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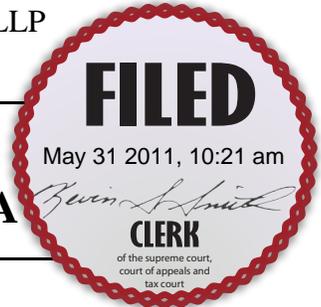
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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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JOAN MAZURKIEWICZ, Individually, and )  
ALICE RUETH, as Administratrix of the Estate of )  
Henry Mazurkiewicz, deceased, )

Appellants-Plaintiffs, )

vs. )

No. 45A03-1008-CT-408

GEORGE HODAKOWSKI, M.D., and )  
MICHAEL PERELMAN, M.D., )

Appellees-Defendants. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Raymond D. Kickbush, Senior Judge  
Cause No. 45D11-0812-CT-189

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**May 31, 2011**

## MEMORANDUM DECISION - NOT FOR PUBLICATION

### FRIEDLANDER, Judge

Henry Mazurkiewicz (Mazurkiewicz) died of infection four days after coronary bypass surgery performed by Drs. George Hodakowski and Michael Perelman. Mazurkiewicz's widow, Joan, and Alice Rueth, administratrix of Mazurkiewicz's estate (the Estate) (Joan Mazurkiewicz and the Estate are hereafter collectively referred to as Appellants unless otherwise noted), filed a medical malpractice action against Drs. Hodakowski and Perelman. After the presentation of Appellants' case-in-chief, the trial court granted Perelman's motion for judgment on the evidence. Following trial, the jury found in favor of Dr. Hodakowski. Appellants appeal those judgments, presenting the following restated issues for review:

1. Did the trial court err in denying Appellants' motion to bar an expert witness from testifying?
2. Did the trial court err in denying Appellants' motion for judgment on the evidence on the question of proximate cause?
3. Did the trial court err in granting Dr. Perelman's motion for judgment on the evidence on the question whether he breached the standard of care?

We affirm in part, reverse in part, and remand.

The facts are that on November 16, 1998, Mazurkiewicz underwent coronary bypass surgery. Dr. Hodakowski, a cardiothoracic surgeon, performed the surgery and Dr. Perelman assisted. Dr. Perelman's limited duties in the procedure included harvesting a portion of the saphenous vein from one of Mazurkiewicz's legs for use in bypass grafting. For precautionary purposes, Dr. Hodakowski placed an epicardial pacemaker wire through

Mazurkiewicz's abdominal wall during the surgery. In so doing, although not immediately aware of it, Dr. Hodakowski perforated Mazurkiewicz's colon.

Mazurkiewicz initially appeared to respond well, but on the second day after surgery, he began to complain of abdominal pain and his abdomen became markedly distended. Mazurkiewicz's internist called a general surgeon, Dr. Carl Levy, for consultation. Dr. Levy reviewed Mazurkiewicz's file and suspected that an impairment of circulation to Mazurkiewicz's bowel had occurred. A subsequent test of blood flow to the bowel, however, failed to reveal any circulatory abnormality. Dr. Joel Cahan, a gastroenterologist, was consulted. Dr. Cahan spoke with Dr. Perelman by telephone at approximately 6:15 p.m. on November 18, 1998, which was about the time that Dr. Perelman was examining Mazurkiewicz. Following that conversation, Dr. Perelman ordered an immediate KUB (kidney, ureter, and bladder), a diagnostic medical imaging technique of the abdomen typically used to investigate gastrointestinal conditions such as bowel obstructions and gallstones.

Dr. Cahan examined and assessed Mazurkiewicz's condition approximately thirty minutes later, at 6:45 p.m. The KUB was performed at Mazurkiewicz's bedside at approximately 7:47 p.m. The test was interpreted by radiologist Dr. J.M. Lee at 8:52 p.m. He concluded it showed the presence of a "large amount of intraperitoneal air." *The Exhibits, Vol. I* at tab 11. This is an indication of loss of continuity of the bowel. These results, however, were not reviewed by any of Mazurkiewicz's treating physicians until the following morning. After they were read, Dr. Levy performed additional surgery on November 19 and discovered the perforation in Mazurkiewicz's colon. The next day,

Mazurkiewicz died of sepsis and necrotizing fasciitis.

Appellants submitted a medical malpractice cause of action to a medical review panel, which rendered the following opinion:

The evidence supports the conclusion that the defendant **GEORGE HODAKOWSKI, M.D.** failed to comply with the appropriate standard of care as charged in the complaint, AND, the conduct complained of was a factor of the resultant damages.

[]Assuming Dr. Cahan asked Dr. Perelman to order a KUB, then the evidence does not support the conclusion that the defendant **MICHAEL PERELMAN, M.D.** failed to meet the applicable standard of care as charged in the complaint.

*Appellants' Appendix at 19.*

On December 23, 2008, Appellants filed a complaint for medical malpractice against Drs. Hodakowski and Perelman. A jury trial commenced on July 12, 2010. At trial, after Appellants rested their case-in-chief, Perelman moved for judgment on the evidence on the grounds that there was no evidence that he had breached the standard of care. The trial court granted the motion. After the parties rested, Appellants submitted a motion for judgment on the evidence on the issue of the proximate cause of Mazurkiewicz's death. The trial court denied that motion. On July 14, 2010, the trial court entered the following judgments:

**JUDGMENT ON THE EVIDENCE IN FAVOR OF MICHAEL PERELMAN, M.D.**

This cause was submitted to trial by Jury on July 12 through 14, 2010. Plaintiffs appeared in person and by Counsel, Jeffrey S. Wrage. Defendant George Hodakowski, M.D. appeared in person and by Counsel, James L. Hough. Defendant Michael Perelman, M.D. appeared in person and by Counsel, David C. Jensen. At the close of the Plaintiffs' case, the Defendant, Michael Perelman, M.D., moved for judgment on the evidence. Argument heard. Motion granted.

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Joan Mazurkiewicz, Individually, and Alice Rueth as Administratrix of the Estate of Henry Mazurkiewicz, Deceased, shall take nothing by their Complaint against the Defendant, Michael Perelman, M.D. Judgment is hereby entered in favor of Michael Perelman, M.D. and against the Plaintiffs.

SO ORDERED this 14th day of July, 2010.

*Id.* at 14.

### JUDGMENT

This cause was submitted to trial by Jury on July 12 through 14, 2010. Plaintiffs appeared in person and by Counsel, Jeffrey S. Wrage. Defendant appeared in person and by Counsel, James L. Hough. Evidence was presented to the jury and arguments of Counsel were heard. Final instructions read to the Jury. After retiring to deliberate, the Jury returned in open Court with its verdicts in favor of the Defendant and against the Plaintiffs. The Court now finds that judgment should be entered on the verdicts.

IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff, Joan Mazurkiewicz, shall take nothing by her Complaint against the Defendant, George Hodakowski, M.D.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, Alice Rueth, as Administratrix of the Estate of Henry Mazurkiewicz, deceased, shall take nothing by her Complaint as against the Defendant, George Hodakowski, M.D. Costs versus Plaintiffs. Jury discharged.

SO ORDERED this 14th day of July, 2010

*Id.* at 15. Appellants appeal the judgments in favor of Drs. Mazurkiewicz and Perelman.

1.

Appellants contend the trial court erred in denying their motion to bar an expert witness from testifying at trial. Trial courts enjoy broad discretion in ruling on the admissibility of evidence. *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671 (Ind. Ct. App. 2010). We review such rulings for an abuse of discretion and the trial court's decisions in this respect

are afforded great deference on appeal. *Whiteside v. State*, 853 N.E.2d 1021 (Ind. Ct. App. 2006). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id.* In reviewing the admissibility of evidence, we consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. *Id.* We will not reverse because of the erroneous admission of evidence unless the complaining party demonstrates the evidence impacted the decision. *Strack & Van Til, Inc. v. Carter*, 803 N.E.2d 666 (Ind. Ct. App. 2004).

