

STATE OF MICHIGAN
COURT OF APPEALS

JOHN SCHAENDORF and CONNIE
SCHAENDORF,

UNPUBLISHED
March 5, 2009

Plaintiffs-Appellants,

v

CONSUMERS ENERGY COMPANY,

No. 281001
Allegan Circuit Court
LC No. 04-035985-NZ

Defendant-Appellee.

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

PER CURIAM.

Plaintiffs brought this action against defendant, Consumers Energy Company, to recover damages allegedly caused by stray voltage on their dairy farm. In a prior appeal, this Court, addressing a statute of limitations argument, reversed the trial court's order denying defendant's motion for summary disposition with respect to plaintiffs' nuisance claim, but affirmed the trial court's denial of summary disposition with respect to plaintiffs' negligence claim. *Schaendorf v Consumers Energy Co*, 275 Mich App 507; 739 NW2d 402 (2007). The trial court subsequently granted defendant's motion for summary disposition of the negligence claim based on the issue of causation. Plaintiffs appeal as of right. We affirm.

Plaintiffs argue that the trial court erred in ruling, following a *Daubert*¹ hearing, that proposed expert testimony was not admissible. We disagree.

"Whether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony are within the trial court's discretion." *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002), citing *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999); see also *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). The trial court's ruling to admit or exclude expert testimony is therefore reviewed for an abuse of discretion. *Id.*; *Tate, supra* at 215. An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes. *Novi v Robert Adell*

¹ *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

Children's Funded Trust, 473 Mich 242, 254; 701 NW2d 144 (2005). If our inquiry into the admissibility of the evidence entails a preliminary question of law, such as whether the Michigan Rules of Evidence or a statute preclude admissibility, or simply an issue concerning the construction of an underlying evidentiary rule or statute, this Court reviews the matter de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003); *Dobek*, *supra* at 93. When a court permits the admission of evidence that is inadmissible as a matter of law, an abuse of discretion is established *Id.*

Under MRE 104(a), a trial court is not bound by the rules of evidence, except as to privilege, when resolving a preliminary question regarding the qualifications of a person to be a witness or the admissibility of evidence. MRE 104(a) applies to the admission of expert testimony under MRE 702, allowing the court to address the preconditions set forth in MRE 702 before admitting the testimony. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004). MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule was intended to emphasize the trial court's gatekeeping role to exclude unreliable expert testimony consistent with the United States Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). See Staff Comment to 2004 Amendment of MRE 702; *Woodard v Custer*, 476 Mich 545, 599 n 15; 719 NW2d 842 (2006)(Taylor, C.J.); *Gilbert*, *supra* at 781. According to *Daubert*, *supra* at 595, the focus must be on the principles and methodology used by the expert, not the conclusions that they generate. While the exercise of the gatekeeper function is within a court's discretion, the court can neither abandon this obligation nor perform the function inadequately. *Gilbert*, *supra* at 780. "Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy scientific data." *Dobek*, *supra* at 94. The *Gilbert* Court, after emphasizing that "junk science" cannot be admitted into evidence, further stated:

Th[e] 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. [*Gilbert*, *supra* at 782.]

Our Legislature has also enacted MCL 600.2955 in an apparent attempt to codify the holding in *Daubert, supra*. See *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd in part on other grounds 465 Mich 885 (2001).² As indicated by the express language used by the Legislature in the statute, a trial court “shall consider all of the . . . factors” listed in MCL 600.2955(1). See *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007).

² MCL 600.2955 provides in relevant 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:

(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.

Initially, we reject plaintiffs' argument that the trial court failed to comply with MCL 600.2955(1) because it did not issue specific findings with respect to each statutory factor. On its face, the trial court's decision reflects that that court was aware of its duty to consider each factor. The trial court quoted § 2955(1) in full, referred to the various factors throughout the opinion, and it is quite evident from the thoughtful and detailed opinion that the court contemplated all of the factors. Indeed, the trial court specifically stated that § 2955(1) provided a "mandatory checklist" and that § 2955(1) "require[s] this [c]ourt to consider the aforementioned factors" Because the statute does not require explicit findings on each factor, it is sufficient that the trial court's decision reflects that it was aware of the factual issues and correctly applied the law. Cf. *In re Cotton*, 208 Mich App 180, 183; 526 NW2d 601 (1994).

We now turn to the merits of the trial court's decision with respect to each expert witness in question. We first make an observation regarding general causation and specific causation, both of which were the subject of the *Daubert* hearing. In *Easum v Miller*, 92 P3d 794, 802 n 3 (Wy, 2004), the Wyoming Supreme Court distinguished the two concepts, stating:

General causation deals with whether the substance at issue, *e.g.*, silicone, can cause diseases or disorders in people in general. Specific causation focuses upon whether the substance, *e.g.*, silicone, was in fact the cause of the ailments or symptoms in the particular patient. Claims must provide admissible evidence of both general and specific causation for these two types of claims.

Here, there is no dispute between the parties that, in general, it is accepted in the scientific community that in some instances and under certain circumstances milk production by dairy cows can be negatively affected by stray voltage. We need to concern ourselves with specific causation, *i.e.*, was there a decrease in milk production on plaintiffs' farm specifically caused by stray voltage, in relation to analyzing the issues presented on appeal.

In Michigan, causation actually entails two separate elements, which are cause in fact and legal cause, *i.e.*, proximate cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Here, the issue regarding the admissibility of the expert testimony relates to factual causation. "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.* at 163. Circumstantial evidence can establish causation if it facilitates reasonable inferences of causation, not mere speculation or impermissible conjecture. *Id.* at 163-164. The *Skinner* Court explained the distinction:

"As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Id.* at 164 (citation omitted).]

A mere possibility of causation is not enough; rather, a plaintiff must introduce evidence that affords a reasonable basis to conclude that it is more likely than not that the complained of conduct was a cause in fact of the injury. *Id.* at 165.

In this case, plaintiffs must show harmful effects to their dairy herd attributable to stray voltage.³ *Schaendorf, supra* at 513. The claimed harmful effect is a decline in milk production. Plaintiffs' proposed causation experts consisted of two engineers, David Winter and Gerald Bodman, and one veterinarian, Dr. Richard Schulte.

The trial court ruled that Winter was qualified to testify about issues related to electrical measurements on the dairy farm, but did not offer an opinion on causation at the *Daubert* hearing. In applying the reliability factors in MCL 600.2955(1), it is apparent from the face of the statute that it is necessary to first identify the "scientific opinion rendered by an otherwise qualified expert" that the proponent seeks to introduce. Here, plaintiffs have not cited record evidence of a particular opinion on causation by Winter that they believe was improperly excluded by the trial court. "We will not search the record for factual support for plaintiffs' claims." *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004); see also MCR 7.212(C)(7) (facts stated in support of an argument "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court"). Thus, plaintiffs have not demonstrated that the trial court erred by concluding that Winter was not competent to provide testimony regarding causation. Furthermore, Winter testified:

Q. Are you saying that you specifically diagnosed this herd's problems as being caused by stray voltage, Dr. Winter?

A. I'm saying that my diagnosis is that there was current sufficient to cause trouble in any herd at the levels we recorded prior to putting in the – the electronic grounding system to try to do the work the utility should have done.

Q. Well, that's what I'm trying to clarify, because as you probably recall from your deposition, you told me in no uncertain terms that you were not offering an opinion as to whether this dairy herd was in fact harmed by stray voltage. Do you – do you recall that?

³ As set forth in the 1991 United States Department of Agricultural (USDA) publication entitled "Effects of Electric Voltage/Current on Farm Animals," which was commonly referred to as the USDA Redbook at the *Daubert* hearing, stray voltage refers to:

[a] small voltage (less than 10 V) measured between two points that can be contacted simultaneously by an animal. Because animals respond to the current produced by a voltage and not to that voltage directly, the source of the voltage must be able to produce current flows greater than the threshold current needed to elicit a response from an animal when an animal, or an equivalent electrical load, contacts both points.

