

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD GOLDBERG and MARIETTE
GOLDBERG,

UNPUBLISHED
June 21, 2012

Plaintiffs-Appellees,

v

No. 301439
Wayne Circuit Court
LC No. 09-009067-NH

JOHN WLEZNIAK, M.D., MARIO PASTORES,
R.N., and ST. MARY HOSPITAL OF LIVONIA,

Defendants-Appellants.

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Defendants appeal by leave granted an order denying their motion to strike the testimony of plaintiffs' expert witnesses in this medical malpractice case. We reverse and remand.

On April 17, 2009, plaintiffs filed this medical malpractice action alleging in pertinent part that an emergency room physician, Dr. John Wlezniak, improperly treated plaintiff, Edward Goldberg, on December 11, 2007, shortly after his stroke by failing to timely administer t-PA (tissue plasminogen activator), which resulted in significant injuries. Plaintiffs' standard of care expert was Dr. Frank Ramsey, a physician board certified in emergency room medicine. Plaintiffs also had two experts who would testify on the issue of proximate cause.

On August 13, 2010, defendants filed a motion "to strike the unscientific testimony offered by plaintiffs' experts" pursuant to MRE 702 and MCL 600.2955. Defendants argued that plaintiffs' sole standard of care expert, Dr. Ramsey, testified in his deposition that the standard of care for emergency medicine specialists mandated the use of t-PA to treat Edward Goldberg's stroke symptoms. However, defendants argued, Dr. Ramsey was unable to demonstrate that his opinion was reliable. Further, Dr. Ramsey admitted that the American College of Emergency Physicians (ACEP) and the American Academy of Emergency Medicine (AAEM) did not endorse the administration of t-PA as the standard of care of emergency medical physicians. In fact, the ACEP issued a policy statement in 2002 which included the statements that (1) further studies were needed "to define more clearly those patients most likely to benefit" from such therapy, and (2) there was insufficient evidence to endorse the use of such therapy in "clinical practice when systems are not in place to ensure that the inclusion/exclusion criteria established by the NINDS (National Institute of Neurological Disorders and Stroke) guidelines for t-PA use

in acute stroke are followed.” And the AAEM also issued a policy statement, which remained unchanged, that included the conclusion that “objective evidence regarding the efficacy, safety, and applicability of t-PA for acute ischemic stroke is insufficient to warrant its classification as a standard of care.” Further, the AAEM stated that “given the cited absence of definitive evidence, AAEM believes it is inappropriate to claim that either use or non-use of intravenous thrombolytic therapy constitutes a standard of care in the treatment of stroke.” Accordingly, defendants argued, plaintiffs could not demonstrate that the standard of care of an emergency medical physician required the administration of t-PA. In short, plaintiffs’ expert witness testimony regarding the standard of care and proximate cause as relates to the failure to administer t-PA did not meet the requirements of MRE 702 and MCL 600.2955 and should be barred.

Plaintiffs responded to defendants’ motion to strike their expert testimony and argued that there was ample scientific foundation in the literature supporting the role of t-PA in the prevention of permanent injury from stroke. Although defendants had directly challenged the standard of care opinion of Dr. Ramsey, plaintiffs failed to mention Dr. Ramsey in their responsive brief and did not reference or attach any of his deposition testimony. Plaintiffs did, however, quote the purported abstracts from five medical publications which mentioned the administration of t-PA. One referenced publication pertained to nursing care, two were abstracts from a publication titled “Chest,” apparently related to the American College of Chest Physicians, and one was an abstract from a publication titled “Stroke.” The fifth publication cited was apparently published in “Emerg Med Clin North Am,” according to plaintiffs’ brief, and discussed a 1995 NINDS stroke study regarding the administration of t-PA. See *Dalmia v Palffy*, unpublished opinion per curiam of the Court of Appeals, issued December 1, 2009 (Docket No. 281706), slip op at 1 n 1, 5 (apparently discussing this NINDS study). Plaintiffs did not attach these publications or any other medical publications to their responsive brief. Nevertheless, plaintiffs argued that their expert testimony on the issues of the standard of care and proximate cause as relates to the failure to administer t-PA met the requirements of MRE 702 and MCL 600.2955; thus, defendants’ motion must be denied.

On October 22, 2010, oral arguments were conducted on defendants’ motion. Defendants argued consistent with their brief that the administration of t-PA was not the standard of care of emergency medical physicians and that plaintiffs had provided no evidence to the contrary. Further, plaintiffs could not establish that, with the administration of t-PA, Edward Goldberg more likely than not would have fully recovered. Plaintiffs argued that if t-PA had been administered Edward Goldberg more likely than not would have achieved a significantly beneficial neurological outcome. The trial court held that there was a genuine disagreement as to whether t-PA should have been administered as the standard of care. That is, there was medical literature supporting both legal positions as to the standard of care; thus, the trial court denied defendants’ motion. This application for leave to appeal followed and was granted. *Goldberg v Wlezniak*, unpublished order of the Court of Appeals, entered July 20, 2011 (Docket No. 301439).

Defendants argue that the standard of care and proximate cause opinions of plaintiffs’ experts are unreliable because they are not grounded in science and should have been stricken pursuant to MCR 702 and MCL 600.2955; thus, the trial court failed to exercise its gatekeeping responsibility and abused its discretion when it denied defendants’ motion to strike the

testimony. We agree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

In a medical malpractice action, the plaintiff must prove the applicable standard of care, breach of the standard of care, injury, and proximate cause between the alleged breach and the injury. *Gonzales v St John Hosp & Med Ctr*, 275 Mich App 290, 294; 739 NW2d 392 (2007). Here, plaintiffs offered the expert witness testimony of Dr. Ramsey to testify that the standard of care required that t-PA be administered to Edward Goldberg within three hours of the onset of his stroke symptoms. Defendants argue that the administration of t-PA is not the standard of care for emergency medicine physicians and plaintiffs failed to set forth reliable evidence to the contrary, as required by MRE 702 and MCL 600.2955.

MRE 702 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 fact of the case.

And MCL 600.2955 provides:

(1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

- (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
- (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

Accordingly, the trial court serves as a gatekeeper and is required to exclude unreliable expert testimony. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782; 685 NW2d 391 (2004).

In response to defendants' motion to strike, plaintiffs argued that the administration of t-PA was the standard of care and supported that claim solely with purported quotations of abstracts from medical publications in its brief. Such publications were not submitted to the trial court. Plaintiffs did not reference Dr. Ramsey, discuss the basis of his opinions, or set forth any deposition testimony from Dr. Ramsey which supported his claim that the standard of care of emergency medical physicians required the administration of t-PA. Plaintiffs' argument that the standard of care required the administration of t-PA was without legally sufficient support. The alleged abstracts that were quoted were insufficient to establish that the administration of t-PA is the standard of care for emergency medicine physicians and, in fact, did not claim that such was the case. Moreover, plaintiffs failed to provide any medical literature purporting that the administration of t-PA is the standard of care in mild stroke cases and plaintiffs admitted that Edward Goldberg had a mild stroke.

Because defendants attached Dr. Ramsey's deposition testimony to its motion to strike, we have reviewed it. Dr. Ramsey, an emergency medicine physician, testified that only about two percent of patients nationwide with a diagnosis of ischemic stroke are administered t-PA. In the previous five years, Dr. Ramsey testified, he had personally administered t-PA one time and had referred patients for t-PA only about 20 times in a nine year period of time. And he could not cite to any medical literature pertaining to emergency medical physicians that endorsed the administration of t-PA as the standard of care. Dr. Ramsey also could not cite to any medical literature which indicated that someone suffering a mild stroke would more likely than not benefit from the administration of t-PA.

Pursuant to MCL 600.2912a(1)(b), plaintiffs have the burden of proving that, in light of the state of the art existing at the time of the alleged malpractice, Dr. Wlezniak "failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community" In that regard, plaintiffs have merely offered the opinion of one expert who opined that the standard of care required that t-PA be administered to Edward Goldberg. However, plaintiffs have not demonstrated that this opinion was "the product of reliable principles and methods," as required by MRE 702, and met the requirements set forth in MCL 600.2955. Accordingly, plaintiffs failed to establish that Dr. Ramsey's opinion as to the standard of care was scientifically reliable or generally accepted within the relevant expert community and such opinion was, therefore, unreliable and inadmissible. Accordingly, the trial court's decision to admit Dr. Ramsey's testimony constituted an abuse of discretion. Defendants' motion to strike Dr. Ramsey's testimony should have been granted. Because plaintiffs offered no other expert testimony regarding the standard of care, we need not consider whether plaintiffs' expert testimony regarding proximate cause should also have been stricken.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra