IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 9, 2002 Session

CHRISTOPHER SANDLIN v. UNIVERSITY MEDICAL CENTER

Appeal from the Circuit Court for Wilson County
No. 9755 Clara Byrd, Judge

No. M2001-00679-COA-R3-CV - Filed July 25, 2002

This appeal arises from a medical malpractice suit in which Christopher Sandlin alleged the negligent delay in his medical treatment by Dr. Herbert Smith, Dr. Scott Giles and the University Medical Center resulted in residual facial deformity which could have been prevented. The jury found Dr. Smith was not guilty of negligence but found Dr. Giles guilty of negligence. The jury awarded Mr. Sandlin compensatory damages of $250,000 from UMC for the negligence of Dr. Giles. UMC appeals the qualification of the plaintiff's expert witnesses in accordance with the locality rule of T.C.A. § 29-26-115, the sufficiency of the evidence and the application of the appropriate statute of limitations. For the reasons below, we reverse the lower court's decision.

Tenn.R.App.P.3 Appeal as of Right; Judgment of the Circuit Court
Reversed and Remanded

DON R. ASH, S.J., delivered the opinion of the court, in which BEN H. CANTRELL, J., and PATRICIA J. COTTRELL, J., joined.

William C. Moody, Nashville, Tennessee, for the appellant, University Medical Center.

Richard L. Wommack, Nashville, Tennessee, for the appellee, Christopher Sandlin.

OPINION

Christopher Sandlin ("Sandlin") suffers from a rare disease known as neurofibromatosis. Neurofibromatosis causes the growth of tumors in and around the skin and nerve sheaths and may produce significant deformities around the head and neck on the facial skeleton. Sandlin was forced to undergo extensive facial surgery as a child as a result of this disease. However, he was accidentally struck in the face on July 10, 1995. On July 11, 1995, he awoke with "a little pin scratch" and no appreciable swelling. Sandlin and his mother became concerned when the injured area began to swell and he was admitted to the emergency room of the University Medical Center ("UMC") in Lebanon, Tennessee at 11:28 a.m. on the same day. Dr. Herbert Smith performed the initial physical examination of Sandlin, ordered a CT scan and observed the presence of a massive hematoma. He elected to treat the injury conservatively, as he would any other hematoma, even though he was informed the patient suffered from neurofibromatosis. Mr. Sandlin was discharged at 1:00 p.m. after being instructed to apply ice to the swelling and keep the injured area elevated. The swelling around Sandlin's hematoma became dramatically more pronounced and he returned to the UMC emergency room at 2:20 p.m. on July 12. Dr. Scott Giles examined him at 2:50 p.m. and directed the patient to continue conservative treatment of the hematoma. Sandlin was discharged at the conclusion of his first visit on July 12 at 3:08 p.m. Sandlin's face began to bleed profusely thirty minutes after he arrived at home. Approximately one and one half hours later, he returned to the emergency room at UMC for a second visit. Dr. Giles observed Sandlin's condition, conferred with a plastic surgeon and transferred the plaintiff to Vanderbilt Medical Center at 5:40 p.m. where he was admitted. The hematoma was surgically removed on July 13, 1995, but the patient suffered extensive residual facial deformity.

Sandlin filed a *pro se c*omplaint on July 12, 1996 against UMC alleging negligent medical treatment. On October 18, 1996, an amended complaint was filed adding Dr. Smith and Dr. Giles to the medical malpractice suit. Sandlin alleged the negligent delay in his medical treatment at UMC resulted in residual facial deformity which could have been prevented. On May 20, 1998, the deposition of Dr. Milton Edgerton was taken. UMC objected throughout the testimony of Dr. Milton, due to the failure to establish a proper foundation for the witness's expert testimony. Likewise, UMC filed several Motions *in limine* on December 18, 2000, including one asking the court to strike comments, questions and answers it viewed as irrelevant, inadmissible or otherwise improper from the evidentiary deposition of Dr. Milton Edgerton pursuant to the locality rule of T.C.A. § 29-26-115. The trial court denied this *motion in limine*. During the jury trial, UMC also objected to the qualification of Sandlin's other expert witness, Dr. Richard Bucci, challenging his familiarity with the standard of care in Lebanon, Tennessee or a similar community. The trial court denied UMC's objection to Dr. Bucci's testimony.

At the conclusion of the Plaintiff's proof during trial, UMC moved for a directed verdict, arguing the lack of proof of proximate cause, the statute of limitations as it related to the alleged negligence of Dr. Giles, and failure to properly qualify Sandlin's standard of care expert witnesses, namely Dr. Edgerton and Dr. Bucci. The trial court denied the motion. UMC renewed its motion for a directed verdict at the conclusion of all the proof. The trial court also denied this motion. The jury found Dr. Smith was not guilty of negligence but found Dr. Giles guilty of negligence. Sandlin was awarded $250,000 in compensatory damages from UMC for

the negligence of Dr. Giles. UMC also filed a motion for judgment in accordance with their motion for directed verdict on January 25, 2001, which was denied by the trial court as well.

UMC appeals the qualification of the plaintiff's expert witnesses in accordance with the locality rule of T.C.A. § 29-26-115. UMC argues Sandlin would be unable to meet his burden of proof on the elements of medical malpractice if the testimony of his expert witnesses had been properly excluded by the trial court for failure to demonstrate knowledge of the standard of care in Lebanon, Tennessee, the community in which the defendants practiced, or a similar community. Thus, UMC presents the following issue for appeal: Did the trial court err by denying the defendant's Rule 50.02 motion for a judgment in accordance with its motion for directed verdict because:

1. The plaintiff's standard of care expert witnesses, Dr. Bucci and Dr. Edgerton, were not properly qualified to testify.

2. There was no evidence upon which a jury could have based a verdict that the negligence of Dr. Giles was the cause in fact of an injury, which would not have otherwise occurred.

3. The allegations of negligence regarding the treatment by Dr. Giles are barred by the statute of limitations.

We reverse the lower court's decision for the reasons stated below.

I.

It is the role of the trial court to review and determine the trustworthiness of the factual basis for an expert's testimony. The trial court has broad discretion in determining the "admissibility, qualifications, relevancy and competency of expert testimony," and we will not reverse that decision unless there is an abuse of that discretion. McDaniel v. CSX Transp., 955 S.W.2d 257, 263 (Tenn. 1997); Shelby County v. Barden, 527 S.W.2d 124, 131 (Tenn. 1975). "Abuse of discretion" does not denote intentional wrong, bad faith or misconduct on the part of the trial court. Foster v. Amcon International, Inc., 621 S.W.2d 142, 145 (Tenn. 1981). Instead, it "simply means an erroneous conclusion or judgment on the part of the trial judge." Id.

The abuse of discretion standard requires us to consider (1) whether the decision has a sufficient evidentiary foundation, (2) whether the trial court correctly identified and properly applied the appropriate legal principles, and (3) whether that decision is within the range of acceptable alternatives. State v. Kaatrude, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Reversal of the trial court's discretion is appropriate where the trial court's action is clearly erroneous or where there has been an abuse of discretion. Thomas v. Harper, 385 S.W.2d 130 (Tenn. Ct. App. 1964). While we will set aside a discretionary decision if it lacks an adequate evidentiary foundation, or it is contrary to governing law, we will not substitute our judgment for that of the trial court merely because we would have chosen a different alternative.

II.

A plaintiff's burden in these cases is defined in T.C.A. § 29-26-115, which provides in pertinent part:

> (a) In a medical malpractice action, the claimant shall have the burden of proving by qualified expert testimony:
>
> (1) **The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which he practices or in a similar community at the time the alleged injury or wrongful action occurred** (*emphasis added*);
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries, which would not otherwise have occurred. T.C.A. § 29-26-115.

The "locality rule" component of the statute refers to the requirement a medical malpractice plaintiff show "the defendant failed to act with ordinary and reasonable care when compared to the customs and practices of physicians from a particular geographic region." Sutphin v. Platt, 720 S.W.2d 455, 457 (Tenn. 1986). The Tennessee Supreme Court described the legislative purpose underlying this requirement by stating, "There is an undeniable legitimate state interest in assuring that doctors charged with negligence in this State receive a fair assessment of their conduct in relation to community standards similar to one in which they practice." Id. The expert competency requirement and the locality rule were described as follows:

> "This geographic component to the relevant standard of care evolved out of a recognition that medical customs and practices varied depending on the particular area in which the physician practiced. Traditionally, the relevant geographical area was strictly defined. The plaintiff was required to introduce evidence concerning the standard of care in the strict locality where the defendant worked. However, in light of a modern trend towards the national standardization of medical practices, especially in specialties, courts and legislatures have gradually expanded the relevant geographic area for providing the medical standard of care. Indeed, the Tennessee legislature has adopted a somewhat broadened definition of the geographic component to the medical standard of care, requiring proof of "the recognized standard of acceptable professional practice…in the community in which the defendant practices or in a similar community." Id.

The court must evaluate whether the proposed expert possesses "some knowledge" as a basis for his or her opinion of the applicable standard in the relevant community. Thus, the fundamental issue to be determined by the court when ruling on the admissibility of expert testimony is whether the proposed expert can provide the basis for a "fair assessment" of the defendant's conduct in relation to community standards similar to the one in which they practice. Id.

Reference to a national standard will not automatically exclude a doctor's testimony on the basis of the locality rule. However, the medical profession's trend toward nationalization has not eliminated the statutory requirement a medical malpractice plaintiff establish through expert testimony familiarity with the standard of acceptable practice in the community where the defendant practices or a similar community. Robinson v. Lecorps, 2001 Tenn. App. LEXIS 715 (appeal pending), an unreported opinion of this Court filed in Nashville September 25, 2001

The principal case considered by the trial court was Mabon v. Jackson-Madison County Gen. Hosp., 968 S.W.2d 826 (Tenn. Ct. App. 1997). The court found the testimony of a proposed expert witness familiar with the national standard of care should be excluded because he demonstrated "a complete lack of knowledge of Jackson's medical community." The expert, Dr. Shane, testified on cross examination he did not know the population of Jackson, the number of hospitals in Jackson, if there was a medical school there, the number of doctors in Jackson, he had never been to Jackson, did not know any physicians there, and had never treated a patient there. Id. The court concluded Dr. Shane was not familiar with the standard of care in Jackson. The court also rejected Dr. Shane's bare assertion that the standard of care in Jackson, Tennessee was the same nationwide and the level of care with which the expert was familiar should have been available there. Id. Based upon such testimony, the court held:

> To qualify as an expert, a physician is not required to be familiar with all of the medical statistics of a particular community. However, a complete lack of knowledge concerning a community's medical resources would be contrary to knowledge of the required standard of care. The plaintiff's tendered expert must be familiar with the standard of care in the community in which the defendant practices or in a similar community.

Some of the general knowledge of a community's medical resources with which a proposed expert should be familiar for purposes of satisfying the locality rule were described in Roberts v. Bicknell, 2001 Tenn. App. LEXIS 605 (Tenn. Ct. App. Aug. 16, 2001), an unreported opinion of this Court filed in Jackson. "We believe it is reasonable to base such knowledge, among other things, upon information such as the size of the community, the existence or non-existence of teaching hospitals in the community and the location of the community. Without such information, it is difficult to compare communities for the purpose of satisfying the locality rule." Id. at 8.

This Court closely examined an expert's testimony regarding the applicable standard of care to determine if there was sufficient proof that Lexington, Kentucky, where the proposed expert practiced, was similar to the locality of the defendant's practice, Memphis, Tennessee. Wilson v. Patterson, 2001 Tenn. App. LEXIS 581 (Tenn. Ct. App. Aug. 10, 2001), an unreported opinion of this Court filed in Jackson August 10, 2001. Dr. Swan, the proposed expert in that case, initially testified a national standard of care was applicable, but subsequently submitted affidavits declaring the standard in Lexington, Kentucky and Memphis, Tennessee were the same as the national standard. He further testified he was familiar with the standard of care in Memphis because, like Lexington, it was a regional medical center, had a medical school, and he had testified in trials there, which involved reading medical records and depositions of other doctors in the area. Id. at *3. The defendant attempted to strike the testimony contained in the affidavits as being contradictory to his deposition testimony regarding a national standard. Id. at

*7-8. This court found the affidavits explained the deposition testimony and did not contradict them. Id. The court acknowledged a plaintiff relying on the standard of care in a similar community must present proof the community is similar to the one where the defendant physician practices. See Mabon v. Jackson-Madison County Gen. Hosp., at 831. Although Dr. Swan's testimony concerning the similarities between the medical communities of Lexington, Kentucky and Memphis, Tennessee was considered "somewhat meager," the court determined this testimony in conjunction with his knowledge of the standard of care of Memphis was barely sufficient to withstand attack at the summary judgment stage of the proceeding. Id. at *9.

III.

The factual background relevant to our consideration of this appeal is as follows:

Sandlin called two expert witnesses to testify on the issue of standard of care, Dr. Milton Edgerton and Dr. Richard Bucci. Dr. Edgerton's testimony was obtained by videotape deposition on May 20, 1998, almost thirty-two months before the trial. The proposed expert has over fifty years of experience in plastic surgery and emergency room treatment of facial hematomas, he completed a residency in plastic and general surgery at Johns Hopkins in 1951, served as the head of the plastic surgery program at Johns Hopkins from 1951 to 1970, then served as the chairman of the department of plastic surgery at the University of Virginia in Charlottesville from 1970 to 1996, at which time he elected to serve on a part time basis. He was also instrumental in the promulgation of the standard of emergency practice in the treatment of facial hematomas in Virginia. However, in spite of these impressive credentials, counsel for Sandlin failed to introduce any evidence demonstrating the doctor was familiar with the recognized standard of acceptable professional practice in emergency medicine in Lebanon, Tennessee at the time the alleged wrongful act occurred. The doctor had never visited UMC in Lebanon, Tennessee, nor is he familiar with any physicians practicing in the community. Dr. Edgerton admitted he did not know the number of doctors in the community, the size of the hospital or the specialties available in Wilson County. This testimony demonstrates a lack of familiarity with the standard of care in Lebanon, Tennessee.

Alternatively, Dr. Edgerton may have qualified to testify as an expert witness if it was established he was familiar with the standard of care in a community similar to Lebanon, Tennessee. The doctor testified generally regarding the standard of care in community hospitals in comparison to larger medical centers, and referred specifically to community hospitals in the outlying areas surrounding Charlottesville and the University of Virginia Medical Center. Dr. Edgerton indicated he has received calls from physicians in community hospitals when one of his patients presented with "a problem that was puzzling," and testified the University of Virginia Medical Center is very similar to Vanderbilt University Medical Center. Yet in contrast to the proposed expert in Wilson v. Patterson, Dr. Edgerton presented no testimony describing a familiarity with the standard of care in Lebanon, Tennessee, or as to the similarities between Charlottesville, Virginia and Lebanon, Tennessee. He has never testified in a trial in the Defendant's community, read the medical records or depositions of physicians practicing in Lebanon, Tennessee prior to this trial, or even asserted he is familiar with the standard of care in Lebanon, Tennessee "in a broad sense." Furthermore, counsel for UMC objected to Dr.

Edgerton's testimony and provided Sandlin's attorney with an opportunity to solicit information demonstrating familiarity with the local standard of care or the standard of care in a similar community. Sandlin's attorney asked his proposed expert additional questions regarding his experience but failed to elicit the relevant information. Plaintiff's counsel conceded during the oral argument for this appeal there was no proof regarding either the witness's familiarity with the standard of medical care in Lebanon, Tennessee, or how the communities with which he was familiar were similar to Lebanon, Tennessee. Unfortunately, we conclude the record in this matter lacks a sufficient evidentiary foundation to establish Dr. Edgerton was familiar with the standard of care in Lebanon, Tennessee, or a similar community. The trial court correctly identified the appropriate legal principles but failed to properly apply the requirements for qualification of an expert witness. Thus, the trial court's decision was not within the range of acceptable alternatives. Dr. Edgerton was not properly qualified to testify as an expert witness pursuant to T.C.A. § 29-26-115.

We must next consider the qualification of Dr. Bucci pursuant to the locality rule of T.C.A. § 29-26-115. Dr. Bucci is a board certified specialist in emergency medicine practicing in a community hospital in Pascagoula, Mississippi. The doctor testified he received referrals from smaller community hospitals near Pascagoula and was familiar with how they practice medicine in those communities, their referral processes, and the facilities available at their disposal. Upon cross-examination, counsel for UMC inquired if the proposed expert's opinion regarding the standard of care was based upon his knowledge of a national standard of care. Dr. Bucci clarified his opinion regarding the standard of care by indicating it was based upon his board certification training at the American College of Emergency Physicians. The witness admitted he had never visited Lebanon, Tennessee, was unaware of the population of the community, did not know any doctors practicing in Lebanon, Tennessee, or the number of hospitals or doctors available in Wilson County. Dr. Bucci was unfamiliar with the medical specialties available in Lebanon, Tennessee, the number of beds at UMC, the number of visits the hospital received, or the type of equipment available there on a 24-hour basis. UMC claimed this testimony revealed the witness was totally unfamiliar with the medical community in Lebanon, Tennessee, and more specifically with the standard of acceptable medical practice at UMC, and objected to his testimony pursuant to T.C.A. § 29-26-115. The trial court responded by stating there was insufficient testimony to establish if Pascagoula was a similar community. Upon redirect, Dr. Bucci was again questioned regarding a national standard of care. The witness stated he believed medical school and residency training were the same around the country, all hospitals use the same antibiotics, and that all physicians would treat patients in the same manner within the limits of the capacity of the hospital and the available equipment. Sandlin's attorney next questioned the proposed expert regarding his knowledge of communities around Pascagoula, the population, size and the number of hospitals in the area, the specialties available, the standard of medical practice, and the economic and industrial character of the community. Unfortunately, there is absolutely no proof in the record regarding the witness's knowledge of Lebanon, Tennessee, to support his ability to make an informed comparison with a similar community.

Sandlin's counsel argued the proposed expert must be familiar with the standard of care in the community where the defendant practiced rather than be familiar with the area itself. The trial court concluded the proposed expert satisfied the requirements of T.C.A. § 29-26-115 and permitted him to testify. However, this Court is troubled by the manner in which Sandlin's attorney attempted to frame the qualification of a proposed expert witness because it would seem rather difficult, if not impossible, to know the standard of care in a community without having any knowledge of the community in question. This Court has acknowledged, "Precise knowledge of the medical statistics of a particular community…is not a requirement of the statute." Ledford v. Moskowitz, 742 S.W.2d 645 (Tenn. Ct. App. 1987). However, the proposed expert is required to have *some* knowledge of the practice of medicine in the community at issue or a similar community. This Court indicated a reasonable basis for an expert's knowledge of the medical community in question could consist of information such as the size, location and presence of teaching hospitals in the community. Roberts v. Bicknell, 2001 Tenn. App. LEXIS 605 (Tenn. Ct. App. Aug. 16, 2001). "Without such information, it is difficult to compare communities for the purpose of satisfying the locality rule." *Id.* Thus, the issue presented in this case focuses on the ability of Mr. Sandlin's attorney to cure the testimony of a proposed expert that is candidly unfamiliar with the community in which the defendant practices by eliciting testimony regarding the characteristics of an ostensibly similar community. The legislative purpose underlying the locality rule is to assure doctors charged with negligence in this State receive a fair assessment of their conduct in relation to community standards similar to one in which they practice. Sutphin v. Platt, at 457. The geographic component to the locality rule has been relaxed to allow proof of the recognized standard of care in the community in which the defendant practices or in a similar community, rather than requiring the plaintiff to introduce evidence concerning the standard of care in the strict locality where the defendant practiced. Id. Dr. Bucci's testimony would be permissible if he knew Lebanon and Pascagoula were comparable communities, but his testimony revealed no such knowledge. *See* T.C.A. § 29-26-115(a)(1). Permitting the witness to testify in the absence of such knowledge would ironically hold UMC accountable to the community standards of Pascagoula, Mississippi rather than Lebanon, Tennessee. This is contrary to the legislative intent of T.C.A. § 29-26-115. Thus, the problematic issue presented in this case is the failure of plaintiff's counsel to submit any proof evidencing the doctor's knowledge that Lebanon and Pascagoula were similar to each other because the witness knew nothing about Lebanon, Tennessee.

In contrast, it would be consistent with the legislative intent of T.C.A. § 29-26-115 for plaintiff's counsel to ask a proposed expert additional questions probing the extent of his or her familiarity with the standard of acceptable practice in the defendant's community or the basis for his or her opinion that the standard of care in their community is similar to that of the defendant's community. We must conclude the trial court correctly identified the appropriate legal principles but failed to properly apply the requirements for qualification of an expert witness. Dr. Bucci's testimony lacked a sufficient evidentiary foundation. The trial court's decision to allow such testimony was not within the range of acceptable alternatives. Dr. Bucci was not qualified to testify as an expert witness pursuant to T.C.A. § 29-26-115.

UMC also challenges the qualification of Dr. Bucci due to Sandlin's failure to establish the proposed expert witness was licensed to practice medicine in Tennessee or a contiguous bordering state and had practiced medicine in one of these states during the year proceeding the

date that the alleged injury or wrongful act occurred, pursuant to T.C.A. § 29-26-115(b). Dr. Bucci testified he is currently licensed to practice medicine in Mississippi, Alabama and Louisiana. Sandlin's attorney did not inquire if Dr. Bucci was licensed to practice medicine in the year preceding this controversy. However, it is not necessary to address this issue since Dr. Bucci was not properly qualified to testify pursuant to the locality rule of T.C.A. § 29-26-115(a).

IV.

UMC's additional arguments regarding the sufficiency of the evidence and the statute of limitations are also moot based upon our previous ruling.

V.

This court concludes the trial court erred by denying UMC's Rule 50.02 motion for a judgment in accordance with its motion for directed verdict. Sandlin is unable to demonstrate any breach of duty without evidence regarding the appropriate standard of care. Regretfully, the trial court is reversed. This case shall be remanded for enforcement of these orders and dismissed. The costs of this appeal are taxed to the appellee, Christopher Sandlin, for which execution shall issue if necessary.

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DON R. ASH, S.J.