

STATE OF MICHIGAN  
COURT OF APPEALS

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CAROL MACKENZIE, Personal Representative  
of the ESTATE OF THEREL B. KUZMA,

UNPUBLISHED  
June 18, 2013

Plaintiff-Appellant/Cross-Appellee,

v

No. 306549  
Calhoun Circuit Court  
LC No. 2003-001783-NH

JOHN D. KOZIARSKI, M.D., FAMILY  
SURGICAL SERVES, P.C., FAMILY  
SURGICAL CARE, P.C., and XYZ UNKNOWN  
CORPORATION,

Defendants-Appellees/Cross-  
Appellants.

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Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff appeals as of right the trial court's order dismissing her complaint after granting defendants' motion to strike her only expert witness. On cross-appeal, defendants challenge the trial court's order denying their motion for directed verdict on the issue of causation. Because we conclude that the trial court properly struck plaintiff's expert because the expert's opinion failed to satisfy the reliability requirements of MRE 702 and MCL 600.2955, we affirm.

This case is a medical malpractice action brought by plaintiff after the death of Therel Kuzma, who died from complications that arose following a laparoscopic surgery to repair her hernia. The pertinent facts of this case were previously set forth by this Court in its unpublished opinion, *Mackenzie v Koziarski*, unpublished per curiam opinion of the Court of Appeals, issued March 22, 2011 (Docket No. 289234). Relevant to the issues now before us, this Court in its previous opinion remanded the case to the trial court for a determination regarding whether plaintiff's expert, John D. Corbitt, Jr., M.D., could offer opinion testimony that satisfied the requirements of MCL 702 and MCL 600.2955. This Court also noted that defendants could raise their argument regarding causation on remand.

After the release of this Court's opinion remanding the case to the trial court, defendants moved for a directed verdict on the basis of plaintiff's alleged failure to prove causation. Defendants also moved to strike Corbitt's testimony and for a directed verdict on that basis.

Defendants argued that Corbitt's testimony should be stricken because his opinion was not reliable under MRE 702 and MCL 600.2955. After hearings on both motions, the trial court denied defendants' motion for a directed verdict on the basis of plaintiff's failure to prove causation, but granted defendants' motion to strike Corbitt's testimony. However, the trial court denied defendants' motion for a directed verdict on that basis and set the case for trial. On the first day of the scheduled trial, defendants again moved for a directed verdict on the basis of the fact that plaintiff now had no expert to testify to the standard of care, breach of that standard, and causation. The trial court noted that after reviewing defendants' supplemental pleadings, it was convinced that a directed verdict was required after striking plaintiff's only expert witness. Accordingly, the trial court granted a directed verdict in favor of defendants and dismissed the case. This appeal and cross-appeal followed.

On appeal, plaintiff argues that the trial court erred by concluding that Corbitt's testimony was unreliable and, accordingly, inadmissible.

"The determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001). We also review for an abuse of discretion a trial court's decision to grant a motion to strike. *Kalaj v Khan*, 295 Mich App 420, 425; 820 NW2d 223 (2012). An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of reasonable and principled outcomes. *Corporan v Henton*, 282 Mich App 599, 605-606; 766 NW2d 903 (2009).

In *Craig v Oakwood Hosp*, 471 Mich 67, 86; 684 NW2d 296 (2004), the Court explained the elements a plaintiff must demonstrate in order to establish a cause for medical malpractice:

- (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care.

These elements are codified in MCL 600.2912a. Expert testimony is required to establish the standard of care and to demonstrate a defendant's breach of that standard. *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010).

In this case, the trial court struck the testimony of plaintiff's only expert witness. Thus, without Corbitt's testimony, plaintiff is unable to demonstrate the standard of care and any alleged breach of that standard. The trial court struck Corbitt's testimony because it concluded that the testimony was unreliable under MCL 600.2955. The admissibility of scientific or expert testimony is governed by MCL 600.2955, which provides in pertinent 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.

Also relevant to the admissibility of Corbitt’s testimony is 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.

The proponent of evidence bears the burden of establishing the admissibility of that evidence. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). A trial court “may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule’s standard of reliability.” *Id.* at 782. The Court explained that a trial court’s 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. [*Id.* (emphasis in original).]

Moreover in *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068; 729 NW2d 221 (2007), the Court noted that in order to fulfill its gatekeeper role, a trial court “shall” consider the factors set forth by MCL 600.2955. In that case, the Court remanded the case back to the trial court because the trial court failed to “consider the range of indices of reliability listed in MCL 600.2955,” and instead focused only on plaintiff’s failure to present specific studies on the growth rate of untreated cancer. *Id.* Accordingly, specific analysis of all the statutory factors is required.

During the hearing on defendants’ motion to strike, the trial court requested that both parties address each factor set forth by MCL 600.2955. Thus, the trial court complied with this Court’s instructions on remand and with *Clerc* by specifically considering each statutory factor. The trial court ultimately concluded that many of the reliability factors set forth by MCL 600.2955 were not satisfied or were inapplicable. However, it rejected the notion that a majority of the factors must be satisfied in order to find the testimony reliable, and acknowledged that the statute did not require the balance of the factors to favor admissibility in order for it to find the opinion reliable. Nevertheless, it concluded that Corbitt’s testimony was not sufficiently reliable under MCL 600.2955 and MRE 702 because Corbitt specifically testified in his de bene esse deposition that his work focused on inguinal hernia repair, which while related to the hernia repair at issue in this case, is a distinct type of surgery. The trial court also found fatal the fact that Corbitt testified in his discovery deposition that he did not read the complaints, the answers, the interrogatories and transcripts, or the medical records and pharmacy notes.<sup>1</sup> Finally, Corbitt also testified in his discovery deposition that there is no literature or study that supports his opinions. On the basis of these specific failings paired with the fact that the statutory factors did not favor a finding of reliability, the trial court concluded that Corbitt’s opinion was not sufficiently reliable.

We conclude that the trial court’s decision striking Corbitt’s testimony as unreliable was not an abuse of discretion. Review of the record supports the trial court’s findings regarding Corbitt’s testimony. Further, the majority of the reliability factors are not satisfied in this case and, while no case has ever held that a certain number of the factors must support reliability in order for an opinion to be admissible, the fact that very few can be answered in the affirmative calls the reliability of Corbitt’s opinion into question. First, Corbitt’s opinion has not been subjected to scientific testing, and his opinion has not been subjected to peer review publication; thus, factors (a) and (b) must be answered in the negative. Plaintiff has not proffered any evidence of the existence and maintenance of generally accepted standards for governing the application and interpretation of a methodology or technique, but it is possible that factor (c) is

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<sup>1</sup> We note that the trial court accurately quotes that portion of Corbitt’s testimony in its opinion; however, later in the same deposition Corbitt indicates that he did review and make notes on some medical records regarding Kuzma’s medical history before the hernia surgery at issue in this case.

not relevant to Corbitt's opinion in this case. Regarding factor (d), there is no known or potential error rate of Corbitt's opinion. Regarding factor (e), Corbitt admitted that there is no published work that supports his opinion, and defendants admitted several articles explicitly disagreeing with Corbitt's opinion; thus, it would seem that the opinion is not generally accepted within the relevant expert community. Regarding factor (f), it is not clear whether the basis for Corbitt's opinion is reliable or whether other experts would rely on it because Corbitt's basis seems to be his general feeling about what was appropriate in this case based upon his general knowledge of medicine and laparoscopic surgery rather than anything specific. No information is known regarding factor (g).

Moreover, in *Gilbert*, 470 Mich at 782, the Court explained that MRE 702 "mandates a searching inquiry" of not only the data underlying an expert's testimony but also the manner that the expert extrapolates from that data. In this case, the record demonstrates that Corbitt admitted that there is essentially no data to support his opinion and that his opinion is based on his general experience with laparoscopic surgery in other contexts because he does not perform the specific type of surgery at issue in this case. We conclude that this is not sufficient to support a finding of reliability. Moreover, *Gilbert* stresses that an expert's opinion must be based on conclusions reached through reliable principles and methodology; here, Corbitt relied on principles of laparoscopic surgery not specific to the surgery that occurred and on an incomplete review of Kuzma's medical records. While it cannot be disputed that Corbitt's credentials support a conclusion that he could express a reliable expert opinion regarding laparoscopic surgery generally, there is no evidence that Corbitt can present a reliable expert opinion regarding the standard of care for the specific surgery performed in this case or whether the use of laparoscopic surgery in Kuzma's specific case breached the standard of care. Accordingly, we affirm the trial court's order striking Corbitt's testimony and its order directing the verdict in favor of defendants.<sup>2</sup>

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<sup>2</sup> In light of our conclusion that the trial court properly struck Corbitt's testimony, we need not address defendants' argument on cross-appeal regarding whether Corbitt's testimony was sufficient to establish causation. Nevertheless, we note that we would conclude that the trial court properly denied defendants' motion for directed verdict on that basis. On cross-appeal, defendants argue that the trial court erred by denying their motion for directed verdict on the basis of plaintiff's failure to prove causation because Corbitt's testimony was not sufficient to establish but for cause. Defendants raise two specific arguments.

First, defendants maintain that plaintiff cannot demonstrate but for cause because she cannot demonstrate that Kuzma would have consented to the open procedure if it would have been recommended. This argument fails because while Kuzma is deceased and obviously cannot testify, it is reasonable to assume that she would have consented to the procedure if plaintiff's argument that an open procedure would be the only type of procedure that complies with the standard of care is accepted. The jury would be permitted to assume that Kuzma would exercise ordinary care for her own safety, M Civ JI 10.08, and review of Kuzma's extensive medical history demonstrates that she has a pattern of consenting to her doctor's recommendations. These facts coupled with Corbitt's testimony regarding the benefits of an open procedure for a

Affirmed.

/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald  
/s/ Joel P. Hoekstra

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patient like Kuzma are sufficient to establish that Kuzma would have consented to an open procedure had the option been presented to her.

Defendants also argue that but for cause cannot be established because Corbitt testified on cross-examination that Kuzma had at best a 50 percent chance of survival if any complications arose during an open or a laparoscopic surgery. However, defendants' argument fails to acknowledge that on direct examination Corbitt testified that if an open procedure were performed on a patient like Kuzma, and the same complications arose, it was "more likely than not" that those complications would not have been fatal to her. Thus, Corbitt's testimony presents a credibility question for a jury to resolve. *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008). A directed verdict is not appropriate when there is a question of fact. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011). Thus, the trial court properly denied defendants' motion for a directed verdict on the basis of causation.