MEMORANDUM DECISION

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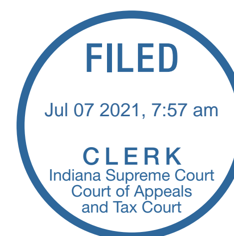

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IN THE COURT OF APPEALS OF INDIANA

Cynthia Rossner, individually and as Legal Guardian of Shawn Rossner, *Appellants-Plaintiffs,* v. South Bend Orthopaedics; Jeffrey Biever, DPM; Cheryl Stahl, NP; Julie Ortega-Schmitt, M.D.; and Annette Millie, M.D., *Appellees-Defendants*	July 7, 2021 Court of Appeals Case No. 20A-CT-1804 Appeal from the St. Joseph County Superior Court The Honorable Steven L. Hostetler, Judge Trial Court Cause No. 71D07-1904-CT-000160

May, Judge.

[1] Cynthia Rossner, individually and as Legal Guardian of Shawn Rossner, (collectively, "the Rossners") appeals the trial court's grant of summary judgment in favor of South Bend Orthopaedics ("SBO"), Jeffrey Biever, DPM ("Dr. Biever"), Cheryl Stahl, NP ("Practitioner Stahl") (collectively, "SBO Defendants"), and Julie Ortega-Schmitt, M.D. ("Dr. Ortega-Schmitt").[1] The Rossners argue the trial court erred when it granted summary judgment in favor of the SBO Defendants and Dr. Ortega-Schmitt based on the Rossners' failure to designate expert testimony to refute the unanimous medical review panel's opinion in favor of SBO Defendants and Dr. Ortega-Schmitt. We affirm.

[1] The Rossners do not appeal the trial court's grant of summary judgment in favor of Annette Millie, M.D. ("Dr. Millie"). However, as Dr. Millie was a party before the lower court, she is also a party on appeal.

Facts and Procedural History

[2] On June 18, 2013, thirty-six-year-old Shawn visited Dr. Biever, a physician at South Bend Orthopaedics, for pain in Shawn's right foot following an injury while playing basketball. Dr. Biever observed that Shawn had a "fifth metatarsal shaft fracture that is shortened and displaced." (Appellants' App. Vol. III at 53.) Dr. Biever indicated in his report that Shawn would need surgery to "reduce and fixate this fracture." (*Id.*) Dr. Biever also noted at the end of his report that he "discussed the risks and benefits of the procedure with the patient including but not limited to infection, bleeding, neurovascular injury, DVT, PE,[2] death, need for revision surgery, post traumatic arthritis, and any other related complications." (*Id.*) Dr. Biever performed the surgery on June 21, 2013.

[3] The surgery was without complication, and Shawn seemed to be "making progress" in healing. (*Id.* at 50.) However, on July 30, 2013, Shawn saw Dr. Biever for a recheck appointment and reported he "had a slight injury at home about 10 days ago where he landed on the outside of the right foot." (*Id.* at 48.) Dr. Biever wrote in his report that Shawn's x-rays "did not show increased bone healing compared to his last x-ray" and that Dr. Biever recommended "that at this point [Shawn] needs to have this right fifth metatarsal revised with a plate and bone grafting." (*Id.*) Dr. Biever again noted in his report that he

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[2] The record does not indicate what "DVT" or "PE" mean.

"discussed the risks and benefits of the procedure with the patient including but not limited to infection, bleeding, neurovascular injury, DVT, PE, death, need for revision surgery, post traumatic arthritis, and any other related complications." (*Id.*) Dr. Biever performed the second surgery on August 3, 2013.

[4] The surgery was without complication, and Shawn visited Dr. Biever for regular recheck appointments. Dr. Biever saw Shawn on August 27, 2013, and noted:

> Patient presents today with some increased redness and some mild drainage through the incision site. Today this area was cleaned and I put him into a posterior splint that he will be able to take off and apply peroxide to the incision site. I did place him on Clindamycin for the next 10 days. If the redness or drainage gets worse he will let me know.

(*Id.* at 41.) During an appointment on September 10, 2013, Dr. Biever noted, "[p]atient is healing well and has no signs of infection today" however Dr. Biever "kept him on Clindamycin for another seven days[.]" (*Id.* at 38.)

[5] On October 28, 2013, Shawn contacted Dr. Biever's office and reported "some discharge from the incision site[.]" (*Id.* at 26.) Dr. Biever placed Shawn on Clindamycin. On October 31, 2013, Shawn visited Dr. Biever's office and Dr. Biever "opened a small portion of the incision and cleaned it out." (*Id.*) He did not see a "deep space abscess or inner undermining." (*Id.*) He directed Shawn to "soak with Epsom salt and apply peroxide to the area . . . [and] finish his Clindamycin prescription[.]" (*Id.*)

[6] On November 5, 2013, Dr. Biever reported, regarding his recheck visit with Shawn that day:

> Patient is here today for follow up for his right soft tissue infection along the lateral incision line. Clinically it is not worse than what it was last week but still has a small area of purulence upon expression. Today a culture was performed to his right small wound. I don't feel there is any deep space abscess, especially with deep palpitation and expression. He will finish his Clindamycin this week and I will call him if we need to change his antibiotic course pending his culture results.

(*Id*. at 24.) At the next visit on November 12, 2013, Dr. Biever reported that Shawn had "made nice progress" and "did well with the augmentin prescription." (*Id*. at 21.) He directed Shawn to finish the prescription "even with the incision being healed." (*Id*.) Shawn thereafter had an allergic reaction to the augmentin and stopped using it. Subsequent medical reports indicate Shawn continued to take Clindamycin as prescribed.

[7] On December 2, 2013, Shawn also began seeing Practitioner Stahl, who worked for South Bend Orthopaedics, for pain management. She noted in her report that Shawn was experiencing a pain level of seven on a scale from one to ten; the skin on Shawn's right lower extremity was "ecchymotic; edema 2+; elasticity decreased; temperature warmer than usual[;]" and that his gait was "antalgic[.]" (*Id*. at 15.) Shawn last saw Dr. Biever on December 10, 2013. During that visit, Shawn reported that he "did notice over the weekend a small area of purulence" but Dr. Biever noted that Shawn told him that the issue had been resolved. (*Id*. at 13.) Dr. Biever observed that on the day of the visit Dr.

Biever "d[id] not see any signs of abscess formation or streaking to the foot." (*Id*.) Dr. Biever prescribed Shawn "14 days of Levaquin 750 mg" and directed Shawn to "continue to see [Practitioner Stahl] for his pain." (*Id*.) Dr. Biever advised Shawn to call him "if he has concerns with increased pain or infection down the road." (*Id*.) On December 23, 2013, Practitioner Stahl saw Shawn again and noted Shawn reported his pain was "dissipating" and the relevant area did not have "edema, erythema or sensitivity to the touch." (*Id*. at 10.) Practitioner Stahl advised Shawn to contact her office if there were any further problems.

[8] On February 21, 2014, Shawn posted on Twitter, "So tired of my foot hurting!! It's making me grouchy[.]" (*Id*. at 103.) On March 1, 2014, Shawn became ill with symptoms including "fever, chills, vomiting, rash and loss of dexterity[.]" (Appellants' App. Vol. II at 153.) Because Shawn was an employee of the University of Notre Dame, he went to the Notre Dame Wellness Center on March 3, 2014, and saw Dr. Ortega-Schmitt. In the Progress Note from that visit, Dr. Ortega-Schmitt reported, under "History of Present Illness" on the Progress Note:

> episodic pt with fever and body aches, headache
> sinuses some congestion
> no cough
> vomited this am
> not sleeping well
> did not eat today, no appetite
> drinking a lot of water and urine is clear
> stools – none today and fine yesterday
> chills significant

no one ill at home
no sore throat
usually healthy
had a fleeting rash when he was feverish over the weekend but
quickly resolved

(Appellants' App. Vol. IV at 96) (errors and formatting in original). On the same Progress Note, under "Past Surgical History[,]" there was no mention of the two recent foot surgeries. (*Id.*) Based on the information before her and Shawn's symptoms, Dr. Ortega-Schmitt surmised Shawn had a virus "consistent with influenza" and prescribed him Tamiflu. (*Id*. at 97.) She directed Shawn to "call if not improving in 48 hours" and "Call or Return if symptoms worsen or persist." (*Id.*) (formatting in original).

[9] On March 6, 2014, Shawn returned to the Notre Dame Wellness Center, complaining of "joint pain, hard to walk, and having trouble dressing himself[.]" (*Id*. at 93) (errors in original). Dr. Ortega-Schmitt put him on an IV of "normal saline sol 1000 CC", (*id*. at 95) (original formatting omitted), and reported that Shawn "appear[ed] to be feeling better [after the IV treatment], however he did break into a sweat during IVF administration[.]" (*Id*. at 94.) The Progress Note indicated Dr. Ortega-Schmitt believed Shawn to be dehydrated and still suffering from the flu. She prescribed antibiotics to guard against pneumonia and told Shawn to "return Saturday for recheck" and to "Call or Return if symptoms worsen or persist[.]" (*Id*. at 95.)

[10] On Saturday, March 8, 2014, Shawn returned as instructed to the Notre Dame Wellness Center for a recheck. He saw Dr. Annette Millie, who was the doctor

on call that day, and she reported in her notes that Shawn's "flu" was "improving[.]" (*Id*. at 89.) Dr. Millie directed Shawn to finish his antibiotics as directed, continue Motrin for joint pain, continue drinking fluids, "advance diet" as he could tolerate it, and monitor his blood pressure. (*Id*. at 89.)

[11] On Monday, March 10, 2014, Cynthia took Shawn to an urgent care clinic. The doctor examined Shawn and told Cynthia to take Shawn to the emergency room immediately. Cynthia took Shawn to the emergency room at St. Joseph Regional Medical Center, and she reported in her affidavit designated as part of summary judgment that when they "got to the emergency room, [they] learned that Shawn had a large vegetation on the mitral valve of his heart. Dr. Patel, the cardiologist treating Shawn at the hospital, told [Cynthia that] Shawn would likely have open heart surgery to remove it." (Appellants' App. Vol. II at 154.) The Consultation for the emergency room visit notes that Shawn's "past surgical history" included "foot surgery[.]" (Appellants' App. Vol. III at 105) (formatting in original omitted). The emergency room doctor admitted Shawn to the hospital.

[12] The next day, Dr. Truc Trung Ly examined Shawn and indicated in the consultation report:

> I am very concerned about the size of this vegetation. I do think he needs to go to the [operating room] as soon as possible. Dr. Patel and I discussed that. [Dr. Patel] is going to consult Cardiothoracic Surgery. I am sure the source is that foot and I am most convinced that he probably has osteomyelitis in that lower extremity with hardware involvement. Obviously, his

> condition is critical at this point in time and we are hoping we can stabilize him and get him to the operating room. He will need a very prolonged course of antimicrobials. Again, the most important thing is that I think he goes to the [operating room] and we repeat cultures daily and make sure he clears this bacteremia. I am also concerned about seeding elsewhere. Again, Staph easily could seed to other joints, back, psoas abscess, etc. I think we need to watch him carefully for that.

(*Id*. at 106.)

[13] By the next day, the vegetation in Shawn's heart had moved to his spleen, right kidney, and small intestine. Dr. Mark Thompson indicated in his report that the vegetation was likely a "septic emboli." (*Id*. at 110.) Dr. Thompson did not recommend surgery. A brain scan on March 14, 2014, showed a portion of the mass had moved to Shawn's brain. On March 17, 2014, Shawn suffered a cerebral hemorrhage and Dr. Walter Langheinrich performed surgery to remove the hemorrhage. According to Cynthia's affidavit, since March 17, 2014, "Shawn is unable to eat or speak, and cannot use his limbs. His condition is permanent." (Appellants' App. Vol. II at 155.)

[14] On March 17, 2015, the Rossners filed a complaint for damages with the State of Indiana Department of Insurance against SBO, Dr. Biever, Dr. Ortega-Schmitt, Dr. Millie, and Take Care Health, Indiana, P.C. d/b/a Notre Dame Wellness Center, alleging, generally, that the defendants were medically negligent when treating Shawn and that negligence resulted in his permanent disability. On July 3, 2015, Cynthia filed an amended complaint, adding Practitioner Stahl, Take Care Health Systems, LLC, and Healthworks Med

Group of Indiana, P.C. as defendants. On April 29, 2019, the Rossners filed a complaint in St. Joseph Superior Court against "Surgeons Group A; Surgeon A; Nurse Practitioner A; Doctor A; and Doctor B[.]" (*Id*. at 34) (formatting in original omitted). The complaint alleged those defendants were negligent in their various capacities.

[15] On January 10, 2020, the Indiana Department of Insurance's Medical Review Panel issued its decision on Cynthia's 2015 complaint. The Medical Review Panel unanimously concluded "[t]he evidence does not support the conclusion that the Defendants failed to meet the applicable standard of care and the conduct complained of was not a factor of the resultant damages. Referral for review of fitness to practice medicine is not recommended." (*Id*. at 77.)

[16] On March 10, 2020, the SBO Defendants filed a motion for summary judgment arguing:

> There exists no genuine issue of material of [sic] fact in this matter . . . therefore, these parties are entitled to judgment in their favor as a matter of law because Plaintiffs have failed to produce an expert opinion refuting the unanimous Opinion rendered by the Medical Review Panel.

(*Id*. at 24.) On March 23, 2020, Dr. Ortega-Schmitt and Dr. Millie filed an almost identical motion for summary judgment also alleging there was no genuine issue of material fact based on the Medical Review Panel's decision and the fact that "Plaintiffs have failed to demonstrate through expert medical testimony that [Dr. Ortega-Schmitt or Dr. Millie] breached the standard of care

in the medical care and treatment of the plaintiff, Shawn Rossner and that their conduct complained of was a factor in causing the Plaintiffs' damage claimed herein." (*Id*. at 85.)

[17] In their response to the motion for summary judgment from Dr. Ortega-Schmitt and Dr. Millie, the Rossners conceded that summary judgment was appropriate as to Dr. Millie because she did not have access to some of Shawn's medical records when she examined him at the Notre Dame Wellness Center and the Medical Review Panel had decided in Dr. Millie's favor. However, they argued that they were not required to present evidence from a medical expert to support their claims against Dr. Ortega-Schmitt because the breaches of duty were "matters which require no medical or scientific knowledge/explanation." (*Id*. at 118) (original formatting omitted). The Rossners made an identical argument regarding their lack of need to present evidence from a medical expert in their response to the motion for summary judgment filed by the SBO Defendants. Instead of expert evidence, the Rossners designated Cynthia's affidavit, an affidavit from a lab technician regarding the comparison of certain bacterial samples relevant to the case, and portions of deposition testimony from Dr. Biever, Practitioner Stahl, and Dr. Ortega-Schmitt.

[18] The parties, except for Dr. Millie, filed competing motions to strike for various reasons, none of which are relevant to our review. On June 15, 2020, the trial court held a hearing on the motions for summary judgment. On June 26, 2020, the trial court issued an order granting all Defendants' motions for summary judgment and denying the motions to strike filed by all Defendants except Dr.

Millie. The trial court's order did not address the Rossners' motion to strike, however, it stated, "[t]here being no just reason for delay, this Order constitutes a final judgment of this court." (*Id*. at 22.)

[19] On July 16, 2020, the Rossners filed a motion to correct error, asserting summary judgment was improper because the trial court misunderstood their argument:

> [T]his is not a pure "common knowledge" case and it surely isn't akin to a left-behind sponge. Rather, it is a case where jurors can use their common knowledge, **crucially aided by admissions from the defendants themselves** which – as discussed more below – have whittled down the jury's analyses to very basic questions of reasonableness.

(Appellants' App. Vol. V at 53) (emphasis in original). On August 24, 2020, the trial court held a hearing on the Rossners' motion to correct error. On September 2, 2020, the trial court issued its order denying the Rossners' motion to correct error.

Discussion and Decision

[20] Our standard of review of a trial court's order on summary judgment[3] is well-settled.

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[3] As noted in the Facts, the Rossners filed a motion to correct error, and the trial court denied it. The Rossners do not argue the trial court erred when it denied their motion to correct error, and our standard of review for appeal of a motion to correct error directs us to consider the underlying order, here the order

> When reviewing the grant or denial of a motion for summary judgment, we apply the same standard as the trial court: whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. We grant summary judgment only if the evidence sanctioned by Indiana Trial Rule 56(C) [meets that standard]. Further, we construe all evidence in favor of the nonmoving party and resolve all doubts as to the existence of a material issue of fact against the moving party.

Anonymous Doctor A v. Foreman, 127 N.E.3d 1273, 1276-77 (Ind. Ct. App. 2019) (internal citations and quotation marks omitted).

[21] "Because medicine is an inexact science, an inference of negligence will not arise simply because there is a bad result without proof of some negligent act." *Narducci v. Tedrow*, 736 N.E.2d 1288, 1292 (Ind. Ct. App. 2000). In claims of medical malpractice it is well-settled:

> In addressing the sufficiency of a medical malpractice action based upon negligence, the plaintiff must establish: 1) a duty on the part of the defendant in relation to the plaintiff; 2) failure on the part of the defendant to conform to the requisite standard of care required by the relationship; and 3) an injury to the plaintiff resulting from that failure. *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992). Physicians are not held to a duty of perfect care. *Slease v. Hughbanks*, 684 N.E.2d 496, 498 (Ind. Ct. App. 1997). Instead, the doctor must exercise the degree of skill and care ordinarily possessed and exercised by a reasonably skillful and careful practitioner under the same or similar circumstances. *Id*.

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granting summary judgment in favor of Defendants. *See In re Paternity of H.H.*, 879 N.E.2d 1175, 1177 (Ind. Ct. App. 2008) (review of motion to correct error includes review of underlying order).

> To establish the applicable standard of care and to show a breach of that standard, a plaintiff must generally present expert testimony. *Id*.

Syfu v. Quinn, 826 N.E.2d 699, 703 (Ind. Ct. App. 2005). The unanimous opinion of a Medical Review Panel concluding the providers did not breach the applicable standard of care "is ordinarily sufficient to negate the existence of a genuine issue of material fact entitling the physician to summary judgment." *Id*. A plaintiff can demonstrate a genuine issue of material fact precluding summary judgment for the provider despite such a finding by presenting medical expert testimony to dispute the Medical Review Panel's findings. *Desai v. Croy*, 805 N.E.2d 844, 850 (Ind. Ct. App. 2004), *trans. denied*.

[22] "Expert testimony is required only when the issue of care is beyond the realm of the lay person. In other words, the standard of care need not be established by expert opinion when the doctor's conduct was understandable by the jury without extensive technical input." *Narducci*, 736 N.E.2d at 1293 (internal citations omitted).

> In a medical malpractice action, an opposing affidavit submitted to establish that a defendant doctor breached the applicable standard of care must set forth that the expert is familiar with the proper standard of care under the same or similar circumstances, what that standard of care is, and that the defendant's treatment of the plaintiff fell below that standard.

Perry v. Driehorst, 806 N.E.2d 765, 769 (Ind. Ct. App. 2004), *reh'g denied*, *trans. denied.*

[23] However, in some instances, a provider's "allegedly negligent act or omission is so obvious that expert testimony is unnecessary." *Syfu*, 826 N.E.2d at 703. Those instances fall under the "common knowledge" or res ipsa loquitur exceptions. *Id*. The application of the "common knowledge" exception is limited to instances in which the provider's alleged conduct "is so obviously substandard that one need not possess medical expertise in order to recognize the breach of the applicable standard of care." *Id*. Similarly,

> [r]es ipsa loquitur literally means "the thing speaks for itself." Consequently, the facts or circumstances accompanying an injury may be such as to raise a presumption, or at least permit an inference, of negligence on the part of the defendant. The doctrine of res ipsa loquitur is a rule of evidence which allows an inference of negligence to be drawn from certain surrounding facts. Application of the doctrine does not in any way depend on the standard of care imposed by law but, rather, depends entirely upon the nature of the occurrence out of which the injury arose. Whether the doctrine applies in any given negligence case is a mixed question of law and fact. The question of law is whether the plaintiff's evidence included all of the underlying elements of res ipsa loquitur.

Narducci, 736 N.E.2d at 1292 (internal citations omitted).

[24] Under the doctrine of res ipsa loquitur, negligence may be inferred when: "1) the injuring instrumentality is shown to be under the management or exclusive control of the defendant or his servants, and 2) the accident is such as in the ordinary course of things does not happen if those who have management of the injuring instrumentality use proper care." *Vogler v. Dominguez*, 625 N.E.2d 56, 61 (Ind. Ct. App. 1993), *trans. denied*. The medical malpractice cases

demonstrated by "common knowledge" or res ipsa loquitur typically involve a situation wherein a provider has left a foreign object inside a patient's body. *See Ciesiolka v. Selby*, 147 Ind. App. 396, 399, 261 N.E.2d 95, 97 (1970) (expert testimony not required when doctor negligently left mesh in patient's abdomen causing infection). Additionally, medical expert testimony is not required when negligence is obvious based on a reason that does not involve the performance of a medical treatment. *See Gold v. Ishak*, 720 N.E.2d 1175, 1181 (Ind. Ct. App. 1999) (medical expert testimony not required when negligence arose from spark emitted near a source of oxygen in an operating room, causing injury), *trans. denied*.

[25] In its order granting summary judgment in favor of the SBO Defendants and Dr. Ortega-Schmitt, the trial court stated:

> In opposing the Ortega-Schmitt Summary Judgment Motion, Ms. Rossner argues primarily that the "common knowledge exception obviates the need for her to present expert evidence as to the standard of care applicable to Dr. Ortega-Schmitt and any deviation from that standard of care. She contends that Dr. Ortega-Schmitt's reasoning "lacks any basis in logic" and that Dr. Ortega Schmitt's "reasoning rests on false premises" and that "an ordinary juror" can understand that.
>
> Unfortunately, it is not that simple. Ms. Rossner's claim against Dr. Ortega-Schmitt is based on an alleged failure to properly diagnose a medical condition, which squarely presents a question of whether or not there was a failure to follow the applicable standard of care. To answer that very direct question requires an understanding of what the applicable standard of care is and whether and how that standard of care was met or not met.

These are clearly outside the understanding of ordinary jurors. Ms. Rossner has not designated any expert evidence on these matters. She did designate an affidavit given by a Medical Technologist with a bachelor's degree in Health Sciences, Alissa Lheto-Hoffman. However, Ms. Lehto-Hoffman does not have the expertise, education or experience to opine on the relevant standard of care or any deviation thereof.

Ms. Rossner also designated as evidence the Panel Submission filed on behalf of Dr. Ortega-Schmitt. Page 44 of that Panel Submission contains the following sentence:

> In the outpatient/ambulatory setting, sepsis screen may be appropriate if two of the following clinical findings are present: heart rate > 110, temperature > 38º C (100.4º), respirations > 25, or an altered mental status.

Ms. Rossner argues that sentence, when coupled with the medical evidence and testimony given during depositions, is sufficient to allow a jury to find that Dr. Ortega-Schmitt was negligent even without expert testimony. It is an interesting argument, and one to which the Court gave particular consideration.

Dr. Ortega-Schmitt moved to strike the Panel Submission as not constituting admissible evidence that may be considered in deciding a summary judgment motion. But even if the Panel Submission is not stricken, it does not lead to the result Ms. Rossner contends. The relied-upon language does not establish, or even discuss, the applicable standard of care. All it says is that sepsis screening "may be appropriate" under certain circumstances. It does not say that sepsis screening is <u>required</u> under the circumstances presented or that a failure to screen would be a deviation from the standard of care. Moreover, the

experts that did weigh in on the standard of care issues, those on the Panel, were presented with that sentence as part of the Panel Submission and they nevertheless determined that there was no deviation from the standard of care.

In short, no matter how the issues with respect to Dr. Ortega-Schmitt are framed, the claim against her comes down to the question of whether or not she met the applicable standard of care. Ms. Rossner has presented no expert testimony on that issue and the evidence that she did designate is not an acceptable facsimile for such expert testimony. Ms. Rossner has therefore not met her burden under *Hughley*[*v. State,* 15 N.E.3d 1000 (Ind. 2014),] and *Stafford v. Szymanowski*[, 31 N.E.3d 959 (Ind. 2015)]. There are no genuine issues of material fact and the Ortega-Schmitt Summary Judgment Motion must be granted as a matter of law.

The issue presented by the SBO Summary Judgment Motion is somewhat more complicated. Ms. Rossner presents her claim against the SBO Defendants as primarily arising from their alleged failure to warn and educate Shawn Rossner as to the potential for infections so that he could be on the lookout for signs of infection. Such failure, Ms. Rossner posits, is akin to leaving a sponge in a patient during surgery. It is well established that a juror does not need expert testimony to understand that it is negligence to leave a sponge in a surgery patient. From that analogy, Ms. Rossner contends that expert testimony is not needed to determine whether a health care provider should warn a surgery patient to be on the lookout for infections. It is a simple matter of common-sense, Ms. Rossner argues.

Indeed, with the benefit of hindsight, it might seem that such education and warnings are a matter of common sense. But the sad and often overlooked reality is that the human body, and the diseases and conditions affecting it, are extremely complex. They are sometimes unknowable, and often unpredictable. The

list of potential side effects and adverse reactions to a given course of treatment can be extensive, if not endless. Health care providers have to make judgment calls every day as to whether and how to warn their patients. In making those judgment calls, health care providers have to operate consistent with the applicable standard of care.

Ordinary lay people, including judges and jurors, do not have the requisite expertise to determine and apply such [a] standard of care. Expert evidence is required. The SBO Defendants have designated such expert evidence. Ms. Rossner, unfortunately, has not.

She did designate some deposition testimony from Nurse Practitioner Stahl. In her deposition, Nurse Practitioner Stahl acknowledged that there are situations where providing education to patients about infections would be appropriate. Nurse Practitioner Stahl states that if she were to "suspect" the presence of an infection, it would be important to let the patient know some things they need to watch. However, while Ms. Stahl observed possible symptoms that could have indicated the presence of infection (as well as other possible conditions), she never testified that she suspected infection to be present. Therefore, her testimony cannot be taken as an admission that she or any of the other defendants deviated from the applicable standard of care.

Ms. Rossner also contends that the SBO Defendants discharged Shawn Rossner from their care too soon. But again, the decision of when and under what circumstances to discharge a patient is a complicated medical care decision. Expert testimony is needed to determine whether or not the discharge was consistent with the applicable standard of care. Lay persons such as judges and jurors simply do not have the requisite knowledge and experience to determine such a matter without the assistance of qualified expert testimony.

> The expert testimony that has been designated unanimously opines that the SBO Defendants did not violate the applicable standard of care. Without any expert medical evidence to the contrary having been designated, the court has no choice but to follow applicable Indiana law and determine that there are no genuine issues of material fact and that the SBO Defendants are entitled to the entry of summary judgment on Plaintiff's Complaint as a matter of law.

(Appellants' App. Vol. II at 19-21.)

[26] The Rossners argue the trial court erred when it granted summary judgment because, while this is not a case of res ipsa loquitur, medical expert testimony is not required to prove "what lay people should know on their own." (Appellants' Br. at 16.) They contend that "average jurors can understand the importance of a patient being educated about 1) the fact that they have a staph infection; and 2) the fact that constitutional illness indicates a dangerous escalation to 'severe infection[.]'" (*Id.* at 17.) Therefore, they assert, they "should not be forced to hire/present experts who would essentially be 'talking down to' the jurors about what they should or should not know on their own, and what is reasonable for them to expect in terms of education and warnings from those rendering medical care." (*Id.*)

[27] To support this argument, the Rossners rely upon our holding in *Chaffins v. Kauffman*, 995 N.E.2d 707 (Ind. Ct. App. 2013), *trans. denied*. In *Chaffins*, the plaintiff filed a complaint before the Indiana Department of Insurance alleging Dr. Kauffman and the nursing staff were negligent when Dr. Kauffman released Chaffins from the hospital after a colonoscopy despite Chaffins' report of severe

pain immediately following the procedure, of which she told the nursing staff and Dr. Kauffman. *Id*. at 710. The Medical Review Board determined Dr. Kauffman and the nursing staff did not deviate from the applicable standard of care. *Id*. Chaffins then filed a civil complaint. Shortly thereafter, Dr. Kauffman and the nursing staff filed motions for summary judgment based on the Medical Review Panel's decision. *Id*. at 711.

[28] The trial court granted summary judgment in favor of Dr. Kauffman and the nursing staff. *Id*. Similar to the case before us, Chaffins did not designate medical expert evidence in their response to the nursing staff's motion for summary judgment because they argued that the nursing staff's conduct could be evaluated "without extensive technical input." *Id*. at 713. The designated evidence established that Chaffins informed the nursing staff that she was in severe pain and the nursing staff did not inform Dr. Kauffman, nor did the nursing staff note Chaffins' pain in Chaffins' chart. *Id*. Our court held that expert testimony was not needed for a reasonable trier of fact to determine that the nursing staff deviated from the applicable standard of care. *Id*.

[29] The Rossners' complaint alleges that Defendants were negligent in their separate capacities and actions based on each provider's "failure to meet the reasonable and accepted standard of medical care in [his or her] treatment of Shawn Rossner was a proximate cause of the injuries he suffered – including but not limited to a massive stroke following infective endocarditis." (Appellants' App. Vol. II at 37.) Specifically, the Rossners claim Shawn's ultimate medical condition resulted from SBO's deviation from the accepted

standard of care when Dr. Biever and Practitioner Stahl did not educate the Rossners regarding any constitutional symptoms that may be linked to infection such as fever, nausea, and vomiting and when SBO released Shawn from care too early. Regarding Dr. Ortega-Schmitt, the Rossners claim she deviated from the standard of care when she did not consider other possible causes of Shawn's flu-like symptoms during his second visit, which the Rossners contend would have prevented the ultimate medical consequences Shawn suffered.

[30] These are complicated medical issues, and the holding in *Chaffins* does not apply here. The plaintiff in *Chaffins* suffered severe pain that she reported to the nursing staff, and the nursing staff neither reported her complaints to the relevant doctor nor recorded that information in her chart. To expect a subordinate, in *Chaffins* the nursing staff, to report a complaint from a client, in that case, Chaffins, to a superior is a requirement that is not unique to the medical field. As we stated in *Chaffins*, the "common knowledge exception" applies when

> the complained-of conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach. It is otherwise when the question involves the delicate inter-relationship between a particular medical procedure and the causative effect of that procedure upon a given patient's structure, endurance, biological makeup, and pathology. The sophisticated subtleties of the latter question are not susceptible to resolution by resort to mere common knowledge.

995 N.E.2d at 713 (quoting *Malooley v. McIntyre*, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992) (disapproved by *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184 (Ind. 2016), on unrelated grounds)).

[31] To this point, regarding the SBO Defendants, the applicable standard of care regarding when and how to educate a patient about symptoms of a specific type of infection is a medical matter that depends upon the facts of each specific case. The complexities of determining an appropriate level of education is apparent in the Rossners' own argument that they, as laypeople, were unaware of what information was appropriate for Dr. Biever to give them about the situation. As the trial court noted in its order:

> Indeed, with the benefit of hindsight, it might seem that such education and warnings are a matter of common sense. But the sad and often overlooked reality is that the human body, and the diseases and conditions affecting it, are extremely complex. That are sometimes unknowable, and often unpredictable. The list of potential side effects and adverse reactions to a given course of treatment can be extensive, if not endless. Health care providers have to make judgment calls every day as to whether and how to educate and warn their patients. In making those judgment calls, health care providers have to operate consistent with the applicable standard of care.
>
> Ordinary lay people, including judges and jurors, do not have the requisite expertise to determine and apply such standard of care.

(Appellants' App. Vol. II at 20.)

[32] In their response to SBO Defendants' motion for summary judgment, the Rossners designated the following portion of Dr. Biever's depositional testimony:

> Q: Did you notify Shawn's primary care doctor of the fact that a staph infection had been found in his foot?
>
> [Dr. Biever]: No.
>
> Q: Why not?
>
> [Dr. Biever]: Again, I was the treating physician. And you know, I felt I had a firm grasp on what Shawn was dealing with. And again, he never had any clinical picture that I felt needed an outside source to – to have. You know, he didn't have any of the constitutional symptoms that would go along with a severe infection.

(*Id*. at 193.) The Rossners argue that Dr. Biever's depositional testimony established "the important correlation between constitutional symptoms and severe infection, and the Rossners designated evidence that Dr. Biever never warned Shawn about the significance of fever or chills in the context of infection." (Br. of Appellants at 14.) These admissions, they assert, coupled with common knowledge, create a genuine issue of material fact as to whether Dr. Biever acted according to the applicable standard of care under the circumstances.

[33] The Rossners also designated another portion of Dr. Biever's depositional testimony in their response to the SBO Defendants' motion for summary judgment:

> Q: How would Shawn know if he had an infection going on?
>
> [Dr. Biever]: Well, I would think if there's – if there's any type of signs where there's drainage or anything going on like that with his foot or if there's anything constitution, not feeling good, I feel malaise, I feel flu-like, anything, that would be – I better call a doctor. I mean, common sense is if you look at your foot and it's got pus coming out of it or anything like that, you should call a doctor. I never did. I never got any of those calls until the end of October where he states he's sore in his foot and he's got some drainage. So, then I had him come in.

(Appellant's App. Vol. II at 175.) Dr. Biever's statement, according to the Rossners, illustrates that the common knowledge exception is "uniquely applicable here for establishing the reasonableness of Dr. Biever expecting Shawn to know the correlation between serious infection and constitutional symptoms on his own." (Br. of Appellants at 15.) Again, the Rossners assert this testimony, along with the common knowledge of "what is reasonable . . . to expect in terms of education and warnings from those rendering . . . medical care." (*Id*. at 17.)

[34] Similarly, the Rossners claim Practitioner Stahl's depositional testimony provides the applicable standard of care without expert testimony:

Q:	But I'm saying, in situations where you may suspect the presence of infection, do you feel like it's, you know, important to let the patient know some things they need to –
[Stahl]:	Yes, I do.
Q:	-- be watchful for?
[Stahl]:	Yes, I do.
Q:	And why? Why do you feel that way?
[Stahl]:	Because that is educating the patient if they should have any of the signs or symptoms that I'm educating them on.
Q:	Is it fair to say that such an education might help them understand if something dangerous is occurring in their body?
[Stahl]:	That's fair to say, yes.
Q:	Is it fair to say that that may be something that they may not know on their own?
[Stahl]:	Yes.

(Appellants' App. Vol. II at 147.) The Rossners contend Practitioner Stahl's depositional testimony sets forth the applicable standard of care without the need for additional medical expert testimony.

[35] Relatedly, regarding Dr. Ortega-Schmitt, the applicable standard of care involved in making the decision to test a patient to determine an alternate diagnosis is inherently medical, as it involves medical testing and diagnosis. The Rossners designated testimony from Dr. Ortega-Schmitt's deposition where she discussed the treatment plan for Shawn when he returned to her clinic on March 6, 2014, still complaining of flu-like symptoms. She testified she gave him IV fluids, which made him feel better, though she acknowledged that IV fluids would improve the condition of someone with "influenza or a bacterial-type infection[.]" (Appellants' App. Vol. III at 121.) The Rossners claim this illustrates that Dr. Ortega-Schmitt knew that sepsis was a possibility and that she should have tested Shawn for sepsis instead of continuing treatment for the flu.

[36] As an initial matter, the parties disagree whether these statements can be used to establish an applicable standard of care in the same way a medical expert's opinion would. The Rossners rely on *Whyde v. Czarkowski*, 659 N.E.2d 625 (Ind. Ct. App. 1995), *trans. denied*, to support their contention that a defendant's statement can be used as expert testimony in a medical malpractice case. In that case, Whyde filed a claim against Dr. Robert Czarkowski, claiming Dr. Czarkowski further injured her shoulder during an examination following shoulder surgery. *Id*. at 627. Like in the case before us, the trial court granted summary judgment in Dr. Czarkowski's favor after Whyde did not designate medical expert evidence to rebut the Medical Panel's decision that Dr.

Czarkowski's behavior fell within the acceptable standard of care in her response to the motion for summary judgment. *Id*.

[37] On appeal, Whyde argued the trial court erred when it granted summary judgment in favor of Dr. Czarkowski because she was not required to present expert testimony, as "common folk understand that when a physician is merely 'examining' a patient's arm he or she does not forcefully jerk the injured arm." *Id*. at 628 (citation to the record omitted). Our court noted that Whyde's complaint relied upon the proper application of passive range of motion ("PROM"), which was "used to determine which motions may not be performed by the patient without assistance because of injury or muscle weakness." *Id*. We determined that PROM was a medical procedure and the proper application thereof was not common knowledge. Therefore, Whyde was required to present expert testimony to establish the applicable standard of care under those circumstances. *Id*.

[38] However, we ultimately reversed entry of summary judgment in favor of Dr. Czarkowski. We held:

> Although the questions to Czarkowski and his answers were not couched in classic terms of the applicable standard of care, it is clear that an orthopedic surgeon was expressing his opinion that an orthopedic surgeon should not use passive motion to move a patient's arm beyond the point where the patient complains of pain because to do so could injure the patient. For purposes of summary judgment, at least, this statement will suffice as evidence of the applicable standard of care and, therefore, Whyde satisfied her burden of demonstrating a genuine issue of material fact.

Id. at 630. Additionally, dicta contained in a footnote regarding the holding states:

> We note that neither party cites to an Indiana case for the proposition that a defendant's own testimony may be used to establish the standard of care. However, Whyde cites to cases in other jurisdictions which have addressed the issue. Whyde also relies upon Ind.Trial Rule 43(B) which allows a party to call an adverse party as a witness in order to establish facts and evidence. T.R. 43(B). Finally, Czarkowski appears to accept Whyde's position. Therefore, without addressing this issue in detail, we will assume that a patient may use the physician's deposition as the sole expert testimony regarding the standard of care.

Id. at 629 n.3.

[39] The Rossners' argument ignores our subsequent clarification of the *Whyde* decision in *Perry.* The *Perry* case was also a medical malpractice case in which the trial court granted summary judgment for the defendant, Dr. William Driehorst, based upon the fact that Perry did not designate expert evidence to establish the applicable standard of care. *Perry*, 808 N.E.2d at 768. In appealing the summary judgment decision, Perry relied on *Whyde* for the same reason the Rossners do here – that *Whyde* held that a defendant's testimony could be used as the required expert testimony to establish the applicable standard of care. Our court disagreed:

> We recognize that in *Whyde*, a panel of this court found that a defendant-physician's deposition testimony provided the applicable standard of care. However, in that case, the panel of

> this court did not squarely address the issue of whether a defendant-physician's deposition testimony was sufficient to withstand a motion for summary judgment. The defendant-physician in that case implicitly accepted the patient's position that his deposition testimony could be used as the sole expert testimony regarding the standard of care. Most cases hold that because of the complex nature of medical diagnosis and treatment, expert testimony is generally required to establish the applicable standard of care. If medical expert opinion is not in conflict regarding whether the physician's conduct met the requisite standard of care, there are no genuine triable issues. The nonmovant must present expert medical testimony to rebut the unanimous decision of the medical review panel.

Id. at 769-70 (internal citations omitted).

[40] Expert evidence independent of a defendant to is provide the fact finder with objective evidence of the expert's qualifications to know the applicable standard of care, what that standard of care is, and how the defendant's treatment of the plaintiff deviated from that standard of care. *Id*. at 768. What we have here is, at best, acknowledgements by SBO Defendants and Dr. Ortega-Schmitt that, in hindsight, there may have been a better or different way to approach Shawn's medical issues. However, there is no evidence from anyone about whether the approach used fell outside the applicable standard of care for medical professionals practicing in the same area. Thus, the trial court did not err when it granted summary judgment in favor of the SBO Defendants and Dr. Ortega-Schmitt because the Rossners were required to designate expert testimony regarding the applicable standard of care and failed to do so.

Conclusion

[41] The law dictates certain requirements to create a genuine issue of material fact in the majority of medical malpractice cases, that is, proper expert evidence regarding the applicable standard of care as it pertains to specific medical procedures. This was one such situation that required more than layperson knowledge or conjecture regarding what steps certain medical professionals should or should not have taken. The Rossners seek to Monday-morning quarterback all of the decisions made by those treating Shawn without establishing a goal line for that treatment, and their refusal to conform to a well-established legal requirement in a medical malpractice case -- the designation of an expert opinion regarding the standard of care -- has stopped their claim yards short of the endzone.

[42] The trial court did not err when it granted summary judgment in favor of the SBO Defendants and Dr. Ortega-Schmitt because the Rossners were required to submit expert testimony and did not do so. Accordingly, we affirm.

[43] Affirmed.

Bailey, J., and Robb, J., concur.