Oral Argument Preview: *Shadrick v. Grana*
Alabama Supreme Court

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I. INTRODUCTION

The Alabama Medical Liability Act[1] controls medical malpractice actions brought against "health care providers" for medical injuries.[2] Under the AMLA, a medical-malpractice plaintiff must prove "by substantial evidence" (1) the appropriate standard of care, (2) a breach of that standard by the health-care provider, and (3) a proximate causal connection between the health-care provider's breach and the plaintiff's injuries.[3]

In Alabama, the general rule is that expert medical testimony must establish evidence of medical malpractice.[4] And, relevant to this case, in general, the expert medical witness and the defendant must be "similarly situated health care provider[s]" who practice "in the same discipline or school of practice."[5] This standard does not require that the expert witness and the medical-malpractice defendant have "identical training, experiences, or types of practice, or even the same specialties."[6] But the "similarly situated health care provider" standard would, for example, prevent an orthodontist from establishing the standard of care for a procedure that was unique to the field of urology.[7]

There are, however, exceptions to the general rule that a similarly situated expert witness must establish the relevant standard of care: expert testimony is unnecessary when the appropriate standard of care is so obvious

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[1] ALA. CODE §§ 6-5-541–552 (1975).

[2] ALA. CODE § 6-5-542(1).

[3] Giles v. Brookwood Health Servs., Inc., 5 So. 3d 533, 549 (Ala. 2008).

[4] *See* ALA. CODE § 6-5-54; Brookwood Med. Ctr. v. Lindstrom, 763 So. 2d 951, 952 (Ala. 2000) ("The plaintiff must prove the alleged negligence through expert testimony, unless an understanding of the alleged lack of due care or skill requires only common knowledge or experience.") (citations and quotations omitted).

[5] ALA. CODE § 6-5-548(b)–(c). *See also* Rogers v. Adams, 657 So. 2d 838, 840 (Ala. 1995) ("To be 'similarly situated,' an expert witness must be able to testify about the standard of care alleged to have been breached in the procedure that is involved in the case.") (citations omitted).

[6] *Id.* at 842 (holding that a doctor specializing in prosthodontics would qualify as an expert to testify that a general dentist had breached the standard of care for a procedure that was common to both disciplines).

[7] *Cf.* Bell v. Hart, 516 So. 2d 562, 564 (Ala. 1987) (holding that a pharmacist and psychologist were not qualified to establish standard of care for medical doctor).

and apparent that a layperson could understand it.[8] And a standard of care is obvious enough for lay comprehension when it can be understood through "common knowledge and experience . . . ."[9] For example, the average layperson understands that hospital employees shouldn't use a piece of sterilized surgical equipment that is so hot that it causes third-degree burns on the plaintiff's skin.[10] Simply put, it doesn't take an expert to know that a hot object will burn skin, and the average lay person understands that as a result of her day-to-day-experiences.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On October 29, 2010, William H. Shadrick arrived at Northeast Alabama Medical Center's emergency department, complaining of shortness of breath and chest pain. Shadrick—the decedent in this case—was admitted and placed under the care of Dr. Wilfredo Grana, M.D.—the defendant-appellee in this case. Dr. Grana, a board-certified internal medicine physician, determined that Shadrick's condition required a cardiology consultation. Both parties agree that, after Shadrick was admitted, Dr. Grana initially called the on-call cardiologist—Dr. Osita Onyekwere.[11] The parties disagree, however, on the facts that took place after Dr. Grana first consulted Dr. Onyekwere. According to Dr. Grana, he told Dr. Onyekwere that Shadrick was in danger of imminent, life-threatening cardiac deterioration. Dr. Onyekwere denied receiving that information. In any event, on October 30, 2010, Shadrick went into cardiac arrest and died when medical personnel were unable to save him. As a result, Sue Shadrick, in her capacity as personal representative of William Shadrick's estate, brought suit under the AMLA against Dr. Grana, Dr. Onyekwere, and the Northeast Alabama Regional Medical Center Board.

On January 18, 2018, Dr. Grana filed a motion for summary judgment and a motion to strike the testimony of the appellant's cardiology expert. And on February 21, 2018, the Circuit Court for Calhoun County, Alabama granted both motions.[12] The appellant then appealed to the Alabama

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[8] *See* ALA. CODE § 6-5-548; Anderson v. Ala. Ref. Labs., 778 So. 2d 806, 811 (Ala. 2000).
[9] Tuscaloosa Orthopedic Appliance Co., Inc. v. Wyatt, 460 So. 2d 156, 161 (Ala. 1984).
[10] McGathey v. Brookwood Health Servs., Inc., 143 So. 3d 95, 102 (Ala. 2013) (citations and quotations omitted). *See also* Morgan v. Publix Super Mkts., Inc., 138 So. 3d 982, 989 (Ala. 2013) (concluding that the average lay person knows that failure to fill a prescription with the correct medication falls below a pharmacist's standard of care).
[11] *See* Brief of Appellant at 5, Shadrick v. Grana, No. 1170513 (Ala. May 3, 2018); Brief of Appellee at 3–4, Shadrick v. Grana, No. 1170513 (Ala. May 31, 2018).
[12] At the time of Dr. Grana's motion to strike and motion for summary judgment, he was the only remaining defendant in the case. The trial court had previously granted summary judgment in favor of the Board on July 1, 2015, and Dr. Onyekwere was voluntarily

Supreme Court. On appeal, the question before the Court is whether the trial court correctly entered summary judgment on either of the following grounds: (1) the plaintiff's failure to present the required expert testimony from a similarly situated health-care provider that established that Dr. Grana breached his professional standard of care; or (2) the plaintiff 's failure to present the required expert testimony that established that Dr. Grana proximately caused the decedent's death.

In all likelihood, resolution of the case will depend on how the Alabama Supreme Court answers the following question: whether the plaintiff's expert witness—Dr. James C. Bower—was qualified to testify about the relevant standard of care. And the question of whether the plaintiff's expert witness was qualified to establish the relevant standard of care raises, in turn, two additional issues. The first issue is whether the plaintiff's expert medical witness, Dr. James C. Bower, and Dr. Grana are "similarly situated health care provider[s]" who practice "in the same discipline or school of practice."[13] If the two doctors are similarly situated, then Dr. Bower could testify about the relevant standard of care. If not, then the issue becomes whether the appropriate standard of care is so apparent and obvious that a layperson could understand it through common knowledge and experience.[14] This second issue was a central focus of both parties' briefs, and the arguments raised in those briefs will be addressed in turn.

III. APPELLANT'S ARGUMENTS

Appellant first argues that its expert witness—Dr. James C. Bower—was competent to establish the relevant standard of care in this case because Dr. Bower and Dr. Grana, the appellee-defendant, are "similarly situated health care provider[s]."[15] According to the appellant, Dr. Bower and Dr. Grana are similarly situated health-care providers for two reasons.

One, Dr. Bower is board certified in internal medicine—as is Dr. Grana—as well as cardiology.[16] Dr. Bower did not, however, meet the qualifications of a board certified internal medicine physician on the date of Shadrick's death, having failed to renew his qualifications in 2007, and Dr. Bower has never practiced internal medicine.[17] But, according to the appellant, those facts do not preclude Dr. Bower from establishing Dr.

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dismissed in November 2015 after a confidential, pro-tanto settlement. Brief of Appellant, *supra* note 11, at 1.

[13] *See* Brief of Appellant, *supra* note 11, at 2.

[14] *See id.*

[15] Brief of Appellant, *supra* note 11, at 25–26, 39, 46–47.

[16] Brief of Appellant, *supra* note 11, at 39.

[17] Brief of Appellant, *supra* note 11, at 46.

Grana's standard of care because "'[t]he Alabama Medical Liability Act does not require that the Defendant healthcare provider and the expert witness have identical training, experience, or type of practice, or even the same specialty.'"[18] According to the appellant, the requirement of "similarly situated health care provider" is a question of whether the expert witness is qualified to testify about the procedure at issue, not whether the expert witness is qualified to testify about the defendant's medical discipline as a whole.[19]

Two, and related to the appellant's first point, appellant argues that Dr. Bower's testimony was proper because requesting a consultation from a specialist during an emergency is common practice across medical specialties.[20] Dr. Bower testified that an attending physician, "regardless of speciality[,]" must request a consult in an emergency to ensure the patient's well-being.[21] Dr. Bower testified that medicine is a team effort and that, regardless of discipline, when a doctor knows that his patient needs consistent attention, the doctor must either render that attention or ensure that another competent person does so.[22] In this way, the appellant argues, requesting an emergency consultation is a common requirement that transcends medical disciplines and Dr. Bower was therefore qualified to establish the standard of care for requesting an emergency consultation.[23]

The appellant frames the second issue as one of miscommunication during an emergency, an issue that the appellant argues is well within the understanding of a layperson.[24] According to the appellant, the average person understands that you don't let an emergency—in any situation, medical or otherwise—sit for 18 hours.[25] That is, according to the appellant, the jury could have understood the relevant standard of care without any technical or medical information or expertise. "Any average person can fully appreciate this was an emergency[,]" the appellant argues; and in particular, this was a cardiac emergency where the attending physician—Dr. Grana—was not a cardiac doctor.[26] And, so the argument goes, everyone understands

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[18] Brief of Appellant, *supra* note 11, at 46–47 (quoting Rogers v. Adams, 657 So. 2d 838, 842 (Ala. 1995)).
[19] Brief of Appellant, *supra* note 11, at 47 (citing *Rogers*, 657 So. 2d at 842).
[20] Brief of Appellant, *supra* note 11, at 47–48.
[21] Brief of Appellant, *supra* note 11, at 47–48.
[22] Brief of Appellant, *supra* note 11, at 41–42.
[23] Brief of Appellant, *supra* note 11, at 41.
[24] *See* Brief of Appellant, *supra* note 11, at 22–26 ("You don't need to be a medical doctor to use your common sense, knowledge and experience to appreciate the duty of the attending physician to communicate this life-threatening need so that the patient gets the attention he requires.").
[25] *See* Brief of Appellant, *supra* note 11, at 25.
[26] Brief of Appellant, *supra* note 11, at 25.

that in an emergency, you should call an expert. For the same reason that a homeowner calls a plumber when a pipe bursts, so too should a general physician call a cardiac specialist during a cardiac emergency.[27] Appellant argues that determining the relevant standard of care didn't require the jury to use any medical or technical expertise; instead, the appellant argues "that once an emergency is medically recognized it must be handled as just that—an EMERGENCY."[28]

The appellant then turned to the allegedly conflicting testimony of Dr. Grana and Dr. Onyekwere. According to the appellant, the testimony conflicts because Dr. Grana contends that he represented the decedent's condition as requiring an emergency consult and Dr. Onyekwere contends that Dr. Grana made no such representation.[29] This, according to the appellant, is nothing more than a fact question and that it is for the jury to decide who is telling the truth about what Dr. Grana said to Dr. Onyekwere.[30] And for that reason, the appellant argues, summary judgment in favor of the appellee was inappropriate.

IV. APPELLEE'S BRIEF

By contrast, the appellee argues that: (1) an expert witness was required to establish the relevant standard of care in this case because that standard was beyond the understanding of the average layperson; and (2) Dr. Bower was not qualified to establish that standard because he and Dr. Grana are not "similarly situated health care provider[s]."[31] In all likelihood, a favorable outcome for the appellee requires the Alabama Supreme Court accepting appellee's position on both arguments.

First, the appellee rejected the appellant's framing of the issue as one of simple miscommunication, arguing that "[t]he issues present here . . . involve complex medical issues which require medical interpretation and expertise . . . ."[32] To put it another way, the appellee argues that only an expert may establish the relevant standard of care in this case because the relevant standard of care goes beyond a layperson's understanding. According to the appellee, this was not a case of miscommunication between Dr. Grana and Dr. Onyekwere; it was a case of a difference of opinion between Dr. Grana and Dr. Onyekwere. That sort of disagreement about the

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[27] This was not a specific argument in the appellant's brief and is instead an illustrative, editorialized example.
[28] Brief of Appellant, *supra* note 11, at 34 (emphasis in original).
[29] Brief of Appellant, *supra* note 11, at 35–36.
[30] Brief of Appellant, *supra* note 11, at 25, 36.
[31] Brief of Appellee, *supra* note 11, at 14–17.
[32] Brief of Appellee, *supra* note 11, at 15.

proper course of treatment for a patient, the appellee argues, "involves complex medical issues" that require expert medical testimony.[33] "Accordingly, testimony of any breach in the standard of care by Dr. Grana must come from a similarly situated health care provider . . . ."[34] Put simply, according to the appellee, the exception to the AMLA's expert-witness requirement does not apply in this case.

Second, the appellee argues that, in this case, a similarly situated health care provider takes the form of a board-certified internal medicine physician.[35] Dr. Bower, as a board-certified and practicing *cardiologist*, appellee argues, is not qualified to testify to the standard of care for Dr. Grana, an *internist*.[36] Appellee noted that Dr. Bower is not an internist, has never practiced internal medicine, and has not been board certified in internal medicine since 2007, all of which, according to the appellee, cut against a finding that Dr. Bower and Dr. Grana are "similarly situated health care provider[s]" under the AMLA.[37] Specifically, the appellee interprets the AMLA's "similarly situated" requirement as follows: "The AMLA defines 'similarly situated health care provider' as a physician who is similarly trained, licensed, and certified as the defendant-physician in the year prior to the alleged breach in the standard of care . . . ."[38] The appellee takes this definition to mean that the plaintiff-appellant was required to present standard-of-care testimony from a board-certified internist that had practiced as an internist during the year prior to the date of Dr. Grana's alleged breach.[39]

In that way, the appellant and the appellee are talking about two different questions. From the appellant's point of view, the relevant inquiry is the nature of the procedure or conduct, which, in this case, the appellant frames as requesting an emergency consultation.[40] In the appellant's view, any number of physicians from any number of disciplines are competent to give standard-of-care testimony about a medical process or procedure if that process or procedure transcends one specific medical discipline.[41] From the appellee's view, by contrast, the relevant inquiry is the similarities and dissimilarities between the defendant's expertise and the expert witness's

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[33] Brief of Appellee, *supra* note 11, at 27.
[34] Brief of Appellee, *supra* note 11, at 27.
[35] Brief of Appellee, *supra* note 11, at 27–28.
[36] Brief of Appellee, *supra* note 11, at 28.
[37] Brief of Appellee, *supra* note 11, at 29 (quoting ALA. CODE § 6-5-548(c)).
[38] Brief of Appellee, *supra* note 11, at 29 (quoting ALA. CODE § 6-5-548(c)).
[39] Brief of Appellee, *supra* note 11, at 29–30.
[40] Brief of Appellant, *supra* note 11, at 46–47 (quoting Rogers v. Adams, 657 So. 2d 838, 842 (Ala. 1995)).
[41] Brief of Appellant, *supra* note 11, at 45–46.

expertise.[42] According to the appellee, whether a witness may establish the relevant standard of care is a qualitative comparison between the witness's field of practice and the defendant's field of practice.[43] For example, according to the appellee, an OB/GYN is unqualified to testify to the standard of care for a board-certified family practitioner, regardless of the OB/GYN's familiarity with the procedure that gave rise to the lawsuit.[44] Applying this principle, the appellee argues, makes clear that Dr. Bower and Dr. Grana are not similarly situated.

V. CONCLUSION

It is unclear which side has the better of that argument because both sides seem to have Alabama Supreme Court case law that support their positions. Oral arguments are mercurial and can spin off in any number of directions. But at first blush, it seems like this case will largely turn on which point the Court decides is the central question: the nature of the procedure—the appellant's argument—or the similarities between the defendant and the witness—the appellee's argument.

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[42] Brief of Appellee, *supra* note 11, at 29–30 (citing Hegarty v. Hudson, 123 So. 3d 945, 951 (Ala. 2013)).

[43] Brief of Appellee, *supra* note 11, at 31 (citing Panayiotou v. Johnson, 995 So. 2d 871 (Ala. 2008)).

[44] *See* Hegarty v. Hudson, 123 So. 3d 945, 951 (Ala. 2013) ("The fact that there is some overlap or commonality in the practice of a board-certified family practitioner and a board-certified Ob-Gyn (i.e., that both were trained to perform C-sections) is irrelevant.").