S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DONALD L. SCOTT,

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Intervening Plaintiff,

v

SECURA INSURANCE,

Defendant-Appellee.

UNPUBLISHED
July 20, 2006

No. 266944
Kent Circuit Court
LC No. 03-006112-NF

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order excluding plaintiff's expert testimony and granting defendant summary disposition pursuant to MCR 2.116(C)(10) in this automobile insurance liability case. The trial court determined that summary disposition was appropriate because plaintiff had not demonstrated a causal connection between his involvement in an automobile accident and the exacerbation of his preexisting condition. We reverse and remand.

Plaintiff first claims the trial court improperly excluded plaintiff's expert, Dr. Joseph Brown, from testifying about the element of causation. We agree.

A trial court's decision whether to exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). In the instant case, the trial court excluded Dr. Brown's testimony pursuant to MRE 702 on the ground that there was no reliable foundation for his opinion but only temporal association and logical fallacy. The interpretation of a rule of evidence is a question of law that is reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Under the Michigan no-fault act, an insurer must pay benefits for bodily injury "arising out of the ownership, operation, maintenance or use of a motor vehicle." MCL 500.3105(1). Not all injuries trigger an insurer's liability; rather, only injuries stemming from the automobile accident are compensable. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 531; 697 NW2d 895 (2005).

It is undisputed in this case that plaintiff suffered from a preexisting medically identifiable condition to his back before his involvement in the accident. While it is understood that a plaintiff is not precluded under MCL 500.3135 from bringing a claim based on aggravation of a preexisting injury, a plaintiff must bear the burden of establishing a causal link between the accident and the aggravation of the preexisting condition. *Wilkinson v Lee*, 463 Mich 388, 391, 395; 617 NW2d 305 (2000). Plaintiff intended to prove causation by calling Dr. Brown to testify that the February 6, 2003 accident exacerbated plaintiff's dormant preexisting condition by causing a shift within his spine, and this in turn aggravated his pre-existing spondylolisthesis. He argued that Dr. Brown's testimony was not merely based on a temporal association, but was predicated on his medical diagnosis of plaintiff, his examination of objective medical tests, and his expertise in the area of spondylolisthesis, all of which have been deemed acceptable by the federal judiciary as reliable under FRE 702. Accordingly, plaintiff asserts that because MRE 702 is founded upon FRE 702, this Court should adopt the rulings of the federal courts and find Dr. Brown's methods reliable.

MRE 702 controls the admissibility of expert testimony. *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 602; 705 NW2d 703 (2005). MRE 702 as amended, effective January 1, 2004, would apply if this case proceeded to trial. See *People v Stanaway*, 446 Mich 643, 692-693 n 51; 521 NW2d 557 (1994). Accordingly, 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 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.

This language incorporates and reflects the changes in the federal evidentiary standard of admissibility for expert scientific testimony at trial pursuant to the United States Supreme Court's decision in *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781; 685 NW2d 391 (2004). In discussing how MRE 702 was amended to conform the Michigan rule to FRE 702 and *Daubert*, our Supreme Court stated that MRE 702 requires that trial courts "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." *Gilbert, supra* at 779. This gatekeeping role applies to every stage of expert analysis. *Id.* at 782.

When expert testimony is based only on speculation, the trial court should exclude the testimony. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). However, if the basic methodology and principles employed to reach a conclusion create a sound foundation for the conclusion reached, the expert testimony is admissible. *Nelson v American Sterilizer Co (On*

Remand), 223 Mich App 485, 492; 566 NW2d 671 (1997). Several federal courts have determined that opinions predicated on the expert's treatment of a patient, review of a patient's medical history, training, and experience with a specific medical condition were sufficient to meet the requirements of FRE 702.[1] While we are not bound by the authority provided by plaintiff, we find it highly persuasive given our Supreme Court's recognition of the applicability of *Daubert.*

Moreover, this process was acknowledged by Dr. Herkner, plaintiff's other expert witness in his deposition testimony as the accepted method associated with diagnosis and treatment of spondylolisthesis. As noted by the Court in *Gen Electric Co v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997), "conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data." "The underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular … syndrome develops and knows what factors cause the process to occur." *Black v Food Lion, Inc*, 171 F3d 308, 314 (CA 5, 1999).

Without dispute, plaintiff suffered from a preexisting medical condition. However, the presented evidence indicated plaintiff had been asymptomatic since 1993. Dr. Brown testified that plaintiff's specific preexisting condition could cause him to experience severe collateral effects from a minor shift in his spine, and events causing asymptomatic spondylolisthesis to become symptomatic typically involved hyperextension, heavy lifting, or an acute trauma. By all accounts, the runaway van caved in the gas station door three or four feet, which struck plaintiff – who was standing just inside the door – in the legs and buttocks and caused him to stumble and fall. Immediately after the incident, plaintiff complained of pain in his back and left leg. Moreover, there was no evidence of any other physically traumatic event within this time frame. Dr. Brown's opinion that the accident aggravated plaintiff's preexisting condition was not the type of *post hoc ergo propter hoc* "scientific" analysis of which courts must be wary. See *Nelson v American Home Products Corp*, 92 F Supp 2d 954, 971 (WD Mo, 2000). Instead, the proffered testimony would have established a logical sequence of cause and effect between the accident and the aggravation of plaintiff's spondylolisthesis. The trial court erred in not allowing Dr. Brown to provide his expert opinion on the issue of causation. See *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956).

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[1] *Westberry v Gislaved Gummi AB*, 178 F3d 257, 263-266 (CA 4, 1999) (physician's testimony on cause of plaintiff's sinus problem, which was based on differential diagnosis and temporal relationship between events, was admissible under *Daubert*); *McCullock v HB Fuller Co*, 61 F3d 1038, 1043 (CA 2, 1995) (doctor was qualified under *Daubert* to give expert opinion on cause of throat ailment based on experience as medical doctor and certification in field of otolaryngology); *Hopkins v Dow Corning Corp*, 33 F3d 1116, 1125 (CA 9, 1994) (district court properly admitted expert testimony under *Daubert* that was based on, among other things, the doctor's clinical experience and review of the medical records); *Carroll v Morgan*, 17 F3d 787, 790 (CA 5, 1994) (doctor was qualified under *Daubert* to give an expert opinion on standard of medical care based on thirty years of experience as a practicing, board-certified cardiologist and his review of medical records).

Plaintiff next argues the court erred in granting defendant summary disposition. We agree, but not for the reasons stated in plaintiff's brief. This Court reviews de novo a trial court's decision to grant summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we review the submitted admissible evidence in a light most favorable to the nonmoving party. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). Summary disposition is appropriate when all evidence demonstrates no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id*. The trial court granted defendant summary disposition on the ground that plaintiff was unable to establish an issue of material fact with respect to causation without Dr. Brown's testimony. Because we find that Dr. Brown's testimony was not only admissible but also created an issue of material fact with respect to causation, we reverse the grant of summary disposition on this ground.

Reversed and remanded for further proceedings on plaintiff's complaint. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray