STATE OF MICHIGAN

IN THE COURT OF APPEALS

MARKELL VANSLEMBROUCK, a legally incapacitated Minor, by and through her conservator, ERIC BRAVERMAN,

Plaintiff-Appellee,

and

KIMBERLY A. VANSLEMBROUCK, individually,

Plaintiff,

v

ANDREW J. HALPERIN, M.D., and WILLIAM BEAUMONT HOSPITAL, a Domestic Nonprofit Corporation,

Defendants-Appellants,

and

MICHIGAN INSTITUTE OF GYNECOLOGY AND OBSTETRICS, PC, a Domestic Professional Service Corporation,

Defendant.

Court of Appeals No. 309680

Oakland County Circuit Court
No. 06-074585-NH

BRIEF OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY

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STATEMENT OF QUESTIONS PRESENTED

Numerous important and jurisprudentially significant issues have been raised by Defendants-Appellants in this case. Amicus Curiae MSMS expresses its views with respect to the following matters:

First, whether the Trial Court reversibly erred in refusing to apply the expert opinion reliability factors of MCL 600.2955 to this action for medical malpractice?

Plaintiff-Appellee says "no."
Defendants-Appellants say "yes."
The Trial Court says "no."
Amicus Curiae MSMS says "yes."

Second, whether the Trial Court reversibly erred in excluding and denigrating the results of genetic testing which show to a 99% certainty that Plaintiff-Minor has a significant genetic defect that accounts for her severe mental and physical disabilities?

Plaintiff-Appellee says "no."
Defendants-Appellants say "yes."
The Trial Court says "no."
Amicus Curiae MSMS says "yes."

Third, whether the Trial Court reversibly erred in excluding the "gold standard" criteria developed by the American College of Obstetricians and Gynecologists and the American Academy of Pediatrics to determine the relationship between an acute intra-partum hypoxic event and cerebral palsy?

Plaintiff-Appellee says "no."
Defendants-Appellants say "yes."
The Trial Court says "no."
Amicus Curiae MSMS says "yes."

Fourth, whether the Trial Court reversibly erred in giving the pre-existing injury, aggravation and indivisibility instructions of Mich Civ JI 50.10 and 50.11 in the absence of the

necessary prerequisites: a pre-existing injury capable of aggravation, aggravation, and indivisibility of the alleged injuries?

Plaintiff-Appellee says "yes."
Defendants-Appellants say "no."
The Trial Court says "yes."
Amicus Curiae MSMS says "no."

STATEMENT OF FACTS AND PROCEEDINGS

MSMS relies upon the Statement of Facts contained in Defendants-Appellants' Brief on Appeal and Reply Brief on Appeal.

STATEMENT OF INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 14,000 Michigan physicians. Organized to protect the public health and to preserve the interests of its members, the mission of MSMS "is to promote a health care environment that supports physicians in caring for and enhancing the health of Michigan citizens through science, quality, and ethics in the practice of medicine." MSMS has a continuing interest in issues which affect the medical profession and the patients it serves and is an active advocate in the educational, judicial and legislative arenas. Over the course of many years, this Court has graciously allowed MSMS to share its views when legal issues affecting physicians have been presented. This is certainly such a case. MSMS appreciates the opportunity this Court has provided to address the significant issues raised in the pending appeal.

INTRODUCTION

Health care providers throughout the state cannot help but wonder whether the processes and rules designed to insure that "***justice is blind***" and that "***truth will prevail***" can withstand the force of judicial activism. The issues raised on appeal invoke the imperative of procedural fairness and will determine whether a ***trial*** is a search for the truth or something else. Plaintiff Eric Braverman, as conservator for Markell Vanslembrouck, ***alleges*** that Markell incurred catastrophically disabling hypoxic and ischemic brain injuries when she was assertedly squeezed through the birth canal due to the ***alleged*** mismanagement of Pitocin. Plaintiff erected an unfathomable $144 million claim around this construct, which not only lacked a scientifically

reliable basis but was conclusively negated by a genetics report which demonstrates to a ***99.9% certainty*** that Markell's unfortunate condition is caused by a congenital brain defect.

That this untoward result was made possible by judicial error is an understatement. The jurisprudential controls that should have forestalled this result were not exercised. The Trial Court outspokenly expressed its disdain for the statutory reliability constraints on expert testimony on the ostensible basis that medicine "is not a science," and concomitantly refused to apply them. The effect was to ***admit*** causation theories that have been repeatedly excluded as unreliable by the appellate courts of the state and to ***exclude*** scientifically-established causation criteria that bear the imprimatur of the premier obstetrical and pediatric specialty organizations in this country.

All challenges to the genetics report – with respect to both scientific methodology and chain of custody – were resolved in favor of admission prior to trial, but the Trial Court refused to allow this critical piece of evidence to be admitted. It did allow, however, inappropriate pres-existing injury/aggravation/indivisibility instructions to be given that lacked a factual premise in the evidence but bridged a cavernous gap in Plaintiff's proximate cause proofs.

These and other errors culminated in an astounding verdict that will have ramifications beyond the context of the underlying case. Each of these issues – and numerous others raised by Defendants-Appellants – is of critical importance to the integrity and utility of the judicial process. Only a new trial can rectify the parade of errors that presaged this untoward result.

ARGUMENT

I. The Trial Court's Outspoken Disdain for, and Refusal to Apply, the Expert Witness Reliability Factors of MCL 600.2955 in Actions for Medical Malpractice Constitutes Reversible Error and Should be Soundly Rejected by This Court.

A. Decisions Regarding the Admissibility of Expert Testimony are Reviewed for an Abuse of Discretion But When Questions of Law Underlie the Admissibility Issue, the Review is De Novo.

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). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). However, "questions of law underlying a trial court's evidentiary decision, such as the construction of a constitutional provision, rule of evidence, court rule, or statute, are reviewed de novo." *Howard v Kowalski*, 296 Mich App 664, 675; 823 NW2d 302 (2012) (*citing Barnett v Hidalgo*, 478 Mich 151, 159; 732 NW2d 472 (2007) and *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002)). "While the trial court's exercise of its role as a gatekeeper under MRE 702 to ensure that expert testimony is reliable 'is within a court's discretion, a trial judge may neither abandon this obligation nor perform the function inadequately.'" *Clerc v Chippewa County War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005) (internal quotations omitted), *quoting Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).[1] It is the proponent's burden to establish the relevance and admissibility of the evidence. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

[1] Arguably, however, because the Court did not apply the correct legal standards to its analysis of Dr. Gabriel's opinion, "its conclusions are not entitled to the deference that they would otherwise receive under the abuse-of-discretion standard of review." *Best v Lowe's Home Centers, Inc.*, 563 F3d 171, 178 (CA 6, 2009).

B. The Statutory Criteria For Assessing the Reliability of Expert Testimony Must Be Applied in Medical Malpractice Actions.

The Trial Court's transparent aversion to the application of the statutory expert witness reliability standards in an action for medical malpractice explains the lack of scrutiny it afforded to the testimony of Plaintiff's causation witnesses. The Trial Court's opposition to the required *Daubert* hearing was apparent from the start. A reliability hearing was only conducted after this Court instructed the Trial Court to do so. Even then, however, the Trial Court advocated dispensing with the factors contained in MCL 600.2955 and asserted that the statute was "not designed for the judicial system, but rather for those groups supporting it in the 1990's." "In other words," the Court explained, "it was not sound judicial doctrine a court should apply and utilize…" Opinion and Order Regarding Daubert Hearing (9/7/2011) at 13.

The Trial Court was particularly opposed to the application of scientific methods and principles to medicine, opining that "medicine and the clinical procedures and diagnoses" are not strictly "scientific" but also constitute "technical or other specialized knowledge." The Trial Court opined:

> "With no proof as to either medicine or science, Defendant has assumed, incorrectly this Court believes, that the Court's ruling is confined to science and a scientific methodology. But medicine is not necessarily science, and MRE 702 is **not** limited to just scientific knowledge; it reads in the disjunctive to also include **technical or other specialized knowledge …** [T]his Court believes that the latter applies to the case at bar, and that the remaining aspects of MRE 702 should apply without some of the restrictive and limiting aspects of MCLA 600.2955.

Id. (emphasis in original). See also, *id*. at 17 ("In this Court's Opinion MCLA 600.2955 should be held ineffective under MRE 101 and MRE 702 should instead be applied to malpractice cases since that itself is sound judicial doctrine embracing the best of legal principles that can operate and be applied to eliminate novel ideas and junk science in our courtrooms").

The Trial Court was not authorized to disregard the imperative of MCL 600.2955. Nonetheless, the Court's abdication was blatant, apparently compelled to some degree by the Court's perception that some worthy litigants would be turned away from the court if it required that their evidence be reliable:

> [T]his Court believes that to superimpose the requisites of MCL 600.2955 upon MRE 702 is unduly restrictive and adds both unnecessary and unsound barriers to admissibility which operates [sic] to preclude legitimate access to the very people for whom the Courts exists: to serve the public, those who have journeyed to the one and only place in our society that has as its sole purpose the resolution of disputes that arise during the course of human affairs. It does that by applying unsound judicial doctrine to medicine: the application of scientific methods and principles to something that is more than science, but also an art. It is what we call medicine and is encapsulated in the medical record and reports.

With all due respect, it is not for the Court to denigrate the evidentiary standards which assure the integrity of the trial process as a search for truth. It is not for the Court to deem some categories of litigants more worthy than others. If the Courts are to be "the one and only place in our society that has as its sole purpose the resolution of disputes," all parties must be confident that they will be fairly treated. There should be no hierarchy or preference. The judicial process cannot function successfully in any other way.

The Trial Court's refusal to treat the practice of medicine as scientifically-based is puzzling. The Court explained:

> While science is intimately involved, it was not and cannot be the only knowledge used in this case. For both legal and ethical reasons we cannot and do not subject such opinions regarding affects on the fetus/baby to scientific testing and replication, peer review, error rates, and general principles of acceptance/rejection. There is, instead, the human factor, human discernment, wisdom and judgment, beside manners and experience, patient histories, medical devices and tests, differential diagnoses and pharmaceutical modalities involved as well. It is, in other words, a distinct human profession we call medicine revealed through medical records.

Id. at 17. The logic of this conclusion is not at all clear. That physicians contemplate differential diagnoses, exercise judgment, order tests, utilize medical devices, and prescribe pharmaceutical

treatment does not mean that medicine is unscientific. Science is at the heart of medicine. The National Institutes of Health ("NIH") reports that it invests over $30.9 billion annually in medical research, over 80% of which is awarded through close to 50,000 competitive grants to more than 300,000 researchers at over 2,500 universities, medical schools, and other research institutions throughout the country and around the world. Ten percent of that budget supports projects conducted by nearly 6,000 scientists in NIH's own laboratories. *See* http://www.nih.gov/about/budget.htm. Current topics in NIH's on-line report, "*NIH Turning Discovery Into Health*," underscore the science in medicine:

> APPLYING CUTTING-EDGE TECHNOLOGIES - surveying huge sets of biological components
>
> TRANSLATING DISCOVERIES - turning molecules into medicines and cells into cures
>
> HELPING HEALTH CARE – personalizing therapies and behaviors to people and communities
>
> ACTING GLOBALLY - finding vaccines and fighting worldwide chronic diseases
>
> NURTURING CREATIVE MINDS - exploring the unknown and improving our health

http://www.nih.gov/about/discovery/viewbook_2011.pdf.

If medicine is not science, it is hard to imagine what is. But even if medicine could be considered "technical" or "specialized knowledge" (as the Trial Court insists), it remains within the mandatory scope of MCL 600.2955. Nothing in that statute is limited to strictly scientific testimony.

In fact, the Trial Court's anarchistic approach to the reliability of expert opinion testimony is fraught with concern and uncertainty. One need only hark back a couple of decades to recall with horror the haphazard manner in which medical malpractice experts were deemed "qualified" to testify. Back then, the test was whether the proffered witness was "familiar with

the standard of care."[2] The liberality of that inquiry allowed expert witnesses to testify without credentials or experience in the defendant's specialty,[3] and despite years of absence from medical practice.[4] Professional experts proliferated, jeopardizing the integrity of the judicial process and prompting the enactment of the expert witness qualification statute, MCL 600.2169, which governs today.[5]

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[2] See, e.g., *Dybata v Kistler*, 140 Mich App 65, 69; 362 NW2d 891 (1985); *Bahr v Harper-Grace Hospital*, 198 Mich App 31, 34-35; 497 NW2d 526 (1993); *Siirila v Barrios*, 398 Mich 576, 593; 248 NW2d 171 (1976); *Francisco v Parchment Medical Clinic, P.C.*, 407 Mich 325, 327; 285 NW2d 39 (1979); *Callahan v William Beaumont Hospital*, 400 Mich 177, 180; 254 NW2d 31 (1977).

[3] See, e.g., *Wolak v Walczak*, 125 Mich App 271, 276; 335 NW2d 908 (1983) (ob/gyn may testify about the effect of bilirubin in newborns); *Strach v St John Hospital Corp*, 160 Mich App 251; 408 NW2d 441 (1987) (board certified general surgeon permitted to testify against a thoracic surgeon); *Banks v Wittenberg*, 82 Mich App 274; 266 NW2d 788 (1978) (neurologist can testify regarding the standard of care applicable to a general practitioner); *Wilson v W A Foote Memorial Hosp*, 91 Mich App 90; 284 NW2d 126 (1979) (orthopedic surgeon permitted to testify regarding the standard of care of a hospital relative to the emergency nature of a breech presentation at birth); *Mazey v Adams*, 191 Mich App 328; 477 NW2d 698 (1991) (internist with specialty in cardiology permitted to testify to standard of care of general practitioner); *Siirila v Barrios*, *supra*, and *Berwald v Kasal*, 102 Mich App 269; 301 NW2d 499 (1980) (specialist may testify as to standard of care applicable to a general practitioner).

[4] See, e.g., *Pietrzyk v Detroit*, 123 Mich App 244; 333 NW2d 236 (1983) (medical doctor's 20-year absence from the emergency room setting did not preclude him from testifying about the standard of care in an emergency room); *Haisenleder v Reeder*, 114 Mich App 258; 318 NW2d 634 (1982) (physician who had not practiced for 13 years in an emergency room setting was permitted to testify regarding the standard of care applicable to an emergency room physician).

[5] As explained in part in the Report of the Senate Select Committee on Civil Justice Reform (at 28-29), presented to the Michigan Senate on September 26, 1985:

> [A] physician-witness is qualified to testify as an expert in Michigan, even though he/she does not practice in Michigan and is not of the same specialty, based on a mere showing of an acceptable background and a familiarity with the nature of the medical condition involved in the case. As a practical matter, in many courts merely a license to practice medicine is needed to become a medical expert on an issue.

(footnote continued . . .)

MCL 600.2169 is fulfilling its purpose of protecting the integrity of the judicial process from professional circuit-riders. But as we continue to witness the sway of an expert in a jury setting, it has became clear that courts must do more than scrutinize the expert's curriculum vitae. The equally important test of admissibility is to scrutinize what the jury is being asked to believe and whether it satisfies the test of reliability. The Legislature was fully within its right to prescribe the relevant factors. In fact, contrary to the Trial Court's perception, MRE 101 itself embraces statutory rules of evidence. It provides:

> These rules govern proceedings in the courts of this state to the extent and with the exceptions stated in Rule 1101. ***A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective*** until superseded by rule or decision of the Supreme Court.

MRE 101 (emphasis added). While the first sentence of this rule is identical to Rule 101 of the Uniform Rules of Evidence (1974) and is similar to Rule 101 of the Federal Rules of Evidence, the second sentence of MRE 101 has no equivalent in either the uniform rules or the federal rules. (See NOTE following MRE 101.) This demonstrates the Supreme Court's particularized imprimatur upon non-conflicting legislative enactments that affect the admissibility of evidence.

MRE 702 and MCL 600.2955 do not conflict. Amended effective January 1, 2004 to bring the admissibility of expert testimony in line with the federal standard established by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), MRE 702 now provides:

> This has given rise to a group of national professional witnesses who travel the country routinely testifying for plaintiffs in malpractice actions. These "hired guns" advertise extensively in professional journals and compete fiercely with each other for the expert witness business. For many, testifying is a full-time occupation and they rarely actually engage in the practice of medicine. There is a perception that these so-called expert witnesses will testify to whatever someone pays the [sic] to testify about.

> 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 role of the trial court judge is that of a "gatekeeper" who must exclude "unproven" methodologies and "theories" from the jury's consideration. *Woodard v Custer*, 476 Mich 545, 599, n 15; 719 NW2d 842 (2006).[6] The Supreme Court has observed that MRE 702 was amended to explicitly "incorporate *Daubert's* standards of reliability." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). Thus, MRE 702 "requires the trial court to ensure that each aspect of an expert witness's proffered testimony – including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data – is reliable." *Id.* at 779. Consistent with this requirement, MRE 703 requires that the "facts or data in the particular case upon which an expert bases an opinion or inference *shall be in evidence*" (emphasis added).

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[6] The Staff Comment to MRE 702 explains:

> The July 22, 2003, amendment of MRE 702, effective January 1, 2004, conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words "the court determines that" after the word "If" at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 141; 119 S Ct 1167; 143 L Ed 2d 238 (1999). ***The retained words emphasize the centrality of the court's gatekeeping role in excluding unproven expert theories and methodologies from jury consideration***.

(emphasis added).

In *Daubert*, the United States Supreme Court held that FRE 702 "assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 US at 597. Ensuring reliability requires the trial court to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is ***scientifically valid*** and of whether that reasoning or methodology ***properly can be applied*** to the facts in issue." *Id*. at 592-593 (emphasis added). The five-factor, non-dispositive, nonexclusive test established by the *Daubert* Court to make that determination evaluates: (1) whether the technique or theory can be or has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards and controls; and (5) the degree to which the theory or technique has been generally accepted in the scientific community. *Id*. at 593-595. On remand from the Supreme Court in *Daubert*, the Ninth Circuit Court of Appeals added another factor: whether the expert's opinion is a product of independent research or whether the opinion was formulated for the litigation. *Daubert v Merrell Dow Pharm, Inc*, 43 F3d 1311, 1317 (CA 9, 1995). *See also*, *Kumho Tire Co v Carmichael*, 526 US 137, 141; 119 SCt 1167; 143 L Ed 2d 238 (1999) (which holds that *Daubert* applies to the testimony of experts who are not scientists).

The specific *Daubert* factors have been incorporated into the expert admissibility requirements in Michigan through MCL 600.2955, reproduced below, the statute the Trial Court refused to apply.[7] Enacted as part of the 1995 tort reform initiative, one of the "declared

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[7] MCL 600.2955 states in pertinent 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

(footnote continued . . .)

purposes" of MCL 600.2955 "was to rid Michigan tort cases of 'junk testimony' or 'junk science' by precluding scientific opinions that have yet to be examined and accepted by impartial and disinterested experts." Ryan, *Expert Opinion Testimony and Scientific Evidence: Does M.C.L. 600.2955 "Assist" the Trial Judge in Michigan Tort Cases*, 75 U Det Mercy L Rev 263, 267 (1998). But MCL 600.2955 actually goes further than *Daubert*. As explained in Bitensky, *Cat in the Hat Moves to Michigan; Expert Witnesses and Their Proponents Curse Dr. Seuss,*

> 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.
>
> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

2002 L Rev MSU-DCL 835 (2002), *Daubert's* list of reliability factors is neither mandatory nor exhaustive, ***but the factors in MCL 600.2955 are both***.

The Supreme Court has held that consistent with its gate-keeping role, the trial court "'shall' consider all of the factors listed in MCL 600.2955(1)" and "[i]f applicable, the proponent must also satisfy the requirement of MCL 600.2955(2) to show that a novel methodology or form of scientific evidence has achieved ***general acceptance among impartial and disinterested experts in the field***." *Clerc v Chippewa County War Mem'l Hosp,* 477 Mich 1067, 1068; 729 NW2d 221 (2007) (emphasis added).[8] The Supreme Court further noted in *Gilbert, supra,* that the trial court's obligation to adjudicate the admissibility of scientific evidence is "even stronger than that contemplated by FRE 702 because Michigan's rule specifically provides that the court's determination is a *precondition to admissibility*." 470 Mich 780, n 46 (emphasis added). "[T]he 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 782.

The rigorous application required by MRE 702 is demonstrated in *Craig v Oakwood Hospital,* 471 Mich 67, 82; 684 NW2d 296 (2004), where plaintiff asserted that her son sustained brain damage as a result of the negligent administration of Pitocin during labor and delivery. Dr. Ronald Gabriel – one of the very same experts at issue in the present case – opined that "'hyperstimulation' of the uterus caused the head of the fetus (plaintiff) to pound against his mother's pelvic anatomy, thereby producing permanent brain damage" in the plaintiff child, a theory very similar to the theory espoused here . *Id*. at 81. Prior to trial, the defendant filed a

[8] In *Edry v Adelman,* after concluding that the expert's opinion was inadmissible under MRE 702, the majority deemed any further consideration of the MCL 600.2955 factors to be unnecessary. 486 Mich at 642, n 7. The dissent, on the other hand, concluded that all factors enumerated in MCL 600.2955 must be considered before striking an expert witness to determine if any one factor establishes an indicia of reliability.

motion asking the trial judge to hold a hearing on the admissibility of this causation theory, but the court denied the motion, ruling that the defendant was not entitled to a hearing because it failed to prove that the testimony lacked "general acceptance." *Id.* The trial resulted in a verdict for plaintiff. *Id.* at 70. On appeal, the Supreme Court concluded that if the trial court had conducted a hearing, it would have discovered that the expert's testimony was not recognized and therefore inadmissible, and further, lacked evidentiary support. *Id.* at 83-84.[9]

In *Craig*, the Supreme Court went much further than finding that Dr. Gabriel's testimony raised a question as to whether it satisfied the threshold standard of reliability. It found that Dr. Gabriel's theory lacked general acceptance. The Court explained:

> [T]he evidence plaintiff offered in support of Dr. Gabriel should have provided sufficient notice to the trial court that his theory lacked general acceptance in the medical community. For one thing, Dr. Gabriel was unable to cite a single study supporting his traumatic injury theory during a voir dire conducted at trial. The only authorities he offered for the proposition that excessive amounts of Pitocin may cause cerebral palsy through the traumatic mechanism he described at trial were studies he cited in which Pitocin caused cerebral palsy in animals when given in excessive amounts. These studies did not involve the "bumping and grinding" mechanism on which Dr. Gabriel's expert testimony relied. In fact, Dr. Gabriel expressly distinguished the mechanism to which he attributed plaintiff's injuries from those at work in the animal studies. It would appear, then, that there was little evidence that Dr. Gabriel's theory was "recognized," much less generally accepted, within pediatric neurology.
>
> Second, had the court conducted the MRE 702 inquiry requested by defendant, it might have discovered that Dr. Gabriel's theory lacked evidentiary support. Dr. Gabriel was unable to identify the specific part of Ms. Craig's anatomy with which, according to his theory, plaintiff's head repeatedly collided during labor. Indeed, Dr. Gabriel pointedly refused to identify this anatomical structure on a chart, contending that such testimony was beyond his expertise. This failure to root his causal theory in anything but his own hypothetical depiction of female anatomy indicates that Dr. Gabriel's testimony may have been too speculative under MRE 702 to assist the trier of fact.

[9] *Craig* was decided under the former MRE 702, which provided "If the 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 …" (emphasis supplied).

> Finally, a *Davis-Frye*/MRE 702 hearing should have alerted the court to the error described in part IV. At no point did Dr. Gabriel opine that the traumatic and vascular mechanisms he described could cause cerebral palsy, or that those mechanisms might produce the asymmetrical development shown in plaintiff's MRI. Thus Dr. Gabriel's testimony supported plaintiff's medical malpractice claim only if the jury was permitted to assume, without supporting evidence, that a causal connection existed between these elements. As shown in part IV, this is not a permissible inference. Consequently, the court again had reason to conclude that Dr. Gabriel's testimony could not have "assisted the trier of fact" given the yawning gap between Dr. Gabriel's testimony and the conclusions plaintiff hoped the jury would draw from it.

Craig, 471 Mich 84-85.

In *Gilbert*, the trial court permitted a certified social worker and substance abuse counselor to testify that the sexual harassment plaintiff encountered at her work place "caused a permanent change in her brain chemistry that produced a relapse into alcohol abuse and the onset of depression." These conditions, the social worker opined, "would lead inexorably to plaintiff's untimely and excruciating death." 470 Mich 760. Addressing the trial court's error in admitting this testimony, the Supreme Court explained that MRE 702 demands a searching inquiry not only of the data underlying the expert testimony "but also of the manner in which the expert interprets and extrapolates from those data:"

> Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

470 Mich 782.

More recently, in *Edry*, the Supreme Court held that the testimony of plaintiff's expert regarding plaintiff's chance of survival was inadmissible because it was not based on reliable principles or methods and was contradicted by both defendant's oncology expert's opinion and ***the published literature on the subject***. No evidence was admitted that supported the expert's testimony, and although he made general references to textbooks and journals, that literature was

never produced. The material that plaintiff subsequently provided from publicly accessible websites contained general statistics about survival rates, but the materials were not peer-reviewed and did not directly support the testimony. Further, there was no evidence that the expert reviewed or used the articles to formulate his opinions.

Michigan goes further than *Daubert* in mandating general acceptance by experts in the field. As Bitensky explains,

> On the one hand, Daubert states that a reliability factor may be whether the expert's underlying theory or technique has been subject to peer review and publication and notes that publication is but one element of peer review. According to Daubert, publication is not always "a sine qua non of admissibility." The Michigan statute, on the other hand, specifically requires "peer review publication." Another example of the differences is apparent in a comparison of Daubert's "general acceptance" factor with that of section 600.2955(1)(e). It will be recalled that Daubert takes the position that one reliability factor may be whether there is "general acceptance" of the expert's underlying theory or technique in the relevant scientific community. However, ***section 600.2955(1)(e) makes the "general acceptance" test mandatory and requires its application both to the basis of the expert's opinion and to the opinion itself*** …
>
> Section 600.2955(1) treats as mandatory two reliability criteria that are not even mentioned in Daubert. That is, ***section 600.2955(1)(f) directs the trial judge to assess whether experts in the field would rely on the same basis to reach the type of expert opinion being proffered***; and, ***section 600.2955(1)(g) requires the trial judge to assess whether the expert's opinion or underlying methodology is relied upon by experts outside of the litigation context***.

2002 L Rev MSU-DCL at 835 (emphasis added). *See also*, Lowe, *Scientific Testimony in Michigan: Testing the Experts*, 13 TM Cooley L Rev 207, 233 (1996) (internal quotations omitted; emphasis in original) ("Additionally, the court *must* consider the degree to which the opinion and its basis are generally accepted within the relevant expert community."); Mandel, *Scientific Expert Witnesses*: *Admitting and Challenging Them in Michigan Courts*, 83 Mich Bar J 26, 26 (2004) ("The Michigan legislature has mandated that expert testimony that does not meet the criteria established by [MCL 600.2955] is inadmissible").

Indeed, by statute, even "novel" methods must be generally accepted. MCL 600.2955(2) provides that "[a] novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes ***that it has achieved general scientific acceptance among impartial and disinterested experts in the field***." (emphasis added). As to this provision, Lowe has explained:

> To be admissible under Section 2955(2), novel scientific evidence must be generally accepted, as before. However, once the proponent proves that the "novel methodology or form of scientific evidence … has achieved general scientific acceptance," the evidence will no longer be novel, by definition. That formerly novel technique or "form of scientific evidence" must now be reanalyzed, along with other non-novel evidence, as part of the basis for the opinion.

Lowe, *Scientific Testimony in Michigan: Testing the Experts*, 13 TM Cooley L Rev 207, 240-241 (1996).[10]

In observing in *Gilbert* that a "[c]areful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation," the Supreme Court explained:

> When a court focuses its MRE 702 inquiry on the data underlying [an] expert opinion and neglects to evaluate the extent to which an expert extrapolates from those data in a manner consistent with *Davis-Frye* (or now *Daubert*), it runs the risk of overlooking a yawning "analytical gap" between that data and the opinion expressed by an expert. As a result, ostensibly legitimate data may serve as a Trojan horse that facilitates the surreptitious advance of junk science and spurious, unreliable opinions.

470 Mich 783. Similarly, in *Daubert*, the Supreme Court stated:

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[10] In *Edry*, a majority of the Supreme Court observed that while peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature "combined with the lack of any other form of support for [the expert's] opinion, renders [the] opinion unreliable and inadmissible under MRE 702." 486 Mich 634, 641; 786 NW2d 567 (2010). This implies that some form of general acceptance is required.

> The subject of an expert's testimony must be "scientific . . . knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. . . . [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method.

509 US 589-590. This holds true under MRE 702. Elaborating on what the rule requires, the Supreme Court has stated that MRE 702 demands a searching inquiry not only of the data underlying the expert testimony "but also of the manner in which the expert interprets and extrapolates from those data." *Gilbert*, 470 Mich 782. Thus, this Court explained:

> [I]t is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

Id. See, also, *Kumho Tire*, 526 US at 151 ("disagree[ing] with the Eleventh Circuit's holding that a trial judge may ask questions of the sort *Daubert* mentioned only where an expert 'relies on the application of scientific principles,' but not where an expert relies 'on skill – or experience-based observation.'").

An expert's opinion must fit the facts at issue in the lawsuit. An opinion that is based on assumptions that do not comport to the evidence is inadmissible. *Skinner v Square D Co*, 445 Mich 153, 173-174; 516 NW2d 475 (1994). In *Skinner*, this Court explained:

> Plaintiffs further argue that the testimony of their experts proved factual causation. In *Jordan*, this Court taught that expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury. Moreover, in *Mulholland* at 411, we stated that "there must be facts in evidence to support the opinion testimony of an expert."
>
> Plaintiffs' expert testimony did not sufficiently establish causation. Plaintiffs' experts maintained that the switch was defective, and that the defect was the proximate cause of the decedent's death. The experts' causation theories were deficient, however, because each lacked a basis in established fact. Specifically, each expert either assumed, or was asked to assume, that (somehow) the wires were unhooked, and that the power was on when Mr. Skinner began working on

> the machine. Because the experts' conclusions regarding causation are premised on mere suppositions, they did not establish an authentic issue of causation.

Id. If an expert's opinion is based upon facts or data that are not in evidence, the opinion must be excluded. The United States Supreme Court explained the importance of this in *Daubert*, 509 US 591-592, stating that this requirement

> goes primarily to relevance. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 Weinstein & Berger P702[02], p. 702-18. See also *United States v Downing*, 753 F2d 1224, 1242 (CA3 1985) ("An additional consideration under Rule 702 – and another aspect of relevancy – is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid*. . . . Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

See also, *Kumho Tire*, 526 US at 157 ("'[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert'"), quoting *General Electric Co v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997), which continued, "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."

Here, the Trial Court's 17-page *Daubert* opinion is mired in minutia, but this Court should not be impressed. Without the statutorily-required analysis the Trial Court has refused to perform, it is merely smoke and mirrors, "full of sound and fury, signifying nothing."[11] The opinion alludes to the requisites of scientific testing, peer review, generally accepted standards, potential error rate, degree of acceptance, use by other experts, and use outside the context of litigation, but makes no pretense of applying those standards. And this is despite this Court's direction that "[t]he circuit court shall perform a searching inquiry as to these factors … and

[11] William Shakespeare, *Macbeth*, Act V, Scene V.

make specific findings regarding those factors." See *Daubert* Opinion at 2. Under the circumstances, the expert causation testimony should not have been allowed.

II. The Trial Court Erred in Excluding the Genetics Report.

This error is shocking. The Trial Court cavalierly excluded and denigrated the most ***important*** piece of scientific evidence available to explain the cause of Markell's condition, and upon protest, chided Defendants for making "a mountain out of a mole hill." The factual context for this issue is recited in detail in the Brief of Defendants-Appellants but even a cursory review highlights the significance of this error. Markell Vanslembrouck was born on December 1, 1995. A CT scan taken three days later demonstrated extensive brain abnormalities. Defendants Br. at 3-4. Specialists in the fields of pediatric neurology and pediatric neurosurgery diagnosed a congenital malformation of the brain. *Id*. at 4. A follow-up MRI was performed when Markell was five months old. *Id*. at 4. The neuroradiologist who interpreted the study deemed the findings consistent with a congenital abnormality.

On September 6, 1996, when Markell was just over nine months old, her treating pediatric neurologist referred her to a geneticist for further evaluation. As Defendants-Appellants explain, the geneticist, Dr. David Aughton, concluded that Markell "had a congenital defect of the brain which was consistent with at least 36 different congenital syndromes, but was unable to identify her specific syndrome because of the limited technology available at that time…" *Id*. at 5. Subsequently, in 2009, in the course of reviewing Markell's medical records, Defendants-Appellants' experts in pediatric neurology and genetics diagnosed a progressive degenerative genetic disorder known as pontocerebellar hypoplasia type 2 ("PCH"). *Id*. Markell was tested for PCH via gene sequencing in 2010. *Id*. at 6. The results tested positive for PCH and a genetic defect. *Id*. The report confirmed to a 99% certainty that Markell's mental and physical deficiencies resulted from a genetic disorder that was unrelated to the events at birth.

Id. ***But that report was never provided to the jury and the Trial Court's repeated admonishments precluded the jury from considering it.***

That such an error could ever occur is alarming. The genetics report was the most scientifically reliable piece of evidence regarding the cause of Markell's condition and absolutely critical to the defense. Yet, it could not be used to substantively establish that Markell's condition resulted from PCH, rather than the alleged acts of malpractice. This distorted the truth-seeking process "If the function of a court is to find the truth of a matter so that justice might be done, then a rule which absolutely excludes the best possible evidence of a matter in issue rather than allow it to be weighed by the trier of fact must necessarily lead to injustice." *Serafin v Serafin*, 401 Mich 629, 635-36; 258 NW2d 461 (1977), *quoting Davis v Davis*, 507 SW2d 841, 847 (Tex Civ App 1974, *rev'd on other grounds*, 521 SW2d 603 (Tex 1975).

Indeed, the "real controversy" cannot be fully tried "when the jury is denied the opportunity to hear important evidence." *Noel v Wisconsin Health Care Liability Ins Plan*, 156 Wis 2d 465; 458 NW2d 388 (Wis Ct App 1990). In *Arlton v Schraut*, 936 NE2d 831, 842 (Ind Ct App 2010), the Court explained that by excluding enlarged angiogram photos, "the trial court prevented the jury from having access to ***critical, objective evidence*** supporting Arlton's claim of negligence" (emphasis added). See also, *Anderson v Kunduru*, 215 W Va 484; 472 SE2d 827 (W Va 1996) ("By excluding Dr. Cox's testimony, the circuit court excluded what little evidence the party's attorney had compiled on a critical issue in the case, and thereby eviscerated the party's entire cause of action").

In this case, the genetics report was a critically important piece of objective evidence, highly probative of the causation issue. Excluding this evidence from the jury's consideration was reversible error.

III. The Trial Court Erred in Excluding ACOG Criteria.

Ironically, although the Trial Court found that Dr. Gabriel's much-maligned causation theory met the test of reliability, it found that the widely acclaimed "gold standard" ACOG criteria did not. The ACOG Criteria, published by the American College of Obstetricians and Gynecologists ("ACOG"), requires that certain criteria be satisfied before hypoxic/ischemic injury during the birth process can be considered to have caused cerebral palsy: metabolic acidosis (Essential Criteria 1); early onset of severe or moderate neonatal encephalopathy (Essential Criteria 2); cerebral palsy of the spastic, quadriplegic or dyskinetic type (Essential Criteria 3); and the exclusion of other identifiable causes such as trauma, coagulation disorders, infectious conditions, or genetic disorders (Essential Criteria 4). The absence of metabolic acidosis and the unequivocal existence of PCH negates Plaintiff's theory of birth-related trauma. But this evidence was also kept from the jury.

The Trial Court's reason for excluding the ACOG Criteria is contorted. The Court concluded that the ACOG Criteria could not be reliably applied under MRE 702 because the Criteria did not apply when trauma, in addition to hypoxia and/or ischemia, was a factor. Use of the Criteria, the Court explained, would "unilaterally and deliberately" distort Plaintiff's causation theory and was more prejudicial than probative.[12] See September 13, 2011 Opinion and Order Granting in Part Plaintiff's Motion for Sanctions and an Order Barring Defendants' Causation Defense That Markell Was Not Hypoxic at Birth. Despite recognizing that "the ACOG hypoxic-ischemic event defense could be critical to Defendants," the Court absolutely prohibited Defendants from showing that the peer-reviewed standards developed by the premiere

[12] The Court found that the ACOG criteria required an arterial, not venous, blood gas sample to show metabolic acidosis and that Defendants also had to show that no trauma occurred.

pediatric and obstetrical specialty organizations in the world were at odds with the causation theory espoused by Dr. Gabriel and Plaintiff's other causation experts. The Court explained:

> The Court turns to the essence of its responsibilities as a trial court and address **THE major evidentiary flaw Defendant has in proceeding with any defense concerning hypoxic even sufficient to cause cerebral palsy**. This concerns its lack of its reliability as applied by even Defendants' experts on causation. Here, the Court assumes, but does not rule, that Defendants' position about it being a gold standard is true . . .
>
> Under MRE 702, the Court must say the principles and methods are reliable and reliably applied. Here the Court cannot say that Defendants are reliably applying their four criteria to establish a sufficient hypoxic-ischemic event causing cerebral palsy because Defendants are unilaterally and deliberately, it appears to this Court, distorting Plaintiff's theory in saying that it must be an hypoxic-ischemic event. Plaintiff's theory is a combination of trauma and ischemia leading to minor Plaintiff's injuries and damages. This is very significant, because the Court held, as a matter of fact and law on September 7, 2011, that cerebral palsy can occur in the face of a multiple of factors – not just those in ACOG, especially here where Plaintiff is not arguing hypoxia alone. It was the Court's legal opinion and conclusion binding on the parties before it, and supported by the testimony of all five witnesses who testified. In a word, it is now the law of this case.

Id. at 3-4. The Trial Court's opinion on this issue is inexplicable. There is no way the "gold standard" ACOG Criteria is unreliable. The reliability of the Criteria is intrinsic, having been developed by the ACOG/AAP Task Force after years of reviewing and collecting scientific data on cerebral palsy. The Court's purported finding "as a matter of fact and law … that cerebral palsy can occur in the face of a multiple of factors – not just those in ACOG" cannot displace the international consensus the ACOG Criteria represents relative to how one can determine whether a hypoxic ischemic event caused cerebral palsy. There is recognized evidentiary value in the ACOG Criteria. It should not have been kept from the jury. It was not for the Court to determine how the ACOG Criteria applied or the effect it should be given. That was for the jury to determine. Nonetheless, the Court opined:

> In addition, and most significantly here, the Court cannot find Defendants' defense theory was reliably employed because the Court cannot conclude that Defendants' witnesses correctly applied the medical facts to the criteria. **The**

> **Court cannot find as a fact that arterial blood was tested (and thus used) and that there was no trauma**…
>
> For these reasons, the Court cannot conclude that Defendants' attempt to use this theory in order to discredit Plaintiff's case is reliable or reliably applied. The court holds that Defendants have failed, in particular, to carry their burden by a preponderance of the evidence under MRE 702 that the defense theory has been reliably applied.
>
> Employing the weighing process of MRE 403, the probative value of Defendants' defense stating Plaintiff cannot prove an hypoxic-ischemic event based on ACOG's four criteria is significantly outweighed by its prejudicial effect, confusion of the issues, misleading the jury, and considerations of undue delay and waste of time, where, as here, it misstates Plaintiff's theory of the case and has been erroneously applied in methodology. It is undisputable that the criteria required by ACOG has not been established in this case. Specifically as to the first and fourth criteria, no arterial blood was tested and birth trauma exists. To allow testimony on Defendant's theory here will unnecessarily confuse and mislead athe jury and be a waste of time since the criteria has not been established andh as even been conceded as existing as to birth trauma by Defendant's own witnesses. The probative value of the evidence is clearly substantially outweighed by the potential prejudicial effect to Plaintiff.

Id. at 4-5.

The Trial Court's resort to an MRE 403 inquiry is telling. "When proffered evidence relates to the central issue in a case, it is a difficult matter indeed to show that the prejudicial effect of that evidence substantially outweighs its highly probative nature, as Rule 403 requires." See *Rubert-Torres ex rel. Cintron-Rupert v Hospital San Pablo, Inc*, 205 F3d 472, 479 (CA 1, 2000). In *Dukes v Harper-Hutzel Hosp*, unpublished opinion per curiam of the Court of Appeals, issued January 30, 2007 (Docket No. 255824), *Slip Op* at 10, this Court determined that Dr. Gabriel's testimony would not assist the trier of fact because he disregarded the ACOG Bulletin 163 criteria (a predecessor version of the ACOG criteria involved here). This Court explained:

> In addition, Dr. Gabriel's proposed testimony would not assist the trier of fact determine [sic] a fact in issue as his testimony was not in accord with the established facts. The ACOG Bulletin 163 outlined the four generally recognized factors necessary to establish a causal link between hypoxia and ischemia in utero

> and neurological deficit: (1) a p[H] of less than 7.00, (2) Apgar scores of less than three for five minutes, (3) more post-birth, seizures, coma or hypotonia and (4) multi-organ system dysfunction. However, in this case, the medical record evidence shows that an umbilical cord pH of greater that [sic] 7.0 was present in this case – 7.27.

A trial cannot be a search for truth if probative evidence is excluded. The ACOG Criteria should have been admitted.

IV. The Required Predicate for M Civ JI 50.10 and 50.11 Was Lacking and These Instructions Should Not Have Been Given.

M Civ JI 50.10 and 50.11 should not be given if the evidence does not support a theory of unusual susceptibility to injury or aggravation of pre-existing injury. *Wincher v City of Detroit*, 144 Mich App 448, 456; 376 NW2d 125 (1985). The Trial Court failed to heed that admonishment here. M Civ JI 50.10 and 50.11 were given despite Plaintiff's failure to establish that PCH was a preexisting condition within the meaning of the jury instruction that would make Markell "unusually susceptible to injury," that the actions of Defendants-Appellants aggravated PCH, and that damages for the severe mental retardation and spastic quadriplegia caused by PCH were indivisible from the minor facial bruising and shoulder dystocia allegedly caused during birth. The Court's belief that the instructions were appropriate because the parties' causation theories were not mutually exclusive is simply wrong. The instructions functioned as a platform to foist upon Defendants the full scope of damages for Markell's catastrophic condition (irrespective of whether Defendants' acts were the proximate cause).

M Civ JI 50.10 is the "eggshell plaintiff" instruction intended for a plaintiff with an unusual susceptibility to injury because of some pre-existing condition. It provides:

> You are instructed that the defendant takes the plaintiff as [he/she] finds [him/her]. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence.

M Civ JI 50.04 allows as a separate element of damage, those damages arising from the aggravation of a pre-existing condition *if the proof justifies submitting the issue of aggravation to the jury*. M Civ JI 50.04 Note on Use. M Civ JI 50.11 can be given "[i]f it appears *from the evidence* that the jury may have difficulty determining the damages caused by defendant as compared to those resulting from a preexisting ailment or condition…" *Id*. (emphasis added). In those circumstances, M Civ JI 50.11 provides:

> If an injury suffered by plaintiff is a combined product of both a preexisting [disease/injury/state of health] and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.
>
> However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

It does not "cry wolf" to say that the use of M Civ JI 50.10 and 50.11 in the manner allowed here violates due process. The jury could not have been led further astray. Through the device of these instructions, the life-time costs of addressing the catastrophic mental and physical disabilities that unquestionably result from PCH were shifted to Defendants as the alleged indivisible sequelae of facial bruising and shoulder dystocia. If M Civ JI 50.10 and 50.11 are allowed to be used in this manner, all semblance of the stalwart proximate cause requirements will fall away. Any latent medical condition – however catastrophic the consequences that pre-existed the subsequent injury – will become a platform for skirting the proximate cause requirements. Because in the end, what this means is that Plaintiff needn't prove that Markell's catastrophic condition was proximately caused by some act or omission of Defendants. The jury was allowed to presume it.

The ramifications of this circumstance are alarming. If the instructions are to be applied in this manner, any plaintiff in any context with any latent condition and any subsequent injury

can be relieved of her obligation to establish proximate cause by incanting "aggravation" and "indivisibility" with only the weakest of proofs. A presumption will then arise, unfairly shifting the burden of proving otherwise to the defendant. To safeguard against this abuse, this Court should require a greater evidentiary showing before these instructions can be given than the Trial Court required here.

CONCLUSION/RELIEF REQUESTED

For the reasons discussed above, Amicus Curiae Michigan State Medical Society respectfully joins Defendants-Appellants in requesting reversal of the judgment entered against them in this matter.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

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Dated: April 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2013 I electronically filed the foregoing paper with the Clerk of the Court using the Court's ECF system which will send notification of such filing to all ECF participants.

/s/ Joanne Geha Swanson

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Unpublished Cases

1 of 1 DOCUMENT

EBONY DUKES, by her Next Friend, TRACY HUGHES and TRACY HUGHES, individually, Plaintiffs-Appellants/Cross-Appellees, v HARPER-HUTZEL HOSPITAL, f/k/a HUTZEL HOSPITAL, Defendant-Appellee/Cross-Appellant, and DAVID BEACH COTTON, M.D. Defendant-Appellee.

No. 255824

COURT OF APPEALS OF MICHIGAN

2007 Mich. App. LEXIS 180

January 30, 2007, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Wayne Circuit Court. LC No. 00-030844-NH.

DISPOSITION: Affirmed.

JUDGES: Before: White, P.J., and Jansen and Wilder, JJ. Helene N. White, P.J. (concurring in part and dissenting in part).

OPINION

PER CURIAM.

In this malpractice action, plaintiffs, Ebony Dukes (minor-plaintiff), by her mother Tracy Hughes acting as next friend, and Hughes in her individual capacity (plaintiff-mother), appeals as of right from the order granting summary disposition under *MCR 2.116(C)(10)* to defendants, Harper-Hutzel Hospital (defendant-hospital) and David Beach Cotton, M.D. We affirm.

I

Tracy Hughes was admitted to defendant-hospital on December 2, 1998 at approximately 8:20 a.m. and delivered the minor-plaintiff on December 3, 1998 at approximately 3:17 p.m. At some point during or after the delivery, the minor-plaintiff suffered undefined seizures and a neurological injury to her brain.

On September 20, 2000, plaintiffs filed a complaint alleging defendants breached the standard of care in failing, among other things, [*2] to perform a caesarian section (C-section), failing to recognize fetal distress, failing to obtain a scalp pH, and failing to "properly take those steps necessary to provide a safe labor and delivery for the ultimate delivery" of the minor-plaintiff. An affidavit of merit executed by Ronald G. Zack, M.D. accompanied the complaint.

Following discovery, defendants collectively filed a motion in limine to strike plaintiffs' causation theory or in the alternative, for a *Davis-Frye* [1] evidentiary hearing on the grounds that plaintiffs' causation theory was inadmissible because of its scientific unreliability and as such, plaintiffs were unable to establish causation. Defendants challenged plaintiffs' theory that the minor-plaintiff suffered brain damage in utero as a result of decreased blood flow through the placenta and

umbilical cord resulting in decreased oxygen to the brain (hypoxia and/or asphyxia and/or ischemia) on the basis that the plaintiff's theory is contrary to established medical authority. Citing to thirteen published medical authorities, including an American College of Obstetrics and Gynecology (ACOG) article, ACOG Technical Bulletin No. 163, Fetal and Neonatal Injury, [*3] defendants argued that if hypoxia and/or ischemia severe enough to cause brain damage had occurred, symptoms of "neurologic syndrome" would have been present immediately after the minor-plaintiff's birth and during the first few days after birth, and that the infant would have demonstrated abnormal activity, seizures and problems with feeding. The record did not establish these evidentiary findings. Defendants further argued, contrary to plaintiffs' theory, that to establish hypoxia/ischemia and poor neurological outcome, there must be evidence establishing that the umbilical cord pH is less than 7.0. The evidence in this case was that the umbilical cord pH level was 7.27. Alternatively, defendants requested a *Davis-Frye* hearing to determine whether plaintiffs' experts' opinions gained general acceptance within the medical community.

1 See *People v Davis, 343 Mich. 348*; *72 NW2d 269 (1955)*; *Frye v United States, 54 App. D.C. 46, 293 F 1013* (DC App, 1923).

In [*4] response to defendants' motion to strike, plaintiffs argued that the motion was premature as Dr. Gabriel was scheduled for depositions. Alternatively, plaintiffs argued that Dr. Gabriel's testimony was scientifically reliable, thus a *Davis-Frye* hearing was unwarranted. The trial court took the matter under advisement pending Dr. Gabriel's deposition.

Dr. Gabriel opined in his deposition that the minor-plaintiff suffered brain damage in utero due to hypoxia through a "hyper-acute event" a few minutes before birth, resulting from an infection of the plaintiff-mother's chorionic and amniotic membranes (chorioamnionitis). Before reaching his conclusion, Dr. Gabriel had reviewed an ultrasound, x-rays and CT scan, as well as medical and hospital reports pertaining to the minor-plaintiff. Dr. Gabriel, relying on his previous experience as an expert witness where defendant-hospital was a party, further testified that he previously submitted "three-or four of the most current or the most well-researched papers" on the association between acute chorioamnionitis and decrease per fusion, which had been reported in the medical literature. Dr. Gabriel acknowledged that an umbilical pH of 7.28 [*5] [sic] would be considered normal; however, he challenged defendants' theory that a pH level less than 7.0 was required to establish hypoxia/ischemia and poor neurological outcome. According to Dr. Gabriel, the presence of significant metabolic acidosis was nonetheless demonstrated by the base excess value of minus 8 as well as a low Apgar [2] score. Dr. Gabriel explained that the normal range for base excess is "[b]etween plus two and minus two," and a base excess of minus eight was indicative of metabolic acidosis and [g]iven the child's other complications, that probably was a [venous] maternal pH" versus an arterial [3] cord pH.

2 An "Apgar score" is a numerical scoring, ranging from 1 to 10 (with 10 representing the highest value) rating a newborn's color, respiration, tone and reflexes.

3 A venous sample measures maternal blood gases and an arterial sample measures fetal oxygenation.

After Dr. Gabriel's deposition, defendants filed a supplemental brief requesting that the trial court strike [*6] his testimony as scientifically unreliable given his failure to cite any studies to support his theory. To refute Dr. Gabriel's testimony, defendants attached two medical articles, which address the specific mechanism underlying his theory. These articles, *Doppler Evaluation of the Fetoplacental Circulation in the Latent Phase of Preterm Premature Rupture of Membranes* and *Clinical Chorioamnionitis is Not Predicted by Umbilical Artery Doppler Velocimetry in Patients with Premature Rupture of Membranes*, analyzed tests using utrasonography to measure umbilical blood flow and both articles concluded that chorioamnionitis does not cause decreased placental blood flow to the fetus. Defendants' supplemental brief also cited to Dr. Gabriel's testimony that the minor-plaintiff did not exhibit and signs of motor problems or cerebral palsy, conditions historically associated with prenatal hypoxia and a subsequent neurological injury. Finally, defendants cited to plaintiffs' own obstetrical experts, who both testified that chorioamnionitis was an insignificant factor in this case, in further support of their contention that Dr. Gabriel's testimony lacked foundation.

In response to defendants' [*7] supplemental brief, plaintiffs, citing *Anton v State Farm, 238 Mich App 673*;

607 NW2d 123 (1999), principally argued that defendants' evidence contradicting Dr. Gabriel's theory was not dispositive of the scientific reliability of his testimony. Plaintiffs argued that under *Anton*, a single reference in the literature theorizing a causal link is sufficient to meet the threshold to admit expert testimony. Plaintiffs further argued that more than 35 years of research exists supporting the theory that a fetus can suffer harm in utero, either by a decrease in oxygenation which can be detected by fetal strips, a low Apgar score, a core ph, a base excess, "or it may not show up at all, other than the reading of neuro imaging studies that are sophisticated enough to detect a problem." By way of evidentiary support, plaintiffs relied extensively on Dr. Gabriel's deposition testimony where he, without giving the specific years or titles of studies, discussed medical literature generally supporting his theory. To buttress Dr. Gabriel's statements that he previously submitted articles to defendant-hospital's legal defense firm, plaintiff attached a bibliography [*8] of articles discussing" watershed perinatal hypoxic-ischemic central nervous system damage." In addition, plaintiffs submitted excerpts and synopses of articles, including an article written by a Michigan attorney for *Michigan Lawyer's Weekly* that "fully support Dr. Gabriel's testimony." To explain the conflicting opinions between Dr. Gabriel and Dr. Zack, plaintiffs argued that Dr. Zack was not going to provide causation testimony. [4]

> 4 Plaintiffs did not address the conflicting causation testimony given by Dr. Berke.

Meanwhile, on August 27, 2002, plaintiffs filed a motion for a default judgment or summary judgment arguing that dismissal was warranted in favor of plaintiffs because defendant-hospital failed to file an affidavit of meritorious defense. On September 5, 2002, the trial court heard a variety of motions, including plaintiffs' motion for default judgment. Plaintiffs also presented the trial court with an untimely motion in limine to exclude testimony pertaining to the plaintiff-mother's history [*9] of substance abuse or to any references that she was incarcerated at the time she went into labor. The trial court agreed that defendant-hospital was required to file an affidavit of merit, but it determined that a default judgment was not mandatory and instead, allowed plaintiffs to argue their untimely motion in limine.

Three hearings were held on defendants' motion to strike on September 6, 2002, September 9, 2002, and September 18, 2002. The multiple hearings were required as the trial court provided plaintiffs several opportunities to cite to any portion of Dr. Gabriel's testimony that established the scientific reliability of his testimony. At the September 9, 2002, hearing, plaintiffs' counsel, despite 115 pages of deposition testimony provided by Dr. Gabriel, informed the trial court he was unprepared to give the trial court a detailed response or to argue from the literature or the deposition testimony. Given the trial court's expressed reluctance to strike plaintiffs' causation testimony, the trial court "reluctantly allow[ed]" plaintiffs "a last gasp opportunity to present in writing any information" to establish the scientific reliability" of Dr. Gabriel's causation [*10] testimony. At the conclusion of the September 18, 2002, hearing, and hearing extensive arguments, the trial court did not render a decision, and instead, stated that it needed to determine whether Dr. Gabriel's testimony was relevant, i.e., in accord with established facts or whether, assuming the testimony was relevant, whether it satisfied the sufficient indicia of scientific reliability standard under *Davis-Frye*. On March 12, 2004, the trial court orally granted defendants' motion for summary disposition on the record. [5] After reviewing the supporting documentation and depositions provided by the parties and "pull[ing] certain copies of the material alluded to by the Plaintiff," the trial court struck Dr. Gabriel's testimony on the grounds of relevance. Because plaintiffs could not provide testimony on causation, the trial court granted summary disposition in favor of defendants. Citing plaintiffs' supporting documentation and reliance on the *Michigan Lawyer's Weekly* article, the trial court determined that the article "although interesting, is not competent scientific evidence or authority." Similarly, the trial court provided a synopsis of defendants' supporting documentation, [*11] giving special attention to the ACOG Bulletin 163:

> ACOG Bulletin 163 summarizes the most generous view of some causal link between hypoxia and ischemia in utero and neurological deficit in children where four factors are present. Those factors are a p[H] of less than 7.00, Apgar scores of less than three for five minutes or more post-birth, seizures, coma or hypotonia and multi-organ system dysfunction.
>
> The Court does not believe that every disagreement amongst competent experts should resulted [sic] in a *Davis-Frye* or a

Daubert-Kuomo hearing. The instant case provides a circumstance in which such a hearing is not required. The Court accepts the Defendant's [sic] assertion that *Nelson[v] American Sterilizer ([O]n [R]emand), 223 Mich. App., 485* (1987) [sic]and *M.C.L. 600.2955* are controlling. Both the case and the statute require that there be sufficient indicia of scientific reliability. Scientific reliability does not require that there be mirror image studies available upon which the trier of fact could compare an absolute apple to another absolute apple. Instead, there must be material which have been subjected [*12] to appropriate scientific, rigorous standards upon which the Judge could conclude that there is some indicia of reliability. Owing to the fact that the Defendants' own ACOG Bulletin 163 acknowledges that there is some evidence of a causal connection between the events which Plaintiff asserts occurred during the delivery of this child and neurological injury, the Court believes that there is no reason for a *Davis-Frye* hearing.

However, the Defendant has also presented a plethora of literature that supports the need for all four of the criteria stated below to be present to establish a scientific reliable basis for the causation testimony. Plaintiff's article from Lawyer's Weekly does assert that there is literature which challenges the need for all four criteria. Plaintiff, however, did not furnish this literature nor an excerpt from this literature for the Court's review. The Court did begin the process of reviewing some of the materials in the bibliography offered by the Plaintiff, but concluded that that was both inappropriate and not helpful. This Court is, therefore, left to determine if all four criteria are present in this case from the materials presented.

A review of [*13] the record demonstrates that the Plaintiff has a plausible case that there are three factors in the medical history of this child, seizure, multi-system organ dysfunction and low Apgar scores. While the Apgar scores are not the classic 1-3 within 3 minutes of birth, Dr. Gabriel presents competent testimony challenging the efficacy of the Apgar score of six, which is recorded in the medical record. However, there is no evidence in the record of a p[H] of less than seven. The record reveals a cord p[H] of 7.27.

The causation testimony is only relevant if there is evidence of all four criteria. It is therefore irrelevant to this case. Without relevant causation testimony, the Court must dismiss the case and enter an order of no cause on behalf of the Defendants. [(Emphasis to case cites added).]

5 The trial court's opinion and order striking causation testimony and granting summary disposition in favor of defendants was not entered until May 11, 2004.

Plaintiffs now appeal the trial court's order [*14] granting summary disposition to defendants.

II

Atrial court's determination whether a witness is qualified to serve as an expert witness and the actual admissibility of the expert's testimony will not be reversed absent an abuse of discretion. *Tate v Detroit Receiving Hosp, 249 Mich. App. 212, 215*; *642 NW2d 346 (2002)*. Similarly, the grant or denial of motion for default judgment for failing to file an affidavit of meritorious defense is reviewed for an abuse of discretion. *Costa v Community Emergency Med Svcs, 263 Mich. App. 572, 581*; *689 NW2d 712 (2004)*.

When deciding a motion for summary disposition under *MCR 2.116(C)(10)*, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed, 470 Mich 274, 278*; *681 NW2d 342 (2004)*. Summary disposition is proper under *MCR 2.116(C)(10)* if the documentary evidence shows that there is no genuine

issue regarding any material fact and the moving party is entitled to judgment as a [*15] matter of law. *West v GMC, 469 Mich 177, 183*; *665 NW2d 468 (2003)*. 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 could differ. *Id.*

III

A

Before addressing the issue squarely before this Court, we must first address an ancillary dispute between the parties as to whether the current or predecessor version of *MRE 702* is applicable. [6] At the time defendants' motion to strike was heard, the prior version was in effect; however, the trial court ruled on the matter after *MRE 702* was amended. [7]

> 6 Defendant-hospital and plaintiffs are in agreement that the amended version is applicable. However, defendant Cotton contends plaintiffs abandoned the claim, first raised on appeal, that thet rial court failed to apply the amended version given plaintiff's failure to raise the issue in (1) a supplemental motion between the effective date of the current version and the date the trial court's opinion was issued, or (2) a motion for reconsideration. Alternatively, defendant Cotton contends the predecessor version is inapplicable as the current version of *MRE 702* was not in effect at the time the trial court heard defendants' motions but nonetheless argues that under either version, Dr. Gabriel's testimony was properly stricken.
>
> [*16]
>
> 7 *MRE 702* was amended effective January 1, 2004.

This Court addressed the rule pertaining to the prospective or retroactive application of court rules in *Reitmeyer v Schultz Equipment & Parts Co, 237 Mich. App. 332, 337-343*; *602 NW2d 596 (1999)*, where this Court recognized that *MCR 1.102* indicates that a new rule should generally apply to all pending cases, but recognized that application of an amended rule is within the trial court's discretion if it would work an injustice on a party who acted in reliance on the consequences of the prior rule. See also *Davis v O'Brien, 152 Mich. App. 495, 393 NW2d 914 (1986)* (an injustice occurs where a party acts or fails to act in reliance on the prior rules and his action or inaction has consequences under the new rules which were not present under the old rules).

Although *Reitmeyer* concerned the retroactive application of an amended court rule, *MCR 2.405*, and not a rule of evidence, this Court in *Reid v A H Robins Co, 92 Mich. App. 140, 143*; [*17] *285 NW2d 60 (1979)*, held that amendments to the Michigan Rules of Evidence should be treated as amendments to the court rules and thus amendments to rules of evidence were applicable to pending actions as well as other actions tried after March 1, 1978.

In *People v Allen, 429 Mich. 558, 608-609*; *285 NW2d 60 (1988)*, the Supreme Court promulgated an amendment to *MRE 609(a)* to apply to all cases "tried" after March 1, 1988. In doing so, the Court stated:

> [Because] parts of the amendment of *MRE 609* are "clear breaks" in our jurisprudence . . . we will apply them only prospectively. See, e.g., *Tebo v Havlik, 418 Mich. 350*; *343 NW2d 181 (1984)*. Accordingly, the amendment of *MRE 609* will take effect March 1, 1988. Trials begun before that date will be governed by the existing version of *MRE 609* as interpreted by this opinion.

Accordingly, consistent with *MCR 1.102* and *MRE 102*, [8] we conclude that that application of the amended *MRE 702* will work an injustice, given (1) the eighteen-month delay between the hearings and the trial court's decision in March 2004, (2) that, as observed [*18] by the trial court, discovery in this case was protracted at great expense, and (3) plaintiffs' failed to request application of the current version of *MRE 702* in either a supplemental motion between the effective date of the current version of the rule and the date the trial court rendered its decision, or in a motion for reconsideration. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Center v Auto Club Ins Ass'n, 218 Mich. App 375, 388*; *554 NW2d 49 (1996)*. We therefore find no abuse of discretion in the trial court's reliance on the predecessor version of *MRE 702*. [9]

8 *MRE 102* provides:

> These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

9

Accordingly, we reject plaintiffs reliance on *Craig v Oakwood Hosp, 471 Mich. 67, 79; 684 NW2d 296 (2004)*, for the proposition that a trial court's decision regarding the admissibility of expert testimony is evaluated under the version of *MRE 702* in effect when the trial court decided the issue. *Craig* is distinguishable as (1) the defendant's motion to strike the plaintiffs' expert or request for a *Davis-Frye* hearing was filed prior to the effective date of the amended version of *MRE 702*, *(2)* the trial court's decision to deny the motion for a *Davis-Frye* hearing occurred prior to the effective date of the amended version of *MRE 702* and *(3)* the subsequent trial occurred prior to the effective date of the amended version of *MRE 702*. See e.g. *Craig v Oakwood Hosp, 249 Mich. App. 534; 643 NW2d 580 (2002)*. Accordingly, neither the trial court, this Court nor the Supreme Court was required to determine whether *MRE 702* as amended applied retroactively or prospectively.

[*19] B

Plaintiffs argue that the rigid formula for admitting expert testimony under the *Davis-Frye* standard was abandoned in favor of the more flexible standard enunciated in *Daubert v Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 (1993)*, when the Supreme Court amended *MRE 702*. Plaintiffs contend that scientific unanimity is not required, thus an expert is not required to submit the actual medical articles for a court to review in deciding a motion for summary disposition. Instead, plaintiffs contend the trial court, taking into consideration the proposed expert's experience and citation to relevant medical articles, is obligated to conduct its own inquiry to determine that the principles and methodology employed by an expert in arriving at his theories were inadequate or unreliable. Given our conclusion, *supra*, that the predecessor version of *MRE 702* applies, we disagree.

In malpractice actions, each party is obligated to provide an expert witness to articulate the applicable standard of care involved. *MCL 600.2912d(1)*. Expert testimony is generally required to establish [*20] a prima facie case of medical malpractice, including causation. *Locke v Pachtman, 446 Mich. 216, 230; 521 NW2d 786 (1994)*.

The *Davis-Frye* rule, adopted from *People v Davis, 343 Mich. 348; 72 NW2d 269 (1955)*, and *Frye v United States, 54 App. D.C. 46; 293 F 1013 (1923)*, provides that novel scientific evidence is admissible only if the proponent of that evidence demonstrates, through disinterested and impartial experts, that it has gained general acceptance in the scientific community. *Stitt v Holland Abundant Life Fellowship (On Remand), 243 Mich. App. 461, 468; 624 NW2d 427 (2000)*; *Anton, supra at 678-679*. In conducting a *Davis-Frye* inquiry, a trial court is not concerned with the ultimate conclusion of an expert, but rather with the method, process, or basis for the expert's conclusion and whether it is generally accepted or recognized. *Anton, supra* at 78-679.

Before *MRE 702* was amended, the rule provided:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier [*21] 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.

Accordingly, under the predecessor version of *MRE 702*, the proponent of expert testimony was required to establish (1) that the expert witness was qualified, [10] (2) that the proposed testimony would assist the trier of fact to either understand the evidence or determine a fact in issue, i.e. relevant, and (3) that the proposed testimony was based on a recognized form of "scientific, technical or other specialized knowledge." [11] *Craig, supra at 79*.

10 To determine the qualifications of an expert witness in a medical malpractice case, *MCL 600.2169(2)* requires the court to evaluate (a) the witness' educational and professional training, (b) the witness' area of specialization, (c) the length of time the witness has been engaged in the active clinical practice or instruction of the specialty, and (d) the relevancy of the witness' testimony. *MCL 600.2169*; *Tate, supra at 217*.

[*22]

11 *MRE 702* now 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.

The admissibility of scientific expert testimony is also governed by *MCL 600.2955(1)*, which provides:

> (1) . . . In making that determination [that the opinion is reliable and relevant], 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 [*23] 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.

In this case, plaintiffs failed to satisfy either *MRE 702* or *MCL 600.2955(1)*. Dr. Gabriel acknowledged that the minor-plaintiff did not exhibit any signs of motor problems or cerebral palsy, conditions historically [*24] associated with prenatal hypoxia. More importantly, Dr. Gabriel was unable to cite to any studies to support his theory, other than to state that it had been "discussed in the literature."

Further, although plaintiff cited to *Michigan Lawyer's Weekly* and other "synopses" of studies as supporting authority for Dr. Gabriel's testimony, the trial court properly rejected these, as plaintiff was unable to cite to or explain the methodology therein. In contrast, defendants provided two medical articles, which address and refute the specific mechanism underlying his theory. In addition, Dr. Gabriel's proposed testimony would not assist the trier of fact determine a fact in issue as his testimony was not in accord with the established facts. The ACOG Bulletin 163 outlined the four generally recognized factors necessary to establish a causal link between hypoxia and ischemia in utero and neurological deficit: (1) a p[H] of less than 7.00, (2) Apgar scores of

less than three for five minutes, (3) more post-birth, seizures, coma or hypotonia and (4) multi-organ system dysfunction. However, in this case, the medical record evidence shows that an umbilical cord pH of greater that 7.0 was [*25] present in this case--7.27. Yet, without any justification or supporting evidence, Dr. Gabriel theorized the pH score in this case was false. Mere skepticism or disparagement of medical findings is insufficient to support an expert opinion. *Badalamenti v Beaumont Hosp-Troy, 237 Mich. App. 278, 288-289; 602 NW2d 854 (1999)*. Moreover, while an expert witness need not rule out all alternative causes of the effect in question, he must have an evidentiary basis for his own conclusions that are based on assumptions that are in accord with the established facts. *Green v Jerome-Duncan Ford, Inc, 195 Mich. App. 493, 498-499; 491 NW2d 243 (1992)*.

Plaintiffs nonetheless argue that although defendants' literature established that the great majority of infants are not brain damaged where the fetal arterial cord pH was below 7.0, defendants' literature failed to eliminate (1) the potential harm to the "minority" or infants or (2) the possibility that a pH level in excess of 7.0 will not have a neurologic outcome. Plaintiffs misapprehend their burden to survive a motion for summary disposition.

To establish causation in a medical malpractice [*26] case, a plaintiff must present "substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Baldalamenti, supra at 285*. As noted in *Skinner v Square D Co, 445 Mich. 153, 164-165; 516 NW2d 475 (1994)*:

> [A] causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.

Accordingly, to establish the relevancy of Dr. Gabriel's testimony, plaintiff was required to present evidence of a neurological outcome in infants with umbilical cords with pH levels in excess of 7.0 to establish causation based on "generally accepted [views] within the relevant expert community," or demonstrate that his novel theory "has achieved general scientific acceptance among impartial [*27] and disinterested experts in the field." Failing to do either, the trial court did not abuse its discretion when it determined that Dr. Gabriel's testimony was irrelevant. *Green, supra*. The trial court properly performed its role as gate keeper under *MRE 702* and *MCL 600.2955*. [12] Having failed to create a material dispute of fact regarding causation, the trial court properly granted summary disposition to defendants. *Nelson, supra* at 498-499.

12 Because *MRE 702* as amended incorporates the *Daubert* test into the *MRE 702*, we note that although the trial court decided defendants' motion under the predecessor version of *MRE 702*, it is unlikely that Dr. Gabriel's testimony would be admissible under *MRE 702* as amended. As recognized by the Supreme Court, the trial court's gatekeeper role is the same under *Davis-Frye* and *Daubert*. *Gilbert v Daimler Chrysler Corp, 470 Mich. 749, 782; 685 NW2d 391 (2004)*. "Regardless of which test the court applies, the court may admit evidence only once it ensures, pursuant to *MRE 702*, that expert testimony meets that rule's standard of reliability." *Id.*

> *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. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. *Id.*

In this case, given Gabriel's repeated inability to cite to or explain the methodology within his

supporting documents as well the erroneous factual basis supporting his theory, the trial court could reasonably conclude that plaintiffs have not established that Gabriel's theory was based on reliable principles and methodology. *MRE 702*.

[*28] C

We decline to address plaintiffs' next argument that the trial court erred when it refused to enter either a default judgment against defendant Harper or an order of summary disposition in favor of plaintiffs under the theory that defendants should be held to the same standards as that of malpractice plaintiffs who have their complaints dismissed for failing to comply with *MCL 600.2912*. [13] Plaintiffs affirmatively abandoned this argument at the September 5, 2002, hearing by stating "*I don't want to see their pleadings struck because I think* [*MCL 600.2912*] *is ridiculous*." By renouncing the form of relief requested in their motion, plaintiffs contributed to the trial court's decision to not grant the motion, which precludes an argument on appeal that the trial court erred in failing to enter an order of default or grant plaintiffs' motion for summary disposition. *Munson Med Center, supra at 388*.

13 *MCL 600.2912e*, reads in relevant part:

(1) In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with section 2912d, the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defendants attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendants attorney reasonably believes meets the requirements for an expert witness under section 2169 . . . .

[*29] Even if we were to review the issue, we would nonetheless conclude plaintiff has not established reversible error. This Court has previously rejected similar claims by plaintiffs that a defendant's failure to file an affidavit of meritorious defense pursuant to *MCL 600.2912e* in a medical malpractice action requires a default or sanction precluding the defendant from presenting a defense. See *Costa, supra at 580-581* (a default judgment is not mandatory under *MCL 600.2912e*); *Kowalski v Fiutowski, 247 Mich. App. 156, 165-166*; *635 NW2d 502 (2001)* (although a default is a permissible remedy, a trial court errs by believing it lacks discretion to fashion any other appropriate sanction and further declining to equate a defendant's failure to file an affidavit of meritorious defense to a plaintiff's failure to file an affidavit of merit, determining that the circumstances and goals of the parties are distinct); *Wilhelm v Mustafa, 243 Mich. App. 478, 483-486*; *624 NW2d 435 (2000)* (the trial court was not compelled by statute to enter a default against defendant [*30] for his failure to timely file an affidavit of meritorious defense).

In this case, because the trial court's stated reasons in fashioning a remedy are supported by the record, we find no abuse of discretion. Having determined that summary disposition was properly granted, we need not address the merits of defendants' issues raised on cross-appeal.

Affirmed.

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder

CONCUR BY: Helene N. White (In Part)

DISSENT BY: Helene N. White (In Part)

DISSENT

WHITE, P.J. (*concurring in part and dissenting in part*).

I concur in section III C of the majority opinion. I dissent from the disposition of the primary issue on appeal. I would remand for a *Daubert* [1] hearing regarding the reliability of Dr. Gabriel's testimony.

1 *Daubert v Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579*; *113 S. Ct. 2786*; *125 L. Ed. 2d 469 (1993)*; *MRE 702*.

/s/ Helene N. White