

BRANDON KUHN, a minor, by STEPHANIE KUHN and MICHAEL KUHN, his guardians, and STEPHANIE KUHN and MICHAEL KUHN, in their own right, Plaintiffs vs. CHAMBERSBURG HOSPITAL and MICHAEL GROSSBERG, M.D., Defendants, C.P. Franklin County Branch, Civil Action - Law, No. A.D. 1997 - 1

Kuhn v. Chambersburg Hospital and Michael Grossberg, M.D.

1. To establish a prima facie case of medical malpractice, a plaintiff must establish the elements of duty, breach, proximate cause and damages.
2. In a medical malpractice action, a claimant must also present expert testimony that the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered.
3. The trial court has discretion on whether to permit a witness to testify as an expert.
4. In Pennsylvania, an expert witness must have any reasonable pretension to specialized knowledge on the subject matter under investigation.
5. In a medical malpractice action for improper emergency room treatment of neonatal seizures, an expert witness must possess some actual experience as an emergency room physician if he or she is not board certified in emergency room medicine.
6. A physician with duties as a hospital administrator is not qualified to testify as an expert of emergency room medicine.

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OPINION

WALKER, P.J., June 11, 1999

Factual and Procedural Background

This action was brought by the plaintiff parents on behalf of their son, Brandon Kuhn, in a negligence suit against the defendants Chambersburg Hospital and Dr. Michael

Grossberg. The plaintiffs in their January 2, 1997 complaint alleged that their 13-month-old son Brandon arrived in the Chambersburg Hospital emergency room at 7:00 AM on December 31, 1992 after awaking at 4:30 AM with fever symptoms that later developed into seizures. The complaint further alleged that within minutes the emergency room staff telephoned Dr. Michael Grossberg, the pediatrician on call. While awaiting Dr. Grossberg's arrival, the emergency room physician attempted repeated times to stop the seizures by administering medication through an intravenous line. The emergency room physician was unsuccessful in getting an adequate intravenous line in the infant until Dr. Grossberg arrived at approximately 8:00 AM. A successful intravenous line was placed in Brandon at 8:15, and the seizures finally halted after a total of two hours.

Before the December 31, 1992 seizures, the plaintiffs alleged that Brandon was a healthy, normally developing infant. They further alleged, however, that after the seizures Brandon regressed in his speech development and began to show signs of a behavioral disorder known as Pervasive Developmental Disorder (PDD). In bringing suit the plaintiffs claimed that the medical treatment by the emergency room staff of the Chambersburg Hospital was negligent because of the staff's inability to get a successful intravenous line started until Dr. Grossberg's arrival. The plaintiffs claimed that the hospital's negligence, along with Dr. Grossberg's tardy arrival, unnecessarily prolonged Brandon's seizures, and therefore increased the harm to Brandon and furthered the extent of his injuries.

To provide evidence of the hospital's negligence, the plaintiffs sought to introduce the expert testimony of Dr. Richard Bonaforte. Dr. Bonaforte is a board certified pediatrician working in an administrative position at the Jersey City Medical Center. Dr. Bonaforte does not specialize in emergency medicine, is not board certified in emergency medicine, and does not work full time directly on

the emergency room floor caring for patients. His employment duties consist of oversight, protocol, and quality assurance in the overall hospital, which includes the emergency room.

After an in camera hearing in judge's chambers, this court ruled that Dr. Bonaforte's testimony was excluded because he was not qualified as an expert witness. Because Dr. Bonaforte was the plaintiff's sole expert as to the care of emergency room physicians, the defendant Chambersburg Hospital filed a motion for summary judgment. The court granted summary judgment to the Chambersburg Hospital and dismissed Dr. Bonaforte. A subsequent trial resulted in a hung verdict against the remaining defendant Dr. Grossberg. This appeal of the court's grant of summary judgment to the Chambersburg Hospital followed.

Discussion

Under Pa.R.Civ.P. 1035.2, summary judgment may be granted as a matter of law: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. Summary judgment may only be granted where the right is free and clear from doubt. *Drapeau v. Joy Technologies, Inc.*, 447 Pa. Super. 560, 563, 670 A.2d 165 (1996). The moving party has the burden of proving there is no genuine issue of material fact. *Drapeau*, at 563. The record and any inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* Any doubt must be resolved against the moving party. *Id.* It is in this light that the above stated issues must be determined.

Here, defendant Chambersburg Hospital moved for summary judgment upon the exclusion of plaintiff's expert witness, Dr. Richard Bonaforte. To establish a prima facie case of medical malpractice, a claimant must establish the requisite elements of duty, breach, proximate cause, and damages. *Mitzelfelt v. Kamrin*, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990). In addition, an expert witness must testify "to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." *Id.* at 62, 584 A.2d at 892. In this case, because Dr. Bonaforte was the only expert witness relied upon by the plaintiffs to prove their claim against the hospital, the exclusion of his testimony left the above requirement unfulfilled.

The decision to permit a witness to testify as an expert lies within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Montgomery v. South Philadelphia Medical Group, Inc.*, 441 Pa. Super. 146, 151-53, 656 A.2d 1385, 1388 (1995). In order to qualify as an expert witness in Pennsylvania courts, a witness must have "any reasonable pretension to specialized knowledge on the subject matter under investigation." *McCullough v. Holland Furnace Co.*, 293 Pa. 45, 49, 141 A. 631, 632 (1928). In Pennsylvania, the standard is liberal, but it is nonetheless a standard. Here, the subject matter under investigation is the proper treatment for neonatal seizures by emergency room physicians in an emergency room setting. To have a reasonable pretension to specialized knowledge on this subject, this court believes an expert witness should possess some actual experience as an emergency room physician if the expert is not board certified in emergency medicine. While all doctors have a general knowledge of the human body, not all doctors have experience in every possible specialty in the medical profession. An ophthalmologist, for example, is not qualified to testify concerning the causes and treatment of heart

disease. *Dambacher v. Mallis*, 336 Pa. Super. 22, 43, 485 A.2d 408, 419 (1984), appeal denied, 508 Pa. 643, 500 A.2d 428 (1985).

Dr. Bonaforte graduated from medical school in 1965 and finished his pediatric training in 1968 after an internship and two year residency at Mount Sinai Hospital, New York. He then served 2 years active duty in the United States Army, stationed in Panama and working as assistant chief of pediatrics at Coco Solo Hospital. While in Panama, Dr. Bonaforte also worked in an emergency room on a rotational basis eight to ten times a month. After his military discharge, the doctor then returned to Mount Sinai for a two- year fellowship in infectious diseases. He then accepted a staff position at Mount Sinai and remained there until 1982.

While on staff at Mount Sinai from 1972 to 1982, Dr. Bonaforte was division chief of pediatric ambulatory care. In 1982, Dr. Bonaforte assumed responsibilities as chairman of pediatrics at Beth Israel in New York City. In both of these positions, Dr. Bonaforte's responsibilities were management, oversight, and quality assurance. Most recently, Dr. Bonaforte became the chief of pediatrics at the Jersey City Medical Center in 1998. His duties remain in oversight and management rather than hands-on treatment.

Dr. Bonaforte was not qualified to testify as an expert witness for the plaintiffs in this case because his experience is in administration, not emergency room care. He does not possess the firsthand experience of making the immediate determinations an emergency physician must make daily. Because the emergency room is a unique environment within a hospital, Dr. Bonaforte's experience does not enable him to assist the trier of fact in determining the proper treatment in an emergency setting. The limited hands-on emergency room experience Dr. Bonaforte possesses was acquired during an Army tour over thirty years ago. Since then, his career has focused on

administrative responsibilities instead of medical treatment of patients on a daily basis.

A hospital administrator cannot be called to testify as an expert witness about the proper treatment of patients in an emergency room. The functions of an administrator differ markedly from those of an emergency physician. An administrator's time is occupied with protocols, oversight, handling requests, and supervising. His time is not spent directly, physically in the emergency room treating cardiac arrests, fractures, lacerations, etc. Rather, his time is spent in an office. Experience as an emergency room doctor cannot be gained in a position as a hospital administrator any more than litigation experience can be gained by being the business manager in a large law firm.

The plaintiffs had the opportunity to acquire an expert witness with experience in emergency medicine, but chose instead to select a hospital administrator. A layman can assume the obvious difficulty a physician would have administering an intravenous line into a tiny thirteen-month-old infant. This court speculates as to whether the plaintiffs here would not or could not find a qualified expert in emergency medicine, as opposed to a hospital administrator whose limited experience working in an emergency room was over thirty years ago.

Wherefore, the lower court would respectfully request that plaintiff's appeal be dismissed.