COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2178 **Cir. Ct. No. 2015CV2459**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

FABIOLA COLIN MIRANDA AND JESUS PEREZ,

PLAINTIFFS-APPELLANTS,

V.

LUTHER GASTON, M.D.,

DEFENDANT-RESPONDENT,

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: REBECCA F. DALLET, Judge. *Affirmed*.

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 BRENNAN, P.J. Plaintiffs ask this court to reverse a judgment dismissing medical negligence claims based on an unsuccessful sterilization procedure and a subsequent pregnancy and birth. Plaintiffs argue that the trial

court erred when it held that their expert witness did not satisfy the ***Daubert***[1] reliability standard codified in WIS. STAT. § 907.02(1) (2015-16)[2] and excluded his testimony. That ruling deprived them of a necessary element of their *prima facie* case and was thus fatal to their claim. The trial court based its ruling on the expert's failure, in deposition testimony, to identify a basis other than "life experience" for his opinion that the failure of the sterilization procedure was caused by negligence—specifically, by the "improper application" of a sterilization device known as a Filshie clip. We conclude that the trial court did not erroneously exercise its discretion when it excluded the plaintiffs' expert, and we affirm.

BACKGROUND

¶2 Plaintiffs are Fabiola Colin Miranda and her husband Jesus Perez. Colin Miranda underwent a permanent sterilization procedure in September 2012, performed by Dr. Luther Gaston. The procedure involved placing devices known as Filshie clips on each fallopian tube. Colin Miranda became pregnant and delivered a child in November 2013. Following this delivery, she again underwent a sterilization surgery performed by a different doctor. The doctor who performed this procedure observed during the surgery that the Filshie clip on the right fallopian tube was not blocking the tube entirely. Colin Miranda and Perez brought this action for medical negligence, alleging that Gaston had "fail[ed] to

[1] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

properly position the Filshie clip so that it would traverse the right fallopian tube[.]"

¶3 Plaintiffs disclosed Dr. Julian Busby as an expert witness. Busby's report included his opinion about causation, which was based on information from a November 2013 pathology report prepared in connection with Colin Miranda's second sterilization procedure:

> The … pathology report … reads[,] "At the proximal end of each [fallopian] tube there is an attached metallic clip; however, one is only attached to the soft tissue and does not clamp the tube."
>
> It is my opinion that this malpositioned clip is the most probable cause of the patient's unintended pregnancy and it is also my opinion that the most common reason for this malpositioning is improper application of the clip.

¶4 In a deposition in which defense counsel pressed Busby for the basis of his opinion, Busby gave the following answers:

> Q: [A]re you aware of any studies that suggest that the clip can migrate such that it would be on just soft tissue instead of the tube, many months later?
>
> A: We see these clips that are in atopic locations. But I don't know how it got there, other than to say that, usually in situations like that, when things are in the wrong location, more than likely they haven't been applied properly.
>
> Q: And when you say that, are you basing that opinion on any medical literature?
>
> A: It's just a life lesson learned.
>
> Q: And if you don't know how these clips migrate but you know they can be found anywhere in the abdomen many months later, how do you know it was by misapplication as opposed to something else if you don't really know what caused the migration?

> A: Well, I'm not saying that the migration was caused by misapplication. I'm just saying that when something doesn't work like it's supposed to, the most common reason is that it wasn't applied correctly. It's just a life lesson learned.

¶5 Gaston moved *in limine* to exclude Busby's testimony on the grounds that it did not satisfy the requirements of WIS. STAT. § 907.02 because he was not qualified (noting that Busby said he had no experience with Filshie clips since the mid-1990's) to opine on the relevant standard of care and because his opinion that negligence caused the sterilization failure was not based on scientifically reliable data (in light of the fact that there is a known failure rate for all sterilization procedures).

¶6 The parties argued the motion at the final pretrial hearing. The trial court zeroed in on the basis for Busby's opinion, asking counsel:

> [W]hat is he relying on to say that it wasn't placed correctly? Obviously it didn't work. We know that because there's a baby, but sometimes it doesn't work.… [T]his case is medical malpractice, so it's not just [']this … doesn't work,['] because sometimes things don't work. It's that it was negligence. How do we get there?

The trial court referred to the portion of Busby's deposition testimony quoted above in which Busby stated that a "life lesson learned" taught him that if something didn't work it was most likely because something was done wrong in the first place. The trial court then explained its reasoning for excluding the testimony:

> [T]here has to be expert testimony that the defendant's alleged negligent conduct was a cause of this failed sterilization….
>
> Here, because of this deposition and the lack of expertise, the lack of experience, the way in which the opinion was formed, it's absolutely speculative in terms of why she got pregnant. The speculation that's being …

> proposed by Dr. Busby is that the doctor misapplied the clip. But without any kind of basis for that opinion, the jury is speculating on whether that's the reason or just a failure rate that's part of the known failure rate of using these clips, or some other type of migration of the clip for some other reason. And without any kind of connection to cause, this opinion doesn't supply it to the level that's necessary.
>
> …[T]he mere fact [of] pregnancy itself doesn't link this to medical malpractice or negligence on the part of the doctor. There has to be this link, and this doctor, Dr. Busby is not supplying … that link.

¶7 The trial court granted the defense motion to exclude Busby's testimony and then, because the plaintiffs lacked the requisite expert testimony to proceed, granted the defense motion to dismiss the case. A judgment of dismissal was entered September 20, 2016, and this appeal follows.

DISCUSSION

I. Relevant law and standard of review.

Necessity of expert testimony in a medical negligence action.

¶8 Expert testimony is required to define the standard of care in a medical malpractice case. ***Christianson v. Downs***, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979). "The reason for this is because the degree of care, skill, and judgment which a reasonable [medical professional] would exercise is not a matter within the common knowledge of laypersons." WI JI-CIVIL 1023. *See also* ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 667, 505 N.W.2d 399 (Ct. App. 1993). Summary judgment is appropriate if the plaintiff is unable to produce medical expert testimony that can establish a causal connection between the alleged negligence and the plaintiff's injury. ***Estate of Hegarty ex rel. Hegarty v. Beauchaine***, 2006 WI App 248, ¶154, 297 Wis. 2d 70, 159-60, 727

N.W.2d 857 ("To establish causation in a medical malpractice case … testimony from medical experts is essential. '[T]he lack of expert testimony on the question of causation results in an insufficiency of proof[.]'") (citation omitted).

Requirements for expert testimony.

¶9 The admissibility of expert testimony in Wisconsin is governed by WIS. STAT. § 907.02. Consistent with ***Daubert*** and Federal Rule of Evidence 702, § 907.02(1) provides:

> If 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* the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

(Emphasis added.) To determine whether expert testimony is admissible under this standard, a court must engage in a three-step analysis, considering whether: (1) the witness is qualified; (2) the witness's methodology is scientifically reliable; and (3) the testimony will assist the trier of fact to determine a fact in issue. ***Myers v. Illinois Cent. R.R. Co.***, 629 F.3d 639, 644 (7th Cir. 2010) (discussing the standard set forth in ***Daubert*** and Federal Rule of Evidence 702).

¶10 Under the ***Daubert*** standard, the trial court serves as a "gate-keeper" to "ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***State v. Giese***, 2014 WI App 92, ¶18, 356 Wis. 2d 796, 854 N.W.2d 687. When assessing reliability, "[t]he court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated." ***Id.*** The goal of the ***Daubert*** standard is "to prevent the jury from

hearing conjecture dressed up in the guise of expert opinion." ***Giese***, 356 Wis. 2d 796, ¶19.

Standard of review for trial court's determinations.

¶11 "We review a circuit court's decision to admit or exclude expert testimony under the erroneous exercise of discretion standard." ***Petrucelli v. Dobbins***, 2016 WI App 65, ¶19, 371 Wis. 2d 428, 885 N.W.2d 173. "A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." ***Id.***

II. The trial court's decision to exclude Busby's testimony was not an erroneous exercise of discretion because it had a rational basis and was made in accordance with accepted legal standards based on the facts.

A. The trial court considered the relevant facts.

¶12 The record reflects that the trial court reviewed Busby's experience, including his credentials, his experience with other types of sterilization procedures, and his statement that the last time he had performed a sterilization with the Filshie clips was in the mid-1990s. The trial court cited the pages from Busby's deposition transcript where relevant statements were made. The trial court noted that in the deposition, Busby stated that he did not remember his training on the use of the clips.

B. The trial court applied the correct legal standard to the proffered testimony.

¶13 The applicable legal standard is the standard for experience-based expert opinion. Our supreme court recently interpreted WIS. STAT. § 907.02(1) in

a case where defendants argued that an expert's testimony had been improperly admitted because it was experience-based, and therefore, the expert's "method was unreliable and inadmissible under WIS. STAT. § 907.02(1)." ***Seifert v. Balink***, 2017 WI 2, ¶13, 372 Wis. 2d 525, 888 N.W.2d 816.[3] As the Wisconsin Supreme Court stated there, experience-based testimony is not the sort of junk science the ***Daubert*** rule is designed to prevent, and for that reason, exclusion is generally not the correct remedy when an opposing party wants to attack experience-based testimony: "The case law teaches that ***Daubert***'s role of ensuring that the courtroom door remains closed to junk science is not served by excluding medical expert testimony that is supported by extensive relevant medical experience. Such exclusion is rarely justified in cases involving medical experts." ***Siefert***, 372 Wis. 2d 525, ¶85 (footnote omitted). When experience-based evidence satisfies the standard, an opponent is left with the usual tools of the adversary system: "Instead of exclusion, the appropriate means of attacking 'shaky but admissible' experience-based medical expert testimony is by '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof[.]'" ***Id.***, ¶86 (citing ***Daubert***, 509 U.S. at 597).

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[3] ***Seifert v. Balink***, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816, consisted of a lead opinion, two concurrences that joined in the judgment, and a dissent. All writings, including the dissent, agreed with the proposition that experience-based testimony can satisfy WIS. STAT. § 907.02(1) for the purpose of testifying about a standard of medical care. *See* ***id.***, ¶294 (Kelly, J., dissenting, joined by R.G. Bradley, J.) ("To the extent the lead opinion concludes that a person's personal experience can qualify him as an expert witness for the purpose of testifying about a standard of medical care, I have no dispute.").

Writings authored or joined by five of the justices expressly emphasized the significance of the exercise-of-discretion standard of appellate review. *See* ***id.***, ¶¶94-100; ¶187 (Ziegler, J., concurring); ¶¶236-37 (Gableman, J., concurring, joined by Roggensack, C.J.). The dissent implicitly agreed; it made no mention of the standard of review. *See* ***id.***, ¶¶258-296 (Kelly, J., dissenting).

¶14 ***Seifert*** noted that federal precedent addressed questions about how to differentiate between admissible experience-based testimony and inadmissible experience-based testimony:

> In ***Kumho Tire***, the United States Supreme Court specifically addressed the application of the ***Daubert*** reliability analysis to experience-based, non-scientific expert testimony. The Court required *a witness relying on experience to offer some articulated rationale supporting his or her opinion*….
>
> ….
>
> The Federal Advisory Committee Note to the 2000 Amendment to Rule 702 also recognizes that *expert evidence based on personal experiences can meet the reliability test* and offers the following general guidance for evaluating experience-based testimony:
>
> > If the witness is relying solely or primarily on experience, *then the witness must explain how that experience leads to the conclusion reache*d, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.

Id., ¶¶70, 73 (footnotes omitted; emphasis added).

¶15 In order for experience-based expert opinion to survive WIS. STAT. § 907.02(1) scrutiny, it must be "connected to existing data," ***id.***, ¶75, by more than the witness's say-so.

> The trial court's gatekeeping function in regard to experience-based testimony, however, "requires more than simply 'taking the expert's word for it.'"
>
> An expert cannot establish that a fact is generally accepted merely by saying so. Trial courts *do not have "to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."* Such an application is unreliable because "there is simply too great an analytical gap between the data and the opinion offered." ***Gen. Elec. Co. v. Joiner***, 522 U.S. 136, 146 (1997).

Id., ¶¶74-75 (footnotes omitted) (emphasis added).

¶16 The trial court here started by stating the three parts of the determination made by the gatekeeper under the reliability test: whether the witness is qualified; whether the witness's methodology is scientifically reliable; and whether the testimony will assist the trier of fact to determine a fact in issue.

¶17 The trial court focused on the first two, acknowledging that "of course it would be relevant to have an opinion on whether these clips were negligently placed[.]" It concluded that Busby's testimony did not satisfy either of the two requirements.

¶18 As to his qualification as a witness, the trial court concluded that he did not have superior knowledge in the area in which the precise question lies—in this case, the precise question being "not general sterilization methods" but "a very specific issue" concerning placing of Filshie clips. It said that he had no recent experience with placement of the clips, that in recent years he had performed only other types of procedures, that he did not remember anything about his training with Filshie clips, and that he did not know how the clips migrate after placement. The trial court summed up the deficiencies as follows:

> He doesn't have the knowledge, he doesn't have the skill developed, he doesn't have the training, he [doesn't] have the education, he's asked if [he] keeps up on the literature; he doesn't. So we've got someone who doesn't use this procedure who wants to give an opinion on this procedure and whether this doctor did it incorrectly because that is the crux of the issue.

¶19 The trial court then turned to the question of the reliability of the testimony. After reviewing case law discussing the ways testimony can be shown to be reliable, the trial court concluded, "So in looking at these opinions that Dr. Busby is reaching, they're really not based on anything other than this life lesson idea." The trial court quoted from Busby's deposition to illustrate:

> And then he's asked, "And in this case, what are you basing your opinion on? What are you basing your opinion [on] that the clips were misapplied?" And his answer: "The fact that it wasn't on the tube at the time of surgery. It was just kind of dangling there from the report that the pathologist gave."

¶20 Colin Miranda argues that Busby's testimony "met the standard" and that in rejecting Busby's testimony on the grounds that it was not "the most appropriate," the trial court applied the wrong legal standard to the testimony. In support of this argument, Colin Miranda cites to ***Torres v. Mennonite General Hospital, Inc.***, a district court opinion applying the ***Daubert*** standard and denying a defense motion to exclude a doctor's testimony. ***Torres v. Mennonite Gen. Hosp., Inc.***, 988 F. Supp. 2d 180, 184 (D. P.R. 2013). In that case, the federal district court denied a defense motion to exclude an expert on the grounds that he lacked training and experience to treat the specific medical diagnosis of the patient in the case, that he lacked experience at the relevant type of medical facility, and that the proffered witness had allegedly not had to stand in the shoes of a clinical cardiologist for at least 24 years. ***Id.*** at 183. The district court focused on the question of whether the witness would "assist the trier better to understand a fact in issue." ***Id.*** at 182. Citing "the broad discretionary powers awarded to the trial courts in qualification of experts," it deemed the doctor qualified as an expert and admitted his expert opinion. ***Id.*** at 183-84.

¶21 ***Torres*** is not binding on this court, and even as persuasive authority, it has little value given the fact-intensive nature of a trial court's analysis of a ***Daubert*** question. *See* ***Kumho Tire Co., Ltd. v. Carmichael***, 526 U.S. 137, 138 (1999) ("the gatekeeping inquiry must be tied to the particular facts" of the case). ***Torres*** does emphasize the "wide discretion" granted to trial courts making this determination, discretion that is deferentially reviewed once the case reaches the

appellate level. The ***Torres*** trial court's order thus does not compel the conclusion that the trial court in this case erroneously exercised its discretion.

¶22 In contrast, our supreme court's decision in ***Seifert*** compels the conclusion that the trial court in this case applied the proper legal standard for two reasons. First, in ***Seifert***, the court set forth the standard for evaluating experience-based expert testimony and made clear that there will be the rare case when it does not satisfy the ***Daubert*** standard. While clearly upholding the admissibility of experience-based expert testimony generally, ***Seifert*** states that in performing its WIS. STAT. § 907.02(1) gatekeeping function, the trial court faced with experience-based testimony "requires more than simply 'taking the expert's word for it.'" ***Seifert***, 372 Wis. 2d. 525, ¶74. And it cited case law for the proposition that trial courts do not have "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." ***Id.***, ¶75.

¶23 This is precisely the analysis that the trial court in this instance applied. The trial court focused on Busby's answer when he was asked why he had concluded that the out-of-position clip had been negligently misapplied during the initial procedure in 2012. His answer was, "The fact that it wasn't on the tube at the time of [2013] surgery." When pressed on how he knew the clip had been misapplied, as opposed to migrating to a different position, Busby attributed it to a "common reason," a "life lesson learned," without giving any other basis. He even back-tracked on his causation opinion, saying, "I'm not saying that the migration was caused by misapplication. I'm just saying that when something doesn't work like it's supposed to, the most common reason is that it wasn't applied correctly. It's just a life lesson learned."

¶24 The applicable legal standard precludes an expert's opinion that negligence occurred when it is based on nothing more than the fact that something went wrong. In this case, it was acknowledged by all parties that Filshie clips do not have a one hundred percent success rate; the question was whether the expert's opinion could help answer the question of whether the failure *in this particular case* was part of the known failure rate or was caused by Gaston's negligence. By requiring more than *ipse dixit* support for Busby's opinion, the trial court applied the correct legal standard for experience-based expert testimony.

C. The trial court's ruling had a rational basis.

¶25 The record reflects that the trial court identified the relevant facts and applied the correct legal standard. The analysis followed the rules from the relevant case law and WIS. STAT. § 907.02(1). The trial court referred to specific statements from the transcript and reached a rational result, holding Busby to the correct standard.

¶26 We therefore conclude that the trial court did not erroneously exercise its discretion in excluding Busby's expert testimony, and we affirm the judgment dismissing the plaintiffs' case with prejudice.

By the Court.—Judgment affirmed.

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