[Cite as *Theis v. Lane*, 2013-Ohio-729.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Robert Theis	Court of Appeals No. WD-12-047
Appellant	Trial Court No. 11 CV 789
v.	
Brian Lane, M.D., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: March 1, 2013

* * * * *

Charles H. Cooper, Jr., Rex H. Elliott and Karl C. Kerschner, for appellant.

Jeffrey W. Van Wagner and Jennifer R. Becker, for appellee Brian Lane, M.D.

Donald J. Moracz and Justin D. Harris, for appellees The Center for Weight Loss Surgery at Wood County Hospital, Wood County Hospital and Wood County Hospital Association.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Robert Theis, timely appeals the August 2, 2012 judgment of the Wood County Court of Common Pleas which granted summary

judgment in favor of defendants-appellees, Brian Lane, M.D., The Center for Weight Loss Surgery at Wood County Hospital, Wood County Hospital, and Wood County Hospital Association. The sole issue before the court is whether the testimony of Theis' expert in this medical malpractice action was sufficiently reliable under Evid.R. 702(C) to establish a prima facie case of medical negligence so as to defeat appellees' motions for summary judgment.

{¶ 2} As such, appellant assigns one error for our review:

> The trial court erred by granting summary judgment against Plaintiff.

For the reasons that follow, we find appellant's assignment of error well-taken and we reverse the trial court's decision.

I. Factual Background

{¶ 3} On June 18, 2007, appellant underwent a laparoscopic ventral hernia repair during which he alleges that appellee Lane perforated his bowel. Appellant claims that Dr. Lane then negligently failed to timely detect the perforation, resulting in widespread infection and significant harm. Appellant retained New York surgeon Howard Beaton, M.D., to provide opinions as to the applicable standard of care, breach of that standard of care, and proximate cause.

{¶ 4} Dr. Beaton is a board-certified general surgeon with extensive experience in hernia repair and laparoscopic surgery. He completed his surgical residency in 1981 at New York Hospital-Cornell Medical Center and maintains a private practice at New York

Downtown Hospital and Mount Sinai Medical Center where 85 percent of his surgeries are abdominal. He is also Associate Clinical Professor of Surgery at Mount Sinai Medical Center where he instructs medical students, medical residents, and surgical fellows. Dr. Beaton opined that based on his review of the medical records, and not based on any particular literature, Dr. Lane's care of Mr. Theis fell below the standard of care and proximately resulted in Mr. Theis' injury.[1]

{¶ 5} Dr. Lane and the hospital entities filed motions for summary judgment challenging the reliability of Dr. Beaton's testimony under Evid.R. 702(C) based on Dr. Beaton's acknowledgment that he did not review or rely on any medical literature in arriving at his opinions. The trial court agreed that Dr. Beaton's testimony was not sufficiently reliable under Evid.R. 702(C) and precluded Dr. Beaton from providing expert opinions. Because appellant was required to establish by expert testimony the applicable standard of care, that appellee breached the standard of care, and that breach of the standard of care proximately caused appellant's injuries, the exclusion of Dr. Beaton's testimony necessarily resulted in the dismissal of his claims. *See Roberts v. Ohio Permananente Med. Group, Inc.*, 76 Ohio St.3d 483, 485, 668 N.E.2d 480 (1996) (holding that a plaintiff in a medical malpractice case must present medical expert

[1] Appellant claims that Dr. Lane was employed by The Center for Weight Loss Surgery at Wood County Hospital, Wood County Hospital, and Wood County Hospital Association, and are liable under the doctrine of respondeat superior. Appellees dispute that Dr. Lane was employed by these entities. This issue, however, is not before the court.

testimony as to the applicable standard of care, the breach of that standard, and proximate cause).

{¶ 6} We must decide whether the trial court erred in granting summary judgment to appellees on this basis.

II. Standard of Review

{¶ 7} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 8} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293,

662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826, 675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

III. Analysis

{¶ 9} Evid.R. 702 provides that a witness may testify as an expert if all of the following apply:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports

the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶ 10} More succinctly stated, for expert testimony to be admissible, Evid.R. 702(A) requires that the subject of the testimony be beyond the knowledge possessed by lay persons, (B) requires that the witness be qualified because of experience, education, and training, and (C) requires that the witness's testimony be reliable. That expert testimony is required in this case and that Dr. Beaton is qualified by his experience, education, and training are not at issue in this appeal. The sole issue is whether Dr. Beaton's testimony is sufficiently reliable.

{¶ 11} "A trial court's role in determining whether an expert's testimony is admissible under Evid.R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 687 N.E.2d 735 (1998), paragraph one of the syllabus. "In

evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance." *Id.* at 611. "The focus is 'solely on principles and methodology, not on the conclusions that they generate.'" *Id.* at 612, citing *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 209 U.S. 579, 595, 113 S.Ct. 2786, 125 L.E.2d 469 (1993).

{¶ 12} Discretion in determining the admissibility of expert testimony generally lies with the trial court. *Valentine v. Conrad*, 110 Ohio St.3d 42, 43, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 9. Absent an abuse of discretion, the trial court's decision will be upheld. *Id.* "'Abuse of discretion' suggests unreasonableness, arbitrariness, or unconscionability. Without those elements, it is not the role of [the] court to substitute its judgment for that of the trial court." *Id.*

{¶ 13} At his deposition, Dr. Beaton testified that the standard of care required Dr. Lane to recognize that Mr. Theis' abdominal pain, tachycardia, and abnormal bowel sounds experienced in the days following his surgery were signs and symptoms of a bowel perforation. He was critical that Dr. Lane failed to order appropriate tests to determine whether, in fact, a bowel perforation was the cause of appellant's symptoms. He concluded that Dr. Lane failed to recognize and to perform tests to determine whether a bowel perforation was the cause of appellant's symptoms and that this failure delayed a

diagnosis and resulted in infection more severe than would have occurred if the bowel perforation had been discovered earlier.

{¶ 14} Appellees claim, and the trial court held, that Dr. Beaton, a board certified surgeon with more than 30 years of experience, including extensive experience with laparoscopic and abdominal surgeries, should be precluded from offering his opinions because they were not based on any particular medical literature. Notably, Evid.R. 702(C) contains no requirement that an expert rely on specific medical literature in establishing the reliability of his or her testimony.

{¶ 15} Citing *Valentine*, appellees insist that Dr. Beaton's failure to recite medical literature in support of his opinions renders his testimony unreliable. *Valentine* addressed the issue of whether exposure to toxic chemicals caused decedent's glioblastoma multiforme, a type of brain cancer. There was great debate over whether chemical toxins were capable of causing glioblastoma multiforme and the only proven cause was ionizing radiation—not at issue in that case. The court conducted a *Daubert* analysis. *Valentine* at ¶ 21. The experts' testimony attempting to make this causal connection was ultimately held to be unreliable based on the absence of studies establishing that chemical exposure caused brain cancer.

{¶ 16} *Valentine* is not applicable to the present case. The evidence and testimony presented here is that bowel perforation can occur during the procedure that Mr. Theis underwent. Dr. Beaton described that although this may occur, it is incumbent on the surgeon to recognize and treat the perforation in order to prevent further harm to the

patient. He testified that there are certain signs and symptoms that should lead a surgeon to suspect that a perforation has occurred and tests that should be performed to determine whether symptoms experienced by the patient, in fact, resulted from a perforation. This is not a novel scientific theory requiring a *Daubert* analysis.

{¶ 17} We agree with the First District Court of Appeals that despite Evid.R. 702(C)'s language, not all scientific or medical opinions require a *Daubert* analysis such as the one that the Ohio Supreme Court held was necessary in *Valentine. Goddard v. Children's Hosp. Med. Ctr.*, 1st Dist. No. C-95-0278, C-950295, 1996 WL 312474, *3 (June 12, 1996) ("*Daubert's* application to Evid.R. 702 appears to be limited to cases in which there are novel scientific theories.") And significantly, the Staff Note to the amendment to the evidence rules which added the reliability requirement of Evid.R. 702(C) indicates that "the amended rule does not attempt to define the standard of reliability but leaves that to further development through case law * * *." This suggests to this court that there is necessarily flexibility in making reliability determinations and that Evid.R. 702(C) is not as rigid as appellees argue.

{¶ 18} The Eleventh District considered a similar issue in *Chaffins v. Al-Madani,* 11th Dist. Nos. 2002-P-0037, 2003-P-0090, 2004-Ohio-6703. There, the appellant argued that the trial court erred in allowing the testimony of a pathologist who rendered opinions based on his review of medical records and pathology slides. Appellant argued that the pathologist's opinions were not sufficiently reliable. The court held that the physician's testimony—which was based on his observations, training, and experience as

a pathologist—demonstrated that reliable principles and methods were employed in arriving at his opinions. We agree with this reasoning.

{¶ 19} We also agree with appellant that the principles and methodology for identifying complications following laparoscopic abdominal surgery are not "junk science," just as the First and Second District Courts of Appeals determined that "orthopaedics is simply not the kind of 'junk science' or unproven theory that Evid.R. 702(C) was drafted to exclude." *Eve v. Johnson*, 1st Dist. No. C-970957, 1998 WL 754320, *3 (Oct. 30, 1998). *See also Hutchins v. Delco Chassis Sys., GMC*, 2nd Dist. No. 16659, 1998 WL 70511, *5 (Feb. 20, 1998) ("If Ohio courts considered the examination of a patient, review of his medical records, and the taking of his history to be an unreliable methodology, the bulk of all medical testimony would be inadmissible.") A review of medical records in a medical malpractice action, as was performed by Dr. Beaton, coupled with his vast experience, are appropriate principles and methodologies to be used by a physician expert in forming medical opinions. *See, e.g., Nieminen v. Leek*, 11th Dist. No. 2000-A0043, 2001 WL 1647112, *5 (Dec. 21, 2001).

{¶ 20} Even if Evid.R. 702(C) were to be as strictly construed as appellees contend it should be, the only questions appellees asked of Dr. Beaton at his deposition and the only deficiency that appellees point to is that he had not relied on any *literature* in forming his opinions. He was not questioned as to other principles and methodologies upon which he could establish the reliability of his proffered opinions. In any event, this court concludes that review of the medical records by a physician with experience,

education, and training pertinent to the subject on which the medical malpractice claim is premised renders his testimony reliable and admissible. Whether his testimony is credible or outweighs the testimony of appellees' experts is now a matter for the jury.

IV. Conclusion

{¶ 21} It was error for the trial court to conclude that appellant's expert's testimony lacked sufficient reliability. Summary judgment should not have been granted and the court, therefore, reverses the August 2, 2012 judgment of the Wood County Court of Common Pleas. The costs of this appeal are assessed to appellees pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.