

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA12-57

DENISE BAILEY-GRAY

APPELLANT

V.

ALICE MARTINSON, M.D.

APPELLEE

Opinion Delivered February 13, 2013

APPEAL FROM THE CARROLL
COUNTY CIRCUIT COURT,
EASTERN DISTRICT [NO. CV-2007-
113]HONORABLE GERALD K. CROW,
JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Appellant filed a complaint alleging that she was injured in 1999 by the medical negligence of the appellee, who is an orthopedic surgeon practicing in Berryville, Arkansas. The case was tried before a jury in May 2011. At the close of the appellant's case-in-chief, the trial court granted appellee's motion for a directed verdict on the grounds that appellant had failed to meet her burden of proof. On appeal, appellant argues that the trial court erred in striking the deposition testimony of Dr. Morton Kasdan, in directing a verdict against appellant, and in denying her motion for a new trial. We affirm.

We first address appellant's argument regarding the striking of Dr. Kasdan's deposition. Appellant's experts, Dr. Kasdan and Dr. Randy Bindra, were deposed by both parties. Appellee deposed Dr. Kasdan in Louisville, Kentucky, in August 2005 and deposed Dr. Bindra in March 2006. Appellant took a videotaped deposition of Dr. Kasdan in July 2006

for presentation at trial. No objections were made to the expert qualifications of either Kasdan or Bindra during the depositions, and appellant sought to introduce all three depositions at trial. The deposition of Dr. Bindra was read into the record at trial without objection. However, after appellant played Dr. Kasdan's videotaped deposition to the jury, appellee moved to strike Dr. Kasdan's testimony on the ground that Dr. Kasdan's testimony did not satisfy the requirements of Ark. Code Ann. § 16-114-206(a)(1) (Repl. 2006). The trial court granted the motion and directed the jury to disregard the video deposition of Dr. Kasdan.

Arkansas Code Annotated section 16-114-206 establishes the burden of proof in medical-malpractice cases. Subsection (a)(1) provides that, in any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving, by means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality. Citing *Padilla v. Archer*, 2011 Ark. App. 746, ___ S.W.3d ___, appellant argues that striking Dr. Kasdan's testimony was error because appellant had waived any objection to Dr. Kasdan's testimony by failing to raise the objection during the deposition. We do not agree that *Padilla* stands for that proposition. In *Padilla*, we held that the trial court did not err in finding that there had been a waiver of objections to a physician's expert credentials because those objections were not presented at

that physician's deposition. However, the physician in *Padilla* was not simply offering expert testimony regarding the standard of care; instead, he had actually treated the appellee in *Padilla* for the complications alleged to have been caused by the malpractice, and his testimony thus had independent relevance. The great distinction between the present case and *Padilla* is that the physician in *Padilla* expressly stated that he was offering no opinion on whether the defendant physician in that case violated the standard of care. Here, Dr. Kasdan *did* opine that the appellant physician violated the standard of care. *Padilla*, then, stands only for the proposition that objections going to lack of foundation to testify as an expert *where the expert testimony expresses no opinion as to the local standard of care* may be found to have been waived by failure to raise those objections at the deposition.

The establishment of the local standard of care is not a mere matter of foundation; the supreme court has expressly held that this is an issue going to sufficiency of the evidence that may be raised for the first time in a directed-verdict motion. *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002). An expert must demonstrate a familiarity with the standard of practice in a similar locality, either by his testimony or by other evidence showing the similarity of localities. *First Commercial Trust Co. v. Rank*, 323 Ark. 390, 401, 915 S.W.2d 262, 267 (1996). Although we consider the geographical location, size, and character of the community, similarity of localities is based not on population or area, but on the similarity of the local medical facilities, practices, and advantages. *Id.* In reviewing Dr. Kasdan's testimony, we find nothing to show that he was sufficiently familiar with the medical facilities or practices located in Berryville, Arkansas, to identify similar localities and to make any

meaningful comparison thereto. We cannot say that the trial court erred in striking his testimony on that basis.

Next, appellant argues that the trial court erred in granting a directed verdict on the ground that appellant failed to establish the local standard of care. In determining whether a directed verdict was properly granted, we view the evidence in the light most favorable to the party against whom the verdict was sought and give it its highest probative value, taking into account all reasonable inferences deducible from it. *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). A motion for a directed verdict should be granted only if there is no substantial evidence to support a jury verdict. *Boykin v. Mr. Tidy Car Wash, Inc.*, 294 Ark. 182, 741 S.W.2d 270 (1987). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and a directed verdict should be reversed. *Mankey v. Wal-Mart Stores, Inc., supra*.

Reviewing the record in light of this standard, we conclude that the testimony of Dr. Bindra, who was stipulated to have been familiar with the locality, failed either to prove the standard of care applicable to that locality or to establish a causal connection between appellant's injury and the treatment provided by appellee. Given that Dr. Bindra expressly stated that he was not trying to prove anybody's standard of care, and that he could only say

that the surgery “may”¹ have caused appellant’s injury, we do not think that the trial court erred in granting a directed verdict.

Finally, appellant argues that the trial court erred in denying her motion for a new trial based on the same issues that we have previously discussed. She makes this contention in a very conclusory manner, without any further argument and without citation to any authority. Because we have held that the underlying issues lack merit, we find no error in the denial of the motion.

Affirmed.

GLADWIN, C.J., and WALMSLEY, J., agree.

The Boyd Law Firm, by: *Charles Phillip Boyd, Jr.*, for appellant.

Cox, Cox & Estes, PLLC, by: *Walter B. Cox*, for appellee.

¹To establish the “but for” causation necessary to establish medical malpractice, medical opinions regarding causation must be stated to a reasonable degree of medical certainty or probability. *Ford v. St. Paul Fire & Marine Insurance Co.*, 339 Ark. 434, 5 S.W.3d 460 (1999).