

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ESTATE OF HENRY SANDS, JR., a protected  
individual, by his Conservator, CAROL  
LATHAM,

UNPUBLISHED  
December 28, 2006

Plaintiff-Appellant/Cross-Appellee,

v

PROVIDENCE HOSPITAL AND MEDICAL  
CENTER and JEREMIAH WHITTINGTON,  
M.D.,

No. 268401  
Oakland Circuit Court  
LC No. 03-050889-NH

Defendants-Appellees/Cross-  
Appellants.

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Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's January 27, 2006, order granting summary disposition in favor of defendants, Providence Hospital and Medical Center (PHMC) and Jeremiah Whittington, M.D. (Whittington). We affirm.

I. Background

Plaintiff brought a medical malpractice action against defendants, alleging that her child, Henry Sands, Jr.'s (Henry's) neurological problems, as manifested in speech and learning disabilities first identified approximately four years after his birth, were caused by defendants' improper use of a vacuum extractor, and failure to get reassurance and/or perform an immediate cesarean section after the fetal monitor strips showed a pattern of heart rate decelerations. Plaintiff's expert witnesses, Doctors Roger Kushner (Kushner), Michael Berke (Berke) and Ronald Zack (Zack), opined that defendants' performance during the delivery process fell below the proper standard of care.

Plaintiff's sole expert causation witness was Doctor Donald Gabriel (Gabriel), a pediatric neurologist. Gabriel opined that a combination of factors during Henry's delivery (hyperstimulation, abnormal uterine pressures, decelerations and use of a vacuum) amounted to a mechanical trauma that resulted in "significant subarachnoid or subdural bleeding" causing "reduced arterial flow to the watershed regions of the brain," causing a brain injury that remained silent during Henry's infant stages. Gabriel opined that Henry's brain injuries occurred

immediately after his birth and could have been prevented if he was delivered before 4:33 a.m. Based on Henry's Apgar scores, Gabriel ruled out the possibility that Henry's brain injuries were the result of perinatal asphyxia or a hypoxic ischemic injury.

Defendants filed a motion to strike Gabriel's proposed expert testimony, arguing that Gabriel's testimony should be excluded because his causation theory was unsupported by the scientific community. After conducting an evidentiary hearing, the circuit court granted defendants' motion to strike Gabriel's proposed testimony, finding that (1) Gabriel's causation theory lacked scientific authority, and (2) the factors that "the consensus of the scientific community" had identified as prerequisites to causally linking perinatal asphyxia to fetal brain injury were not present in the case at hand. Without Gabriel's testimony, plaintiff could not establish causation, and accordingly, the circuit court granted summary disposition in favor of defendants under MCR 2.116(C)(10).

## II. Standard of Review

We review a circuit court's decision to grant or deny a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

Here, the circuit court's order granting summary disposition in favor of defendants was predicated on its order granting defendants' motion to strike Gabriel's proposed testimony. We review a circuit court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hospital*, 471 Mich 67, 76; 684 NW2d 296 (2004). We defer to the circuit court's judgment, and if the circuit court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Furthermore, the interpretation of a rule of evidence is a question of law that we review de novo. *Department of Transportation v Tomkins*, 270 Mich App 153, 157; 715 NW2d 363 (2006). A circuit court abuses its discretion if it admits evidence that is inadmissible as a matter of law. *Craig, supra* at 76.

## III. Analysis

"In a medical malpractice case, the plaintiff must establish: (1) the applicable standard of care, (2) breach of that standard of care by the defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Woodward v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005). Plaintiff does not dispute the fact that she could not establish proximate causation without Gabriel's excluded testimony. Thus, if we find that the circuit court properly excluded Gabriel's proposed testimony, we must accordingly find that the circuit court properly granted defendants' motion for summary disposition. *Id.*

The decision whether to allow proposed scientific expert testimony into evidence is governed by 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.

Plaintiff properly contends that MRE 702 conforms to FRE 702, and replaces the *Davis-Frye*<sup>1</sup> test with the test set forth in *Daubert v Merrill Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). See *Gilbert v Daimler Chrysler Corp.*, 470 Mich 749, 781; 685 NW2d 391 (2004). *Gilbert* confirmed that the standards outlined in *Daubert* were to govern the admission of expert testimony, but noted that the amendment of MRE 702 did not alter the circuit judge's gatekeeper function, but rather merely expanded the amount of factors the circuit judge could consider, beyond "general acceptance," when determining whether expert opinion evidence is admissible. *Gilbert, supra* at 781-782. The United States Supreme Court set forth an illustrative, non-exhaustive list of factors that a trial court could consider when determining whether to admit scientific expert testimony, which include whether the theory or technique that forms the basis of the expert's testimony: (1) has been or can be tested; (2) "has been subjected to peer review and publication[;]" (3) has a high "known or potential rate of error[;]" and (4) has a "general acceptance" with the scientific community. *Daubert, supra* at 593-595. When applying the aforementioned factors, the trial court's emphasis "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

The admissibility of scientific expert testimony is also governed by MCL 600.2955(1), which provides:

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.

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<sup>1</sup> *Frye v United States*, 54 App DC 46; 293 F 1013 (1923), superseded by statute.

(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.

Here, plaintiff argues that Gabriel's causation theory was scientifically reliable because it was based on his review of the fetal monitor strips, all relevant medical records regarding Henry's delivery and birth, as well as various other records concerning Henry's conditions, Gabriel's publication in progress on the complications of labor and delivery, MRI's, depositions, and on his own background, education and experiences as a pediatric neurologist. However, the medical data and depositions pertain only to the facts or data underlying Gabriel's medical opinion, not the principles and methods on which Gabriel relied to interpret this data and arrive at his conclusion. Similarly, Gabriel's background (education and experiences) relates only to his qualifications as an expert, not the reliability of his conclusion. Additionally, Gabriel's own publication that he relied on is still admittedly incomplete. Plaintiff has never identified what principles and methods Gabriel utilized to reach his conclusion that a combination of factors during Henry's delivery (hyperstimulation, abnormal uterine pressures, decelerations and use of a vacuum) amounted to a mechanical trauma that resulted in “significant subarachnoid or subdural bleeding” causing “reduced arterial flow to the watershed regions of the brain,” causing a brain injury that remained silent during Henry's infant stages. Consequently, plaintiff did not establish that Gabriel's causation theory has been tested, subjected to peer review and publication, or is generally accepted within the relevant scientific community. Moreover, the record is void of evidence of hyperstimulation or abnormal uterine pressures. Thus, we conclude that the circuit court did not abuse its discretion when it granted defendants' motion to strike Gabriel's causation testimony. MRE 702; MCL 600.2955(1); *Maldonado, supra* at 388; *Daubert, supra* at 592-594.<sup>2</sup> Given that Gabriel was plaintiff's only causation witness, it

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<sup>2</sup> We note that Gabriel specifically ruled out the possibility that Henry's brain injuries were the result of perinatal asphyxia or an hypoxic icshemic injury. Thus, we accede that the circuit court's partial reasoning for striking Gabriel's testimony because the factors that “the consensus of the scientific community” had identified as prerequisites to causally linking perinatal asphyxia to fetal brain injury were not present in the case at hand, was erroneous. However, this Court will not reverse a circuit court's order “when the right result was reached for the wrong reason.” *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

likewise follows that the circuit court did not err when it granted summary disposition in favor of defendants. *Custer, supra* at 6.<sup>3</sup>

Given our resolution of plaintiff's appeal, we need not address the arguments raised by defendants in their cross-appeal.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio

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<sup>3</sup> Though not dispositive of the issue at hand, we note that in *Craig, supra* at 83-83, 91-92, our Supreme Court noted that if the circuit court would have conducted a hearing regarding Gabriel's causation theory (the same theory Gabriel proposes in the present case) the circuit court would have likely concluded that Gabriel's proposed causation testimony was inadmissible because it was not recognized by the scientific community.