

SUPREME COURT OF ARKANSAS

No. 12-998

DELORES PLYMATE

APPELLANT

V.

HEATHER MARTINELLI

APPELLEE

Opinion Delivered May 9, 2013APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CV-06-1918-3]HONORABLE MARK T. FRYAUF,
JUDGEAFFIRMED.**KAREN R. BAKER, Associate Justice**

Appellant Delores Plymate brings this appeal from the circuit court's order granting appellee Dr. Heather Martinelli's motion for directed verdict. The circuit court found that Plymate had not met the burden of proof required by Arkansas Code Annotated section 16-114-206(a) (Repl. 2006). On appeal, Plymate makes three arguments: (1) her medical expert's testimony satisfied the locality rule pursuant to Arkansas Code Annotated section 16-114-206(a); (2) section 16-114-206(a) is unconstitutional; and (3) the expert's testimony was sufficient to satisfy a claim for future medical expenses, pain, and suffering. We affirm.

In October 2000, Martinelli performed laparoscopic surgery to remove Plymate's left ovary. The following day, Plymate was released, but she came back to the hospital five days after being released with complaints of fever and abdominal pain. Upon her return, doctors

discovered that Plymate's bowel had been perforated due to the surgery. Plymate required a colostomy to repair the perforation and was in the hospital for almost one month.

Plymate filed a claim alleging medical malpractice against Martinelli and others. At trial, Plymate presented the expert testimony of Dr. Michael Baggish, who testified that, in his medical opinion, the actions of Martinelli during the operation were negligent. Specifically, he opined that the injury to Plymate came from a burn to the sigmoid colon during the surgery. He stated that it was below the standard of care to burn a portion of the colon while performing the surgery in question, and that it was also below the normal standard of care to not inspect the area after the procedure. He further stated that the injury would have been obvious to Martinelli had she inspected the sigmoid colon.

After Plymate rested, Martinelli moved for a directed verdict on the issue of negligence, asserting that Plymate had not met the burden of proof on the standard of care. The circuit court granted the motion and dismissed the complaint in its entirety, with prejudice.

Plymate filed a motion for a new trial and/or motion for reconsideration. In this motion, Plymate asserted that Arkansas Code Annotated section 16-114-206(a) is unconstitutional. The circuit court denied the motion, and Plymate brought this appeal.

When considering a motion for directed verdict made by a defendant, the plaintiff's evidence, and all reasonable inferences therefrom, are examined in the light most favorable to the plaintiff. *Dodson v. Charter Behavioral Health Sys. of Nw. Ark., Inc.*, 335 Ark. 96, 983 S.W.2d 98 (1998). A directed-verdict motion should be granted only if the evidence would

be so insubstantial as to require a jury verdict for that party to be set aside; evidence is insubstantial when it is not of sufficient force or character to compel a conclusion one way or the other, or if it does not pass beyond mere suspicion or conjecture. *Id.* Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003).

We have jurisdiction over this appeal because it involves the interpretation or construction of the Constitution of Arkansas. Ark. Sup.Ct. R. 1-2(a)(1) (2012).

For her first point on appeal, Plymate contends that Dr. Baggish's testimony satisfied the locality rule. Plymate contends in the alternative that, if Dr. Baggish's testimony was not sufficient to satisfy the locality rule, the standard of care that Martinelli should be held to is that of residency programs across the nation.

Our locality rule as set out in Arkansas Code Annotated section 16-114-206(a) states as follows:

- (a) 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:
 - (1) 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.

In order to meet the locality requirement, there must be an attestation by an expert regarding this locality or a similar one. *Young v. Gastro-Intestinal Ctr., Inc.*, 361 Ark. 209, 205 S.W.3d 741 (2005).

The only statement Dr. Baggish made regarding the standard of care in this case was as follows:

PLAINTIFF'S COUNSEL:	Are you familiar with the standards of ordinary OB/GYNs, what they're held up to?
DR. BAGGISH:	The standard of care, yes.
PLAINTIFF'S COUNSEL:	Are you qualified to render an opinion as to the standard of care?
DR. BAGGISH:	I believe I am.
PLAINTIFF'S COUNSEL:	And are those standards any different here in Arkansas?
DR. BAGGISH:	Than national?
PLAINTIFF'S COUNSEL:	Yes, sir?
DR. BAGGISH:	No.

Plymate asserts that this is sufficient to show that Dr. Baggish was informed as to the standard of care in Rogers, Arkansas. We disagree.

In *Mitchell v. Lincoln*, 366 Ark. 592, 237 S.W.3d 455 (2006), we affirmed the grant of summary judgment where the expert's affidavit was devoid of any mention of the standard of care in Baxter County, the locality in question. In *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002), we held that the record did not reflect that the expert ever testified regarding the degree of skill and learning ordinarily possessed by doctors in good standing in the locality. If the expert witness fails to initially establish this standard of care, any testimony the witness gives as to the plaintiff's failure to meet the standard is of no merit. *Williamson, supra*.

In both *Mitchell* and *Williamson*, the plaintiffs failed to elicit testimony from their expert regarding any specific facts relative to the community in which the alleged malpractice occurred. The same is true here. Dr. Baggish offered testimony only as to the standard of care in Arkansas as a whole, not as to the locality of Rogers, Arkansas. Dr. Baggish offered no testimony that he was aware of any relevant facts as to Rogers, Arkansas, nor did he offer any similar locality that he was aware of in regard to the standard of care.

Plymate contends in the alternative that Martinelli should be held to the standard of care for medical residents. However, in doing so, Plymate suggests that we use a national standard of care. We have endorsed the locality rule as to the standard of care in Arkansas, and we decline to adopt the use of a national standard. *Gambill v. Stroud*, 258 Ark. 766, 531 S.W.2d 945 (1976).

Because our case law is explicit in requiring expert testimony regarding the standard of care in the same or similar locality, Dr. Baggish's expert testimony was insufficient to create a question of fact on this issue. Accordingly, the circuit court did not err in granting Martinelli's motion for directed verdict.

For her second point on appeal, Plymate contends that Arkansas Code Annotated section 16-114-206(a) is unconstitutional as it is an imposition of procedural law by the legislature. However, Plymate raised this issue for the first time in her motion for a new trial and/or motion for reconsideration. An issue must be presented to the trial court at the earliest opportunity in order to preserve it for appeal, and even a constitutional issue must be raised at trial in order to preserve it for appeal. *LaFont v. Mooney Mixon*, 2010 Ark. 450 at 15, 374

S.W.3d 668, 676. Plymate did not present this argument to the circuit court at the earliest opportunity. Thus, these arguments were not timely raised below and are not preserved for our review.

For her third point on appeal, Plymate asserts that Dr. Baggish's testimony was sufficient to satisfy a claim for future medical expenses, pain, and suffering. However, because we hold that Plymate did not meet her burden of proof as to negligence, it is unnecessary to discuss this argument.

Affirmed.

McKinnon Law Firm, by: *Laura J. McKinnon*, for appellants.

Cox, Cox & Estes, PLLC, by: *James R. Estes* and *Walter B. Cox*, for appellees.