[Cite as *Malcom v. Ducket,* 2013-Ohio-2806.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Jeanne Malcolm	Court of Appeals No. L-12-1109
Appellant	Trial Court No. CI0200903810
v.	
Timothy G. Duckett, M.D., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 28, 2013

* * * * *

Guy T. Barone, for appellant.

Stephen A. Skiver and Amber R. Billmaier, for appellees.

* * * * *

JENSEN, J.

{¶ 1} Following a jury verdict in favor of defendants-appellees, Timothy G. Duckett, M.D. and Northwest Surgical Specialists, Inc., plaintiff-appellant, Jeanne Malcolm, timely appeals the trial court's rulings permitting appellees to question

testifying medical experts concerning two journal articles and denying appellant's motion to compel discovery and to examine witnesses as to Duckett's alleged prior surgical errors. Appellant presents the following assignments of error for our review:

> I. Defendants in a medical malpractice case having opened the door to other acts evidence by introducing statistical evidence of the rate of occurrence of undiscovered enterotomies in certain laparoscopic surgeries, the trial court committed reversible error in prohibiting plaintiff from inquiring into past incidents of undiscovered enterotomies and their outcomes in the defendant physician's surgical history.
>
> II. The trial court erred in denying plaintiff the right to conduct discovery concerning prior numbers of laparoscopic ventral hernia surgeries, instances of enterotomies, and deaths resulting from laparoscopic surgeries.
>
> III. The trial court committed reversible error in permitting defendants in a medical malpractice case, over objection, from examining and cross-examining expert witnesses with regard to the content of two medical journal articles, without first requiring defendants to establish a foundation of reliable authority.

{¶ 2} For the reasons that follow, we find appellant's assignments of error not well-taken and we affirm the trial court's rulings.

A. Factual Background

{¶ 3} On November 16, 2005, Malcolm underwent a laparoscopic ventral hernia repair during which she alleges that Duckett, a general surgeon, caused an enterotomy (a bowel perforation) and failed to recognize it, resulting in severe infection, the need for additional surgery, and serious complications. She filed this medical malpractice action against Duckett and his employer, and she included claims against St. Luke's Hospital for negligent credentialing and retention. The trial court dismissed the action against St. Luke's, ruling that the statute of limitations barred those claims. On appeal, we affirmed St. Luke's dismissal. *Malcom v. Duckett,* 6th Dist. No. L-10-1110, 2011-Ohio-865. The case proceeded as to Duckett and his surgical group.

{¶ 4} During discovery, appellant sought information concerning the number of laparoscopic procedures performed by Duckett at St. Luke's Hospital between 1989 to the present, the number of laparoscopic procedures that resulted in death, the number of laparoscopic ventral hernia repairs he performed, the number of laparoscopic ventral hernia repairs that resulted in enterotomy, and the number of laparoscopic ventral hernia repairs that resulted in enterotomy and death.

{¶ 5} After some initial motion practice, Duckett provided responses to Malcolm's requests. Over objection, Duckett referred Malcolm to pages of his deposition transcript where he had answered questions similar to those posed in Malcolm's interrogatories. He also indicated that he did not keep track of the number of procedures that he performed or the rate of complications, he estimated that ventral hernia repairs comprise less than 50%

of his laparoscopic cases, and he recalled two patients who had died after re-exploration of the abdomen following ventral hernia repairs involving bowel perforations of unknown etiology.

{¶ 6} The topic of Duckett's past laparoscopic surgeries, complications, enterotomies, and mortality rates eventually formed the basis for two sets of motions: (1) Malcolm's motion to compel more specific interrogatory answers and Duckett's corresponding motion for protective order; and (2) Duckett's motion in limine to prohibit references at trial to prior litigation or care provided to other patients. The trial court denied Malcolm's motion to compel and granted Duckett's motion for protective order on the basis that "the alleged negligent care of non-parties [was] not at issue in [the] case," was not relevant, and was beyond the scope of Civ.R. 26(B). The trial court granted Duckett's motion in limine, holding that "prior or pending medical negligence claims, pursued by non-parties, would only serve to confuse the issues for the jury" and the danger of undue prejudice greatly outweighed any probative value, especially given that there had been no findings of liability against Duckett.

{¶ 7} The case proceeded to trial from March 5, 2012 through March 9, 2012. At trial, Duckett's counsel questioned Malcolm's expert surgeon, Leonard Milewski, M.D., and his own expert, William Schirmer, M.D., about two articles pertaining to the incidence of unrecognized enterotomies during laparoscopic ventral hernia repairs: *Enterotomy and Mortality Rates of Laparoscopic and Ventral Hernia Repair* from the

Journal of the Society of Laparoscopic Surgeons, and *Laparoscopic Incisional and Ventral Hernia Repair Complications and How to Avoid It*, presented to the American Hernia Society in February of 2004 ("the LeBlanc articles"). Malcolm's counsel objected, arguing that if Duckett could question the expert witnesses about articles reporting enterotomy statistics, Malcolm should have been permitted to discover and to question witnesses about Duckett's incidence of unrecognized enterotomies. Malcom's counsel also argued that the articles had not been established to be reliable and authoritative. Over Malcolm's counsel's objections, the trial court allowed the questioning.

{¶ 8} It is the trial court's orders on the discovery motion and the motion in limine, as well as its ruling allowing Duckett's counsel to examine witnesses about the information contained within the two articles, that led to the present appeal.

B. Standard of Review

{¶ 9} An appellate court reviews a trial court's rulings on evidentiary and discovery matters under an abuse of discretion standard. *State v. Elliott*, 5th Dist. No. 2007AP070044, 2008-Ohio-5673, ¶ 23, citing *State v. Lorraine*, 11th App. No. 2006-T-0100, 2007-Ohio-6724, ¶ 13; *State v. Rahman*, 23 Ohio St.3d 146, 152, 492 N.E.2d 401 (1986); *State v. Williams*, 4 Ohio St.3d 53, 446 N.E.2d 444 (1983). An abuse of discretion is more than an error of law. *Blackmore v. Blackmore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "'Abuse of discretion' suggests unreasonableness,

arbitrariness, or unconscionability. Without those elements, it is not the role of [the] court to substitute its judgment for that of the trial court." *Valentine v. Conrad*, 110 Ohio St.3d 42, 43, 2006-Ohio-3561, 850 N.E.2d 683, ¶ 9.

C. Analysis

I. Defendants in a medical malpractice case having opened the door to other acts evidence by introducing statistical evidence of the rate of occurrence of undiscovered enterotomies in certain laparoscopic surgeries, the trial court committed reversible error in prohibiting plaintiff from inquiring into past incidents of undiscovered enterotomies and their outcomes in the defendant physician's surgical history.

{¶ 10} In her first assignment of error, Malcolm claims that by questioning Dr. Milewski about the study described in the LeBlanc articles, Duckett opened the door for her to introduce evidence of the number of times Duckett perforated patients' bowels without recognizing it.

{¶ 11} At trial, Dr. Milewski testified on direct that although it is not negligence to inadvertently cause an enterotomy during a laparoscopic ventral hernia repair, it is always malpractice for a physician to fail to detect the enterotomy. On cross-examination, Duckett's counsel presented Dr. Milewski with the LeBlanc articles which described multiple potential causes of enterotomies and instances that make detection of certain enterotomies particularly challenging. The articles indicated that 18 percent of

enterotomies are unrecognized and unrecognized eneterotomies occur in six percent of patients. Malcolm's counsel objected and a discussion was held off the record after which the court announced that it would reserve ruling on the objection.

{¶ 12} On redirect, Malcolm's counsel delved into additional details about the statistics reported in the articles. Those statistics were derived from information provided by 35 surgical groups that submitted data concerning 3,925 patients. Of those 3,925 patients, 72 suffered enterotomies. And of the 72 patients who suffered enterotomies, 13 of those were unrecognized. The rate of unrecognized enterotomies reported in the article was .33 percent of all laparoscopic ventral hernia repairs. The mortality rate was .05 percent.

{¶ 13} Despite the court's ruling on Duckett's motion in limine prohibiting any mention of prior patient care or prior malpractice cases, Malcolm's counsel began to question Dr. Milewski concerning Duckett's incident rate for enterotomies. Malcolm's counsel knew of three lawsuits filed against Duckett in a seven-year period of time where the patients died from complications of unrecognized enterotomies; counsel, in fact, had represented the plaintiff in one of those cases. Counsel wanted to show that Duckett's rate of enterotomies was high. The court sustained an objection by Duckett's counsel and held an in-chambers discussion.

{¶ 14} In chambers, Malcolm's counsel argued that Duckett had opened the door by presenting enterotomy statistics. Duckett's counsel responded that he questioned Dr. Milewski about the article to show that unexplained enterotomies can and do occur even

where the surgeon examines the bowels for evidence of problems. Malcolm's counsel insisted that Duckett should not have been permitted to refer to the articles because they did not indicate that it was within the standard of care to fail to recognize an enterotomy. He argued that he should be permitted to present evidence of Duckett's incidence of unrecognized enterotomies so the jury could compare "apples to apples." The court did not alter its previous ruling that it was inappropriate to apprise the jury of incidents involving "different people, different health conditions, [and] * * * different elements." It allowed Malcolm's counsel to continue with redirect but did not permit questioning about Duckett's prior unrecognized enterotomies.

{¶ 15} Malcolm claims that under Evid.R. 404(B), she should have been allowed to present evidence of Duckett's prior unrecognized enterotomies. She insists that the information was being offered to show that Duckett did not practice with the same degree of care as the physicians represented in the study and, therefore, the articles were not relevant. She denied that her purpose was to establish that prior acts of malpractice made it more probable that Duckett had been negligent in her care.

{¶ 16} Evid.R. 404(B) provides as follows:

> Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. * * *.

{¶ 17} The trial court held that Duckett's prior unrecognized enterotomies were not relevant and that Malcolm was offering the evidence for purposes that were not permissible under Evid.R. 404(B). The court further held that even if the information was offered for a purpose that is permissible under Evid.R. 404(B), Evid.R. 403(A) barred its admission. We agree.

{¶ 18} First, evidence of Duckett's other unrecognized enterotomies is not relevant. Unless the patients presented with substantially similar medical histories, symptoms, complaints, etc., and were in all other ways substantially the same, the unrecognized bowel perforations they experienced did not tend to make it more or less probable that Duckett perforated Malcolm's bowel without recognizing it. Unlike Malcolm, the patients in the prior instances identified by Malcolm had died. And in those cases, there had been no finding of negligence. Additionally, in the absence of a credible allegation that Duckett intentionally caused and failed to recognize a perforation, prior enterotomies would not establish "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B) is inapplicable.

{¶ 19} Beyond being irrelevant and violating Evid.R. 404(B), we agree with the trial court that evidence of prior incidents is inadmissible under Evid.R. 403(A). That rule provides:

> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶ 20} As we have held before, admission of prior unrecognized enterotomies would certainly have caused unfair prejudice and would have confused and misled the jury. In *House v. Swan*, 6th Dist. No. L-09-1232, 2010-Ohio-4704, plaintiffs sought to introduce evidence against the defendant obstetrician of prior, similar, injuries involving shoulder dystocia and brachial plexus injuries. We concluded that the trial court properly excluded this evidence because its probative value was substantially outweighed by the danger of unfair prejudice under an Evid.R.403(A) analysis. We also affirmed the trial court's ruling prohibiting plaintiffs from entering evidence of the physician's complication rate based on other similar injuries.

{¶ 21} Similarly in *D'Amore v. Cardwell*, 6th Dist. No. L-06-13 42, 2008-Ohio-1559, the trial court had granted the defendant physician's motion in limine to preclude testimony of permanent brachial plexus injuries suffered by other children delivered by the defendant obstetrician. We held that the trial court was within its discretion to exclude evidence of two pending malpractice claims under Evid.R. 403(A). There had been no finding of negligence in either of those cases and consideration of the other negligence claims would have been highly prejudicial and would have risked confusing the issues for the jury.

{¶ 22} The Second District reached the same conclusion in *Lumpkin v. Wayne Hospital*, 2d Dist. No. 1615, 2004-Ohio-264. There the plaintiff intended to present evidence that the surgeon who allegedly transected her bile duct during gall bladder surgery had made an identical mistake in a surgery performed on another patient. Plaintiff claimed that this demonstrated that the physician was on notice that his surgical technique was flawed. The court held that plaintiff failed to proffer evidence establishing that the circumstances of the prior occurrence were substantially similar to the circumstances of her surgery. Nevertheless, the court explained that that even if plaintiff had made that proffer, the evidence would have been excluded under Evid.R. 403(A).

{¶ 23} We reach the same conclusion here that we reached in *House* and *D'Amore* and as reached by the Second District in *Lumpkin*. Admission of Duckett's prior unrecognized enterotomies, particularly those that resulted in patients' deaths, would have been highly prejudicial and would have risked misleading and confusing the issues for the jury. The trial court did not abuse its discretion in excluding the evidence. Appellant's first assignment of error is found not well-taken.

II. The trial court erred in denying plaintiff the right to conduct discovery concerning prior numbers a laparoscopic ventral hernia surgeries, instances of enterotomies, and deaths resulting from laparoscopic surgeries.

{¶ 24} Similar to her argument in her first assignment of error, Malcolm contends that the trial court erred in denying her discovery concerning the number of laparoscopic ventral hernia surgeries performed by Duckett, the number of enterotomies, and the number of deaths resulting from laparoscopic surgeries. Malcolm claims that even if the information could be used to prove negligence, it was nonetheless discoverable.

{¶ 25} The trial court held that the discovery sought by Malcolm was not relevant because the previous patients were non-parties and their care was not at issue. Malcolm claims that the information was relevant and was reasonably calculated to lead to discovery of admissible evidence, the standard under Civ.R. 26(B)(1). Civ.R. 26(B) (1) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

{¶ 26} As the trial court held, that Duckett allegedly failed to recognize enterotomies in prior cases does not tend to make it more or less probable that he failed to recognize an enterotomy in the present case. The information is, therefore, not "relevant to the subject matter involved in the pending action." In any event, for the reasons

described in our analysis of Malcolm's first assignment of error, the information she sought is inadmissible under Evid.R. 404(B) and Evid.R. 403(A). Malcolm has failed to explain how this *inadmissible* information was reasonably calculated to lead to the discovery of *admissible* evidence.

{¶ 27} The trial court did not abuse its discretion in denying Malcolm's motion to compel and in granting Duckett's motion for protective order. Appellant's second assignment of error is found not well-taken.

III. The trial court committed reversible error in permitting defendants in a medical malpractice case, over objection, from examining and cross-examining expert witnesses with regard to the content of two medical journal articles, without first requiring defendants to establish a foundation of reliable authority.

{¶ 28} In her third assignment of error, Malcolm claims that Duckett failed to establish that the LeBlanc articles were reliable and authoritative as required by Evid.R. 803(18). The rule provides:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable

authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

{¶ 29} At trial, Duckett's counsel questioned Milewski as follows:

Q: Let me ask you this. Would you a [sic] disagree that of the enterotomies that occur during laparoscopic and open procedures to repair ventral hernias, that 18% of those are unrecognizable enterotomies, would you disagree with that number?

* * *

A: I'll be honest with you [sic] statistics was never one of my strong points. I don't work well with numbers. The study that you're referring to I had the opportunity to review that

* * *

Q: If you would, tell us what the title of this article [sic]?

A: This is Dr. LeBlanc's article on the enterotomy and mortality -- Enterotomy and Mortality Rates of Laparoscopic Incisional and Ventral Hernia Repair.

The Court: Mr. Skiver, can you give me some additional foundation on this article?

Mr. Skiver: Yes, Your Honor.

Q: Doctor, you indicated to us that you did a Google search, Google Scholar search when you reviewed materials for this trial or for this case did you not?

A: That is correct.

Q: And in fact when you do a Google Scholar search this specific article pops up, doesn't it?

A: I don't recall. I really don't recall.

Q: Okay. If I were to show you the Google search we ran you wouldn't dispute that that's –

A: No.

Q: It certainly -- the title of it would certainly indicate it appears to be right on point as to the issue that something you would have reviewed, isn't that a fair statement [sic]?

A: I can't say that I reviewed it at the time of the deposition, no.

Q: You just don't recall one way or the other?

A: No, I did not. I reviewed its subsequent to that. I know that for a fact.

Q: The article itself, first of all do you know Dr. LeBlanc?

A: No.

Q: The journal that it's in is a reasonably reliable journal, is it not?

* * *

The Witness: The Journal of the Society of Laparoscopic Surgeons.

Q: Reasonable material?

A: I would imagine it is.

Q: Very good, thank you. And so it would certainly be something that you as a surgeon, when you're out there searching for information would read and dete3rmine in your own mind whether or not you necessarily agree with it but certainly a reliable source of information, is it not?

A: I think the numbers here are pretty big. I think it's a pretty decent composite study.

Q: Alright, thank you. May I proceed?

The Court: Yes.

{¶ 30} The Supreme Court of Ohio held in *Freshwater v. Scheidt*, 86 Ohio St.3d 260, 261, 714 N.E.2d 891 (1999), that Evid.R. 803(18) does not require an *express* acknowledgment by the testifying expert of the reliability and authoritative nature of published medical literature. As the court recognized, testifying experts go to great lengths to avoid conceding the authoritative nature of literature presented to them by opposing counsel. *Id.* at 269. However, an expert's careful avoidance of the words "reliable" and "authoritative" will not foreclose opposing counsel from impeaching him or her with medical literature if the expert *implicitly* acknowledges that the literature is reliable or authoritative. *Id.* at 268-269. Dr. Milewski did just that.

17.

{¶ 31} Dr. Milewski testified that he had reviewed the LeBlanc articles before trial, he said that he "would imagine" that the journal in which the articles were published was reasonably reliable, and in answering the question of whether the information contained within the articles was reliable, he conceded that the numbers were "pretty big" and that it was "a pretty decent composite study." We agree with Duckett that Dr. Milewski's testimony was sufficient to establish that the LeBlanc articles were reliable and authoritative. Again, the trial court properly permitted Duckett's counsel to question Malcolm's expert about the articles. Appellant's third assignment of error is found not well-taken.

D. Conclusion

{¶ 32} Finding appellant's three assignments of error not well-taken, judgment of the Lucas County Court of Common Pleas is affirmed. The costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE