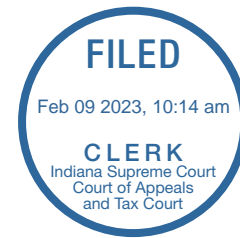


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Tammi Clark,
Appellant,

v.

Samer Mattar, M.D.,
Appellee.

February 9, 2023

Court of Appeals Case No.
22A-CT-116

Appeal from the Marion Superior
Court

The Honorable Heather A. Welch,
Judge

Trial Court Cause No.
49D01-1601-CT-3080

Memorandum Decision by Judge Bailey
Judges Brown and Weissmann concur.

Case Summary

- [1] Tammi Clark, as personal representative of the estate of Kandance Pyles, appeals the trial court’s judgment after a jury verdict in favor of Dr. Samar Mattar on her complaint for medical malpractice. Clark raises one issue for our review, namely, whether the trial court abused its discretion when it limited the scope of her cross-examination of Dr. Mattar. We affirm.¹

Facts and Procedural History

- [2] In 2010, Pyles was “clinically severely obese,” and she suffered from gestational diabetes, asthma, acid reflux, bilateral knee pain, sleep apnea, and polycystic ovarian syndrome. Tr. Vol. 3 at 249. On July 7, Dr. Mattar performed bariatric surgery on Pyles with the assistance of Dr. Scott Mimms. The operation “went well.” Tr. Vol. 4 at 14. On July 8, Pyles was still “doing well,” and there had “been no problems overnight.” *Id.* at 18. Pyles was “tolerating” a liquid diet, and she had “no complaints.” *Id.* at 19. Similarly, Pyles was “doing well” on July 9. *Id.* at 22. But she experienced some nausea

¹ This is the second appeal in this case. Following the first jury trial in 2019, the Indiana Supreme Court reversed the judgment of the trial court and remanded for a new trial on the ground that the trial court had erred when it did not strike a juror. See *Clark v. Mattar*, 148 N.E.3d 988, 944 (Ind. 2020).

and vomiting, so Dr. Mattar ordered some medication. Dr. Mimms also gave Pyles one dose of steroids.

- [3] On the morning of July 10, Pyles felt “better,” and she had tolerated liquids for six hours following the dose of steroids. *Id.* at 28. Pyles was “making slow progress,” but Dr. Mattar was “anticipating discharge soon.” *Id.* at 30. However, Pyles began vomiting again. As a result, at approximately 10:00 p.m., Pyles underwent a barium swallow test. The result of that test indicated that Pyles “was experiencing nausea because of edema or swelling” at one of the surgical connection sites. *Id.* at 31. Following the barium swallow, Dr. Mattar “observe[d]” Pyles to “see how she did over time and allow this swelling to naturally subside.” *Id.* at 32. Pyles’ heart rate, temperature, blood pressure, respiratory rate, and oxygenation saturation were “within all the limits.” *Id.* at 32.
- [4] On July 11, Pyles’ nausea and vomiting “became much worse[.]” *Id.* at 33. Her vital signs were “stable,” but she was not able to tolerate enough liquids to be discharged. *Id.* at 34. Dr. Mattar then had Pyles “rest her bowel” and not drink anything. *Id.* On July 12, Pyles again attempted to take in liquids, but she continued “to have issues with vomiting[.]” *Id.* at 37. Pyles had to “sit upright in the chair to avoid regurgitation.” *Id.* Later that day, Pyles made “progress,” and her vital signs were “within normal limits.” *Id.* at 40. Pyles’ nausea and vomiting returned that evening.

[5] In the overnight hours of July 12 and July 13, Pyles had “an unprovoked episode of nausea and vomiting while sitting up asleep in a bedside chair.” *Id.* at 41. Throughout the day on July 13, Pyles’ heart rate, blood pressure, respiratory rate, and oxygen saturation were all “normal.” *Id.* at 44. However, at 8:13 p.m., Pyles’ temperature was 100.4 degrees Fahrenheit. And, at 11:30 p.m., her temperature reached 101.1 degrees Fahrenheit. As a result of the rising temperature, the hospitalist ordered a CT scan.

[6] The CT scan was performed at approximately 3:45 a.m. on July 14. The result of the scan showed “a high-grade small bowel obstruction” at one of the surgical connection points. *Id.* at 46. Pyles’ vitals continued to be “normal,” her abdomen was “soft,” and her white blood cell count was “right in the middle of normal.” *Id.* at 50, 55. In addition, the hospitalist noted that Pyles’ lung exam was “clear” and that there were “no episodes of suspected aspiration.” Tr. Vol. 5 at 122. After Dr. Mattar learned of the results of the CT scan, he scheduled Pyles for surgery. Dr. Mattar ultimately performed the second surgery on Pyles at 5:05 p.m. that day. During the surgery, Pyles began to have “trouble oxygenating[.]” Tr. Vol. 4 at 62. Dr. Mattar “hurried up” and finished the surgery and transferred Pyles directly to the intensive care unit, where Pyles was placed on a ventilator. *Id.*

[7] At some point, Pyles’ “needs for oxygen” were getting too great for the small hospital she was in, so she was transferred to a larger hospital. *Id.* at 62. Pyles remained on a ventilator at the other hospital until August 15, when she ultimately died from acute respiratory distress syndrome. As a result of her

death, Clark filed a proposed complaint for medical malpractice against Dr. Mattar.²

[8] Three doctors were selected to sit on a medical review panel: Dr. Eric Knapp, a bariatric surgeon; Dr. Bradley Richards, an anesthesiologist; and Dr. David Harris, a pulmonologist. The medical review panel convened on November 9, 2015. Then, on December 21, the medical review panel issued its opinion in which it unanimously found that Dr. Mattar had “failed to comply with the appropriate standard of care, and that his conduct was a factor of the resultant damages.” Ex. Vol. 1 at 7.

[9] Thereafter, Clark filed a complaint against Dr. Mattar in the trial court. Prior to trial, Dr. Mattar filed a motion in limine in which he sought to prohibit Clark from questioning him about or referencing his “general reputation in the medical community, including reference to any other medical malpractice claims, medical licensing board issues, marital problems, and counseling.” Appellant’s App. Vol. 2 at 56. Dr. Mattar asserted that any such evidence “should be excluded as irrelevant or unduly prejudicial.” *Id.* Clark responded and asserted that evidence of “an expert’s professional licensing or findings of

² Clark additionally named other doctors in the proposed complaint, but the medical review panel unanimously concluded that they did not breach the standard of care or that their actions were not a factor in Pyles’ death. The claims against the other doctors were disposed of and they were not parties to the underlying jury trial.

malpractice are admissible for the purpose of impeaching an expert, including a treating physician who proffers expert opinions.” *Id.* at 72.

[10] The court held a hearing on Dr. Mattar’s motion. At the hearing, Clark asserted that Dr. Mattar had been “involved with [another] patient sexually,” which resulted in him being disciplined “for unprofessional behavior involving another patient.” Tr. Vol. 2 at 23. And Clark asserted that Dr. Mattar had been “denied admission” into other states and that those factors “speak to his qualifications as an expert in this case.” *Id.* Dr. Mattar responded that he had received “a letter of reprimand” from the Indiana medical licensing board but that he had not “been disciplined” and that there “was no revoking of his privileges.” *Id.* at 23-24. Dr. Mattar also stated that he was “not being put up as an expert” but that he was simply “going to tell what he did.” *Id.* at 26-27. The court took the matter under advisement.

[11] Thereafter, the court determined that Clark would be “permitted to question any **expert witness** about the result of any peer review proceeding[.]” Appellant’s App. Vol. 2 at 86 (emphasis in original). The court further found that “any expert witness who has been subjected to professional discipline by a licensing board may be questioned about the status and the reasons for the professional discipline **when testifying as an expert witness but not a factual witness.**” *Id.* at 87 (emphasis in original).

[12] The court then held a five-day jury trial beginning on December 13, 2021. At the beginning of the second day of trial and outside the presence of the jury, the

parties discussed the admission of Dr. Mattar’s curriculum vitae (“CV”) as evidence. Clark asserted that, if Dr. Mattar “is not going to be an expert I don’t believe that they should have the CV in. And if they are, I think that opens the door to then me . . . inquiring into his entire professional background.” Tr. Vol. 2 at 200. Dr. Mattar responded that his CV was “relevant in the fact that he was credentialed and qualified to do this surgery and take care of this lady.” *Id.* The court took the issue under advisement.

[13] Clark then proceeded to present her case. Clark read into the record portions of a deposition of Dr. Carol Greenspan, the doctor who had been Pyles’ anesthesiologist for both surgeries. Dr. Greenspan testified that there was a “concern” that Pyles could aspirate during the second surgery because she had been vomiting. Appellant’s App. Vol. 2 at 142. Clark also read into the record a portion of Dr. Mimms’ deposition. Dr. Mimms testified that, as of July 10, Pyles had an “obstruction.” *Id.* at 163. Dr. Mimms also testified that he “assume[d]” Pyles had aspirated prior to the second surgery. *Id.* at 165

[14] Clark also presented the testimony of her expert witness, Dr. Tom Sonnanstine. Dr. Sonnanstine testified that vomiting can lead to aspiration and that aspiration can “trigger” acute respiratory distress syndrome. Tr. Vol. 3 at 30. Dr. Sonnanstine then testified that the “standard of care was . . . breached in this patient.” *Id.* at 37. He stated that the original surgery on July 7 “went well” and that Pyles did not have any post-operative complications on the 8th or 9th. *Id.* However, Dr. Sonnanstine testified that Pyles “wasn’t tolerating her liquids” and that she “didn’t really reach” any “meaningful milestones.” *Id.* at

38. He acknowledged that a “barium upper GI was done” on July 10. *Id.* But he testified that the results of that test indicated “that she could have a downstream problem with the lower anastomosis.” *Id.* at 46. He then testified that “at the bare minimum” the standard of care required Dr. Mattar to obtain another abdominal x-ray “hours later” and that Pyles would have been “better served” with a CT scan. *Id.* at 49. He further opined that Dr. Mattar’s decision to give a dose of steroids was not “a typical way to deal with this type of problem.” *Id.* at 50-51. He then restated that he believed that the CT scan should have been ordered on July 10.

[15] After Dr. Sonnanstine completed his testimony, the parties held a hearing outside the presence of the jury on the admission of Dr. Mattar’s CV. The court found that, “if he does not opine on the standard of care, he is not an expert witness. He is a factual witness.” Tr. Vol. 3 at 173-74. The court then determined that the admission of the CV “does not open the door to asking him . . . questions about . . . licensure . . . issues or peer review findings because he’s not testifying as . . . an expert.” *Id.* at 174. And the court stated that “[t]he only way the door gets opened is if there are questions about whether or not he practiced below or above the standard of care.” *Id.*

[16] After Clark had rested her case, Dr. Mattar presented the deposition testimony of Dr. Richards, the anesthesiologist who had served on the medical review panel. Dr. Richards testified that, at the time the medical review panel had rendered its opinion, he had “relied heavily” on Dr. Knapp’s opinion because Dr. Knapp was a bariatric surgeon. Appellant’s App. Vol. 2 at 177. He further

testified that he would continue to defer to Dr. Knapp's opinion as to whether Dr. Mattar had breached the standard of care. Dr. Richards then testified that, from his perspective, he "did not see evidence of Dr. Mattar not meeting the . . . clinical standards." *Id.* at 218.

[17] After the conclusion of Dr. Richards' testimony, Dr. Mattar moved to admit a number of exhibits, including his CV. The court admitted that exhibit over Clark's "previously discussed" objections. Tr. Vol. 3 at 242. Dr. Mattar then testified about the events that had occurred. In particular, Dr. Mattar testified to the first surgery, Pyles' symptoms and vital signs in the days following the surgery, the barium swallow, the reasons for his actions following that test, the continued monitoring of Pyles' vital signs and symptoms, the CT scan, and the second surgery. In regard to the reasons for the delay in obtaining the CT scan, Dr. Mattar testified that "there was nothing to indicate that there was something else going on." *Id.* at 56. And he testified that, while it was clear that Pyles needed surgery following the CT scan, Pyles' need was "urgent" but not "emergency" because "her vital signs were all normal at the time." *Id.* at 57.

[18] Because the court had previously ordered that Clark was prohibited from asking Dr. Mattar about any past disciplinary issues, Clark made an offer of proof after Dr. Mattar had completed his testimony and outside the presence of the jury. In particular, Clark stated that she would have asked Dr. Mattar about a "denial of licensure" in Ohio, the "limitation of his right to practice in Texas," and "disciplinary action" in Pennsylvania and Indiana. Tr. Vol. 4 at 126; *see*

also Ex. Vol. 2 at 170-74, 205-06. Dr. Mattar responded that any such questions would be “irrelevant” and “prejudicial.” Tr. Vol. 4 at 137. Specifically, Dr. Mattar asserted that the document from Ohio simply indicated that he was “seeking to permanently withdraw” his application for a faculty position because he had obtained other employment. *Id.* And Dr. Mattar contended that the agreed entry from Texas simply referenced the “patient boundary issues” that had served as the basis for the reprimands in Indiana and Pennsylvania and that it had “nothing to do with patient care.” *Id.*

[19] Dr. Mattar then presented the expert testimony of Dr. James Foote. Dr. Foote testified that nausea is “[v]ery common” after bariatric surgery and that “just about every patient” vomits after surgery. *Id.* at 148-49. Dr. Foote also testified that ordering the barium swallow as an investigation into Pyles’ nausea and vomiting “met the standard of care.” *Id.* at 149. He then testified that the barium swallow showed swelling at a connection point and that it “provide[d] a reason for” Pyles’ vomiting. *Id.* at 152. Dr. Foote additionally testified that a CT scan was not “needed to be done” based on the results of the barium swallow “in order to meet the standard of care.” *Id.* at 153. He also testified that the standard of care did not require “that a CT scan be done at any point between the swallow study” on the 10th and the evening of July 13th. *Id.* at 157. He further testified that Pyles needed to be returned to surgery “within 24 hours” of the CT scan. *Id.* at 165. And Dr. Foote testified that Dr. Mattar “[a]bsolutely” met the standard of care. *Id.* at 209.

[20] Dr. Mattar also presented the expert testimony of Dr. Stacy Brethaur, who similarly testified that Dr. Mattar “met the standard of care” in his care and treatment of Pyles. *Id.* at 235. In particular, Dr. Brethaur testified that a “review of the case revealed a very logical stepwise approach” to Pyles’ nausea and vomiting. *Id.* at 236. Dr. Brethaur further testified that the results of the barium swallow “explained [Pyles’] symptoms at the time and that it was not a breach of the standard of care to not do a CT scan at that time.” *Id.* at 240. Dr. Brethaur also testified that nothing “prior to when [Pyles] had a temperature” would have prompted a CT scan. *Id.* at 242. And Dr. Brethaur testified that, while aspiration is a complication that can arise from a bowel obstruction, there was “nothing” in the record “that varied from . . . the standard of care[.]” Tr. Vol. 5 at 30.

[21] Dr. Knapp, the bariatric surgeon who had sat on the medical review panel, also testified as an expert in support of Dr. Mattar. Dr. Knapp testified that the results of the barium swallow did not necessitate a CT scan and that, based on the vital signs, the standard of care did not “require Dr. Mattar to order a CT scan at least up to July 13th at 8 p.m.” *Id.* at 72. He also testified that he did not “have any issue with the period of time that it took for a CT scan to be ordered[.]” *Id.* at 80. Additionally, he testified that, while he originally thought Dr. Mattar had breached the standard of care for failing to place a nasogastric tube, that decision was “based on hypothetical thinking” that “if the tube had been placed that the outcome would have been different.” *Id.* at 84. But he testified that whether the outcome would have been different “is a separate

issue” from the question of “does the standard of care require a physician to place the tube.” *Id.* He also testified that he no longer thinks Dr. Mattar’s failure to place the tube “was a breach in the standard of care.” *Id.* at 83. And he testified that he was “changing his opinion as to whether Dr. Mattar breached the standard of care” and that Dr. Mattar “did meet it.” *Id.* at 89.

[22] At the conclusion of the trial, the jury found in favor of Dr. Mattar and against Clark. The court entered judgment accordingly. This appeal ensued.

Discussion and Decision

[23] Clark contends that the trial court abused its discretion when it limited the scope of her cross-examination. Typically, the “decision to admit or exclude evidence is within the trial court’s discretion, and this court reviews the trial court’s decision for an abuse of discretion.” *Cain v. Back*, 889 N.E.2d 1253, 1256 (Ind. Ct. App. 2008), *trans. denied*. “An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before it, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Id.*

[24] On appeal, Clark contends that the court abused its discretion when it did not allow her to question Dr. Mattar as an expert because “he created the impression that he is an ‘expert’ in this case” by “placing his CV into evidence and testifying about it and explaining matters that can only be addressed by a medical doctor[.]” Appellant’s Br. at 29. And Clark maintains that the court

should have allowed her to ask Dr. Mattar whether he met the standard of care and about past licensing issues.

[25] However, even if we assume for the sake of argument that Dr. Mattar should have been treated as an expert witness subject to more vigorous cross examination, we agree with Dr. Mattar that any error in the exclusion of Clark's proffered evidence was harmless.³ As our Supreme Court has stated:

An error excluding evidence is harmless if "its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights." *Rohr v. State*, 866 N.E.2d 242, 246 (Ind. 2007) (quoting *Williams v. State*, 714 N.E.2d 644, 652 (Ind. 1999)); see also App. R. 66(A); Ind. Trial Rule 61. When making this determination, we consider the evidence's likely impact on a reasonable, average jury. See *Bonner v. State*, 650 N.E.2d 1139, 1141-42 (Ind. 1995).

Tunstall v. Manning, 124 N.E.3d 1193, 1200 (Ind 2019).

[26] As to Clark's argument that she should have been able to ask Dr. Mattar whether he breached the standard of care, we first note that Clark neither directs us to the location in the record where she made an offer of proof on this specific question nor makes any argument on appeal as to how Dr. Mattar would have answered had she been allowed to ask that question. However, we

³ We note that Dr. Mattar did not testify to the standard of care, whether he breached the standard of care, or whether any breach caused Pyles' death, which is the type of testimony generally provided by expert witnesses. However, we struggle to find any reason why Dr. Mattar would admit his CV as evidence other than to bolster his credibility and competency as a surgeon. While he argued at trial that it was to demonstrate that he was qualified to perform the surgery and treat Pyles, that was never an issue in the case.

think it is safe to assume that Dr. Mattar would have testified that he met the standard of care. Indeed, it goes without saying that a doctor who spends ten years and an unknown amount of money to rigorously defend his actions would testify without hesitation that he believed he met the standard of care. As such, the exclusion of any question to Dr. Mattar regarding whether he met the standard of care was harmless.

[27] Still, Clark also asserts that the court should have allowed her to question Dr. Mattar about past licensing issues. In a pretrial hearing, Clark asserted that Dr. Mattar had been “involved with [another] patient sexually,” which resulted in him being disciplined in Indiana. Tr. Vol. 2 at 23. And Clark asserted that Dr. Mattar had been “denied admission” into other states. *Id.* Then, in her offer of proof at trial, Clark stated that she would have asked Dr. Mattar about a “denial of licensure” in Ohio, the “limitation of his right to practice in Texas,” and “disciplinary action” in Pennsylvania and Indiana. Tr. Vol. 4 at 126. In support of her offer of proof, Clark provided the court with an agreed order from the State of Texas and Dr. Mattar’s request to permanently withdraw his application for a medical license in Ohio. *See Ex. Vol. 2 at 170-74, 205-06.* According to Clark, the court’s denial of her ability to question Dr. Mattar about those issues “prevented the jury from properly assessing Dr. Mattar’s credibility[.]” Appellant’s Br. at 35-36.

[28] However, we again hold that any error in the exclusion of that evidence was harmless. First, we note that the action against Dr. Mattar by the Indiana Medical Licensing Board consisted only of a letter of reprimand in 2012 and an

order that he pay \$2,000 based on “patient boundary issues.” Ex. Vol. 2 at 171. In addition, the Pennsylvania Board of Medicine issued a disciplinary order to Dr. Mattar and ordered him to pay \$2,000. The basis of that order “was the February 2012 disciplinary order issued by the Medical Licensing Board of Indiana.”⁴ *Id.*

[29] Then, in December 2020, after Dr. Mattar sought a medical license in Texas, he entered into an agreed entry in which the Texas Medical Board granted him a license but issued a public reprimand and ordered that he pay a \$2,000 fine. *See id.* at 172. Also in 2020, Dr. Mattar submitted a request to the Ohio State Medical Board to permanently withdraw his application for a medical license. In that request, Dr. Mattar indicated that he had applied for a license in anticipation of a faculty position he was seeking, that he did not receive that position, and that he had received a position in another state. In addition, Dr. Mattar agreed that his “request for permanent withdrawal is taking place at the same time as, and is in lieu of, further investigation regarding a possible violation of [an Ohio statute] relating to an action taken by the Medical Licensing Board of Indiana in or around February 2012.” *Id.* at 205.

[30] In other words, Dr. Mattar engaged in inappropriate behavior with a patient other than Pyles, which resulted in minimal action by the licensing boards of

⁴ Clark has not provided us with a copy of the order from the Indiana Medical Licensing Board or the disciplinary order from Pennsylvania. However, the agreed entry from Texas references both orders. *See* Ex. Vol. 2 at 170-171.

three states and a possible investigation by a fourth. Contrary to Clark's assertions, there is no evidence to indicate that Dr. Mattar was denied a license by any state medical board or that any state medical board had revoked, suspended, or otherwise limited his ability to practice medicine. And, importantly, the inappropriate action that prompted the reprimands—Dr. Mattar's sexual relationship with a patient—was not related to the exercise of his medical skill. It has no bearing on his abilities as a surgeon and is irrelevant to the question of whether he conformed to the standard of care when he treated Pyles.

[31] In addition, at trial, Dr. Mattar simply testified as to the actions he took, which testimony is supported by other testimony and thousands of pages of medical records. Thus, even if Clark had successfully impeached Dr. Mattar, the substance of his testimony was present in other evidence. Further, beyond confirming what actions Dr. Mattar had taken, three separate experts all testified unequivocally that Dr. Mattar had not breached the standard of care during his care and treatment of Pyles. We therefore agree with Dr. Mattar that “[a] ‘reasonable, average jury’ would not have—upon learning of Dr. Mattar crossing the physician-patient boundary with a patient other than [Pyles]—come to the conclusion that Dr. Mattar breached the standard of care in treating” Pyles. Appellee's Br. at 44.

Conclusion

[32] In light of all of the evidence before the court and the irrelevant evidence sought to be admitted, we cannot conclude that the limitation of Clark's cross-examination of Dr. Mattar affected Clark's substantial rights. Accordingly, we hold that any error in the court's evidentiary decision was harmless. We affirm the decision of the trial court in entering judgment on the jury's verdict.

[33] Affirmed.

Brown, J., and Weissmann, J., concur.