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Jessen v. Chambersburg Hospital

CHRISTIAN A. JESSEN and ELLEN ROSE, Administrators of the Estate of Christian Jessen, Plaintiffs,
v. CHAMBERSBURG HOSPITAL, TIMOTHY J. SEMPOWSKI, D.O., and YIN KEONG NGEOW, M.D., Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action, No. 2000-3515

Expert Opinion, MCARE Act, Standard of Care

1. The MCARE Act, 40 P.S. §1303.101 through §1303.1115, does not define the terms "expert," "expert medical opinion," "board" and "board certification." Nevertheless, the Court has concluded that §1303.512 addressing expert qualifications refers to the qualifications of an expert physician and not to other experts.
2. The rule regarding an expert testifying on a medical matter in a medical professional liability action against a physician requires a physician's license or be engaged in or retired within the previous five years.
3. §512 neither permits nor contemplates an emergency medical technician rendering opinions on pediatric resuscitation against physicians.

Appearances:

James R. Ronca, Esq., *Counsel for Plaintiffs*

Kevin E. Osborne, Esq., *Counsel for Defendant Chambersburg Hospital*

Michael M. Badowski, Esq., *Counsel for Defendants Timothy J. Sempowski, D.O., and Yin Keong Ngeow, M.D.*

MEMORANDUM

Walsh, J., March 10, 2006

Among the Motions in Limine filed in this case is the Motion in Limine of Defendants, Timothy J. Sempowski, D.O., and Yin Keong Ngeow, M.D. to Preclude Plaintiffs from Presenting Expert Testimony from David Padfield at Trial with Regard to Standard of Care and Causation ("Defendants' Motion"). The Court has also reviewed Plaintiffs' Response to Motion in Limine of Defendants, Timothy J. Sempowski, D.O. and Yin Keong Ngeow, M.D. ("Plaintiffs' Response"). In addition, counsel have referred the Court to the deposition transcripts, or portions thereof, of David Padfield taken on November 5, 2003, of Yin Keong Ngeow, M.D. taken September 12, 2002 and of Sally Peterson taken June 18, 2004.

Defendants' Motion and Plaintiffs' Response are not entirely specific and the Court notes the following things:

1. In paragraph 7 of Defendants' Motion, Defendants claim that Mr. Padfield is not competent to offer "opinions referable to the standards of care applicable to anesthesiologists."
2. Also in paragraph 7 of Defendants' Motion, Defendants claim that Padfield is "incompetent to render opinions as to diagnosis and causation."
3. In paragraph 9 of Defendants' Motion, counsel makes reference to "opinions of Mr. Padfield regarding diagnosis."
4. In paragraph 12 of Defendants' Motion, they ask the Court to preclude Padfield from

offering "opinions with regard to minor decedent's care and treatment."

5. In paragraph 7 of Plaintiffs' Response, counsel asserts that Padfield is "fully competent to render opinions on pediatric resuscitation." In the same paragraph, Plaintiffs' counsel concedes that Padfield "cannot offer opinions referable to the standards of care applicable to anesthesiology."

6. In paragraph 10 of Plaintiffs' Response, by reference to 40 P.S. §1303.512(d), Plaintiffs' counsel suggests that the Court can waive requirements for experts testifying on standard of care.

7. In paragraph 10 of Plaintiffs' Response, counsel suggests that Padfield should be able to "give opinions about the resuscitation." Further, in paragraph 10, Plaintiffs' assert that Padfield is "qualified to testify about patient assessment and appropriate steps to be taken in a pediatric resuscitation."

In an effort to determine what testimony the Plaintiffs seek to introduce through David Padfield and in an effort to determine precisely what testimony Defendants seek to preclude, the Court has looked to 40 P.S. §1303.512. Unless the Court is mistaken, the Court cannot find anywhere in the MCARE Act, 40 P.S. §1303.101 through §1303.1115, any definition of the terms "expert," "expert medical opinion," "board" and "board certification." Nevertheless, the Court has concluded that §1303.512 addressing expert qualifications refers to the qualifications of an expert physician and not to other experts. In support of the Court's conclusion, we offer the following:

- a. We can find no reported case in which the testimony of a non-physician expert was permitted in a medical professional liability action against a physician.
- b. It is clear that §1303.512 purports to address only medical professional liability actions against physicians and not, for example, medical professional liability actions against other kinds of healthcare providers. 40 P.S. §1303.512(a).
- c. Although the Court may waive the requirements of subsection (b) in certain circumstances, it is clear that the rule regarding an expert testifying on a medical matter (in a medical professional liability action against a physician, see subsection (a)) requires a physician's license or be engaged in or retired within the previous five years. We believe subsection (b), by its terms, makes reference to testifying experts who are physicians.
- d. Subsection (c) of §1303.512 refers to an expert testifying as to a physician's standard of care. Once again, we are hard-pressed to think of a situation in which someone "short" of a physician would be permitted to testify as to a physician's standard of care. Moreover, the third part of subsection (c) addresses board certification. We interpret board certification to refer to the certification of physicians and not to the certifications of other healthcare providers or health-related personnel such as EMTs.
- e. Our reasoning is similar to our reasoning with respect to subsection (b), the subspecialty requirement for an expert testifying on the standard of care for diagnosis or treatment may be waived but we don't interpret that to be a waiver for a non-physician testifying in a medical professional liability action against a physician.
- f. Subsection (e) speaks of waiving board certification requirements for an expert testifying as to a standard of care and, once again, reference to "board certification requirements" causes us to conclude once again that §1303.512 is intending to address the expert qualifications for physician expert witnesses.

Padfield is apparently certified in pediatric advanced life support (PALS) by the American Heart Association through a "certification program." Defendants' Response, paragraph 7. We do not interpret that to rise to the level of board certification referred to in §512 of the Act.

Further, to permit Padfield to render opinions on pediatric resuscitation squarely pits his expert opinion against that of the Defendant physicians, a result which we do not believe is either contemplated or permitted by §512. We believe any such opinion rendered by Padfield would clearly be compared by the jury to the conduct of Dr. Ngeow and would provide in their minds a "yardstick" by which the jury would evaluate Dr. Ngeow's care. We believe Padfield's opinions with regard to pediatric resuscitation would be far more relevant in a suit naming as defendant an emergency medical technician, a paramedic or another person certified in pediatric life support or pediatric advanced life support; but in a "medical professional liability action against a physician," 40 P.S. §1303.512(a), we believe Padfield's opinions on pediatric resuscitation would be more prejudicial to Dr. Ngeow vis-à-vis the standard of care to which he should be

held than it would be probative of any relevant issue in this case.

In Plaintiffs' Response, we are asked not to limit Padfield's important factual testimony, paragraph 14, and we are told that in his deposition he did testify about what he found when he arrived, the steps that needed to be taken, the steps he took when he took over the resuscitation, and the effect those steps had on Christian's recovery. Paragraph 10. We believe that Padfield should be permitted to testify as to such relevant facts and as to his credentials that allowed him, in the first instance, to be involved in Jessen's care.

ORDER OF COURT

March 10 , 2006, having considered the Defendants' Motion, the Plaintiffs' Response, the arguments of counsel and the law, it is hereby ordered that:

1. Padfield may not offer opinion as to the standard of care applicable to anesthesiology or anesthesiologists; and his opinion as to the standard of care applicable to non-anesthesiologists is not relevant.
2. Padfield may not offer opinions as to diagnosis, but he may testify as to his observations, any examination he conducted and his assessment of the patient's condition.
3. Padfield may not offer opinions that are critical of the intubation and resuscitation efforts of Drs. Ngeow, Sempowski or other doctors at Chambersburg Hospital.
4. Padfield may not testify as to his opinion regarding the standard of care as it applies to pediatric resuscitation.
5. Padfield may not testify as to the "appropriate steps" to be taken in a pediatric resuscitation.

It is further ordered that as a fact witness, Padfield may testify as to any relevant facts on matters of his personal observation or participation. He is not precluded from testifying about what he found when he arrived; the steps, based on his knowledge, education, experience and training that he decided to take and that he actually took when he intervened in the resuscitation; and he may testify regarding his observations of Christian's medical course up to the point Christian was deplaned at Hershey Medical Center.

It is further ordered that unless changed by subsequent Order of Court, this Order shall govern in large measure the issues raised by counsel in the Motion and Response relating to David Padfield's testimony and counsel calling David Padfield shall assure that he is provided a copy of this order and that he understands the nature of the testimony which this Order precludes his utterance before the jury.