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STATE OF MEDICAL MALPRACTICE & NURSING HOME LIABILITY

Standard of Care Proofs Now Subject to *Daubert* Analysis

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March 3, 2016

SECRET WARDLE NOTES

The Michigan Supreme Court has applied what was traditionally viewed as an issue for causation, and addressing scientific methodology, to standard of care proofs. As a consequence of the *Elher* opinion, to successfully prosecute a claim for medical malpractice, a plaintiff's expert will need to support his or her opinion with proofs admissible not merely under MRE 702, but also under MCL 600.2955 (Michigan's statutory codification of *Daubert*). It will no longer be sufficient for an expert to opine based upon his own experiences and beliefs, or even a "belief system". Rather, the expert will need to buttress any standard of care opinion with literature, with data, with support from colleagues, or other proofs sufficient to address the "*Daubert* standard".

Caution must be applied, however, as to the effect of this decision. First, defense experts must be prepared to support their standard of care opinions with similarly admissible proofs. Second, and although this could prove immediately fatal to pending cases in which plaintiff's experts have not adequately supported their standard of care testimony, there must be a presumption that, as has been the case with prior statutory and common law reforms to the requisites for prosecution of medical malpractice actions, the Plaintiff's Bar will "learn its lesson", and in going forward have experts prepare to testify in support of their standard of care opinions in a way that will satisfy the statutory and common law requisites of reliability.

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In a published opinion reversing the Michigan Court of Appeals, and affirming a prior grant of summary disposition by the trial court, the Michigan Supreme Court has applied the *Daubert* standard, as also codified in Michigan under MCL 600.2955, to the admissibility standards applicable to standard of care testimony. In *Elher v. Misra, et al*, the Court reinstated summary disposition and found that the trial court did not abuse its discretion in precluding the plaintiff's expert from opining as to the standard of care. The plaintiff's expert could not support his opinion with literature, with supporting opinions of colleagues, or with anything that would otherwise meet the elements of MCL 600.2955. Although the Supreme Court did acknowledge that there was a partial abuse of discretion when the trial court applied certain factors and, in that limited regard, it agreed with the majority from the Court of Appeals that certain MCL 600.2955

elements could not be applicable to standard of care testimony, on balance, the trial court correctly excluded the expert’s standard of care testimony (or at least did not abuse its discretion in doing so).

It is undoubtedly significant that the expert who was proffering the testimony on the behalf of the plaintiff was clear in his dispositive admissions. The admissions included the lack of literature to support his opinion. The admissions included that he had not talked to any colleagues and had no idea what his colleagues thought about the issue of the applicable standard. It was also of significance that the expert testified that his opinions on the standard of care were based upon a “belief system”.

Disagreeing with the position taken by the Court of Appeals, the Michigan Supreme Court held that standard of care testimony was not outside of the realm of scientific methodology. The *Daubert* standard can be helpful in addressing the reliability of opinions that are based upon personal knowledge.

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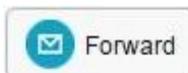
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