

---

---

**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

(ON APPEAL FROM THE COURT OF APPEALS)  
(Cavanaugh, P.J. and Owens and M.J. Kelly, JJ.)

JEFFREY CULLUM

Plaintiff-Appellee,

v.

Supreme Court No. 149955  
Court of Appeals No. 313739  
Lower Court No. 10-007013-NH  
(Wayne County Circuit Court)

FREDERICK LOPATIN, D.O.

Defendant-Appellant,

and

DEARBORN EAR, NOSE AND THROAT  
CLINIC, P.C.,

Defendant.

---

---

**APPELLEE'S SUPPLEMENTAL BRIEF  
ON ORDER OF THE COURT DATED APRIL 29, 2015**

SEIKALY & STEWART, P.C.  
Attorneys for Plaintiff-Appellee  
JEFFREY T. STEWART (P24138)  
30445 Northwestern Highway, Ste. 250  
Farmington Hills, Michigan 48334  
(248) 785-0102  
[jts@sslawpc.com](mailto:jts@sslawpc.com)

Dated: June 30, 2015

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

INDEX OF EXHIBITS ..... v

QUESTIONS PRESENTED..... vi

    I.    WAS THE TRIAL COURT REQUIRED TO CONSIDER ALL OF THE FACTORS  
    OUTLINED IN MCL 600.2955(1) IN LIGHT OF *EDRY V. ADELMAN* 486 MICH  
    634 (2010)..... vi

    II.   DID THE TRIAL COURT ABUSE ITS DISCRETION IN HOLDING THAT  
    PLAINTIFF’S EXPERT’S OPINION WAS INADMISSIBLE UNDER MRE 702  
    BECAUSE IT WAS BASED ON SPECULATION ..... vi

    III.  DID THE COURT OF APPEALS APPLY THE CORRECT STANDARD OF  
    REVIEW ..... vi

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 1

ARGUMENT..... 6

    I.    BECAUSE THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL  
    COURT ON GROUNDS INDEPENDENT OF MCL 600.2955, IT IS NOT  
    NECESSARY FOR THIS COURT TO DETERMINE THE IMPACT OF *EDRY v.*  
    *ADELMAN* .....6

    II.   *EDRY V ADELMAN* DOES NOT COMPEL REVERSAL OF THE COURT OF  
    APPEALS DECISION, BECAUSE *EDRY* SHOULD ONLY BE READ TO PERMIT  
    BYPASS OF MCL 600.2955 IN CIRCUMSTANCES NOT PRESENT HERE.....14

        A.   MRE 702 can obviate the need for analysis under MCL 600.2955 in some cases, but  
        not others ..... 14

        B.   *Edry* was correct to dispense with the other factors under MCL 600.2955 because no  
        others were presented by the parties..... 17

    III.  THE COURT OF APPEALS UTILIZED THE CORRECT STANDARD OF  
    REVIEW IN LOOKING AT THE COURT’S LEGAL PROCESS UNDER MRE 702  
    AND MCL 600.2955 *DE NOVO* .....19

        A.   Procedural history relating to the motions before the trial court..... 19

        B.   The two-step process utilized in determining whether a trial court has abused its  
        discretion on a *Daubert* motion is appropriate and provides an important safeguard  
        to the nonmoving party, because many *Daubert* motions are tantamount to summary  
        disposition motions..... 21

IV. CLERC MAY MAKE IT AUTOMATIC ERROR NOT TO EXAMINE ALL THE FACTORS UNDER MCL 600.2955 WHEN REQUESTED TO DO SO, BUT REVERSAL SHOULD NOT BE REQUIRED IF THE ERROR IS HARMLESS.....27

A. There may be apparent conflict, but not actual conflict between *Clerc* and *Edry* .... 27

B. Any apparent conflict between *Edry* and *Clerc* can be resolved by holding that it is only error to ignore a statutory factor that at least one party has asked be considered, and that any error in failing to examine enough factors will be tested under the harmless error rule..... 30

C. It would be inconsistent with this Court’s frequent holdings to rule that at failure to examine statutory factors addressed by the parties is not error..... 31

D. Application of this proposed rule to the facts of this case would lead to a affirmance of the Court of Appeals decision..... 39

CONCLUSION..... 40

CERTIFICATE OF SERVICE ..... 43

## TABLE OF AUTHORITIES

### Cases

<i>Allison v McGhan</i> , 184 F3d 1300 (11th Cir. 1999) .....	24
<i>Ambrosini v Labarraque</i> , 101 F3d 129; 322 US App DC 19 (1996) .....	9, 24, 25
<i>Baker v Dalkon Shield Claimants Trust</i> , 156 F3d 248 (1st Cir.1998).....	9
<i>Best v Lowe's Home Centers, Inc</i> , 563 F3d 171 (CA 6, 2009): .....	8, 9
<i>Bouverette v Westinghouse Elec Corp</i> , 245 Mich App 391; 628 NW2d 86 (2001) .....	26
<i>Bowers v Bowers</i> , 190 Mich App 51; 475 NW2d 394 (1991) .....	37
<i>Burkhardt v Bailey</i> , 260 Mich App 636; 680 NW2d 453 (2004) .....	24
<i>Clerc v Chippewa Co War Mem Hosp</i> , 267 Mich App 597; 705 NW2d 703 (2005) <u>remanded</u> <u>in part, app den in part</u> 477 Mich 1067; 729 NW2d 221 (2007) .....	28
<i>Clerc v Chippewa War Memorial Hospital</i> , 477 Mich 1067; 729 NW2d 221 (2007) 1, 2, 3, 6, 14, 17, 27, 30, 33, 40	
<i>Craig v Oakwood Hosp</i> , 471 Mich 67; 684 NW2d 296 (2004).....	22, 34
<i>Daubert v Merrell Dow Pharmaceuticals</i> , 509 U.S. 579, 113 S.Ct. 2786, 125 L Ed 2d 469 (1993).....	24, 25, 32
<i>De Puy Inc v Biomedical Engg Trust</i> , 216 F Supp 2d 358 (DNJ 2001) .....	18
<i>Derderian v Genesys Health Care Systems</i> , 263 Mich App 364; 689 NW2d 145 (2004) .....	17
<i>Edry v Adelman</i> , 486 Mich 634; 786 NW2d 567 (2010)... 1, 2, 3, 6, 13, 14, 15, 16, 17, 18, 19, 23, 27, 28, 29, 30, 40	
<i>Elher v Misra</i> , 308 Mich App. 276; __ NW2d __ (2014).....	22
<i>Foskett v Foskett</i> , 247 Mich App 1; 634 NW2d 363 (2001) .....	37
<i>Frye v United States</i> , 54 App DC 46, 293 F 1013 (1923) .....	32
<i>Gen Elec Co v Joiner</i> , 522 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997) .....	15
<i>Gilbert v DaimlerChrysler Corp</i> , 470 Mich 749; 685 NW2d 391 (2004):.....	22, 23
<i>Great Lakes Div. of Nat'l Steel Corp. v Ecorse</i> , 227 Mich App 379; 576 NW2d 667 (1998).....	17
<i>Heid v AAA Sulewski</i> , 209 Mich App 587; 532 NW2d 205 (1995).....	37
<i>Heller v Shaw Indus., Inc</i> , 167 F3d 146 (3d Cir. 1999).....	9
<i>Henry v St Croix Alumina, LLC</i> , 572 F Appx 114 (CA 3, 2014).....	18
<i>Javis v Bd of Ed of Sch Dist of Ypsilanti</i> , 393 Mich 689; 227 NW2d 543 (1975).....	34, 35
<i>Johnson v Corbet</i> , 423 Mich 304; 377 NW2d 713 (1985) .....	35, 36
<i>Kennedy v Collagen Corp.</i> , 161 F3d 1226 (9th Cir.1998).....	9
<i>Kirby v. Larson</i> , 400 Mich 585; 256 NW2d 400 (1977) .....	31
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999).....	21
<i>Maldonado v Ford Motor Co</i> , 476 Mich 372; 719 NW2d 809 (2006).....	23
<i>McCain v McCain</i> , 229 Mich App 123; 580 NW2d 485 (1998) .....	37
<i>McDougall v Schanz</i> , 461 Mich 15; 597 NW2d 148 (1999). .....	31
<i>Mitcham v Detroit</i> , 355 Mich 182; 94 NW2d 388 (1959) .....	17
<i>Moore v Ashland Chem., Inc</i> , 151 F3d 269 (5th Cir. 1998) .....	9
<i>Pappas v DePuy Orthopaedics, Inc</i> , 33 F Appx 35 (CA 3, 2002).....	18
<i>People v Babcock</i> , 469 Mich 247; 666 NW2d 231 (2003) .....	22, 23, 41
<i>People v Beckley</i> , 434 Mich 691; 456 NW2d 391 (1989) .....	28
<i>People v Benton</i> , 294 Mich App 191; 817 NW2d 599 (2011).....	22
<i>People v. England</i> , 176 Mich App 334: 438 NW2d 908 (1989), <i>aff'd</i> . .....	25
<i>People v. Perlos</i> , 436 Mich 305; 462 NW2d 310 (1990) .....	25

*Pierron v Pierron*, 486 Mich 81; 782 NW2d 480 (2010) ..... 37  
*Quiet Tech DC-8, Inc v Hurel-Dubois UK Ltd*, 326 F3d 1333 (CA 11, 2003)..... 25, 38  
*Rittershaus v Rittershaus*, 273 Mich App 462; 730 NW2d 262 (2007)..... 37  
*Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959) ..... 23  
*Spiek v Dep’t of Transp*, 456 Mich 331; 572 NW2d 201 (1998)..... 23  
*United States v Dunkel*, 927 F2d 955 (CA 7, 1991). ..... 18  
*United States v Jasin*, 292 F Supp 2d 670 (E.D.Pa. 2003) ..... 18  
*Westberry v Gislaved Gummi AB*, 178 F3d 257 (4th Cir. 1999) ..... 8, 9  
*Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006) ..... 14  
*Woodruff v USS Great Lakes Fleet, Inc.*, 210 Mich App 255; 533 NW2d 356 (1995) ..... 25  
*Wurtz v Beecher Metro Dist*, 495 Mich 1010; 846 NW2d 581 (2014)..... 31  
*Wurtz v Beecher Metro Dist*, 495 Mich 242; 848 NW2d 121 reh den sub nom..... 31  
*Zuchowicz v United States*, 140 F3d 381 (2d Cir. 1998) ..... 9

**Constitutional Provisions**

MCL 600.2169 ..... 31  
MCL 600.2955 ..... 1, 2, 4, 6, 7, 13, 14, 18, 19, 20, 22, 27, 28, 29, 30, 31, 32, 33, 34, 36, 40  
MCL 722.21 ..... 36  
MCL 722.23 ..... 36  
MCL 722.27 ..... 36

**Rules**

MCR 2.116..... 4  
MCR 2.516..... 35  
MCR 2.516(D)(2) ..... 35  
MCR 2.517..... 37  
MCR 2.613..... 34, 35, 36  
MCR 2.613(A) ..... 35  
MRE 702 ..... 2, 3, 4, 9, 13, 14, 18, 19, 20, 22, 23, 27, 30, 31, 32, 34, 40

**Constitutional Provisions**

Const 1963, art 6, § 5 ..... 31

**INDEX OF EXHIBITS**

No.	Description
1	Medical record for Jeffrey Cullum
2	Excerpts Dr. Michael McKee deposition
3	Plaintiff's Response to Defendant's Motion for Summary Disposition
4	Pfizer package insert for Medrol
5	Survey Article

**QUESTIONS PRESENTED**

**(As Ordered by the Court)**

- I. WAS THE TRIAL COURT REQUIRED TO CONSIDER ALL OF THE FACTORS OUTLINED IN MCL 600.2955(1) IN LIGHT OF *EDRY V. ADELMAN* 486 MICH 634 (2010)
- II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN HOLDING THAT PLAINTIFF'S EXPERT'S OPINION WAS INADMISSIBLE UNDER MRE 702 BECAUSE IT WAS BASED ON SPECULATION
- III. DID THE COURT OF APPEALS APPLY THE CORRECT STANDARD OF REVIEW

## INTRODUCTION AND SUMMARY OF ARGUMENT

In order to assist the Court in determining whether it should grant leave, deny leave, or take other action on the merits of this case, the Court has directed the parties to brief three questions:

1. Was the trial court required to consider all the factors set forth in MCL 600.2955, in light of this Court's decision in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010);
2. Did the trial court abuse its discretion in finding that the opinion of the Plaintiff's expert was mere speculation and therefore inadmissible;
3. Did the Court of Appeals apply the correct standard of review?

Plaintiff-Appellee (hereinafter "Plaintiff") respectfully submits that the Court should deny leave and take no further action in the matter for the reason that the Court of Appeals applied well-settled principles of law in arriving at the correct result. This becomes evident when the specific questions posed by the Court are examined.

### **Question 1: The Effect of the *Edry* Case**

The first question posed by this Court is whether consideration of all the factors set out in MCL 600.2955 is an absolute requirement, given this Court's decision in *Edry*, 486 Mich at \*\*. This Court held in *Clerc v Chippewa War Memorial Hospital*, 477 Mich 1067; 729 NW2d 221 (2007) just three years earlier that a trial court decision excluding evidence must be reversed if it fails to consider all of the factors under MCL 600.2955. Therefore, any discussion of *Edry* must include a discussion of *Clerc*. Plaintiff maintains that *Clerc* stands for the proposition that MCL 600.2955 means what it says when it states that the trial court "shall" consider all seven of the

*Daubert*<sup>1</sup> factors. The only time a court need not consider any of the seven factors under 2955 is when the challenge is to the application of the science and methodology of the expert to facts of the case before the court, rather than the underlying principles, methods and premises upon which the expert relies before analyzing the specific facts of the case. This is because the seven factors address the basic scientific premises and methods of the expert (e.g. whether it has been adequately established that asbestos in brake linings causes mesothelioma in humans), not application of the general premise to the facts of the case (e.g. was the plaintiff exposed to sufficient airborne asbestos in this case to make it a likely cause of his condition even if asbestos is an established cause generally).

However, even if the issue in *Edry* was general rather than specific causation (which it was) thereby making analysis of the factors under 2955 ordinarily mandatory, the *Edry* decision was not in conflict with *Clerc* because there is no indication in *Edry* that the parties asked the court to consider more than two factors: whether there was literature support for the expert's opinion on the Plaintiff's chances of surviving her breast cancer and whether the expert's own opinion was enough to overcome accepted, authoritative literature contradicting his opinion. It is settled law in this state that the court is not required to search the record for supporting evidence nor research the law for relevant authority when a party asserts an argument but then fails to support it. Moreover, as will be seen below, Michigan simply does not apply an automatic reversal rule in civil cases, with the possible exception of failure by a family court to consider all of the statutory factors in a child custody case. Instead, the approach almost universally used, even when there is abject error, is to apply the harmless error rule.

---

<sup>1</sup> Throughout this brief, "*Daubert*" will be used as a shorthand reference to the body of law now captured in MRE 702, MCL 600.2955, and the Michigan cases interpreting them.

Consequently, the rule that emerges from *Edry* is that the court is only required to look at factors raised by at least one of the parties. Moreover, even if failure to consider a factor not raised by either party is error as a matter of law (because of the wording of the statute itself and the *Clerc* decision), reversal is only required when the error is not harmless. In *Edry*, there is no indication that consideration of additional factors would have changed the outcome. Certainly the proponent of the challenged evidence did not say so. That is in contrast with the instant case, in which Plaintiff argued that *all* of the relevant statutory factors favored his view, and the trial court ignored most of them. More important, in this case (unlike *Edry*) the Court of Appeals opinion demonstrates why the errors made by the trial court went far beyond simply not considering the remaining statutory factors. The trial court failed to engage the “searching inquiry” required by MRE 702 and instead ignored strong evidence in the record that supported admission of the evidence and contradicted the trial court’s conclusion that the opinion was pure speculation. In addition, the trial court simply preferred the *conclusions* of the defense experts without stating that why their *methodology* may have been considered by the trial court to be superior to that of the Plaintiff’s expert.

**Question 2: Did the Trial Court Abuse its Discretion in Rejecting the Expert Opinion as Speculative?**

The second question posed by the court is whether the trial court abused its discretion in finding the opinion of Plaintiff’s expert too speculative to meet the reliability requirements of MRE 702 and MCL 600.2955. However, in order to understand why the trial court’s decision was fatally flawed, it is helpful to first consider this Court’s final question: did the Court of Appeals apply the proper standard of review?

**Question 3: Did the Court of Appeals Apply the Correct Standard of Review?**

Yes. The motion before the trial court was one for summary disposition, on the basis that the Plaintiff's expert's opinion, even if valid, did not establish a high enough risk of AVN from low-dose steroids to create a duty in the Defendant to refrain from using them or even to warn the patient so he could make his own decision. This second motion by the Defendant did not mention MRE 702 or MCL 600.2955. However, as the Court of Appeals noted, the trial court granted summary disposition *sua sponte* on *Daubert* grounds instead, finding the opinion of the Plaintiff's expert on causation, Dr. Michael McKee speculative and therefore inadmissible. The Court of Appeals properly recognized that even though the motion was brought exclusively as one for summary disposition under MCR 2.116, the underlying basis for the trial court's ruling - an evidentiary ruling under MRE 702 and MCL 600.2955 - was to be reviewed under an abuse of discretion standard. However, it applied *de novo* review and cited cases applicable to summary dispositions, rather than review of purely evidentiary decisions under MRE 702 and MCL 600.2955. This was not error. The Michigan *Daubert* decisions have shown that the abuse of discretion standard in this realm has two components. First, an appellate court reviews *de novo* the legal *process* by which the trial court interprets and applies MRE 702 and MCL 600.2955, in order to assure that it is performing its gatekeeper function adequately. If the process is adequate, then the *content* of the decision must be reviewed only under an abuse of discretion standard, wherein the trial court does not abuse its discretion unless its determination falls outside the range of principled outcomes.

It is important to preserve an appellate court's ability to review *de novo* the legal process by which the trial court acts, not only because it is a question of law that is ordinarily reviewed *de novo*, but because the effect of these *Daubert* motions, usually brought after discovery and witness lists are closed, is to make the granting of the motion tantamount to summary

disposition. This is so because, typically, the barring of expert testimony on an important point results in a fatal failure of proof on a critical element of the claim or defense. Summary disposition becomes inevitable; and the fact that review of that aspect of the case is *de novo* becomes immaterial.

The Court of Appeals correctly found the trial court's legal process flawed and, relying upon established precedent, found that to result in an abuse of discretion as a matter of law.

**Back to Question 2: Whether the Trial Court Abused its Discretion in Finding the Expert's Opinion Speculative**

Assuming that the Court of Appeals was entitled to review *de novo* the adequacy of the trial court's gatekeeping function, it becomes clear that the trial court in this case abused its discretion in finding the opinion of the Plaintiff's expert speculative. To begin with, the trial court inexplicably, ignored significant literature support that had been supplied to the Court when it initially took up the Defendant's *Daubert* motion many months earlier, as well as literature supplied with Plaintiff's response to the second motion. The trial court incorrectly stated that the only literature supplied to support the opinion of Plaintiff's expert was his own small study from a number of years earlier. In fact, it was demonstrated to the trial court that Dr. McKee's work had been cited no less than 44 times in the literature following his study – and never unfavorably. Even more important, the Court of Appeals noted that the trial court had completely ignored extensive and persuasive testimony from Dr. McKee explaining how his own clinical experience over many years of treating patients with this disease fully supported his opinion. Dr. McKee's testimony also showed that he properly considered alternative causes, most importantly, Plaintiff's allegedly excessive alcohol consumption. After looking at the evidence, Dr. McKee found it far more likely that the steroids administered by the Defendant in this case were the cause of Plaintiff's AVN. He pointed out that Plaintiff had consumed alcohol

over a long period of time without evidence of AVN. However, Plaintiff AVN symptoms began immediately following the taking of the steroids. More important, the symptoms followed a classic pattern of severe pain immediately following completion of the steroid dose, followed by a quiescent period of several months, followed by more pain and collapse of the affected bone several months later.

Is important to note that while the Court of Appeals cited this Court's decision in *Clerc* for the proposition that all the factors under MCL 600.2955 must be considered, it did so only after finding that the trial court's decision could not be justified even on the factors that the trial court expressly discussed. A fair reading of the Court of Appeals' decision shows that failure to consider all the statutory factors, though part of the Court's analysis, was by no means essential to the Court's decision to reverse; that would have happened anyway. If this Court agrees, then there is little reason to use this case to decide a potentially important question of Michigan law (whether, in all cases, all seven of the statutory factors must be considered). Better the Court should use a case in which because resolution of that question would be determinative of the outcome.

For the reasons summarized above and more fully explained below, Plaintiff-Appellee requests that the Court deny leave and take no further action on this case.

