Finally, the evidence must be from a recognized discipline.” *Id.*

MCL 600.2955 provides:

(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:

(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.

(2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

(3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in [MCL 600.2169].

MCL 600.2955(2) reflects a codification of the *Davis-Frye*³ analysis, which provides that a party offering novel scientific evidence must demonstrate that it has gained general acceptance within the scientific community. *Anton v State Farm Mut Automobile Ins Co*, 238 Mich app 673, 679; 607 NW2d 123 (1999). When conducting the *Davis-Frye* analysis, the trial court must focus on the method, process, or basis underlying an expert's conclusions and whether it is generally accepted and recognized, and not on the ultimate conclusion of the expert. *Anton*, *supra* at 678-679.

Turning to the case before us today, it is necessary to first determine the proper analytical framework. The ultimate opinion that we are addressing is that the use of the Vaportrode possibly caused an irritative injury to the nerve of the external sphincter, resulting in it remaining open and unable to restrict, thereby causing stress incontinence. Our focus, however, is not directly on that conclusion, which still must be considered under MCL 600.2955, but must stress the reliability and recognition of the underlying basis of this medical-scientific conclusion, which is that heat and electrical charges or impulses from surgical instruments such as the Vaportrode can extend beyond the point of cutting and cause injuries in the body. Because the opinion testimony proffered by defendants does not assert that the heat/electrical charge theory is conclusively the cause of Mr. Longhini's injury, but merely a possible cause, our attention must be on whether there was sufficient information and evidence, indicating scientific recognition and reliability, as to support the proposition that the theory could explain a *possible* cause of the complained injury. Record support must be sufficient such that we cannot conclude that the trial court's ruling was "so palpably and grossly violative of fact and logic that it evidence[d] perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001).

The trial court ruled, in part:

The other reason for admitting it is that, while the theory is, itself, something that has apparently not gained a lot of currency, perhaps, because this implement [Vaportrode] is too new for there to have been a lot of experience with it, it does strike me that the theory or opinion is really just a conclusion derived from recognized scientific knowledge and basic scientific methodology and principles.

It's, frankly, just an example of the process of elimination, which is a standard principle of science. It also does seem to simply be applying the concept of conduction of heat and electricity, which are, again, readily accepted scientific principles.

³ *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923).

In the Anton case, as well as others . . . , our courts have said that something is not novel, even though it might be the first of its particular conclusion being drawn, so long as it is being drawn based upon methodologies and principles which are, themselves, accepted.

The learned trial court's focus and analysis above is correct. Moreover, the record supports the court's findings and conclusion.

The record reflects that the manufacturer of the Vaportrode initially recommended operation of the instrument at a wattage of between 250 and 300. *Subsequent* to Mr. Longhini's surgery, the manufacturer issued new guidelines that recommended a much lower setting. Defendant Barnett, who opined that the injury to the sphincter or the nerves controlling its function could have resulted from the transmission of heat/electricity, stated, in relation to the reduction in wattage:

There was a concern that some of our patients, after having a resection of the prostate with this particular loop [Vaportrode], they were experiencing irritative symptoms over and above what we'd normally expect for a patient who has had a resection of the prostate. Those symptoms lasted anywhere from two to six months. This was a commonly recognized problem, especially with my colleagues in the area. After discussing it with the representative, it was their opinion it would be wise to cut back to 180 [watts]

The reduction in the wattage recommendation was acknowledged by other experts retained for trial. Defendant Barnett also testified that "we do know for sure that when heat gets too close to the capsule of the prostate, that it can cause damage to some of these fibers and that's the reason why these patients develop impotence."

Dr. Kasper, one of plaintiffs' witnesses, acknowledged on cross-examination that although defendant's theory was not particularly described in medical literature, it may have occurred, and that there was "a remote possibility" that heat/electrical charges or impulses caused Mr. Longhini's injury. Regarding the wattage, Dr. Kasper stated that "the higher the wattage, the more likely the theory [defendants] purport could have some credence." There was deposition testimony by Dr. Sirls that heat/electrical current may have caused the injury. Dr. Rodriguez, who opined that the heat/electrical transference theory was logical and intuitive, testified:

Well, it's, umm, known that the electricity used to do the cutting extends beyond the actual location of the loop as it's going through the prostate tissue. In other words, the power can dissipate or extend for certain distance beyond that point.

Dr. Gerber testified that Mr. Longhini's external sphincter could have become damaged through heat transfer or electrical energy transfer from the Vaportrode to the sphincter area. Dr. Leach, who testified on plaintiffs' behalf by way of deposition, indicated that an electrical current can be transmitted to surrounding nerves and other tissue through use of the Vaportrode, and that use of the instrument increased complications of irritation in patients.

Our overall review of the record indicates unanimous agreement by the medical experts, who have treated their own patients over the years, that heat/electrical charges, currents, impulses, or transferences can extend beyond the exact point of surgery and possibly do injury to nearby nerves and tissue. Dr. Kasper's acknowledgement that the specific conclusory opinion was also possible further supports admittance of the evidence. Taking into consideration the dictates of MRE 702 and MCL 600.2955, along with the required deference that must be given to the trial court in these circumstances, we conclude that the court's finding that the pertinent medical opinion and its basis were reliable and recognized by the medical and scientific community was not "so palpably and grossly violative of fact and logic that it evidence[d] perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett, supra* at 325.

Affirmed.

/s/ Christopher M. Murray

/s/ William B. Murphy

/s/ Jane E. Markey