Dr. Perelman retained Dr. Vincent Scavo as an expert witness. After Dr. Perelman's successful motion for judgment on the evidence, Dr. Scavo was called as a witness by Dr. Hodakowski during the presentation of his case-in-chief. Appellants objected to Dr. Scavo's testimony on grounds that he was not qualified as a witness and because his proposed testimony was merely cumulative of another expert testifying on behalf of Dr. Hodakowski. The former claim was based upon Dr. Scavo's response to the following question during his deposition: "Is the standard of care any different today for the placement of epicardial pacing wires than it was in 1998?" *Transcript* at 433. He responded, "I cannot comment. I was not performing this surgery in 1998." *Id.* Because he acknowledged that he did not know the standard of care relative to the medical procedure in question on the date it was performed, the Appellants contend Dr. Scavo was not qualified to assess Dr. Hodakowski's performance in that regard. Specifically, they contend that Dr. Scavo was not qualified to express an opinion as to whether the perforation of Mazurkiewicz's colon breached the standard of care.

The trial court functions as a gatekeeper for expert opinion evidence in that it does not merely admit whatever expert testimony that is offered. *Bennett v. Richmond*, 932 N.E.2d

704 (Ind. Ct. App. 2010). The trial court's exclusion or admission of expert testimony will be reversed only for an abuse of discretion. *Id.* Rule 702 of the Indiana Rules of Evidence provides that an expert be qualified by knowledge, skill, experience, training, or education. Moreover, an expert must have sufficient skill in the particular area of expert testimony before the expert can offer opinions in that area. *Id.* An expert in one field of expertise cannot offer opinions in other fields absent a requisite showing of competency in that other field. *Id.* Moreover, questions of medical causation of a particular injury are questions of science generally dependent on the testimony of physicians and surgeons learned in such matters. *See id.*

Were we to focus solely upon the deposition response upon which Appellants base this argument, we might be more inclined to agree with their contention. We note, however, there was other relevant evidence offered with respect to Dr. Scavo's qualifications. He received his medical degree in 1994, and in 1996 and 1997 he was involved in research in cardiothoracic surgery at the Indiana University School of Medicine. He completed his general surgery residency in 2000 and completed his residency in thoracic surgery in 2002. With respect to the placement of pacing wires during cardiothoracic surgery, in 1998 Dr. Scavo "witnessed them being put in – being placed and also was the person tasking [sic] to take them out." *Transcript* at 416. Moreover, we note the following exchange during Dr. Scavo's trial testimony:

Q. Do you have any basis to believe that the techniques used for placing temporary pacing wires were any different in 1998 than what you started seeing in 2002?

A. [Dr. Scavo] They are not, as I witnessed them put in – being placed and

also was the person tasking to take them out.

Q. If we've heard testimony from both Dr. Griffith, who testified for the Plaintiff, and Dr. Peterson, who testified earlier today, that the standard of care is the same in 1998 as it is today for passing (sic) temporary pacing wires, would you have any basis to disagree with that?

A. No, sir.

Q. Has the standard of care for placing temporary pacing wires changed from the time you started pacing – placing them till today?

A. No, sir.

Q. Were you asked by me to determine whether Dr. Hodakowski's care of Mr. Mazurkiewicz complied with the standard of care?

A. Yes, sir.

\* \* \* \* \*

Q. What was your determination regarding whether Dr. Hodakowski's care of Mr. Mazurkiewicz complied with the standard of care?

A. I felt he complied with the standard of care.

*Id.* at 416-17.

The above exchange and other evidence reflect that Dr. Scavo assisted in or observed cardiothoracic surgery in 1998 and before. By 2002, he specialized in that procedure. Thus, it is inaccurate to say that he would have had no basis for evaluating the standard of care in 1998 for the placement of pacing wires. Moreover, cardio-thoracic surgeons Drs. Gary Griffith and Alan Peterson also testified at trial. Dr. Griffith testified that the standard of care for placing pacing wires did not change from 1998 to the time of trial. Similarly, Dr. Peterson testified that the standard of care was the same in 1998 as it was at the time of trial in 2010. Thus, according to Drs. Griffith and Peterson, a surgeon such as Dr. Scavo, who

had been performing that procedure since 2002, would be subject to the same standard of care as would a surgeon performing that procedure in 1998. This being the basis of Appellants' claim that Dr. Scavo was not qualified as an expert, the argument fails.

Finally, we note Appellants' argument that Dr. Scavo's testimony was inadmissible because it was cumulative of Dr. Peterson's testimony. Even assuming the premise is true, i.e., that Dr. Scavo's testimony was cumulative of Dr. Peterson's, Appellants have not explained how they were prejudiced thereby. In fact, our Supreme Court has stated that "reversible error cannot be predicated upon the erroneous admission of evidence that is merely cumulative of other evidence that has already been properly admitted." *Sibbing v. Cave*, 922 N.E.2d 594, 598 (Ind. 2010). Appellants have not challenged the admissibility of Dr. Peterson's testimony, i.e., that which Dr. Scavo's testimony is alleged to duplicate. Therefore, even if Dr. Scavo's testimony were deemed cumulative of Dr. Peterson's testimony, there would be no valid basis for reversal.

The trial court did not err in permitting Dr. Scavo to offer expert testimony regarding the placing of pacing wires during cardiothoracic surgery.

2.

Appellants contend the trial court erred in denying their motion for judgment on the evidence on the question of proximate cause. We have described the standard of review applicable for rulings on motions for judgment on the evidence as follows:

The standard of review on a challenge to a motion for judgment on the evidence is the same as the standard governing the trial court in making its decision. Judgment on the evidence is proper where all or some of the issues are not supported by sufficient evidence. We will examine only the evidence and reasonable inferences that may be drawn therefrom that are most favorable

to the nonmovant, and the motion should be granted only where there is no substantial evidence supporting an essential issue in the case. If there is evidence that would allow reasonable people to differ as to the result, judgment on the evidence is improper.

*Newland Res., LLC v. Branham Corp.*, 918 N.E.2d 763, 770 (Ind. Ct. App. 2009) (quoting *State Farm Mut. Auto. Ins. Co. v. Noble*, 854 N.E.2d 925, 931 (Ind. Ct. App. 2006), *trans. denied*).

Appellants contend that the evidence conclusively established the element of proximate cause because there was no evidence to contradict their assertion that Dr. Hodakowski perforated Mazurkiewicz's colon, which lead to an infection, which in turn caused Mazurkiewicz's death.

In order to prevail on a claim of negligence, a plaintiff is required to prove that the defendant breached a duty owed to the plaintiff, and that said breach was the proximate cause of an injury to the plaintiff. *See Raytheon Eng'rs & Constructors, Inc. v. Sargent Elec. Co.*, 932 N.E.2d 691 (Ind. Ct. App. 2010). The concept of proximate cause is thus predicated upon a finding of breach of duty. As our Supreme Court has explained, in allocating comparative fault for an injury, "the jury is first required to decide whether an actor's negligence was a proximate cause of the plaintiff's injury." *Green v. Ford Motor Co.*, 942 N.E.2d 791, 795 (Ind. 2011) (quoting *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002)). Put more plainly, in the context of an action for negligence, proximate cause presumes breach of duty, or negligent action. *See Green v. Ford Motor Co.*, 942 N.E.2d 791. Therefore, a court cannot rule as a matter of law that proximate cause exists without, at a minimum, implying to the jury that the defendant acted negligently in the first

place.

In the instant case, the jury was tasked with determining whether Hodakowski acted negligently in treating Mazurkiewicz, and whether that negligent conduct proximately caused injury to Appellants. The jury could not proceed to a determination of whether proximate cause existed without first determining that Mazurkiewicz's complained-of actions breached the applicable standard of care. To grant the motion on proximate cause would have, at a minimum, impermissibly influenced the jury on the predicate question of breach. The trial court did not err in denying Appellants' motion for judgment on the evidence on the question of proximate cause.

3.

Appellants contend the trial court erred in granting Perelman's motion for judgment on the evidence on the question of whether he breached the standard of care. "The standard of review for a challenge to a ruling on a motion for judgment on the evidence is the same as the standard governing the trial court in making its decision." *Smith v. Baxter*, 796 N.E.2d 242, 243 (Ind. 2003). Judgment on the evidence is proper only "where all or some of the issues ... are not supported by sufficient evidence." *Id.* (quoting Ind. Trial Rule 50(A)). Such a motion should be granted only where there is no substantial evidence supporting an essential issue in the case. *Smith v. Baxter*, 796 N.E.2d 242. If there is evidence that would permit reasonable people to differ with respect to the result, judgment on the evidence is improper. *Id.* In reviewing the trial court's ruling, we consider only the evidence and the reasonable inferences most favorable to the non-moving party. *Id.*

At approximately 6:00 p.m. on November 18, Dr. Perelman ordered a KUB "stat",

meaning immediately. *Appellants' Appendix* at 49. Records indicate that the KUB was performed at 7:47 that evening. Dr. Perelman acknowledged during a deposition that it would be standard procedure for a physician to follow up on a stat order and that he did not do so. His defense, however, was that he did not order the KUB for his own treatment purposes, but instead ordered it as a courtesy to and on behalf of the gastroenterologist, Dr. Cahan. Dr. Perelman claimed that he “would not have had a great interest in seeing a KUB”, the clear implication being that Dr. Perelman would not have used the results in conjunction with his treatment of Mazurkiewicz, whereas Dr. Cahan would have. *Id.* at 229. Appellants alleged that Dr. Perelman was negligent in waiting so long before reviewing the results of the KUB.

As reflected above, Appellants' case against Dr. Perelman hinged upon the question of whether Dr. Perelman ordered the KUB for his own purposes or those of Dr. Cahan. The medical review panel that determined Dr. Perelman did not breach the standard of care in this case expressly premised this conclusion upon its finding that Dr. Perelman ordered the test on behalf of another, i.e., “[a]ssuming Dr. Cahan asked Dr. Perelman to order a KUB, then the evidence does not support the conclusion that the defendant **MICHAEL PERELMAN, M.D.** failed to meet the applicable standard of care[.]” *Id.* at 19 (emphasis supplied). This was made abundantly clear during the trial testimony of Dr. Griffith, who also happened to be a member of the medical review panel in question, i.e.:

Q And during the medical review panel process, is it fair to say that Dr. Perelman claimed that Dr. Cahan asked him to order the KUB stat?

A Yes, sir.

Q Okay. And was it the unanimous decision of the panel members that they could not determine one way or the other if that was, in fact, correct?

[Objection interposed, discussed, and overruled.]

A It was the panel's opinion that we did not find fault with Dr. Perelman based on the veracity or the truthfulness of his statement that he ordered this for Dr. – for the GI doctor, Dr. Cahan.

Q So in other words, the panel opinion was assuming that if Cahan actually did request Perelman to order the KUB stat, that he's off the hook?

A Our feeling was it would have been Dr. Cahan's responsibility to check that X-ray.

Q And if Dr. Perelman had actually ordered the KUB stat, it would have been his responsibility to follow up on that?

A If he had ordered it of his own volition and not as a - not as a [sic] doing a favor for Dr. Cahan who was getting ready to do a colonoscopy, yes.

*Transcript* at 182-83. With the primary factual issue concerning Dr. Perelman's motion thus framed, we examine the transcript to determine whether the evidence and reasonable inferences viewed in a light most favorable to Appellants' claim would allow reasonable people to differ as to the finding that Dr. Perelman ordered the test on behalf of Dr. Cahan.

*See Newland Res., LLC v. Branham Corp.*, 918 N.E.2d 763

In support of Appellants' theory of the case, Mazurkiewicz's medical charts clearly indicate that Dr. Perelman ordered the KUB. The chart does not specify that the test was ordered at the behest of Dr. Cahan or for Dr. Cahan's use. The evidence offered by Dr. Perelman to refute the inference that he ordered the test for his own purposes was offered during his deposition, portions of which were read at trial. He was asked why he had not

followed up on the KUB test after having ordered it. He responded: “Well, I think all I can surmise is that I actually ordered the KUB as a courtesy for Dr. Cahan, the gastroenterologist who had come to see the patient.” *Appellants’ Appendix* at 50. When Dr. Perelman was asked if he had consulted with Dr. Cahan, he responded, “Perhaps. I don’t know.” *Id.* He then was asked, “Is there anything that indicates to you in the orders that you were doing it as a courtesy for Dr. Cahan?” *Id.* He answered, “Nothing other than I would not have had a great interest in seeing a KUB.” *Id.* Later he was asked, “Do you remember having any conversations with Dr. Cahan where he asked you to do that as a courtesy?” *Id.* Dr. Perelman responded, “Nothing other than I had a conversation apparently on the phone with Dr. Cahan before ... the order was written.” *Id.* at 230. When asked what he was looking at in order to make that determination, Dr. Perelman recited a portion of Mazurkiewicz’s medical records that stated, “Spoke with Dr. Cahan on telephone. Condition update rendered per Dr. Perelman. New orders received and noted.” *Id.* Finally, Dr. Perelman was asked, “So did you order the portable KUB stat before or after you talked to Dr. Cahan?” *Id.* He replied, “Well, I can’t go back six years and be a fly on the wall and tell you. I’m assuming that I ordered it for Dr. Cahan.” *Id.* Later, Dr. Perelman reiterated, “Well, as I stated, I think that I ordered the X-ray as a courtesy for Dr. Cahan, and I don’t know that I would have followed up on it.” *Id.* at 231.

It is apparent that, by the time of his deposition, which was approximately six years after the events in question, Dr. Perelman did not have independent recollection of whether he had ordered the KUB for Dr. Cahan. He could not state unequivocally, or even equivocally, that he did in fact order the KUB at Dr. Cahan’s behest. Rather, he *surmised* or

*assumed*, based upon inferences he drew from Mazurkiewicz's medical charts, that he must have ordered the test for Dr. Cahan. This falls far short of conclusive evidence that would prevent reasonable people from differing as to whether Dr. Perelman ordered the KUB for another doctor and therefore had no duty to follow up on the test. In fact, even were it otherwise, i.e., even if Dr. Perelman testified that he remembered ordering the test as a courtesy for Dr. Cahan, his testimony would not stand as conclusive evidence of the truth of that assertion. We note for instance, that none of Mazurkiewicz's medical records indicate that the test was ordered by Dr. Cahan and so far as we can tell, Dr. Cahan did not utilize the test results in assessing or treating Mazurkiewicz's condition. These facts at least permit a reasonable inference that the KUB was not ordered for Dr. Cahan.

In the end, to arrive at the conclusion that Dr. Perelman ordered the test for another doctor and thus had no duty to follow up, one would have to rely upon the credibility and reasonableness of Dr. Perelman's deduction that he must have ordered the test for another physician. In fact, the medical review panel explicitly stated that, in reaching its decision, it relied upon Dr. Perelman's claim that he ordered the KUB for another physician. It appears to us that the trial court's decision vis-à-vis Dr. Perelman's motion for judgment on the evidence was made upon the same basis.

Because the evidence was such that it permitted reasonable conflicting inferences on this pivotal question with respect to the standard of care pertaining to Dr. Perelman, and because it depended in part upon an assessment of Dr. Perelman's credibility, the question of whether Dr. Perelman breached the standard of care should have been submitted to the jury. Therefore, the trial court erred in granting Dr. Perelman's motion for judgment on the

evidence and that ruling must be reversed.

In summary, we affirm the judgment in favor of Dr. Hodakowski, reverse the grant of Dr. Perelman's motion for judgment on the evidence, and remand for proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and remanded.

BAILEY, J., and BROWN, J., concur.