STATE OF MICHIGAN

COURT OF APPEALS

TAMARA MORROW, Plaintiff-Appellant,	UNPUBLISHED October 17, 2013
v	No. 310764 Genesee Circuit Court
DR. EDILBERTO MORENO, Defendant-Appellee.	LC No. 11-095473-NH

Before: SAAD, P.J., and SAWYER and JANSEN, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) and dismissing her medical-malpractice claim. We affirm.

I. BACKGROUND

This appeal arises from plaintiff's medical-malpractice action against defendant, an Ob/Gyn specialist, who performed laparoscopic surgery on plaintiff's abdomen. Plaintiff alleged in her complaint that defendant caused an injury to her colon while performing the surgery which led to a bowel perforation. She further alleged that defendant breached the standard of care by failing to recognize, diagnose, and treat her bowel injury during the surgery. Plaintiff asserted that, as a result of defendant's malpractice, she required another surgery to repair her perforated bowel, a colostomy for six months, additional hospitalization, and surgery to remove the colostomy.

Dr. Jeffrey Soffer, plaintiff's Ob/Gyn expert, testified at his deposition that defendant breached the appropriate standard of care when he failed to recognize or notice and repair plaintiff's bowel perforation upon inspection during surgery. Dr. Soffer further testified that malpractice occurs "every time" a physician inspects the bowel during surgery and fails to recognize an injury before "closing." According to Dr. Soffer, in accordance with the standard of care in surgery, a physician should notice a bowel injury 100 percent of the time. Dr. Soffer admitted that he did not rely on any medical literature as a basis for his opinion that defendant

breached the standard of care. Instead, he relied on his medical training and extensive experience as an Ob/Gyn specialist to form his opinion.[1]

Citing published medical literature indicating that an injury to the bowel is often not recognized at the time of surgery, defendant moved to exclude Dr. Soffer's testimony. Defendant argued that there was no support for Dr. Soffer's opinion that a physician, upon careful inspection, should notice an injury to the bowel 100 percent of the time. In light of the medical literature contradicting Dr. Soffer's opinion, the trial court found his testimony to be unreliable, and thus inadmissible under MRE 702 and MCL 600.2955. The court excluded Dr. Soffer's testimony regarding defendant's breach of the standard of care from trial. Concluding that plaintiff could not prove her medical-malpractice claim without expert testimony to establish that defendant breached the standard of care, the court then proceeded to grant defendant's motion for summary disposition and deny plaintiff's subsequent motion to adjourn the trial so that she could procure another expert witness. The court entered an order dismissing plaintiff's claim in its entirety, with prejudice. This appeal ensued.

II. EXCLUDING EXPERT TESTIMONY

Plaintiff first argues that the trial court erred by granting defendant's motion to exclude Dr. Soffer's testimony regarding the appropriate standard of care and defendant's breach of the standard of care. We disagree.

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010); see also *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry*, 486 Mich at 639. The proponent of expert testimony must establish that the expert testimony admitted at trial is reliable under MRE 702. *Edry*, 486 Mich at 639-640; *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780-781; 685 NW2d 391 (2004).

In a claim for medical malpractice, a plaintiff must establish: '"(1) the standard of care, (2) breach of that standard of care, (3) injury, and (4) proximate causation between the alleged breach and the injury."' *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 565; 766 NW2d 896 (2009), quoting *Pennington v Longabaugh*, 271 Mich App 101, 104; 719 NW2d 616 (2006). Expert testimony is required to establish the standard of care and a breach of the standard of care. *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010). MRE 702 governs the admissibility of expert witness testimony and 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,

[1] Although Dr. Soffer referred to an anatomy textbook during his deposition testimony, his reference pertained to the cause of the bowel perforation, not to whether defendant should have noticed and repaired the perforation.

> 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.

See also MCL 600.2955(1).

"MRE 702 has imposed an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable." *Gilbert*, 470 Mich at 780. "MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993)." *Edry*, 486 Mich 639-640. "Under *Daubert*, 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."' *Edry*, 486 Mich at 640, quoting *Daubert*, 509 US at 589. Consequently, "the court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Gilbert*, 470 Mich at 782. "[W]hile not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." *Edry*, 486 Mich at 640. For instance, an expert's "singular reliance on his own hypothetical depiction of an event may [be] too speculative, and, therefore, inadmissible under MRE 702." *Id*.; see also *Craig*, 471 Mich at 83-84. "[W]hether there is peer-reviewed and published literature on a theory is a 'pertinent consideration' because 'submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected."' *Edry*, 486 Mich at 640, quoting *Daubert*, 509 US at 593. "Under MRE 702, it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable, and therefore, admissible." *Edry*, 486 Mich at 642.

We find our Supreme Court's decision in *Edry* to be instructive. In *Edry*, 486 Mich at 640-641, the testimony provided by the plaintiff's oncology expert regarding survival rates was contradicted by the defendant's oncology expert and the published medical literature admitted into evidence; additionally, the plaintiff did not present any literature to support her expert's opinion and her expert did not indicate how he used the medical literature to formulate his opinion. Our Supreme Court determined that the expert's testimony failed to meet the requirements of MRE 702, concluding that his opinion was not based on reliable principles or methods. *Edry*, 486 Mich at 641-642.

As in *Edry*, 486 Mich at 642, the trial court in the instant case did not abuse its discretion by excluding Dr. Soffer's testimony regarding the appropriate standard of care. Plaintiff failed to provide any support for Dr. Soffer's opinion that a physician should recognize a bowel injury "every time" he or she inspects the bowel. Nor did plaintiff present evidence to establish that Dr. Soffer "applied his methods to the facts of the case in a reliable manner, as required under MRE 702." *Edry*, 486 Mich at 641. Dr. Soffer's opinion conflicted with published literature on the subject cited by defendant and presented to the court, and plaintiff failed to present any literature of her own to support Dr. Soffer's opinion. In fact, Dr. Soffer admitted that he had relied solely on his experience and training as an Ob/Gyn specialist to form opinion. "[I]t is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable, and therefore, admissible." *Edry*, 486 Mich at 642. This is especially so

where, as here, there is no medical literature supporting the expert's opinion and medical literature presented by the defendant conflicts with the expert's opinion. Although our Supreme Court has recognized that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702," the "lack of supporting literature, combined with the lack of any other form of support for [Dr. Soffer's] opinion, renders his opinion unreliable and inadmissible under MRE 702." *Edry*, 486 Mich at 641-642. We cannot conclude that the trial court's decision to exclude Dr. Soffer's expert testimony as unreliable under MRE 702 constituted an abuse of discretion.

Plaintiff additionally asserts that the trial court should have considered Dr. Soffer's subsequently filed affidavit, which was prepared after his deposition testimony and submitted with plaintiff's brief in opposition to defendant's motion to exclude Dr. Soffer's testimony. Dr. Soffer's affidavit takes into account the size and location of the perforation in ascertaining whether defendant breached the standard of care by failing to recognize or observe the injury. This standard conflicts with his clear and unequivocal deposition testimony that a physician should recognize and repair a bowel injury 100 percent of the time, and that a breach of the standard of care occurs "every time" a physician inspects the bowel and fails to recognize an injury before closing.

It is apparent that the subsequently filed affidavit was likely an attempt to rehabilitate Dr. Soffer's sworn deposition testimony, especially in light of the published medical literature cited by defendant indicating that bowel injuries often go unnoticed during surgery. "[D]eposition testimony, given in a clear, intelligent, and unequivocal manner, is binding in the absence of proper explanation[.]" *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 670; 440 NW2d 629 (1989). "Parties may not create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition." *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). This "rule is equally applicable to nonparty witnesses," such as the expert witness at issue here. *Palazzola v Karmazin Prods Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997). Hence, we find no error in the trial court's failure to consider Dr. Soffer's subsequently filed affidavit.

III. SUMMARY DISPOSITION OF PLAINTIFF'S MEDICAL-MALPRACTICE CLAIM

Plaintiff next argues that the trial court erred by granting defendant's motion for summary disposition with respect to her medical-malpractice claim. We disagree.

We review de novo the trial court's grant of summary disposition. *Edry*, 486 Mich at 639. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion brought under subrule (C)(10), 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. MCR 2.116(G)(5); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id.* at 362. "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any

material fact and that the moving party is entitled to judgment as a matter of law." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

Plaintiff appears to concede that, given the trial court's exclusion of Dr. Soffer's expert testimony, there is currently no expert testimony by an Ob/Gyn specialist to establish the applicable standard of care or that defendant breached that standard of care. As the trial court properly found, without expert testimony to establish the applicable standard of care, plaintiff's claim for medical malpractice must fail. MCL 600.2912a; *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Nevertheless, plaintiff asserts that defendant, himself, can establish the applicable standard of care and breach of that standard when he is called to testify at trial. Plaintiff also anticipates that other expert witnesses, who apparently had not yet been deposed, might also provide testimony to establish the applicable standard of care. However, plaintiff failed to proffer any evidence to support her assertion in this regard. A "mere pledge" to present supporting evidence is not sufficient to avoid summary disposition under MCR 2.116(C)(10). *Maiden*, 461 Mich at 121.

> The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence *actually proffered* in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Maiden*, 461 Mich at 121 (emphasis added).]

Plaintiff cannot rely on her mere assertion, without more, that witnesses will testify regarding the appropriate standard of care to survive summary disposition of her medical-malpractice claim. As noted earlier, plaintiff has the burden to prove through expert testimony the appropriate standard of care and that defendant breached the standard of care. Without such expert testimony, plaintiff cannot establish her medical-malpractice claim as a matter of law. Summary disposition was therefore appropriate.

IV. MOTION TO ADJOURN TO OBTAIN A NEW EXPERT

Plaintiff lastly claims that the trial court erred by denying her motion to adjourn trial to allow her to obtain a new Ob/Gyn expert. We disagree.

"The decision whether to allow a party to add an expert witness is within the discretion of the trial court." *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991); see also *Levinson v Sklar*, 181 Mich App 693, 699; 449 NW2d 682 (1989). "The grant or denial of a motion for adjournment is also within the trial court's discretion." *Tisbury*, 194 Mich App at 20.

As a preliminary matter, we note that plaintiff has failed to cite any authority for her position in her brief on appeal. "A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). In any event, however, we conclude that the court's decision did not constitute an abuse of discretion.

A motion for an adjournment must be based on good cause, MCR 2.503(B)(1), and may be granted to promote the interests of justice, MCR 2.503(D)(1). The motion must be made as

soon as possible after ascertaining the facts that support the need for an adjournment. MCR 2.503(C)(1). "A denial because of the absence of a witness is proper where the movant fails to provide an adequate explanation and show that diligent efforts were made to secure the presence of the witness." *Tisbury*, 194 Mich App at 20. The prejudicial effect on the opposing party of allowing the moving party to add a witness is an important consideration. *Levinson*, 181 Mich App at 698-699.

Allowing plaintiff an adjournment to procure another expert clearly would have prejudiced defendant at the late stage of the proceedings. Notably, Dr. Soffer and other witnesses had already been deposed, mediation had already been completed, and the trial was scheduled to take place shortly. See *Tisbury*, 194 Mich App at 20-21. Further, plaintiff's inability to locate and secure another expert witness earlier, despite having notice that defendant would likely challenge Dr. Soffer's testimony, suggests a lack of diligent effort on the part of plaintiff. See *id*. Considering the late stage of the proceedings, we agree with defendant that the case would effectively need to be relitigated if plaintiff were allowed additional time to procure a new expert witness. A new expert would presumably set forth a different standard of care than that asserted by Dr. Soffer. We acknowledge that the court's decision not to adjourn the trial to allow plaintiff additional time to procure another expert witness effectively ended plaintiff's case, arguably a harsh result. See *id.* at 21. However, we believe that the likely prejudicial effect on defendant supports the court's decision. We cannot conclude that the trial court's denial of plaintiff's motion to adjourn trial to obtain a new expert witness constituted an abuse of discretion.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Kathleen Jansen