FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3987

JACQUELINE HUGGINS,
individually, and with
ALEXANDER HUGGINS, as Mother
and Father and Next Friends of
A.R.H., a minor child,

Appellants,

v.

JEFFREY SIEGEL,

Appellee.

On appeal from the Circuit Court for Alachua County.
Donna M. Keim, Judge.

June 3, 2021

B.L. THOMAS, J.

Appellants challenge the trial court's ruling surrounding Appellee's *Daubert*[1] challenge, which resulted in final summary judgment in favor of Appellee. Under these facts, we affirm.

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[1] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Facts

Appellants rented a house on Appellee's property from August 2015 through December 2017. Appellants complained about potential water intrusion and mold before moving into the home, and again in July or August of 2017. Appellants asked Appellee to have the house inspected for mold, but he refused. Appellants then hired their own mold inspection company. The inspection occurred on December 1, 2017, and the report indicated that multiple mold types, including two toxic molds – aspergillus and penicillium – were present in the home. After reading the mold report, Appellants vacated the property. A second inspection and analysis were performed on February 22, 2018.

Appellants filed a complaint asserting negligence, private nuisance, and breach of contract. The parties agreed that the only claim Appellants intended to present at trial alleged that Appellee's negligence as a landlord caused Mrs. Huggins to be exposed to dangerous mold during her pregnancy, resulting in her child being born with one kidney and suffering a brain injury, which caused Mrs. Huggins to suffer emotional distress. Throughout Mrs. Huggins's pregnancy, ultrasounds showed that her child was forming two kidneys. Tragically, the child was born with one kidney, a condition known as renal agenesis.

Appellants retained Dr. Merhi, a board-certified physician in reproductive endocrinology and infertility, obstetrics and gynecology. Appellee received a copy of Dr. Merhi's report in January 2019 and deposed him for the first time on February 6, 2019.[2] Appellees did not raise a *Daubert* objection at the deposition. Shortly after the deposition, the trial court amended its original pretrial scheduling order and set the pretrial conference for October 22, 2019. The scheduling order advised that all motions must be heard and filed before the pretrial conference including motions in limine, objections to deposition exhibits, and (*Daubert*) motions.

[2] Dr. Merhi was later deposed a second time two days before the evidentiary hearing on Appellee's *Daubert* motion.

On September 23, 2019, Appellee moved to exclude Dr. Merhi's testimony and the 2017 and 2018 mold-testing reports. Appellants argued that Appellee's *Daubert* motion was untimely. The non-evidentiary hearing addressing Appellee's motions was held on October 11, 2019. The trial court granted Appellee's motion to exclude Dr. Merhi's testimony. The trial court rejected Appellants' argument that the *Daubert* motion was untimely, noting that the motion was filed within the time allowed by the pretrial scheduling order. The trial court also found that Dr. Merhi was not qualified to testify on causation and his testimony was neither reliable nor valid under *Daubert*. As a result, the trial court determined that Dr. Merhi's testimony that the child was born with one kidney and suffered a brain injury as a result of mold exposure did not meet the *Daubert* standard. Following the trial court's ruling, Appellants did not move for a continuance to acquire an expert to replace Dr. Merhi.

Appellee then moved for summary judgment on all remaining claims. Appellants responded to Appellee's motion, conceding that the trial court's granting of Appellee's *Daubert* motion precluded Appellants from asserting a genuine issue of material fact on the issue of causation. The trial court granted Appellee's motion for final summary judgment.

Analysis

Appellants first argue that Appellee's *Daubert* challenge was untimely. A trial court's determination that an objection was not timely raised is reviewed for an abuse of discretion. *Booker v. Sumter Cnty. Sheriff's Office*, 166 So. 3d 189, 192 (Fla. 1st DCA 2015). Additionally, a trial court's enforcement of its own pretrial order is reviewed for an abuse of discretion "and reversal is appropriate only when the affected party can clearly show the abuse resulted in unfair prejudice." *Gutierrez v. Vargas*, 239 So. 3d 615, 622 (Fla. 2018).

A trial court has broad discretion in determining how to perform its gatekeeper function, which may include allowing a *Daubert* motion during trial. *Booker*, 166 So. 3d at 192; *see also Club Car, Inc. v. Club Car (Quebec) Imp., Inc.*, 362 F.3d 775, 780

(11th Cir. 2004). The focus for determining whether a *Daubert* motion is untimely is on when the party became aware of the opposing party's expert's opinion. *Booker*, 166 So. 3d at 192. Because *Daubert* serves as a "gatekeeping" function, a court may reject as untimely *Daubert* motions raised late in the trial process. *Alfred v. Caterpillar, Inc.*, 262 F.3d 1083, 1087 (10th Cir. 2001); *see also Feliciano-Hill v. Principi*, 439 F.3d 18, 24 (1st Cir. 2006).

Here, Appellee waited approximately 230 days after deposing Dr. Merhi to challenge his testimony. Still, Appellee's motion was filed before the deadline provided in the pretrial order. Although Appellee could have challenged the testimony earlier, Appellants were not prejudiced by the delay because they failed to request a continuance to acquire a new expert. *See Booker*, 166 So. 3d at 192. Thus, under the circumstances of this case, the trial court did not abuse its broad discretion by determining that Appellee's objection was timely filed. *See id.*; *Club Car, Inc.*, 362 F.3d at 780.

We now address whether the trial court properly excluded Dr. Merhi's testimony. Appellants argue that this Court should review the trial court's decision de novo, but this Court has previously determined that the appellate standard of review for a trial court's *Daubert* decision is an abuse of discretion. *Booker*, 166 So. 3d at 194 n. 2; *Baan v. Columbia Cnty.*, 180 So. 3d 1127, 1131 (Fla. 1st DCA 2015). Other Florida District Courts have also applied the abuse of discretion standard of review. *See Bunin v. Matrixx Initiatives, Inc.*, 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016); *Hedvall v. State*, 283 So. 3d 901, 911 (Fla. 3d DCA 2019); *Vitiello v. State*, 281 So. 3d 554, 559 (Fla. 5th DCA 2019). This standard of review is also consistent with controlling decisions from the United States Supreme Court. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) ("Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it 'review[s] a trial court's decision to admit or exclude expert testimony.'" (citations omitted)). Thus, this Court may not reverse the order excluding Dr. Merhi's testimony unless the trial court abused its discretion.

When determining whether evidence is admissible, the trial court's role is that of the evidentiary "gatekeeper" and the court must ensure an expert "employs in the court room the same level

of intellectual rigor that characterizes the practice of an expert in the relevant field." *Booker*, 166 So. 3d at 193 (quoting *Carmichael*, 526 U.S. at 152). "[E]xperts may be qualified in various ways." *U.S. v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004). "While scientific training or education may provide possible means to qualify an expert, experience in a field may offer another path to expert status." *Id.* at 1260–61.

Florida appellate courts have previously addressed whether an expert is qualified under *Daubert*. *See Baan v. Columbia Cnty.*, 180 So. 3d 1127, 1133–34 (Fla. 1st DCA 2015) (holding that a doctor was qualified to testify regarding EMS's handling of child's respiratory distress where the doctor had first-hand knowledge of children's respiratory problems, thirty years' experience as an emergency room physician, and served twenty-five years as an advisor for the Hillsborough County Fire Rescue and the Tampa Fire Department, Rescue Division); *see also White v. Ring Power Corp.*, 261 So. 3d 689, 696–97 (Fla. 3d DCA 2018) (excluding expert witness testimony where none of the experts had ever interpreted crane-loading data or used such data to investigate the cause of a crane accident or wire rope failure).

Appellants retained Dr. Merhi as their causation expert to support the argument that the mold in Appellee's rental home caused their child's renal agenesis and brain damage. Although Dr. Merhi is a qualified and accomplished doctor, he was not qualified to testify on the issue of causation in this case. Dr. Merhi testified that his specialty is infertility. As a result, he did not typically treat patients such as Appellants, and he has not been involved in cases involving the disappearance of a kidney in an unborn child, or cases where a kidney was observed but later disappeared before birth. Dr. Merhi was also unable to find scientific or medical literature directly linking aspergillus and penicillium to kidney disappearance in human beings. In any event, there is little to no scientific support for Dr. Merhi's testimony, and he lacked the medical experience and education to testify about the cause of the child's renal agenesis and brain injury. *See Perez v. Bell S. Telecommunications, Inc.*, 138 So. 3d 492, 499 (Fla. 3d DCA 2014) (holding that trial court properly excluded expert testimony because expert "had never before

related a placental abruption to workplace stress and knew of no one who had").

Additionally, Dr. Merhi admitted that his opinion was based on the presence of mold in the home during Mrs. Huggins's pregnancy, but Dr. Merhi was never provided information stating that there was mold in the home during this time. Mrs. Huggins was pregnant from August 2015 until February 2016. The first mold inspection did not occur until December 2017, almost two years after the child was born. Instead of consulting a mold expert, which Dr. Merhi admitted he is not, Dr. Merhi could only speculate that mold was present during the pregnancy, because "mold doesn't happen overnight." Thus, Dr. Merhi lacked the education and experience to testify as to the presence of mold in the home and his opinion is "a classic example of the common fallacy of assuming causality from temporal sequence." *See Perez*, 138 So. 3d at 499. As a result, the trial court did not err by finding Dr. Merhi unqualified under *Daubert*. *See White*, 261 So. 3d at 696–97. And, because Dr. Merhi was not qualified to testify regarding causation, we need not decide whether his testimony was reliable.

AFFIRMED.

ROWE and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jordan S. Redavid of Fischer Redavid PLLC, Hollywood, for Appellants.

Rhonda B. Boggess of Marks Gray, P.A., Jacksonville, and Chandra L. Miller of Goodis Thompson & Miller, P.A., St. Petersburg, for Appellee.