STATE OF MICHIGAN

COURT OF APPEALS

THOMAS SANDUSKY as Personal Representative of the ESTATE OF HAL SANDUSKY,

Plaintiff-Appellant,

v

VHS OF MICHIGAN, INC., doing business as DETROIT MEDICAL CENTER, VHS DETROIT RECEIVING HOSPITAL, INC., doing business as DETROIT RECEIVING HOSPITAL AND UNIVERSITY HEALTH CENTER, and SARAH E. ALBERS, M.D.,

Defendants-Appellees.

UNPUBLISHED
September 23, 2021

No. 354661
Wayne Circuit Court
LC No. 18-004973-NH

Before: CAVANAGH, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Plaintiff Thomas Sandusky, personal representative of the estate of Hal Sandusky, appeals the trial court's order granting defendants summary disposition of plaintiff's medical malpractice claims. We affirm.

I. FACTUAL BACKGROUND

Plaintiff brought this action against defendants alleging that defendant, Dr. Sarah Albers, provided negligent treatment to Hal after the Detroit police arrested him and brought him to the Detroit Receiving Hospital's emergency room for treatment of two lacerations on his right arm near his elbow that he sustained during a domestic dispute from putting his arm through a glass window. Upon arriving at the hospital emergency department, nurses triaged and assessed Hal's condition. He presented with an abrasion to his head and lacerations near his right elbow on his forearm, one a superficial cut and the other a cut deeper through the skin exposing the muscle bellies. Hal's arm lacerations were not bleeding and he advised that that he did not feel as though he had any foreign body retained in the lacerations. Dr. Albers obtained an x-ray to rule out any foreign body in the deeper laceration. The x-ray indicated the possible presence of a tiny focus of

hyperdensity in the deeper aspect of the soft tissue laceration. Dr. Albers offered but Hal declined anesthesia by topical application or injection. Dr. Albers thoroughly irrigated the wound with saline and saw no obvious foreign body when probing the wound or when irrigating the wound. Dr. Albers sutured the lacerations, washed the wound after getting off all of the dried blood, and gave Hal wound care and follow-up instructions. The discharge instructions given to Hal and his accompanying police officers directed Hal to inspect and wash his wounds with soapy water and put on a new dressing in 24 hours, and to call his doctor if he had redness, pain, or swelling in the area of his stitches.

The hospital discharged Hal into the custody of the Detroit police who took him to the precinct where the police booked him and placed him in jail. Two days later, during the evening of June 27, 2013, jail personnel found Hal unresponsive, unsuccessfully attempted to revive him, and then had him transported to Detroit Medical Center's Sinai-Grace Hospital by ambulance. Emergency personnel tried to revive Hal and administered various medications, performed CPR, and attempted to restore his heart function. During the examination of his body they noted swelling in the upper portion of his right arm with sloughing of the skin. Resuscitation efforts proved unsuccessful and the attending physician pronounced Hal dead at 12:56 a.m. on June 28, 2013. Lab work performed on a sample of Hal's blood indicated that he had a streptococcus infection. The Post Mortem Report indicated that Hal had a broad area of skin sloughing with blister formation with necrosis on his upper right arm and forearm measuring 15 by 3 inches. The tissue surrounding the stitched wounds showed evidence of infection and sepsis. The medical examiner concluded that septic shock, right arm laceration infection, and blunt trauma caused Hal's death.[1]

On May 4, 2018, plaintiff brought this medical malpractice action against defendants. On March 27, 2020, defendants moved for summary disposition on the ground that Dr. Saul Levine, plaintiff's standard of care expert, held inadmissible speculative opinions requiring summary disposition of plaintiff's case. On July 7, 2020, the trial court granted defendants' motion and entered a final order ruling that plaintiff's expert's standard of care opinions were premised upon improper assumptions and not based upon facts in evidence requiring the exclusion of Dr. Levine's opinions. Consequently, plaintiff could not establish elements of her prima facie case, that Dr. Albers breached the applicable standard of care, entitling defendants to summary disposition as a matter of law.

Plaintiff filed his opposition brief to defendants' summary disposition motion on July 16, 2020, and on July 28, 2020, also moved for rehearing or reconsideration of the trial court's

[1] In June 2017, plaintiff sued the City of Detroit, the Detroit Police Department, and numerous police officers in federal court. Plaintiff filed a second federal lawsuit on May 15, 2018, in which he named Dr. Albers and numerous additional police officers as defendants. The two cases alleged claims of violations of 42 USC 1983 and were later consolidated. The federal district court granted Dr. Albers summary judgment after finding that she had not acted under color of state law and even if she had her conduct did not rise to the level of a violation of the statute. *Sandusky v Okeefe*, unpublished opinion and order of the US District Court for the Eastern District of Michigan, entered August 8, 2019, Case No. 17-11784.

summary disposition order. The trial court denied plaintiff's motion for reconsideration and this appeal followed.

II. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's determination regarding the admission of expert witness testimony. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). We review for an abuse of discretion the trial court's decision to exclude evidence. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016) (citation omitted). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes . . . ." *Id.* (quotation marks and citation omitted).

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. A court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id*. "When a motion under subrule (C)(10) is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 120. The party who moves for summary disposition under MCR 2.116 bears the initial burden of production, which may be satisfied in one of two ways. *Quinto v Cross & Peters Co*, 451 Mich 358, 361; 547 NW2d 314 (1996). The moving party may either submit affirmative evidence that negates an essential element of the nonmoving party's claim or demonstrate to the trial court that the nonmoving party's evidence fails to establish an essential element of the nonmoving party's claim. *Id*. at 362. Once the moving party satisfies its burden in one of those two ways, "[t]he burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id*. The reviewing court "should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered." *Maiden*, 461 Mich at 121. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted). A material fact is an ultimate fact essential to the claim on which a jury's verdict must be based. *Simerka v Pridemore*, 380 Mich 250, 274-275; 156 NW2d 509 (1968). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden*, 461 Mich at 121 (citations omitted).

III. ANALYSIS

Plaintiff argues that the trial court erred by granting defendants summary disposition because Dr. Levine's opinions were supported by evidence in the record. We disagree.

"In a medical malpractice case, plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal."

Wischmeyer v Schanz, 449 Mich 469, 484; 536 NW2d 760 (1995) (citations omitted); *Kalaj v Khan*, 295 Mich App 420, 429; 820 NW2d 223 (2012). In medical malpractice cases, expert testimony is required to establish the applicable standard of care and demonstrate a breach of that standard. *Gonzalez v St. John Hosp & Med Ctr (On Reconsideration)*, 275 Mich App 290, 294-295; 739 NW2d 392 (2007). Expert testimony may not be based on mere speculation, and there "must be facts in evidence to support the opinion testimony of an expert." *Teal v Prasad*, 283 Mich App 384, 395; 772 NW2d 57 (2009). "In order to proceed against a hospital on a theory of vicarious liability, a plaintiff must offer expert testimony to establish specific breaches of the standards of care applicable to the individuals involved in the plaintiff's care and treatment alleged to be deficient." *Gonzalez*, 275 Mich App at 295 (citation omitted).

MCL 600.2955 governs admission of expert testimony in wrongful death actions and 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:
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> (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.

The relevant inquiry under MCL 600.2955 is whether a scientific opinion is "rationally derived from a sound foundation." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 137, 139; 732 NW2d 578 (2007).

MRE 702, which governs the evidentiary requirements for admissibility of expert testimony, 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.

MRE 703 further provides:

> 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 hereafter.

Trial courts have a "gatekeeping obligation" under MRE 702, under which they must "review all expert opinion testimony" for admissibility. *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004). "This 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." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). Trial courts must vet all aspects of expert testimony. *Id.* A party relying on expert-opinion testimony to survive summary disposition bears the burden of demonstrating that such testimony will be admissible at trial under the strictures of MRE 702. *Amorello v Monsanto Corp*, 186 Mich App 324, 331-332; 463 NW2d 487 (1990). Because MRE 703 requires that the facts on which an expert bases an opinion or inference be in evidence, an expert's opinion is objectionable when based on assumptions that may be consistent with but not properly deducible from the established facts because it constitutes impermissible conjecture. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003).

Plaintiff asserts that Dr. Levine based his opinions on medical literature and Hal's medical records. Plaintiff argues that, because Dr. Albers's treatment notes omitted stating that she cleansed Hal's wound under pressure and omitted the amount of liquid used, one must infer that she failed to do both. Plaintiff contends that Dr. Albers inadequately irrigated the wound, closed it, and then had Hal's arm x-rayed. De novo review of the record, however, does not support plaintiff's contentions.

Close examination of the record evidence, particularly Hal's Detroit Receiving Hospital's emergency department medical treatment records in conjunction with Dr. Albers's treatment notes, do not comport with plaintiff's contentions that Dr. Albers inadequately cleansed Hal's wounds and then sutured closed Hal's wounds before obtaining x-ray imaging. The records reflect that the emergency department admitted Hal on June 25, 2013, at 6:31 p.m. Thereafter, nurses performed triage and assessment of Hal's mental awareness and physical status, measured and recorded his respiration rate, blood pressure, and oxygen saturation levels from 6:31 p.m. until 7:01 p.m. The

records indicate that, at 7:07 p.m., Dr. Albers ordered an x-ray of Hal's right elbow and ordered that he receive a tetanus shot. A nurse administered Hal a tetanus shot in his right arm at 7:11 p.m. At 7:19 p.m., a nurse transported Hal on a stretcher to have his x-rays performed. The order notes indicate that a technician performed Hal's x-ray between 7:34 p.m. to 7:38 p.m. The radiology report indicates that Hal's x-ray occurred at 7:34 p.m. and stated that Hal had an open wound of his right elbow. A nurse took and reported Hal's vital signs at 7:51 p.m. The medical records indicate that the hospital discharged Hal into the custody of the police at 8:53 p.m. The medical records specified the discharge instructions and that they were given to both Hal and to the police.

Dr. Albers's dictated but unedited treatment notes stated in relevant part as follows:

> I have given him wound care instructions bedside for the abrasion as well as potentially closed head injury instructions given that he does have this abrasion to his head. I have also sutured his lacerations to his right anterior elbow close. After I did obtain an x-ray to rule out any foreign body as the right cut is a laceration, it is deep. The patient's right elbow x-ray shows no acute fracture or dislocation. The patient does have a tiny focus of hyperdensity in the deep aspect of the laceration, which could represent a tiny foreign body. I did thoroughly irrigate this patient's wound with saline. I did not see any obvious foreign body when probing the wound or when irrigating the wound out. At this time, the patient has requested that he not receive lidocaine either by topical placement or by injection to numb the wound. He would just like me to sew it and "hurry up." At this time, I have used 4-0 nylon suture in interrupted fashion, placed interrupted sutures over each laceration in total. The patient has had 10 interrupted sutures. He tolerated the procedure well. No complications were had. Against this is under his request for no anesthesia. Risks, benefits and alternatives were discussed with the patient prior to performing the procedure and verbal consent was obtained. No complications were had. I did wash the wound after getting off all dried blood and placed some dressing, gauze as well as bacitracin dressing and gave this patient wound care instructions. He was given follow up with the Emergency Department in the next 7-10 days for removal of his sutures as he does not have a primary care physician. He was discharged back to the Detroit Police Department custody for further care and treatment.

Dr. Albers's treatment notes state the procedures performed but close analysis raises questions regarding the actual chronology of the procedures. During her deposition, Dr. Albers explained the typical procedure she followed for treatment of a patient presenting with a laceration wound. She stated that she would cleanse and inspect the wound and if appropriate have the wound x-rayed to determine the presence or absence of any foreign body. After review of an x-ray report, she would irrigate the wound with saline and probe it while inspecting for the presence of a foreign body. Once she determined that no foreign body appeared present in the wound she would close it with sutures and dress the wound with a topical antibiotic and gauze. Dr. Albers was not asked questions regarding the pressure at which she irrigated laceration wounds nor about the volume of liquid that she used.

Dr. Albers testified initially that she lacked an independent recollection of treating Hal. She stated that she needed to review his emergency medical records to recall details. The record

reflects that her review of Hal's medical records enabled her to explain her treatment of Hal. When confronted regarding the procedural irregularities featured in her treatment notes regarding the sequence of treatment procedures, Dr. Albers explained that her notes appeared to have typographical or grammatical errors. She stated that they did not reflect the sequence of her actual treatment procedures.

In his deposition, Dr. Levine agreed with Dr. Albers's testimony that her transcribed notes did not accurately represent the sequence of the x-ray and wound closure because he developed a timeline of Hal's emergency treatment from the medical records, and the timing of events supported Dr. Albers's deposition testimony's clarification. Dr. Levine agreed that Dr. Albers's use of saline had been appropriate but he suggested that the volume and pressure needed to be documented. He did not opine, however, that the standard of care required documenting those two things nor that not documenting the pressure and volume of liquid breached the standard of care.

Dr. Levine testified that he assumed that the wound management had not been done properly because the volume and pressure of saline had not been documented. He also assumed that, because Hal had refused anesthesia, that in itself must have resulted in inadequate irrigation and exploration of the wound, because he assumed further that Hal would not have tolerated the extent of needed irrigation and exploration of the wound.

The record reflects that the trial court had available for its review Hal's Detroit Receiving Hospital emergency department medical records, Dr. Albers's deposition transcript, Dr. Levine's affidavit of merit, and Dr. Levine's deposition transcript. From that evidence the trial court could reasonably conclude that the sequence of medical treatment events on June 25, 2013, occurred as described in the totality of the records which comported with Dr. Albers's deposition testimony. From that evidence, the trial court could discern that even Dr. Levine conceded that the sequence of treatment, particularly the x-ray and later closure of the wound, occurred in the proper order. Plaintiff's argument to the trial court in opposition to defendants' motion and again in plaintiff's motion for reconsideration, that the trial court could only conclude that Dr. Albers closed Hal's wound first and then x-rayed it, lacked merit. The trial court could conclude from the totality of the evidence the chronological order of the procedures performed by Dr. Albers.

Review of defendants' motion under MCR 2.116(C)(10) required the trial court to consider the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . ." *Maiden v Rozwood*, 461 Mich at 120. The trial court was not obligated to view only a small portion of the record—Dr. Albers's treatment notes—out of the context of the other medical records that clarified the timing and sequence of events. Further, close analysis of Dr. Albers's treatment notes indicates that Dr. Albers described the various treatment procedures she followed in providing Hal care, but she did not dictate it in a chronological order or specify the time at which she provided any of the various features of the treatment. The other medical records provide a backdrop that reveals the temporal sequencing that comports with Dr. Albers's deposition testimony. Dr. Albers's treatment notes indicate that after x-ray of his wound, Dr. Albers recommended use of lidocaine but Hal declined administration of anesthesia and submitted to irrigation and probing of his wound without anesthetic. Dr. Albers's treatment notes indicate that she thoroughly irrigated his wound and probed it in an effort to determine the presence of any foreign body. After cleansing and probing the wound, having found no foreign body present, Dr. Albers sutured Hal's wounds closed.

Dr. Levine testified that the standard of care for laceration wound management required x-raying the wound and thoroughly cleansing it with adequate liquid under pressure. The record reflects that Dr. Levine premised his opinions on his belief that Hal's deep wound could not have been adequately cleansed, irrigated, and probed because Hal declined anesthesia and Dr. Albers did not administer any despite his refusal. Dr. Levine suggested that Dr. Albers should have administered anesthesia or a sedative despite Hal's refusal. In *In re Rosebush*, 195 Mich App 675, 680-681; 491 NW2d 633 (1992) (citations omitted), however, our Supreme Court explained:

> Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent. Accordingly, if a physician treats or operates on a patient without consent, the physician has committed a battery and may be required to respond in damages.
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> * * *
>
> Thus, a competent adult patient has the right to decline any and all forms of medical intervention, including lifesaving or life-prolonging treatment.

Hal, therefore, had the right to decline the administration of anesthesia and Dr. Albers had the obligation to honor his directive. The record reflects that Dr. Albers informed Hal of the risks, benefits, and alternatives, and proceeded with Hal's consent to thoroughly irrigate and probe the wound.

