MEMORANDUM DECISION

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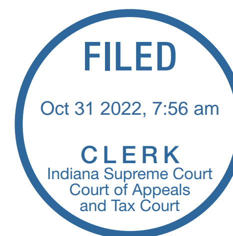

ATTORNEY FOR APPELLANT

Stephen B. Caplin
Stephen B. Caplin Professional Corporation
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES

Brett T. Clayton
Katherine M. Haire
Reminger Co., L.P.A.
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Linda M. Schulstad,
Appellant-Plaintiff,

v.

Center for Implant Dentistry and Periodontics, LLC, and Michael D. Edwards, DDS,
Appellees-Defendants.

October 31, 2022

Court of Appeals Case No. 22A-CT-245

Appeal from the Marion Superior Court

The Honorable Kurt M. Eisgruber, Judge

Trial Court Cause No. 49D06-1912-CT-51156

Pyle, Judge.

Statement of the Case

[1] Michael D. Edwards, DDS ("Dr. Edwards") prescribed Levaquin as a prophylactic antibiotic for Linda M. Schulstad ("Schulstad"). She experienced insomnia, anxiety, body tremors, weakness, and confusion, which she blamed on the Levaquin. She filed a proposed complaint with the Indiana Department of Insurance, claiming Dr. Edwards had failed to meet the standard of care by prescribing Levaquin. The medical review panel issued a unanimous opinion finding Dr. Edwards had met the standard of care. Schulstad filed a complaint in the trial court, raising the same claim, and the trial court later granted Dr. Edwards' motion for summary judgment. Schulstad contends there are material issues of fact related to three distinct aspects of the standard of care that make summary judgment inappropriate. Concluding there are no material issues of fact, we affirm the trial court's judgment.

[2] We affirm.

Issue

> 1. Whether there are material issues of fact about whether Dr. Edwards met the standard of care in prescribing Levaquin;
>
> 2. Whether there are material issues of fact about whether Dr. Edwards met the standard of care in failing to advise Schulstad about risks from taking Levaquin; and,
>
> 3. Whether there are material issues of fact about whether Dr. Edwards met the standard of care by abandoning Schulstad.

Facts

[3] Dr. Edwards focused his dental practice on periodontal disease, which he often treated by inserting dental implants. In early July 2015, Schulstad was concerned her molar was infected, so she met with Dr. Edwards, and they agreed that he would remove the tooth and replace it with a dental implant. Later that month, Dr. Edwards recommended that Schulstad take a prophylactic antibiotic both before and after the implant procedure to decrease the risk of infection, so he prescribed Levaquin.

[4] When Schulstad picked up the prescription from the Wal-Mart pharmacy, she did not ask any questions about Levaquin. The pharmacy gave Schulstad an eight-page guide that provided information about Levaquin, including the risks associated with the drug. Before taking her first dose of Levaquin, Schulstad read the guide, including the information about the risks of the medicine.

[5] Schulstad took her first dose of Levaquin on Sunday, November 1, 2015, the day before the implant procedure, and she took another dose the next day. Before the implant procedure, Schulstad signed another form consenting to the procedure and raised no concerns about Levaquin with Dr. Edwards.

[6] On November 5, three days after the procedure, Dr. Edwards' staff called Schulstad to ask how she was doing. Schulstad said she was healing but "was having some really unusual symptoms and . . . was concerned that they were due to the Levaquin." (App. Vol. II at 202). That afternoon, Schulstad took another dose of Levaquin and then decided to stop taking the drug.

[7] The next day, Schulstad called Dr. Edwards' office to make an emergency appointment with Doctor Edwards that day because the side effects from the Levaquin were getting worse. Because Dr. Edwards was vacationing in Mexico, his staff set an emergency appointment for Schulstad on Dr. Edwards' first day back in the office—November 10, 2015. On November 9, 2015, Schulstad called Dr. Edwards' office again to get a same-day appointment but was again told Dr. Edwards would not be in the office until the next day.

[8] Schulstad met with Dr. Edwards as scheduled on November 10. They had the following exchange:

> Schulstad: Did you get any of my messages?
>
> Dr. Edwards: But I was in Mexico.
>
> . . . .
>
> Schulstad: Don't you have a back-up dentist covering for you when you are on vacation?
>
> Dr. Edwards: Yes, but only for normal stuff.

(App. Vol. III at 69–70).

[9] In her deposition testimony, Schulstad said the Levaquin caused her to experience insomnia, strange sensations, weakness, confusion, dizziness, and body tremors. She also said it felt like her "entire face was on fire." (App. Vol. II at 207). Schulstad claimed her symptoms did not improve until four months

later. On December 17, 2015, Schulstad began treatment with Clifford W. Fetters, M.D. ("Dr. Fetters"), a holistic family practice physician who said that prescription medication was "poison." (App. Vol. II at 58–61). Dr. Fetters directed Schulstad to follow an organic diet and recommended a vitamin regimen.

[10] In October 2017, Schulstad filed a proposed complaint with the Indiana Department of Insurance, contending Dr. Edwards' care fell below the standard of care. The parties tendered evidence to a medical review panel composed of two periodontists and one infectious diseases physician. Two years later, the medical review panel issued a unanimous opinion that "[t]he evidence does not support the conclusion that [Dr. Edwards] violated the standard of care." (App. Vol. II at 46–52).

[11] In December 2019, Schulstad filed a complaint in the trial court where she reiterated her claim that Dr. Edwards had failed to meet the standard of care by prescribing Levaquin and that the Levaquin had caused physical, financial, and emotional damage. Schulstad filed an affidavit from Dr. Fetters, who stated that Dr. Edwards had failed to meet the standard of care in prescribing Levaquin. Schulstad also provided statements from Caryn Guba, DDS, and Richard Feldman, M.D. ("Dr. Feldman").

[12] In August 2021, Dr. Edwards filed his "Renewed Motion for Summary Judgment" and designated supporting evidence, including the medical review panel's unanimous decision that he met the standard of care. (App. Vol. II at

25–231). Dr. Edwards also designated evidence from Schulstad's experts, which included: (1) admissions that they lacked the qualifications to opine on whether Dr. Edwards met the standard of care in prescribing Levaquin and (2) testimony that Schulstad received all necessary information about the risks of Levaquin. Dr. Edwards also designated Schulstad's admission that before she took her first dose of Levaquin, she had read about and understood the risks of the drug.

[13] On January 5, 2022, the trial court granted Dr. Edwards' motion for summary judgment. It found and concluded:

> First, . . . [Schulstad] failed to rebut [the] Medical Review Panel's opinion with qualified, admissible expert testimony. The testimony offered by [Schulstad] by Dr. Fetters . . . on the issue does not meet the requirements of Indiana Evidence Rule 702.
>
> Second, [Schulstad] asserted she did not receive appropriate informed consent regarding the risks of Levaquin. Expert testimony was required to establish the content of the disclosure required of [Dr. Edwards]. [Schulstad] submitted testimony of Dr. Feldman, who testified that Dr. Edwards was required to disclose certain risks. However, he also testified that [Schulstad] received all required risk information before she took the medication. [Schulstad] also has admitted that she had no questions about the medication before taking it, even though she read the entirety of a disclosure that contained all of the risks Dr. Feldman claims were required to be disclosed. The causation elements of [Schulstad's] informed consent claim include the requirement of proof that she suffered harm from an undisclosed risk, and that she would have rejected the treatment had she known the risk. The Court finds that [Schulstad] cannot establish these required elements of her claim. [Schulstad] did not suffer

> harm from an undisclosed risk as all risks that were required to be disclosed under [Schulstad's] theory of the case were, in fact, disclosed. [Schulstad] also did not reject the medication despite a disclosure of the pertinent medication risks.

(App. Vol. II at 15–16 (citations omitted)). Schulstad now appeals.

Decision

[14] Schulstad contends the trial court erred in granting summary judgment to Dr. Edwards. Specifically, she claims the trial court erred in finding that Schulstad failed to rebut the unanimous opinion of the medical review panel on three issues related to the standard of care: (1) Dr. Edwards' decision to prescribe Levaquin; (2) Dr. Edwards' failure to advise Schulstad about the risks associated with Levaquin; and (3) Dr. Edwards' abandonment of Schulstad.

[15] Our summary judgment standard of review is well settled. We draw all reasonable inferences in favor of the non-moving party and affirm summary judgment only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C); *see also, e.g.*, *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). And we "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003) (citing *Landmark Health Care Assocs. L.P. v. Bradbury*, 671 N.E.2d 113, 116 (Ind. 1996)).

