

STATE OF MICHIGAN
COURT OF APPEALS

SAMUEL SAGGERS, a Legally Incapacitated
Person.

SHERRY SAGGERS, Guardian of SAMUEL
SAGGERS,

Plaintiff-Appellant,

v

DETROIT RECEIVING HOSPITAL &
UNIVERSITY HEALTH CENTER,

Defendant-Appellee,

and

KEVIN R. McDONALD, M.D., ROY ELROD,
M.D., and MEDICAL CENTER EMERGENCY
SERVICES, PC.,

Defendants.

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right the trial court's grant of summary disposition in favor of defendant Detroit Receiving Hospital and University Health Center² in this medical malpractice action. We affirm in part, reverse in part, and remand.

¹ Plaintiff is the sister of Samuel Sagers.

² The emergency room physician defendants were dismissed from the case and are not a party to this appeal.

UNPUBLISHED
July 26, 2005

No. 260170
Wayne Circuit Court
LC No. 02-200953-NH

This case arises from injuries suffered by Samuel Sagggers after he sought emergency medical treatment from defendant for varicella (chicken pox) over the course of four days in February 2000.³ Sagggers, who was twenty-eight years old at the time, went to defendant's emergency room at 10:45 p.m. on Sunday, February 6, 2000, complaining of nausea, pain in his back and sides and multiple lesions, which were diagnosed as varicella. He had first noticed the lesions two days earlier on Friday, February 4, 2000. Following an examination and portable chest x-ray, which was reportedly negative,⁴ Sagggers was administered fluids and medication for nausea. He was discharged approximately four hours later, with instructions to follow-up at a clinic in a few days.

The next day, February 8, 2000, Sagggers returned to defendant's emergency room, at approximately 12:00 p.m., complaining of chest and back pain, and breathing difficulty. He was administered fluids, prescribed an antibiotic, and a decongestant. He was discharged less than an hour after his arrival.

On February 9, 2000, at approximately 9:30 p.m., Sagggers returned to defendant's emergency room for a third time. His body was now covered with chicken pox lesions, he was in respiratory distress, and was coughing up blood from his lungs. He was intravenously given an anti-viral medication, acyclovir, and other treatment, diagnosed with extensive varicella causing pneumonitis (pneumonia) or inflammation of the lungs. He was admitted to the hospital's intensive care unit.

While in defendant's intensive care unit, Sagggers suffered respiratory arrest and succumbed to a coma. He was transferred to the University of Michigan Medical Center. Although he received life-saving treatment, the deprivation of oxygen to his brain left him with permanent and severe brain damage.

On January 9, 2002, plaintiff filed a complaint and affidavit of merit commencing this medical malpractice action. Plaintiff's complaint alleged that defendant (1) "failed to adequately treat [Sagggers] on both February 6 and February 8, 2000," (2) "failed to hospitalize [Sagggers] on February 6 and/or February 8, 2000," (3) "failed to order a chest x-ray in the emergency department of Defendant hospital in order to determine whether plaintiff was suffering from pneumonia," (4) "failed to prescribe an anti-viral medication for [Sagggers] while he was in the emergency department on February 6 and February 8, 2000," and (5) "failed to monitor and observe [Sagggers] for at least twenty-four hours by medical personnel so that the true nature of his medical condition could be ascertained."

³ Although the parties essentially agree on the underlying facts, this recitation is not intended to be conclusive with respect to any disputed fact on remand.

⁴ Plaintiff notes that although there is a written record of the x-ray, the hospital has been unable to locate and produce the actual x-ray film.

Following extensive discovery, on May 28, 2004, defendant filed a motion to prohibit expert opinion testimony and for summary disposition. Defendant argued that plaintiff's medical malpractice claim was based in part on a claim that defendant failed to timely administer the anti-viral medication, acyclovir; however, acyclovir was approved for use and effective only if given within 24 hours of being exposed to the varicella virus. Because more than 24 hours had transpired between the time Sagers contracted the varicella and the time he first appeared at defendant's emergency room, the failure to administer acyclovir could not be a basis of medical malpractice. Further, plaintiff's expert's opinion that acyclovir should have been administered despite its limited approved use, was "novel" and unreliable.

Following an evidentiary hearing⁵ concerning the proposed expert testimony of plaintiff's infectious disease expert, Dr. John Sheagren, the trial court granted defendant's motion to prohibit any testimony by Sheagren. The trial court concluded that Sheagren's testimony concerning the usefulness of acyclovir in treating Sagers was not scientifically reliable.

Defendant again filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted the motion and dismissed plaintiff's case. Noting that it had ruled that the expert testimony was stricken with regard to treatment, breach of the standard of care, and causation, the trial court granted summary disposition with respect to all theories.

II

Plaintiff argues that the trial court abused its discretion in striking all testimony of plaintiff's infectious disease expert as unreliable when defendant contested the reliability of only one specific opinion—whether acyclovir can be used prophylactically to prevent varicella pneumonia, i.e., whether the administration of acyclovir more than twenty-four hours after the onset of varicella (chicken pox lesions) will prevent the subsequent development of varicella pneumonia.

The trial court found, pursuant to MCL 600.2955, that Sheagren's testimony was not reliable and therefore struck testimony concerning "the usefulness of [a]cyclovir in treating the patient" Plaintiff asserts that Sheagren had a number of opinions, only one of which was the effectiveness of acyclovir given more than twenty-four hours after the onset of lesions but before the patient had varicella pneumonia, and because defendant's motion concerned only that particular opinion, the trial court erred in prohibiting Sheagren's testimony with respect to his other opinions.

A

The admissibility of expert testimony is within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76, 82; 684 NW2d 296 (2004); *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). An

⁵ The hearing is referenced throughout the lower court proceedings as a *Daubert* hearing, *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579, 590; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and will be referenced accordingly in this opinion.

abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *Id.*

B

To be admissible, expert testimony must be reliable, including the data underlying the expert's theories and the methodology by which the expert draws his conclusions. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-780; 685 NW2d 391 (2004). If the trial court determines that recognized 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 may testify to the knowledge by opinion or otherwise, if the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. MRE 702; *In re Noecker*, 472 Mich 1, 11; 691 NW2d 440 (2005).

To be recognized scientific knowledge subject to expert testimony, the proposed testimony must contain inferences or assertions the source of which rests in an application of scientific methods, and the inferences or assertions must be supported by appropriate objective and independent validation based upon what is known. *Tobin v Providence Hosp*, 244 Mich App 626, 647; 624 NW2d 548 (2001). The party proffering the expert bears the burden of persuading the trial court that the expert opinion is based on a recognized field and methodology, *Craig, supra* at 80, 83; *Gilbert, supra* at 789.

C

To the extent that plaintiff argues that the court abused its discretion in excluding Sheagren's expert testimony on the prophylactic use of acyclovir, we disagree. Plaintiff did not include this issue in her statement of questions presented, and it is therefore not properly presented for review. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Further, we find no abuse of discretion given the lack of reliable supporting data for this opinion testimony. *Gilbert, supra* at 782. We therefore affirm the trial court's ruling prohibiting Sheagren's testimony concerning the accepted use of acyclovir more than sixty hours⁶ after the onset of varicella but before development of varicella pneumonia.

D

Plaintiff argues that even if the trial court properly concluded that Sheagren's opinion concerning the prophylactic use of acyclovir was unreliable, the trial court abused its discretion in excluding Sheagren's testimony with respect to his other opinions expressed at the evidentiary hearing. Plaintiff contends that Sheagren should have been permitted to testify that:

⁶ Because it was undisputed that Saggars' first visit to defendant's emergency room was approximately sixty-one hours after he noticed the chicken pox lesions, the timeframe used for purposes of this case was sixty-hours. We note, however, that the evidence indicated accepted use of acyclovir within either a twenty-four or a forty-eight hour time period following the onset of lesions.

1. varicella (chicken pox) more severely affects adults than children;
2. generally, adults with varicella have more pain and higher fevers;
3. the most common complication in adults who have contracted the varicella virus is pneumonia;
4. some of the risk factors for adults contracting chicken pox or the varicella virus is being male versus female, and for contracting varicella pneumonia, is being a smoker;
5. acyclovir has been available to treat varicella and varicella pneumonia for the last twenty years;
6. he has “routinely” and “effectively” treated adult patients with the anti-viral medication acyclovir for the last twenty years;
7. the reason that acyclovir is such an effective treatment for chicken pox or the varicella virus is that the drug blocks the reproduction of the virus, i.e., acyclovir stops the virus’ ability to replicate itself;
8. in 2000, the year that Saggars went to defendant with his chicken pox, acyclovir was used daily thousands of times throughout the United States;
9. acyclovir is undisputedly effective in the prevention of the complications of varicella and it is undisputedly the drug to use for someone with varicella pneumonia;
10. if Saggars had received an appropriate amount of acyclovir, it would have reduced the symptoms and caused his damages to be significantly less or nothing at all.

Defendant argues that all of these opinions relate back to Sheagren’s opinion on the effectiveness of acyclovir in treating a patient more than sixty hours after the onset of varicella, which the trial court properly found unreliable. These other opinions are therefore similarly unreliable.

We agree with plaintiff that the trial court abused its discretion in prohibiting all expert testimony from Sheagren merely on the basis that the court found the opinion concerning prophylactic use of the acyclovir unreliable. The trial court failed to indicate any specific basis for the blanket exclusion of Sheagren’s testimony. Defendant’s motion sought exclusion of expert testimony concerning the efficacy of administering acyclovir to prevent complications from varicella. However, during the *Daubert* hearing, the parties agreed that treatment with acyclovir for varicella pneumonia was generally accepted.

Although some of the above opinions, particularly those involving the general use of acyclovir, would appear to be encompassed within the trial court’s ruling as affirmed by this Court, others appear unrelated to the ruling. Because the trial court issued a blanket exclusion without addressing the admissibility of Sheagren’s independent proffered opinions, we remand to the trial court to decide the admissibility of the other proffered testimony.

III

Plaintiff argues that the trial court erred in granting summary disposition with respect to all of plaintiff's claims. We agree.

A

This Court reviews de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10).⁷ *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

“[A] party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted.” *Smith, supra* at 455-456 n 2. A party moving for summary disposition has the initial burden of supporting its motion by affidavits, depositions, admissions or other documentary evidence. *Id.* at 455. The opposing party then has the burden of showing by evidentiary proofs that a genuine issue of material fact exists. *Id.* “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 the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

B

A key dispute below and on appeal is the characterization of plaintiffs' claims. On appeal, plaintiff asserts that she alleged separate theories of liability based on the failure to timely administer acyclovir, failure to timely hospitalize Saggars, and failure to timely perform a chest-x-ray. Plaintiff argues that even if the trial court properly prohibited testimony concerning treatment of Saggars with acyclovir before the onset of varicella pneumonia, and therefore properly dismissed claims based on that testimony, the trial court's summary dismissal of plaintiff's remaining claims was improper. We agree.

Defendant argues that plaintiff changed her theory of liability after the trial court struck the testimony of her expert witness and after defendant moved for summary disposition. Defendant asserts that plaintiff initially claimed that Saggars' injuries would have been prevented; however, plaintiff changed her theory to allege that Saggars' injuries would have been lessened or reduced. Defendant argues that the trial court properly ignored plaintiff's “new”

⁷ Although the trial court did not specifically articulate which subrule it relied on in deciding the motions, the court relied on matters outside of the pleadings. Therefore, review is properly under MCR 2.116(C)(10) rather than subrule C(8). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

theory of negligence, as should this Court, and the trial court properly granted summary disposition based on plaintiff's failure to establish causation.

We conclude that plaintiff more accurately characterizes the nature of her claims before the trial court. Plaintiff's claim at the outset was that earlier diagnosis, treatment, and supportive care would have significantly *reduced the complications of chicken pox* and thereby *prevented neurological injury*. Neither the notice of intent nor plaintiff's complaint stated that proper care would have prevented varicella pneumonia, and the allegations of malpractice clearly were not limited to the failure to prevent pneumonia. Although one aspect of plaintiff's claim concerning treatment by defendant on June 6 was that had Saggars been given acyclovir and proper supportive care, he would not have developed varicella pneumonia, that was not plaintiff's claim regarding subsequent treatment.

Our review of the record and the arguments indicates that the claims and issues in this case became more clouded with defendant's successive motions and the hearings, largely as a result of the differing challenges to plaintiff's case. In fact, during the *Daubert* hearing, the trial court twice ruled in favor of plaintiff from the bench, deciding that Sheagren's testimony was not prohibited. Only after further argument by both defense counsel, did the court agree to hear testimony from defense expert witnesses. After further testimony and argument, the court concluded the *Daubert* hearing by requesting supplemental briefs from the parties.

At a subsequent hearing on September 29, 2004, the trial court heard additional argument and ruled from the bench that Sheagren's testimony was prohibited in its entirety, not just on the issue of acyclovir. Defendant then filed a new motion for summary disposition, seeking dismissal of the case. Plaintiff's emphasis on any particular aspect of her case resulted more from the specific challenge at issue, rather than any change in her theories.⁸

Defendant's combined motion to prohibit expert testimony and for summary disposition focused on plaintiff's acyclovir claim, not plaintiff's claims based on hospitalization and supportive care. The subsequent *Daubert* hearing focused specifically on the efficacy of administering acyclovir before the onset of varicella pneumonia. As noted above, the parties agreed during the course of the hearing that acyclovir was recognized and accepted treatment for varicella pneumonia. Defendant's motion for summary disposition following the *Daubert* hearing sought dismissal on the basis that plaintiff failed to establish causation.

At the hearing on the motion for summary disposition, defendant argued that despite plaintiff's proffered testimony of another expert, reportedly in the area of emergency medicine, there was "no reliable scientific evidence to suggest that either varicella pneumonia or the complications from varicella pneumonia were preventable with the use of the medication in question," i.e., acyclovir. Defendant argued that contrary to plaintiff's argument, plaintiff had

⁸ To the extent that defendant asserted below that plaintiff's case evaluation summary supported defendant's contention that plaintiff changed her legal theories, the record does not bear out defendant's assertion. In her case evaluation summary, plaintiff distinguished between Saggars treatment on June 6 and that on June 8, and her arguments were based on those distinctions.

not, in her complaint, pleaded the theory that defendant failed to prevent complications from varicella pneumonia as opposed to varicella pneumonia itself.

Plaintiff argued, however, that in her complaint, in addition to alleging the failure to give acyclovir as a theory, she had alleged other theories, which were supported by her expert testimony. Her experts had opined that Saggars needed to be hospitalized and that other treatment should have been provided, including taking x-rays to determine whether Saggars had varicella pneumonia and giving Saggars supportive therapies.

Plaintiff pointed out that defense counsel's argument related only to the acyclovir theory and that defense counsel had not attacked the other theories of causation, including those related to the failure to earlier admit Saggars to the hospital and to administer certain diagnostic tests, which were theories supported by plaintiff's expert testimony. The trial court rejected plaintiff's argument, indicating that it was plaintiff's burden to support her theories.

Defense counsel pointed to plaintiff's expert opinion that the failure to order a chest x-ray and the failure to earlier hospitalize Saggars had not likely caused Saggars to develop varicella pneumonia. Plaintiff responded that her cause of action was not based on defendant's failure to prevent Saggars from developing varicella pneumonia, but rather upon failure to treat his varicella pneumonia. However, the trial court disagreed, stating that plaintiff's theory at the *Daubert* hearing was not based on a theory of failure to treat the varicella pneumonia. The trial court then granted defendant's motion for summary disposition and dismissed plaintiff's case.

Although as we noted above, the claims and issues in this case became increasingly clouded as the case progressed, it is clear that plaintiff's malpractice action was not limited to the failure to give acyclovir before February 9,⁹ nor was it limited to the failure to properly treat Saggars on February 6 and thereby prevent the development of varicella pneumonia.¹⁰ Nonetheless, the trial court dismissed the case. Other than the court's remarks at the outset of the hearing on the motion for summary disposition, concerning its ruling at the *Daubert* hearing, the court indicated no specific basis for dismissing plaintiff's various claims. The court's remarks were merely that it had "ruled that the expert testimony of the plaintiff on the issue of the treatment and the breach of the standard of care and indeed, causation was stricken." We find this an inadequate basis for the dismissal of plaintiff's claims in their entirety.

Plaintiff's malpractice claim that was based on a failure to treat Saggars with acyclovir on February 6, hinged on the prohibited expert opinion testimony discussed above, and therefore summary disposition of this claim was proper. However, to the extent that plaintiff's claim that defendant failed to treat Saggars with acyclovir on February 8, 2000 was based on plaintiff's

⁹ At the *Daubert* hearing, defense counsel stated: "Plaintiffs (sic) have claimed Acyclovir as the necessary causal link in *much* of their case against the Defendants. And that issue is medical or scientific in nature, whether Acyclovir would have prevented this Plaintiff from suffering the injury he suffered." (Emphasis added.)

¹⁰ Plaintiff emphasized that Saggars was a smoker, which placed him at a higher risk for development of varicella pneumonia, and therefore required closer monitoring with respect to potential complications of varicella.

allegation that Sagers had developed varicella pneumonia by that time, a disputed fact, summary disposition of that claim was improper.

Likewise, plaintiff's claims that were unrelated to the administration of acyclovir, e.g., failure to hospitalize and failure to provide proper supportive care, including taking a chest x-ray on February 8, 2000, did not hinge on Sheagren's prohibited expert testimony concerning the use of acyclovir more than sixty hours after the onset of varicella, but before the development of varicella pneumonia. Accordingly, the trial court erred in dismissing the claims unrelated to the administration of acyclovir.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot