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Court upholds ruling that doctor was not qualified as expert witness

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An oncologist was not qualified to testify as an expert witness against a surgeon accused of failing to diagnose a patient's lymphoma, the 1st District Appellate Court held Tuesday.

In a split decision, the appeals court affirmed Cook County Circuit Judge [Carol Pearce McCarthy](#)'s grant of a motion in limine brought by Dr. Christopher D. Joyce. Joyce, the defendant in a medical negligence suit brought by Carol and Robert McWilliams, sought to prevent Dr. Hector Gomez from testifying that Joyce violated the standard of care when he chose not to perform a biopsy on Carol McWilliams' swollen lymph nodes. Gomez is a hematologist/oncologist; Joyce is a surgeon.

McWilliams was later diagnosed with stage IV non-Hodgkin's lymphoma, which cannot be cured, according to the ruling. She argued her lymphoma would have been curable if caught sooner. The lymphoma went into remission, but McWilliams later developed ovarian cancer, which the parties agreed would likely be fatal.

Writing for the court in a 34-page ruling, Justice [Rodolfo Garcia](#) said the ruling as to Gomez's qualifications to testify was not based on the fact that Gomez is not a surgeon. Rather, the court found it key that Gomez had no experience with the decision-making process used by surgeons in deciding whether to perform a biopsy.

"[B]efore a plaintiff's expert may step into the shoes of a defendant doctor to assess his medical skills, the plaintiff's expert must demonstrate he is familiar with the medical standard against which the defendant doctor's medical judgment must be measured," Garcia wrote. "While it is not beyond the realm of possibility that an oncologist may be capable of criticizing a surgeon's decision to forego a biopsy, Dr. Gomez's testimony did not demonstrate the necessary expertise."

Justice [Warren D. Wolfson](#) concurred, but wrote separately to say an abuse of discretion standard should have been applied to the decision to bar Gomez's testimony about Joyce. Garcia employed de novo review. Presiding Justice [Robert E. Gordon](#) dissented, saying Gomez was familiar with the applicable standard of care for all physicians when it comes to determining whether to perform a biopsy.

"The majority and the trial court apparently believe that there is some 'magic' in the decision-making process of a surgeon that only another surgeon can testify to," Gordon wrote.

The plaintiffs filed suit prior to the ovarian cancer diagnosis, but planned to argue at trial that the heavy doses of chemotherapy she received to treat her lymphoma increased her chances of developing

ovarian cancer. Named in the lawsuit were Joyce, Suburban Surgical Associates and McWilliams' primary care physician, Dr. Donald Dettore.

Gomez was the plaintiff's sole expert witness. On the eve of trial, Dettore and Joyce filed several motions challenging Gomez's anticipated testimony. McCarthy, according to the opinion, expressed doubts about Gomez's qualifications to testify against Joyce, prompting the plaintiffs to conduct a voir dire of him.

After reviewing the voir dire, McCarthy concluded that Gomez failed to demonstrate his familiarity with the methods, procedures and treatments used by physicians like Joyce. When McCarthy granted the motion in limine, the plaintiffs sought to voluntarily dismiss their case, but McCarthy refused because the jury already had been sworn. Ultimately, McCarthy dismissed the claim against both doctors with prejudice.

In addition to affirming McCarthy's ruling in regard to Gomez's qualifications to testify against Joyce, the appeals court also affirmed her rulings denying voluntary dismissal and barring Gomez from testifying that there was a causal connection between the defendants' alleged failure to timely diagnose McWilliams' lymphoma and her subsequent development of ovarian cancer.

In his deposition, Gomez had testified that McWilliams' lymphoma and the high-dose chemotherapy she received to treat it "greatly enhanced" the likelihood she would suffer from ovarian cancer. He could not identify medical textbooks supporting that position, but said he had "read it somewhere."

The plaintiffs argued Gomez's testimony should have been allowed under the loss-of-chance doctrine, which is used when a missed diagnosis increases the chance of an unfavorable outcome. The appeals court, however, found the plaintiffs had waived that argument by not raising it in the trial court, and that regardless more evidence was necessary to support the claim.

Carol and Robert McWilliams v. Donald Dettore, et al., No. 1-07-0678.

Dettore was represented by [Mark J. Smith](#), [Joan M. Kubalanza](#), [Scott R. Wolfe](#) and [Mehreen S. Sherwani](#) of Lewis & Gellen LLP.

Smith was pleased with the ruling, which he said "echoes existing case law" as to the qualifications of experts.

The plaintiffs were represented by [Ronald S. Fishman](#) of Fishman & Fishman Ltd., who could not be reached for comment Tuesday morning. Joyce and Suburban Surgical Associates were represented by [Krista R. Frick](#) and [Luisa F. Trujillo](#) of Bollinger, Ruberry & Garvey.

"I think [the appeals court] stayed true to the line of cases on expert qualifications and that each case needs to be decided on its own merits," Frick said.

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