DA 18-0567

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 92N

JANICE GRIFFIN, M.D.,

Plaintiff and Appellant,

v.

RICHARD LEWIS, D.O. and MARK NICHOLS, M.D.,

Defendants and Appellees.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Dawson, Cause No. DV 16-049
Honorable Olivia C. Rieger, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John C. Doubek, Doubek, Pyfer & Storrar, PC, Helena, Montana

For Appellee Richard Lewis, D.O.:

Lisa A. Speare, William J. Speare, Speare Law Firm, PC, Billings, Montana

For Appellee Mark Nichols, M.D.:

John J. Russell, Brown Law Firm, PC, Billings, Montana

Submitted on Briefs: February 27, 2019

Decided: April 16, 2019

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Janice Griffin, M.D., appeals the summary judgment dismissal of her medical malpractice claim against Richard Lewis, D.O., and Mark Nichols, M.D., entered by the Seventh Judicial District Court, Dawson County, on grounds that Dr. Griffin's disclosed expert lacked proper qualifications to render opinions on the standard of care. We affirm.

¶3 Dr. Griffin worked in Glendive, Montana, as a board-certified internist. In June 2013, Dr. Griffin discussed not feeling well with her colleague, Dr. Nichols, a board-certified surgeon. Dr. Griffin reported feeling bloated and constipated and experiencing pelvic pressure. Dr. Nichols ordered an abdominal CT scan and stated in his office notes that a "colonoscopy may be indicated for possible identification of an obstructing lesion of the colon causing your symptoms." Dr. Griffin had moved to Helena for a new position by the time the scan was signed by a radiologist and available for review. Prior to moving, Dr. Griffin spoke with another colleague, Dr. Lewis, a board-certified OB-GYN, about her physical symptoms. Dr. Lewis ordered an ultrasound of her pelvis and related the results of the report to Dr. Griffin. Neither Dr. Nichols nor Dr. Lewis diagnosed Dr. Griffin with cancer.

¶4 Nine months later, Dr. Griffin was evaluated by several different physicians in Helena, none of whom diagnosed her with cancer. Dr. Griffin decided to travel to Michigan, where she underwent surgical diagnosis that revealed Stage IV uterine cancer. In April 2016, Dr. Griffin filed suit against Dr. Lewis and Dr. Nichols alleging that the care she received was substandard and negligent because the doctors did not make a recommendation for a colonoscopy. Dr. Griffin maintained that if Dr. Nichols had performed a colonoscopy and Dr. Lewis had performed a gynecological pelvic exam and/or a colonoscopy, her cancer diagnosis would have been made earlier and led to a Stage I diagnosis rather than a Stage IV diagnosis.

¶5 Dr. Griffin disclosed Dr. Anna C. Beck as the only witness who would supply the requisite standard of care testimony as to both Dr. Nichols and Dr. Lewis. The Defendants deposed Dr. Beck and asked numerous questions about her qualifications. Dr. Beck testified that she is board-certified in internal medicine, medical oncology, and hospice and palliative care. She explained that palliative care is not limited to cancer but includes "providing support structures for people with serious illnesses," citing rheumatoid arthritis as an example. Dr. Beck testified that she teaches courses at the University of Utah on oncology and palliative medicine. Dr. Beck confirmed that she does not perform evaluations or work-ups of patients with abdominal complaints who are not already oncology or palliative patients. She testified that she does not perform colonoscopies or pelvic examinations routinely as part of her practice. Plaintiff's counsel did not question

Dr. Beck during the deposition to develop additional information regarding her qualifications.

¶6 Dr. Nichols and Dr. Lewis concurrently filed motions for summary judgment, alleging that judgment was appropriate as a matter of law because Dr. Beck is not qualified to testify to the appropriate standards of care, departure from those standards, and causation. The District Court granted Dr. Nichols and Dr. Lewis summary judgment, concluding that Dr. Beck lacked the requisite knowledge, training, experience, and/or education to render her qualified to offer expert testimony regarding the standard of care of a board-certified general surgeon or a board-certified OB-GYN. The District Court reasoned that Dr. Beck's specialties are not substantially similar to that of either Dr. Nichols or Dr. Lewis as required by § 26-2-601(3), MCA.