[16] To that end, Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant to show the lack of any genuine issue of material fact on at least one element of the claim. *Hughley,* 15 N.E.3d at 1003. For a medical malpractice claim, those elements are "(1) that the physician owed a duty to the plaintiff; (2) that the physician breached that duty; and (3) that the breach proximately caused the plaintiff's injuries." *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1386 (Ind. 1995). Cases hinging on disputed material facts are inappropriate for summary judgment because weighing evidence is "a matter for trial, not summary judgment." *Hughley*, 15 N.E.3d at 1005–06. Summary judgment is thus rarely appropriate in medical malpractice cases. *Zelman v. Cent. Ind. Orthopedics, P.C.*, 88 N.E.3d 798, 802 (Ind. Ct. App. 2017), *trans. denied*.

[17] A plaintiff in a medical malpractice case must generally present expert opinion testimony to show the existence of a genuine issue of fact once the defending parties designate the opinion of a medical review panel finding that the defendants exercised the applicable standard of care. *Boston v. GYN, Ltd.*, 785 N.E.2d 1187, 1190 (Ind. Ct. App. 2003), *trans. denied; see also Ho v. Frye,* 880 N.E.2d 1192, 1201 (Ind. 2008). Because of the complexity of medical diagnosis and treatment, "'substantive law requires expert opinion as to the existence and scope of the standard of care which is imposed upon medical specialists and as to whether particular acts or omissions measure up to the standard of care . . . . Before the trier of fact may confront the factual question [of negligence] the issue must be presented and placed in controversy by reference to expert

opinion.'" *McGee,* 605 N.E.2d 792, 794 (Ind. Ct. App. 1993) (quoting *Bassett v. Glock,* 174 Ind. App. 439, 368 N.E.2d 18, 23 (1977)). The trial court acts as a gatekeeper when determining the admissibility of opinion evidence under Indiana Evidence Rule 702. *Summerhill v. Klauer*, 49 N.E.3d 175, 180 (Ind. Ct. App. 2015). A decision to exclude expert testimony lies solely within the discretion of the trial court and will be reversed only for an abuse of discretion. *Id*.

[18] A unanimous opinion of the medical review panel that the defendant did not breach the applicable standard of care is sufficient to negate the existence of a genuine issue of material fact. *Ziobron v. Squires*, 907 N.E.2d 118, 123 (Ind. Ct. App. 2008). Once a medical malpractice defendant designates the opinion of the medical review panel that the defendant exercised the applicable standard of care, a plaintiff must generally present expert opinion to show the existence of a genuine issue of material fact to defeat summary judgment. *Id*. at 122. "Failure to provide expert testimony will usually subject the plaintiff's claim to summary disposition." *Speaks v. Vishnuvardhan Rao*, 117 N.E.3d 661, 667 (Ind. Ct. App. 2018).

I. Standard of Care – Prescribing Levaquin

[19] Schulstad first contends Dr. Fetters' testimony created material issues of fact about whether Dr. Edwards met the standard of care when he prescribed Levaquin. This claim fails as Schulstad failed to rebut the unanimous opinion of the medical review panel because she failed to present testimony that

qualified as expert testimony under Indiana Rule of Evidence 702 on the standard of care for prescribing Levaquin for a dental implant.

[20] Dr. Fetters' affidavit alleged:

> a. I do not feel that [Levaquin] is appropriate to use prophylactically for a routine dental implant. It is not the standard of care for treating oral infections. [Levaquin] is a fluoroquinolone antibiotic. I do not feel fluoroquinolones are a first line therapy to the potential devastating effects of potential fluoroquinolone toxicity.
>
> b. Dr. [Edwards's] prescription of [Levaquin] to [Schulstad] and her consumption of that drug resulted in the signs, symptoms, and complaints . . . .

(App. Vol. III at 84).

[21] The trial court determined that Dr. Fetters was not an expert under Indiana Rule of Evidence 702. That rule provides:

> (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
>
> (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.

Ind. Evidence Rule 702.

[22] Schulstad contends Dr. Fetters' education and experience qualified him as an expert to determine whether Dr. Edwards violated the standard of care. Schulstad notes that: (1) Dr. Fetters is a licensed Indiana physician who has been providing health care since 1990; (2) his education includes (a) an M.D. degree from the Indiana University School of Medicine; (b) the Family Practice Residency Program in Fort Wayne; (c) a Bachelor of Science degree in Life Science from Indiana State University; (3) that he is affiliated with the American Academy of Family Physicians and the Indiana State Medical Association; and (4) he is often consulted by dentists about the prophylactic use of antibiotics, including when performing dental implants.

[23] But in his deposition, Dr. Fetters acknowledged he was not qualified to testify about the standard of care:

> Q. Do you intend to express an opinion before the jury in this case that Dr. Edwards violated the standard of care required of a periodontologist?
>
> A. Well, I guess based upon the standard of care as a primary care doctor and a holistic doctor, *but I can't really say for a periodontist because, you know, that's not my field of expertise*.

(App. Vol. II at 54) (emphasis added)).

> Q. All right. Are you fully aware of standard routine practices in the field of periodontology?
>
> A. No.

(App. Vol. II at 56).

> Q. Okay. Regarding generally accepted standards within the field of periodontology specifically, that's an area outside of your expertise, true?
>
> A. Correct.

(App. Vol. II at 70).

[24] Dr. Fetters also admitted that he offered a standard of care opinion without reviewing any medical or dental records, including the periodontal chart relevant to the antibiotics and dental implant, the medical review panel's opinion, or Schulstad's prescription history. We have held that a witness who lacks detailed knowledge of a plaintiff's medical condition and past medical history has no basis to give an opinion on causation under Evidence Rule 702. *Bunger v. Brooks*, 12 N.E.3d 275, 283 (Ind. Ct. App. 2014) (quoting *Clark v. Sporre*, 777 N.E.2d 1166, 1171 (Ind. Ct. App. 2002)), *trans. denied*.

[25] The trial court did not abuse its discretion in finding that Dr. Fetters did not qualify as an expert under Indiana Rule of Evidence 702 on whether Dr. Edwards met the standard of care by prescribing Levaquin. As the gatekeeper for determining the admissibility of opinion evidence, the trial court was tasked with weighing the evidence about Dr. Fetters' expertise, and we will not disturb that determination on appeal. *See Summerhill*, 49 N.E.3d at 180. Therefore, Schulstad failed to rebut the medical review panel's unanimous opinion that Dr. Edwards met the standard of care regarding the use of Levaquin because

she failed to present expert testimony on the issue. This failure subjects her claim to summary disposition. *See Speaks*, 117 N.E.3d at 667.

II. Standard of Care – Informed Consent

[26] Schulstad next contends there are material issues of fact about whether she consented to taking Levaquin because Dr. Edwards did not advise her about the risks associated with Levaquin and that Dr. Feldman testified that this failure was a breach of the applicable standard of care. We reject this claim because Schulstad cannot show that Dr. Edwards' failure to advise her was the proximate cause of her damages.

[27] Unless there is a complete lack of consent, questions about consent are treated as one aspect of negligence in a claim that a doctor failed to meet the required standard of care. *Spar v. Cha*, 907 N.E.2d 974, 979–80 (Ind. 2009). The requirement of informed consent arises from the tenet that "[t]he patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his own determination on treatment." *Culbertson*, *v. Mernitz,* 602 N.E.2d 98, 103 (Ind. 1992). Accordingly, a physician must present relevant medical facts accurately to the patient to help the patient make choices from different therapeutic options. *Id*.

[28] To succeed on such a claim, a plaintiff must prove: (1) nondisclosure of required information; (2) actual damages; (3) resulting from the risks of which the patient was not informed; (4) cause in fact or proximate cause, that is, the

plaintiff would have rejected the treatment had she known the risks; and (5) reasonable persons, if properly informed, would have rejected the proposed treatment. *Spar*, 907 N.E.2d at 980. Dr. Edwards was entitled to summary judgment on this claim if he affirmatively negated any element of Schulstad's informed consent claim. *McGee*, 605 N.E.2d at 794.

[29] Dr. Edwards did, indeed, negate the proximate cause element of Schulstad's informed consent claim. The trial court found that the undisputed evidence showed that Schulstad received all the information she needed to make an informed decision about whether to take Levaquin, relying on this exchange with Dr. Feldman[1] during his deposition:

> Q. Okay. Do you have an opinion as to whether there was information regarding Levaquin that was not conveyed to Mrs. Schulstad by either Dr. Edwards or the pharmacist or by the prescribing information?
>
> A. There was no information that was not contained in those sources.

(App. Vol. II at 128). Dr. Feldman also testified that Schulstad "received all required risk information before she took the medication." (App. Vol. II at 15).

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[1] A claim of informed consent requires expert testimony to establish the standard of care required for disclosure of medical information, *Culbertson*, *v. Mernitz,* 602 N.E.2d 98, 103 (Ind. 1992), and a lack of expert evidence provides grounds for summary judgment. *Speaks v. Vishnuvardhan Rao*, 117 N.E.3d 661, 667 (Ind. Ct. App. 2018). We see nothing in the record that suggests Dr. Feldman was an expert on informed consent, but we will assume without deciding that he was an expert.

And Schulstad "admitted that she had no questions about the medication before taking it, even though she read the entirety of a disclosure that contained all the risks Dr. Feldman claims were required to be disclosed." (App. Vol. II at 15–16).

[30] By designating these statements from Dr. Feldman and Schulstad, Dr. Edwards negated the element of Schulstad's informed consent claim that required her to show that the lack of advisement from Dr. Edwards was the cause in fact, or proximate cause, of her side effects from Levaquin. Proximate cause is a necessary element in any tort case. *Bowman v. Beghin*, 713 N.E.2d 913, 917 (Ind. Ct. App. 1999). "Such causal connection arises only if it is established that had [a] revelation been made, consent to treatment would not have been given. Thus, there is no proximate cause if the plaintiff would have submitted to the treatment even if a full disclosure had been made." *Id.* Proximate cause is a question of law suitable for summary judgment where "only a single conclusion can be drawn from the designated evidence." *Laycock v. Silwkowski,* 12 N.E.3d 986, 991 (Ind. Ct. App. 2014), *trans. denied*.

[31] Because of Schulstad's and Dr. Feldman's testimony that Schulstad was fully aware of the risks of taking Levaquin but took it anyway, Schulstad cannot establish that Dr. Edwards' failure to advise her about the risks of Levaquin was the proximate cause of her injuries. Thus, the designated and undisputed evidence negated the proximate cause element of Schulstad's informed consent claim. Because "only a single conclusion can be drawn from the designated

evidence," the trial court did not err in granting summary judgment to Dr. Edwards on Schulstad's informed consent claim. *See id*.

III. Standard of Care – Abandonment

[32] Schulstad finally contends there are material issues of fact about whether Dr. Edwards abandoned her. She notes that Dr. Edwards did not advise her that he would be vacationing in Mexico for a few days, did not arrange for another dentist to care for her while he was gone, and did not meet with her until four days after she first requested an appointment. We reject this argument because Schulstad failed to present expert testimony to rebut the medical review panel's unanimous opinion that Dr. Edwards met the standard of care.

[33] In *Weinberger v. Gill*, we found that "a physician's duty to a patient does not terminate upon the cessation of services if the physician is aware of the need for future care." 983 N.E.2d 1158, 1164 (Ind. Ct. App. 2013). A medical abandonment claim is subsumed into the broader claim that a physician's actions did not conform to the applicable standard of care. *Weinberger v. Boyer*, 956 N.E.2d 1095, 1112, n.5 (Ind. Ct. App. 2011)[2] (discussing *Melton v. Medtronic, Inc.*, 698 S.E.2d 886, 893 (S.C. Ct. App. 2010)), *trans. denied*.

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[2] Both *Weinberger* cases involved the same physician, who permanently left the country without telling his patients, did not arrange for another doctor to care for them, and whose whereabouts remained unknown until he was "apprehended in a tent in the Italian Alps" five years later. *Weinberger v. Gill*, 983 N.E.2d 1158, 1160 (Ind. Ct. App. 2013); *Weinberger v. Boyer*, 956 N.E.2d 1095, 1101–02 (Ind. Ct. App. 2011), *trans. denied*.

Schulstad was thus required to present expert testimony about the applicable standard of care about abandonment to rebut the medical review panel's unanimous opinion that Dr. Edwards met the applicable standard of care. *See Ziobron*, 907 N.E.2d 118 at 122; *Melton*, 698 S.E.2d at 892 (claim of abandonment requires plaintiff to file an expert affidavit).

[34] Schulstad acknowledges she presented no expert testimony about the standard of care for an abandonment claim, but she contends that her lay testimony that Dr. Edwards abandoned her creates material issues of fact about whether Dr. Edwards abandoned her. We disagree. A plaintiff in a medical malpractice case must present expert opinion testimony to show the existence of a genuine issue of fact once the defending party designates the opinion of a medical review panel finding that he exercised the standard of care. *Boston*, 785 N.E.2d at 1190. Because Schulstad failed to present expert testimony on the standard of care related to abandonment, she failed to rebut the medical review panel's opinion that Dr. Edwards met the standard of care. "Failure to provide expert testimony will usually subject the plaintiff's claim to summary disposition." *Speaks*, 117 N.E.3d at 667. The trial court did not commit error in granting summary judgment to Dr. Edwards on Schulstad's abandonment claim.

[35] Affirmed.

Bradford, C.J., and Altice, J., concur.