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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2013

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**Tammie L. Boyles, as mother and next friend of Colton Elijah
Powell Boyles, a minor**

v.

Denise Dougherty, R.N.

**Appeal from Jefferson Circuit Court
(CV-11-900633)**

PER CURIAM.

Tammie L. Boyles ("Boyles"), as mother and next friend of Colton Elijah Powell Boyles ("Eli"), a minor, filed a lawsuit on behalf of her son for injuries he allegedly sustained from an arterial stick while he was hospitalized at University of

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Alabama at Birmingham Hospital ("UAB Hospital").¹ Boyles appeals from a summary judgment in favor of Denise Dougherty, a registered nurse at UAB Hospital. We reverse and remand.

I. Facts and Procedural History

The evidence, viewed in the light most favorable to Boyles, shows the following: On September 24, 2009, Eli was born prematurely at UAB Hospital. On September 29, 2009, Eli's treating physician ordered a blood culture, which was taken by Dougherty from Eli's right arm. Later that day, Eli's mother, who is also a nurse, noticed that Eli's fingertips on his right hand were blue or "dusky." Dougherty applied a warm compress to Eli's right hand. The discoloration in Eli's fingertips moved upward from his right hand toward his shoulder.

On October 1, 2009, Eli was transferred to Children's Hospital of Alabama ("Children's Hospital") for treatment of a bowel perforation. While at Children's Hospital, the fingertips of Eli's right hand auto-amputated or fell off.

¹Boyles originally named as defendants UAB Hospital, UAB Health System, and Denise Dougherty, R.N. UAB Hospital does not exist as a separate entity. UAB Health System was dismissed on joint motion.

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Boyles claims her son's injury occurred as a result of an improper arterial stick to his right arm by Dougherty.

On February 22, 2011, Boyles sued, alleging that Dougherty's nursing negligence caused the auto-amputation of Eli's fingertips. The complaint alleged that Dougherty performed an arterial stick on the right hand/arm of Boyles's infant son, Eli, instead of an arterial stick to his heel, causing "poor perfusion to his hand with resulting thrombosis of the fingertips." In the complaint, Boyles contended that "the recommended location for blood collection on a newborn baby is the heel and the prior sticks for [her] infant son had been to his heel until [Dougherty] negligently caused or negligently allowed the arterial stick to be done at his right hand/arm."

Dougherty filed an answer denying that she was guilty of negligence and denying that there was a causal relationship between her and the injury alleged in the complaint. Boyles identified Lauren Cooper, R.N., as an expert witness in this case.

On October 17, 2012, Dougherty filed a motion for a summary judgment premised on Boyles's failure to offer expert

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testimony as to causation in the case.² Boyles filed a response to Dougherty's summary-judgment motion arguing that Cooper was qualified to testify as an expert witness and that the Children's Hospital records showed that the cause of the auto-amputation of Eli's fingertips was "poor perfusion and thrombotic fingertips while at UAB [Hospital]." In opposing Dougherty's summary-judgment motion, Boyles submitted: excerpts from her deposition; excerpts from Dougherty's deposition; excerpts from Cooper's deposition; UAB Hospital's progress note dated September 30, 2009; certified copies of the medical records of Children's Hospital; various photographs; and UAB Hospital's Interdisciplinary Standard Regarding Arterial Punctures for Specimen Collection.

On November 21, 2012, the trial court entered a summary judgment in favor of Dougherty. The trial court concluded that a summary judgment in favor of Dougherty was proper because "[Boyles] lacks an expert capable of testifying as to causation [and] there has been no evidence presented to the [trial court] that [Eli]'s injuries were probably a result of

²Dougherty attached to her summary-judgment motion Boyles's designation of Lauren Cooper, R.N., as her expert witness.

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a breach of the standard of care by Dougherty." Boyles appealed.

II. Standard of Review

Boyles challenges the summary judgment in favor of Dougherty. In determining whether the trial court erred in entering the summary judgment, we consider the following:

"Under Rule 8, Ala. R. Civ. P., a complaint is sufficient if it puts the defendant on notice of the claims against him; however, the rule of generalized notice pleading may be qualified by rule or statute. Bethel v. Thorn, 757 So. 2d 1154, 1158 (Ala. 1999). Section 6-5-551, Code of Ala. 1975, provides that in any medical-malpractice action, '[t]he plaintiff shall include in the complaint filed in the action a detailed specification and factual description of each act and omission alleged by plaintiff to render the health care provider liable to plaintiff.' The plaintiff is prohibited 'from introducing at trial evidence of any other act or omission.'

"Substantial evidence is defined in the medical-malpractice context as 'that character of admissible evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.' § 6-5-542(5). Rule 56, Ala. R. Civ. P., governing motions for summary judgment, must be read in conjunction with that definition of substantial evidence. Golden v. Stein, 670 So. 2d 904, 907 (Ala. 1995).

"This Court's review of a summary judgment in a medical-malpractice case, as in other cases, is guided by the proposition that 'this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant.' Hobson v. American Cast Iron

Pipe Co., 690 So. 2d 341, 344 (Ala. 1997), quoted in Hauseman v. University of Alabama Health Servs. Found., 793 So. 2d 730, 734 (Ala. 2000).

"If the movant in a medical-malpractice case makes a prima facie showing that there is no genuine issue of material fact, then, as in other civil cases, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Ex parte Elba Gen. Hosp. & Nursing Home, Inc., 828 So. 2d 308, 311 (Ala. 2001).

"To maintain a medical-malpractice action, the plaintiff ordinarily must present expert testimony from a "similarly situated health-care provider" as to (1) "the appropriate standard of care," (2) a "deviation from that standard [of care]," and (3) "a proximate causal connection between the [defendant's] act or omission constituting the breach and the injury sustained by the plaintiff."

Lyons v. Walker Reg'l Med. Ctr., 791 So. 2d 937, 942 (Ala. 2000) (bracketed language original).

"[A] medical malpractice plaintiff must produce substantial evidence that "the alleged negligence 'probably caused the [complained of] injury,'" in order to survive a summary judgment motion, if the defendant has made a prima facie showing that no genuine issue of material fact exists as to the issue of causation.'

Golden, 670 So. 2d at 907.

"To present a jury question, the plaintiff [in a medical-malpractice action] must adduce some evidence indicating that the alleged negligence (the breach of the appropriate standard of care) probably

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caused the injury. A mere possibility is insufficient. The evidence produced by the plaintiff must have 'selective application' to one theory of causation."

"Rivard v. University of Alabama Health Servs. Found., P.C., 835 So. 2d 987, 988 (Ala. 2002)."

Cain v. Howorth, 877 So. 2d 566, 575-76 (Ala. 2003). See

Breland v. Rich, 69 So. 3d 803, 814-15 (Ala. 2011).

Additionally, regarding causation, this Court has stated:

"[A] theory of causation is not mere conjecture, when it is deducible as a reasonable inference from "known facts or conditions," Alabama Power Co. v. Robinson, 447 So. 2d 148, 153-54 (Ala. 1983). "[I]f there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a judicial basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." Griffin Lumber Co. v. Harper, 247 Ala. 616, 621, 25 So. 2d 505, 509 (1946) (quoting Southern Ry. v. Dickson, 211 Ala. 481, 486, 100 So. 665, 669 (1924)).'

"Dixon v. Board of Water & Sewer Comm'rs of Mobile, 865 So. 2d 1161, 1166 (Ala. 2003)."

Miller v. Bailey, 60 So. 3d 857, 867 (Ala. 2010).

III. Analysis

On appeal, Boyles argues that the summary judgment was improper because, she says, she presented substantial evidence

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that Dougherty's negligence probably caused Eli's injury. Boyles contends that the record supports her contention that Dougherty breached the appropriate standard of care in her arterial stick to Eli's arm, and, she says, the certified medical records from Children's Hospital and the testimony by Cooper establish that the injury occurred as a result of the improper arterial stick by Dougherty.

Boyles alleged in her complaint that Eli sustained auto-amputation of his fingertips through negligence on the part of Dougherty. Dougherty filed a motion for a summary judgment, arguing that the only issue before the court was whether Boyles would be able to present testimony that any breach of the standard of care by Dougherty proximately caused Eli's injury.

The record supports a "logical sequence of cause and effect" based on the time line and the absence of any other explanation in the record. See Miller v. Bailey, 60 So. 3d at 867. Further, this logical sequence is corroborated under the facts of this case by certified medical records that were before the trial court and by the testimony of the Boyles's expert, Cooper. Boyles presented certified medical records

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and testimony that would support a reasonable inference that the negligent conduct of Dougherty probably caused the auto-amputation of Eli's fingertips. See Miller. The evidence submitted by Boyles in opposition to Dougherty's summary-judgment motion shows that Dougherty breached the appropriate standard of care in her arterial stick to Eli's hand and in applying a warm compress to that hand, which worsened a problem with perfusion of blood circulation. The certified medical records establish that the injury occurred "following arterial stick." The certified medical records from Children's Hospital state that Eli had "poor perfusion of his right hand and thrombotic fingertips develop[ed] while at UAB [Hospital]."

Boyles's nurse expert, Cooper, testified that the arterial stick in this case was too high and that this could cause and did cause occluded blood flow to Eli's right hand.

Cooper testified:

"A. I believe that what caused the fingertips to turn black and ultimately be amputated was that when performing an ABG [arterial blood gas], you have to make sure that you have done the

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Allen's test³ or you have used an illuminator
--

"Q. Okay.

"A. --to make sure that when you are in one artery getting your blood that there is sufficient blood to the rest of the hand. If the blood is taken in the incorrect spot, then you have occluded the entire hand. You may be drawing the blood and at that moment you may not realize it, but that entire hand will not have perfusion. It has got to be performed in the correct spot or that will cause lack of perfusion and eventually sepsis and cell death.

"Q. Information that we were provided about what your opinions were said that you were of the opinion that the arterial stick was too high up.

"A. Yes, sir.

"Q. And that's a paraphrase from me, that it should not be done above the wrist area.

"A. Uh-huh.

"Q. Is that correct?

"A. Yes, sir.

"Q. Is that one of your opinions?

"A. Yes, sir.

"Q. Is that what you were just talking about?

"A. Yes, sir.

³According to the record, an Allen's test is "a method of confirming radial artery occlusion."

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"Q. What evidence did you find in the record that the arterial stick was above the wrist?

"A. Well, I believe because, like I said, what happens, it branches off at the wrist, and if it's done in the correct spot, there would be no reason for sepsis and lack of perfusion."

The certified medical records from Children's Hospital provide that Eli developed poor perfusion of his right hand and thrombotic fingertips while he was at UAB Hospital. In addition, Dougherty acknowledged that an improperly performed stick can cause occlusion or blockage of blood flow to the hand. No contradictory evidence of any other plausible cause was presented by Dougherty.

We conclude that the certified medical records and the testimony sufficiently established causation for the purpose of rebutting Dougherty's motion for a summary judgment. The medical records and the testimony are more than sufficient to create a question of fact as to whether the acts of Dougherty were the proximate cause of Eli's injuries. The certified medical records, Cooper's testimony, and Dougherty's acknowledgment provides substantial evidence that the improperly performed arterial stick caused Eli's injuries. Therefore, the summary judgment in favor of Dougherty was improper.

IV. Conclusion

Based on the foregoing, we conclude that, under the facts of this case, the evidence is sufficient to "warrant the reasonable inference and conclusion that [Eli's injuries] did so occur as alleged." Prowell v. Children's Hosp. of Alabama, 949 So. 2d 117, 130 (Ala. 2006) (quoting McAfee v. Baptist Med. Ctr., 641 So. 2d 265, 267 (Ala. 1994), quoting in turn McKinnon v. Polk, 219 Ala. 167, 168, 121 So. 539, 540 (1929)). Boyles's evidence sufficiently overcame Dougherty's showing in support of her motion for a summary judgment. Therefore, we reverse the summary judgment entered in favor of Dougherty, and we remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, C.J., and Parker, Main, and Wise, JJ., concur.

Murdock, J., concurs in the result.

Stuart, Bolin, Shaw, and Bryan, JJ., dissent.

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STUART, Justice (dissenting).

The main opinion reverses the summary judgment entered by the trial court in favor of Denise Dougherty, a registered nurse employed by University of Alabama at Birmingham Hospital, on the medical-malpractice claim asserted against her by Tammie L. Boyles ("Boyles") on behalf of her minor son Colton Elijah Powell Boyles ("Eli"). I agree with the trial court that Boyles failed to identify an expert capable of testifying that Dougherty's alleged breach of the standard of care probably caused the identified injury to Eli and that summary judgment was accordingly proper on that basis. I therefore dissent.

To prevail in a medical-malpractice case subject to the Alabama Medical Liability Act ("AMLA"), § 6-5-480 et seq. and § 6-5-541 et seq., Ala. Code 1975, a plaintiff must establish 1) the appropriate standard of care, 2) that the defendant health-care provider breached that standard of care, and 3) a proximate causal connection between the health-care provider's breach and the identified injury. Bradford v. McGee, 534 So. 2d 1076, 1079 (Ala. 1988), and § 6-5-548, Ala. Code 1975. In the instant case, Boyles identified Lauren Cooper, a registered nurse with experience working in a neonatal

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intensive-care unit, as her sole expert witness. Cooper accordingly may have been a similarly situated health-care provider qualified to give testimony regarding the applicable standard of care and whether Dougherty breached that standard. See generally Springhill Hosps., Inc. v. Critopoulos, 87 So. 3d 1178, 1187-89 (Ala. 2011), and § 6-5-548. However, I do not believe that Cooper's status as a registered nurse and a similarly situated health-care provider automatically qualifies her to testify regarding causation.

In Phillips v. Alamed Co., 588 So. 2d 463, 465 (Ala. 1991), this Court considered a challenge to a trial court's ruling barring a registered nurse from testifying on the issue of proximate cause because, the trial court held, testimony from a physician was necessary to establish causation due to the "complex medical issues" in that case. We stated:

"Phillips ... argues that the court erred by sustaining Alamed's objection to testimony by Anne Bailey-Allen, a registered nurse, on the issue of proximate cause. The trial court held that testimony on the issue of proximate cause could be provided only by a physician. As a general rule, decisions as to a witness's competency to testify as an expert on a particular subject are within the discretion of the trial court. Ward v. Dale County Farmers Co-op., 472 So. 2d 978 (Ala. 1985). Those decisions will not be reversed by this Court absent an abuse of discretion. Bell v. Hart, 516 So. 2d 562 (Ala. 1987); Byars v. Mixon, 292 Ala. 661, 299 So. 2d 262 (1974).

"The question of whether Alamed's failure to report Ms. Phillips's complaint of shortness of breath to her physician proximately caused her death is clearly a question involving complex medical issues. Therefore, we cannot say that the trial judge abused his discretion by requiring the testimony of a physician and, implicitly, holding that a registered nurse was not competent to testify as an expert on the issue of proximate cause. Bell, supra; Byars, supra."

Although in Phillips this Court did not expressly state the rationale for not allowing a nurse to testify regarding causation, the Court of Civil Appeals subsequently addressed that issue in Nelson v. Elba General Hospital & Nursing Home, Inc., 828 So. 2d 301, 304-05 (Ala. Civ. App. 2000), reversed on other grounds, 828 So. 2d 308 (Ala. 2001), stating:

"Although a registered nurse may be qualified to testify as to the standard of care that exists in the field of medicine applicable to registered nurses and as to whether that standard of care was breached, a registered nurse is not qualified to testify as an expert with regard to medical causation. ...

"There is a vast difference in the education and training of a physician and the education and training of a nurse and a vast difference in the activities they can perform. A licensed physician in the practice of medicine can

'diagnose, treat, correct, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality.'

"§ 34-24-50(1), Ala. Code 1975. A registered nurse in the practice of professional nursing can perform

"any act in the care and counselling of persons or in the promotion and maintenance of health and prevention of illness and injury based upon the nursing process which includes systematic data gathering, assessment, appropriate nursing judgment and evaluation of human responses to actual or potential health problems through such services as case finding, health teaching, health counselling; and provision of care supportive to or restorative of life and well-being, and executing medical regimens including administering medications and treatments prescribed by a licensed or otherwise legally authorized physician or dentist.'

"§ 34-21-1(3)a[, Ala. Code 1975].

"The legislature has not authorized a registered nurse to make a medical diagnosis. Rather, a registered nurse is limited to providing 'care and counselling' for a patient and works at the direction of a physician. For this reason, it would be a gross miscarriage of justice to enter a summary judgment in favor of Elba General when the testimony supporting its summary-judgment motion, as to the question of medical causation, has been provided by a person who is not authorized to formulate medical diagnoses.

"We find helpful several cases from other jurisdictions addressing the issue of a nurse's testimony as to medical causation. In Flanagan v. Labe, 446 Pa.Super. 107, 666 A.2d 333 (1995), aff'd, 547 Pa. 254, 690 A.2d 183 (1997), the Pennsylvania Superior Court held that a registered nurse is not competent to testify as to medical causation in a malpractice case. In Short v. Appalachian OH-9, Inc., 203 W.Va. 246, 507 S.E.2d 124 (1998), the West Virginia court held that a nurse was not qualified

to testify as to cause of death, time of death, or whether resuscitation was possible. Long v. Methodist Hospital of Indiana, Inc., 699 N.E.2d 1164 (Ind. App. Ct. 1998), involved a claim by a heart-surgery patient who claimed to have developed a serious staph infection following the surgery. The Indiana court held that a nurse was not qualified to offer expert testimony on the question whether the hospital's conduct caused, or increased the risk of, infection. In Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah Ct. App. 1997), an action against a health-services provider, a registered nurse was held not qualified to give an opinion as to proximate cause of nerve damage.

"Three courts in Texas have addressed the issue. In Arlington Memorial Hospital Foundation, Inc. v. Baird, 991 S.W.2d 918 (Tex. App.-Fort Worth 1999), the court held that a nursing expert who was not shown to be qualified to medically diagnose thermal burns or to be an expert on the equipment used, was precluded from testifying as to medical causation. In Pace v. Sadler, 966 S.W.2d 685 (Tex. App.-San Antonio 1998), a nurse was not qualified to medically diagnose causation of a heart condition. In Lesser v. St. Elizabeth Hospital, 807 S.W.2d 657 (Tex. App.-Beaumont 1991), the court held that a nurse might be permitted to testify about proximate causation if she is shown to have specialized experience or training that qualifies her to testify as to medical causation."

(Footnote omitted.) See also Robinson v. Baptist Health Sys., Inc., 24 So. 3d 1119, 1125 (Ala. Civ. App. 2009) (affirming trial court's ruling that nursing expert was not qualified to express an opinion regarding causation).

In the instant case, the trial court considered the evidence in the record and, noting that Eli had been born

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prematurely and suffered from "many serious conditions," concluded that a summary judgment was appropriate because there was "no qualified expert opinion as to causation." The trial court had already recognized that Cooper had been identified to testify as to Dougherty's alleged breach of the standard of care; thus, it is evident that the trial court did not consider Cooper qualified to give expert testimony regarding the cause of Eli's injury based on the complex nature of the case. We have previously stated that it is within a trial court's discretion to determine whether a witness is qualified to give expert testimony on a subject, see, e.g., Critopoulos, 87 So. 3d at 1180, and Phillips, 588 So. 2d at 465, and I do not believe the trial court exceeded its discretion in concluding that Cooper was not qualified to provide an expert opinion as to the cause of Eli's injury. In the absence of any other expert witness to testify regarding causation, summary judgment was appropriate.⁴ See University

⁴The main opinion concludes that "the certified medical records and [Cooper's] testimony sufficiently established causation for the purpose of rebutting Dougherty's motion for a summary judgment." ___ So. 3d at ___ (emphasis added). Beyond the insufficiency of Cooper's testimony to establish causation, explained supra, I would also note that there is nothing in the medical records before us that indicates that Eli's injury was caused by a breach of the standard of care committed by Dougherty. There are some general chart notes

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of Alabama Health Servs. Found., P.C. v. Bush, 638 So. 2d 794, 802 (Ala. 1994) ("To prove causation in a medical malpractice case, the plaintiff must prove, through expert medical testimony, that the alleged negligence probably caused, rather than only possibly caused, the plaintiff's injury." (emphasis added)).

I write further to emphasize the importance of expert testimony in AMLA cases. The legislature, in enacting the AMLA, evinced its intent that expert testimony be required in AMLA cases, see, e.g., § 6-5-548, and this Court has recognized that "[u]nless 'the cause and effect relationship between the breach of the standard of care and the subsequent complication or injury is so readily understood that a layperson can reliably determine the issue of causation,' causation in a medical-malpractice case must be established through expert testimony." DCH Healthcare Auth. v. Duckworth, 883 So. 2d 1214, 1217-18 (Ala. 2003) (citing Cain v. Howorth, 877 So. 2d 566, 576 (Ala. 2003)).⁵ The Supreme Court of

referring to poor perfusion and thrombotic fingertips; however, there is nothing in those medical records stating what caused that condition.

⁵A similar requirement for expert testimony exists with regard to establishing the applicable standard of care and any breach thereof. See Anderson v. Alabama Reference Labs., 778

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Minnesota has explained the purpose for requiring expert testimony in medical-malpractice cases as follows:

"The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes [medical] malpractice and causation.' [Sorenson v. St. Paul Ramsey Med. Ctr., 457 N.W.2d 188, 192 (Minn. 1990)]. This is based on the assumption that most medical malpractice cases involve complex issues of science or technology, requiring expert testimony to assist the jury in determining liability."

Tousignant v. St. Louis County, 615 N.W.2d 53, 58 (Minn. 2000). In the instant case, Boyles states in her complaint that this case involves an "arterial stick to [Eli's] right hand/arm [that] caused poor perfusion to his hand with resulting thrombosis of the fingertips," which allegedly resulted in auto-amputation of the same. This clearly involves matters outside the purview of a layperson, and expert testimony establishing causation is accordingly vital. Indeed, the trial court apparently determined that expert testimony from a physician was necessary under the facts of the case, and I fear that in reversing the trial court's

So. 2d 806, 811 (Ala. 2000) (reciting the general rule that a "plaintiff is required to produce expert medical testimony to establish the applicable standard of care and a breach of that standard of care" but noting an exception if the case involves a "want of skill or lack of care" that is readily comprehensible by a layperson).

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judgment in the absence of such testimony we are acting contrary to the will of the legislature, as expressed in the AMLA, that expert testimony be required in these cases. For these reasons, I respectfully dissent.

Bolin and Shaw, JJ., concur.

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BRYAN, Justice (dissenting).

I respectfully dissent from the main opinion's reversal of the trial court's summary judgment in favor of Denise Dougherty, R.N., and its remand of the cause for further proceedings. In its order, the trial court found that "[Tammie L. Boyles] had retained an expert to testify on Dougherty's breach of the standard of care" but that, "[i]n the instant case, there is no qualified expert opinion as to causation." The trial court went on to conclude: "Because [Boyles] lacks an expert capable of testifying as to causation, there has been no evidence presented to the Court that [Boyles's] child's injuries were probably the result of a breach of the standard of care by Dougherty." I agree with Justice Stuart that these statements indicate that the trial court did not consider Boyles's expert, Registered Nurse Lauren Cooper, qualified to give expert testimony regarding the cause of the child's injury.

It is well established that, "[i]n a medical malpractice case, the plaintiff must prove by expert testimony that the [health-care provider] breached the standard of care and by the breach proximately caused the plaintiff's injury." See University of Alabama Health Servs. Found., P.C. v. Bush, 638

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So. 2d 794, 798 (Ala. 1994). Boyles has not argued on appeal that the trial court erred in finding that Cooper was not qualified to testify as an expert on the issue of causation, and Boyles did not present any other expert testimony as to that issue. Thus, she has not demonstrated that the trial court erred in finding either that "there [was] no qualified expert opinion as to causation" presented in this case or that Dougherty was entitled to a summary judgment on that basis. Therefore, I would affirm the trial court's judgment.