

July 2025 MPT-1 Item

Lowe v. Jost

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE. For personal use only.

May not be reproduced or distributed in any way.

Lowe v. Jost

FILE

Memorandum to examinee.....	1
Excerpts of verified complaint	2
Affidavit of Karen Baines	3
Affidavit of Dr. Emil Jost	4
Excerpts from motion hearing testimony	5

LIBRARY

Franklin Rule of Evidence 702	9
Franklin Rule of Civil Procedure 56	9
Jacobs v. Becker , Franklin Court of Appeal (2020).....	10
Smith v. McGann , Franklin Court of Appeal (2004).....	12

LOPEZ & NICHOLS LLP
Attorneys at Law
12 Main Street
Centralia, Franklin 33705

To: Examinee
From: Sydney Nichols
Date: July 29, 2025
Re: Lowe v. Jost

We represent Dr. Emil Jost in a medical malpractice action. The complaint alleges that Dr. Jost was negligent in performing a hip replacement on Alice Lowe. Dr. Jost's defense is that he was not negligent and that any injuries suffered by Ms. Lowe were caused by her failure to follow post-surgery precautions and her subsequent fall.

We have retained an expert witness: Dr. Ariel Shulman, professor of orthopedics at Olympia University Medical School. Ms. Lowe has also retained an expert witness: Dr. Robert Ajax, a practicing orthopedic surgeon. Each party has filed a motion to exclude the testimony of the opposing party's expert witness; the motions were argued last week. We have also filed a motion for summary judgment. The judge will be deciding the motions to exclude expert testimony and our summary judgment motion at the same time.

I need you to draft the section of our brief arguing that

(1) the Court should qualify Dr. Shulman as an expert and admit her opinion testimony;

(2) the Court should not find Dr. Ajax to be a qualified expert, but even if he is qualified, should exclude all of his proffered opinion testimony; and

(3) even if the Court qualifies Dr. Ajax as an expert, the Court should grant our motion for summary judgment because the plaintiff has failed to offer any admissible evidence on elements of her malpractice claim.

Do not draft a separate statement of facts but incorporate the relevant facts into your argument. Using appropriate headings, you should persuasively argue that both the facts and the law support our position. Contrary authority and facts should also be cited, addressed in the argument, and explained or distinguished. Be sure to anticipate and respond to opposing arguments as we may not be allowed to submit a reply brief.

EXCERPTS OF VERIFIED COMPLAINT

Alice Lowe,

Plaintiff,

v.

Case No. 2024-CV-534

Emil Jost, MD,

Defendant.

STATEMENT OF FACTS

...

4. Ms. Lowe consulted with Dr. Jost because she had severe pain in her left hip. Dr. Jost diagnosed Ms. Lowe with arthritis and recommended that she undergo a hip replacement. Ms. Lowe agreed to the procedure, and Dr. Jost performed a hip replacement of Ms. Lowe's left hip on March 1, 2022, in Centralia, Franklin.

5. Ms. Lowe followed all post-operative requirements set by Dr. Jost. She went to physical therapy and followed the prescribed limitations on twisting and bending.

6. On March 16, 2022, Ms. Lowe was walking with the aid of a cane around her condominium complex. She suddenly felt a sharp and excruciating pain that caused her to drop her purse. She fell to the ground in pain.

7. Ms. Lowe was rushed to the emergency room of Franklin General Hospital. The examining physician told Ms. Lowe that she had a small fracture of the femur (thighbone) and a dislocated hip.

8. On March 20, Ms. Lowe had a surgery consult with Dr. Harry Nix, who determined that Ms. Lowe had a small fracture of her femur and a severely dislocated left hip. Dr. Nix told Ms. Lowe that she needed a hip revision surgery (a second hip replacement) as soon as possible.

9. Ms. Lowe had revision surgery on March 21, 2022. Dr. Nix removed the original prosthetic hip, which was out of place and damaged, and replaced it with a new prosthetic.

10. Ms. Lowe followed all post-operative requirements set by Dr. Nix and is now fully recovered.

11. As a result of the improperly placed prosthetic hip, Ms. Lowe suffered severe pain. In addition, she incurred costs for the revision surgery and missed work for six weeks.

* * * *

AFFIDAVIT OF KAREN BAINES

STATE OF FRANKLIN

SURREY COUNTY

1. I, Karen Baines, first being duly sworn, make oath that I am a resident of Cloverdale Condominiums in Centralia in the State of Franklin.
 2. Alice Lowe is my neighbor.
 3. On March 16, 2022, I was walking my dog around the condominium complex. I saw Ms. Lowe walking with the assistance of a cane. I was about 25 feet away from Ms. Lowe.
 4. I saw Ms. Lowe drop her purse, which landed on the pavement. I yelled to her that I would be happy to pick it up for her. She said that she didn't need my help and then she bent over to pick up her purse. To pick up the purse, she bent forward at the waist and touched the ground with her hands.
 5. Immediately after picking up the purse and then standing back up, Ms. Lowe cried out in pain. She then fell to the pavement. I called 911, and an ambulance came and took her away.
 6. Further affiant saith not.
- Dated and signed this 2nd day of April, 2025.

AFFIDAVIT OF DR. EMIL JOST

STATE OF FRANKLIN

SURREY COUNTY

1. I, Dr. Emil Jost, first being duly sworn, make oath that I am a physician licensed to practice in the State of Franklin. I graduated from Franklin University Medical School, and I am a board-certified orthopedic surgeon, having completed a residency in orthopedic surgery at Franklin General Hospital.
2. On February 12, 2022, Alice Lowe came to my office to discuss a hip replacement. I ordered X-rays of Ms. Lowe's hips and, after examining the X-rays, told Ms. Lowe that she had serious osteoarthritis in her left hip and recommended that she have a hip replacement. I then scheduled the surgery. As best I could determine, Ms. Lowe complied with pre-surgical preparations and tests.
3. On March 1, 2022, Ms. Lowe was admitted to Franklin Medical Center for a hip replacement of her left hip. I performed the surgery, replacing her damaged hip with a prosthetic hip. After I completed the surgery, Ms. Lowe went to the post-anesthesia care unit where she underwent a single anteroposterior ("front-to-back view") X-ray. I did not request, and Ms. Lowe did not undergo, any additional X-rays after the surgery.
4. The day after the surgery, I told Ms. Lowe that, for six weeks, she should not bend more than 90 degrees at the waist and should not twist at the hip. She was scheduled for six weeks of physical therapy. At the first meeting, the physical therapist reminded Ms. Lowe of the precautions against bending and twisting.
5. Immediately after surgery, as directed by me and the physical therapist, Ms. Lowe used a walker to assist her when she walked. Two weeks after Ms. Lowe began physical therapy, the physical therapist (in consultation with me) told Ms. Lowe that she could begin using a cane instead of a walker, thus allowing her hip to be more weight-bearing. She was reminded again about the precautions against bending and twisting.
6. I had no further contact with Ms. Lowe. She failed to appear for her scheduled checkup six weeks after the surgery.
7. Further affiant saith not.

Not for public distribution. For personal use only.

Dated and signed this 2nd day of April, 2025.

Do Not Copy

EXCERPTED HEARING TESTIMONY OF DR. ARIEL SHULMAN

Direct Examination by Defendant's Attorney Sydney Nichols

Q: Could you state your name and your educational background for the Court?

A: My name is Ariel Shulman. I am a 2000 graduate of Franklin University, and I graduated from the University of Franklin Medical School in 2004. I completed a residency in orthopedic surgery at Franklin Medical Center. I was a resident from 2004 to 2009. I am board-certified in orthopedics. I am currently a professor of orthopedics at Olympia University Medical School.

Q: What does it mean to be "board-certified"?

A: It means that I have finished my residency in orthopedics and that I have passed the board certification exam.

Q: Are you currently practicing orthopedics?

A: No, I am teaching orthopedics at the Olympia University Medical School.

Q: Do you have any specialties within orthopedics?

A: I teach students how to do knee and hip replacements.

Q: Does your practice currently involve any actual hip replacements?

A: Currently I teach a simulated joint replacement class to medical students. In the past, from 2009 to 2019, I was in private practice in Olympia, and my practice was limited to hip and knee replacements. I probably performed an average of 100 knee and hip replacements per year during that time.

Q: Does the standard of care in Olympia equate with the standard of care in Franklin?

A: Well, Olympia has a much smaller medical community than Franklin. But the practice of orthopedics is pretty much the same in both states.

Q: Have you written any articles in the medical field?

A: Yes, I have written three articles on the proper procedures for knee replacement.

Q: Have you reviewed the records of Ms. Lowe's hip replacement that was performed by Dr. Jost?

A: Yes, I have reviewed all the surgical and medical records. I have also performed a physical examination of Ms. Lowe.

Q: Are you aware of the issues in this litigation?

A: Yes, I have reviewed the complaint and answer in this case.

Q: What is your opinion as to the surgery? Do you believe that Dr. Jost's performance of the hip replacement met the standard of care for an orthopedic surgeon in the community of Franklin?

A: Yes, I believe his care was well within the standard of care in the community.

Q: What is the basis of your opinion?

A: I base my opinion on my long experience performing hip replacements. And I keep up with the medical literature in the area.

Q: Is there any literature that you would refer to in this area?

A: I just follow all the articles on joint replacement that are in the *Journal of the American Medical Association (JAMA)* and *The New England Journal of Medicine*. They are considered the most up-to-date and reliable sources of information in medicine.

Q: Do you attend conferences on joint replacement?

A: I attend them regularly. I also present lectures at conferences annually discussing the appropriate procedures for joint replacements.

Q: Could you elaborate on your opinion that Dr. Jost's treatment met the standard of care in the area?

A: I reviewed the notes from the surgery. Once all the permanent prosthetic components were in place, the hip was taken through range-of-motion testing and stability testing in the operating room while the patient was still under anesthesia. After that testing confirmed that range of motion and alignment of the components were acceptable, Dr. Jost closed the incision. He ordered and reviewed a post-operative X-ray to confirm that the new hip was properly situated. Dr. Jost's surgical management of the patient, the manner in which he carried out the surgery, and his medical assessment of the patient's condition were at all times appropriate and fully comported with accepted standards of surgical care. In my opinion, no act or omission attributable to Dr. Jost proximately caused any of the injuries that the patient sustained.

Dr. Jost also gave Ms. Lowe specific instructions not to bend or twist for six weeks after surgery. The reason for these precautions is that twisting and/or bending can cause a dislocation of the hip and possible injury to the femur. Giving

such instructions comports with the recognized standard of medical care for hip replacements.

In my opinion, Ms. Lowe's fracture did not occur during the original hip-replacement surgery. During surgery, Dr. Jost was able to fully observe the prosthetic joint, and there is no evidence that the pieces were improperly placed. The joint was stable at the conclusion of the surgery, and the X-ray done in the surgical suite supports this finding. I reviewed that X-ray myself, and there was no evidence of a fracture or of dislocation at that time.

Thus, it is my conclusion that the fracture and dislocation did not occur during or immediately after the surgery but occurred two weeks later when Ms. Lowe fell. At no time did Dr. Jost's treatment depart from good and accepted standards in the community.

* * * *

Cross-Examination by Plaintiff's Attorney Jeffrey Mansfield

Q: So, to be clear, you have not practiced orthopedics in Franklin since your residency in 2009, is that correct?

A: Yes.

Q: And the 10 years you were in practice from 2009 until 2019, you practiced exclusively in Olympia, right?

A: Yes.

Q: And since 2019, you have not performed even one hip replacement on a living patient?

A: That is correct.

Q: And you have not made a thorough comparison of the population and availability of medical care in Olympia and Franklin.

A: That is correct.

* * * *

EXCERPTED HEARING TESTIMONY OF DR. ROBERT AJAX

Direct Examination by Plaintiff's Attorney Jeffrey Mansfield

Q: What is your name and educational background?

A: I am Robert Ajax. I completed my bachelor's degree in biology at Franklin State University in 1998 and received my MD degree from Franklin State University in 2002. I completed my residency in orthopedics at Olympia General Hospital in the state of Olympia in 2007. I have a practice in orthopedics in Franklin, and I am board-certified in orthopedics.

Q: Are you familiar with the standard of care in hip replacements in the state of Franklin?

A: Yes, I currently practice in Franklin.

Q: Do you specialize in any type of orthopedics?

A: I do all of it—fractures, knee replacements, hip replacements.

Q: How many hip replacements have you done since you finished your residency?

A: Probably 50.

Q: Did you do any during your residency?

A: I assisted in over 100. I probably did about 20 myself.

Q: What is your opinion about the care that was given to Ms. Lowe during the hip-replacement surgery performed by Dr. Jost?

A: Dr. Jost departed from good and accepted medical practice in failing to order another X-ray from a different position. A second X-ray, from a different angle, might have shown that the prosthesis was out of place or that there was a broken bone. Because he did not order X-rays from different positions, he could not see whether there was a bone break or a misplaced prosthesis.

Q: On what evidence do you base this conclusion?

A: Dr. Jost did just one X-ray after surgery. That X-ray was front-to-back. That practice did not comport with the standard of care in Franklin.

* * * *

FRANKLIN RULES OF EVIDENCE

Rule 702. Testimony by Expert Witnesses

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 if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

FRANKLIN RULES OF CIVIL PROCEDURE

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. 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. The court should state on the record the reasons for granting or denying the motion.

...

Jacobs v. Becker
Franklin Court of Appeal (2020)

Elise Jacobs has sued Dr. Carl Becker, a surgeon, for malpractice claiming that Dr. Becker failed to properly treat her post-surgical wound and that, as a result, she needed additional surgery and suffered intense pain. The trial court granted summary judgment to Dr. Becker. We affirm.

In support of his motion for summary judgment, Dr. Becker presented the affidavit of an expert witness, Dr. Otto, a surgeon practicing in the state of Franklin. In the affidavit, Dr. Otto stated that Dr. Becker's treatment of Ms. Jacobs at all times met the standard of care in the community. Dr. Otto concluded that the wound became infected, which is a common post-surgical occurrence. It was undisputed that Dr. Becker had prescribed antibiotics for Ms. Jacobs, and by the patient's admission, she failed to use them as prescribed. Ms. Jacobs did not present any expert testimony regarding her malpractice claim.

We have consistently held that a plaintiff must prove three elements to establish a prima facie case for negligence: (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. There is no question that Dr. Becker owed a duty to Ms. Jacobs. The standard of care for physicians 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.

Therefore, to succeed on a motion for summary judgment, the defendant must show that the plaintiff has failed to establish a factual basis for any of these elements. In ruling on summary judgment, the court must view the evidence in the light most favorable to the nonmoving party.

In addition, the Franklin Supreme Court has held that a Rule 56 motion for summary judgment "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 at trial" should be granted. *Alexander v. ChemCo Ltd.* (Fr. Sup. Ct. 2003). In such a situation, there can be "no genuine issue as to any material fact,"

since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Id.* A material fact is a fact that is essential to the establishment of an element of the case and determinative of the outcome. "The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* In other words, if a plaintiff fails to produce any evidence to prove an element of the case on which that plaintiff bears the burden of proof, then the defendant is entitled to summary judgment.

Expert testimony is required in medical malpractice cases because only expert testimony can demonstrate how the required standard of care was breached and how the breach caused the injury to the plaintiff. A party's failure to provide any expert testimony on causation or the standard of care justifies an adverse ruling on summary judgment.

Because Ms. Jacobs failed to present expert testimony in support of her claim, the trial court properly granted summary judgment to Dr. Becker.

Affirmed.

Smith v. McGann
Franklin Court of Appeal (2004)

The only issue before us in this medical malpractice case is how to properly utilize a newly enacted statute, Franklin Civil Code § 233. This statute was enacted to clarify the law surrounding the introduction of expert testimony following the Franklin Supreme Court's determination that Franklin would adopt the United States Supreme Court's approach in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in interpreting our own evidentiary rules. *Park v. Green* (Fr. Sup. Ct. 1999). In *Daubert*, the Supreme Court clarified that "general acceptance" was no longer the standard for determining the reliability of expert testimony. Instead, the trial court had broader latitude to determine whether an expert's "reasoning or methodology properly can be applied to the facts at issue." Under *Daubert*, the trial court is the "gatekeeper" to determine whether expert testimony is admissible.

Following the decision in *Park*, Franklin Rule of Evidence 702 was amended to be consistent with *Daubert*. Three years later, the legislature passed Franklin Code § 233, which echoed the *Daubert* criteria for determining the reliability of expert testimony.

In the case before us, the plaintiff, Manuel Smith, alleged that defendant Dr. Jenna McGann, an orthopedist, failed to diagnose a fracture of Smith's tibia, causing him great pain until the fracture was properly diagnosed. Smith went to Dr. McGann on June 1, 1999, claiming leg pain. Dr. McGann took one X-ray of his leg and found nothing wrong. Two months later, Smith saw another physician, who took further and more extensive X-rays and found the tibial fracture. Smith claimed that Dr. McGann's care fell below the standard of care in Franklin for this type of condition.

At the *Daubert* hearing, where the trial court determined whether each party's experts were sufficiently qualified to testify, the plaintiff proffered two physicians: Dr. Jeff Adams, an orthopedist who practiced medicine in the state of North Brunswick, which is over 800 miles from Franklin; and Dr. Sylvia Brown, an internal medicine specialist in the state of Franklin. Because the trial court refused to admit the testimony of either physician, the trial court dismissed the plaintiff's case. This appeal followed.

First, we turn to the testimony of Dr. Adams. Generally, experts can testify about the standard of care for a specialist only if the experts specialize in the same or a similar

specialty that includes the performance of the procedure at issue. Although it is not necessary for the expert witness testifying to the standard of care to have practiced in the same community as the defendant, the witness must demonstrate familiarity with the standard of care where the injury occurred. Dr. Adams, an orthopedist, testified that he had studied the demographics of Franklin and of North Brunswick. His study demonstrated that the population and the availability of medical care were quite similar. He also testified that the standard of care in orthopedics was virtually the same in Franklin and in North Brunswick. He was properly qualified as an expert in orthopedics.

But what Franklin Code § 233 reminds us is that qualifications and reliability remain separate and independent prongs of the *Daubert* inquiry. A witness is *qualified* as an expert if he is the type of person who should be testifying on the matter at hand. An expert opinion is *reliable* if the opinion is based on a scientifically valid methodology. Conflating the inquiries is legal error.

Under *Daubert*, the question remains whether Dr. Adams's testimony was reliable. Dr. Adams testified that the fracture was not visible in the X-ray taken on June 1, 1999. He based that opinion on his many years of experience in orthopedics, the many articles he had read and conferences he had attended, and the fact that other physicians relied on his diagnoses of fractured bones. While these factors do not fit neatly into the categories listed in the statute, we must remember that the statute only provides examples and that courts are instructed to "utilize any other factors" we deem appropriate. We conclude that Dr. Adams was qualified and that his testimony was reliable. He should have been allowed to testify as an expert.

As for the plaintiff's second witness, Dr. Brown, her specialty was internal medicine, not orthopedics. We have held that a physician does not have to practice in, or be a specialist in, every area in which she offers an opinion, but the physician must demonstrate that she is "sufficiently familiar with the standards" in that area by her "knowledge, skill, experience, training, or education" to satisfy Rule 702.

Under Franklin Rule of Evidence 702, to be qualified as an expert the witness must possess scientific, technical, or specialized knowledge on all topics that form the basis of the witness's opinion testimony. Accordingly, in *Wyatt v. Dozier* (Fr. Sup. Ct. 2000), the Franklin Supreme Court held that the trial judge did not abuse his discretion by excluding

the testimony of a pediatrician who attempted to testify about the standard of care for an obstetrician. Because the pediatrician was not sufficiently familiar with the standards of obstetrics by knowledge, skill, experience, training, or education, she was not qualified to give expert opinion testimony about that specialty. Similarly, here we agree with the trial court and find that Dr. Brown was not qualified as an expert in orthopedics.

Even though we find that Dr. Brown was not qualified and could end our analysis there, we feel that this case provides fertile ground for analyzing the reliability of expert testimony. Our cases recognize many different factors courts can use to assess the reliability of expert testimony. One of these factors is the degree to which the expert's opinion and its basis are generally accepted within the relevant community. We have also considered whether experts in that field would rely on the same evidence to reach the type of opinion being offered. See *Ridley v. St. Mark's Hospital* (Fr. Ct. App. 2002) (expert's opinions were based on sufficiently reliable methodology when he based his conclusions on medical records, CT scans, medical notes, and deposition testimony). Speculation about what might have occurred had the facts been different can never provide a sufficiently reliable basis for an expert opinion. The opposing party bears responsibility for examining the basis for the opinion in cross-examination. However, "if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury, it must be excluded." *Park v. Green*. An expert opinion is fundamentally unsupported when it "fails to consider the relevant facts of the case." *Id.*

Even when an expert is qualified and the expert's testimony is based on reliable methods, the trier of fact must still—as with any other witness—determine whether the witness is credible. The factual basis of an expert opinion in the particular case before the court goes to the credibility of the testimony, not its admissibility. Likewise, even if a court finds that an expert's qualifications satisfy the baseline for admissibility, the extent and substance of those qualifications can affect the credibility of that expert.

Here, Dr. Brown testified that, although not an orthopedist, she did treat many bone fractures. She said that, in her reading of the initial X-ray, there was the possibility of a fracture. She also testified that Dr. McGann fell below the standard of care in not ordering further X-rays on June 1. We affirm the finding of the trial court that Dr. Brown was not qualified as an expert in orthopedics. In addition, she did not demonstrate that her

methods were reliable. Her testimony as to causation was both speculative and without reliable basis.

The decision of the trial court dismissing the case is reversed based on the trial court's erroneous exclusion of the testimony of Dr. Adams. We, however, affirm the decision of the trial court excluding the testimony of Dr. Brown.