STATE OF MICHIGAN

COURT OF APPEALS

TIERRA HARRIS, Personal Representative of the ESTATE OF TERRY HARRIS,

Plaintiff-Appellee,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, also known as SMART,

Defendant-Appellant.

UNPUBLISHED
June 15, 2023

No. 360312
Wayne Circuit Court
LC No. 19-005614-NI

Before: SWARTZLE, P.J., and CAVANAGH and LETICA, JJ.

PER CURIAM.

In this interlocutory appeal involving a third-party claim of negligence, defendant appeals as of right the trial court's order denying its motion for summary disposition based on governmental immunity under MCR 2.116(C)(7), and allowing Dr. Fernando Diaz to testify regarding medical causation. On appeal, defendant contends that it should have been granted summary disposition based on governmental immunity because (1) plaintiff, as personal representative of the estate of Terry Harris ("Terry"),[1] cannot establish causation, and (2) Dr. Diaz's causation opinion was inadmissible[2] under MRE 702. We affirm.

[1] Terry filed his suit and participated as an individual plaintiff below, but he passed away before defendant moved for summary disposition. The trial court granted a motion to amend the case caption as provided herein to reflect Tierra Harris's authority as personal representative of Terry's estate. Therefore, we simply identify Terry by name in discussing his testimony and actions as plaintiff below, with all other references to "plaintiff" identifying Tierra Harris as personal representative for Terry's estate in this appeal.

[2] Although defendant seemingly claims that this expert was unqualified to testify, its argument actually relates to the admissibility of the expert's opinion.

I. BACKGROUND

This case arises from Terry's involvement in a motor-vehicle accident while riding as a passenger on one of defendant's buses. Based on video of the incident, the bus approached an intersection some distance behind two other cars in the right-turn-only lane and appeared to initially slow down, but then sped up and rear-ended the preceding vehicle before it could turn. The impact caused Terry to jolt forward slightly in his seat. Following the accident and later that same day, Terry went to the hospital complaining of back and knee pain. After seeing numerous doctors and related specialists over a period of months, Terry was diagnosed with various spinal injuries; he ultimately underwent spinal surgery with Dr. Diaz after rehabilitation and other treatments were unsuccessful.

According to Terry, his spinal injuries, along with a sprained right knee, occurred as a result of the bus accident. Terry specifically said the accident caused him to jolt forward and back in his seat, though without slipping out, and hit his right knee on the seat ahead of him. However, various medical records provided by defendant show that Terry was previously treated for back pain, in part due to a 2008 work injury, and relatedly prescribed narcotics before the accident here. And Terry initially testified to falling off a ladder sometime in 2007, seeking treatment for subsequent back pain in 2013 or 2014, and being prescribed and taking narcotics for the pain.

Terry filed a complaint against defendant, alleging that the involved bus driver (not named as a party to the suit) was negligent and/or grossly negligent in causing the accident at issue, and that defendant was vicariously liable for the driver's conduct. Terry alleged that he suffered numerous physical injuries (or otherwise exacerbated preexisting injuries) as a result of the bus accident. After Terry's death, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), seeking dismissal on grounds of governmental immunity. While acknowledging the motor-vehicle exception to governmental immunity under MCL 691.1405 and even assuming arguendo that the bus driver acted negligently, defendant argued that (1) Terry was not injured in the "minor" bus accident—as supported by the videos and various experts' analyses of the incident—and (2) plaintiff thus could not establish the necessary causation that Terry's alleged injuries "result[ed] from," see MCL 691.1405, the accident such as to defeat governmental immunity here. Defendant provided affidavits of two expert witnesses, accident reconstructionist William Newberry and orthopedic surgeon Dr. Paul Drouillard, opining that the bus accident could not have caused Terry's alleged injuries. Alternatively, defendant requested a *Daubert*[3] hearing to evaluate the admissibility of plaintiff's potential expert testimony regarding causation, arguing that plaintiff could not demonstrate that the opinions of Terry's medical providers were reliably based on sufficient facts or data under MRE 702.

At a hearing on defendant's motion, the trial court stated that governmental immunity was inapplicable and summary disposition unwarranted because, as relevant here, Dr. Diaz opined (in Terry's postaccident medical records) that Terry's injuries were related to the bus accident. However, because Dr. Diaz had never given his opinion or been questioned thereon under oath, the court determined that a *Daubert* hearing was warranted to evaluate the basis for his opinion.

[3] See *Daubert v Merrell Dow Pharms, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

The trial court, therefore, denied defendant's motion for summary disposition without prejudice and granted its request for a *Daubert* hearing.

At the *Daubert* hearing, Dr. Diaz testified that he treated Terry in 2016 and, based on his review of Terry's MRIs and the medical history Terry provided, Terry's back injury was either caused by or significantly aggravated by the bus accident. Dr. Diaz explained that he could not be sure without knowing all Terry's prior history whether the accident directly caused or only significantly worsened Terry's condition, but Dr. Diaz confirmed that, in either case, the bus accident was "the precipitating event causing [Terry's] need for treatment . . . ." After watching the video showing the bus accident, Dr. Diaz maintained his causation opinion. Dr. Diaz ultimately testified that, within a reasonable degree of medical certainty and regardless of any preexisting conditions, Terry was injured from the bus accident.

On cross-examination, Dr. Diaz testified that he reviewed Terry's chart but had no independent recollection of him as a patient. Dr. Diaz said he never reviewed any of Terry's preaccident medical records during his treatment because Terry did not report any prior injuries or issues at the time. Dr. Diaz acknowledged also never reviewing Terry's emergency-room records from the date of the accident, or the reports and affidavits of defendant's experts. According to Dr. Diaz, Terry never told him of any prior back injuries and explicitly denied having preexisting back problems. Dr. Diaz also confirmed that Terry, when seeking treatment, reported that the bus was traveling 45 miles per hour during the collision. Dr. Diaz testified further that his knowledge, training, and experience, including extensive review of medical literature, provided him an understanding of the kinds of compressive load subjected to a person's spine from various activities. While either unable or unwilling to cite specific supporting medical literature, Dr. Diaz stated, based on standard practices in neurosurgery, literature he had reviewed (but that he did not identify), and his multiple interactions with other experts in the field, that an impact at speeds as low as 5 miles per hour would generate sufficient force to cause injuries like Terry's.

The trial court ultimately concluded that Dr. Diaz's causation opinion was based on sufficient facts or data for admission, and that the opinion made summary disposition unwarranted by creating a question of fact on causation. The court emphasized that Dr. Diaz's opinion was adequately based on the patient history Terry provided and medical literature within Dr. Diaz's area of expertise, and that he maintained his opinion after reviewing the accident video. The court stated that whether Dr. Diaz's opinion ultimately holds up given the competing opinions of defendant's experts was an issue of weight and credibility for a jury. Accordingly, the trial court denied defendant's motion for summary disposition with prejudice and ordered that Dr. Diaz could testify regarding medical causation. This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews a trial court's denial of summary disposition de novo to determine if the movant is entitled to judgment as a matter of law. *Bronner v Detroit*, 507 Mich 158, 165; 968 NW2d 310 (2021). Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by immunity granted by law. *Seldon v Suburban Mobility Auth for Regional Transp*, 297 Mich App 427, 432; 824 NW2d 318 (2012). When determining whether summary disposition is appropriate under MCR 2.116(C)(7), this Court "consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate

documents specifically contradict them." *Id.* "If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law." *Ray v Swager*, 321 Mich App 755, 761 n 1; 909 NW2d 917 (2017); see also *Xu v Gay*, 257 Mich App 263, 267; 668 NW2d 166 (2003) ("[A (C)(7)] motion should be granted only if no factual development could provide recovery.").

This Court reviews a trial court's decision to admit or exclude expert testimony for an abuse of discretion, *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010), while reviewing any preliminary legal questions regarding admissibility de novo, *People v Bass*, 317 Mich App 241, 255; 893 NW2d 140 (2016). A trial court's decision is not an abuse of discretion if it falls within the range of principled outcomes. *Edry*, 486 Mich at 639.

III. ANALYSIS

Defendant argues that it should have been granted summary disposition because plaintiff cannot establish causation necessary to defeat governmental immunity under the motor-vehicle exception, particularly because Dr. Diaz's causation opinion was inadmissible under MRE 702. We disagree.

As a general rule, a governmental agency is immune from tort liability when it is "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). There are, however, several narrowly drawn exceptions to such immunity, including the motor-vehicle exception. This exception provides that a governmental agency "shall be liable for bodily injury and property damage *resulting from* the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405 (emphasis added). Because exceptions to governmental immunity must be construed narrowly, causation under the statute must be direct as opposed to the lesser "but for" causation standard in other cases. See *Robinson v Detroit*, 462 Mich 439, 457 n 14; 613 NW2d 307 (2000). Here, neither party disputes that defendant is a governmental agency, that the bus driver was its employee, or that defendant owned the bus at issue. And whether the bus driver was negligent is not at issue in this appeal. Accordingly, the only issue is whether there was sufficient evidence to satisfy the "resulting from," i.e., causation, prong of MCL 691.1405.

Expert testimony is generally required to establish medical causation. *Elher v Misra*, 499 Mich 11, 21-22; 878 NW2d 790 (2016) (requiring expert testimony on negligence in a medical malpractice action unless the matter "is within the common knowledge and experience" of the average juror); see also *Howard v Feld*, 100 Mich App 271, 273; 298 NW2d 722 (1980)[4]

[4] Although this Court is not required to follow cases decided before November 1, 1990, see MCR 7.215(J)(1), a published case decided by this Court "has precedential effect under the rule of stare decisis," MCR 7.215(C)(2). See also *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018) (stating that although this Court is not "strictly required to follow uncontradicted opinions from this Court decided before November 1, 1990," those opinions are nonetheless "considered to be precedent and entitled to significantly greater deference than are unpublished cases.").

("Where . . . the contested issue involves medical questions beyond the scope of lay knowledge, such as the existence *vel non* of an injury, the scope of the injury or the causal link between an alleged accident and an injury, testimony by [a] lay witness may be improper."). MRE 702 governs the admissibility of expert testimony and 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.

Under MRE 702, the trial court is required to "ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable," thereby incorporating "the standards of reliability that the United States Supreme Court articulated in *Daubert* . . . ." *Elher*, 499 Mich at 22. Under the directive of *Daubert*, the trial court must ensure that all scientific testimony is both relevant and reliable. *Id*. at 22-23. Generally, it is not sufficient under MRE 702 to simply rely upon the expert's background and experience to establish the reliability, and therefore the admissibility, of the expert's opinion. *Id*. at 23.

> The proper role of the trial court is to filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation. [*People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008) (citation omitted).]

"Careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). "[I]t is within a trial court's discretion how to determine reliability." *Elher*, 499 Mich at 25.

In addition to considering MRE 702 in determining the reliability of an expert's testimony, the trial court must consider MCL 600.2955(1) (notably, defendant never made, and does not make on appeal, any argument concerning MCL 600.2955(1)). "MCL 600.2955(1) requires the court to determine whether the expert's opinion is reliable and will assist the trier of fact by examining the opinion and its basis, including the facts, technique, methodology, and reasoning relied on by the expert[.]" *Elher*, 499 Mich at 23. MCL 600.2955(1) sets forth the following factors to be considered in making this determination:

> (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. [MCL 600.2955(1)(a) through (g).]

However, not every factor identified in MCL 600.2955, nor every *Daubert* factor, is relevant to every case. *Elher*, 499 Mich at 24-25.

Defendant argues that Dr. Diaz's causation opinion was inadmissible and summary disposition warranted because Terry failed to inform Dr. Diaz of his earlier injuries and preexisting back issues, and he inaccurately described the bus's speed when seeking treatment; consequently, Dr. Diaz's opinion was speculative rather than based on sufficient and reliable facts or data. Defendant also emphasizes that Dr. Diaz failed to specify the medical literature purportedly supporting his opinion, and he admitted to: lacking expertise in biomechanical engineering or accident reconstruction; having no independent recollection of Terry; and not reviewing Terry's preaccident medical records or those from the date of the incident. Given these defects in Dr. Diaz's opinion, various inaccuracies and omissions in Terry's postaccident medical records from his other providers, the unbiased video showing only a minor collision, and the opinions of defendant's experts that this accident could not have caused Terry's injuries, defendant asserts that plaintiff cannot establish the essential element of causation to defeat its entitlement to governmental immunity. Therefore, according to defendant, the trial court erred in denying its motion for summary disposition.

As an initial matter we note that attempts to enlarge the record on appeal are generally prohibited; therefore, we do not consider plaintiff's medical literature cited (via links in her brief on appeal) for the first time on appeal that purportedly supports Dr. Diaz's opinions. See *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011) (declining to consider evidence not before the trial court when it decided the motion at issue).

Here, the trial court found Dr. Diaz's opinion sufficiently reliable after conducting the *Daubert* hearing. While Dr. Diaz admitted not having complete and detailed information regarding Terry's medical history—particularly his history of preexisting back issues—or the bus accident when Terry sought treatment, Dr. Diaz was made aware of Terry's history and watched the video of the accident before his opinion was admitted. Once fully informed of the circumstances, and

regardless of any of Terry's preexisting issues, Dr. Diaz maintained that the bus accident caused or significantly exacerbated his injuries here. Dr. Diaz specifically testified, based on generally accepted principles in his field and his experience with other experts and applicable medical literature, that Terry's injuries were consistent with even a low-speed collision. Although Dr. Diaz did not provide specific supporting medical literature, the trial court determined that it was unreasonable to make him specifically recall what studies he relied on when treating Terry six years earlier, and it was satisfied that his opinion had a sufficiently sound factual and scientific basis.

It bears repeating that it is within a trial court's discretion how to determine reliability. *Elher*, 499 Mich at 25; see also *id*. at 27 ("peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702"). Under these circumstances, the trial court did not abuse its discretion by admitting Dr. Diaz's causation opinion. Contra *Elher*, 499 Mich at 27 ("[T]he lack of supporting literature, *combined with the lack of any other form of support*, rendered [the expert]'s opinion unreliable and inadmissible under MRE 702.") (emphasis added); *Edry*, 486 Mich at 641 (same).

To survive summary disposition, plaintiff's "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, [] plaintiff must present substantial evidence from which a jury may conclude that more likely than not," the bus accident caused Terry's injuries. *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994). Given Dr. Diaz's causation opinion—notably following his review of the accident video at the *Daubert* hearing—in conjunction with Terry's medical records corroborating his injuries and postaccident treatment, we conclude that reasonable minds could differ on the issue of causation. While defendant submitted contrary causation opinions from its own experts, we agree with the trial court that the disputing opinions should be resolved by a jury at trial. Importantly, Dr. Diaz never conceded that Terry's injury could have resulted even if there had not been trauma. And Dr. Diaz did not otherwise indicate that some other causation theory was just as likely. Accordingly, the trial court did not err by denying defendant's motion for summary disposition.

Affirmed.

/s/ Brock A. Swartzle
/s/ Mark J. Cavanagh
/s/ Anica Letica