¶7 On appeal, Dr. Griffin argues that Dr. Beck's credentials satisfy the statutory requirements for expert testimony in a medical malpractice case because the medical area in which Dr. Beck is routinely involved and the symptoms with which Dr. Griffin presented intersect the medical backgrounds of the Defendants.

¶8 We review summary judgment rulings de novo, applying the criteria of M. R. Civ. P. 56. *Melton v. Speth*, 2018 MT 212, ¶ 5, 392 Mont. 409, 425 P.3d 700. We generally review the exclusion of expert witness testimony for abuse of discretion. *McColl v. Lang*, 2016 MT 255, ¶ 7, 385 Mont. 150, 381 P.3d 574. When the trial court excludes an expert based on its interpretation of evidentiary rules and statutes, however, we review for correctness. *Melton*, ¶ 5.

¶9 The plaintiff in a medical malpractice claim "must generally produce expert medical testimony establishing the applicable standard of care and a subsequent departure from that standard." *Melton*, ¶ 9 (quoting *Beehler v. E. Radiological Assocs., P.C.*, 2012 MT 260, ¶ 18, 367 Mont. 21, 289 P.3d 131). Section 26-2-601(1)(a), MCA, provides that a person may not testify as an expert on standards of care and practice in a medical malpractice action unless the person:

> is licensed as a health care provider in at least one state and routinely treats or has routinely treated within the previous 5 years the diagnosis or condition or provides the type of treatment that is the subject matter of the malpractice claim or is or was within the previous 5 years an instructor of students in an accredited health professional school or accredited residency or clinical research program relating to the diagnosis or condition or the type of treatment that is the subject matter of the malpractice claim.

In addition, it must be shown that the person "is thoroughly familiar with the standards of care and practice as they related to the act or omission that is the subject matter of the malpractice claim on the date of the incident upon which the malpractice claim is based." Section 26-2-601(1)(b), MCA. A person qualified as an expert in one specialty is not qualified to testify as an expert in a malpractice claim against a provider in another specialty "unless there is a showing that the standards of care and practice in the two specialty or subspecialty fields are substantially similar." Section 26-2-601(3), MCA. Section 26-2-601, MCA, adds to the foundational requirements of M. R. Evid. 702, which require expert witnesses to be qualified by way of "knowledge, skill, experience, training, or education." *Beehler*, ¶ 24.

¶10 The District Court's conclusion on the summary judgment record the parties presented is consistent with this Court's prior holdings regarding medical expert qualification. In *Melton*, the plaintiff claimed that the defendant surgeon breached the standard of care by failing to properly secure a locking screw on the implanted device during back surgery, resulting in only partial fusion of the plaintiff's spine. *Melton*, ¶ 2. We determined that the plaintiff's proposed expert did not satisfy § 26-2-601(1)(a), MCA, despite being a licensed physician who treats orthopedic conditions, because the proposed witness did not perform spinal surgery or treat patients who required surgery. *Melton*, ¶¶ 10-11.

¶11 In *Beehler*, the plaintiff claimed a radiologist negligently performed an injection control procedure during a myelogram injection by failing to wear a mask, resulting in bacterial spinal meningitis. *Beehler*, ¶¶ 2-4. We determined that the plaintiff's proposed expert, despite not being a radiologist who performs myelograms, nonetheless satisfied the statutory requirements for expert qualification. We relied on the fact that, in his own practice, the expert "treat[ed] bacterial meningitis, and provide[d] the type of treatment at issue, infection prevention during a myelogram," where the subject matter of the claim was "the wearing of a mask during a myelogram." *Beehler*, ¶ 25. The evidence demonstrated that infection prevention is not unique to any medical specialty, and the standards of care in infection prevention and radiology are substantially similar regarding myelogram injections. *Beehler*, ¶ 26. The proposed witness testified that wearing a mask is

comparable to hand-washing, which is "similar for other invasive procedures," and wearing a mask applies "anytime something was injected into the spinal cord." *Beehler*, ¶ 26.

¶12 In *McColl*, the plaintiff claimed that a naturopathic physician negligently applied black salve to a facial blemish and burned the plaintiff's nose. *McColl*, ¶ 3. We affirmed the trial court's determination that the defense expert, a naturopathic physician, was qualified under § 26-2-601(1)(a), MCA, because he routinely treated the condition at issue, facial lesions, and was familiar with the standard of care for a naturopath treating facial lesions. *McColl*, ¶ 18.

¶13 The evidence before the District Court in the summary judgment proceedings is no stronger than that presented in *Melton*. Dr. Beck testified that she does not perform colonoscopies or routine pelvic examinations. She does not see patients who have no cancer diagnosis. For more than five years before her deposition, she had not examined or performed a work-up of abdominal pain on a patient with no history of cancer. Dr. Griffin did not develop any additional testimony demonstrating that Dr. Beck's practice includes the treatment or type of patients within the subject matter of Dr. Griffin's claim.

¶14 Without additional showing that she had engaged in similar diagnostic examinations, and in contrast to the proposed experts in *Beehler* and *McColl*, Dr. Griffin failed to demonstrate that Dr. Beck provides "the type of treatment at issue" in this case: the recommendation of a colonoscopy for a patient with no history of cancer presenting with abdominal pain. Although Dr. Beck is an instructor at the University of Utah, she testified that she teaches oncology and palliative care. Her testimony was not further developed to

show that her teaching would encompass diagnosis of a patient with no cancer history presenting with abdominal pain. Dr. Beck's deposition testimony established only that she teaches students about and treats individuals who have received a cancer diagnosis.

¶15 Dr. Griffin emphasizes Dr. Beck's mention at the end of her deposition that a "change in bowel habits" should signal to any doctor "the reason for a colonoscopy." That generalized statement alone does not secure the foundation to show that Dr. Beck's practice and the Defendants' practices are "substantially similar" or that her areas of expertise sufficiently intersected with the Defendants' practices. Dr. Beck does not perform surgical evaluation of non-oncology patients presenting abdominal pain; she does not do work-ups of patients who have not been diagnosed with cancer; she does not perform colonoscopies; and she would send patients to a GI specialist or a surgeon if she thought they needed a colonoscopy. Dr. Griffin's claim is about failing to take proper measures to diagnose uterine cancer. The evidence does not show that Dr. Beck has routinely treated the subject matter at issue, or instructed on the subject matter, within the last five years. *Compare with Beehler*, ¶ 26. We conclude that on the record before it the District Court properly excluded Dr. Beck's testimony for failing to satisfy the requirements of § 26-2-601, MCA.

¶16 Dr. Griffin argues alternatively that third-party expert testimony is unnecessary because the Defendant doctors' testimony established that a colonoscopy was the proper standard of care and that they departed from that standard. "[I]t is well-established we will not address an issue raised for the first time on appeal, nor will we address a party's change in legal theory." *Maier v. Wilson*, 2017 MT 316, ¶ 22, 390 Mont. 43, 409 P.3d 878.

Dr. Griffin's arguments against summary judgment were based solely on Dr. Beck's qualifications as an oncologist and her ability to testify to the standard of care. We decline to consider this alternative argument.

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. We conclude that the District Court did not err when it concluded that Dr. Griffin failed to establish Dr. Beck's qualifications to give an expert opinion under § 26-2-601, MCA. Its order granting summary judgment to Dr. Lewis and Dr. Nichols is affirmed.

/S/ BETH BAKER

We Concur:

/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE