

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

CHERYL ELAINE PERRY,	:	APPEAL NO. C-0800960
	:	TRIAL NO. A-0602972
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
J. THEODORE BIGGS, M.D.,	:	
	:	
and	:	
	:	
BETHESDA NORTH HOSPITAL,	:	
	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Plaintiff-appellant Cheryl Perry appeals the trial court’s entry granting summary judgment in favor of the defendants-appellees, Bethesda North Hospital and J. Theodore Biggs, M.D., on her medical malpractice claim. Because the trial court properly excluded the testimony of Perry’s proffered expert witness on causation, we affirm.

In June 2003, Perry underwent laparoscopic surgery at Bethesda North Hospital to remove a mass on her lung. Following the procedure, an intravenous line was set to deliver 75 ml/hr of 5% dextrose in 0.5 normal saline (“the dextrose infusion”) through Perry’s arm while an epidural line was set to administer the

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

anesthetic Naropin at 4 ml/hr into Perry's upper back. But following Perry's complaints of pain and swelling during the infusions, Biggs discovered that the lines from the intravenous pump connected to Perry's right arm and from the epidural pump connected to her upper back had been switched. Thus, Perry may have been accidentally receiving approximately 75 ml/hr of dextrose, under pressure, into her epidural space for more than eight hours. As Perry's complaints of pain and stiffness in her upper back and neck grew steadily worse, her primary doctor referred her to a neurologist who diagnosed her with Myofascial Pain Syndrome ("MFPS") and then referred her to a pain-management specialist, Dr. Hal Blatman.

After being diagnosed with MFPS, Perry sued Biggs and the hospital. She identified Blatman as her causation expert. The trial court granted the defendants' motions in limine to exclude Blatman's testimony, but allowed Perry another chance to secure an expert and thus avoid summary judgment. Perry then offered the affidavit and deposition of neurologist Frances Dyro, M.D.

Dyro stated in her affidavit and deposition that "myofascial pain syndrome is usually associated with traumatic injury to sensory neurons." She then stated that Perry, as the result of the dextrose infusion, had suffered trauma to the sensory neurons in her upper back. Thus, Dyro opined that, based on a reasonable medical probability, Perry's MFPS had been directly and proximately caused by the accidental dextrose infusion. She developed her causation theory using differential diagnosis, whereby she "ruled out" other possible causes of Perry's MPFS and "ruled in" the trauma from the infusion as the cause of the MFPS. Dyro, in concluding that the dextrose infusion into Perry's upper back had caused the MFPS, gave considerable weight to the temporal association between Perry's treatment at the hospital and the onset of symptoms consistent with MFPS. Dryo rendered her

opinion after reviewing Blatman's affidavit and the deposition of the defendants' medical expert. She did not examine Perry herself or review any of Perry's medical records prior to her hospitalization for her lung biopsy.

Dyro admitted that in her practice she could not discover the cause of MFPS in five percent of her patients. She also testified that fibromyalgia and MFPS were two parts of the spectrum of the same condition.

Biggs and the hospital filed motions in limine to exclude Dyro's evidence and moved for summary judgment should the motions in limine be granted. Biggs and the hospital argued that Dyro's theory of causation was unreliable. Ultimately, the trial court excluded Dyro's testimony without explanation. Because Perry then did not have any expert evidence to support her theory that the dextrose infusion had proximately caused her MFPS, summary judgment was entered in favor of the defendants.

In her appeal, Perry brings forth a single assignment of error, contending that the trial court abused its discretion by excluding Dyro's testimony as to proximate cause and by entering summary judgment for the defendants.

This court reviews a grant of summary judgment *de novo*.<sup>2</sup> Summary judgment is appropriately granted when there exists no genuine issue of material fact, the movant is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to the nonmoving party.<sup>3</sup>

Here, summary judgment was appropriately entered for the defendants if the trial court properly excluded Dyro's affidavit and deposition testimony. The

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<sup>2</sup> *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241.

<sup>3</sup> *State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 1994-Ohio-130, 639 N.E.2d 241.

determination of the admissibility of expert testimony is within the discretion of the trial court. Such decisions will not be disturbed absent an abuse of that discretion.<sup>4</sup>

Under Evid.R. 702(C), an expert witness's testimony must be "based on reliable, scientific, technical or other specialized information." In determining whether the opinion of an expert is reliable, a trial court "examines whether the expert's conclusion is based on scientifically valid principles and methods."<sup>5</sup> The court's focus is not concerned with the substance of the expert's conclusion, but with how the expert arrived at the conclusion.<sup>6</sup>

Although the practice of differential diagnosis is recognized as valid basis for medical-causation opinions, "its use is appropriate only when considering potential causes that are scientifically known."<sup>7</sup> Thus "[n]ot every opinion that is reached via a differential-diagnosis method will meet the standard of reliability required by *Daubert*."<sup>8</sup> A particular differential diagnosis is more likely to meet this standard if it has been carried out with methodical rigor that includes "ruling in" one or more causes of the injury using a valid methodology, as well as engaging in standard diagnostic techniques by which doctors normally "rule out" alternative causes to reach a conclusion as to which cause is most likely.<sup>9</sup>

After a thorough review of the record, we conclude that Dyro could not have reliably "ruled in" the dextrose infusion as the cause of Perry's MFPS. Accordingly, the trial court did not abuse its discretion in excluding her testimony and entering summary judgment in favor of the defendants.

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<sup>4</sup> *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 616, 1998-Ohio-178, 687 N.E.2d 735.

<sup>5</sup> *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 683, ¶16, citing *Miller*, supra.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at ¶22.

<sup>8</sup> *Best v. Lowe's Home Centers, Inc.* (C.A. 6, 2009), 563 F.3d 171, 178.

<sup>9</sup> See *id.* at 179

Although Dyro's testimony established that Perry's sensory neurons had most likely suffered some trauma, she could not reliably establish that "more likely than not" that trauma to the sensory neurons had caused the MFPS. Dyro had never had a patient who had developed MFPS after receiving a dextrose infusion as Perry had, but more importantly, Dyro could not cite to any scientific literature or medical studies that demonstrated that trauma to sensory neurons caused MFPS. Although Perry cited to an article indicating a connection between trauma to sensory nerves and the development of fibromyalgia, a relative of MFPS, that article concluded by stating that "[f]urther prospective studies, however, are needed to confirm this association and to identify whether trauma plays a causal role for [fibromyalgia] pain."<sup>10</sup>

Dyro did refer to a research paper presenting the latest finding that MFPS was likely linked to excessive production of neurotransmitters at the neuromuscular junction. This excessive production, the research suggested, would likely result from injury to the neurons. The problem here was that the research specifically implicated injury to the endplates, which are a part of the motor neurons. The literature did not implicate trauma to the sensory neurons, which is what Dyro indicated was the cause of Perry's MFPS.

Because Dyro could not demonstrate that the dextrose infusion and resulting trauma to the sensory neurons<sup>11</sup> was a known cause of MFPS, Dyro's differential

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<sup>10</sup> Staud, *Fibromyalgia Pain: Do We Know the Source?*, *Curr.Opin.Rheumatol* (2004) 16(2), 157-163.

<sup>11</sup> We note that although Dyro testified that the dextrose infusion caused trauma to the sensory neurons, Dyro conceded that, at the time she gave her medical opinion, no objective medical test had yet been performed to substantiate the suspected damage to the sensory neurons.

diagnosis was unreliable.<sup>12</sup> Furthermore, even if Dryo could have “ruled in” the dextrose infusion and trauma to the sensory neurons as a potential cause of MFPS, the record does not demonstrate that she had methodically performed a differential diagnosis. Aside from the idea of temporal association, her testimony did not demonstrate how she had “ruled out”, let alone considered, alternative suspected causes for MFPS, because Dryo had never examined Perry or reviewed her medical history prior to her hospitalization for the lung biopsy.

Based on the foregoing, we overrule Perry’s single assignment of error. Therefore, the judgment of the trial court is affirmed.

A certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., HILDEBRANDT and SUNDERMANN, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on September 16, 2009

per order of the Court \_\_\_\_\_  
Presiding Judge

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<sup>12</sup> See *Valentine*, supra (supreme court held that differential diagnosis was an unreliable method for determining legal causation where the experts could not cite to studies showing a causal connection between the plaintiff’s chemical exposure in the workplace and the plaintiff’s injury of glioblastoma multiform).