

Question MPT-1 – July 2025 – Selected Answer 1

**IN THE STATE OF FRANKLIN
IN THE CITY CENTRALIA
Case No. 2024-CV-534**

Alice Lowe,

Plaintiff,

v.

Emil Jost, MD,

Defendant.

MOTION TO THE COURT

I. INTRODUCTION

Here, the defendant is prepared to show that Dr. Shulman is a qualified expert since she possess scientific, technical or specialized knowledge on all topic that form the basis of the witness opinion testimony and used the most reliable and accurate litature when reaching her opinion. In contrast, Dr. Ajax should not be found to be an expert witness since he has not used reliable data experts in the field would use nor is he qualified since is not relied on by other experts in the felid. However, if the court finds that Dr. Ajax is qualified as an expert, his testimony is not sufficient to show that Dr. Jost was the cause of the injury or that she breached the standard of care since his testimony is not based on reliable litature nor does he testify as to how the injury came about.

II. STATEMENT OF FACTS [omitted]

III. ARGUMENT

**a. THE COURT SHOULD QUALIFY DR. SHULMAN AS AN
EXPERT AN ADMIT HER OPINION TESTIMONY**

Under Franklin Rules of Evidence Rule 702 states that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that; (a) the experts scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, (b) the testimony is based on sufficient facts or data, (c) the

testimony is the product of reliable principles and methods, and (d) the experts opinion reflects a reliable application of the principles and methods to the facts of the case. (FRE 702).

Under Franklin Civil Code § 233, it clarifies the law surrounding the introduction of expert testimony would be the Supreme Courts approach in *Daubert*. (*Smith*). In *Daubert*, the Supreme court clarified that the “general acceptance” was no longer the standard for determining reliability of expert testimony which was used to interpret Franklins evidence rules. (*Green*). Instead, the trial court has broader latitude to determine whether an experts “reasoning or methodology properly can be applied to the facts at issue; the trial court is the gatekeeper in determining whether expert testimony is admissible. (*Smith*).

Specifically, Franklin Code § 233 reminds us that the qualifications and reliability remain separate and independent prongs of the *Daubert* inquiry. (*Smith*). A witness is qualified as an expert if they are the type of person who should be testifying on the matter at hand. (*Id.*). Further, under Franklin Rules of Evidence 702, to be qualified as an expert the witness must possess scientific, technical or specialized knowledge on all topic that form the basis of the witness opinion testimony. (*Id.*). Generally, experts can testify about the standard of care for a specialty only if the expert specializes in the same or similar specialty that includes the performance of the procedure at issue. (*Id.*). Further, the physician must demonstrate they are “sufficiently familiar with the standards in that area” by their “knowledge, skill, experience, training, or education” to stratify Rule 702. (*Id.*). Although it is not necessary for the expert witness to testifying to the standard of care to have practice in the “same community” as the defendant, the witness testifying must demonstrate familiarity with the standard of care where the injury occurred. (*Id.*).

In contrast an expert opinion is reliable if the opinion is based on a “scientifically valid methodology.” (*Smith*). Franklin law recognize many different factors courts can use to assess the reliability of expert testimony. (*Id.*). One of these factors is the degree to which the expert’s opinion and its basis are generally accepted within the relevant community. We have also considered whether experts in that field would rely on the same evidence to reach the type of opinion being offered. (*Ridley*). The trier of fact must determine whether the witness is creditable. (*Id.*). The factual basis of an expert opinion in the particular case before the court goes to the credibility of the testimony, not its admissibility. (*Id.*). Likewise, even if a court finds that an expert’s qualifications satisfy the baseline for admissibility, the extent and substance of those qualifications can affect the credibility of that expert. (*Id.*). Moreover, Speculation about what might have occurred had the facts been different can never

provide a sufficiently reliable basis for an expert opinion. (*Id.*). If the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded.” (*Park*). An expert opinion is fundamentally unsupported when it "fails to consider the relevant facts of the case.” (*Id.*).

In *Smith*, the court found that Dr. Adams was qualified as a witness since he was an orthopedist who could testify to the standard of care and population of Franklin and that he was reliable since he had many years of experience, read many articles, attended many conferences, and other physicians have relied on his diagnose. (*Smith*). In contrast, the court in *Smith* found that Dr. Brown was not qualified since she was a specialist in internal medicine rather than orthopedics and could not demonstrate that her testimony was reliable. (*Id.*).

In *Ridley*, the court found expert’s opinions were based on sufficiently reliable methodology when he based his conclusions on medical records, CT scans, medical notes, and deposition testimony. (*Ridley*).

(a) the experts scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue

Here, Dr. Shulman does possess scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue since she specializes in the same or similar specialty in the procedure at issue. (*Smith*). Shulman is a 200 graduate of Franklin University. She graduated from the University of Franklin Medical School in 2004. She completed her residency in orthopedic surgery at Franklin Medical Center which she was a resident at from 2004 to 2009. Further, she is board certified in orthopedics and is currently a professor of orthopedics at Olympia University Medical School. Specifically she teaches students how to do knee and hip replacements Board certified means that she has finished her residency in orthopedics and passed the board exam. While it is true she only practiced in Olympia from 2009 until 2019 that alone will not make Dr. Shulman unqualified since is not necessary for the expert witness testifying to the standard of care to have practice in the “same community as the defendant.” (*Id.*). It is only required that they demonstrate a familiarity with the standard of care where the injury occurred. (*Id.*). Since Dr. Shulman graduated from the University of Franklin medical school and because she completed her residency there Dr. Shulman knows the standard of care in Franklin as that was what she was taught in medical school. Further, while it is true that Olympia has a smaller medical community than Franklin, the practice of orthopedics is essentially the same in both states. This is similar to *Smith* since like Dr. Adams in *Smith* she compared the standard of care between the

states and found that the “standard of orthopedic care was virtually the same.” (*Smith*).

Moreover, Dr. Shulman keeps up with all the medical literature in the area. She follows all the articles on joint replacement that are in the *Journal of the American Medical Association (JAMA)* and *The New England Journal of Medicine*. These are considered the most up-to-date and reliable sources of information in medicine which shows that Dr. Shulman is qualified as an expert. Further, she attends conferences on joint replacements and presents lectures at conferences annually discussing appropriate procedures for joint replacement. Moreover, she writes articles used in the medical field. This shows that Dr. Shulman is qualified as an expert since she “must demonstrate they are “sufficiently familiar with the standards in that area” by their “knowledge, skill, experience, training, or education.” (*Smith*).

(b) the testimony is based on sufficient facts or data

As stated above, Dr. Shulman based her testimony on her long experience of performing hip replacements as well as articles on joint replacement that are in the *Journal of the American Medical Association (JAMA)* and *The New England Journal of Medicine* which is considered the most up to date and reliable sources of information on medicine.

(c) the testimony is the product of reliable principles and methods

Here, Dr. Shulman has shown that she uses reliable principles in reaching her conclusion. Not only has she relied on the most up to date and reliable sources but also presents lectures at conferences. She is relied on to provide lectures on the appropriate procedures for joint replacement. This is again similar to *Smith* since Dr. Adams was reliable since other physicians have relied on him and his diagnosis and that he had many years of experience in orthopedics.

(d) the experts opinion reflects a reliable application of the principles and methods to the facts of the case.

Again, Dr. Shulman is reliable since she reviewed all the notes from the surgery. She also reviewed all the surgical and medical records as well as physically examined Ms. Lowe. Like *Ridley*, Dr. Shulman is reliable since experts in the field would rely on the same evidence to reach the type of the opinion being offered. (*Ridley*).

Therefore, the court should find Dr. Shulman is a qualified reliable medical expert witness.

b. THE COURT SHOULD NOT FIND DR. AJAX TO BE QUALIFIED AS AN EXPERT, BUT EVEN IF HE IS QUALIFIED, SHOULD EXCLUDE ALL OF HIS PROFFERED OPINION TESTIMONY

(a) the experts scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue

Here, Dr. Ajax is not qualified as an expert since he does not possess scientific, technical or specialized knowledge on all topics that form the basis of the witness opinion testimony. (FRE 720.). Dr. Ajax completed a bachelor's degree in biology at Franklin State University in 1998 and received his MD degree from Franklin State University in 2002. Further, he completed his residency in orthopedics at Olympia General Hospital in the state of Olympia in 2007. He has a practice in orthopedics in Franklin, and is board-certified in orthopedics. He also stated that he is familiar with the practice and standard of care in hip replacements in the state of Franklin. However, he has only done 50 hip replacements since he finished his residency. During his residency he assisted in over 100 but only did 20 himself. Dr. Ajax cannot show that he is "sufficiently familiar with the standards in that area" by their "knowledge, skill, experience, training, or education" since he is not as experienced. Further, he does not give lectures, teach, or attend any lectures unlike Dr. Adams in *Smith*. Further, Dr. Ajax has not written or read any of the journals including the *Journal of the American Medical Association (JAMA)* and *The New England Journal of Medicine* which is considered the most up to date and reliable sources of information on medicine further in contrast from *Smith*. This suggests that he is not qualified and therefore should not be considered an expert.

(b) the testimony is based on sufficient facts or data

Here, Dr. Ajax testimony is not based on sufficient facts or data since he relied solely on his experience and the single x-ray conducted by Dr. Jost. This is not sufficient to be based on sufficient facts or data since Dr. Ajax did not consult any journals or other literature that "other experts in the field would rely on." (*Smith*).

(c) the testimony is the product of reliable principles and methods

As stated above, Dr. Ajax did not rely on anything other than the x-ray conducted by Dr. Jost and his own knowledge. In comparison to Dr. Adams in *Smith*,

Dr. Ajax has not read “many articles,” nor does he present lectures therefore he is not relied on by other experts in the field. This further shows that Dr. Ajax is not qualified as an expert nor did he base his opinion on reliable testimony.

(d) the experts opinion reflects a reliable application of the principles and methods to the facts of the case.

Since Dr. Ajax did not demonstrate his the opinion is based on a scientifically valid methodology. Moreover, Dr. Ajax’s opinion is so fundamentally unsupported since it is not based on any things that are generally accepted in the community “that it can offer no assistance to the jury, it must be excluded.” (*Park*). Therefore, the court should find that Dr. Ajax does not qualify as an expert nor is he reliable.

c. EVEN IF THE COURT QUALIFIES DR. AJAX AS AN EXPERT, THE COURT SHOULD GRANT OUR MOTION FOR SUMMARY JUDGMENT BECAUSE THE PLAINTIFF HAS FAILED TO OFFER ANY ADMISSIBLE EVIDENCE ON ELEMENTS OF HER MALPRACTICE CLAIM

Under the Franklin Rules of Civil Procedure Rule 56, a party may move for summary judgment, identifying each claim or defense or the part of each claim or defense on which summary judgment is sought. (FRCP 56). The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. (*Id.*). The court should state on the record the reasons for granting or denying the motion. (*Id.*).

To succeed on a motion for summary judgment, the defendant must show that the plaintiff has failed to establish a factual basis for any of these elements. (*Jacobs*). In ruling on summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. (*Id.*). The Franklin Supreme Court has held that a Rule 56 motion for summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial” should be granted. (*Alexander*). In such a situation, there can be “no genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. (*Id.*). A material fact is a fact that is essential to the establishment of an element of the case and determinative of the outcome. (*Jacobs*). “The moving party is ‘entitled to a judgment as a matter of law’ because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.” (*Jacobs*). In other words, if a plaintiff fails to produce any evidence to prove an element of the

case on which that plaintiff bears the burden of proof, then the defendant is entitled to summary judgment. (*Id.*). In medical malpractice cases, expert testimony is required since only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. (*Id.*). A party's failure to provide any expert testimony on causation or the standard of care justifies an adverse ruling on summary judgment motion. (*Id.*).

In *Jacobs*, the court held that Ms. Jacobs failed to produce expert testimony in support of her claim that the doctor failed to treat her post-surgical wound and therefore did not meet the required element to make a medical malpractice case. (*Jacobs*).

Here, the plaintiff has no produced evidence of expert testimony regarding the standard of care since Dr. Ajax should not be considered a qualified expert. Further, his testimony does not discuss causation since he only stated that he believes Dr. Jost comported with the standard of care in Franklin. Causation or "how the breach caused the injury," is an integral part of having expert testimony in a medical malpractice case. In contrast, Dr. Shulman has testified regarding the cause of the injuries which shows that Dr. Ajax's testimony is not sufficient to meet the requirements to survive a summary judgment motion for the medical malpractice case. This testimony is so fundamentally unsupported that it can offer no assistance to the jury and should therefore be excluded. (*Smith*). Dr. Ajax expert opinion fails to consider the relevant facts of the case. (*Id.*).

This is similar to *Jacobs* since the plaintiff has not presented evidence reading the cause or how Dr. Jost breached the standard of care. In *Jacobs*, Dr. Otto, a surgeon practicing in the state of Franklin testified that the wound became infected, which is a common post-surgical occurrence therefore testified as to the causation of the injury. Here, Dr. Ajax merely testified that using one x-ray was insufficient. This does not establish the cause of the injury which is required to make a case for medical malpractice. In contrast, Dr. Shulman provided her opinion regarding when the fracture occurred and how. This is sufficient testimony since it is expert testimony on causation as required in *Jacobs*. This is not sufficient to show causation of the injury nor is it sufficient to show that Dr. Jost breached the standard of care. Therefore, the court should rule in favor of the defendant on the motion for summary judgment since the plaintiff has failed to prove through expert testimony that Dr. Jost caused her injury.

IV. CONCLUSION

The court should find that Dr. Shulman is qualified as an expert and reliable. Further, the court should find that Dr. Ajax is not qualified as an expert since he has not shown he is the type of person who should be testifying on the matter at hand nor did he show he used material relied on by experts in the field. Finally, even if the court finds that Dr. Ajax can testify as an expert the court should grant the defendants motion for summary judgement since Dr. Ajax's testimony did not sufficiently indicate the standard of care but more importantly that Dr. Jost was the cause of the plaintiffs injury. Therefore, the court should find all motions in the defendants favor.

Question MPT-1 – July 2025 – Selected Answer 2

BRIEF IN SUPPORT OF MOTIONS TO EXCLUDE EXPERT TESTIMONY AND SUMMARY JUDGMENT FOR THE DEFENDANT

Alice Lowe,
Plaintiff

Case No. 2024-VC-534

v.
Emil Jost, MD,
Defendant

I. Statement of the Case
[Omitted]

II. Statement of Facts
[Omitted]

III. Legal Argument

A. The Court should qualify Dr. Shulman as an expert and admit her opinion testimony.

1. Dr. Shulman should be qualified as an expert.

A witness is qualified as an expert if he is the type of person who should be testifying on the matter at hand. *Daubert v. Merrell Dow* (1993). To be qualified, an expert must possess scientific, technical, or specialized knowledge on all topics of her testimony. *Smith v. McGann* (2004). Experts can testify about the standard of care for a specialist only if the experts specialize in the same or similar specialty that includes the performance of the procedure at issue. *Id.* Although not necessary to have practiced

in the same community as the defendant, the expert must demonstrate familiarity with the standard of care where the injury occurred. *Id.*

In Smith, the plaintiff's first expert was qualified because he studied the demographics of the defendant's community and demonstrated that the population and availability of care in general were similar with his community and the standard of care for the specific medical department of orthopedics was virtually the same. *Id.* In Wyatt v. Dozier, the court held that a pediatrician who attempted to testify about standard of care for an obstetrician did not qualified because she did not has sufficient familiarity with the topic. *Wyatt v. Dozier (2000)*.

Here, Dr. Shulman is qualified because she has the scientific and specialized knowledge of orthopedics. Specifically, she graduated from medical school in Franklin, is board certified in orthopedics, and completed residency in orthopedics Franklin. Even though she did not practice in Franklin, Dr. Shulman has practiced in orthopedics for over 10 years and has likely performed over 1,000 replacements in her time. The court in Smith confirmed that the expert did not have to practice in the area but must demonstrate familiarity with the practice. Similar to the expert in Smith and unlike the expert in Wyatt, Dr. Shulman has studied the medicine of orthopedics for over 25 years, teaches classes on the subject and specifically on hip replacements, and confirms that the practice of orthopedics is the same in Olympia. Thus, Dr. Shulman is familiar with the standard of care.

Thus, Dr. Shulman should be qualified as an expert.

2. Dr. Shulman's testimony should be admitted.

A witness who is qualified may testify in the form of opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert's opinion reflects a reliable application of the principles and methods to the case. FRE 702.

a. Specialized knowledge will help the trier of fact.

Here, Dr. Shulman has specialized knowledge as evidence above that will help the trier of fact determine the duty owed by Dr. Jost and why Dr. Jost did not breach this duty.

Thus, she has specialized knowledge that will help the judge.

b. Testimony is based on sufficient facts.

The court must also determine that the expert's testimony is credible. *Smith*. Even if a court finds that an expert's qualifications satisfy the baseline for admissibility, those qualifications can effect credibility, which are based on the factual basis of the opinion. *Id.* If the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded. *Park v. Green*. An opinion is fundamentally unsupported if it fails to consider the relevant facts of the case. *Id.*

Here, Dr. Shulman has reviewed the medical records, facts of the case, and performed her own evaluation of Ms. Lowe, which she puts her testimony on.

Thus, her testimony is based on sufficient facts.

c. Testimony is product of reliable principles.

In *Daubert*, the Supreme Court clarified that general acceptance was no longer the standard for determining reliability of expert testimony. *Daubert v. Merrell Dow* (1993). The trial court has broad discretion to determine whether expert's reasoning or methodology can be applied to the facts. *Id.* The court is the gatekeeper to determine whether expert testimony is admissible and can use any factors it deems appropriate. *Id.* Franklin law has adopted civil code Section 233 to match *Daubert*. An expert opinion is reliable if it is based on a scientifically reliable method. *Smith*.

In *Smith*, the plaintiff's first expert was reliable because he had many years of experience in the specific area of medicine, wrote many articles on the subject, attended many conferences on the subject, and other physicians relied on his diagnoses on the subject. *Id.* The court also considers whether the expert's basis is generally accepted in the community and whether other experts would rely on the same evidence. *Id.* But the speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for an expert opinion. *Id.* In *Smith*, the plaintiff's second expert's methods were not reliable because they were too speculative, based only on the fact that an injury may have occurred and the defendant should have ordered more tests. *Id.*

Here, Dr. Shulman's testimony is reliable because it is based on scientifically reliable methods. Similar to the expert allowed in *Smith*, she has also written articles, keeps up with the literature in the area, follows the most up to date journals, and attends and presents at conferences. Unlike the expert not allowed in *Smith*, her opinion is not based on speculation but review of the methods.

Thus, her methods are reliable.

d. The expert's opinion reflects reliable application of the principles.

Here, Dr. Shulman's opinion reflects reliable application based on her reliable principles because it is reasonable to see how her methods can lead her to her opinion.

Thus, her opinion is a reliable application.

Thus, Dr. Shulman's testimony should be admitted. Therefore, the court should grant our motion to admit her testimony.

B. The Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered testimony.

1. Dr. Ajax should not be qualified as an expert.

Here, while Dr. Ajax has completed his medical degree, completed residency in orthopedics, and is board certified in orthopedics, he has only completed 50 hip replacements since his residency, and the majority of those completed in his residency he was only assisting in them, in comparison to the thousands that Dr. Shulman has done herself. Similar to the expert in Wyatt, he does not have sufficient similarity with the specific topic of hip replacements.

Thus, Dr. Ajax should not be qualified.

2. Dr. Ajax's testimony should be excluded.

a. Specialized knowledge will help the trier of fact.

Here, Dr. Ajax does not have the specialized knowledge as above.

b. Testimony is based on sufficient facts.

Here, Dr. Ajax's opinion is not based on sufficient facts because there is no evidence that he reviewed the entire medical record and did not perform his own evaluation of Ms. Lowe. His only opinion is based on one x-ray.

Thus, his testimony is not based in sufficient facts.

c. Testimony is product of reliable principles.

Here, Dr. Ajax has only reviewed one x-ray and there is no evidence that he has based on opinion on anything else that is scientifically reliable. Unlike the expert allowed in Smith, there is no record of him writing articles, relying on journals, keeping up with the literature, attending conferences, or anything else. Similar to the expert disallowed in Smith, his opinion is too speculative based on trying to prove something that only might have occurred had the facts been different and is only basing his opinion on the need for more tests, which the court held was not reliable in Smith.

Thus, his opinion is not the product of reliable principles.

d. The expert's opinion reflects reliable application of the principles.

Here, Dr. Ajax's opinion is not a reliable application of the principles because

Thus, Dr. Ajax's testimony should not be admitted. Therefore, the court should grant our motion to deny his testimony.

C. Even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff failed to offer any admissible evidence on elements of her malpractice claim.

A party may move for summary judgment, identifying each claim or defense on which summary judgment is sought. FRE 56. The court shall grant the summary judgment motion if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.* A material fact is essential to the establishment of an element of the case and determinative of the outcome. *Id.* To succeed on a summary judgment motion, the defendant must show that the plaintiff has failed to establish a factual basis or sufficient showing on an essential element of her case for which she bears the burden of proof at trial.

Alexander v. ChemCo (2003). A complete failure of proof concerning an essential element necessarily renders all other facts immaterial. *Id.*

For a plaintiff to establish a case for negligence, the plaintiff must prove (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach caused harm to the plaintiff. *Jacobs v. Becker* (2020). Expert testimony is required in medical malpractice cases because only an expert can demonstrate how the required standard of care was breached and how the breach caused the injury. *Id.* A party's failure to provide expert testimony on duty or causation justifies an adverse summary judgment ruling. *Id.*

1. Duty

The standard of care for physicians is to act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field. *Jacobs*. Experts can testify about the standard of care for a specialist only if the experts specialize in the same or similar specialty that includes the performance of the procedure at issue. *Id.* A party's failure to provide expert testimony on duty justifies an adverse summary judgment ruling. *Id.* In *Jacobs*, the plaintiff failed to provide any expert testimony on duty and thus summary judgment was proper against her. *Id.*

Here, while Dr. Ajax explained that taking x-rays are within the duty of care, Dr. Jost did take x-rays after the procedure to confirm it was successful. However, no other testimony was provided regarding the standard of care needed to meet a claim of malpractice.

Thus, Ms. Lowe failed to meet her burden and provide testimony on duty required by Dr. Jost.

2. Breach of Duty

Here, Dr. Jost did not breach his duty of care owed to Ms. Lowe. Dr. Shulman believes Dr. Jost surgical management, manner in which he carried out the surgery, and his medical assessment were at all times appropriate and comported with the standard of care of an average member of the orthopedics field. Dr. Shulman stated that Dr. Jost met his standard of care by correctly replacing the hip, taking the replaced hip through range of motion and stability testing and properly closed in incision. Further, while Dr. Jost only took one x-ray, Dr. Shulman testifies that he correctly ordered a post-operation x-ray to confirm everything was good and that the one x-ray was enough, thus confirming the joint was stable. Dr. Jost also gave Ms. Lowe proper instructions on not bending at the waist.

Thus, he did not breach his duty.

3. Causation

A party's failure to provide expert testimony on causation justifies an adverse summary judgment ruling. *Id.* In *Jacobs*, the plaintiff failed to provide any expert testimony on duty and thus summary judgment was proper against her. *Id.*

Here, the hip replacement surgery was not the cause of Ms. Lowe's injuries. Dr. Jost specifically told her, and the physical therapist reminded her, to not bend at the waist more than 90 degrees and should not twist the hip for 6 six weeks. Ms. Lowe was the

cause of her injury by bending at the waist when she was not supposed to based on her neighbor's affidavit. Further, the fracture could have been caused by the fall she sustained and not her surgery or previous pain. Dr. Shulman even testified that this could cause dislocation and injury to the femur, as occurred here.

Thus, her injury was not caused by any breach by Dr. Jost.

Therefore, the court should grant the motion for summary judgment in favor of Dr. Jost.

IV. Conclusion

The Court should qualify Dr. Shulman as an expert and admit her opinion testimony. The Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered testimony. Even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff failed to offer any admissible evidence on elements of her malpractice claim.

Question MPT-1 – July 2025 – Selected Answer 3

IN THE FIFTEENTH COURT IN THE STATE OF FRANKLIN

Plaintiff
Alice Lowe

v.

Defendant
Emil Jost

DEFENSE BRIEF IN SUPPORT OF EXPERT TESTIMONY EXCLUSION AND SUMMARY JUDGMENT

I. Statement of Authorities

[excluded]

II. Statement of Facts

[excluded]

III. Discussion

1. The Court should qualify Dr. Shulman as an expert and admit her testimony because she is both a qualified expert due to her medical training and familiarity with Franklin community hip replacement standards of care, and she is reliable because she bases her opinions on articles, conferences, and experience relevant within the Franklin community.

The rule for testimony by expert witnesses is governed by the Franklin Rules of Evidence, specifically rule 702.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the experts scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

As explained in *Jacobs v. Becker* (Franklin Court of Appeals, 2020), expert testimony is ***required*** in medical malpractice cases because only experts can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. A party's failure to provide an expert will justify an adverse ruling on summary judgment. When the plaintiff in *Jacobs* failed to provide expert testimony, the trial Court properly granted summary judgment in favor of the defendant, Dr. Becker. Further, when the trial court in *Smith v. McGann* (2004) refused to admit the testimony of either physician offered by the plaintiff, the trial court dismissed the plaintiffs case.

Further, in *Smith v. McGann* (Franklin Court of Appeals 2004), the court applied the new Franklin Civil Code section 233 pursuant to *Park v. Green* (Fr. Sup. Ct. 1999), which explains the adaptation of *Daubert v. Merrell Dow Pharmaceuticals* (1993) to Franklin courts. There, the trial court has broader latitude to determine whether an experts "reasoning or methodology properly can be applied to the facts at issue..." the trial court is the "gate keeper" to determine whether expert testimony is admissible.

