

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED
January 26, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

E1999-02427-COA-R3-CV

DANUTA CARMICHAEL, daughter)	C/A NO. 03A01-9904-CV-00124
and surviving heir of)	
ELISABETH M. WICHA, deceased,)	
)	
Plaintiff-Appellant,)	
)	
)	
)	
)	
v.)	APPEAL AS OF RIGHT FROM THE
)	ANDERSON COUNTY CIRCUIT COURT
)	
)	
)	
)	
PAMELA A. BRIDGEMAN, M.D. and)	
ALEX M. ALEXANDER, M.D.,)	
)	HONORABLE CONRAD E. TROUTMAN, JR.,
Defendants-Appellees.)	JUDGE, By Interchange

For Appellant

J.D. LEE
Lee, Lee & Lee
Knoxville, Tennessee

For Appellee Bridgeman

STEPHEN C. DAVES
O'Neil, Parker & Williamson
Knoxville, Tennessee

For Appellee Alexander

ANDREW R. TILLMAN
WYNNE C. HALL
Paine, Tarwater, Bickers, and
Tillman, LLP
Knoxville, Tennessee

OPINION

Danuta Carmichael ("Carmichael") filed this medical malpractice action against Alex M. Alexander, M.D. ("Dr. Alexander") and Pamela A. Bridgeman, M.D. ("Dr. Bridgeman"), (collectively, "the defendants") alleging, *inter alia*, negligence in the diagnosis and treatment of Carmichael's mother, Elisabeth M. Wicha ("the deceased"). The trial court disallowed the proffered testimony of Dr. Cleland Blake ("Dr. Blake") as it related to the standard of care required of the defendants. The jury returned a verdict for the defendants. Carmichael appeals, arguing that the trial court erred in refusing to allow Dr. Blake's testimony regarding the standard of care. We affirm.

I.

On January 31, 1995, the deceased was admitted as a resident at Briarcliff Health Care Center ("Briarcliff") located in Oak Ridge. Dr. Alexander, a family practitioner practicing in Clinton, had been the deceased's treating physician since 1993. While the deceased was a resident at Briarcliff, however, her treating physician was Dr. Bridgeman, also a family practitioner.

On May 1, 1995, the deceased began experiencing nausea, abdominal pain, and vomiting. On at least three occasions over the next few days, Dr. Bridgeman was informed of the deceased's various complaints, including the fact that the deceased had not had a good bowel movement in four days. On each occasion, Dr. Bridgeman prescribed, by phone, medication for the deceased. She

did not personally examine the deceased during this period.

On May 5, 1995, Carmichael drove the deceased to Dr. Alexander's office. Here, the deceased complained to Dr. Alexander of intermittent aching in her lower abdomen. Her chief complaint, however, was shoulder pain. Dr. Alexander administered a cortisone injection to the deceased's shoulder.

On May 7, 1995, the deceased was found dead in her nursing home room. On May 6, 1996, Carmichael brought suit against several defendants, including Dr. Bridgeman and Dr. Alexander. The complaint alleges, among other things, negligence in examination, diagnosis, and treatment.

Drs. Bridgeman and Alexander subsequently moved for summary judgment. They supported their motions with their own affidavits affirmatively stating facts and opinions reflecting a lack of negligence on their part. In response, Carmichael proffered the affidavit of Dr. Blake, the pathologist who performed the autopsy on the deceased. Dr. Blake is board-certified in clinical pathology, anatomical pathology and forensic pathology. He has practiced his profession since 1963. According to Dr. Blake, a pathologist

in general is a physician's physician and serves as a diagnostic consultant to other physicians with problems of a wide variety of sorts of the patient in the hospital. An active pathologist has to be ready to go to the surgery and help make decisions on whether or not the segment of bowel could be taken out safely or whether some could be left in; in other words, how severe is it, is

this tumor cancer or is it not, to guide the physician in his operation actually by being in and hands-on in the operatory....

While Blake's practice is limited to pathology, he has substantial experience serving as a diagnostic consultant to physicians in other specialties, including family practice physicians treating nursing home patients.

In his affidavit, Dr. Blake states that he is "familiar with the recognized standards of acceptable professional practice pertaining to the practice of family medicine as [they] existed in Oak Ridge, Tennessee in May of 1995." Dr. Blake further states that the defendants' breach of the applicable standard of care proximately caused the deceased's death.

The trial court, in considering the defendants' motions for summary judgment, refused to consider Dr. Blake's testimony as it relates to the standard of care for family practitioners, finding that "Dr. Cleland Blake is not a qualified standard of care expert as to any of the defendant physicians in this action." The court then gave Carmichael 60 days to "file competent countervailing medical expert affidavits establishing the applicable standard of care and standard of care violations...." Within the allotted time, Carmichael filed the affidavit of Robert E. Pieroni, M.D. ("Dr. Pieroni"), an Alabama physician practicing the specialties of family medicine, internal medicine, and geriatric medicine. In his affidavit, Dr. Pieroni states that he is familiar with the appropriate standard for family practitioners, and he opines that the defendants' breach

of that standard proximately caused the deceased's death. Upon presentment of Dr. Pieroni's affidavit, the trial court denied the defendants' summary judgment motions.

The three-day trial began on November 3, 1998. Carmichael's expert, Dr. Blake, testified that the cause of death was a bowel obstruction. The defendants' pathology expert testified that the deceased died as a result of a heart attack, a heart arrhythmia, or a stroke.

In addition to their expert in pathology, the defendants presented the testimony of two family physicians. These witnesses opined that the defendants did not breach the standard of care for family practitioners. Carmichael presented the testimony of Dr. Pieroni, who stated that, in his opinion, the defendants' breach of the standard of care of family practitioners proximately caused the death of the deceased. Carmichael also presented, in the form of an offer of proof outside the presence of the jury, Dr. Blake's testimony, in which he opined that Dr. Bridgeman breached the standard of care required of family practitioners and that the breach proximately caused the deceased's death.¹

At the conclusion of the trial, the jury returned a verdict for the defendants.

¹Interestingly enough, Dr. Blake expressed no opinion as to Dr. Alexander in this offer of proof.

II.

T.C.A. § 29-26-115(b) (1980) provides as follows:

No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a) *unless he was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make his expert testimony relevant to the issues in the case and had practiced this profession or specialty in one of these states during the year preceding the date that the alleged injury or wrongful act occurred.* This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection when it determines that the appropriate witnesses otherwise would not be available.

(Emphasis added).

A close reading of this statute reveals that it does not require that an expert witness practice the same specialty as the defendant. **Searle v. Bryant**, 713 S.W.2d 62, 65 (Tenn. 1986). Rather, the necessary inquiry is whether the licensed witness is sufficiently familiar with the standard of care of the defendant's specialty to make his expert testimony relevant to the issue in question. **Cardwell v. Bechtol**, 724 S.W.2d 739, 754 (Tenn. 1987); **Goodman v. Phythyon**, 803 S.W.2d 697, 702 (Tenn.Ct.App. 1990).

A trial court has broad discretion in determining the qualifications of experts and the admissibility of their

testimony, and its determinations will generally not be disturbed on appeal absent some abuse of discretion. **Cardwell**, 724 S.W.2d at 754; **Mabon v. Jackson-Madison County Gen. Hosp.**, 968 S.W.2d 826, 829 (Tenn.Ct.App. 1997).

III.

Carmichael argues on appeal that the trial court improperly disallowed Blake's testimony regarding the standard of care of family practitioners. More specifically, she argues that Blake's testimony is relevant to the issue at hand because Blake's experience as a consulting pathologist renders him sufficiently familiar with the standard of care required of family practitioners.

In support of her argument, Carmichael relies heavily upon the cases of **Searle v. Bryant**, 713 S.W.2d 62 (Tenn. 1986), and **Stokes v. Leung**, 651 S.W.2d 704 (Tenn.Ct.App. 1982). In **Searle**, the defendant's specialty was surgery, and the plaintiff's proffered expert witness was an infectious disease specialist and clinical microbiologist. **Searle**, 713 S.W.2d at 64, 65. The issue to be resolved was the treatment and management of a post-surgical infection. **Id.** at 65. The court found that the proffered expert testimony was relevant to the issue to be resolved because the expert's testimony made it clear that he was familiar with the standard of care applicable to surgeons in the prevention and treatment of surgical wound infections. **Id.**

In **Stokes**, the defendant specialized in internal medicine and cardiology. **Stokes**, 651 S.W.2d at 706. The plaintiff's proffered expert was a non-treating physician who specialized in psychiatry. **Id.** At issue was the defendant's treatment of a patient with a psychiatric disorder. **Id.** The court allowed the expert's testimony, finding that it was relevant to the issue to be decided because the expert testified that he was familiar with "the standards of practice in psychiatry and the standards of practice with regard to psychiatric patients in general medicine." **Id.**

We recognize that an expert in one specialty may, in appropriate circumstances, be sufficiently familiar with the standard of care of another specialty to render his or her testimony relevant to the resolution of an issue common to both specialties. We agree with Carmichael that **Searle** and **Stokes** are prime examples of this principle. We disagree, however, with Carmichael's assertion that the trial court abused its discretion in declining to find a commonality here. We are cognizant of the fact that Blake believes his experience as a diagnostic consultant for family practitioners renders him familiar with the standard of care required of such family practitioners. However, the claims against the defendants here arise from the evaluation and treatment of abdominal complaints. It seems to us that a pathologist's diagnosis, being based primarily on the laboratory examination of body tissue or fluid, is a substantially more narrow one than that involved in family medicine. A family

practitioner is faced with a much broader universe of potential factors to consider in rendering his or her diagnosis. We find and hold that the trial court did not abuse its discretion in disallowing Blake's testimony as to a family practitioner's standard of care.

Carmichael also relies on certain other cases to support her argument that Dr. Blake's standard-of-care testimony should have been allowed. Specifically, Carmichael asserts that the cases that have disallowed an expert's testimony did so either because the expert admitted unfamiliarity with the appropriate standard of care, see **Cardwell v. Bechtol**, 724 S.W.2d 739, 752 (Tenn. 1987) (experts in orthopedics and neurology admitted unfamiliarity with standard of care of osteopaths); **Goodman v. Phythyon**, 803 S.W.2d 697, 700 (Tenn.Ct.App. 1990) (anesthesiologist admitted unfamiliarity with the standard of care required in ophthalmology); **Johnson v. Lawrence**, 720 S.W.2d 50, 54 (Tenn.Ct.App. 1986) (a neurologist and a surgeon/family practitioner admitted unfamiliarity with standard of care required of chiropractors), or because the expert's own testimony clearly indicated an unfamiliarity with the appropriate standard of care, see **Mabon v. Jackson-Madison County Gen. Hosp.**, 968 S.W.2d 826, 830 (Tenn.Ct.App. 1997) (expert's testimony revealed his belief that standard of care was premised on a national standard of care and that he had no knowledge of the relevant community); **Ayers v. Rutherford Hosp., Inc.**, 689 S.W.2d 155, 163 (Tenn.Ct.App. 1984) (expert's testimony clearly revealed that he had no knowledge of the relevant community). Carmichael argues that because Blake affirmatively professed a familiarity with the

applicable standard of care, and because his testimony does not clearly indicate otherwise, the trial court should have allowed his testimony.

We find nothing in the cases suggesting that an expert witness must discredit himself before the trial court may disallow his testimony. Furthermore, we find no support for the proposition that a witness' statement that he or she is familiar with the standard of care, *ipso facto*, renders that testimony relevant and admissible. Accordingly, we find Carmichael's arguments to be without merit.

If we were inclined to find that the trial court abused its discretion -- and we repeat that we do not so find -- such would not, in this case, constitute reversible error. Under Rule 36(b), T.R.A.P., we cannot set aside an otherwise appropriate final judgment "unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." The trial court disallowed Blake's testimony as to the standard of care 20 months prior to trial. Carmichael was given the opportunity to procure another expert. Carmichael in fact found Dr. Pieroni, who met the qualifications of T.C.A. § 29-26-115(b). Dr. Pieroni's testimony was substantially similar to Blake's proffered, but disallowed, testimony. Hence, the error, had there been one, would have been harmless.²

²Dr. Alexander argues that the trial court's disallowance of Dr. Blake's testimony regarding standard of care was non-prejudicial because, in the offer of proof, Dr. Blake merely stated that Dr. Bridgeman breached the appropriate standard of care and did not level any specific criticism at Dr. Alexander. We agree with Dr. Alexander that even if the trial court's refusal to allow

IV.

The judgment of the trial court is affirmed. This case is remanded for collection of costs, pursuant to applicable law. Costs on appeal are taxed to Carmichael.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

Herschel P. Franks, J.

Dr. Blake's testimony as to standard of care had been reversible error, it would not have affected the verdict in favor of Dr. Alexander since Dr. Blake refused to criticize Dr. Alexander's treatment in his offer of proof.