- A. No, I don't recall saying that, but maybe I did. I'm not one to decide that, actually. All I do is make measurements and let the chips fall where they may. [A]ll the authorities know what it takes to get a cow in trouble.

[Winter then proceeded to acknowledge his deposition testimony that his role was to measure electrical currents and determine their sources, that he did not have expertise in cow nutrition and veterinary medicine, and that his role as an expert did not involve determining whether the cows on the farm had actually been adversely affected by stray voltage.]

- Q. So you're not offering an opinion that these cows were in fact damaged, are you, sir?

- A. I have a feeling they may have been damaged by the previously available currents to them. I cannot prove that and that's not my area of expertise.

This testimony makes it abundantly clear that Winter was not qualified to testify as an expert on the issue of whether stray voltage caused a decrease in milk production with respect to plaintiffs' dairy herd.

With respect to Bodman, the trial court ruled that his opinion regarding causation was not admissible, in part, because he was not qualified to make a complete differential diagnosis,⁴ inasmuch as he admittedly was unqualified to evaluate diseases. Plaintiffs do not address this aspect of the trial court's ruling. The failure to address this necessary issue may alone preclude appellate relief. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). In any event, considering the evidence that Bodman admittedly lacked the necessary expertise, the trial court did not abuse its discretion by excluding any opinion by Bodman regarding causation. Cf. *Dengler v State Farm Mut Ins Co*, 135 Mich App 645, 649-650; 354 NW2d 294 (1984) (differential diagnosis properly excluded where a medical expert lacked expertise in neurology that was necessary to perform a complete diagnosis).⁵ Because Bodman was unqualified to perform a complete differential diagnosis, it was unnecessary for the trial court to analyze the reliability of his opinion under MCL 600.2955(1).

⁴ A differential diagnosis is a scientific technique in which the probable cause of an injury is determined by ruling out plausible causes of the injury until one is ruled in, or, stated otherwise, it involves a "process of elimination." *Attorney General v Beno*, 422 Mich 293, 306, 311-312; 373 NW2d 544 (1985). A differential diagnosis "is simply a method by which all possible causes of a condition are listed and then the various causes are ruled out so as to leave the most likely cause or causes of a particular . . . problem." *Dengler v State Farm Mut Ins Co*, 135 Mich App 645, 649; 354 NW2d 294 (1984).

⁵ In *Dengler, supra* at 649, a doctor, qualified as an expert in internal medicine, was able to testify with respect to the three most likely causes of a hemorrhage, but a complete differential diagnosis would still have required an expert in neurology, and the doctor conceded that he was unqualified in that area.

Bodman testified with respect to the various possible causes of a decrease in milk production by a dairy herd, including a poor housing environment for the herd, the malfunctioning of the milking system, stray voltage, poor nutrition or genetics, and unsound veterinary practices. In speaking about veterinary practices, Bodman touched on vaccinations, responses to mastitis, and somatic cell counts. However, Bodman later testified that he did not “do any disease diagnosis” as that was “not [his] area.” Ruling out disease as a cause of the decrease in milk production would be part of a complete differential diagnosis, and Bodman was not qualified in the field of animal diseases.

To the extent that the trial court considered whether there was a reliable basis for Bodman to “rule in” stray voltage as a cause in fact of the decreased milk production on the dairy farm, we are satisfied that the trial court was aware of the disputed issues and properly applied the statute. Because the parties did not dispute that differential diagnosis was, in general, a reliable means to reach an opinion on specific causation, it was appropriate for the trial court to focus on the reliability of the particular diagnosis proposed by Bodman and whether it was based on sufficient facts or data.

Here, the trial court’s particular concern was the lack of sufficient evidence or data for Bodman to link the electrical measurements on plaintiffs’ farm to behavioral responses exhibited by plaintiffs’ cows (reduced water consumption or stepping nervously at milking machines) so as to “rule in” stray voltage as a cause of decreased milk production. It is apparent from the trial court’s decision that it considered a number of factors, including the lack of water data, the various electrical measurements, scientific studies and publications regarding stray voltage, and the personal observations made by Bodman. We are not persuaded that the trial court’s determination that Bodman did not demonstrate a reliable factual basis for his opinion was an abuse of discretion.

We also conclude that the trial court did not abuse its discretion in determining that Dr. Schulte’s specific causation opinion was unreliable and inadmissible. Unlike Bodman’s testimony at the *Daubert* hearing, which focused on cow behavior, Dr. Schulte’s testimony focused on physiology, that is, whether stray voltage caused stress in cows, and in turn weakened the cows’ immune systems, thereby leading to increases in diseases and a decrease in milk production. The trial court found Dr. Schulte qualified to render an opinion, but concluded that he performed unreliable blood tests on cows and that the opinion itself, evaluated separately or as part of a differential diagnosis, lacked reliability because it was not supported by a scientific study. The trial court further found that Dr. Schulte’s opinion would be inadmissible, even if he had taken a behavioral approach to causation, for the same reason that Bodman’s opinion was inadmissible.

We reject plaintiffs’ argument that the trial court’s decision reflects that it focused solely on the “peer review publication” standard in MCL 600.2955(1)(b) as the basis for excluding Dr. Schulte’s causation opinion. Examining the court’s decision in its entirety, it is apparent that the court did not ignore other factors, but rather determined from the nature of the opinion (physiological effect on immune system) and the level of electrical current involved in this case that laboratory experiments should exist to support the proposed opinion. Plaintiffs have failed to substantiate their position that Dr. Schulte demonstrated scientific studies to support his opinion. As stated in MCL 600.2955(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.” Although an excerpt of the eighth edition of the veterinary medicine textbook introduced at the *Daubert* hearing contained some summary information regarding “behavior responses” shown by field observations and experimental studies, plaintiffs have not established the relevancy of this information to the trial court’s concern. The scientific studies sought by the trial court related to Dr. Schulte’s opinion grounded in physiological principles. The trial court separately rejected any behavioral-based causation opinion based on the lack of sufficient facts and data showing the behavioral responses.

It is clear from the trial court’s decision that it could not find a reliable basis for Dr. Schulte to give a specific causation opinion grounded on either behavioral or physiological principles. The trial court’s decision reflects that it gave careful consideration to the basis of Dr. Schulte’s opinion, including the underlying data and the methodology that he employed, in assessing its reliability. Because the court’s decision to exclude Dr. Schulte’s opinion falls within the range of principled outcomes, reversal is not warranted.

Next, plaintiffs argue that the trial court erred in concluding that defendant was entitled to summary disposition under MCR 2.116(C)(10) based on the lack of expert testimony to establish causation. Plaintiffs argue that expert testimony is unnecessary to establish that stray voltage caused injury and, in particular, a decrease in milk production. Plaintiffs contend that causation could be established through the testimony of plaintiff John Schaendorf and plaintiffs’ herdsman, Todd Klaasen, regarding their observations on the dairy farm and testimony from Winter regarding electrical measurements. Alternatively, plaintiffs argue that the trial court erred by not allowing them to use Dr. Keith Salmon’s proposed opinion regarding causation, as set forth in an affidavit filed in opposition to defendant’s motion for summary disposition.

With respect to Dr. Salmon, the trial court precluded consideration of his affidavit on the basis that he was not sufficiently identified as a causation expert in answers to interrogatories and because plaintiffs had the opportunity to present Salmon at the *Daubert* hearing and failed to call him to the stand. After reviewing plaintiffs’ answers to interrogatories, and specifically interrogatories 1, 2, and 3, we shall proceed with our analysis on the assumption that plaintiffs adequately identified Dr. Salmon as a causation expert. However, at the *Daubert* hearing, which was held for the express purpose of addressing the admissibility of expert testimony on the issue of causation, plaintiffs did not call Salmon to testify. Although, as acknowledged by defendant, it indicated at the hearing that it was challenging only Winter, Bodman, and Dr. Schulte, presumably because defendant believed that those were the causation experts upon which plaintiffs were relying, the trial court stated as follows prior to the calling of witnesses:

I’m not going to go through tons of depositions to see what they establish. We’re going to do that here, this week. I want the plaintiff[s] to go forward and put in their evidence as to what they want the Court to consider whether or not they meet the requirements of the law of this state, and then the defense, Consumers, can put in their experts to refute anything that the plaintiff[s]’ experts use as a basis for . . . their qualifications and that’s all I’m here to decide.

It is abundantly clear from this passage and the context of the entire hearing that, whether legally correct or not with respect to burdens or procedure, the trial court wanted to fully address the issue of causation, the opinions of all of plaintiffs’ experts who would testify on causation,

the qualifications of those experts, and the reliability of the opinions. A piecemeal approach was not contemplated. The trial court conducted an extensive hearing and crafted a thoughtful and detailed opinion, and the court did not abuse its discretion in rejecting plaintiffs' subsequent attempt, made in hindsight, to proffer Dr. Salmon's affidavit for consideration.

Accordingly, we review the trial court's decision on defendant's motion for summary disposition without consideration of Dr. Salmon's proposed opinion regarding causation. See MCR 2.116(G)(6) (only admissible evidence may be considered when deciding a motion under MCR 2.116[C](10)). Our review of the court's ruling on the motion for summary disposition is *de novo*. *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007). We decline plaintiffs' invitation to adopt a rule of law that would permit a plaintiff in any stray voltage case to establish specific causation without expert testimony. Our task is to decide whether there is factual support for plaintiffs' claim in this case. *Id.* at 55-56. A motion under MCR 2.116(C)(10) should only be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 56. "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Id.*

It has long been recognized in Michigan that expert testimony is not necessary in a negligence case if the occurrence of negligence is within the common understanding of a jury. *Locke v Pachtman*, 446 Mich 216, 231-232; 521 NW2d 786 (1994). Stated otherwise, expert testimony is unnecessary to show what is within everyone's knowledge. *Brown v Arnold*, 303 Mich 616, 624; 6 NW2d 914 (1942). This is so because, "[w]hile the jurors may not make use of their own private or secret information concerning the matter at issue, they must, in order to act intelligently in the determination of a case, view the evidence presented in the light of their general knowledge of the field embraced within the scope of the inquiry." *Deyo v Detroit Creamery Co*, 257 Mich 77, 84; 241 NW 244 (1932).

Although the question presented in this appeal does involve whether negligence occurred, this Court has found that expert testimony is indispensable to prove causation where "it is to the scientific community that the law must look for the answer." *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 489; 566 NW2d 671 (1997). We conclude that plaintiffs' theory of liability in the case at bar, i.e., stray voltage negatively affecting the milk production of a dairy herd, presents technical issues that are beyond the common experience and understanding of the average juror, making expert testimony necessary to establish the negligence cause of action. "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." *Craig v Oakwood Hosp*, 471 Mich 67, 93; 684 NW2d 296 (2004).

Further, while plaintiffs offered evidence that cows demonstrated behavior that would be consistent with exposure to stray voltage, the inference that plaintiffs sought to draw regarding the decreased milk production was speculative in the absence of proper supporting expert testimony on causation. *Skinner, supra* at 164. Although a plaintiff need not negate all other possible causes of an injury, a plaintiff must "exclude other reasonable hypotheses with a fair amount of certainty." *Skinner supra* at 166, quoting 57A Am Jur 2d, Negligence, § 461, p 442; see also *Craig, supra* at 87-88. Expert testimony would be necessary to rule out other possible causes under the circumstances shown in this case, such as diseases within the herd, which is not

a matter within the common understanding of a jury. The trial court did not err in granting defendant's motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Stephen L. Borrello