Dr. Levine speculated that Hal must have withdrawn from noxious stimuli and pain associated with irrigating and probing his wound making it impossible for Dr. Albers to cleanse it. The record, however, does not support that assumption. Based upon that speculative assumption, he further assumed that Dr. Albers failed to adequately irrigate and probe the wound to reveal and remove a suspected foreign body. Dr. Levine did not state that Dr. Albers breached the standard of care by not documenting the pressure and volume of irrigation liquid. He merely assumed that Dr. Albers failed to use pressure and an adequate volume of liquid because he assumed that Hal would have recoiled and withdrawn when Dr. Albers attempted to irrigate and probe his wounds that had not been anesthetized.

Analysis of Dr. Levine's opinion testimony reveals that he based his conclusion of Dr. Albers's breach of the standard of care regarding wound management on two assumptions, neither of which were based on evidence in the record. Examination of Hal's medical records, particularly Dr. Albers's treatment notes, indicate that Hal declined anesthesia and with his consent Dr. Albers proceeded to irrigate and probe the depths of his deep wound in an effort to locate the potentially present but unconfirmed foreign body. Dr. Albers specifically noted twice in her treatment notes that Hal underwent the treatment procedures without complication. Dr. Albers's treatment notes indicate that she thoroughly applied saline to the wound and probed it for any foreign body's presence without interference from Hal or any intolerance of the procedure. Then, after detecting no foreign body presence, Dr. Albers closed Hal's wounds. One cannot reasonably infer from Hal's medical records and Dr. Albers's treatment notes that Hal recoiled or withdrew from Dr. Albers's efforts and precluded her from adequately cleansing, probing, inspecting, or suturing his wound.

As explained by this Court in *Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999) (citations omitted), "an expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts." Further, if circumstantial evidence is relied on, such evidence must form a reliable ground on which reasonable inferences may be drawn, not speculation of a breach of the applicable standard of care as the cause of injury or death. *Ykimoff v Foote Mem Hosp*, 285 Mich App 80, 87-88; 776 NW2d 114 (2009). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

In this case, Dr. Levine premised his opinions on two speculative assumptions that lacked evidentiary support and were not in accord with the established facts based upon evidence in the record. His opinions rested on one speculative assumption founded upon another speculative assumption. The evidence presented to the trial court did not substantiate Dr. Levine's assumptions. The evidence, when viewed in a light most favorable to plaintiff, did not support plaintiff's contention that Dr. Albers closed Hal's wound before obtaining the x-ray, did not support an inference that Dr. Albers used no pressure while irrigating Hal's wound, did not support an inference that Dr. Albers used insufficient volume to cleanse Hal's wound, and did not support an inference that Hal recoiled and withdrew from Dr. Albers's wound cleansing and probing procedures making it impossible for Dr. Albers to cleanse Hal's wound. Moreover, Dr. Levine admitted that he did not have any direct evidence that Dr. Albers failed to use adequate volume of saline under inadequate pressure.

Further, the portions of the authoritative medical treatises submitted to the trial court on which Dr. Levine and plaintiff relied do not support plaintiff's position that Dr. Albers breached the applicable standard of care by not anesthetizing Hal's wounds. Although recommended, the literature does not require administration of anesthesia for wound management and does not even address circumstances in which the patient expressly declines anesthesia.

Plaintiff argued to the trial court that Dr. Levine's other standard of care opinions, that Hal should have been prescribed antibiotics because he had a contaminated wound that had not been adequately cleansed, and that his discharge instructions were inadequate under the circumstances for the same reason, were supported by evidence in the record. Both of those opinions, however, were similarly premised on Dr. Levine's two unsupported speculative assumptions. Consequently, they too were not based upon evidence in the record and were inadmissible.

The trial court did not abuse its discretion by concluding that Dr. Levine's opinion testimony failed to meet MRE 702's and MRE 703's requirements. Because he based his standard of care opinions upon speculative assumptions unsupported by record evidence, they lacked the reliability required under MRE 702 and MCL 600.2955. Under MRE 702, admissibility of expert testimony hinges on its reliability. *Elher*, 499 Mich at 22-23. The trial court properly exercised its gatekeeper function and did not err in discerning the deficiencies in Dr. Levine's opinions. The trial court did not err in concluding that he based his standard of care opinions upon speculation, and therefore, they were inadmissible. Accordingly, the trial court properly excluded his opinion testimony and ruled that plaintiff could not establish her prima facie case because she could not rely on Dr. Levine's speculative standard of care opinions. Dr. Levine's speculative testimony did

not raise a genuine issue of material fact regarding the "standard of care" elements of a medical malpractice claim. *Wischmeyer*, 449 Mich at 484.

Plaintiff further argues that the trial court erred by considering Dr. Albers's deposition testimony because he contends that her statements in her treatment notes that she sutured closed Hal's wounds first before obtaining an x-ray were binding admissions of improper treatment, or at the very least, her deposition testimony created an issue of fact precluding summary disposition. We disagree.

Plaintiff selectively focuses on two sentences in Dr. Albers's treatment notes which state: "I have also sutured his lacerations to his right anterior elbow close[sic]. After I did obtain an x-ray to rule out any foreign body as the right cut is a laceration, it is deep." Plaintiff contends that these two sentences describe the chronology of treatment procedures establishing that Dr. Albers first sutured Hal's wound closed and then obtained an x-ray, thereby breaching the standard of care. Plaintiff argues that, based upon these two sentences, the trial court and this Court must deem Dr. Albers bound by the statements in her treatment notes.

Inherent in plaintiff's argument is the requirement that one read Dr. Albers's treatment notes literally, at least, insofar as the wound closing and x-ray procedures are concerned. A literal reading of Dr. Albers's dictated and unedited treatment notes requires concluding that Dr. Albers closed Hal's wounds, ordered an x-ray, reviewed the x-ray, then irrigated and probed his already closed wound, then discussed the already completed procedure with Hal and received Hal's consent, then honored his request for no lidocaine, and again sutured the closed wounds. Obviously, a literal reading reveals an absurd chronological order of treatment. Plaintiff provides no explanation why the trial court or this Court must rely only on the two sentences plaintiff selected as determinative of the chronology of procedures, but disregard the other statements and order in which the other statements appear in Dr. Albers's treatment notes.

Plaintiff asserts that, because Dr. Albers testified initially that she had no independent recollection of her treatment of Hal, her statements in her treatment notes were conclusively binding and determinative that Dr. Albers closed Hal's wound and then obtained the x-ray. Michigan law, however, provides that, "when a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001). To be bound by a statement, *Dykes* indicates that a party must have made a statement of fact clearly, intelligently, and unequivocally. In this case, Dr. Albers's treatment notes make statements of fact, but when read as a whole, the chronological sequence of the treatment procedures described cannot be considered clear, intelligent, or unequivocal because doing so would require acceptance of an inherent chronological absurdity. Wound closure by suturing, then x-raying, then irrigation and probing the closed wound, and then suturing again the already closed wound, makes no sense. That chronology also contradicts the radiologist's report that stated that Hal had an open wound of his right elbow. The chronology of procedures reported in the treatment notes reveals mistakes or improvidence of Dr. Albers's dictation of the chronological description of her treatment. To be understood, the statements made in her treatment notes required explanation. Dr. Albers provided necessary clarification in her deposition testimony that indicated a mistake necessitating explanation or modification. Accordingly, the trial court correctly declined to bind her by the

statements made in her dictated unedited treatment notes because her notes reveal a mistaken, irrational, nonlinear chronology.

Analysis of Dr. Albers's deposition testimony reveals that, although she had no independent recollection of treating Hal, she requested an opportunity to review Hal's medical records of his emergency room visit to help her recall details. The record reflects that after doing so she testified regarding her treatment of Hal. When challenged regarding the chronological order of her treatment notes, she clarified that her treatment notes did not accurately reflect the temporal sequence of her treatment procedures. Her explanation revealed the mistaken chronological sequencing of the procedures listed in her dictated and unedited treatment notes. Contrary to plaintiff's contention, the trial court did not have to hold Dr. Albers bound by her statements in her treatment notes but could rely upon her deposition testimony which clarified the chronological sequence of the treatment procedures.

Moreover, even Dr. Levine found no merit to plaintiff's contention that Dr. Albers sutured closed Hal's wounds before obtaining an x-ray. He testified that he believed Dr. Albers's clarification given in her deposition based on his review of Hal's medical records that disclosed a timeline that comported with Dr. Albers's explanation of the wound management procedures she performed. He did not base any of his standard of care opinions on Dr. Albers's treatment notes' chronology of procedures and particularly not on the two sentences that plaintiff argues establish that Dr. Albers first closed Hal's wounds and then obtained the x-ray.

Plaintiff argues that Dr. Albers's deposition testimony contradicted her treatment notes creating an issue of fact that precluded the trial court from granting defendants summary disposition. Review of Dr. Albers's treatment notes in conjunction with her deposition testimony and Hal's emergency medical records, however, reveals that the treatment notes were not a literal chronological description of the sequence of treatment procedures. Dr. Albers's deposition testimony did not contradict the treatment notes but clarified the chronology of treatment procedures by explaining what she did and the order in which she treated Hal. The trial court, therefore, did not err by considering Dr. Albers's deposition testimony.

Defendants argue that plaintiff failed and cannot establish the existence of a genuine issue of material fact because the facts plaintiff rely upon, the two sentences in Dr. Albers's treatment notes, are not material to any ultimate fact that must be determined for plaintiff to establish a prima facie case of medical malpractice. Defendants' argument has merit.

In *Simerka*, 380 Mich at 274, our Supreme Court clarified that the "distinction made between evidentiary facts and ultimate facts is crucial to the grant or denial of summary judgment." The Court explained that the material fact concept referenced in the court rule means an ultimate fact issue upon which a jury's verdict must be based. *Id*. at 275. After giving examples to explain the conceptual differentiation, our Supreme Court concluded that "the difference between evidentiary fact and material fact, or ultimate fact, is the difference between the raw data admissible in evidence and the inferences or conclusions of facts essential to the claim or defense

which properly may be drawn or reached by a jury from such data." *Id.*[2] Defendants point out that Dr. Levine determined the chronological sequence of Dr. Albers's treatment, agreed with her deposition testimony's clarification of the sequence of her treatment, and did not rely upon her treatment notes' chronological description of events for his standard of care opinions. Defendants correctly assert that the ultimate issue in this case concerns the applicable standard of care and whether Dr. Albers breached it, and because Dr. Levine determined his standard of care opinions without reliance upon the chronology described in Dr. Albers's treatment notes, those notes merely state evidentiary facts but have no bearing on the ultimate issues. Under *Simerka*, a distinction in this case exists between the treatment notes' evidentiary facts and the material facts related to the ultimate standard of care issues. The trial court correctly ruled that no genuine issue of material fact existed based upon Hal's medical records, Dr. Albers's treatment notes, and her deposition testimony.

The trial court could properly consider Dr. Albers's deposition testimony because her description of the sequence of events did not irreconcilably conflict with her treatment notes which may reasonably be understood to describe the overall events but not necessarily in the exact temporal sequence in which the actions unfolded. The record reflects that her treatment notes were dictated after Dr. Albers performed the treatment procedures and then later transcribed by someone else. Dr. Albers testified that she never went back to review or edit her notes. The trial court could properly reflect upon the sequence of laceration treatment and compare the other emergency room records that set forth a general timeline backdrop that comported with the typical practice of laceration review, x-ray analysis, wound cleansing by irrigation and probing, suturing, and dressing of the wound. The trial court, therefore, did not err by rejecting plaintiff's contention that Dr. Albers closed Hal's wound first and later had it x-rayed, which plaintiff's own expert did not consider as true based upon the evidence. Therefore, the trial court did not err by granting defendants summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ James Robert Redford

[2] In keeping with the principle articulated in *Simerka*, this Court has similarly held that material facts relate to ultimate fact issues on which jury verdicts must be based. See *Partrich v Muscat*, 84 Mich App 724, 730 n. 3; 270 NW2d 506 (1978); *Belmont v Forest Hills Pub Sch*, 114 Mich App 692, 696; 319 NW2d 386 (1982). Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Dist Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).