

Rel: August 19, 2022

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# SUPREME COURT OF ALABAMA

SPECIAL TERM, 2022

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Vivian Nall and Myrus Nall

v.

Arash Arabi, D.P.M.

Appeal from Tuscaloosa Circuit Court  
(CV-17-900712)

MENDHEIM, Justice.

Vivian Nall and her husband Myrus Nall appeal from a summary judgment entered by the Tuscaloosa Circuit Court in favor of

Dr. Arash Arabi on all the claims in the Nalls' medical-malpractice action against Dr. Arabi. We affirm the judgment of the circuit court.

### I. Facts

Dr. Arabi is a podiatrist. In 2015, Vivian was being treated by Dr. Arabi for problems she was experiencing with her left foot. The Nalls allege that Dr. Arabi's negligence in his care of Vivian's foot resulted in complications of circulatory compromise and necrosis that caused the amputation of two toes on her foot and resultant permanent injuries. On June 9, 2017, the Nalls commenced an action in the Tuscaloosa Circuit Court against Dr. Arabi and other defendants; Vivian asserted claims of negligence, and Myrus asserted a claim of loss of consortium. During the course of the litigation, the other defendants were voluntarily dismissed for various reasons, leaving Dr. Arabi as the sole remaining defendant.

On July 2, 2020, the circuit court adopted a scheduling order agreed upon by the parties that set the trial date for November 30, 2021. The scheduling order required expert-witness disclosures to be made by March 19, 2021, and depositions for such witnesses to be completed by April 30, 2021. Summary-judgment motions were to be filed no later than August 20, 2021.

On February 23, 2021, Dr. Arabi sat for his deposition. He testified that he was certified by the American Board of Podiatric Medicine ("the ABPM") and that he initially became certified in 2008. The Nalls subsequently disclosed their standard-of-care expert to be Dr. Steven Krych, and he sat for a deposition on April 28, 2021. Dr. Krych testified that he was initially certified in 1993 by the American Board of Podiatric Orthopedics and Primary Podiatric Medicine, which later changed its name to the ABPM, and that he had maintained that certification. He further testified that he was also certified by the American Board of Podiatric Surgery.

On August 20, 2021, Dr. Arabi filed a summary-judgment motion in which he contended that Dr. Krych was not certified by the ABPM and, thus, was not similarly situated to Dr. Arabi. Dr. Arabi argued that, absent Dr. Krych's testimony, the Nalls lacked substantial evidence of a breach of the standard of care by Dr. Arabi. In the motion, Dr. Arabi stated that a search of the ABPM's Web site indicated that Dr. Krych was not certified by that board. Dr. Arabi's counsel then contacted the ABPM directly and confirmed that Dr. Krych was not certified by it. Dr. Arabi

attached to his motion an affidavit from ABPM Executive Director Dr. James Stavosky, in which Dr. Stavosky stated:

"Dr. Steven M. Krych was initially certified on June 30, 1993, and remained board-certified by the American Board of Podiatric Medicine until December 31, 2012. Dr. Krych has not been certified by the American Board of Podiatric Medicine since December 31, 2012.

"Dr. Arash Arabi was initially certified by the American Board of Podiatric Medicine on June 21, 2008, and he has remained board-certified since that time."

On September 20, 2021, the Nalls filed a response in opposition to the summary-judgment motion. They argued that the ABPM should be estopped from denying Dr. Krych's certification or, in the alternative, that the circuit court should defer ruling on the summary-judgment motion until Dr. Krych could resolve the certification issue. The Nalls also argued in the alternative that the circuit court should modify the scheduling order to allow them to name a new standard-of-care expert. The Nalls attached to their response an affidavit from Dr. Krych in which he sought to explain the discrepancy between his belief that he was certified by the ABPM and its current records showing that he was not certified. Dr. Krych stated that because he was a founding member of the American Board of Podiatric Orthopedics and Primary Podiatric

Medicine, his 1993 certification stated that it was "Valid Through Founder." When the board changed its name to the ABPM, Dr. Krych's understanding was that he

"would be 'grandfathered' for certification purposes and would be considered as Board Certified by the [ABPM] as long as I met CME [continuing medical education] requirements and paid dues. I continued to do self-assessments every 10 years also. I continued to pay dues for the ABPM and do CME's until 2012, when I was advised by the Executive Director at the time, Dr. Marc Bernard, that I did not need to pay dues or do CME's until 2022 if I took a self-assessment test every 10 years which would be 2022.

"I therefore took no further action for recertification after 2012 and have always understood, believed, and listed myself as Board Certified by the [ABPM]. I was not aware of any information to the contrary and have given numerous depositions and trial testimonies wherein I have, in good faith reliance upon the Board's representation that I would be considered Board Certified by them, testified that I was and am Board Certified by the [ABPM]. I have never once been told or notified that this was not true, and have not had that testimony questioned in prior cases. ...

"... I have never personally received any letters or communications from the [ABPM] about this certification issue and was totally unaware of this certification issue until the affidavit of Dr. Stavosky was filed in the Nall case. I therefore asked the office manager [of the ABPM] if I had to do something to rectify the situation and reinstate my Board Certification by the ABPM and was told that I would need to pay TEN (10) years of dues/fees, and submit evidence of compliance with certification requirements, but that such a process would first have to be submitted to, and approved by, the current Board before I could submit my dues and the

required compliance information. I stand ready, willing, able, and qualified to do whatever is required, and am presently awaiting notification from the Board that I can start the process. However, as of the date of this affidavit, I have not received any notification or instructions."

The Nalls also attached to their response a Rule 56(f), Ala. R. Civ. P., affidavit in which the Nalls' counsel asked for additional discovery "concerning all surrounding circumstances applicable to [Dr. Krych's] certification status with the ABPM," information counsel insisted was "critical to establish for the Court that Dr. Krych should qualify as an expert for purposes of this lawsuit."

The circuit court held a hearing on Dr. Arabi's summary-judgment motion. Following that hearing, on December 14, 2021, the circuit court entered a summary judgment in favor of Dr. Arabi, thereby disposing of all the remaining claims in the case. On January 12, 2022, the Nalls filed a postjudgment motion in which they asserted that "the problem with Dr. Krych's certification is essentially a clerical issue. It is undisputed that Dr. Krych was certified by the ABPM, but his certification apparently lapsed without his knowledge after the organization changed its rules about certain members being 'grandfathered' in and a failure by the organization to send notices to Dr. Krych at the correct address." The

Nalls again requested more time to allow Dr. Krych to resolve the certification issue. The Nalls also reargued their alternative position of permitting them to substitute another expert in Dr. Krych's place. On January 25, 2022, the circuit court denied the postjudgment motion.

On February 16, 2022, the Nalls appealed.

## II. Standard of Review

"This Court's review of a summary judgment [or the denial of a summary-judgment motion] is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce "substantial evidence" as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of

Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989).'"

"Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)).'

"Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

"'"In order to overcome a defendant's properly supported summary-judgment motion, the plaintiff bears the burden of presenting substantial evidence as to each disputed element of [its] claim." Ex parte Harold L. Martin Distrib. Co., 769 So. 2d 313, 314 (Ala. 2000).'

"White Sands Grp., L.L.C. v. PRS II, LLC, 32 So. 3d 5, 11 (Ala. 2009)."

Laurel v. Prince, 154 So. 3d 95, 97-98 (Ala. 2014).

"We review a trial court's denial of a motion for a continuance by asking whether in denying the motion the trial court exceeded its discretion. See Cheminova America Corp. v. Corker, 779 So. 2d 1175, 1183 (Ala. 2000); Copeland v. Samford Univ., 686 So. 2d 190 (Ala. 1996).

"'A court exceeds its discretion when its ruling is based on an erroneous conclusion of law or when it has acted arbitrarily without employing

conscientious judgment, has exceeded the bounds of reason in view of all circumstances, or has so far ignored recognized principles of law or practice as to cause substantial injustice. Hale v. Larry Latham Auctioneers, Inc., 607 So. 2d 154, 155 (Ala. 1992); Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 13 (Ala. 1979).'

"Edwards v. Allied Home Mortgage Capital Corp., 962 So. 2d 194, 213 (Ala. 2007)."

Wright Therapy Equip., LLC v. Blue Cross & Blue Shield of Alabama, 991 So. 2d 701, 705 (Ala. 2008). "This Court reviews a trial court's decision to amend or not to amend a pretrial order to determine whether the trial court exceeded its discretion. Hughes v. Arlando's Style Shop, 399 So. 2d 830, 831 (Ala. 1981)." Harris v. Health Care Auth. of Huntsville, 6 So. 3d 468, 473 (Ala. 2008).

### III. Analysis

Section 6-5-548, Ala. Code 1975, provides, in part:

"(a) In any action for injury or damages or wrongful death, whether in contract or in tort, against a health care provider for breach of the standard of care, the plaintiff shall have the burden of proving by substantial evidence that the health care provider failed to exercise such reasonable care, skill, and diligence as other similarly situated health care providers in the same general line of practice ordinarily have and exercise in a like case.

"....

"(c) Notwithstanding any provision of the Alabama Rules of Evidence to the contrary, if the health care provider whose breach of the standard of care is claimed to have created the cause of action is certified by an appropriate American board as a specialist, is trained and experienced in a medical specialty, and holds himself or herself out as a specialist, a 'similarly situated health care provider' is one who meets all of the following requirements:

"(1) Is licensed by the appropriate regulatory board or agency of this or some other state.

"(2) Is trained and experienced in the same specialty.

"(3) Is certified by an appropriate American board in the same specialty.

"(4) Has practiced in this specialty during the year preceding the date that the alleged breach of the standard of care occurred.

"....

"(e) ... It is the intent of the Legislature that in the event that the defendant health care provider is certified by an appropriate American board or in a particular specialty and is practicing that specialty at the time of the alleged breach of the standard of care, a health care provider may testify as an expert witness with respect to an alleged breach of the standard of care ... against another health care provider only if he or she is certified by the same American board in the same specialty."

(Emphasis added.)

In Chapman v. Smith, 893 So. 2d 293, 297-98 (Ala. 2004), this Court interpreted § 6-5-548(c) to mean that an expert must be certified by the same medical board as the defendant physician at the time the expert presents his or her testimony in the case. The Nalls concede that Dr. Krych was not certified by the ABPM when he gave his deposition testimony. They contend, however, that the circuit court exceeded its discretion (1) by not granting a continuance to allow Dr. Krych to resolve the certification issue; (2) by not equitably estopping the ABPM from declaring that Dr. Krych is not certified; or (3) by not allowing the Nalls the opportunity to substitute another expert concerning the standard of care.

With respect to a continuance, the Nalls make much of the fact that if Dr. Krych is able to resolve his certification issue with the ABPM, he could be retroactively reinstated by that board and, therefore, could be considered certified at the time he gave his deposition testimony. As Dr. Arabi observes, however, there is no indication as to when, or even if, Dr. Krych will be able to resolve the certification issue. See Dr. Arabi's brief, pp. 9-10 ("The trial court would need to essentially stay the case indefinitely based on the possibility that Dr. Krych meets the

certification requirements to the satisfaction of the ABPM, and the ABPM votes to grant Dr. Krych certification."). According to his own affidavit executed on September 20, 2021, Dr. Krych had not received any news from the ABPM at that time as to when he might be able to apply for reinstatement. The Nalls state in their appellate brief that "[a]t [the] time of the filing of this appellate brief [May 9, 2022], Dr. Krych still is awaiting a response from the ABPM as to his reinstatement." Nalls' brief, p. 7. If anything, the slowness of the ABPM in engaging Dr. Krych about his certification status confirms the circuit court's decision not to delay a ruling on Dr. Arabi's summary-judgment motion until some indefinite date on which Dr. Krych's certification might be resolved. The circuit court did not exceed its discretion by denying the Nalls' request for a continuance.

The Nalls' argument seeking the application of equitable estoppel against the ABPM is also unpersuasive.

"The elements of equitable estoppel are:

"(1) The person against whom estoppel is asserted, who usually must have knowledge of the facts, communicates something in a misleading way, either by words, conduct, or silence, with the intention that the communication will be acted on; (2) the person seeking to assert estoppel, who lacks

knowledge of the facts, relies upon that communication; and (3) the person relying would be harmed materially if the actor is later permitted to assert a claim inconsistent with his earlier conduct.'"

Crest Constr. Corp. v. Shelby Cnty. Bd. of Educ., 612 So. 2d 425, 430 (Ala. 1992) (quoting General Elec. Credit Corp. v. Strickland Div. of Rebel Lumber Co., 437 So. 2d 1240, 1243 (Ala.1983)).

The Nalls contend that this case "should be the poster child for [the] doctrine" of equitable estoppel. The Nalls' reply brief, p. 6. They argue that the ABPM misleadingly communicated to Dr. Krych that he was "grandfathered" into certification, that Dr. Krych relied upon that communication, that he never received any communication indicating that the ABPM's policy on certification had changed, and that Dr. Krych was harmed by that communication because he makes a living as an expert medical witness. The Nalls thus contend that Dr. Krych's situation meets each of the elements of equitable estoppel.

But there are several problems with applying the doctrine of equitable estoppel against the ABPM and in favor of Dr. Krych. First, neither the ABPM nor Dr. Krych is a party to this case. It is true that equitable estoppel sometimes may be invoked by a nonparty to a

contract,<sup>1</sup> but the Nalls fail to cite even a single case in which a court employed equitable estoppel against or in favor of nonparties to a case. Here, the Nalls attempt to invoke the doctrine of equitable estoppel on behalf of Dr. Krych, who is, at the most, a witness in this case, and they seek to have the circuit court impose the doctrine upon the ABPM, which is neither a party nor a witness in the case. "The doctrine of equitable estoppel is designed to prevent a party from asserting a right under a general rule of law when the parties' own conduct renders the assertion of such right contrary to equity and good conscience." Ally Windsor Howell, Tilley's Alabama Equity § 2:1 (5th ed. 2012) (emphasis added). Second, the Nalls assume that the doctrine of equitable estoppel somehow would empower the circuit court to consider Dr. Krych certified by the ABPM when he is not, in fact, so certified. The Nalls offer no authority suggesting that the doctrine of equitable estoppel could be used to imbue an expert witness with the credentials required by § 6-5-548(c). Third, "[i]t is well settled that the 'party invoking estoppel must have in

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<sup>1</sup>See, e.g., Smith v. Mark Dodge, Inc., 934 So. 2d 375, 380 (Ala. 2006) (observing that sometimes a nonsignatory may enforce an arbitration provision "when the claims against the nonsignatory are "'intimately founded in and intertwined with'" the underlying contract obligations." (citations omitted)).

good faith been ignorant of the true facts at the time a representation is made to him, and must have acted with diligence to learn the truth.'" EvaBank v. Traditions Bank, 258 So. 3d 1119, 1124 (Ala. 2018) (quoting Ivey v. Dixon Inv. Co., 283 Ala. 590, 594, 219 So. 2d 639, 643 (1969)). If we ignore for a moment that the Nalls are invoking the doctrine on Dr. Krych's behalf, it is still the case that Dr. Krych must have acted with diligence to learn the truth about his certification status. But the facts reveal that Dr. Krych made no inquiries of the ABPM until he received a copy of the affidavit from the executive director of the ABPM in this case. Finally, the Nalls' attempt to invoke application of the doctrine of equitable estoppel assumes that the ABPM misled Dr. Krych about the true status of his certification. However, even taking Dr. Krych at his word, his last communication with the ABPM occurred in 2012, and Dr. Krych simply assumed that no possible change in his certification status could have occurred in the intervening 10 years. It is true that it would have been helpful for the ABPM to notify Dr. Krych of changes to its certification policies,<sup>2</sup> but there is no actual evidence indicating that

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<sup>2</sup>The Nalls' statement in their postjudgment motion that there was "a failure by the [ABPM] to send notices to Dr. Krych at the correct address" implies that the ABPM did attempt to send Dr. Krych notices

the ABPM tried to give Dr. Krych a false impression about his certification status. For all the foregoing reasons, we do not believe that the circuit court erred in declining to enforce the doctrine of equitable estoppel against the ABPM in such a way that Dr. Krych could be considered certified for purposes of this case.

Finally, the Nalls contend that the circuit court should have modified the scheduling order to allow them to name a new expert witness on the standard of care. They note that Rule 16(b), Ala. R. Civ. P., allows for the modification of a scheduling order, stating that, "[o]nce a scheduling order is issued, the schedule set thereby shall not be modified except by leave of court upon a showing of good cause." The Nalls argue that good cause existed in this case because "[t]here was no bad faith or dilatory conduct on the part of [the Nalls]. Instead, the issue here is at worst a clerical one which could not have been known or anticipated, and as to which there are questions of fact." The Nalls' brief, p. 24. The Nalls also assert that, without modification of the scheduling

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about his certification status but that Dr. Krych did not receive such notices.

order, their meritorious claims will be dismissed due to "technical matters." Id.

This final argument constitutes one expression of a theme the Nalls repeat throughout their briefs: that the circuit court should have been willing to allow one of their offered solutions to the problem of Dr. Krych's certification because cases should be decided on the merits rather than upon "technicalities." It is true that the Committee Comments on 1973 Adoption of Rule 1 of the Alabama Rules of Civil Procedure state that "the policy of rules such as these is to disregard technicality and form in order that the civil rights of litigants may be asserted and tried on the merits." But we deal here with a statutory requirement of a medical-malpractice cause of action. Plaintiffs in such cases should understand that they usually need expert testimony to establish a breach of the standard of care by a defendant physician and that, if that defendant is certified as a specialist, a plaintiff's expert also must be certified in that specialty. The suggestion that the Nalls should be allowed to start over with obtaining an expert witness is premised on the idea that they were completely surprised by Dr. Krych's lack of certification by the ABPM. But any "surprise" related to Dr. Krych's certification is solely a result of

the Nalls' reliance upon Dr. Krych's statements that he was certified by the ABPM when, in fact, he was not so certified. Dr. Krych testified in his deposition that he was first contacted for this case by the Nalls' counsel in 2017. Dr. Arabi filed his summary-judgment motion on August 20, 2021. In the intervening four years, neither Dr. Krych nor the Nalls' counsel apparently ever checked with the ABPM to confirm that he was certified by that board. Despite this, the Nalls argue that the circuit court reached its decision based on a "technicality" that entitles them to a do-over with respect to obtaining an expert witness. Allowing such a do-over would cause a significant delay in the case and would reward the Nalls for an oversight that Dr. Arabi played no part in precipitating. Under the given circumstances, we do not believe that the circuit court exceeded its discretion in refusing to grant the Nalls additional time to substitute a new expert witness on the standard of care in the place of Dr. Krych.

#### IV. Conclusion

We are not unsympathetic to the fact that the Nalls' case has come to an end due to seemingly facile oversights. Even so, the standard set out in § 6-5-548(c) is plain, and the Nalls had ample opportunity to ensure

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compliance with it in the four years this case proceeded in litigation before Dr. Arabi filed his summary-judgment motion. The circuit court did not exceed its discretion in applying that standard and concluding that, without Dr. Krych's testimony, the Nalls failed to present substantial evidence with respect to the standard of care in this case. Accordingly, the circuit court's summary judgment in favor of Dr. Arabi is affirmed.

**AFFIRMED.**

Parker, C.J., and Shaw, Bryan, and Mitchell, JJ., concur.