

**SAMPLE BRIEF**

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

|                  |   |                                 |
|------------------|---|---------------------------------|
| LARRY ARMSTRONG, | ) |                                 |
|                  | ) |                                 |
| Appellee,        | ) | Court of Appeals No. 2016- 1111 |
|                  | ) |                                 |
|                  | ) |                                 |
| -vs.             | ) | Trial Court No. 2016-2222       |
|                  | ) |                                 |
| JOHN ELLINGTON,  | ) |                                 |
|                  | ) |                                 |
| Appellant.       | ) |                                 |

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**BRIEF OF APPELLANT, JOHN ELLINGTON**

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### APPELLANT'S ASSIGNMENT OF ERROR

The trial court abused its discretion by allowing the testimony of an expert witness when the witness did not have specialized knowledge, skill, experience, or training regarding the subject matter of the testimony under Evid.R. 702.

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### ISSUE PRESENTED FOR REVIEW

Whether the trial court abused its discretion by allowing a surgeon to testify as an expert witness in a medical malpractice case, when he has no specialized training or certification in the type of surgery he gives testimony on, and has never himself performed that type of surgery?

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### STATEMENT OF THE CASE

The plaintiff brought a medical malpractice claim against the defendant in July, after experiencing problems with his knee that was operated on. The case went to trial, and the defendant brought in an expert to give testimony that the defendant had not acted negligently. The expert opined that the defendant had performed the surgery consistently with medical standards. At trial, the plaintiff objected to the testimony on the grounds that the expert was not qualified to testify as an expert witness under Evid.R. 702. The jury found for the defendant, and this appeal followed. The plaintiff-appellant argues that the jury relied upon the expert testimony in reaching their conclusion, and the expert testimony should not have been given.

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### STATEMENT OF THE FACTS

On January 13, 2014, plaintiff John Ellington had surgery performed on his left knee by Dr. Armstrong to correct a torn meniscus. The surgery seemed to run smoothly; there were not any problems noticed by any medical staff throughout the procedure. Ellington returned home to recover. Dr. Armstrong told Ellington that his recovery would be relatively short; though Ellington was instructed to remain immobilized for two weeks, he was told that most daily activity could begin after that time.

After the two week immobilization period, Ellington remained in a great deal of pain. He was still unable to perform normal tasks because of the intense pain. He was seeing a physical therapist, who was taken aback by the lack of progress. Ellington's physical therapist indicated he had never encountered a patient that was performing at such a low level following meniscus surgery.

At that point, Ellington made an appointment with another doctor to find out why he was having so much difficulty with his knee. Upon examination, the doctor found that the surgery had not only been unsuccessful, but had left Ellington in a worse position than he had been in before the surgery. This doctor also looked at Ellington's prior medical records and indicted that given the nature of the knee injury, he would not have performed surgery, but instead would have suggested alternative methods such as physical therapy first.

Based on this information, Ellington brought suit against Dr. Armstrong, as well as the hospital. The case proceeded to a jury trial. The defendants brought in an expert witness to explain to the jury why Dr. Armstrong had not deviated from the proper standard of care. The expert was Dr. James. She opined that it was proper of Dr. Armstrong to recommend surgery to Ellington. Transcript p. 97. She further testified that though the surgery was not successful, it

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was not through any fault of Dr. Armstrong of the hospital; she indicated that Ellington's medical records showed that every part of the procedure was performed properly, and it was not the defendant's fault that he was not healing properly from the surgery. Transcript p. 98.

The plaintiff then questioned Dr. James on her credentials. She indicated that she had received her medical degree from The University of East Boston. Dr. James had been a practicing podiatrist for sixteen years, and had performed multiple surgeries. However, Dr. James specialized in ankle problems; she did not work with patients that had knee problems. Transcript p. 102. She had primarily performed surgeries upon the Achilles tendon in the ankle, and different parts of the foot. Dr. James had never performed a surgery on the meniscus; she had seen one performed during her residency fourteen years before, but could not specifically recall if the same technique was used there. Transcript p. 104.

On October 17, 2014, the jury found the defendant was not negligent. Judgment was entered in the defendant's favor on October 19, 2014. This appeal was timely filed October 25, 2014.

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### ARGUMENT

The trial court erred by ruling the expert testimony of Dr. James was admissible. An expert witness must have specialized knowledge, skill, experience, or training regarding the subject matter of the testimony. Evid.R. 702. Dr. James did not have any specialized knowledge, skill, experience, or training regarding the meniscus surgery she gave testimony on. Therefore, her testimony should not have been permitted.

Case law has shown that a trained medical professional cannot give testimony in regards to the standard of care if he or she does not have specialized knowledge in the applicable medical field. The expert witness must show that she is familiar enough with the standard of care in the applicable circumstances to give an opinion; she cannot give an opinion simply on the standard of care in the medical field she generally practices in, when it differs from the defendant's.

*Alexander v. Mt. Carmel Medical Center*, 56 Oh.St.2d 155, 160, 383 N.E.2d 564, 567 (1978).

This case clarified that the expert witness's qualification to testify on a given topic depends not on her title, but rather on the scope of her knowledge. *Id.*

A witness may be qualified to give testimony in a given medical field, but unqualified to give testimony in regards to a specific procedure or practice. *McCabe v. Janis*, 10th Dist.

Franklin No. 03AP-620, 2004-Ohio-2531. In this case, a podiatrist was generally qualified to provide expert testimony on dressing wounds; but he was not qualified to give testimony on the use of a "polar pack", a device he had never used and had not studied. *Id.* at 46. The trial court properly disallowed his testimony on the issue due to the fact he was not qualified to testify on that specific issue. *Id.* at 54.

Though technically the expert witness was a podiatric surgeon by title, she did not have sufficient knowledge of the standard of care for any given surgery. Dr. James could speak to the

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standard of care for surgeries relating to ankles or feet, but not meniscus surgery; her scope of knowledge did not extend to knee issues, because she had never worked in that field. Dr. James did not have sufficient knowledge of the procedure at issue in this case, and her testimony should not have been admitted.

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### CONCLUSION

The expert witness was not qualified to testify at trial. Because the trial court wrongly allowed the testimony of an unqualified expert witness, the decision must be reversed and remanded.

Respectfully Submitted,

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### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by regular U.S. Mail, this third day of November, 2014, on the following:

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