STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND O'NEAL,

Plaintiff-Appellee,

v

ST. JOHN HOSPITAL & MEDICAL CENTER and RALPH DILISIO, M.D,

Defendants,

and

EFSTATHIOS TAPAZOGLOU, M.D.,

Defendant-Appellant.

UNPUBLISHED
October 28, 2010

No. 277317
Wayne Circuit Court
LC No. 05-515351-NH

RAYMOND O'NEAL,

Plaintiff-Appellee,

v

ST. JOHN HOSPITAL & MEDICAL CENTER and RALPH DILISIO, M.D.,

Defendants-Appellants,

and

EFSTATHIOS TAPAZOGLOU, M.D.,

Defendant.

No. 277318
Wayne Circuit Court
LC No. 05-515351-NH

ON REMAND

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

PER CURIAM.

On July 31, 2010, the Michigan Supreme Court issued an opinion that reversed the decision of this Court and remanded with directions to decide an issue raised but not addressed in this Court's earlier opinion in the matter. *O'Neal v St. John Hosp & Med Ctr*, ___ Mich ___; ___ NW2d ___ (Docket No. 138180; rel'd July 31, 2010). We remand to the trial court for a *Daubert*[1] hearing.

I. FACTS AND PROCEDURAL HISTORY

This Court's earlier opinion provided a brief statement of the underlying facts:

> This case arises out of a stroke that plaintiff, who suffers from sickle cell anemia, developed after being misdiagnosed with pneumonia rather than acute chest syndrome ("ACS"). While plaintiff was later provided with a blood transfusion, plaintiff presented expert testimony concluding that plaintiff would more likely than not have avoided a stroke had he been properly diagnosed and provided with a timely "aggressive" transfusion or an exchange transfusion. [*O'Neal v St John Hosp & Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued November 4, 2008 (Docket Nos. 277317 & 277318), slip op at 2 (footnotes omitted).]

Plaintiff commenced this action, and defendants sought summary disposition. Defendants argued that plaintiff failed to present evidence sufficient to establish that the failure to provide more aggressive transfusion therapy would have reduced his risk of a stroke by at least half. Alternatively, defendants requested a hearing to determine the admissibility of the expert witness testimony offered by plaintiff. The trial court denied both motions. *Id.*

Defendants sought interlocutory relief in this Court, but this Court denied leave, in unpublished orders entered February 8, 2007 (Docket Nos. 274573 & 274570) (Zahra, P.J., and Talbot and Frank Kelly, JJ.). Defendants then sought relief in the Supreme Court, which, in lieu of granting leave, remanded the case to this Court for consideration as on leave granted. *O'Neal v St John Hosp & Med Ctr*, 477 Mich 1087; 729 NW2d 241 (2007). On remand, this Court consolidated the appeals and ultimately issued a two-judge majority opinion on November 4, 2008 (Wilder, P.J., and Owens, J; Jansen, J., concurring). *O'Neal v St John Hosp & Med Ctr*, unpublished opinion issued November 4, 2008 (Docket Nos. 277317 & 277318).

The majority treated this case as one involving lost opportunity, rather than traditional malpractice, and opined that, assuming without deciding that the expert testimony in question was properly admitted, the testimony "that plaintiff 'more likely than not' would have avoided a stroke with proper treatment was insufficient to avoid summary disposition." Unpublished

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

majority opinion issued November 4, 2008 (Docket No. 277317), slip op at 6. In light of this decision, the majority deemed it unnecessary to reach the remaining issue on appeal. *Id.* Judge Jansen, in concurrence, opined that summary disposition would be proper "irrespective of whether this was a loss-of-opportunity case."

The Supreme Court reversed, declaring that this was a traditional malpractice case rather than one of lost opportunity and ruling that "plaintiff established a question of fact on the issue of proximate causation because plaintiff's experts opined that defendants' negligence more probably than not was the proximate cause of plaintiff's injuries." ___ Mich ___; ___ NW2d ___ (Docket No. 138180, decided July 31, 2010), slip op at 2. The Court remanded this case to this Court for resolution of the remaining issue.

II. *DAUBERT* HEARING

The trial court correctly denied the motion to disallow plaintiff's experts, but erred in denying the alternative motion for a *Daubert* hearing.

This Court reviews a trial court's determination regarding the qualification of an expert witness, and the decision to admit expert witness testimony, for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). Likewise whether to conduct a *Daubert* hearing is reviewed for an abuse of discretion. *Id*. at 216-217.

MRE 702 and 703 govern scientific evidence and witnesses attesting to it:

> 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. [MRE 702.]

> 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. [MRE 703.]

Comporting with these rules is MCL 600.2955, which provides, in pertinent part, as follows:

> (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.

The current wording of MRE 702 was intended to reflect the standards set forth in *Daubert v Merrell Dow Pharmaceuticals*, 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). Under this standard, "'[g]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence . . . but the Rules of Evidence . . . do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 US at 597. Comporting with this principle is MRE 104(a), which provides that "[p]reliminary questions concerning the qualification of a person to be a witness . . . shall be determined by the court. . . ." Accordingly, a trial court retains the "fundamental duty of ensuring that *all* expert opinion testimony—regardless of whether the testimony is based on 'novel' science—is reliable." *Gilbert*, 470 Mich at 781 (italics in the original).

In this case, the experts at issue are Dr. Richard Stein, Dr. John Luce, and Dr. Griffin Rodgers. At deposition, Dr. Stein identified himself as a specialist in hematology and oncology. Dr. Stein reported that he reviewed plaintiff's medical records, and also consulted medical articles involving a pediatric study by one Robert J. Adams, M.D., and an article by Elliott P. Vichinsky, M.D. in the New England Journal of Medicine entitled, *Causes and Outcomes of the Acute Chest Syndrome in Sickle Cell Disease*. Dr. Stein stated that "very good data" showed that children with sickle cell disease who are treated with "aggressive transfusion therapy" have a "markedly" reduced risk of thrombotic stroke, and added that such studies had not been conducted on adults and therefore he could only apply this data to adults through

"extrapolation." Dr. Stein admitted, however, that blood transfusions produce difference results in children from those in adults because children require transfusions of lesser amounts of blood. Dr. Stein opined that defendant Dr. Tapazoglou deviated from the appropriate standard of care in failing to avert plaintiff's stroke through resort to exchange- or aggressive-transfusion therapy. Asked for an answer based on what he had extrapolated from the pediatric study, Dr. Stein estimated that, had plaintiff received such treatment, the likelihood of his avoiding his stroke would have been greater than 50 percent.

Dr. Luce described himself as board certified in internal medicine, pulmonary diseases, and critical-care medicine. Dr. Luce opined that the appropriate standard of care in this case required exchange- or aggressive-transfusion therapy. Dr. Luce stated his firm opinion that plaintiff suffered from acute chest disease. Asked for the basis of that opinion, Dr. Luce cited the aforementioned Vichinsky article and pediatric study, along with an article on the management of sickle cell disease by Vichinsky and one Dr. Embry. Asked about drawing conclusions concerning an adult on the basis of a pediatric study, Dr. Luce admitted that he was extrapolating, just as had Dr. Stein before him, and reiterated that there were no adult studies to consult. Asked if he based his opinion concerning the propriety of exchange transfusion in this instance on the pediatric study, Dr. Luce answered in the negative, and elaborated that his opinion was "based on the standard of care for managing sickle crisis—acute chest syndrome," and cited "the articles by Dr. Embry, the chapters by Dr. Embry in the Cecil Textbook of Medicine, and [a] textbook which I have written . . ." Dr. Luce opined that, had plaintiff's blood condition been improved through proper transfusion therapy, plaintiff would probably not have suffered his stroke. However, asked to estimate the chances that the stroke would have occurred even with the recommended therapy, Dr. Luce declined to do so.

Dr. Griffin Rodgers testified at deposition that he reviewed plaintiff's medical records, and stated, "if I was asked about the standard of care, I would say the patient required exchange transfusion." Dr. Rodgers elaborated that sickle cell patients of plaintiff's age had a 1% change of developing a stroke generally, but that those suffering from acute chest syndrome had a 10% to 20% such chance. Dr. Rodgers opined that a timely exchange transfusion would have reduced plaintiff's risk of stroke "by at least half and probably greater than half" such that plaintiff's risk of suffering a stroke would have dropped to 5% to 10%, or even less. Dr. Rodgers explained that his conclusions were based on his general knowledge of patients who have suffered strokes but were not treated with transfusion therapy, and the Vichinsky study. Asked about the pediatric study, Dr. Rodgers replied that it would be "something that you would consider for [plaintiff's] subsequent care," and elaborated that one could extrapolate from that study in this instance because there was no reason to suppose that the sickling of cells would be different in a child from such process in an adult.

The trial court correctly declined to bar these experts outright, but it should have held a *Daubert* hearing the better to develop the question of the reliability of the data upon which those experts relied.

"MRE 702 requires a trial court to insure that each aspect of an expert opinion's proffered testimony—including the data underlying the expert's theories and the methodologies by which the expert draws conclusions from that data—is reliable." *Gilbert*, 470 Mich at 779.

In this case, all three experts cited the pediatric study and the Vichinsky article. Dr. Luce also made mention of textbooks, and Dr. Rodgers referred to his education, training and experience.

Defendants attack the Vichinsky article as not using a control group and not comparing the transfusion regimen the experts say should have been undertaken with the treatment plaintiff did receive. They also note that 68% of the participants in the study received simple transfusions, and that the article indicates that such simple transfusions seemed as effective as exchange transfusions in connection with "'improvements in oxygenation.'" Defendants additionally note that the article states that the optimal treatment for acute chest syndrome has not been established, and that the question of how best to treat it remains a matter of controversy.

That all three experts extrapolated from data gathered in the Adams/pediatric study in connection with young children invites greater scrutiny. Also of concern is that that study did not address staving off an initial stroke, such as plaintiff apparently suffered, but rather a second or successive stroke. We conclude that further adversarial testing of the reliability of that study is in order.

Dr. Luce's reliance on experience and textbooks, and Dr. Rodgers's reliance upon his general knowledge of patients, education, training, and other experience, seem benign enough. But no evidence was in fact presented on the reliability of such information, including whether it was generally accepted in the scientific community, and whether other experts would rely on experience similar to that of Drs. Luce and Rodgers in reaching their conclusions.

"An evidentiary hearing under MRE 702 and MCL 600.2955 is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 139; 732 NW2d 578 (2007) (italics in the original). We conclude that such a threshold inquiry was lacking in this case.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens