

SECOND DIVISION
May 10, 2016

No. 14-3859

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LUIS OCASIO Special Representative for the Estate of Haydee Charvonier,)	Appeal from the Circuit Court of Cook County.
)	
Plaintiff-Appellant,)	
)	
v.)	
)	No. 08 L 7182
CHRISTOPHER GUERRERO, M.D., WALTER PEDEMONTI, M.D., and PRESENCE SAINTS)	
MARY AND ELIZABETH MEDICAL CENTER,)	
)	Honorable William E. Gomolinski
Defendants-Appellees.)	Judge Presiding

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

- ¶ 1 *Held:* Plaintiff's proposed expert lacked the necessary familiarity with the type of allegations in the case to be able to provide competent expert testimony. Summary judgment for defendants was proper.
- ¶ 2 This appeal is taken from a judgment entered in favor of the defendants in a medical negligence case. The trial court held that plaintiff's proposed expert lacked the requisite familiarity to testify at trial. Without expert testimony, the plaintiff could not make out a *prima*

facie case so there was no genuine issue of material fact and the trial court entered summary judgment in favor of the defendants. Because we agree that plaintiff's proposed expert failed to exhibit sufficient familiarity with the corresponding allegations of negligence, we affirm.

¶ 3

BACKGROUND

¶ 4 Plaintiff Luis Ocasio is the special representative for the estate of his mother, Haydee Charvonier, who died during the course of this litigation. Charvonier had a number of medical issues and she was under the care of multiple doctors. The defendants are the doctors that treated her and a medical center where she was treated.

¶ 5 On July 14, 2006, Charvonier fell down the stairs in her home and fractured her neck. She was transported to the hospital and one of the tests revealed that she had low sodium levels. Charvonier was under the general care of defendant Dr. Christopher Guerrero who had examined her a few days before her fall. Charvonier was also under the care of a psychiatrist, defendant Dr. Walter Pedemonte, who prescribed Trileptal to Charvonier for depression and anxiety. Trileptal is a psychotropic medication that can cause sodium levels to drop. Low sodium levels can lead to dizziness and difficulty balancing. Plaintiff contends that improper monitoring of Charvonier as she was taking Trileptal led to her having low sodium levels which caused her to lose her balance, fall, and sustain her injury.

¶ 6 During the course of discovery, plaintiff disclosed Dr. Scott Kale as the expert witness that would testify at trial. Dr. Kale is a retired internist. He never prescribed Trileptal, and for the last several years of his career stopped prescribing psychotropic medications altogether. In his deposition, Dr. Kale expressed his opinion that the low sodium level in Charvonier's blood was the most probable reason for her fall. Dr. Kale testified that routine blood tests are necessary for

patients prescribed drugs like Trileptal and that the failure to perform such tests was a deviation from the standard of care. Dr. Kale concluded that if the standard monitoring had taken place, the low sodium levels that caused the fall probably would have been discovered.

¶ 7 The defendants moved for summary judgment citing Dr. Kale's lack of familiarity with the medication at issue, with psychotropic medications in general, and his overall inability to testify about the facts in the case to a reasonable degree of medical certainty. Defendants also argued that Dr. Kale's testimony could not establish causation because Kale could not testify that Trileptal caused low sodium levels at the time or that low sodium levels even caused Charvonier's dizziness or the fall. The trial court agreed and entered summary judgment for defendants. Plaintiff appeals that decision.

¶ 8 On appeal, plaintiff argues that Dr. Kale demonstrated the ability to offer competent medical testimony about the facts in this case. Plaintiff contends that an expert witness in a medical negligence case dealing with medication need not have prescribed the medication at issue in his career. Plaintiff maintains that it is enough that Dr. Kale demonstrated his ability to testify about the standard of care for the medical management of a patient undergoing drug therapy.

¶ 9 Defendants respond that Kale's own deposition testimony demonstrates his inadequacy to be an expert witness in this case. Aside from never prescribing Trileptal or monitoring a patient that was taking it, Dr. Kale testified that while he was practicing medicine he stopped prescribing psychotropic medication altogether because he was "uncomfortable with [his] lack of experience" with psychotropic drugs. He testified that his only experience with Trileptal came from looking up information about the drug when he was retained for this case. Dr. Kale never practiced psychiatry. He admitted that as for a psychiatrist, he did not know how often Charvonier should

have been monitored or what should have been monitored. Dr. Kale admitted that he had never treated a patient with conditions like those Charvonier had. Kale stated that Charvonier's sodium level was not severely low when tested at the hospital following her fall, and he could not speculate that her levels would have been low days before her fall or at the time she last visited her doctors without guessing.

¶ 10 It was revealed that Charvonier had been taking Trileptal for years. Her medical condition was described by her treating physicians as "complex," with a number of her ailments like hypertension and anorexia potentially causing balance problems, weakness, or dizziness. Charvonier had fallen multiple times over the years.

¶ 11 As for causation, defendants argue that Dr. Kale's testimony could not establish it because Kale testified that he did not know the reason that Charvonier fell or if she was dizzy, weak, or lacked balance when she fell. Dr. Kale stated that Charvonier's low sodium level may not have been the cause of her fall. Kale also could not say whether Charvonier's low sodium levels were caused by taking Trileptal.

¶ 12 ANALYSIS

¶ 13 In a negligence action for medical malpractice, a plaintiff must prove a duty owed by the defendant, a breach of that duty, an injury proximately caused by the breach, and resultant damages. *Lenahan v. University of Chicago*, 348 Ill. App. 3d 155, 163 (2004). Expert testimony is usually required in a case of professional negligence to establish both (1) the standard of care expected of the professional and (2) the professional's deviation from that standard. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 295 (2000).

¶ 14 The Illinois Supreme Court has articulated a three-step process for determining whether an

expert is competent to testify regarding the standard of care in a particular medical negligence case. See *Purtill v. Hess*, 111 Ill. 2d 229 (1986). Initially, plaintiff's proffered expert must satisfy two foundational requirements. *Id.* at 242-43. First, the expert must be licensed in the defendant's given school of medicine. *Petre v. Cardiovascular Consultants*, 373 Ill. App. 3d 929, 940 (2007). Second, the proffered expert must show that he is familiar with the methods, procedures, and treatments ordinarily observed by others in the defendant's community or a similar community. *Id.* If the proffered expert fails to satisfy either of those two foundational requirements, the inquiry ends there, and the trial court must disallow the expert's testimony. *Id.* If the proffered expert satisfies the two foundational requirements, the analysis proceeds to the third step, in which the trial court exercises its discretion to determine if the proffered expert is competent to testify in the particular case before the court. *Id.*

¶ 15 The parties leave it somewhat unclear whether we are looking at the foundational familiarity requirement (step 2) or the competence to testify in this case (step 3) and what standard of review we should apply. Defendants intimate that the standard of review is abuse of discretion because we are reviewing the trial court's ruling that the expert lacks competence to testify in these circumstances. Plaintiff contends that because we are reviewing the entry of summary judgment, we should review *de novo*. While it is arguable that plaintiff's proffered expert does not meet the foundational familiarity requirement, it is readily apparent that he lacks the requisite competence to testify in this particular case. And, even if we engage in *de novo* review, we would hold that Dr. Kale lacks the required familiarity with the treatment administered to Charvonier to testify about the standard of care.

¶ 16 Dr. Kale is not a psychiatrist. We have held that whether the expert is qualified to testify

is not dependent on whether he is a member of the same specialty or subspecialty as the defendant. *Petre*, 373 Ill. App. 3d at 941. But Dr. Kale testified that he had no knowledge about this particular drug before looking up information about it on the internet when he was retained to testify. He never prescribed it and never monitored anyone taking it. He could not know what is customary in the course of treatment. Dr. Kale specifically testified that while he was practicing, he stopped prescribing psychotropic drugs altogether because he was uncomfortable with his lack of experience with them. If Dr. Kale is not comfortable with his own level of knowledge for treating patients with psychotropic drugs, why should the court be comfortable relying on his opinion about their effects?

¶ 17 Plaintiff contends that an expert need not have prescribed the particular drug at issue in a case in order to be able to testify about it. Instead, plaintiff argues, an expert who has prescribed other medications can competently testify about how a physician is supposed to monitor a patient undergoing drug therapy. There is a line though. No one would say that just because a pediatrician has prescribed cold medication, he has sufficient technical knowledge to testify about how an oncologist should monitor a patient undergoing treatment for cancer. Dr. Kale admitted that he had never treated a similarly situated patient—one with the type and degree of afflictions affecting Charvonier. So while we agree with plaintiff that it is not necessarily required that the expert has prescribed the exact drug at issue, he must have familiarity with the course of treatment that would ordinarily be administered under the circumstances, and it is clear that Dr. Kale does not. See *Northern Trust Co. v. Upjohn Co.*, 213 Ill. App. 3d 390, 406-07 (1991).

¶ 18 Importantly, Dr. Kale's deposition testimony reveals that if he were to testify in this case his testimony would be so speculative that it would have no value. Kale testified that he did not

know the reason that Charvonier fell or even if she was dizzy, weak, or lacked balance when she fell. Dr. Kale stated that Charvonier's low sodium level may not have caused her fall at all. Kale could not say whether Charvonier's low sodium level was even caused by taking Trileptal. Kale's testimony, even if credited, does not close a single link in the chain of causation. It was revealed that Charvonier had been taking Trileptal for years. Charvonier had fallen multiple times over the years, and no one knows why. Her medical condition was described by her treating physicians as "complex," with a number of her ailments like hypertension and anorexia potentially causing balance problems, weakness, or dizziness. Dr. Kale's hypothesis that taking Trileptal was the reason Charvonier fell is pure conjecture and requires several leaps that are impermissible under our standards for admitting expert testimony.

¶ 19 Dr. Kale also stated that Charvonier's sodium level was not severely low when it was tested at the hospital following her fall . Therefore, he could not know "without guessing" that her levels would have been low days or weeks before her fall or at the time she last visited her doctors. This testimony reveals that even if defendants had done as Dr. Kale suggests they should have—performing blood tests every six months—there would be no way to know whether such a failure caused her injury. Dr. Kale admitted that Charvonier's sodium level could have plummeted in just the hours before her fall for a number of reasons. There is no way Dr. Kale could testify to a reasonable degree of medical certainty that defendants' alleged failures in monitoring Charvonier were the proximate cause of her injury.

¶ 20 CONCLUSION

¶ 21 Based on the foregoing, the trial court was correct to enter summary judgment in favor of defendants. The testimony that would be given by the proffered expert put forth by the plaintiff

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fails to meet the requirements for the admissibility of expert testimony under Illinois law.

Without that expert testimony, the plaintiff cannot make out a claim for medical negligence.

¶ 22 Affirmed.