



Issued by the Medical Liability Practice Group

August 10, 2005

Trial Court Must Conduct Searching Inquiry Before Determining Expert Testimony Is Unreliable

Estate of Saralyn Clerc, deceased, vs. Chippewa County War Memorial Hospital, et al.

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(No. 254940, rel'd. 08/04/05)

In this recent decision, the Michigan Court of Appeals held that a trial court must conduct a more searching inquiry under MRE 702 to determine if expert testimony is speculative and unreliable, thus inadmissible. Alternatively, if the trial court determines that the expert testimony concerns a novel scientific principle, it must also conduct an evidentiary hearing to provide an opportunity to establish the reliability of the expert testimony.

In July 1997, the plaintiff's decedent sought medical treatment for pneumonia-like symptoms, however, the radiologist that reviewed the decedent's chest x-rays found no abnormalities. In February 1998, the decedent was diagnosed with lung cancer and succumbed to the disease 11 months later. The plaintiff filed a medical malpractice wrongful death action against the radiologist and the affiliate hospital alleging that the negligent misreading of the x-rays delayed treatment that subsequently caused the decedent's death.

The defendants filed separate motions to strike the plaintiff's experts' testimony. The plaintiff's experts were certified medical oncologists who testified that the decedent's cancer was probably at Stage I or Stage II in July 1997. Additionally, one of the experts concluded with a reasonable degree of certainty that based on the weighted averages of survival rates for Stage I and Stage II lung cancer patients, the decedent, if properly diagnosed at the time of the 1997 x-ray, would have had a five-year survival rate of 60 percent. However, neither could state with a reasonable degree of certainty and probability what stage the cancer was in when the x-rays were taken. Their opinions were based upon "general experience" and not specific medical research.

Alternatively, the defendant hospital moved for the court to conduct a *Davis-Frye*¹ hearing and both defendants moved for summary disposition. Without conducting a *Davis-Frye* hearing, the trial court granted the defendants' motions for summary disposition, holding that the plaintiff's expert testimony was "speculation and conjecture" and therefore the plaintiff could not prove that the decedent would have had a greater than 50 percent chance of survival even if properly diagnosed in 1997.

The Michigan Court of Appeals reversed the trial court, holding that the trial court's inquiry into the expert testimony concerning "backwards cancer staging" was inadequate for the purposes of MRE 702 and *Beckley*². The appellate court reasoned that the plaintiff's experts' opinions may be deemed reliable "if the process of 'backwards cancer staging' and the bases for plaintiff's experts' opinions are generally accepted in the medical community as being reliable," but the appellate court was unable to make this determination based on the trial court record.

The court of appeals remanded the case back to the trial court and ordered it to determine if "backwards cancer staging" is a novel scientific principle, and if it is, to conduct a *Davis-Frye* evidentiary hearing. If the trial court determines that "backwards cancer staging" is not a novel scientific principle, then the trial court must conduct a more searching inquiry under MRE 702 to determine if the expert testimony satisfies the conditions for admissibility set forth in *Beckley*, by giving the plaintiff the opportunity to offer testimony from impartial experts that backwards cancer staging is accepted in the medical community.

For a complete copy of the Michigan Court of Appeals opinion on *Estate of Saralyn Clerc, deceased, vs. Chippewa County War Memorial Hospital, et al.*, [click here](#).

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¹ *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 US App DC 46; 296 F 1013 (1923). The *Davis-Frye* test allows the admission of expert testimony regarding scientific evidence only if the evidence has gained general acceptance among scientific experts in the field.

² *People v Beckley*, 434 Mich 691; 456 NW2nd 391 (1990). The Supreme Court in *Beckley* identified three conditions for the admissibility of expert testimony under MRE 702: (1) expert is qualified, (2) the testimony is relevant in that it assists the trier of fact to understand the evidence or determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge.