STATE OF MICHIGAN

COURT OF APPEALS

CHARLOTTE LEWIS, Plaintiff-Appellant/Cross Appellee, v AMANDA YANCY and PHYSICIANS FOR WOMEN, PLLC, Defendants-Appellees/Cross Appellants.	UNPUBLISHED August 12, 2014 No. 313459 Oakland Circuit Court LC No. 2011-117594-NH

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff Charlotte Lewis appeals as of right the order granting a directed verdict in favor of defendants Dr. Amanda Yancy and Physicians for Women, PLLC. In granting the motion, the trial court determined that: (1) defendants were not given sufficient notice of the allegations against which they would be defending, (2) there was insufficient evidence of causation, and (3) the testimony of Lewis's expert lacked the support of sufficient facts and reliable methods, particularly in regard to the standard of care. Plaintiff now appeals as of right, and defendants have filed a cross appeal challenging the trial court's pretrial denial of motions to preclude the testimony of plaintiff's expert and/or for summary disposition. For the reasons described below, we affirm the trial court's decision to grant a directed verdict.

A trial court's decision on a motion for a directed verdict is reviewed de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). This Court considers all the evidence presented up to the point of the motion in a light most favorable to the nonmoving party to determine whether a fact question existed. *Heaton v Benton Const Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). In doing so, we grant the nonmoving party every reasonable inference and resolve any conflicts in the evidence in that party's favor. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 327; 657 NW2d 759 (2002). Reviewing the evidence in this light, a motion for a directed verdict is only properly granted "when no factual question exists upon which reasonable minds could differ." *Heaton*, 286 Mich App at 532.

In a medical malpractice action, the plaintiff bears the burden of showing: "(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." *Teal v Prasad*, 283 Mich App

384, 391; 772 NW2d 57 (2009) (citation omitted). Expert testimony is required to establish the standard of care, breach of that standard, and causation. *Kalaj v Khan*, 295 Mich App 420, 429; 820 NW2d 223 (2012). Further, the proponent of expert testimony bears the burden of establishing both its relevance and admissibility. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (quotation omitted).

> MRE 702 governs the admissibility of expert witness testimony, providing that:
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> > 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.

Under MRE 702, the trial court acts as a gatekeeper, charged with ensuring that expert testimony meets the rule's requirements for admissibility. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). In particular, MRE 702 has also been described as incorporating the standard of reliability set forth in *Daubert*, under which "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 v Merrell Dow Pharm, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993). That expert testimony may not be admitted unless reliable is also provided by statute. MCL 600.2955(1) ("[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."). Although not necessarily dispositive to a determination of reliability, "a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." *Edry*, 486 Mich at 640; see also MCL 600.2955(1)(b). Furthermore, for a plaintiff to satisfy his or her burden, "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." *Id.* at 642.

Relying on MRE 702, defendants argued, and the trial court concluded, that plaintiff's expert, Dr. Ronald Zack, failed to provide reliable testimony as to the applicable standard of care. We agree. In medical malpractices cases where, as here, the defendant is a specialist, the standard of care is defined by "the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances." MCL 600.2912a(1)(b). The standard of care is not based on how a particular health care professional would act. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 493; 668 NW2d 402 (2003). When seeking to offer expert testimony on the standard of care, the proponent of the evidence must demonstrate the witness's knowledge of the applicable standard of care. *Turbin v Graesser*, 214 Mich App 215, 217; 542 NW2d 607 (1995).

Dr. Zack testified in this case that the applicable standard of care required Dr. Yancy to recheck the placement of the Essure coils[1] after performing a D and C procedure during which she used a curette—a sharp metal instrument—to scrape an area in the uterus. In Dr. Zack's opinion, it would have been in fact preferable to curette before placement of the Essure coils. But, if curetting was going to occur afterward, in Dr. Zack's opinion, the standard of care demanded that Dr. Yancy recheck placement of the Essure coils, opining that, had she done so, she could have ascertained a disruption to the Essure coils and taken measures to remove the coil, which would have prevented the need for plaintiff's subsequent surgery. Because Dr. Yancy failed to recheck the placement of the coils, Dr. Zack opined that she breached the standard of care.

Dr. Zack based his opinions on his general understanding of female anatomy and his experience with devices such as IUDs, opining, for example, that "you wouldn't put an IUD in and then curette someone afterward." However, when specifically asked for the basis of his opinions in this case, he could not point to any supporting authority, either in peer-reviewed literature, case studies, or even in the recommendations of the manufacturers of the device in question. In fact, Dr. Zack acknowledged that he had not specifically searched for any literature regarding the Essure device and its complications, he was not aware of any specific studies or case reports relating to similar Essure complications, and he could not cite to any specific article in support of his opinions. Plaintiff also did not support Dr. Zack's testimony with any supporting authority. In short, apart from Dr. Zack's own testimony, there was no support for his conclusion that the standard of care required Dr. Yancy to recheck the location of the Essure coils after curetting, or that she breached the standard of care by failing to do so.

The situation in this case is thus analogous to *Edry*, 486 Mich at 640-642. That is, plaintiff has failed to provide any support for Dr. Zack's opinion regarding the applicable standard of care. Instead, Dr. Zack repeatedly stated that he arrived at his opinion through his training and experience, and vaguely referenced "readings" relating generally to IUDs, without any support for his concerns relating to curetting following placement of the Essure devices. The reliability of his opinion, in regards to the Essure device, based on his own experience is questionable at best when, as discussed in more detail *infra*, he has never performed the procedure himself and he has extremely limited training with the device. However, under *Edry*'s rationale, even more detrimental to his claim is the complete lack of supporting authority of any kind to demonstrate that his opinion has "some basis in fact, that it is the result of reliable principles or methods, or that [he] applied his methods to the facts of the case in a reliable manner." *Edry*, 486 Mich at 641; see also MCL 600.2955(1). Further, as in *Edry*, evidence offered by defendants countered Dr. Zack's view of the desirability of performing the D and C before placement or, at a minimum, rechecking placement of the Essure coils following

[1] According to testimony from Dr. Zack and Dr. Yancy, the Essure device consists of a coil, described as an almost "slinky type looking object," which is placed in each fallopian tube, near the opening to the uterus. After placement of the coils, over a period of three months, scar tissue forms around the coils, occluding the tubes and preventing sperm from passing through. The desired result, in short, is permanent sterilization.

curetting. See *Edry*, 486 Mich at 640. Specifically, Dr. Yancy saw nothing wrong with curetting following placement of the Essure device, testifying that the curetting procedure is gently done and that the polyp area that was curetted in this case was on a completely different operational plane than the fallopian tubes where the coils were placed. Thus, ultimately, the only basis for Dr. Zack's opinion regarding the standard of care for curetting following an Essure placement is his general experience in gynecology and obstetrics. This alone, however, does not render his testimony reliable because, as noted, "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; see also *Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 84; 684 NW2d 296 (2004) (finding physician's "own hypothetical depiction" of events did not render his testimony admissible under MRE 702). Indeed, the opinion of one professional regarding how the procedures should have been done does not, by itself, establish the standard of care. See *Wiley*, 257 Mich App at 493. Given the lack of supporting literature, combined with the lack of any other support for Dr. Zack's opinion regarding the standard of care, the trial court did not abuse its discretion in finding Dr. Zack's opinion regarding the standard of care to be unreliable within the meaning of MRE 702. *Id.* at 641-642. Absent Dr. Zack's testimony on the standard of care, plaintiff cannot meet her burden of establishing the standard of care or offering expert testimony in support thereof. *Kalaj*, 295 Mich App at 429. In this regard, no material factual question exists upon which reasonable minds could differ and a directed verdict was properly granted. *Heaton*, 286 Mich App at 532.

As a related matter, defendants have also challenged Dr. Zack's qualifications to testify regarding the standard of care under MRE 702 and MCL 600.2169. Defendants raised these arguments before trial, moving the trial court to strike Dr. Zack's testimony based on his lack of qualifications. They now challenge the trial court's denial of this motion in their cross appeal before this Court. We review a trial court's ruling regarding an expert's qualifications to testify for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion occurs when the decision falls outside the range of reasonable and principled outcomes. *Id.* A court necessarily abuses its discretion by admitting evidence "that is inadmissible as a matter of law." *Craig ex rel Craig*, 471 Mich at 76 (citation omitted).

In essence, MCL 600.2169 requires that "the qualifications of a purported expert match the qualifications of the defendant against whom that expert intends to testify." *Decker v Flood*, 248 Mich App 75, 85; 638 NW2d 163 (2001). To this end, in relevant part, MCL 600.2169 states:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
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> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
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> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

In this case, Dr. Yancy is a board certified obstetrician and gynecologist who devotes a majority of her time to general obstetrics and gynecology. Dr. Zack is also a board certified obstetrician and gynecologist, thus satisfying the same board certification requirement outlined in MCL 600.2169(1)(a). However, defendants contend that Dr. Zack does not qualify to testify under the same specialty requirement in MCL 600.2169(1)(b) because he devotes a majority of his time to infertility, a subspecialty of obstetrics and gynecology. Contrary to plaintiff's arguments, we agree with defendants that, because infertility constitutes a subspecialty of obstetrics and gynecology in which a physician may become board certified, it is a specialty for purposes of MCL 600.2169(1). See *Woodard*, 476 Mich at 562. Further, although Dr. Zack has not obtained board certification in infertility, he devotes a considerable portion of his professional time exclusively to infertility, rendering him a specialist in this area. *Id.* at 560 ("[A] physician can be a specialist who is not board certified."). That Dr. Zack has a specialty in infertility does not, however, necessarily prevent him from testifying in Dr. Yancy's case. This is so because a physician may have more than one specialty, and not all specialties must match in order to qualify under MCL 600.2169(1)(b). *Woodard*, 476 Mich at 558. Instead, what is determinative is whether Dr. Zack "devoted a majority of his professional time during the year immediately preceding the date on which the alleged malpractice occurred to practicing or teaching the specialty that the defendant physician was practicing at the time of the alleged malpractice, i.e., the one most relevant specialty." *Id.* at 566.

In this regard, the relevant specialty based on Dr. Yancy's practice is general obstetrics and gynecology. Dr. Zack testified that he spends 15 percent of his time on obstetrics, and 85 percent on gynecology. Of that 85 percent, about 50 percent is spent on general gynecology and 50 percent is focused on infertility. In other words, he devotes 42.5 percent of his time to general gynecology and 15 percent to obstetrics, for a total of 57.5 percent of his time spent on general obstetrics and gynecology, and 42.5 percent spent on infertility. On this testimony, the trial court did not abuse its discretion in finding Dr. Zack qualified as an expert because he devotes a majority of his time to Dr. Yancy's specialty, namely, general obstetrics and gynecology. MCL 600.2169(1)(b).

Defendants also contend that the evidence shows Dr. Zack's *current* allocation of professional time and does not show that Dr. Zack devoted a majority of his time to general obstetrics and gynecology during the timeframe in question, i.e. "during the year immediately

preceding the date of the occurrence that is the basis for the claim or action." MCL 600.2169(1)(b). The alleged malpractice in the present case occurred in January of 2010, making the relevant time period January of 2009 through January of 2010. MCL 600.2169(1)(b). In this regard, a fair reading of Dr. Zack's testimony shows that he had been board certified and engaged in the "continuous" practice of obstetrics and gynecology for over 35 years, clearly encompassing the timeframe in question. Moreover, defense counsel specifically asked Dr. Zack about his "current practice" and his practice "at the time in question of this claim 2009-2010," to which Zack responded that he devoted 85 percent of his time to gynecology. Given this testimony regarding the specific timeframe in question, coupled with Zack's testimony that he was engaged in the "continuous" practice of obstetrics and gynecology for over 35 years, the trial court did not abuse its discretion in concluding Dr. Zack was qualified by virtue of having spent the majority of his professional time in the year preceding the alleged malpractice in the practice of the relevant specialty. See MCL 600.2169(1)(b).

While we view Dr. Zack as satisfying the qualification requirements set forth in MCL 600.2169(1)(b), we agree with defendants that he lacked the requisite "knowledge, skill, experience, training, or education" to qualify as an expert pursuant to MRE 702 and, as such, the trial court erred in declining to strike his testimony before trial. In particular, the procedure in question in this case involved the placement of Essure coils in plaintiff's fallopian tubes. Plaintiff offered Dr. Zack's testimony to provide evidence regarding the standard of care, breach thereof, and causation. However, by Dr. Zack's own admission, he had never performed the procedure in question; nor had he ever even been present in an operating room while the procedure was performed. His training relating to the device arose from one dinner presentation two or three years before trial at which simulations of the procedure were performed on a mannequin. Given that he has never performed the procedure and he has received only minimal instruction on the topic, we fail to see how he can qualify as an expert on the topic by reason of knowledge, skill, experience, training, or education. MRE 702; *Woodard*, 476 Mich at 577 n 21 (faulting a physician's qualification as an expert where the "proposed expert has not inserted an arterial line or a venous catheter in an infant, *the specific medical procedure* that was allegedly performed negligently in this case, since his residency in the early 1980's").[2] Consequently, we find that the trial court abused its discretion in denying defendants' pretrial motion to strike Dr. Zack's testimony. In the absence of this testimony, no material question of fact exists regarding plaintiff's claim and defendants were also entitled to summary disposition under MCR 2.116(C)(10).

[2] We also find persuasive the reasoning of *Howard v Zamorano*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2004 (Docket No. 244610) and *Meyers v Ciullo*, unpublished opinion per curiam of the Court of Appeals, issued December 10, 1999 (Docket No. 209718). In both cases, the experts had never performed the procedures in question and lacked "significant familiarity" with the procedures. On this basis, as in the present case, this Court concluded that "an unprejudiced person would have serious reservations as to whether [the expert] was sufficiently qualified by knowledge, skill, experience, training or education, to provide expert testimony as to the standard of care applicable [to the defendant physician] in the performance of the procedure in question." *Meyers*, unpub op at 2; *Howard*, unpub op at 9 n 7.

Overall, because Dr. Zack did not provide reliable testimony on the applicable standard of care, we see no error in the trial court's grant of a directed verdict on this basis. Having determined a directed verdict was properly granted on this basis, we need not consider whether plaintiff provided proper notice of her claims to defendants or whether her causation testimony was speculative and unsupported by reliable expert testimony.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra