2016 IL App (1st) 150301-U
No. 1-15-0301

THIRD DIVISION
August 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BEVERLY COOTE, as Special Administrator of the Estate of PHYLLIS BREVITZ, Deceased, Plaintiff-Appellant, v. MIDWEST ORTHOPAEDIC CONSULTANTS, S.C., and ROBERT ALLAN MILLER, M.D., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 09 L 5543 The Honorable Donald J. Suriano, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* judgment of the circuit court granting defendants' motions for summary judgment in a medical negligence action reversed where the court improperly precluded plaintiff's medical expert from providing standard of care and causation testimony and where the expert's testimony created a genuine issue of material fact as to whether defendants violated the applicable standard of care and caused or contributed to decedent's death.

¶ 2 Plaintiff Beverly Coote, special administrator of the estate of her mother Phyllis Brevitz, deceased, filed a medical malpractice action against defendants, Doctor Robert Allan Miller, and his employer, Midwest Orthopaedic Consultants, S.C. (Midwest Orthopaedic), alleging that

Doctor Miller was negligent in his treatment of Brevitz and that his negligence proximately caused her death. The circuit court granted defendants' motions *in limine* to bar plaintiff's expert from providing standard of care and causation testimony, finding that he was not qualified to provide such testimony. Thereafter, the court granted defendants' motions for summary judgment, reasoning that plaintiff could not prevail in her medical malpractice claim absent expert testimony. Plaintiff challenges the circuit court's judgment on appeal. For the reasons set forth herein, we reverse the judgment of the circuit court and remand for additional proceedings consistent with this disposition.

¶ 3 BACKGROUND

¶ 4 On November 24, 2003, Phyllis Brevitz, a 69-year old bus driver suffered a fall while exiting her bus, injuring both of her knees as well as her right hip and thigh. On December 2, 2003, Brevitz sought out treatment for her injuries from Doctor Miller an orthopaedic specialist employed by Midwest Orthopaedic. Doctor Miller administered cortisone injections, prescribed a pain reliever and wrote out a referral for physical therapy. Brevitz subsequently returned to Doctor Miller's office several times in December 2003 and January 2004. During that time, the pain in Brevitz's knees improved, but she still complained of significant pain in her right thigh and groin area. Doctor Miller attributed Brevitz's lingering pain to her fall.

¶ 5 On January 22, 2004, Brevitz went to the emergency room at Advocate Christ Medical Center complaining of chest tightness. She was ultimately diagnosed with a pulmonary embolism and was prescribed with anticoagulant medication. The medication, however, did not remedy her condition, and Brevitz died on January 28, 2004.

¶ 6 Thereafter, plaintiff filed a complaint and an amendment thereto, advancing claims of medical negligence against Doctor Miller and Midwest Orthopaedic. The crux of plaintiff's

claim was that Doctor Miller negligently failed to properly diagnose Brevitz with deep vein thrombosis (DVT), a blood clot within a deep vein in her right thigh, and failed to prescribe anticoagulants to treat her. As a result of Doctor Miller's failure to properly diagnose and treat Brevitz, the clot in Brevitz's thigh embolised and traveled to her lungs, which ultimately led to her death. In her amended complaint, plaintiff specifically alleged:

> "[Doctor] Miller negligently failed and violated the recognized standard of care as a continuing course of conduct from December 2003 through January 2004. Ms. Brevitz, was an elderly obese female who had fallen on November 24, 2003. She was treated by Doctor Miller throughout December 2003 and mid-January 2004. During this time period she had unrelenting pain in the leg that D[octor] Miller totally ascribed to direct trauma.
>
> a. D[octor] Miller failed to recognize, evaluate, and diagnosis [sic] the continuous, significant disabling pain in the right thigh of Ms. Brevitz that was not consistent with the fall she sustained.
>
> b. D[octor] Miller failed to diagnose that Ms. Brevitz suffered from deep vein thrombosis.
>
> c. D[octor] Miller failed to require anticoagulant therapy in the face of symptoms and complaints consistent with deep vein thrombosis (DVT).
>
> d. Further, D[octor] Miller failed to document and include her past history of DVT which required anticoagulant therapy.
>
> e. He failed to document any pertinent physical findings by examination in the office visits to assistant [sic] in establishing the potential differential diagnosis of acute fracture, radiculopathy, DVT etc.

f. D[octor] Miller failed to communicate the above to his physical therapist.

g. D[octor] Miller failed to read the physical therapy department's records and reports."

¶ 7 Doctor Miller and Midwest Orthopaedic both filed answers in which they denied plaintiff's allegations of negligence. The parties then commenced discovery. In response to defendants' interrogatory requests, plaintiff identified Doctor William C. Daniels, a board certified orthopaedic surgeon, as her expert witness.

¶ 8 During his discovery deposition, Doctor Daniels testified that he is a licensed orthopaedic specialist. He was board certified in 1976 and had an active orthopaedic practice with a "primary emphasis on total joint replacement [and] arthroscopic procedures." He also performed "reconstructive joint type surgery as well as back surgery" and treated "dozens" of patients afflicted with DVT. Doctor Daniels further testified that he subsequently retired from actively practicing medicine in 1995 because he developed arthritis and other medical issues that interfered with his ability to operate and treat patients. Thereafter, in 2003, he opened his own consulting business, Daniels Medical Consultants, Inc., and began providing consulting services on "medical-legal cases." Doctor Daniels testified that he subsequently returned to the practice of medicine in 2008 and became a consulting orthopaedic physician at the Barrier Islands Free Medical Clinic (Clinic). Since 2008, he spends one day per week at the Clinic.

¶ 9 Although he did not actively practice medicine or perform orthopaedic surgeries from 1995 to 2008, Doctor Daniels testified that he continued to read medical literature and attend educational seminars and meetings. He explained: "I maintained my continuing medical education and went to the national meetings and the various subspecialty type meetings. So I did

stay active. I did read the journals. I did read the literature, et cetera, I did all those things, but I was not seeing patients until 2008."

¶ 10 Doctor Daniels testified that after reviewing Brevitz's medical records, he believed that Doctor Miller failed to comply with the requisite standard of care during the course of his treatment of decedent. Specifically, he faulted Doctor Miller for diagnosing Brevitz with "relatively minor contusions or sprains, strain type things" and for failing to alter this initial diagnosis even though she continued to experience "severe vice-like pain and discomfort in her right groin and hip area." He explained:

> "Doctor Miller was below the standard of care in failing to appreciate and recognize the fact that [Brevitz] was having pain and discomfort in this right groin area that far exceeded what he would have normally expected with minor bruises or contusions, and did not take notice of this in his thinking, in his differential diagnosis, that this might potentially represent something more than a minor bruise or contusion. So he never made or entertained the diagnosis of deep vein thrombosis ***. So I think D[octor] Miller was below the standard of care for failing to recognize that this was a potential DVT and take any appropriate steps to rule it out or rule it in."

¶ 11 Doctor Daniels testified that he found Doctor Miller's failure to consider DVT particularly problematic given that Brevitz had a "past history of DVT." Notably, Doctor Miller diagnosed and treated Brevitz for DVT in 2000 after she underwent a total knee replacement surgery. Doctor Daniels explained: "We, as orthopaedic surgeons, know that when you get groin pain of that type and a person's at risk or they've had a major surgery or they've had a total knee replacement or things such as that, it's DVT until proven otherwise, because that's the most potential devastating diagnosis that could result in a pulmonary embolus and death." Based on

Doctor Daniels's review of Brevitz's medical records, it did not appear that DVT was ever considered following her 2003 fall. Doctor Daniels opined that that if Brevitz had been properly diagnosed with and treated for DVT in mid-December 2003, she "most probably" would have survived. When asked about the manner in which Doctor Miller should have treated Brevitz for DVT, Doctor Daniels testified that Doctor Miller should have probably referred her to "an expert in the field." Specifically, Doctor Miller could have referred Brevitz to "an internal medicine [physician], [a] hematolo[gist], maybe even a vascular surgeon, someone in the area of vessel and blood problems."

¶ 12 On cross-examination, Doctor Daniels acknowledged that he had not "managed" patients with DVT since the mid-1980's. Prior to that time, Doctor Miller testified that he would conduct diagnostic tests on patients he suspected had DVT, analyze the results, and manage DVT patients with anticoagulation medications. In the mid-1980's, however, he changed his approach and referred DVT patients to "appropriate specialist[s]" for management and treatment.

¶ 13 Based on the details that Doctor Daniels provided in his curriculum vitae and during his deposition, Doctor Miller and Midwest Orthopaedic filed motions *in limine* seeking to bar Doctor Daniels from providing standard of care and causation testimony at trial because he lacked the requisite knowledge and experience to provide such testimony. In support of its motion *in limine*, Midwest Orthopaedic argued:

> "Though D[octor] Daniels is a licensed orthopaedic surgeon, he cannot show that he is familiar with anticoagulation treatment at the relevant time, December of 2003 through January of 2004. D[octor] Daniels admitted that he has not managed patients with deep vein thrombosis or pulmonary emboli who are on anticoagulant therapy since the mid-1980s, three decades ago, choosing instead to refer to them elsewhere. In

addition to not managing patients like Ms. Brevitz since the mid-1980s, D[octor] Daniels spent several years in retirement and agreed he was inactive from 1995 to 2008, the years in question. In 2008, he returned to practice as an orthopaedic consultant at a small, free clinic in South Carolina. Though he returned to limited practice, he did not manage patients on anti-coagulation therapy or surgery ***. As such, he does not possess the requisite foundation to opine as to the standard of care for anti-coagulation management in 2003 and 2004, and is not qualified to give an opinion as to what, if any, difference earlier anti-coagulation would have made for the decedent."

¶ 14 In support of his motion *in limine* to bar Doctor Daniels from testifying, Doctor Miller similarly argued:

"Illinois jurisprudence mandates that the expert must be familiar with the methods, procedures, and treatments that similarly situated physicians as the defendant would ordinarily observe. D[octor] Daniels is in no position to offer an opinion as to the methods, procedures and treatments that an actively practicing orthopaedic surgeon would observe in his office based practice when he has not been similarly situated for 19 years. ***

D[octor] Daniels is not similarly situated to D[octor] Miller and his practice at the time at issue. D[octor] Daniels is not familiar with the methods, procedures, and treatments observed by other orthopaedic surgeons. He is now completely retired. The only medical care he has rendered in the last 2 decades, volunteering one afternoon a week at a clinic, limited to a role of consulting, does not provide him with adequate familiarity to opine about the standard of care of a full-time, active, practicing orthopaedioc surgeon, such as D[octor] Miller. D[octor] Daniels is simply not 'similarly

> situated.' To permit him to render an opinion as to the care and treatment rendered by D[octor] Miller is inequitable and contrary to the spirit of the applicable law regarding qualifications of an expert."

¶ 15 After reviewing the motions and hearing the arguments of the parties, the circuit court granted defendants' motions *in limine* to preclude Doctor Daniels from offering standard of care and causation testimony. In doing so, the court reasoned: "I have no problem saying that [Doctor Daniels] is not qualified to render opinion as to standard of care since he has not been involved in that area for decades. And I don't think there's anything that he's done since his retirement that qualifies him to render a causation opinion."

¶ 16 In light of the circuit court's ruling, defendants argued they were entitled to summary judgment because plaintiff did not have admissible expert testimony to support her negligence claim. Plaintiff's attorney agreed that he "d[id not] have a case" if Doctor Daniels's testimony was excluded, but requested the circuit court to allow him to provide an offer of proof with additional information pertaining to Doctor Daniels's familiarity with DVT patients and anti-coagulant treatment. The circuit court agreed to the request and continued the matter so that plaintiff could submit an offer of proof.

¶ 17 In plaintiff's subsequent filing, she argued that Doctor Daniels possessed the requisite familiarity with the procedures and treatments utilized by orthopaedic surgeons to provide expert testimony because his knowledge was "based not only on his training and experience but also his continuous review of peer reviewed literature, and interactions with other physicians, including orthopaedic surgeons" during his retirement. Plaintiff further argued that "the diagnosis of [DVT] is not unusual or unique; any medical professional should be competent to make the diagnosis." As such, plaintiff argued that Doctor Daniels possessed the requisite competency "to

testify that anti-coagulation therapy should have been initiated for [decedent]" and that the failure to initiate anti-coagulation therapy prior to [decedent's] admission to the hospital lessened the effectiveness of the treatment she received in the hospital and increased her risk of the unfavorable outcome."

¶ 18 After reviewing plaintiff's offer of proof and hearing additional arguments of the parties, the court reaffirmed its decision that Doctor Daniels did not satisfy the requisite foundational elements to testify as an expert. The court explained:

> "[T]he evidence I have here before me is that he hasn't even treated these type of patients with DVT since sometime in the late '80s and that he totally retired from the practice of medicine in 1995, that he did nothing after that except that he would read some literature and talk to doctors. I don't think that's practicing in the area. I don't think he's familiar with the—particularly with the standard of care, I don't think he can opine as to what the standard of care was for a doctor in his situation, and then 2004, since he was retired in 1995, totally retired. He came back in 2008. I still don't think that made him familiar with causation, but I think it's very clear that this doctor cannot testify as to the standard of care during the, what is it, 2004 is when this incident occurred."

¶ 19 Thereafter, the court granted defendants' oral motions for summary judgment because there was no dispute that plaintiff would be unable to prove her case absent expert testimony.

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 On appeal, plaintiff argues that the circuit court erred in finding that Doctor Daniels lacked the requisite familiarity with DVT diagnosis and treatment to provide standard of care and

causation testimony. She argues that "the methods, procedures, and treatment for [decedent's] condition have been established, unchanged, for the past thirty years." Accordingly, although he had been retired during the time that Doctor Miller treated the decedent, plaintiff argues that Doctor Daniels remained familiar with the requisite standard of care and the treatment methods and procedures applicable to DVT patients.

¶ 23 Defendants respond that the circuit court properly barred Doctor Daniels from providing causation and standard of care testimony because he did not meet the necessary foundational requirements to provide admissible expert testimony. They emphasize that Doctor Daniels has not managed DVT patients or administered anticoagulation treatments since the 1980s. Given his lack of training and experience with DVT patients and DVT treatments, defendants argue that the circuit court properly found that Doctor Daniels did not possess the qualifications necessary to testify about the use and effect of anticoagulation medication on DVT patients or the applicable standard of care.

¶ 24 As a threshold matter, we note that plaintiff categorizes her appeal solely as a challenge to the circuit court's order granting summary judgment in favor of defendants. The court's summary judgment order, however, was predicated on its earlier finding that plaintiff's expert was not qualified to provide expert testimony about the applicable standard of care and Doctor Miller's breach thereof. The court reasoned that plaintiff could not prevail on her negligence claim without a qualified expert to substantiate her claim. Accordingly, we first necessarily address the circuit court's decision to grant defendants' motions *in limine* and bar Doctor Daniels from testifying. See *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 4 (2007).

¶ 25 As part of its inherent authority to admit or exclude evidence, the circuit court is afforded broad discretion to grant or deny motions *in limine*. *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 124. A circuit court's ruling on a motion *in limine* will not be disturbed absent an abuse of discretion. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008); *Alm*, 373 Ill. App. 3d at 4. The abuse of discretion standard is the most deferential standard of review (K*ayman v. Rasheed*, 2015 IL App (1st) 132631, ¶ 68) and as such, a ruling will only been deemed an abuse of discretion where it is unreasonable and arbitrary or where no reasonable person would take the view adopted by the circuit court (*Petraski v. Thedos*, 382 Ill. App. 3d 22, 27 (2008); *Bangaly, v. Baggiani*, 2014 IL App (1st) 123760, ¶ 157).

¶ 26 To prevail on a medical negligence claim, it is incumbent upon the plaintiff to establish: (1) the standard of care against which the medical professional's conduct is to be measured; (2) a negligent failure by the medical professional to comply with that standard of care; and (3) that the medical professional's negligent conduct proximately caused the injuries that the plaintiff seeks to redress. *Neade v. Portes*, 193 Ill. 2d 433, 443-44 (2000); *Purtill v. Hess*, 111 Ill. 2d 229 241-42 (1986); *Wiedenbeck v. Searles*, 385 Ill. App. 3d 289, 292 (2008). Unless the medical professional's negligence is so grossly apparent or the treatment at issue is so common that it is considered to be within the common knowledge of a layperson, expert medical testimony is required to establish the applicable standard of care and the medical professional's deviation therefrom. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112 (2004); *Purtill*, 111 Ill. 2d at 242.