Standard of Care

To qualify as an expert to testify about the standard of care, if they are a specialist, they must specialize in the same or similar specialty that includes performance of the procedure at issue, and must demonstrate familiarity with the standard of care where

the injury occurred. If they are not a specialist, the expert must demonstrate they have "sufficiently familiar with the standards" in that area by their "knowledge, skill, experience, training or education" (*Smith*, see also FRE 702). In *Wyatt v. Dozier* (Fr. Sup. Ct. 2000), the Court did not abuse its discretion in excluding the testimony of a pediatrician about the standard of care for an obstetrician, not because the two physicians practice different fields of medicine, but because the offered testimony of the pediatrician did not meet FRE 702's "knowledge, skill, experience, ..."

Similar to *Smith*, when Dr. Adams court testify as a qualified expert because he studied the demographic of the area, the standard of care in the area he practiced was the same as the one at issue, and he was properly qualified as an expert in Orthopedics, **here**, Dr. Shulman is an expert qualified to testify about the standard of care given in this case because she is a medical school graduate of Franklin (the same as Dr. Jost), she did her residency in orthopedic surgery at Franklin Medical Center (in the same city as Dr. Jost, where plaintiff had her initial surgery), she is board-certified in orthopedics (as well as Dr. Jost), and is professor of orthopedics at Olympia Medical School.

Further, a hip replacement is the procedure at issue because that was what Ms. Lowe had performed twice. Dr. Shulman and Dr. Jost both perform his replacements as orthopedic surgeons. Although Dr. Shulmans practice was in Olympia, the only difference is the community compared to Franklin is smaller, but the procedure for a hip replacement is the same in that area as it is the Franklin. Dr. Shulman qualifies not only as a specialist because she specializes in Ortho as Dr. Jost does, but also as an expert because her knowledge from medical school, residency, private practice, and professorship demonstrate that she is sufficiently familiar with the hip replacement standards in Franklin. Therefore, Dr. Shulman is a qualified expert for purposes of expert testimony.

To be a reliable expert, the testimony opinion must be based on a scientifically valid methodology. As explained in *Ridley v. St. Mark's Hospital* (Fr. Ct. App. 2002), the Court may apply a few different factors to assess the reliability of expert testimony. One such factor is the degree to which the experts opinion and its bases are generally accepted within the relevant community (*Ridley*). Another such factor is whether experts in that field would rely on the same evidence to reach the type of opinion being offered (*Ridley*). Like, medical records, CT scans, medical notes, and deposition testimony.

Speculation about what *may have occurred* will not be enough to deem an expert reliable. Pursuant to *Park v. Green*, when an experts opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded. An opinion is fundamentally unsupported when it "fails to consider the relevant facts of the case".

Even if a Court finds an expert qualified and reliable, the jury still may assess credibility of the testimony.

Like in *Smith* when Dr. Adams was a reliable expert because he based his opinion on many years of experience in ortho, articles he read, and conferences he attended.

Here, Dr. Shulman has performed over 100 hip replacements, reviewed all surgical records and medical records in this case, experienced in Ortho, reads the articles in the Journal of American Medical Association and The New England Journal of Medicine, attend conferences, present at those conferences, and reviewed the subsequent X-ray and post-op instructions. Even if Dr. Shulman has not made a thorough comparison of the population and availability of the medical care in Olympia and Franklin, she has certainly read and studied the comparisons made by other reputable sources through the journals she reads and the conferences she attended. Further, even if Dr. Shulman has not herself performed the same surgery in a number of years, she teaches the exact same procedure so she still active in the process and is there to intervene for students learning. Therefore, Dr. Shulman is a reliable expert.

2. The Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered opinion testimony because Dr. Ajax is not qualified as an expert for the standard of care for Franklin hip replacements, and even if he is, Dr. Ajax did not base his expert testimony on scientifically valid methodology.

The rule for an expert testimony is governed by FRE 702 and additional rules above.

Like Dr. Brown in *Smith*, Dr. Ajax does not demonstrate the he is sufficiently familiar with the standards in Franklin by his knowledge, skill, experience, etc because he did his residency in Olympia which has a different population than Franklin. Further, he does not specialize in hip replacements and instead does "all" types of orthopedics, like fractures and knee replacements. Therefore, Dr. Ajax is not qualified to give expert testimony.

However, if the court does find Dr. Ajax qualified, his testimony should still be excuses because it is not based on scientifically valid methodology. Similar to *Smith*, when Dr. Brown testified he only read the plaintiffs initial X-ray and his only medical opinion about the standard of care was that it "fell below the standard of care in not ordering X-rays until [date]" was not reliable, **here**, Dr. Ajas' only testimony is that Dr. Jost failed to order an X-ray from another position. When asked what evidence Dr. Ajax used to support his contention, he does NOT cite any articles, conferences,

experience, research, medical notes, deposition testimony, Franklin standard of care medical research...the list could go on.

Dr. Ajax only contends what *may have occurred* but for the additional X-ray angles, but he cannot support that with the additional angles there could be a visible showing of an issue. Dr. Ajax does not even mention the plaintiffs fall and failure to follow medical advice by not picking up her bag, which is a failure to consider the facts of the case. Therefore, Dr. Ajax is not qualified because his testimony is not based on scientifically valid methodology.

3. Even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim because Ms. Lowe cannot provide a required medical expert to testify, and Ms. Lowe cannot show the lack of multiple x-rays caused her harm.

The rule for summary judgment is governed by Franklin Rules of Civil procedure, specifically rule 56.

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense-- or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

As explained in *Jacobs v. Becker*, a motion for summary judgment may be granted if the plaintiff fails to establish a factual basis for any of the prima facie elements of their claim, in light most favorable to the non-moving party. Not only must the factual basis be established, but there must be a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. (*Jacobs*, see also *Alexander v. ChemCo Ltd* Fr. Sup. St. 2003). There must be no genuine issue as to any material fact, and a material fact is a fact that is essential to the establishment of an element of the case and determination of the outcome.

Negligence

The plaintiff must show (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach of the standard of care caused the harm to the plaintiff.

[repeated] As explained in *Jacobs v. Becker* (Franklin Court of Appeals, 2020), expert testimony is ***required*** in medical malpractice cases because only experts can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. **A party's failure to provide an expert will justify an adverse ruling on summary judgment.**

Here, we stipulate that Dr. Jost owed a duty to Ms. Lowe because in *Jacobs*, the court held physicians of course owe a duty of care to their patients. However, Ms. Lowe cannot make a prima facie showing (of the second element) that Dr. Jost failed to conform to a specific standard of care because:

1. Dr. Jost did not fail as shown in testimony by Dr. Shulman when she stated the range-of-motion testing was stable and the post-op documents were reviewed and "were at all times appropriate and fully comported with accepted standards or surgical care" and further "no act or omission attributable to Dr. Jost proximate caused any of the injuries". The single X-ray disputed by Dr. Ajax was reported by Dr. Shulman as something she would have also done, and there was no evidence of a fracture or a dislocation.

2. Ms. Lowe cannot provide an expert testimony because Dr. Ajax is not qualified and is not reliable. Dr. Ajax' experience does not comport to Franklin standard of care experience and knowledge, and even if it does, Dr. Ajax provides no rational support that his opinion of the single X-ray being below the standard of care is supported by any scientific accepted data.

Lastly, Ms. Lowe cannot make a showing that the breach of the care by Dr. Jost, specifically the decision to take only one x-ray, was the cause of her harm. As stated by a lay witness, who is qualified to testify because she has personal knowledge of watching Ms. Lowe fall, stated she saw Ms. Lowe drop her purse, and instead of letting Ms. Baines assist her in picking it up, Ms. Lowe twisted and turned in order to reach the purse. This movement was exactly against post-op procedure care laid out by Dr. Jost. Therefore, Ms. Lowe cannot make a showing that the harm was caused by Mr. Jost, and there is even direct evidence to the contrary that Ms. Lowes failure to follow post-op instructions led to her injury.

IV. Conclusion

Dr. Shulman should be granted as an expert witness because she is qualified as an expert due to her education and experience with the Franklin standard of care, and her testimony is reliable because she used articles, research, and experience.

Dr. Ajax should be excluded as an expert because he does not qualify to know the Franklin standard of care as an Olympia trained doctor, and he does not base his expert testimony on any scientific data.

Lastly, the motion for summary judgment should be granted because the plaintiff cannot show Dr. Jost failed to conform to the standard of care because she does not have an expert to testify, and because she cannot make a sufficient showing that the lack of multiple x-rays cause her harm when she instead failed to follow post-op instructions.