**[Cite as *Fritch v. Univ. of Toledo College of Medicine*, 2011-Ohio-4518.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Shirley A. Fritch, | : | |
| Plaintiff-Appellant, | : | |
| | | No. 11AP-103 |
| v. | : | (C.C. No. 2008-03564) |
| The University of Toledo College of Medicine, | : | (REGULAR CALENDAR) |
| Defendant-Appellee. | : | |

D E C I S I O N

Rendered on September 8, 2011

*Mollenkamp & Ingram*, and *Alan L. Mollenkamp*, for appellant.

*Michael DeWine*, *Attorney General*, and *Anne Berry Strait*, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

**{¶1}** Plaintiff-appellant, Shirley A. Fritch ("appellant"), appeals the judgment of the Court of Claims of Ohio in favor of defendant-appellee, The University of Toledo College of Medicine ("appellee"), on appellant's claim of medical negligence. For the following reasons, we affirm.

**{¶2}** In August 2006, appellant underwent a left-shoulder hemiarthroplasty at The University of Toledo Medical Center, performed by orthopedic surgeon, Krishna Mallik, M.D. ("Dr. Mallik"), and orthopedic resident, Philip Nowicki, M.D. ("Dr. Nowicki"). Appellant subsequently developed brachial plexopathy, an injury to the brachial plexus nerves, in her left arm. In her complaint, appellant alleged that the medical care and treatment rendered by appellee, through its employees and/or agents,[1] was negligent and that such negligent care and treatment directly caused her injuries. The trial court bifurcated the issues of liability and damages and conducted a bench trial as to liability in July 2009.

**{¶3}** On January 11, 2011, the trial court issued a decision and final judgment entry. The court concluded that appellant failed to prove her medical negligence claim by a preponderance of the evidence, and, specifically, that appellant failed to prove that acts or omissions by Drs. Mallik and/or Nowicki proximately caused her injuries. The court also rejected appellant's invocation of the doctrine of res ipsa loquitur to prove her negligence claim. Accordingly, the trial court entered judgment in favor of appellee.

**{¶4}** Appellant filed a timely notice of appeal to this court, and she now raises the following, single assignment of error:

> The trial court abused its discretion when it permitted, over objection, incompetent testimony and later relied on the incompetent testimony in reaching its decision.

Appellant specifically contends that the trial court abused its discretion by admitting and relying on testimony from defense witnesses concerning potential causes of appellant's shoulder injuries, other than a surgeon's negligence.

[1] The parties do not dispute that Drs. Mallik and Nowicki were employees of appellee.

**{¶5}** The admission or exclusion of evidence, including expert testimony, is a matter within the trial court's discretion and will be reversed only for an abuse of that discretion. *Robertson v. Mt. Carmel E. Hosp.*, 10th Dist. No. 09AP-931, 2011-Ohio-2043, ¶27, citing *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶9. An abuse of discretion requires more than an error of law or judgment; it connotes that the court's attitude is unreasonable, unconscionable or arbitrary. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶6}** To prevail on a claim for medical negligence, a plaintiff must demonstrate the following three elements: (1) the existence of a standard of care within the medical community; (2) the defendant's breach of that standard; and (3) proximate cause between the defendant's breach and the plaintiff's injury. *Robertson* at ¶22. Expert testimony is generally required to prove these elements when they are beyond the common knowledge and understanding of the jury. Id. at ¶23. Failure to establish any single element is fatal to a medical negligence claim. *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 130-31.

**{¶7}** In support of her claim, appellant presented the expert testimony of Jerome Unatin, M.D. ("Dr. Unatin"), a board-certified orthopedic surgeon in California, via a trial deposition. When asked whether he had determined the cause of appellant's nerve injuries, Dr. Unatin testified as follows:

> Well, the cause of this – the question of what the causes [sic] of the damage is something happened in surgery. * * * it could have only occurred from just a few things: One is that there was some traction on the nerves during the surgery; two, there might have been some bleeding that someone didn't see, or they couldn't see what they were doing and they pulled traction on the nerve; three, they stretched the

> nerve by stretching the arm; and four, there is always a possibility of a [scalene] block injection causing this.

(Dr. Unatin Deposition 12-13.) Dr. Unatin acknowledged that the surgical report did not indicate any complications or problems during appellant's surgery. When asked whether he was able to state, to a reasonable degree of medical probability, the cause of appellant's injury, Dr. Unatin opined that "[t]he most probable cause is either stretching the nerve in surgery from moving the arm or retracting on the retractor." (Dr. Unatin Deposition 13.) Dr. Unatin further testified that both of those proposed causes constitute departures from accepted standards of care for an orthopedic surgeon. (Dr. Unatin Deposition 13.)

**{¶8}** On cross-examination, Dr. Unatin agreed that he "can't tell * * * exactly what it was that went wrong" during appellant's surgery. (Dr. Unatin Deposition 16.) He explained as follows:

> * * * What I'm saying is that obviously something happened in surgery, and the question is "What happened." And in all medical probability, what happened, because by reading the operative note, you can't tell what happened. So something happened. Either the nerve was stretched somehow in surgery, and how the nerve was stretched, there is no way of knowing unless you were there. And maybe it was stretched excessively and they didn't realize it at surgery. Maybe there was [bleeding], and they pulled the retractor, and they at no time realize it at surgery. * * *

(Dr. Unatin Deposition 16.) Dr. Unatin later reiterated, "I know the nerve was stretched hard. How the nerve was stretched, I don't know." (Dr. Unatin Deposition 19.) When asked what evidence he had that any of the potential causes he espoused had actually occurred, he stated, "[t]his patient went into surgery without this and came out of surgery with a nerve damage." (Dr. Unatin Deposition 22.) Dr. Unatin nevertheless

admitted that injury can occur in surgery despite the absence of wrongdoing by the surgeon.

**{¶9}** In its defense, appellee presented expert testimony from Robert Goitz, M.D. ("Dr. Goitz"), the Chief of Hand and Upper Extremity Surgery at the University of Pittsburgh Medical Center. Dr. Goitz did not testify as to a probable cause of appellant's injuries. Rather, he agreed that he could not state, to any degree of reasonable medical probability, the specific cause of appellant's brachial plexopathy. (Tr. 227.) Dr. Goitz stated that "there are many different potential causes" for appellant's injuries, but "no obvious determination from what I can review of the records, and her progressive course subsequently as to the direct cause of her nerve dysfunction after the surgery." (Tr. 209.) He explained that "[t]he reality is that with most nerve injuries, unless there is an identified cut in the nerve, it's often supposition what causes the injury to the nerve." (Tr. 205.) Dr. Goitz listed the following as potential causes of appellant's nerve dysfunction: (1) a stretch injury; (2) the stress of surgery itself; (3) susceptibility to nerve dysfunction based on appellant's preoperative nerve dysfunction in her lower back, going to her legs; (4) appellant's postoperative situation, including living alone and difficulty wearing her prescribed sling properly. (Tr. 212-16.)

**{¶10}** Dr. Goitz opined, within a reasonable degree of medical probability, and based upon his education, training, and experience, that there is no evidence that Dr. Mallik fell below the applicable standard of care in treating or operating on appellant. (Tr. 218.) Both Drs. Goitz and Unatin recognized that nerve dysfunction or injury is a known risk of shoulder surgery. Dr. Goitz, however, disagreed with Dr. Unatin's testimony that Dr. Mallik fell below the standard of care because "something happened,"

and he testified that a brachial plexus injury following a hemiarthroplasty does not necessitate the conclusion that the surgeon fell below accepted standards of care. (Tr. 234.) He explained, "[E]verything I see in the records, the charts, appear[s] to be appropriate care. In fact, the operation itself appeared to likely be a very smooth operation * * *. So I think there were – it appeared that at least from all the documentation that I could see that there [were] no problems or unexpected findings that we aren't seeing." (Tr. 234.)

**{¶11}** Steven Farrell, M.D. ("Dr. Farrell"), appellant's physical medicine doctor, also testified on appellee's behalf. Like Dr. Goitz, Dr. Farrell was asked about possible causes for a brachial plexus injury, following a shoulder surgery, other than the surgeon's negligence. He testified that other possible postoperative causes include "any other type of injury such as any type of manipulation of her shoulder, whether it's during dressing activities at home, physical therapy activity. There's a number of other ways that the nerves could be stretched or damaged in the shoulder region." (Tr. 68.)

**{¶12}** Appellant's assignment of error is directed solely to the evidentiary question of the admissibility of testimony regarding potential causes of appellant's injuries. Appellant argues that the trial court abused its discretion by admitting, over her objections, testimony from Drs. Goitz and Farrell regarding potential, as opposed to probable, causes of appellant's injuries. Appellant bases her evidentiary argument on *Stinson v. England*, 69 Ohio St.3d 451, 1994-Ohio-35, which involved a claim of medical malpractice against an obstetrician, brought by the parents of an infant who suffered brain damage after delivery. In that case, the defense expert testified that there were three possible causes of the infant's injuries. Although one of those possible causes

was the cause advanced by the plaintiffs, the defense expert identified a different cause as the "most likely." On appeal, the plaintiffs disputed the admissibility of the defense expert's testimony regarding causation.

**{¶13}** "In Ohio, the admissibility of expert testimony that an event is the proximate cause [of an injury] is contingent upon the expression of an opinion by the expert with respect to the causative event in terms of probability." Id. at 455, citing *Shepherd v. Midland Mut. Life Ins. Co.* (1949), 152 Ohio St. 6, paragraph two of the syllabus. An event is probable if it is greater than 50-percent likely. See *Stinson* at 455. The expression of probability "is a condition precedent to the admissibility of expert opinion regarding causation" and, thus, "relates to the competence of such evidence and not its weight." Id. The rule that "expert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability [applies] irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue." Id. at 456.

**{¶14}** Appellant argues that *Stinson* precludes the defense witnesses' testimony as to possible or potential causes because those witnesses were unable to identify a cause of appellant's shoulder injuries with a greater than 50-percent likelihood. Appellee, on the other hand, argues that appellant misconstrues *Stinson*, which it maintains does not preclude the testimony at issue here. Appellee additionally contends that appellant failed to meet her burden of establishing the probable cause of her injuries because her expert could not identify which of two potential causes resulted in her injury.

**{¶15}** Careful reading of the *Stinson* opinion reveals the fallacy in appellant's attempt to use that case to preclude the testimony at issue here. In *Stinson*, the Supreme Court of Ohio acknowledged that the burden of persuasion always remains with the plaintiff and that, to avoid a directed verdict, a plaintiff in a medical negligence action is required to establish a prima facie case "by adducing competent evidence supporting the existence of a duty, breach of the duty, causation based on probability and damages." Id. at 455. The court noted that the plaintiffs in that case met their prima facie burden with expert testimony that the defendant's negligence was the probable cause of the infant's injuries. The court then went on to state that a defendant may negate a plaintiff's prima facie case in various ways, as follows:

> * * * He may cross-examine the expert of the other party. He may adduce testimony from another expert which contradicts the testimony of the expert for his adversary. Further, he may adduce expert testimony which sets forth an alternative explanation for the circumstances at issue. *If this last approach is pursued*, the evidence directed to the alternate explanation is governed by the same standard of admissibility applicable to the evidence adduced by his adversary. * * *

Id. at 456. (Emphasis added.)

**{¶16}** Ultimately, the Supreme Court found no abuse of discretion in the trial court's admission of the defense expert's testimony in *Stinson*. In reaching its decision, the court distinguished between two methods of defense—one in which the defendant offers an explanation for the plaintiff's injuries, and one in which the defendant controverts a fact propounded by the plaintiff. Where a defendant employs the first method, "the proponent of the alternative cause theory must support the theory with competent evidence establishing its truth. That is, a proponent of an alternative cause

must adduce expert testimony of its probable nature." Id. at 456. Where a defendant employs the second method, however, "an expert's opinion may be properly admissible even if it is not stated in terms of probability." *Kalaitsides v. Greene* (June 12, 1996), 9th Dist. No. 17196.

**{¶17}** The *Stinson* court recognized that the defense expert's testimony, that one of three alternative causes was the "most likely," lacked the degree of probability necessary for admission as evidence of an alternative cause, because the most likely of three alternatives may have a likelihood of less than 50 percent. Nevertheless, because the three alternative causes espoused by the expert included the cause advanced by the plaintiffs' expert, even if the "most likely" cause had a likelihood of less than 50 percent, "it had a greater likelihood than the theory espoused by [the plaintiffs], in the view of the [defense] expert." *Stinson* at 457. The court found the evidence significant, not because it independently proclaimed a cause with a likelihood of greater than 50 percent, but because it undercut the plaintiffs' theory of causation. The court characterized the defense expert's testimony as "tantamount to an opinion that the cause advanced by [the plaintiffs] was not the probable cause" and determined that the testimony constituted "competent evidence which controverted a fact propounded by [the plaintiffs]." Id. Having affirmed the admission of the defense expert's testimony, the Supreme Court did not establish an inflexible rule that all expert testimony must include testimony of causation, stated in terms of probability, regardless of the testimony's purpose.

**{¶18}** Ohio appellate courts, including this court, have recognized and applied the distinction apparent in the *Stinson* opinion. Perhaps most like this case is *Wissing*

*v. D.F. Electronics, Inc.* (Sept. 26, 1997), 1st Dist. No. C-950915. In that workers' compensation case, the defense presented expert testimony that it was impossible to discern whether the plaintiff's back pain was attributable to congenital or degenerative defects in her spine or to a work-related incident. The expert stated that sufficient evidence did not exist to determine the underlying cause of the plaintiff's pain. The plaintiff challenged the expert's testimony under *Stinson*, but the First District Court of Appeals upheld the trial court's admission of the testimony to controvert the probable cause advanced by the plaintiff; "[i]f it was impossible to determine the most probable cause of the injury out of alternative causes, the cause that [the plaintiff's] expert assigned would not be greater than fifty percent likely." *Wissing.*

**{¶19}** Similarly, the Ninth District Court of Appeals permitted defense expert testimony that a variety of identified issues could have explained the plaintiff's postoperative nerve palsy in *Kalaitsides*. The court stated that, had the defense been trying to establish an alternative cause, its expert's testimony would have been required to meet the probability threshold established in *Stinson*. The court noted, however, that the defendant "was not attempting, nor was he required, to establish the cause of the injury. * * * He suggested only that [the plaintiff's] injuries resulted from any of several causes." *Kalaitsides*. The court concluded that the defense expert's testimony was admissible to refute the plaintiff's theory of causation.

**{¶20}** This court addressed and rejected a challenge to defense expert testimony, based on *Stinson*, in *Clifton v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-677, 2007-Ohio-3791. There, the plaintiff-inmate claimed that he was injured, and consequently rehospitalized, as a result of improper procedures during a post-

surgical transport from The Ohio State University Medical Center to the Corrections Medical Center in Columbus. The plaintiff argued that the defense expert improperly expressed opinions regarding other medical conditions that may have caused the plaintiff's readmission to the hospital, as opposed to injuries sustained during the transfer, because the expert's opinion was not based upon the proper standard of a reasonable degree of medical certainty. Like the Supreme Court in *Stinson*, this court stated that the challenged testimony—that it was not likely that the transfer caused the plaintiff's subsequent medical problems—was " 'tantamount to an opinion that the cause advanced by [the plaintiff] was not the probable cause.' " *Clifton* at ¶25, quoting S*tuller v. Price*, 10th Dist. No. 03AP-66, 2004-Ohio-4416, ¶76 (holding that testimony that the cause espoused by the plaintiff was "extremely unlikely" was not advanced as evidence of an alternative cause, but was admissible to contradict the plaintiff's expert). This court concluded that the testimony was not in contravention of *Stinson* because the defense expert did not assert that " 'one cause was the actual proximate cause or the more likely cause,' but, rather, 'merely espoused * * * other potential causes.' " *Clifton* at ¶25, quoting *Wasmire v. O'Dear*, 5th Dist. No. 2005CA00319, 2007-Ohio-736, ¶115; see also *Jackson v. Sunforest OB-GYN Assoc., Inc.*, 6th Dist. No. L-06-1354, 2008-Ohio-480, ¶68, citing *Wasmire* ("[t]estimony regarding other possible causes, when it does not propose one cause as the actual proximate cause or a probable cause, has been held admissible in similar cases even where those opinions are not stated to a reasonable degree of medical certainty").

**{¶21}** Here, the trial court did not abuse its discretion by admitting or relying on the testimony of Drs. Farrell and Goitz regarding other possible causes of appellant's

nerve injuries. Assuming that appellant established a prima facie case, appellee was entitled to respond by cross-examining Dr. Unatin, presenting contrary evidence that surgeon negligence was not the probable cause of appellant's injuries or presenting expert evidence of an alternate cause for those injuries. See *Stinson* at 455-56. Were appellee to pursue the last approach, its expert witness would be required to state an alternative cause in terms of probability. *Stinson* does not, however, foreclose testimony regarding other possible causes of a plaintiff's injury to contradict the plaintiff's expert testimony that a particular cause was the probable cause of the injury. See *Clifton*. Nor does *Stinson* foreclose expert testimony that it is impossible to determine the cause of a plaintiff's injuries. See *Wissing*.

**{¶22}** Appellee did not attempt to, nor was it required to, establish an alternative cause, as the probable cause, of appellant's injuries. The defense witnesses did not testify that a particular event was the proximate cause of appellant's injuries. Indeed, both Drs. Goitz and Farrell expressly stated that they could not identify, to a reasonable degree of medical certainty, the probable cause of appellant's injuries. Instead, the defense witnesses' testimony was intended to contradict Dr. Unatin's testimony that negligence by Drs. Mallik or Nowicki was the proximate and probable cause of those injuries.

**{¶23}** Dr. Goitz, like Dr. Unatin, agreed with defense counsel that injuries may occur during surgery despite the absence of a deviation from applicable standards of care. He also described the lack of evidence of any breach of a standard of care and opined that appellant's doctors exercised appropriate care in her surgery. Although Drs. Goitz and Farrell both identified possible causes of a brachial plexus injury other than

surgeon negligence, neither asserted one as the actual proximate cause or the most likely cause of appellant's injuries. The testimony of the defense witnesses is tantamount to an opinion that the cause advanced by appellant's expert was not the probable cause of appellant's injuries, and *Stinson* does not preclude such testimony. Accordingly, the trial court did not abuse its discretion in admitting and relying on the testimony of Drs. Goitz and Farrell.

**{¶24}** For these reasons, we overrule appellant's single assignment of error and affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BRYANT, P.J., and TYACK, J., concur.