2017 IL App (4th) 170242-U

NO. 4-17-0242

FILED
December 28, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FIRST BANKERS TRUST COMPANY, INC., as Guardian of the Estate of DRAMARA S. SIVELS, JR., a Disabled Minor; and DRAMARA S. SIVELS, JR., by His Parents and Next Friends, MORGAN C. ALLIN and DRAMARA SIVELS, SR.,	)	Appeal from Circuit Court of Sangamon County No. 15L97
Plaintiffs-Appellants,	)	
v.	)	Honorable
KOKE MILL MEDICAL ASSOCIATES, LLC,	)	John M. Madonia,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The doctrines of *res judicata* and collateral estoppel do not bar plaintiffs' negligence action against a physician's employer.

(2) The trial court did not abuse its discretion in finding the prejudicial impact of expert testimony by a nurse practitioner outweighed its probative value in this case involving physician negligence.

(3) The trial court did not err in denying plaintiffs' motion for a new trial based on an expert's false testimony he was board certified in his specialty; the expert witness was cross-examined on the issue and the jury was aware of the dispute.

¶ 2 In April 2015, plaintiffs, First Bankers Trust Company, Inc., as guardian for the estate of Dramara S. Sivels, Jr. (D.J.), and D.J.'s parents, Dramara S. Sivels, Sr., and Morgan C. Allin, filed a complaint against defendant, Koke Mill Medical Associates, LLC (Koke Mill).

Plaintiffs alleged Koke Mill's employee and agent, Dr. Cara Vasconcelles, negligently caused severe and permanent brain damage to D.J. After a trial, the jury found in favor of Koke Mill.

¶ 3 On appeal, plaintiffs argue (1) the trial court erroneously limited the testimony of their nurse-practitioner expert, and (2) they are entitled to a new trial because one of Koke Mill's expert witnesses testified falsely regarding his board-certification status. Koke Mill disputes plaintiffs' contentions and further argues plaintiffs' suit is barred by *res judicata* and collateral estoppel. We affirm.

¶ 4 I. BACKGROUND

¶ 5 D.J. was born at 1:46 a.m. on April 6, 2007, at Memorial Medical Center (MMC). At 11 a.m. the following day, Cara Vasconcelles, M.D., an employee of Koke Mill, ordered D.J.'s discharge. On April 8, 2007, D.J.'s parents returned D.J. to the hospital. D.J. suffered from an infection, which caused him to be permanently disabled.

¶ 6 At the center of this dispute is Dr. Vasconcelles's decision to discharge D.J. before he was 48 hours old. At the time of trial, the policy statement by the American Academy of Pediatrics Committee on Fetus and Newborn recommended a stay longer than 48 hours when the newborn experiences complications:

> "It is recommended that the following minimum criteria be met before any newborn discharge. It is unlikely that fulfillment of these criteria and conditions can be accomplished in <48 hours. If discharge is considered before 48 hours, it should be limited to infants who are of singleton birth between 38 and 42 weeks' gestation, who are of birth weight appropriate for gestational age,

and who meet other discharge criteria as follows:

> 1. The antepartum, intrapartum, and postpartum courses for mother and infant are uncomplicated." Pediatrics, Vol. 113, No. 5, 1434 (May 2004).

¶ 7 At trial, plaintiffs argued Dr. Vasconcelles breached the standard of care when she discharged D.J. before the 48-hour period expired as D.J. experienced multiple complications after his birth.

¶ 8 A. Plaintiffs' Suit Against MMC

¶ 9 In August 2011, plaintiffs filed a negligence complaint against 12 defendants, including MMC, Koke Mill, and Dr. Vasconcelles. In early April 2015, the trial court, on plaintiffs' motion, dismissed Koke Mill and Dr. Vasconcelles. Plaintiffs' claim continued against one defendant, MMC.

¶ 10 In their complaint, plaintiffs alleged D.J. was born "in a depressed state." He was "lethargic," "nursed poorly," and had "episodic flaring of nostrils with respiration." Before his discharge from MMC, D.J. did not eat for 12 or more hours. During another period before discharge, D.J. did not feed for nine or more hours. At approximately 7:30 a.m. on April 7, 2007, D.J. vomited. At 11 a.m., Dr. Vasconcelles examined D.J. and ordered his discharge.

¶ 11 According to plaintiffs, at D.J.'s discharge, MMC personnel provided D.J.'s parents with several phone numbers to call if they had any questions or concerns. MMC discharged D.J. at approximately 12:40 p.m. on April 7, 2007. Around four hours later, D.J.'s parents called the phone number for the family maternity suites at MMC. They informed a nurse "D.J. was lethargic, eating very poorly, if at all, vomiting and had started to turn yellow." The

nurse did not tell D.J.'s parents to seek immediate medical care. The nurse told D.J.'s parents he was "slightly jaundiced even before he was discharged" and advised they put D.J. near the window "to get some sunlight." Late afternoon the following day, D.J.'s parents made additional calls to MMC regarding D.J.'s condition. During one call, a nurse said to call D.J.'s pediatrician. D.J.'s parents followed the instruction. A short time later, a nurse from St. Louis Children's Hospital in St. Louis, Missouri, contacted D.J.'s parents. The nurse directed D.J.'s parents to take D.J. to the hospital. The parents complied, taking D.J. to MMC's emergency room, where D.J. was diagnosed with possible sepsis. D.J. was transferred to St. John's Hospital in Springfield, Illinois. There, he was diagnosed with group B streptococcus, which led to D.J.'s development of meningitis and permanent disability.

¶ 12 In April 2015, a jury trial was held on two counts of negligence. In count I, plaintiffs alleged MMC's nursing staff failed to (1) recognize and appreciate the severity of D.J.'s respiratory distress, feeding difficulties, and blood-glucose levels; (2) use the chain of command to prevent D.J.'s discharge; and (3) advise D.J.'s parents during the April 7, 2007, phone call to seek further immediate medical attention. In count II, plaintiffs alleged MMC breached its duty of care by failing to have a discharge policy for newborns that adhered to the guidelines for perinatal care.

¶ 13 At the April 2015 trial, the trial court granted summary judgment for MMC on count II and entered a directed verdict for MMC on plaintiffs' count I claim MMC prematurely discharged D.J. because of the nurses' failure to employ the chain of command. Neither of these rulings was challenged on appeal. *First Bankers Trust Co. Inc. v. Memorial Medical Center*, 2016 IL App (4th) 150603-U, ¶ 12. After trial, the jury found in MMC's favor. Plaintiffs

appealed, challenging only the jury verdict. *Id.* ¶¶ 32, 40. We affirmed. *Id.* ¶ 50.

¶ 14 B. Plaintiffs' Suit against Koke Mill

¶ 15 On April 22, 2015, plaintiffs filed a negligence complaint against Koke Mill. The complaint asserted the same allegations regarding D.J.'s condition as alleged in plaintiffs' complaint against MMC. Dr. Vasconcelles examined D.J. and ordered his discharge at approximately 11 a.m. on April 7, 2007. Plaintiffs asserted Koke Mill and Dr. Vasconcelles owed D.J. "the duty to possess and apply the knowledge and use the skill and care of a reasonably careful physician practicing under the same or similar circumstances." Plaintiffs alleged Dr. Vasconcelles breached that duty when she, despite D.J.'s complicated postpartum course, discharged him before 48 hours of life.

¶ 16 1. *Koke Mill's Motion To Dismiss on* Res Judicata *and Collateral Estoppel*

¶ 17 In July 2015, Koke Mill moved to dismiss plaintiffs' complaint, asserting the lawsuit was barred by the doctrines of collateral estoppel and *res judicata*. Koke Mill emphasized Dr. Vasconcelles's decision to discharge D.J. "was an issue actually litigated and an essential element of [p]laintiff[s'] 'chain of command' claim" against MMC. On October 5, 2015, the trial court denied Koke Mill's motion, finding the issues subject to litigation in both cases were not identical: "the ruling that was applied by the Court in 11L184 did not concisely address the Court's finding to make it a final decision on the merits that would preclude the [p]laintiff[s] from raising the issue in this case."

¶ 18 2. *Mistrial*

¶ 19 Trial began on plaintiffs' complaint in September 2016. On September 19, 2016, after plaintiffs presented the bulk of their case, Koke Mill presented an affidavit signed by Dr.

Stanford Shulman, its pediatric-infectious-disease expert. In the affidavit, Dr. Shulman observed he was scheduled to testify on Tuesday, September 20, 2016, but had surgery on September 17, 2016, for a small bowel obstruction. Dr. Shulman averred he had been advised to remain bedridden and housebound for at least two weeks. Over plaintiffs' objection, the trial court ordered a mistrial and set a new trial date.

¶ 20 3. *The Trial Court's Decision To Limit Camille DiCostanzo's Testimony*

¶ 21 Plaintiffs disclosed Camille DiCostanzo, an Illinois licensed neonatal nurse practitioner, as a Rule 213(f)(3) hired expert witness (Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007)). DiCostanzo testified that, over her 44-year career, she provided nursing care for 20,000 to 30,000 newborns. In plaintiffs' action against MMC, DiCostanzo testified regarding the nursing standard of care and opined MMC's nurses violated that standard. *First Bankers Trust*, 2016 IL App (4th) 150603-U, ¶ 24. In this case, plaintiffs offered DiCostanzo to review D.J.'s newborn course for the jury and explain signs and symptoms normal for a newborn versus signs and symptoms that are complications. DiCostanzo would be plaintiffs' first witness.

¶ 22 The trial court's decision to limit DiCostanzo's testimony followed a lengthy debate during multiple hearings.

¶ 23 a. August 25, 2016, Pretrial Hearing

¶ 24 Koke Mill moved to bar DiCostanzo's testimony, arguing plaintiffs' case involved Dr. Vasconcelles's conduct, not the conduct of a nurse. Plaintiffs responded, stating they wanted to call DiCostanzo "to talk about just the nursing care, *** entries about feeding, entries about sleepiness and also what the standard of care would require if DJ had been kept." The trial court agreed with plaintiffs' statement they should be able to call the witnesses they

want "[a]s long as [plaintiffs'] witnesses are going to provide relevant, probative testimony that isn't outweighed by any prejudicial impact." The court concluded "I'm going to allow them to call her subject to renewed objection after I have reviewed this."

¶ 25 b. September 9, 2016, Pretrial Hearing

¶ 26 Three days before trial, before the mistrial, Koke Mill orally moved to bar all testimony from DiCostanzo. Koke Mill argued there is nothing to which DiCostanzo could testify that was not cumulative or barred. Koke Mill emphasized the trial court and the parties already agreed DiCostanzo could not testify regarding either the nurses' or the pediatrician's standard of care or causation. Koke Mill further stated plaintiffs were presenting multiple experts to educate the jury about D.J.'s chart. Koke Mill maintained it could see no other reason DiCostanzo was testifying except to challenge the conduct of the nurses.

¶ 27 Plaintiffs responded DiCostanzo would go through the chart and explain "positive pressure ventilation" and they had a right to put on their case. Plaintiffs argued DiCostanzo would say "if those things happened *** the nurses would have called Dr. Vasconcelles." Plaintiffs assured the court DiCostanzo would not opine regarding Dr. Vasconcelles's standard of care.

¶ 28 The trial court determined DiCostanzo would testify, but limited DiCostanzo's testimony. The court noted "[w]e will be on high alert for objectionable material coming from that witness stand when she's there."

¶ 29 c. September 14, 2016, Pretrial Hearing

¶ 30 After opening statements, Koke Mill argued to the trial court plaintiffs mentioned in their statement DiCostanzo would testify regarding the nurses' standard of care. The trial

court, in addressing Koke Mill's argument, concluded plaintiffs should be afforded some leeway to address what the nurses would have done had D.J. not been discharged and had D.J. experienced the additional breastfeeding problems, jaundice, and vomiting in the hospital. The court found the nursing expert could say the nurses would have charted it and brought those symptoms to the attention of a doctor to bolster their position D.J. would have been in a better position had he remained in the hospital for 48 hours.

¶ 31 Koke Mill responded plaintiffs were attempting to criticize nurses exonerated in plaintiffs' case against MMC. The following discussion occurred:

> "[PLAINTIFFS' COUNSEL]: Judge, briefly, she's not going to criticize the nurses at all. She's not going to say that based on her experience as a nurse – neonatal nurse practitioner the child should not have been discharged, none of that. That's not – absolutely – now, the jury maybe can draw that conclusion at the end of the case, I hope they do, but she's going to go through the chart, just like I – just like I said and talk about the meaning of those things in the chart.
>
> THE COURT: Oh, boy.
>
> [DEFENSE COUNSEL]: And that – the more he talks, Judge, the more we get the motive of what he's doing with this witness.
>
> [PLAINTIFFS' COUNSEL]: That was disclosed, Judge, in the 213.

> THE COURT: I don't see how she's going to do that because that is backdooring and criticizing the doctor for sure, no doubt. That is exactly what she is trying to do. She's going to go through the chart and talk about all the things that Dr. Martin talked about yesterday—this, this, this, and this. And so this child would have had these tests run. I am not in any way doing that."

¶ 32 The trial court further explained it had believed DiCostanzo would testify to what the nurses would have done had D.J. remained in the hospital until 5 p.m. Plaintiffs' counsel stated "different expertises" can talk about complications. The trial court noted to permit DiCostanzo, a nurse practitioner, to testify regarding complications, results in "leaving this jury with the impression that this nurse practitioner has just criticized the heck out of the decision to discharge this child."

¶ 33 Plaintiffs' counsel asserted DiCostanzo should be permitted to testify as Jan Oesterreich, the nurse who discharged D.J., would be testifying as well. Oesterreich would testify D.J. was healthy, but DiCostanzo would not be able to counter that testimony.

¶ 34 The trial court concluded it would permit DiCostanzo to testify. The court held it would permit her to go through the charts but held it would not "tolerate one question that anywhere remotely resembles a direct criticism of anyone's conduct."

¶ 35 After the trial court concluded it would allow DiCostanzo to testify, plaintiffs' infectious disease expert, Dr. Mark Schleiss, testified. Dr. Schleiss questioned Dr. Vasconcelles's decision to discharge D.J. At the conclusion of the direct examination, the court revisited the question of whether to permit DiCostanzo to testify and concluded the prejudicial

impact of DiCostanzo's testimony outweighed its probative value. The court barred DiCostanzo from discussing D.J.'s chart:

> "I simply just said she can testify to all that stuff that I didn't think was relevant just to educate this jury. But the real problem with that is especially after hearing Dr. Schleiss testify is now—after he's gone through that entire chart and pointed out all these complications, now we're going to have a nurse do it leaving this jury with the ability even if she doesn't say a standard of care was violated, just pointing out all these complications, just leaving for a nurse—or leaving for the jury to infer that a nurse who doesn't have the training that a pediatrician has, if a nurse can even see these complications, then the jury can think, well, why wouldn't a pediatrician see these complications?
>
> And why would the pediatrician make this decision when a nurse has clearly identified all of this in? That is such a prejudicial impact and I've got to think it outweighs the probative value of her reintroducing all of these complications in the chart to this jury leaving [it] with that potential. So I didn't like my ruling when I made it. I've considered it a lot more carefully now, especially after hearing Dr. Schleiss, and I think in fairness the prejudicial impact of this nurse going over that chart again pointing out all these complications to this jury as a nurse when this issue has

already been decided about the nurses' care really serves to prejudice the defense to a point where I've – you can do an offer of proof but I'm not going to allow her to testify about these charts, counsel."

¶ 36 d. Offer of Proof

¶ 37 Plaintiffs presented an offer of proof showing DiCostanzo would testify regarding D.J.'s signs and symptoms from birth until his discharge. DiCostanzo would review the hospital chart and testify the signs and symptoms experienced by D.J. were complications.

¶ 38 4. *Jury Trial*

¶ 39 a. Plaintiffs' Motion To Bar Oesterreich From Testifying

¶ 40 The retrial began on October 24, 2016. Plaintiffs moved the court to bar Oesterreich from testifying regarding D.J.'s course from birth until the time she examined D.J. before his discharge. Plaintiffs argued, as a matter of fairness, Oesterreich's testimony should be barred. On October 27, 2016, the trial court heard extensive debate on the issue and concluded Oesterreich, who observed D.J. before discharge and talked to the parents, would be permitted to testify:

"But [Oesterreich] [had] direct contact with this child and the parents, sees this child, may be the last one to see this child before this child absolutely leaves the hospital. I think there is an absolute difference between the testimony of Oesterreich as [a Supreme Court Rule 213(f)(2) (eff. Jan 1, 2007)] treatment provider than there is with DiCostanzo, a retained expert witness,

whose responsibilities would be to criticize the decision to discharge this child when it was discharged based on her testimony of all the complications that are in that chart in her opinion. [And] her opinion is limited to that of a reasonable nurse operating in that capacity."

¶ 41 b. Trial Testimony

¶ 42 Plaintiffs presented the testimony of multiple retained expert physicians on D.J.'s condition and the onset of meningitis. Dr. Jill Maron, board certified in pediatrics and neonatal medicine and an associate professor at Tufts Medical Center in Boston, Massachusetts, testified the standard of care required babies to remain in the hospital 48 hours after birth unless they experienced "no complications whatsoever" and looked well. Complications that should have prevented D.J.'s early discharge include the fact D.J.'s mother had bacterial vaginosis and gonorrhea late in her pregnancy. D.J. required resuscitation at birth, which caused him to remain at high risk for later deterioration. The fact D.J.'s resuscitation fell into the 1% of babies who need aggressive resuscitation was also a complication. That D.J.'s resuscitation involved two minutes of positive pressure ventilation placed D.J. at a higher risk of complications. Other complications included D.J.'s slightly elevated respiratory rate and nasal flaring. Dr. Maron concluded all but two of the 16 signs and symptoms plaintiff identified at trial were complications. Dr. Maron opined Dr. Vasconcelles violated the standard of care by discharging D.J. at 11 a.m.

¶ 43 Dr. Gilbert Martin, a pediatrician with a subspecialty in perinatal/neonatal medicine, testified for plaintiffs. Dr. Martin testified he was a member of the Committee on

Fetus and Newborn with the American Academy of Pediatrics when the policy statement was drafted. Dr. Martin testified he reviewed the depositions in the case as well as D.J.'s chart. Plaintiffs presented Dr. Martin with hypothetical situations and asked him to state whether he believed those situations were considered complications under the American Academy of Pediatrics policy in effect in 2007. Dr. Martin opined "not breathing at birth" and "not breathing to the point where the baby needs bag and mask ventilation" were complications. Other complications included low glucose levels in the first 4 hours of life, supplemental oxygen, not eating for more than 13 hours after birth, not eating for another 10 hours, and vomiting. Dr. Martin opined in the hypothetical situation where all of these signs were present, the course would be considered complicated and any baby experiencing those complications should not be discharged before 48 hours.

¶ 44 Dr. Mark Schleiss, a pediatrician with a subspecialty in pediatric infectious diseases, testified he reviewed Morgan's prenatal records, her MMC chart from the birth of D.J., and D.J.'s MMC chart. Dr. Schleiss testified he reviewed the deposition testimony of Dr. Maron and Dr. Martin. Dr. Schleiss testified to what the chart said regarding D.J.'s condition after birth. According to the chart, D.J. required resuscitation at birth. This was a "red flag" indicating the physician needed to be "careful and cautious." D.J.'s one-minute Apgar score was a three. The five-minute Apgar score was a nine, indicating he was successfully resuscitated, but "depressed a little bit at birth." Dr. Schleiss opined D.J.'s respiratory rate was elevated and not normal. Elevated rates may be a sign of infection. Dr. Schleiss discussed D.J.'s glucose level, vomiting, and feeding behavior.

¶ 45 As part of its case, Koke Mill called Oesterreich to testify. According to

Oesterreich, she was the discharge nurse for D.J. on April 7, 2007. As a discharge nurse, Oesterreich, using a discharge form, would discuss reasons to call the baby's physician or reasons to call the mother's physician. They would also discuss what to watch for to insure the baby is eating sufficiently. Oesterreich would also ask if the parents had questions. Oesterreich would also make a final assessment of the baby. She would run her hand over the baby's head to look for anything abnormal. She would listen to the baby's heart and lungs. If there had been an issue regarding the newborn's temperature, Oesterreich would take an axillary temperature. Oesterreich would visually inspect the color of the child's skin and muscle tone. Oesterreich would also see how the baby reacted to her examination.

¶ 46 Oesterreich testified the discharging physician often performs his or her examination in the nursery where there is better lighting. Oesterreich testified she had probably been the discharge nurse for approximately 5000 babies. She knew the difference between a healthy baby ready to go home and one that was not.

¶ 47 Oesterreich reviewed the chart regarding D.J.'s discharge for the jury. The information in D.J.'s chart, in her handwriting, shows D.J. was a healthy baby ready to go home with his parents. D.J.'s color was pink. His temperature was stable in an open crib. D.J. was stooling and voiding. He appeared to be breast-feeding effectively and had minimal bleeding from his circumcision. Oesterreich said if anything in the baby's history was abnormal, she would have indicated it in the discharge note.

¶ 48 On cross-examination, Oesterreich agreed, before performing her duties as a discharge nurse, she knew Dr. Vasconcelles reviewed the chart and ordered D.J.'s discharge. She agreed with plaintiffs' counsel's statement "there's some comfort there to you knowing that ***

a doctor has looked through the whole chart." When Oesterreich went through charts, she would check the nurses' notes regarding the vital signs and, if there was something the doctor should have addressed, look at doctor notes. Oesterreich agreed, before discharging D.J., she did not "go over the chart from A to Z."

¶ 49 Plaintiffs' counsel then questioned Oesterreich whether she agreed babies who required positive-pressure ventilation and bag-mask ventilation were at a higher risk for recurrent deterioration. Oesterreich agreed those babies were at a higher risk for developing subsequent complications. Oesterreich further agreed positive pressure-ventilation was usually effective within 30 seconds and D.J. had undergone two minutes of that ventilation. Plaintiffs' counsel further asked Oesterreich questions regarding whether jitteriness would require a glucose examination. Plaintiffs' counsel questioned Oesterreich whether feedings and vomiting were complications.

¶ 50 On redirect examination, the following questions and answers occurred:

> "Q. Now, counsel you asked a question about Dr. Vasconcelles and if Dr. Vasconcelles was the discharging pediatrician, would that have given you comfort. Do you remember some of the questions he asked you at the very beginning?
>
> A. Yes.
>
> Q. And you said yes. Why would you, back in April of 2007, in your role as the discharging nurse for D.J., be comforted

knowing that Dr. Vasconcelles had done her own discharge examination, approved D.J. for discharge?

A. I have done and continue to do discharge exams with Dr. Vasconcelles, so even if I wasn't there when she did the exam, I know her routine, and I know that if she had questions about anything, she would have asked whoever was helping her. And if I had a question, I would not hesitate one bit to call her and say, ['']Did you notice this or did you see this[?'']. So, I feel like I have a good personal, professional, working relationship with her.

* * *

She does a very thorough assessment of a baby. So, if she, in her clinical judgment, thought the baby did not look jaundiced, thought that the feedings, just by looking at the chart, were going well, I would have to agree with her. I just know her exams and what she goes through with a baby and the chart to look at for discharge."

¶ 51 At trial, Koke Mill called Dr. Stanford Shulman as its pediatric and pediatric-infectious-disease retained expert. During direct examination, Dr. Shulman testified he was board certified in pediatric infectious disease. He further testified his curriculum vitae (CV) was "up-to-date" as of December 2015. The CV lists Dr. Shulman as chief of the division of infectious diseases at Ann & Robert H. Lurie Children's Hospital of Chicago.

¶ 52 Before beginning cross-examination, plaintiffs informed the court they had

evidence showing Dr. Shulman misrepresented his board-certification status. Plaintiffs emphasized Dr. Shulman was informed of the documents showing he was not board certified at his deposition. Dr. Shulman "threw it back" at counsel and said it must be wrong. Defense counsel replied plaintiffs should not state Dr. Shulman was lying, but let him explain it. The trial court agreed and said: "We'll let you cross-examine him. Do you think his testimony needs to be stricken in some way?" Counsel responded, "No. No, I just want to just call it to his attention." The court told plaintiffs' counsel he "absolutely" had "every right to *voir dire* [Dr. Shulman's] expertise."

¶ 53 During cross-examination, plaintiffs' counsel pointed out these errors to Dr. Shulman. When questioned about the error in the CV, Dr. Shulman apologized, stated he was "not happy about that," and attributed the mistake to "a secretarial problem." Dr. Shulman also testified it was "110 [%] correct" he was board certified in pediatric infectious disease. After plaintiffs' counsel showed Dr. Shulman the "Verification of Certification" pages from the American Board of Pediatrics, showing Dr. Shulman did not hold a certificate in pediatric infectious diseases, Dr. Shulman testified it was "nonsense" he was not board certified. Dr. Shulman stated he accessed the American Academy of Pediatrics website in early October, which showed he was certified in his specialties. Plaintiffs further presented Dr. Shulman with an affidavit from the chief legal officer of the American Board of Medical Specialties, showing Dr. Shulman's certification expired on December 31, 2015. Dr. Shulman acknowledged "[t]hat's what the document says," but insisted his document indicated he was board certified in pediatric infectious disease.

¶ 54 On redirect examination, Dr. Shulman testified the website with the Illinois

Department of Financial and Professional Regulation, checked the day of his testimony, indicates he was board certified in pediatrics and pediatric infectious disease. Plaintiffs did not move to strike Dr. Shulman's testimony.

¶ 55 Ten days after testifying in this case, Dr. Shulman testified in a discovery deposition in an unrelated case. At that deposition, Dr. Shulman was asked about his board-certification status for pediatrics and pediatric infectious disease. Plaintiffs on appeal quote language from that discussion, which follows:

> "Q. *** You testified in a trial on November 1st downstate, and that's where that became knowledge to you that you were not actually currently board certified, true?
>
> A. Well, it's complicated. That's not exactly right.
>
> Q. Okay, tell me how I'm incorrect.
>
> A. So, I testified that to my knowledge, I was board certified, and the firm was able – who had hired me accessed the website of the American Board of Medical Special[ties] which indicated and still indicates that I am actively board certified. So, that's the situation. At that time, it was quite ambiguous, and I've since tried to research this and identified that the American Board of Pediatrics considers me to have an expired certification as of some date in December of last year related to MOC activities which they consider maintenance of certification activities."

¶ 56 The jury returned a verdict for Koke Mill. In December 2016, plaintiffs filed a

motion for a new trial under section 2-1202 of the Code of Civil Procedure (735 ILCS 5/2-1202 (West 2016)). The trial court denied the motion. This appeal followed.

¶ 57 II. ANALYSIS

¶ 58 A. *Res Judicata* and Collateral Estoppel

¶ 59 Koke Mill contends plaintiffs' lawsuit should have been dismissed based on *res judicata* and collateral estoppel. According to Koke Mill, plaintiffs improperly split their claims against MMC and itself into two separate lawsuits. Koke Mill further asserts the final judgment in plaintiffs' action against MMC precludes a judgment on the merits in this case.

¶ 60 Plaintiffs argue it did not engage in improper claim splitting. Plaintiffs initially contend Koke Mill's claim fails because both doctrines of *res judicata* and collateral estoppel require identical parties or privies and that element is not satisfied here. According to plaintiffs, the first action was a claim based on nurse negligence and the second was a claim based on physician negligence. Plaintiffs further note the issue of Dr. Vasconcelles's negligence was not resolved on the merits. Plaintiffs emphasize the trial court entered a directed verdict not by finding Dr. Vasconcelles was not negligent but by finding no evidence that invoking the nursing chain of command would have prevented D.J.'s brain injury.

¶ 61 The doctrines of *res judicata* and collateral estoppel are similar. The equitable doctrine of *res judicata* is designed to prevent multiple lawsuits between the same parties on the same issues. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 44, 28 N.E.3d 727. The doctrine applies when "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889 (1998).

Collateral estoppel precludes relitigation of the same issue. *Simcox v. Simcox*, 131 Ill. 2d 491, 496, 546 N.E.2d 609, 611 (1989). Collateral estoppel applies when "(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication." *Gumma v. White*, 216 Ill. 2d 23, 38, 833 N.E. 2d 834, 843 (2005). We review questions regarding the applicability of *res judicata* and collateral estoppel *de novo*. *Lutkauskas*, 2015 IL 117090, ¶ 43, 28 N.E.3d 727 (*res judicata*); *In re A.W.*, 231 Ill. 2d 92, 99, 896 N.E.2d 316, 321 (2008).

¶ 62 We agree with plaintiffs' first contention: the parties or privies in both actions are not identical. The parties are not the same. The defendant in this action, Koke Mill, is the employer and principal of Dr. Vasconcelles, a physician. MMC, the defendant in the first action, is the employer and principal of the nurses. The parties are also not privies. For purposes of *res judicata*, "privies" include parties who adequately represent the same legal interests. See *Altair Corp. v. Grand Premier Trust & Investment, Inc.*, 318 Ill. App. 3d 57, 63, 742 N.E.2d 351, 357 (2000); see also *Lutkauskas*, 2015 IL 117090, ¶ 50, 28 N.E.3d 727 (noting the identity of interests controls privity). Koke Mill and MMC do not share the same legal interests. As plaintiffs establish, MMC's consent-for-treatment form distinguishes itself and its liabilities from the physicians on its staff: "I understand and acknowledge that the physicians *** on staff at [MMC] are not employees or agents of the medical center, but independent medical practitioners who have been permitted to use its facilities for the care and treatment of their patients." In addition, the facts of each case show both Koke Mill and MMC could have placed blame on the other without admitting or incurring liability.

¶ 63 Plaintiffs' claims against Koke Mill are not barred by *res judicata* or collateral estoppel as a result of its claim of nursing negligence against MMC.

¶ 64 B. The Testimony of Nurse DiCostanzo

¶ 65 Plaintiffs contend the trial court erroneously barred the testimony of their expert neonatal nurse practitioner, Camille DiCostanzo. Plaintiffs argue DiCostanzo offered relevant evidence to show D.J.'s newborn course was complicated and to dispute Oesterreich's credibility. Citing *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 940 N.E.2d 742 (2010), plaintiffs contend Illinois law allows nurses to testify on medical issues. Plaintiffs further contend the trial court improperly excluded the testimony as "backdoor criticism" when Illinois law permits evidence to be admitted for one purpose, even if it is inadmissible for other purposes. Plaintiffs maintain prohibiting DiCostanzo's testimony while permitting Oesterreich's was prejudicial to plaintiffs, particularly at so late in the game.

¶ 66 In response, Koke Mill contends plaintiffs misstate the trial court's holding. According to Koke Mill, the court barred DiCostanzo's testimony not due to the absence of relevance, but because it found the prejudicial impact of such testimony outweighed any probative value. Koke Mill argues plaintiffs' claim against it was based on the conduct of a physician, not of a nurse, and the court did not abuse its discretion by limiting her testimony. Koke Mill further asserts no unfairness resulted from Oesterreich's being allowed to testify, as Oesterreich was not a hired expert but the last medical professional to see D.J. before his discharge.

¶ 67 We agree with Koke Mill's interpretation of the trial court's holding. The trial court did not limit DiCostanzo's testimony based on the belief Illinois law did not permit a nurse

to testify against a physician, but due to the prejudicial nature of such testimony. In making its ruling, the court expressly stated: "That is such a prejudicial impact and I've got to think it outweighs the probative value of her reintroducing all of these complications in the chart to this jury leaving them with that potential."

¶ 68 The question is thus not whether the trial court excluded DiCostanzo's testimony as irrelevant or as improper expert testimony, but whether the trial court committed error in excluding the testimony upon finding the prejudicial effect outweighed the probative value. It is well settled a court may exclude evidence that is relevant "if its probative value is substantially outweighed by such factors as prejudice, confusion, or potential to mislead the jury." *Gill v. Foster*, 157 Ill. 2d 304, 313, 626 N.E.2d 190, 194 (1993). When evidence "has slight probative value, any prejudicial effect on the jury may require exclusion." *Maffett v. Bliss*, 329 Ill. App. 3d 562, 574, 771 N.E.2d 445, 455 (2002). This court will not overturn a ruling with regard to the admission of evidence absent an abuse of discretion. *Pister v. Matrix Service Industrial Contractors, Inc.*, 2013 IL App (4th) 120781, ¶ 55, 998 N.E.2d 123. To find a trial court abused its discretion, we must find the ruling to be arbitrary, fanciful, or unreasonable or conclude no reasonable person would have taken the same view. *Id.*

¶ 69 The trial court did not abuse its discretion in limiting DiCostanzo's testimony. In their offer of proof, plaintiffs maintained nurse DiCostanzo would review D.J.'s medical chart and opine D.J.'s signs and symptoms after birth were complications. The trial court properly considered this offered testimony in the context of the trial. The court observed, in a case involving whether a physician violated a standard of care, DiCostanzo was an expert nurse offered to provide an evaluation of the condition of a newborn DiCostanzo did not treat. The

court observed physicians would do the same, lowering the probative value of DiCostanzo's testimony. We find no error in the court's decision a jury may be misled and Koke Mill prejudiced by allowing "the jury to infer that a nurse who doesn't have the training that a pediatrician has, if a nurse can even see these complications, then the jury can think, well, why wouldn't a pediatrician see these complications."

¶ 70 The fact Oesterreich was allowed to testify regarding D.J.'s treatment while DiCostanzo's testimony was limited does not alter our opinion the trial court acted within its discretion. Oesterreich treated D.J.; DiCostanzo did not. While Oesterreich could not recall examining D.J. or meeting with his parents, she recorded information in his medical chart regarding her examination of D.J. She was able to review her notes and conclude, based on the notes and her custom and practice as a discharge nurse, what her findings were related to D.J.

¶ 71 Moreover, plaintiffs' insistence they were prejudiced when Oesterreich was allowed to testify as to her opinion of Dr. Vasconcelles's abilities as a person is an unconvincing argument. Oesterreich's testimony followed plaintiffs' questions during cross-examination regarding whether Oesterreich was "comforted" by observing a doctor had already viewed D.J. before discharge and were not objected to when Koke Mill asked why she found that comforting. We disagree plaintiffs were improperly denied the opportunity to present testimony to counter the claim of no complications. While DiCostanzo was not permitted to so testify, physicians were and did.

¶ 72 Plaintiffs' case, *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 940 N.E.2d 742 (2010), is distinguishable. Plaintiffs rely on *Iaccino* as showing a nurse may testify as an expert in a medical-malpractice case involving physician negligence. *Iaccino*, however, does not

concern the same issue – whether relevant testimony is properly barred due to its prejudicial effect. Interestingly, of note, the nurse in *Iaccino*, who was permitted to describe and interpret what she observed on fetal-monitoring strips, was not allowed to opine whether what she saw on those strips indicated the baby should have been delivered earlier. *Id.* at 411, 940 N.E.2d at 754-55. *Iaccino* thus does not support the conclusion DiCostanzo should have been able to read the results of D.J.'s symptoms and post-birth experiences to opine whether they were "complications."

¶ 73 C. Dr. Shulman's Board-Certification Status

¶ 74 Plaintiffs contend Dr. Shulman's misrepresentation of his status as board certified in pediatric infectious disease warrants a new trial. Plaintiffs emphasize a key issue in the case was the question of whether D.J. showed signs or symptoms of a bacterial infection while in the hospital, and the credibility of Dr. Shulman, who countered plaintiffs' expert on the matter, was supported by false testimony. Plaintiffs argue defendant had an obligation to verify Dr. Shulman's credentials before trial. In addition, plaintiffs point to *In re Vioxx Products*, 489 F. Supp. 2d 587 (E.D. La. 2007), in which a new trial was granted after an expert misrepresented he was board certified.

¶ 75 Koke Mill counters plaintiffs, who knew of the issue regarding Dr. Shulman's certification status, took no action to prevent the jury from hearing his testimony. Koke Mill emphasizes the trial court provided plaintiffs with the opportunity to strike the testimony, but plaintiffs elected to use the information strategically on cross-examination instead. Koke Mill further points to the fact, even at the close of Dr. Shulman's testimony, plaintiffs did not seek to strike it.

¶ 76 We review a trial court's decision on a motion for a new trial for an abuse of discretion. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132-33, 720 N.E.2d 242, 257 (1999). False testimony alone does not warrant a new trial. *Herington v. Smith*, 138 Ill. App. 3d 28, 31, 485 N.E.2d 500, 502 (1985). When, however, perjured testimony so permeates the trial as to constitute a fraud on the court, false testimony by a material witness may warrant a new trial. *Albin v. Illinois Central Railway Co.*, 277 Ill. App. 3d 50, 61, 660 N.E.2d 994, 1001 (1995); *Herington*, 138 Ill. 2d at 31, 485 N.E.2d at 502.

¶ 77 In ruling against plaintiffs on this ground, the trial court stated the following:

> "I don't believe the case law is supportive of a re-trial on the issue of his denial of being lapsed in certification. I think the issue of his overall qualifications, coupled with your opportunity, your strategy to cross-examine him in trial on that issue, whether it was overall effective or not, it didn't allow whatever incredible testimony you thought you heard from that witness stand to permeate the proceedings in such a way that would require a new jury to hear his testimony."

¶ 78 The trial court did not abuse its discretion. The record supports the court's conclusion. Plaintiffs decided not to move to strike Dr. Shulman's testimony but instead elected to cross-examine him on his credentials. The cross-examination of Dr. Shulman on this topic was extensive. During the cross-examination, Dr. Shulman was shown a letter from the chief legal officer of the American Board of Medical Specialties and acknowledged the letter stated his certification expired on December 31, 2015. The jury was thus well aware of the dispute over Dr.

Shulman's status as board certified in pediatric infectious disease.

¶ 79 We also do not find convincing plaintiffs' argument Dr. Shulman's deposition establishes "false" testimony permeated the case. In the latter, posttrial deposition, Dr. Shulman called the situation "complicated." He stated he testified he was board certified, as the website for the American Board of Medical Specialties indicated he was, but he had since learned the American Academy of Pediatrics considered him not board certified due to "maintenance of certification activities." This is essentially what the jury heard in this case. At trial, Dr. Shulman testified he was certified based on what he had seen on the internet. Plaintiffs elicited testimony from Dr. Shulman acknowledging the organization over the AAP, the American Board of Medical Specialties, stated he was not. A new jury need not hear the same dispute.

¶ 80 Plaintiffs' case law does not require a different result. In *Vioxx Products*, the expert's misstatements regarding his board-certification status occurred *before* the plaintiff knew of his status. *Vioxx Products*, 489 F. Supp. 2d at 592. Moreover, the district court found the misrepresentation of the expert's credentials necessitated a new trial in part because the "misrepresentation prevented the Plaintiff from cross-examining the witness about his failure to maintain his certifications and the importance of such certifications." *Id.* at 594. Here, as a matter of strategy, plaintiffs had that opportunity.

¶ 81 Plaintiffs have failed to demonstrate they are entitled to a new trial.

¶ 82 III. CONCLUSION

¶ 83 We affirm the trial court's judgment.

¶ 84 Affirmed.