

July 2025 MPT-1 Drafters' Point Sheet

Lowe v. Jost

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Lowe v. Jost

DRAFTERS' POINT SHEET

In this performance test, the examinee's law firm represents Dr. Emil Jost, an orthopedic surgeon who has been sued for malpractice by Alice Lowe, a former patient. Ms. Lowe claims that Dr. Jost improperly performed a hip-replacement surgery on her. The complaint alleges that Dr. Jost improperly implanted the prosthetic hip and then failed to discover his mistake because after he performed the hip replacement on Ms. Lowe, he ordered and read just a single front-to-back X-ray of Ms. Lowe's hip, which did not enable him to determine whether there was a post-operative fracture or misplaced prosthesis.

Both parties have hired proposed expert witnesses: Ms. Lowe has hired Dr. Robert Ajax, and Dr. Jost has retained Dr. Ariel Shulman.

Three motions are before the court: (1) plaintiff's motion to admit the opinion testimony of her proposed expert, (2) defendant's motion to admit the opinion testimony of his proposed expert, and (3) defendant's motion for summary judgment. The examinee's task is to prepare the argument section of the brief in support of these motions on behalf of the defendant, Dr. Jost. Specifically, the examinee is asked to make the following arguments:

- (1) Dr. Shulman is a qualified expert, and the court should admit her opinion testimony;
- (2) Dr. Ajax is not a qualified expert, but even if he is qualified, the court should exclude his opinion testimony; and
- (3) even if the court were to qualify Dr. Ajax as an expert, it should grant Dr. Jost's motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim.

The File contains the instructional memorandum from the supervising attorney, excerpts from the complaint, and excerpts from the hearing testimony of the two proposed expert witnesses. In addition, the File includes affidavits from Dr. Jost and from Karen Baines, a neighbor of Ms. Lowe's. The Library contains Franklin Rule of Evidence 702 and Franklin Rule of Civil Procedure 56, both of which are identical to the corresponding federal rules. The Library also includes two appellate cases: *Jacobs v. Becker* (Fr. Ct. App. 2020) and *Smith v. McGann* (Fr. Ct. App. 2004).

The following discussion covers all the points the drafters intended to raise in the item.

FORMAT AND OVERVIEW

There is no required format for the argument, although examinees are told *not* to draft a separate statement of facts. Examinees should take care to incorporate relevant facts, analyze the applicable legal authorities, and explain, in a well-organized and persuasive argument, how the facts and law should lead the court to rule in the defendant's favor on each motion. Note that the examinee should address the issues in the order presented by the task memorandum, as each issue relies on the analysis developed in the preceding issue(s). Finally, the examinee should anticipate and respond to opposing arguments as the court will likely decide the motions without asking the parties to submit rebuttal briefs.

APPLICABLE LAW

The Library contains two Franklin rules, one of evidence and one of civil procedure, that mirror the federal rules for testimony by expert witnesses and for motions for summary judgment.

Under Franklin Rule of Evidence 702, a witness may testify as an expert if two requirements are demonstrated to the court. First, that the witness is "qualified as an expert by knowledge, skill, experience, training, or education." Second, the proponent must establish that the witness's specialized knowledge "will help the trier of fact to understand the evidence or to determine a fact in issue" and that "the testimony is based on sufficient facts or data, . . . is the product of reliable principles and methods," and "reflects a reliable application of the principles and methods to the facts of the case." Fr. R. Evid. 702.

Pursuant to Rule 56 of the Franklin Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The *Jacobs* case involves a claim of malpractice against a surgeon and presents issues under both rules. First, the Franklin Court of Appeal reiterated the elements of a negligence claim: (1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach of the standard of care caused the harm to the plaintiff. With respect to physicians, the standard of care is "to act with that degree of care, knowledge, and skill ordinarily possessed and exercised in similar situations by the average member of the profession practicing in the field." *Jacobs*. Expert testimony is required in medical malpractice cases because only expert testimony can demonstrate how the required standard of care was breached and how that breach caused the plaintiff's alleged injury. *Id.* The court also quoted *Alexander v. ChemCo Ltd.* (Fr. Sup. Ct. 2003) for the proposition that a party is entitled to summary judgment when the

nonmoving party fails to establish the existence of a material fact. A material fact is one that is essential to the establishment of an element of the case and determinative of the outcome.

In *Jacobs*, because the plaintiff had failed to present any expert testimony on causation or the standard of care, the trial court properly granted summary judgment to the defendant surgeon.

The second case in the Library, *Smith v. McGann*, another medical malpractice case, provides guidance for how Franklin courts approach the issue of whether a party's experts are sufficiently qualified to testify. If the case involves the standard of care for a specialist in an area of medicine, the potential expert witness must "specialize in the same or a similar specialty that includes the performance of the procedure at issue." *Smith*. Thus, in *Smith*, the trial court properly concluded that a specialist in internal medicine was not sufficiently qualified to testify as to the standard of care required of an orthopedist. Further, the witness must demonstrate familiarity with the standard of care where the injury occurred.

Next, if the court deems an expert to be qualified in a Daubert inquiry (as codified in Franklin Code § 233), the proponent of the expert's testimony must still show that the expert's opinion is reliable, that is, that "it is based on a scientifically valid methodology." In *Smith*, the court listed as relevant factors

- the degree to which the opinion and its basis are generally accepted within the relevant community; and
- whether experts in that field would rely on the same evidence to reach the type of opinion being offered.

Reliable opinion testimony cannot be based on speculation.

Finally, the *Smith* court explained that while the factual basis of an expert's testimony goes to its *credibility* as opposed to its *admissibility*, when that opinion "is so fundamentally unsupported that it can offer no assistance to the jury," the court must exclude it. In short, when deciding whether to admit into evidence the opinion testimony of an expert, the court must be persuaded that the proponent has demonstrated two distinct requirements: the expert's qualifications and the testimony's reliability.

ARGUMENT

Defendant's motion to admit testimony of Dr. Ariel Schulman

- The admission of expert testimony is governed by Rule 702 of the Franklin Rules of Evidence, which states, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" provided the expert meets the standards for reliability set out in Rule 702 and Franklin Code § 233 (as discussed in Smith). Based on the following, the defendant has a strong argument that Dr. Shulman should be qualified as an expert under Rule 702.
- Dr. Shulman's education qualifies her as an expert.
 - She completed her residency in orthopedic surgery.
 - She is board-certified in orthopedic surgery.
- In addition, Dr. Shulman is qualified based on her experience.
 - She teaches students how to perform knee and hip replacements through simulation, which is arguably a form of surgery.
 - She conducted an average of 100 replacement surgeries per year in the decade before she entered academia.
- Anticipated counterargument: Ms. Lowe may argue that Dr. Shulman should not be qualified because she has not practiced in Franklin.
 - Response: The examinee should note that Dr. Shulman completed both medical school and her residency in Franklin and thus knows the standard of care in that location. She also knows the standard of care in Olympia and can testify that the standard of care is the same in both states. *See Smith*.
- Anticipated counterargument: Ms. Lowe may argue that Dr. Shulman does not do hip replacements currently (not since 2019) and thus is not qualified as an expert.
 - Response: Nothing in Franklin Code § 233 or Rule 702 requires that an expert currently engage in that practice. And Dr. Shulman is teaching medical students, presenting lectures at joint replacement conferences, and keeping current with the relevant medical literature. Students in medical school rely on her expertise as she teaches them to do replacement surgery.
 - While she has not written about hip-replacement surgery, she has written about knee-replacement surgery.
 - Ms. Lowe may try to argue that Dr. Shulman has not written about hip replacements and that her opinion is thus not reliable. However, Dr. Shulman

would be qualified even if she had not written any articles. The fact that she is a published orthopedic surgeon only adds to that reliability.

- The fact that Dr. Shulman is not currently performing hip-replacement surgeries and has not compared the populations and availability of medical care in Olympia and Franklin may be considered by the fact-finder when deciding how much weight (credibility) to give Dr. Shulman's testimony but should not prevent the court from qualifying her as an expert witness under Rule 702.
- Dr. Shulman's expert opinion is based on reliable methods, as required by Fr. Code § 233.
- While the statute provides certain criteria that can be used to establish reliability, those criteria are merely examples and other factors can be used to establish reliability. Thus, in Smith, the court found an orthopedist's opinion to be reliable because it was based on his many years of experience in orthopedics, the many articles he had read, the many conferences he had attended, and the fact that many doctors relied on his diagnoses.
- Dr. Shulman's testimony is based on these same factors: she has 20 years' experience in orthopedics.
- Dr. Shulman's opinion was based on reviewing Ms. Lowe's surgical and medical records as well as her physical examination of Ms. Lowe.
- Dr. Shulman testified that she keeps current with the literature on hip replacements in respected medical journals and regularly attends conferences on joint replacement.
- Accordingly, based on her qualifications and the reliable methods by which Dr. Shulman reaches her conclusions, she should be qualified as an expert.

Defendant's motion to preclude testimony of Dr. Robert Ajax

- The examinee can argue that Dr. Ajax should not be qualified as an expert because he does not specialize in hip replacements. This is likely not a strong argument.
- Like Dr. Shulman, Dr. Ajax is also board-certified in orthopedic surgery. Further, his practice is in Franklin, so he has specialized knowledge of the medical community in which the defendant practices. And while he does not limit his practice to hip and knee replacements like Dr. Shulman, he does have extensive practice experience that includes hip replacements.
- The stronger argument to exclude Dr. Ajax's opinion testimony is that it is not based on reliable methods. He gives his opinion about the care provided to Ms. Lowe ("Dr. Jost departed from good and accepted medical practice in failing to order another

X-ray from a different position.”), but he does not describe any of the methods or sources on which he relied for his conclusory opinion that Dr. Jost’s actions “did not comport with the standard of care in Franklin.”

- Because Dr. Ajax failed to provide a single source when asked, “On what evidence do you base this conclusion?” his testimony is speculative. This makes Dr. Ajax’s conclusion that Dr. Jost’s practice “did not comport with the standard of care in Franklin” unreliable.
- In addition, Dr. Ajax offered no opinion as to whether there was a break in the femur or a misplacement of the prosthesis that could have been detected by an X-ray. For the plaintiff to prevail, there must have been a fracture or a misplaced prosthesis that Dr. Jost failed to detect, but Dr. Ajax’s testimony cannot provide any reliable support for this conclusion.
- For these reasons, even if the court finds that Dr. Ajax is qualified as an expert in orthopedics/hip replacements, because the record does not support a conclusion that Dr. Ajax’s opinion testimony is based on reliable methods, that testimony should be excluded from evidence.

Defendant’s Motion for Summary Judgment

- Under Franklin Rule of Civil Procedure Rule 56(a), the “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”
- In Franklin, a plaintiff asserting a claim of medical malpractice must establish three elements: “(1) that a duty existed requiring the defendant to conform to a specific standard of care for the protection of others against harm, (2) that the defendant failed to conform to that specific standard of care, and (3) that the breach of the standard of care caused the harm to the plaintiff. *Jacobs*.
- Within that framework, a motion for summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof. Thus, if the proof presented by Ms. Lowe fails to make a showing as to any of the elements of the claim, there is not a genuine issue of material fact. *Alexander v. ChemCo Ltd.* (Fr. Sup. Ct. 2003) (cited in *Jacobs*).
- First element—duty: There are no facts suggesting that this element of a malpractice action is in dispute. Dr. Jost had a duty requiring that he conform to the standard of care for an orthopedic surgeon performing a hip replacement on a patient, in this case, Ms. Lowe. The examinee should concede this point.

- There is, however, a dispute of fact as to the remaining elements—whether Dr. Jost conformed to that standard of care and whether any breach of care caused the harm to Ms. Lowe.
- Second element—the specific standard of care in the community: expert testimony is required to demonstrate that the defendant failed to meet the standard of care in the community. This is an essential element of the plaintiff's case against Dr. Jost and one on which she will bear the burden of proof at trial. *See Jacobs*.
- Dr. Shulman's testimony clearly establishes that Dr. Jost met the standard of care within Franklin for the performance of a hip replacement.
- Ms. Lowe will argue that there is a contested issue as to whether Dr. Jost met the standard of care in light of Dr. Ajax's testimony that Dr. Jost failed to meet the standard of care in the community.
- Dr. Ajax bases his testimony solely on his own practice and opinions, which, because they are unsupported by any medical evidence, are not sufficiently reliable to be admitted. If testimony is precluded, the plaintiff cannot prove this element because expert testimony is required. *See Jacobs*.
- Third element—causation: Even if there is no issue of contested fact as to whether Dr. Jost met the standard of care, in Franklin the law requires that there be expert testimony on the issue of causation. *Jacobs*.
- Here, the factual issue of causation is contested.
 - Ms. Lowe claims that she fell and that the fall was caused by the incorrect placement of the original prosthesis.
 - But her testimony is controverted by Ms. Baines, whose affidavit states that Ms. Lowe dropped her purse and then to retrieve it, bent at the waist and touched the ground (thereby violating the precautions mandated by Dr. Jost).
 - Dr. Shulman has opined that the dislocation occurred *after* Ms. Lowe fell.
- Even though there are contested facts about the cause of her injury, to succeed on her claim of medical malpractice Ms. Lowe must provide qualified and reliable expert testimony substantiating her theory of injury causation.
- The testimony of Dr. Ajax, Ms. Lowe's expert, does not address or establish injury causation. His testimony merely states, "Dr. Jost departed from good and accepted medical practice in failing to order another X-ray from a different position. . . .

Because he did not order X-rays from different positions, he could not see whether there was a bone break or a misplaced prosthesis.” Dr. Ajax’s unreliable and unsubstantiated speculation regarding the diagnostic value of additional X-rays does not support Ms. Lowe’s injury causation theory.

Because the plaintiff has failed to establish one of the elements of a claim for medical malpractice, under *Alexander*, summary judgment must be granted to Dr. Jost.