¶ 27 As a general rule, "[a] person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions." *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006). With respect to medical expert testimony in particular, there are two foundational

requirements: "the health-care expert witness must be a licensed member of the school of medicine about which the expert proposes to testify" and "the expert must be familiar with the methods, procedures and treatments ordinarily observed by other healthcare providers in either the defendant's community or a similar community." *Sullivan*, 209 Ill. 2d at 114-15 (citing *Jones v. O'Young*, 154 Ill. 2d 39, 44 (1992), citing *Purtill*, 111 Ill. 2d at 242-43). These "foundational requirements provide the trial court with the information necessary to determine whether an expert has expertise in dealing with the plaintiff's medical problem and treatment." *Jones*, 154 Ill. 2d at 43. Once these foundational elements are met, the circuit court is afforded the discretion to allow the healthcare professional to provide testimony about the applicable standard of care (*Willaby v. Bendersky*, 282 Ill. App. 3d 383 (2008)) and the court's decision will not be reversed absent an abuse of discretion (*Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006); *Bangaly*, 2014 IL App (1st) 123760, ¶ 157).

¶ 28 Here, there is no dispute that Doctor Daniels holds a valid medical license. Accordingly, the first foundational element is satisfied. Upon review, we find that the second foundational element is also satisfied. Doctor Daniels became board certified in 1976 and performed a number of different types of orthopaedic procedures until his early retirement in 1995. During the time that he was actively practicing, Doctor Daniels encountered "dozens" of patients with DVT. He routinely referred DVT patients to specialists to receive anticoagulation treatment. Although defendants argue that Doctor Daniels has not actively diagnosed and treated DVT patients with anticoagulation medication since the 1980s, we note that based on the literature that plaintiff submitted with her offer of proof, DVT is a basic medical condition and its diagnosis and treatment has not changed in 30 years. Indeed, Doctor Daniels's deposition testimony established that he remained eminently familiar with the condition and the requisite treatment

notwithstanding his early retirement from the practice of medicine. In his deposition, Doctor Daniels testified that decedent exhibited a number of symptoms that were consistent with DVT. Specifically, she experienced "severe, vice-like pain and discomfort in her right groin and hip area" from the time of her fall to the time of her death. He explained that the level of Brevitz's pain and the location of her pain were consistent with DVT. As such, the fact that Doctor Miller attributed Brevitz's lingering pain to minor sprains and strains was unreasonable. Doctor Daniels further testified that Doctor Miller's failure to consider and diagnose Brevitz with DVT was particularly egregious in light of her "past history with DVT." He noted that Doctor Miller had previously treated Brevitz for DVT following a knee replacement procedure 2000. As a result, it was unreasonable for Doctor Miller to fail to consider DVT following Brevitz's 2003 fall. Doctor Daniels explained: "We as orthopaedic surgeons know that when you get [a patient with] groin pain of that type and a person's at risk, *** it's DVT until proven otherwise." Doctor Daniels further opined that Brevitz would have "probably" survived if Doctor Miller had made the proper diagnosis and treated her accordingly.

¶ 29 Based our review of the record, we find that Doctor Daniels possesses the requisite knowledge and familiarity with the methods, procedures and treatments at issue in this case to provide expert testimony. As such, we conclude that the circuit court abused its discretion in granting defendants' motions *in limine* to bar him from testifying. Because the circuit court's entry of summary judgment resulted from its error in barring plaintiff's expert, we reverse the judgment of the circuit court and remand for additional proceedings consistent with this disposition. See, *e.g.*, *Rock v. Pickleman*, 214 Ill. App. 3d 368, 377 (1991) (reversing the circuit court's summary judgment order where it was a direct result of the court's error in striking the plaintiff's medical expert).

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court is reversed and the cause is remanded for additional proceedings.

¶ 32 Reversed and remanded.