## ARGUMENT

### **I. BECAUSE THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT ON GROUNDS INDEPENDENT OF MCL 600.2955, IT IS NOT NECESSARY FOR THIS COURT TO DETERMINE THE IMPACT OF *EDRY v. ADELMAN***

There is no doubt that the Court of Appeals cited *Clerc v Chippewa War Memorial Hosp*, 477 Mich 1067; 729 NW2d 221 (2007), and noted that the trial court failed to consider all the

factors under MCL 600.2955; but it did so only after a thorough explanation as to why the trial court's error was reversible even on the factors that it actually considered.

In the first part of the opinion on the *Daubert* issues (Slip op at 6), the Court of Appeals made clear that the trial court erroneously concluded that the Plaintiff's expert, Dr. McKee, had relied exclusively on his own small study in 2001 to conclude that the most likely cause of the Plaintiff's avascular necrosis was steroids. In the view of the trial court, Plaintiff's expert was attempting to make it as simple as "he was afflicted with AVN after receiving low dose steroids; according to my study that *can* happen; therefore that *is* what happened." The Court of Appeals correctly pointed out that Dr. McKee relied upon years of clinical experience diagnosing and treating this disease<sup>2</sup>. Slip op at 6-7. More important, the Court of Appeals recognized that Dr. McKee provided a cogent explanation for why Plaintiff's alleged long-standing alcohol use was less likely to have caused his AVN than the triple dose of steroids that he had received at the hands of the Defendant:

I would state that [Plaintiff's] alcohol use may have predisposed him to develop osteonecrosis with a lower dose of corticosteroid than typically would be seen since as far as we understand it, it can be a multifactorial condition. I think it's possible that alcohol abuse would have been the cause of his avascular necrosis, but I think on the balance of probabilities that it's unlikely and that the more probable cause would be the steroid administration<sup>3</sup>.

<sup>2</sup> While it is true that even the most qualified expert must still be using reliable methods and analysis, the remarkable qualifications of Dr. McKee and the fact that very little of his professional time was spent in testifying in support of injury claimants on any theory (McKee 6/23/11 Dep pp 49-51), be it steroid-induced AVN or anything else, should not go unnoticed. Dr. McKee's 141 page *curriculum vitae*, attached to the Plaintiff's brief as Exhibit 6 in the Court of Appeals, includes 221 "major papers" (McKee 5/14/12, p 6 LL 20-25), 119 "lesser papers" *Id.*, and 154 other presentations *Id.* at p 6 LL 1-5. Of the foregoing, 7 papers or presentations focused on avascular necrosis. His clinical experience included treating approximately 30 to 40 AVN patients every year. *Id.* at p 19 LL 21-24.

<sup>3</sup> Defense expert Dr. Mayo conceded (Mayo Dep p 94) that excessive alcohol consumption does *not* cause AVN in most cases.

5 Q. Likewise, many people will drink over a very long  
6 period of time, even more than Mr. Cullum, and never

\* \* \*

. . . I believe [Plaintiff] was an individual who may have been susceptible to this kind of complication because of his alcohol intake, but that the precipitant or the most important factor contributing to his development of osteonecrosis was the short course of corticosteroid medication that he received.

Again, as I stated before, it's my firm belief that had he not taken those corticosteroids, he would not have developed osteonecrosis of the hip.

Slip op at 9.

Without using the phrase, the Court of Appeals essentially recognized that Dr. McKee had used a well-recognized process in medicine known as "differential diagnosis". This process and its acceptance as reliable scientific methodology was explained in *Best v Lowe's Home Centers, Inc*, 563 F3d 171, 178-79 (CA 6, 2009):

This Court recognizes differential diagnosis as "an appropriate method for making a determination of causation for an individual instance of disease." *Hardyman*, 243 F.3d at 260. An "overwhelming majority of the courts of appeals" agree, and have held "that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong [reliability] of the Rule 702 inquiry." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir.1999) (collecting cases from the First, Second, Third, Ninth, and D.C. Circuits). Differential diagnosis is considered to be "a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Hardyman*, 243 F.3d at 260 (quoting *Westberry*, 178 F.3d at 262).

...

We hereby adopt the following differential-diagnosis test, adapted from the Third Circuit's well-reasoned opinion: A medical-causation opinion in the form of a doctor's differential diagnosis is reliable and admissible where the doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, *see id.* at 762 ("A physician who evaluates a patient in preparation for litigation should seek more than a patient's self-report of symptoms or illness and ... should ... determine that a patient is ill and what illness the patient has contracted."), (2)

---

7           get osteonecrosis?  
 8    A.    Right.  
 9    Q.    In fact, that's more common than not, isn't it?  
 10   A.    Certainly, yes, and that's why -- that's the  
 11        importance of the difference between a relative risk  
 12        and a percent risk and so on.

“rules in” one or more causes of the injury using a valid methodology, and (3) engages in “standard diagnostic techniques by which doctors normally rule out alternative causes” to reach a conclusion as to which cause is most likely. *Id.* at 760.

563 F3d at 179<sup>4</sup>

A review of the Court of Appeals’ opinion and its references to the specific testimony of Dr. McKee shows that Dr. McKee’s opinions satisfy every element of this test. There was no doubt that Plaintiff had avascular necrosis (also known as osteonecrosis) and had been treated for it through surgery. The defense never challenged this diagnosis. Thus, Dr. McKee . . . objectively ascertain[ed] . . . , to the extent possible, the nature of the patient’s injury.” Next, Dr. McKee “ruled in” the steroids as a cause based on *both* his prior research and his actual clinical experience, capped by the emblematic progression of symptoms immediately following ingestion of the steroids. This satisfied factor 2. He then ruled out the alternative cause suggested by the

---

<sup>4</sup> Plaintiff has found no Michigan case deciding whether differential diagnosis meets the test for reliability under MRE 702. But most other federal circuits agree with the Sixth Circuit in *Best*. See *Westberry v Gislaved Gummi AB*, 178 F3d 257, 263 (CA 4, 1999) (“ . . . we hold that a reliable differential diagnosis provides a valid foundation for an expert opinion.”); *Heller v Shaw Indus., Inc.*, 167 F3d 146, 154–55 (3d Cir.1999), 167 F3d at 154, 156–57 (concluding that a proper differential diagnosis is adequate to support expert medical opinion on causation), *Kennedy v Collagen Corp.*, 161 F3d 1226, 1228–30 (9th Cir.1998) (holding district court abused its discretion in excluding an expert opinion on causation based upon a reliable differential diagnosis), cert. denied, 526 U.S. 1099, 119 S.Ct. 1577, 143 L.Ed.2d 672 (1999), *Baker v Dalkon Shield Claimants Trust*, 156 F3d 248, 252–53 (1st Cir.1998) (determining that a differential diagnosis rendered expert opinion on causation sufficiently reliable for admission), *Zuchowicz v United States*, 140 F3d 381, 385–87 (2d Cir.1998) (upholding determination that expert opinion was reliable in part based on differential diagnosis), and *Ambrosini v Labarraque*, 101 F3d 129, 140–41 (D.C. Cir. 1996) (holding that because expert opinion was based on differential diagnosis, district court abused its discretion in refusing to admit it). But see *Moore v Ashland Chem., Inc.*, 151 F3d 269, 277–79 (5th Cir.1998) (en banc) (concluding that district court did not abuse its discretion in rejecting expert opinion on causation without discussing why differential diagnosis was insufficient to support admission of opinion into evidence), cert. denied, 526 U.S. 1064, 119 S.Ct. 1454, 143 L.Ed.2d 541 (1999).

defense, alcohol use, by pointing out that the most common cause of AVN is not alcohol, but steroids:

13 Q. Would you agree that  
14 avascular necrosis can be caused by alcoholism?  
15 A. Yes.  
16 Q. Would you agree that  
17 avascular necrosis, in terms of possible causes,  
18 the highest risk is alcoholism?  
19 A. No. In my practice and in  
20 most Canadian practices, the commonest cause of  
21 avascular necrosis of the hips, which is what we're  
22 talking about in this specific case, is a steroid  
23 medication. I have a number of other papers  
24 talking about the treatment of established  
25 avascular necrosis that list steroids as the most  
0011  
1 common inciting cause of that condition.

#### Deposition of Dr. McKee of June 3, 2011, pp 10-11

7 Q. Here is the question: You  
8 cannot state with any reasonable degree of medical  
9 probability that Mr. Cullum's development of  
10 avascular necrosis in roughly August of 2008 was  
11 caused by the steroid use as prescribed by Dr.  
12 Lopatin in January/February 2008 as opposed to his  
13 alcohol use in the interim. Correct?  
14 A. No. I believe that I can  
15 state that in my opinion, it is probable that the  
16 avascular necrosis he developed in August of 2008  
17 was a result of the steroid medication he had been  
18 prescribed in January and February of that year.  
19 Q. The basis for that opinion is  
20 what?  
21 A. The basis for that opinion is  
22 that, number one, steroids in most series are the  
23 commonest cause of avascular necrosis. Number two  
24 is that the time course of administration of the  
25 steroids to the development of mechanical symptoms  
0015  
1 in the hip is consistent with the medication being  
2 the primary cause for his avascular necrosis.  
3 Number three is that I believe that that duration  
4 of steroid medication and the dose prescribed is  
5 sufficient in an individual such as Mr. Cullum to  
6 precipitate a case of avascular necrosis. Number  
7 four is that clinically, I have seen literally  
8 dozens if not hundreds of similar cases with  
9 exactly the same case description as Mr. Cullum's.  
10 I recognize that alcohol  
11 consumption is a contentious issue here, and I  
12 agree that Mr. Cullum does drink alcohol. But to  
13 the best of my knowledge from the review of the

14 records and from the depositions, I don't believe  
15 that the amount of alcohol he drank in and of  
16 itself was sufficient to produce a case of  
17 avascular necrosis either in isolation without some  
18 other precipitating event or cause

*Id.* pp 14-15

This testimony shows that Dr. McKee met the third prong of reliability established by the court in *Best*, because he “. . . engage[d]... in ‘standard diagnostic techniques by which doctors normally rule out alternative causes’ to reach a conclusion as to which cause is most likely.”

As noted by the Court of Appeals, the trial court made no reference to any of this, even though the Plaintiff had presented Dr. McKee’s testimony to the court as well as an affidavit that focused on the characteristic presentation of Plaintiff’s AVN. Plaintiff’s brief in the trial court readily conceded that excessive alcohol use has been correlated to avascular necrosis but that the characteristic pattern of steroid-induced avascular necrosis fit perfectly here. Whatever Plaintiff’s drinking habits were, they had been constant over a period of years and yet he had no history of hip pain. Within days of completing the triple dose of steroids he had severe hip pain with no intervening injury or strain to explain it. Plaintiff called the doctor’s office and specifically asked if there could be a correlation to the steroids; and the phone call was noted in the doctor’s records. (Exhibit 1). The Defendant advised the Plaintiff to simply take a warm bath and come to see him if the pain did not go away. *Id.* The pain *did* go away – temporarily – which Dr. McKee explained was typical in these cases.

00024

7 Q. Doctor, I want you to assume  
8 hypothetically that the record will establish that  
9 he received his first Medrol Dose Pack on January  
10 15 of 2008.  
11 A. Yes.  
12 Q. That beginning on February 5  
13 of 2008, he received, or was prescribed and  
14 obtained, two Medrol Dose Packs with instructions  
15 to take them in successive days such that he would  
16 take six out of pack 1 on day 1, six out of pack 2  
17 on day 2, five out of pack 1 on day 3, five out of

18 pack 2 on day 4 and so forth until all the  
19 medication was used up.  
20 A. Yes.  
21 Q. I want you to assume further  
22 that he reported to his physician, who had  
23 prescribed those medications, pain in his hip, and  
24 that complaint came on or around February 19 of  
25 2008, which would have been approximately 14 days

00025

1 after the prescription of the second course of  
2 corticosteroids.  
3 A. Yes.  
4 Q. Would that history be  
5 consistent with what you were talking about a few  
6 minutes ago in terms of the kind of presentation  
7 you can see?  
8 **A. Yes. And it's thought that**  
9 **what happens in that situation is the pain, the**  
10 **transient pain he experiences early, is the pain**  
11 **from the death of the osteocytes in the hip, or the**  
12 **avascular or the necrosis part. So the cells in**  
13 **the hip die. That's the initial pain someone**  
14 **experiences.**  
15 **Then that pain diminishes or goes**  
16 **away. It's only months later when the mechanical**  
17 **effects of that are felt that the hip pain returns**  
18 **in a more sustained fashion.**  
19 **That is a typical history for**  
20 **someone who has this type of condition induced by a**  
21 **steroid medication.**  
22 Q. In this case, I want you to  
23 assume that his pain subsided for a time and then  
24 by August or September of 2008 he was experiencing  
25 more pain and sought treatment for it, leading to

00026

1 the diagnosis in October of 2008.  
2 A. Yes.  
3 Q. Would that time sequence be  
4 consistent or inconsistent with what you just told  
5 us can happen?  
6 **A. That would be consistent and**  
7 **very typical for a patient with a steroid-induced**  
8 **osteonecrosis<sup>5</sup>.**  
9 Q. If Mr. Cullum were simply  
10 experiencing the eventual effects of too much  
11 alcohol use, would you expect it to present this  
12 way?  
13 A. I'm not sure I understand  
14 your question.  
15 Q. If the only factor at work  
16 were long-term alcohol use, would you expect the

---

<sup>5</sup> Although stating that this was the less common presentation of AVN, defense expert Dr. Mayo conceded that this was a recognized pattern. Mayo Dep p 93.

17 case to present itself this way?  
 18 A. In that type of time  
 19 sequence, possibly but not probably, no.  
 20 Q. In medicine, do you deal with  
 21 probabilities as well as possibilities?  
 22 A. I do.  
 23 Q. In this case, do you think it  
 24 more likely than not, given everything that you  
 25 know about this case and your experience, that the

00027

1 corticosteroids played a material role in his  
 2 contracting avascular necrosis?  
 3 **A. I do. And I think it's a**  
 4 **probable cause. I would firmly believe that if he**  
 5 **had never received the steroids, he would not have**  
 6 **developed avascular necrosis of the hip when he**  
 7 **did.**

(Dr. Michael McKee dep, May 14, 2012, pp 24-27) (Exhibit 2). (Emphasis added)

It was that classic presentation of the symptoms, more than any statistical analysis, that convinced Dr. McKee that the steroid use was far more likely to be the cause of avascular necrosis in this patient than alcohol use. Although Dr. McKee did not state it in these terms, if it was steroids which caused this problem, that fit the signs and symptoms perfectly. If it was alcohol use over a long period of time, it was a monumental and utterly improbable coincidence that the signs and symptoms surfaced only after Plaintiff had received a triple dose of steroids.

This Court in *Edry* made it clear that literature support is by no means the only way a proponent of challenged evidence can meet the searching inquiry required MRE 702 and MCL 600.2955. However, in the absence of literature support, there needs to be *something* that will establish reliability of the opinion, beyond the ipse dixit of the expert.

While peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of *MRE 702*, in this case the lack of supporting literature, *combined with the lack of any other form of support* for Dr. Singer's opinion, renders his opinion unreliable and inadmissible under *MRE 702*. (Emphasis added)

*Edry v Adelman*, 486 Mich. 634, 641; 786 NW2d 567 (2010).

Dr. McKee's extensive clinical experience, in which he had seen “. . . dozens if not hundreds of similar cases with exactly the same case description as Mr. Cullum's. . .” and his special expertise in AVN generally supplied the ingredients missing in *Edry*. If this Court agrees that the failure of the trial court to consider all the factors under MCL 600.2955, though discussed by the Court of Appeals, was by no means essential to its decision, then it becomes evident that this case is a poor vehicle for discussing any apparent inconsistency between *Edry* and *Clerc*.

**II. *EDRY V ADELMAN* DOES NOT COMPEL REVERSAL OF THE COURT OF APPEALS DECISION, BECAUSE *EDRY* SHOULD ONLY BE READ TO PERMIT BYPASS OF MCL 600.2955 IN CIRCUMSTANCES NOT PRESENT HERE**

The thrust of the Court's first question posed to the parties for these supplemental briefs is that, since the trial court in *Edry* did not examine all the factors under MCL 600.2955, and since neither the Court of Appeals nor this Court faulted the trial court's omission, perhaps it is always permissible to analyze evidence under MRE 702 and to skip or abbreviate further analysis under MCL 600.2955 – at least when a Rule 702 analysis would result in exclusion<sup>6</sup>.

**A. MRE 702 can obviate the need for analysis under MCL 600.2955 in some cases, but not others**

Plaintiff submits that it is usually not proper to rely on MRE 702 alone, but it can be in some cases. If the failing in the expert's opinion is not in the underlying science (e.g. general

---

<sup>6</sup> The Court of Appeals in *Edry* never mentioned MCL 600.2955. This Court did, however, in footnote 7 of its opinion, saying:

We need not address MCL 600.2955 in this case because an expert witness who is qualified under one statute may be disqualified on other grounds. See *Woodard v Custer*, 476 Mich 545, 574 n 17; 719 NW2d 842 (2006). Here, Dr. Singer's opinion is inadmissible under MRE 702; therefore, it is unnecessary to consider the admissibility of his opinion under MCL 600.2955

causation and the ability of the alleged cause to produce the claimed harm in at least some instances) but rather in application of the science to the facts of the case at hand, then it is correct to state that analysis of the seven factors under MCL 600.2955 is unnecessary. This is so because, like MCL 600.2955, MRE 702 requires not only reliable methodology and valid underlying science, but also an adequate basis for connecting the science to the case<sup>7</sup>. Absent this, the analytical gap between the general principles and the application to the specific facts of the case can be too great<sup>8</sup>. Since the seven factors under MCL 600.2955 are directed to the validity of the underlying science and the methodology of the expert, a trial court would not need to consider those factors *if* it could conclude at the outset that, even if the science was valid, its application to the facts of the actual case was, itself, unreliable. However, this does not explain the Court's decision to forego consideration of the remaining statutory factors in *Edry*.

Had the major fault with the expert testimony in *Edry* been not in the underlying scientific premise being posited by the expert (that 16 cancerous lymph nodes indicate lower

---

<sup>7</sup> MRE 702 states in relevant part:

... 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*. (Emphasis added)

MCL §600.2955(1) states in relevant part:

... a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, *which basis includes the facts*, technique, methodology, and *reasoning relied on by the expert* and shall consider all of the following factors... (Emphasis added)

<sup>8</sup> *Gen Elec Co v Joiner*, 522 US 136, 146; 118 S Ct 512, 519; 139 L Ed 2d 508 (1997).

prospects for survival than 4<sup>9</sup>) but in the connection of that premise to the plaintiff's circumstances, then footnote 7 in the *Edry* decision would have been a perfectly adequate explanation for why analysis under section MCL 600.2955 was unnecessary. But the problem was not in applying the science to the plaintiff. It was undisputed that she had 16 cancerous lymph nodes; and it further appears that there was no dispute about the fact that the delay in diagnosis had allowed the additional nodes to be affected. Therefore, if this Court believed that analysis under MCL 600.2955 was unnecessary, it cannot be because the evidence was rejected under MRE 702 due to a failure of the expert to reliably connect the science to the plaintiff's case<sup>10</sup>.

Instead, the problem leading to exclusion of the testimony in *Edry* was that neither the trial nor the appellate courts found reliable the expert's underlying opinion that women with sixteen affected lymph nodes have considerably reduced chances for survival when compared to those with only four affected nodes. In theory, even if there was no general acceptance of the expert's medical premise or substantial peer-reviewed literature supporting it, evidence that the methodology used by the plaintiff's expert in *Edry* had been subjected to other testing, that it was generally accepted outside the context of litigation, that other experts in the field routinely rely

---

<sup>9</sup> Additional facts from *Edry* are discussed *infra* at 28.

<sup>10</sup> Nor could the trial judge in this case be affirmed by reliance on MRE 702, because the trial court did not reject Dr. McKee's opinion on the basis that, even if the general science was valid, the factual connection to the individual case was too tenuous. Although Defendant argues that Dr. McKee's opinion should be found unreliable because of what Defendant claims Dr. McKee did not know or adequately consider about the Plaintiff's individual history, that was not the basis relied upon by the trial court. Instead, she focused on the lack of support for the general proposition that low dose steroids could *ever* be deemed more likely cause of avascular necrosis than excessive alcohol consumption. As for the contention that Dr. McKee did not have an adequate answer for how other causes were equally plausible explanations for Plaintiff's AVN, see pp 25-28 of Plaintiff-Appellee's Answer to Application for Leave to Appeal, in which Dr. McKee fully explained why other causes posited by defendant were much less likely than the steroids.

upon the same medical premise, etc. might have saved the opinion. Thus, Plaintiff submits that, although MRE 702 can be an independent basis for exclusion, without resort to 600.2955, that should not be true if: 1) it is a case within the prescribed reach of MCL 600.2955 (a tort case for death or injury to person or property); and, 2) the challenge to the opinion is based on the general reliability of the methodology and the underlying science rather than an application of the science to the case at bar.

If a court wishes to exclude expert opinion on the basis that the general methodology or underlying science is unreliable, then Plaintiff submits that analysis of any factor under MCL 600.2955 brought to the attention of the court is a must.

**B. *Edry* was correct to dispense with the other factors under MCL 600.2955 because no others were presented by the parties**

Although MCL 600.2955 was applicable to the analysis in *Edry*, the decision to forego consideration of the remaining factors under the statute can be considered consistent with *Clerc* for a different reason. It is well-settled that a court need not search the record to find facts that would support a party's position. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). See also *Great Lakes Div. of Nat'l Steel Corp. v Ecorse*, 227 Mich App 379, 424, 576 N.W.2d 667 (1998). Likewise, a court need not research a party's legal position if the party has made an argument without supporting it. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then

search for authority either to sustain or reject his position.”<sup>11</sup>). “Judges are not like pigs, hunting for truffles buried in briefs.” *United States v Dunkel*, 927 F2d 955, 956 (CA 7, 1991).

There is no indication that the Plaintiff in *Edry* asked the trial court to look at any of the factors under MCL 600.2955, either initially or when the trial court signaled that it was inclined to reject the expert’s opinion and allowed the Plaintiff to submit additional support. While the Defendant had initially asked for a *Daubert* hearing, the Plaintiff did not. In fact, this Court pointed out in footnote 5 of *Edry* that the Plaintiff argued that a hearing *was not necessary*. Thus, in order for it to be error not to have considered all the remaining factors, this Court would have to have determined that the trial court was required to fire up its own engine and conduct a more thorough *Daubert* analysis *sua sponte*. No Michigan case has suggested that a court is ever required to act *sua sponte* to hold an evidentiary hearing or search even *inside*, much less outside, the record to save a proponent of evidence from a *Daubert* challenge. Similarly, the federal courts that have considered the matter have uniformly held that a court certainly may, but is not required to, conduct a *Daubert* hearing *sua sponte*. See, e.g., *Henry v St Croix Alumina, LLC*, 572 F Appx 114, 119 (CA 3, 2014); *United States v Jasin*, 292 F Supp 2d 670, 680 (E.D.Pa. 2003); *De Puy Inc v Biomedical Engg Trust*, 216 F Supp 2d 358, 374 (DNJ 2001) sub nom. *Pappas v DePuy Orthopaedics, Inc*, 33 F Appx 35 (CA 3 2002).

Thus, it is submitted that *Edry* need only stand for the propositions that: 1) the trial court must have sufficient material before it to make a reasoned decision about the reliability of the proposed testimony under MRE 702 and under any MCL 600.2955 factors that the parties properly place before the court; 2) the court cannot refuse to consider a factor that the parties have properly argued and supported, at least to the extent of stating why it is not relevant; 3)

---

<sup>11</sup> While this language speaks to the function of an appellate court, there is no reason to believe that a trial court is under any greater burden.

consideration of a statutory factor need not be undertaken if neither party presents the court with material on the omitted factor(s).

In this case, examination of the brief submitted by Plaintiff in opposition to the original *Daubert* motion (Exhibit 3) shows at pages 9, 10, 12 and 14 that Plaintiff submitted argument, supported by the record, on all of the factors, and specifically discussed six of the seven. The trial court was thus put in a very different position from the trial court in *Edry* where there is no indication whatever that the trial court was given any argument or evidentiary material on any factor other than those which it discussed. Plaintiff therefore submits that a proper application of *Edry* would not result in this Court finding that the trial court in the instant case was entitled to ignore most of the factors under MCL 600.2955.

**III. THE COURT OF APPEALS UTILIZED THE CORRECT STANDARD OF REVIEW IN LOOKING AT THE COURT'S LEGAL PROCESS UNDER MRE 702 AND MCL 600.2955 DE NOVO**

**A. Procedural history relating to the motions before the trial court**

Although the trial court ultimately dismissed the case on the basis that the Plaintiff's expert's opinion was speculative and therefore unreliable under MRE 702 and MCL 600.2955, this was not the motion before the trial court at the time. A *Daubert* motion advancing the arguments ultimately accepted by the trial court had been denied several months earlier. The motion before the court when the case was actually dismissed never mentioned MRE 702 or MCL 600.2955. Instead, the Defendant argued that, even if Dr. McKee's testimony was accepted as true, accurate and reliable, the statistical risk of developing AVN from low-dose steroids was so low that the Defendant was not required to withhold the steroids or even warn the patient so that the patient could decline the drugs if he chose. The content of Plaintiff's response overlapped some of the *Daubert* issues because some of the same arguments that support the

admissibility of Dr. McKee's testimony support the need for the Defendant to accept the fact that low-dose steroids can still be a cause of AVN. For example, Plaintiff brought to the attention of the court the fact that the *drug manufacturer itself*, in its drug information pamphlets, warned that AVN was a recognized side effect of Medrol. Other literature was also presented to the court showing that a survey of sports medicine physicians demonstrated that most were reluctant to prescribe even low-dose steroids because of these risks. The survey article<sup>12</sup> was discussed at length in the brief filed before the trial court, and also in Plaintiff's response for the application for leave to appeal in this Court. See Argument III at page 25. Thus, Plaintiff provided valid peer-reviewed literature supporting not only specific causation relative to this Plaintiff on these facts, but also regarding the general tendency of low-dose steroids to cause AVN in a significant number of susceptible individuals.

But, again, just as the Defendant's motion had not cited MRE 702 nor MCL 600.2955, Plaintiff's response did not do so either. Instead, it focused on the duty and foreseeability issues. However, the decision that was issued five months later, which gave rise to this appeal, never addressed foreseeability or duty. Instead, it was premised solely on the court's analysis under MRE 702 and MCL 600.2955. The Court of Appeals acknowledged that the trial court "...may have confused the two motions when it granted Defendant's second motion for summary disposition..." but found no prejudice. Plaintiff does not appeal that aspect of the Court of Appeals ruling. But this history is important because, if the trial court was going to decide the

---

<sup>12</sup> Langer P, Fadale P, Hulstyn M, Fleming B, Brady M.: Survey of Orthopaedic and Sports Medicine Physicians Regarding Use of Medrol Dosepak for Sports Injuries. *Arthroscopy*. 2006; 22(12):1263–1269.

matter as a *Daubert* motion, the arguments and exhibits supplied to the court at the time of the actual *Daubert* motion must be considered to have been before the trial court<sup>13</sup>.

**B. The two-step process utilized in determining whether a trial court has abused its discretion on a *Daubert* motion is appropriate and provides an important safeguard to the nonmoving party, because many *Daubert* motions are tantamount to summary disposition motions**

It is a bedrock principle of law in every state and the federal courts that a motion for summary disposition requires *de novo review* and that, while the nonmoving party may not simply stand on allegations in his complaint, if admissible evidence is put forward to support the nonmoving party's position, it must be viewed in the light most favorable to that party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). But the safeguards built into that standard of review become meaningless in a case like this one because, once the trial court has barred evidence on a critical point, then, assuming that the nonmoving party had the burden of proof on that issue, his case must fail. The most exhaustive standard of review cannot save it. This is especially so because the overwhelming majority of *Daubert* motions are brought after discovery and after the time for amending witness lists has passed. That is exactly what happened here. There is simply no opportunity to recover if the expert testimony is excluded. And the peril for the non-moving party is that the evidentiary decision is reviewed only for abuse of discretion. Thus, the standard of review on summary disposition effectively becomes abuse of discretion instead of *de novo*; and the evidence is *not* viewed in a light most favorable to the non-moving party. However, it is not quite so perilous as this, because the established case law has built in a layer of protection for all parties to a *Daubert* dispute.

---

<sup>13</sup> The error made by the trial court in saying that Plaintiff had supplied no literature other than Dr. McKee's own study would not be cured even if only the response to the motion based upon foreseeability were considered, since Plaintiff attached literature support for that as well, though not to the same extent as submitted on the actual *Daubert* motion.

A trial court's evidentiary ruling is reviewed for an abuse of discretion. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). An abuse of discretion occurs when the trial court reaches a result that is outside the range of principled outcomes. *Id.* However, preliminary questions of law on interpretation of the rules of evidence are reviewed *de novo*. *Id.* The gatekeeping *process* utilized by the trial court in coming to its decision is a preliminary question of law on the interpretation of the rules of evidence, and is therefore also reviewed *de novo*. *Elher v Misra*, 308 Mich App. 276; \_\_\_ NW2d \_\_\_ (2014)<sup>14</sup>. This conclusion is compelled by this Court's statement in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391, 408 (2004):

While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither “abandon” this obligation nor “perform the function inadequately.”

Thus, if that *process* is found inadequate (as it was here) under either MRE 702 or MCL 600.2955, a reviewing court is not required to give to the trial court the same degree of deference it ordinarily would under a pure abuse of discretion standard. However, if the trial court has adequately performed its well-defined gatekeeper function, then the *content* of the decision is indeed reviewed under an abuse of discretion standard. *Craig v. Oakwood Hosp.*, 471 Mich. 67, 76, 684 N.W.2d 296 (2004). However, under more recent pronouncements by this Court, it is not necessary to find a defiance of reason or perversity of will<sup>15</sup> in order to find abuse of discretion.

---

<sup>14</sup> Although this Court did not expressly state that it was reviewing *de novo* the gatekeeping function of the trial court in *Craig ex rel. Craig v Oakwood Hosp*, 471 Mich 67, 82-83; 684 NW2d 296, 306 (2004), that is what it did in finding that the trial court abused its discretion by misapplying MRE 702. In that case, the trial court had shifted the burden from the proponent of the evidence to the opponent, and had denied the Defendant a *Davis-Frye* hearing when this Court believed it was necessary.

<sup>15</sup> “In *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), this Court noted that an abuse of discretion standard must be one that is more deferential than review *de novo*, but less deferential than the standard set forth in *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810

The trial court will be found to have abused its discretion if its determination falls outside the range of principled outcomes. *Edry v Adelman*, 486 Mich. 634, 639; 786 NW2d 567 (2010). True, the Court of Appeals in this case did not discuss this distinction, but instead found that, because the actual decision of the trial court was to grant summary disposition, review was to be *de novo*. However, it also recognized that the evidentiary aspect was to be reviewed for an abuse of discretion:

We review *de novo* a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A trial court's decision to admit or exclude evidence, including the testimony of an expert witness, is reviewed for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id.*

The Court of Appeals in this case applied these well-settled legal principles in analyzing the decision below. In doing so, it found abuse of discretion based upon inadequacy of the trial court's process in entirely ignoring valid testimony from Dr. McKee explaining the scientific basis for his opinion, based upon his extensive direct experience in the field, and relevant literature:

However, the trial court did not take this testimony into account, and instead concluded that Dr. McKee had no support for his causation theory other than his 2001 study. By failing to consider substantial evidence forming the basis for Dr. McKee's opinion, the trial court inadequately performed its gatekeeper role under MRE 702, and thus, abused its discretion, assuming the trial court intended to exclude Dr. McKee's testimony under MRE 702. See *Gilbert*, 470 Mich at 782.

---

(1959). This Court stated that "an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Babcock, supra* at 269, 666 NW2d 231. The *Babcock* Court further noted that "[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id.* While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809, 817 (2006).

The Court of Appeals also noted an additional legal error, consisting of the trial court's willingness to weigh the credibility of opposing experts and simply accept one over another:

Further, it appears that the trial court improperly weighed the relative value of testimonial evidence provided by each party and inappropriately made credibility determinations in reaching its decision to exclude Dr. McKee's causation testimony. Courts "may not resolve factual disputes or determine credibility in ruling on a summary disposition motion." *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004)

While it is true that the Court of Appeals cited cases having to do with summary disposition rather than *Daubert* analysis, the Court of Appeals was still correct because the court is no more entitled to simply choose one expert over another in its role as gatekeeper than it is on summary disposition. This emerges in the *Daubert* case law beginning with *Daubert* itself: "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The lower federal courts have been explicit about the impropriety of the court simply choosing one expert over another.

Indeed, as we said in *Maiz*, "[a] district court's gatekeeper role under *Daubert* 'is not intended to supplant the adversary system or the role of the jury.'" 253 F.3d at 666 (quoting *Allison v. McGhan* 184 F.3d 1300, 1311 (11th Cir. 1999)). Quite the contrary, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798; see also *Ambrosini v. Labarraque*, 101 F.3d 129, 141 (D.C.Cir.1996) ("The district court[ ] err[ed] ... [by] misconce[iving] of the limited 'gatekeeper' role envisioned in *Daubert*. By attempting to evaluate the credibility of opposing experts and the persuasiveness of competing scientific studies, the district court conflated the questions of the admissibility of expert testimony and the weight appropriately to be accorded such testimony by a fact finder.")

*Quiet Tech DC-8, Inc v Hurel-Dubois UK Ltd*, 326 F3d 1333, 1341 (CA 11, 2003); see also *Ambrosini v Labarraque*, 101 F3d 129, 141; 322 US App DC 19, 31 (1996):

By attempting to evaluate the credibility of opposing experts and the persuasiveness of competing scientific studies, the district court conflated the questions of the admissibility of expert testimony and the weight appropriately to be accorded such testimony by a fact finder.

Michigan courts have come to the same conclusion:

It is not this Court's function to compare the parties' expert testimonies, but only to determine whether the trial court properly carried out its "gatekeeper role" in admitting Plaintiff's expert's testimony.

*Chapin v A & L Parts, Inc*, 478 Mich 916, 918; 733 NW2d 23, 26 (2007) (Justice Markman, dissenting).

The Court of Appeals, though not speaking this directly, has suggested the same limitation:

The United States Supreme Court emphasized that the inquiry is flexible and focused "*solely on principles and methodology*" rather than *ultimate conclusions*, and its "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." *Daubert, supra* at 594–595, 113 S.Ct. 2786. (Emphasis added)

*Chapin v A & L Parts, Inc*, 274 Mich App 122, 126-27; 732 NW2d 578, 580 (2007)

... [A]n opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility, *Woodruff v USS Great Lakes Fleet, Inc.*, 210 Mich App 255, 259-260; 533 NW2d 356 (1995); *People v. England*, 176 Mich.App. 334, 340, 438 N.W.2d 908 (1989), *aff'd.* on different grounds sub nom *People v. Perlos*, 436 Mich. 305, 462 N.W.2d 310 (1990).

*Bouverette v Westinghouse Elec Corp*, 245 Mich App 391, 401; 628 NW2d 86, 93 (2001).

All this notwithstanding, the trial court in this case clearly relied on the content of the medical opinions from the defense experts:

Defendant produced Plaintiff's treating orthopedic surgeon's deposition to support its position there is no causal connection between Plaintiffs prescribed corticosteroids and AVN. Dr. Mayo testified:

...it definitely raises his risk significantly for osteonecrosis. You know, the different amounts of alcohol exposure described here I think are pretty common when we see patients who drink alcohol that the dosage may change, the reporting may change, but the inconsistencies in the amounts here are probably really not so significant as the fact that he's drinking a lot of alcohol which increases his risk for osteonecrosis. And so that is ultimately the primary cause I believe of his osteonecrosis.

Dr. Hood also testified he was unaware of any study or evidence to assign a causal relationship between alcohol or steroids to developing AVN. In fact, Dr. Hood and Defendant's expert John Jacob M.D. agree that AVN is a disease of unknown etiology. Dr. Jacob testified " ... the chances of steroids being the major cause of this are basically slim to none."

Trial Court Slip op. p 3.

It is evident that the testimony relied upon by the trial court was not a discussion of Dr. McKee's methodology; it was a direct disagreement with his *conclusion*. There was no discussion by the defense experts of the scientific basis for Dr. McKee's opinion, his use of a differential diagnosis to arrive at his opinion, why his clinical experience over more than a decade since his first study would be immaterial, or anything else running to the reliability of his opinion. It boils down to the fact that the trial court determined that if the defense expert's opinions were seemingly more persuasive, then Dr. McKee's methodology must be flawed. This is precisely what *Daubert* analysis does not permit. Moreover, if it was not proper *Daubert*

analysis, then it certainly was not proper summary disposition analysis, for all the reasons and under all of the authorities cited by the Court of Appeals to begin with.

The standard of review applied in this case was thus fully in accord with the precedents of this Court and other Court of Appeals decisions and requires no further action by this Court.

**IV. CLERC MAY MAKE IT AUTOMATIC ERROR NOT TO EXAMINE ALL THE FACTORS UNDER MCL 600.2955 WHEN REQUESTED TO DO SO, BUT REVERSAL SHOULD NOT BE REQUIRED IF THE ERROR IS HARMLESS**

To this point, Plaintiff has focused on answering the Court's questions and demonstrating why leave need not be granted in this case. However, Plaintiff must anticipate that this Court may disagree and either accept leave or make rulings in this case significant not only to these parties, but to Michigan jurisprudence generally. For this reason, Plaintiff briefs these additional questions:

1. Are *Clerc v Chippewa War Memorial Hospital*, 477 Mich 1067; 729 NW2d 221 (2007) and *Edry v Adelman*, 486 Mich. 634; 786 NW2d 567 (2010) in actual or apparent conflict?
2. If so, how may they be reconciled?

**A. There may be apparent conflict, but not actual conflict between *Clerc* and *Edry***

Plaintiff maintains that, for the reasons set forth in Argument II, *Edry* need not be seen as conflicting with *Clerc*. In *Clerc*, as in this case, the Court of Appeals had reversed the decision of the trial court barring expert evidence by looking at the process engaged in by the trial court and finding it flawed in several respects. The Court of Appeals had not addressed the failure to explore all of the factors under MCL 600.2955. Instead, it analyzed the case as a failure to

adequately perform the trial court's gatekeeper role under MRE 702<sup>16</sup>. In lieu of granting leave to appeal in that case, this Court issued a short but direct opinion affirming the Court of Appeals on the alternative ground that the trial court did not explore all of the factors listed in MCL 600.2955.

Three years later, this Court decided in *Edry* that the trial court and the Court of Appeals were correct in excluding evidence in a malpractice case based upon delay diagnosis of breast cancer. By the time of diagnosis and surgery, the Plaintiff's cancer had invaded 16 lymph nodes surrounding the breast tissue. The Plaintiff's expert was advancing the opinion that the Plaintiff's chances of surviving her cancer were much less with 16 nodes involved than they would have been had as few as four nodes been affected. 486 Mich at 637. The significance of four nodes was that the only literature acknowledged by both parties to be authoritative was contained in the American Joint Cancer Commission (AJCC) manual *Id.* at 640, 647. This document supported the concept that the patient's chances for survival diminish as more nodes are involved, but did not distinguish between four nodes and larger numbers. *Id.* at 637. Nonetheless, it was the Plaintiff's expert opinion that, whether the guidelines recognized a distinction between four nodes and sixteen or not, the distinction was real, and greatly diminished the Plaintiff's chances for survival. *Id.* The trial court had invited Plaintiff to produce other literature that would have supported the doctor's opinion; but the only additional documentation provided was general Internet research, though it included material from the American Cancer Society. The defense

---

<sup>16</sup> "We find that the trial court failed to properly exercise its function as a gatekeeper of expert opinion testimony in striking Plaintiff's experts' testimony without either conducting a more searching inquiry under its obligation to preclude speculative and unreliable evidence under MRE 702, see *People v Beckley*, 434 Mich 691; 456 NW2d 391 at 710-719 (1989), or holding a *Davis-Frye* evidentiary hearing to determine whether Plaintiff's experts' testimony regarding the "backwards staging" of the decedent's cancer had achieved general scientific acceptance for reliability." *Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 603; 705 NW2d 703, 707 (2005) remanded in part, app den in part 477 Mich 1067; 729 NW2d 221 (2007).

argued that it was not peer-reviewed nor accepted by anyone as authoritative. The trial court found, and this Court agreed, that the expert's opinion, in direct contradiction to medical literature accepted as authoritative by both parties, could not survive *Daubert* analysis without more *Id.* at 640-641. Since Plaintiff had not submitted additional supporting material, the trial court was affirmed.

What is important in determining whether *Edry* stands for the proposition that other factors under MCL 600.2955 need not have been explored is that it does not appear from the decisions in the Court of Appeals and this Court that either party had asked the trial court to address any of the other factors under MCL 600.2955. Specifically, and unlike this case, the expert was not in a position to find unique characteristics in the facts surrounding the Plaintiff's diagnosis that he could correlate to any particularized clinical experience of his own. Moreover, the expert in *Edry* was also unable to indicate that he had any special experience in estimating chances for survival<sup>17</sup>. As noted above on page 13, *Edry* would have allowed other support for the expert's opinion, had it been submitted. It wasn't.

Thus, in *Edry*, in order for this Court to have determined that the trial judge erred in not examining all of the factors under MCL 600.2955, the court would also have had to rule that the trial judge was required to conduct his own investigation and research into breast cancer survival statistics, or at a minimum, order the parties to re-brief the issues. As discussed in Argument II on page 17, such a ruling would run directly contrary to the well-established principle in all

---

<sup>17</sup> This is in contrast to Plaintiff's expert in this case, Dr. McKee, who testified as to his years of experience in studying the correlations between steroids and avascular necrosis, and rendering his own diagnoses in his clinical practice. He thus based his opinions not only his original study, but many patients with the same condition. Dr. McKee indicated that, although avascular necrosis cases are not very common, the Canadian health care system tends to funnel specialized cases to a smaller number of practitioners than the US healthcare system. Consequently Dr. McKee sees approximately 30-40 patients per year with avascular necrosis. McKee Trial Dep, May 14, 2012, pp 19-20.

courts that the court is never required to search even *inside* the record much less *outside* the record for factual support for party's stated position. Likewise, the court is never expected to do a party's legal research to support an argument that has been made – or should have been made but was not.

There certainly is no direct conflict between *Edry* and this Court's prior decision in *Clerc* since the court in *Edry* found that there was no need to apply the statute when the testimony was going to be barred anyway under MRE 702. Without doubt, the very fact that *Edry* affirmed the decisions below without requiring examination the seven statutory factors implies that the requirement is not absolute. But this does not support the suggestion that *Clerc* has been impliedly overruled.

**B. Any apparent conflict between *Edry* and *Clerc* can be resolved by holding that it is only error to ignore a statutory factor that at least one party has asked be considered, and that any error in failing to examine enough factors will be tested under the harmless error rule.**

Given the mandate of 600.2955, reinforced by *Clerc*, just what should be the effect of a failure by the trial court to consider one or more statutory factors when their consideration has been requested by at least one of the parties? There are three paths that the court could follow. It could hold, as was implied but not held in *Clerc*, that failure to examine each and every statutory factor results in automatic reversal. It could hold, as was implied but not held in *Edry*, that if evidence could be barred under MRE 702, it is never necessary to consider the effect of MCL 600.2955. Or, it could find that the statute and *Clerc* make it error to ignore a factor that is argued and supported by at least one of the parties, but that reversal will only follow when the error is not harmless. Plaintiff suggests that this third view is the correct one.

**C. It would be inconsistent with this Court’s frequent holdings to rule that at failure to examine statutory factors addressed by the parties is not error**

This Court is not given to ignoring clearly written statutes or interpreting their provisions out of existence:

The most reliable indicator of the Legislature's intent is the language of the statute itself. If the statutory language clearly and unambiguously states the Legislature's intent, then further judicial construction is neither required nor permitted, and the statute must be enforced as written.

*Wurtz v Beecher Metro Dist*, 495 Mich 242, 250; 848 NW2d 121, 125 reh den sub nom. *Wurtz v Beecher Metro Dist*, 495 Mich 1010; 846 NW2d 581 (2014)

Nor can it be said that MRE 702 trumps a statutory evidence rule on the basis that the court has superior constitutional authority in such matters.

We conclude that a statutory rule of evidence violates Const 1963, art 6, 5 only when “ ‘no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified....’ ” *Kirby v. Larson*, 400 Mich. 585, 598, 256 N.W.2d 400 (1977) (opinion of Williams, J.), citing 3 Honigman & Hawkins, *Michigan Court Rules Annotated* (2d ed.), p. 404;<sup>15</sup> see also Joiner & Miller, *Rules of practice and procedure: A study of judicial rule making*, 55 Mich. L.R. 623, 650-651 (1957). Therefore, “[i]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration ... the [court] rule should yield.” Joiner & Miller, *supra* at 635.

*McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148, 156 (1999). In *McDougall*, the Plaintiff was attempting to escape the requirement under MCL 600.2169 that the Plaintiff’s expert in a medical malpractice case be of the same specialty as the Defendant. The Court of Appeals had found MRE 702 and MCL 600.2169 to be in conflict, with the court rule having precedence because of the Michigan Constitution 1963, art 6, 5. This Court disagreed, holding that, where a policy consideration beyond mere judicial administration was at work, the statute – not the court rule – should prevail. Here the statute clearly has policy considerations in mind beyond mere administration. For one thing, it takes direct aim at only a certain class of cases: “...action[s] for the death of a person or for injury to a person or property...” MCL 600.2955(1).

Apparently, it has no application in criminal cases, a contract dispute, a will contest or any of the other myriad matters that are the daily business of trial courts. Based on *McDougall* and the fact that this Court has never suggested that 2955 contravenes the Constitution or this Court's authority, it must be presumed that 2955 is good law and; where it applies by its terms, it will be respected.

It is one thing to say that, the mandatory language of the statute notwithstanding, the Court is not required to examine a factor that neither party has addressed. It is quite another to say that it is not error, when at least one of the parties specifically cites a factor of the statute and gives the court a factual basis upon which to make the determination, for the trial court to flatly disregard MCL 600.2955(1).

The analysis might be somewhat different in this regard if the original *Daubert* decision and its uniform adoption throughout the state and federal courts were predicated upon a bias against admitting scientific evidence. But this is certainly untrue. The original *Daubert* decision was, ironically, intended to create, among other things, a framework within which evidence might be admitted that was barred under the pre-existing *Frye*<sup>18</sup> test, which demanded that the theories of the expert have achieved "general acceptance":

Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention " 'general acceptance,' " the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.

*Daubert v Merrell Dow Pharm., Inc*, 509 U.S. 579, 589; 113 S.Ct. 2786, 2794; 125 L.Ed.2d 469 (1993).

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. [footnote omitted] Its overarching subject is the scientific validity and thus the evidentiary

---

<sup>18</sup> *Frye v United States*, 54 App DC 46, 47, 293 F 1013, 1014 (1923).

relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

*Id. at 594-95*

Moreover, this Court’s decision in *Clerc* remanded the matter for consideration of additional factors under MCL 600.2955 when the trial court had already found what it believed to be sufficient reason to bar the evidence. Clearly, this Court believed that consideration of the statutory factors might lead to the admission of evidence rather than its exclusion. In fact, following remand to the trial court per this Court’s order, the Court of Appeals ultimately ruled in favor of the admission of the expert evidence, *Clerc v. Chippewa War Mem Hosp.*, Docket No. 307915.Nov. 14, 2013, 2013 WL 6037123, and this Court denied leave, 497 Mich. 902 (2014). All of this should lead to the conclusion that the statute is not merely a secondary tripwire intended to bar evidence that can clear the hurdle of MRE 702; it is as much a chance to save challenged evidence as it is to exclude it.

Thus, adherence to this Court’s consistent precedents insisting upon deference to clear statutes can only lead to the conclusion that it is error – every time – when a trial court makes a decision on a *Daubert* challenge without considering a statutory factor that at least one of the parties has brought to the court’s attention and supported with relevant and meaningful material. But that doesn’t mean that such an error must always lead to reversal.

**1. The usual rule to be applied in determining the effect of evidentiary error is the harmless error rule**

It is well-established that the harmless error rule applies to evidentiary mistakes:

However, any error in the admission or exclusion of evidence will not warrant appellate relief “unless refusal to take this action appears ... inconsistent with substantial justice,”<sup>17</sup> or affects “a substantial right of the [opposing] party.”

*Craig ex rel Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296, 303 (2004)

While *Craig* did not address failure to consider all of the statutory factors under MCL 600.2955, it was a *Daubert* decision determining whether expert evidence met sufficient standards of reliability to be admitted. The end result of an analysis under MRE 702 and MCL 600.2955 is that the evidence is either admitted or excluded. If it is established law that the erroneous admission or exclusion of evidence will not lead to reversal if the error is harmless, there is no reason to believe that the fact that the error was made in part because of a failure to follow the mandates of MCL 600.2955 should necessarily raise the ante and lead to automatic reversal.

## **2. Automatic reversal is greatly disfavored in Michigan law**

Plaintiff has been unable to find any statement by this Court or even the Court of Appeals that there are certain errors in civil cases that will lead to automatic reversal without a showing of harm or prejudice. To begin with, MCR 2.613 specifically states:

(A) Harmless Error. An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

The last clear example of an automatic reversal rule in civil matters is the case of *Javis v Bd of Ed of Sch Dist of Ypsilanti*, 393 Mich 689; 227 NW2d 543 (1975). That case, decided shortly following adoption of the Standard Jury Instructions, held that where a Standard Instruction was timely requested and was applicable to the facts and law of the case, it was

automatically reversible error not to give it<sup>19</sup>. That precedent lasted 10 years. Then, in *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985) this Court found that *Javis* had served its purpose and was too often leading to reversals where the error was harmless. This Court explained how *Javis* became a precedent for automatic reversal:

The automatic reversal rule was adopted despite the plain language of Rule 529.1 [now MCR 2.613] that the standard for review of a claim of error arising from “anything done or omitted by the court” requires that no verdict should be set aside or new trial granted unless the refusal to do so would be “inconsistent with substantial justice.” The Court was able to reconcile adoption of a presumption of prejudice standard of review for SJI errors despite the fact that Rule 529.1 establishes a harmless error standard for reviewing discrepancies in civil proceedings because “[s]uch a result (presumption of reversible error) would not ignore the harmless error rule of GCR 1963, 529.1, but rather would construe the specific requirements of GCR 1963, 516.6 as controlling over the general provisions of the harmless error rule.” *Javis*, *supra*, p. 698, 227 N.W.2d 543.

423 Mich at 320

However, the evils of *Javis* were troublesome to the Court.

Automatic nullification of trial court verdicts without regard to prejudice, even in relatively small numbers, for inconsequential departures from the SJI, given the attendant inconvenience, expense, and anguish to litigants, the resultant consumption of trial and appellate judicial resources, and the attendant inefficiency and burden upon the taxpayers, is an inappropriate sanction for harmless procedural trial error.<sup>10</sup> *We are persuaded that the automatic reversal sanction of the Javis rule has accomplished its intended purpose and that its continued application is too often counterproductive of fairness.* (Emphasis added)

423 Mich at 324-25

This Court overruled *Javis* as follows:

We think an appellate court should not do so [automatically reverse] and should vacate a jury verdict only when the failure to comply with MCR 2.516 amounts to

---

<sup>19</sup> “Where there is an omission of, or deviation from an applicable and accurate SJI [Standard Jury Instruction], prejudicial error will be presumed; provided that the erroneously omitted SJI was properly requested at trial; and, provided that in those cases where error is charged as a result of a deviation from a SJI, said deviation was brought to the attention of the trial court prior to the commencement of jury deliberations.” *Javis v Ypsilanti Bd. of Ed.*, 393 Mich 689, 702-703; 227 NW2d 543 (1975).

an “error or defect” in the trial so that the failure to set aside the verdict would be “inconsistent with substantial justice.” That is the harmless error standard adopted by this Court in GCR 1963, 529 and readopted in MCR 2.613(A),<sup>13</sup> and applicable in all civil proceedings. We now hold that it is once again the applicable standard for appellate review of instructional errors, including departure from the requirements of MCR 2.516(D)(2). We will continue to require adherence to the express language of Rule 2.516. What is modified today is the standard of review for errors committed as a result of noncompliance with the rule.

423 Mich at 326

Thus, the *Corbet* case brought error in the failure to give an SJI in line with all other error in civil cases, holding that reversal would only be required when the error was not harmless; i.e., the rule of MCR 2.613 should apply.

Since then, Plaintiff has been unable to find other automatic reversal rules in Michigan civil jurisprudence, with one possible exception.

In the Child Custody Act, MCL 722.21 *et seq.*, the legislature mandates the family court to decide custody matters according to the “best interests of the child”. MCL 722.27. It then explicitly defines in MCL 722.23 eleven factors that constitute the “best interests” of the child:

Sec. 3. As used in this act, “best interests of the child” means the sum total of the following factors to be considered, evaluated, and determined by the court:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

\* \* \*

Notably, the statute itself does not state, unlike MCL 600.2955, that the court *shall* consider all the factors. But the case law quickly moved in that direction following passage of the statute, and has been remarkably consistent since. See, e.g., *Bowers v Bowers*, 190 Mich App 51; 475 NW2d

394 (1991); *Foskett v Foskett*, 247 Mich App 1; 634 NW2d 363 (2001); *Rittershaus v Rittershaus*, 273 Mich App 462; 730 NW2d 262 (2007). Although Plaintiff has found no case stating that, without exception, each and every time the trial court skips one or more factors reversal will occur, these cited cases are just a few of the numerous examples in which reversal and remand for additional findings by the court have occurred for failure to consider all of the statutory factors. This does not mean that every factor must be given equal weight. *Heid v AAA Sulewski*, 209 Mich App 587, 596; 532 NW2d 205 (1995) (“We disapprove the rigid application of a mathematical formulation that equality or near equality on the statutory factors prevents a party from satisfying a clear and convincing evidence standard of proof.”); *McCain v McCain*, 229 Mich App 123, 131; 580 NW2d 485, 489 (1998) (“*Heid*, we believe, supports – and indeed may even require – a conclusion that the statutory best interests factors need not be given equal weight. Neither a trial court in making a child custody decision nor this Court in reviewing such a decision must mathematically assess equal weight to each of the statutory factors.”). Moreover, an irrelevant factor in the Child Custody statute need not be considered so long as the trial court explains why the factor is irrelevant. *Pierron v Pierron*, 486 Mich 81, 782 NW2d 480 (2010).<sup>20</sup>

The rationale universally employed when an appellate court reverses for failure to consider factors in the child custody act is that it leaves the reviewing court without the ability to complete a review of the conclusions of law and findings of fact required of the trial court in the first place. See, e.g. *Foskett v Foskett*, 247 Mich App 1, 634 NW2d 363 (2001).

---

<sup>20</sup> It is no different in *Daubert* analysis. *Chapin v A&L Parts, Inc*, 274 Mich App 122, 137 (2007)(“...although MCL 600.2955(1) explicitly requires the trial court to consider all seven of the factors it enumerates, the statute does not require that each and every one of those seven factors must favor the proffered testimony.”);

But to the extent that this can be seen as an automatic reversal rule, it would be justified on grounds not present in *Daubert* issues. To begin with, child custody decisions are end-point decisions on the merits of the case, wherein the court, sitting without a jury, is the fact finder. Irrespective of it being a child custody matter, the court rules mandate that the court, sitting without a jury, must make explicit findings of fact and conclusions of law. MCR 2.517. Therefore, if the reviewing court allowed a family court to dispense with the requirement of considering all of the statutory factors, it would not only be in derogation of clear substantive law made by the legislature as to what constitutes the “best interests of the child”, it would be undercutting a fundamental principle of appellate review in bench cases. Further, unlike a *Daubert* hearing where the trial court is not supposed to be considering credibility determinations of individual witnesses in the first place, *Quiet Tech DC-8, Inc v Hurel-Dubois UK Ltd*, 326 F3d 1333, 1341 (CA 11, 2003), the trial court in custody matters is making determinations based very much on live witnesses that an appellate court cannot nearly so well assess. Therefore, the appellate court in a child custody matter, wherein the trial court has not considered all the statutory factors, is left to review a record at a double disadvantage: inability to assess credibility of witnesses and an incomplete record.

Given these distinctions, Plaintiff suggests that strict adherence to consideration of all the factors in child custody matter, and nearly universal remand for failure to do so, do not compel the same result here.

**3. A harmless error rule will not marginalize the mandate of the statute but will prevent needless reversals of jury verdicts**

Utilizing a harmless error rule will by no means marginalize the statute. If the trial court knows that failure to consider statutory factors that have been specifically argued and supported by the parties is going to be deemed error and that reversal will occur unless – on the record

before the Court of Appeals – it can be said that the error was harmless, that should be ample deterrent to the trial court’s disregard of the statute.

A harmless error rule would be particularly prudent in cases in which the decision below was to admit the evidence, and the verdict depended upon that evidence was rendered below. Rather than assuming the case has to be tried again on the pure procedural technicality, a reviewing court could preserve a potentially valid verdict in either of two ways: 1) it could find on the record before it that there is enough support for the expert opinion to make a ruling that any error in considering one more factors was harmless; or 2) even if the court found that it was not, because consideration of additional factors that one or both of the parties had raised might have changed the outcome, it could remand the matter for consideration of all of the factors without vacating the jury verdict below. If the trial court determined that the evidence was admissible after all, then vacating the verdict would be unnecessary. If it found otherwise, then consideration would have to be given to whether the case required dismissal for a fatal failure of proof or simply needed to be retried without the barred evidence.

**D. Application of this proposed rule to the facts of this case would lead to a  
affirmance of the Court of Appeals decision**

Because the record in this case included ample submissions by the Plaintiff supporting the admissibility of Dr. McKee’s testimony under all of the factors, it is not necessary to remand the case to the trial court for fresh consideration. The Court of Appeals did not merely find that there was an insufficient basis for judgment to rule one way or the other. It found on the material presented that Dr. McKee’s testimony was sufficiently reliable to warrant admission. In this regard it should be noted that, where the trial court said that the only literature submitted in support of Dr. McKee’s opinion was his own study that was an inexplicable and unfortunate error. Attached to Plaintiff’s response to the original motion expressly addressed to *Daubert*

were nine articles on the subject, all of which supported Dr. McKee's opinion, and most of which cited his article<sup>21</sup>. The second motion provided the court with the drug manufacturer's warning insert for the steroids and an additional article on the dangerous effects of low-dose steroids<sup>22</sup>.

The ample support for Plaintiff's expert and the initial brief addressing the remaining statutory factors contrasts with the *Clerc* case, in which neither the Court of Appeals decision nor this Court's decision suggest that there was sufficient material before the trial court addressing factors that the trial court had failed to consider to permit an appellate court to make a meaningful review. The decision of the Court of Appeals in this case shows that there is no such problem here.

### CONCLUSION

Inasmuch as the trial court's analysis could not pass muster under MRE 702 or MCL 600.2955, and given that the Court of Appeals had ample material before it to rule that the Plaintiffs proffered evidence met standards of reliability and admissibility, this case is not appropriate for Supreme Court review. There is no error to correct, and it is a poor vehicle for making a sweeping decision on the applicability of MCL 600.2955.

If the court determines to take action, however, Plaintiff submits that it should affirm the decision below, holding that:

- *Edry* does not permit a court to bypass the mandates of the *Clerc* decision if a party

---

<sup>21</sup> The articles submitted with Plaintiff's response to the *Daubert* motion are attached to the Plaintiff's Response to the Defendant's Motion for Summary Disposition as to Plaintiff's Claims Against Defendant Frederick L. Lopatin, D.O., which is attached hereto as Exhibit 3.

<sup>22</sup> The additional material supplied with the second motion for summary disposition is attached as Exhibit 4 (the manufacturer's product label) and Exhibit 5 (the survey article regarding reluctance of sports medicine physicians to prescribe Medrol Dosepaks, as were used on this case) referenced above at footnote 12.

- has raised one or more statutory factors ignored by the court and supported those arguments with substantive material;
- the standard of review applied by the Court of Appeals was correct. The appellate court should review *de novo* the process by which the trial court performed its gatekeeping function. If it finds the process appropriate, then it should review the content of the decision for an abuse of discretion, as set forth in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003) and *Maldonado v Ford Motor Co*, 476 Mich 372; 388; 719 NW2d 809, 817 (2006);
  - if a summary disposition motion has been coupled with a motion to exclude evidence under *Daubert*, the summary disposition motion should be reviewed *de novo*, though as a practical matter the outcome may be controlled by the *Daubert* decision, if the appellate court can state that, as a matter of law, the proponent of the evidence cannot sustain a claim or defense without the proffered evidence; and,
  - on the facts of this case the trial court abused its discretion by inadequately performing its gatekeeper function. Plaintiff gave the court ample support for admission of the expert testimony, both through literature that the court apparently did not realize it had and through testimony from Plaintiff's expert that cogently established the basis for his differential diagnosis. Plaintiff also invoked the statutory factors that the court refused to consider, thus making it impossible for the trial court to ignore the statute without committing error;
  - because the record before the Court of Appeals was ample to support the admissibility of Dr. McKee's testimony, remand is unnecessary and would be a waste of judicial resources.

Plaintiff looks forward to the opportunity to answer any further questions the Court may have in the MOAA.

Respectfully submitted,

SEIKALY STEWART & BENNETT, P.C.  
Attorneys for Plaintiff-Appellee

By:     /s/ Jeffrey T. Stewart      
JEFFREY T. STEWART (P24138)  
BENJAMIN J. WILENSKY (P75302)  
30445 Northwestern Hwy., Ste. 250  
Farmington Hills, Michigan 48334  
(248) 785-0102  
jts@sslawpc.com

Dated: June 30, 2015

**CERTIFICATE OF SERVICE**

---

Jeffrey T. Stewart hereby certifies that on this 30th day of June, 2015, he filed the foregoing document with the Clerk of the Court via the Court's TrueFiling system, which will automatically serve the document upon all counsel of record. The foregoing document has also been served upon the parties via U.S. Mail as follows:

Robert G. Kamenech  
PLUNKETT COONEY  
38505 Woodward Ave., Ste. 2000  
Bloomfield Hills, Michigan 48304

Donald K. Warwick  
GIARMARCO, MULLINS & HORTON, P.C.  
101 W. Big Beaver Rd., 10<sup>th</sup> Floor  
Troy, Michigan 48084

Louis Theros  
BUTZEL LONG, P.C.  
150 W. Jefferson Ave., Ste. 100  
Detroit, Michigan 48226

SEIKALY STEWART & BENNETT, P.C.  
Attorneys for Plaintiff-Appellee

By:     /s/ Jeffrey T. Stewart