

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 18, 2006 Session

**LEE ANDERSON WATKINS, ET A., v. WOODS MEMORIAL HOSPITAL,
ET AL.**

**Direct Appeal from the Circuit Court for McMinn County
No. 23740 Hon. John B. Hagler, Circuit Judge**

No. E2006-00001-COA-R3-CV - FILED OCTOBER 31, 2006

Plaintiffs' medical malpractice action against Dr. Stuart Sullins was dismissed upon the Trial Court's granting summary judgment to defendant. Plaintiffs have appealed. We affirm the Trial Court's Judgment.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

W. Holt Smith, Madisonville, Tennessee, for appellants, Lee Anderson Watkins and wife, Christi Lynn Watkins.

Jennifer H. Lawrence, Chattanooga, Tennessee, for appellee.

OPINION

Plaintiffs brought this medical malpractice action against Woods Memorial Hospital, Dr. Daniel Burishkin and United Emergency Services, Inc., Dr. Stuart Sullins and Eyecare Clinics, P.C., and Drs. Mann and Bierly and Southeast Eye Specialists, P.C.

All of the defendants were either dismissed voluntarily, or with prejudice, except Dr. Stuart Sullins, who was granted summary judgment by the Trial Court. Plaintiffs have appealed.

In their Complaint, plaintiffs allege that Dr. Burishkin contacted Dr. Sullins, who came to the emergency room and looked at Watkins' injury, and referred him to the offices of Southeast Eye Specialists. Watkins alleged Sullins was negligent in that he 1) undertook to treat a penetrating eye injury when he had neither the skills nor training to do so, 2) failed to appropriately refer Watkins for needed emergency care of the eye injury, 3) discharged Watkins to be seen by an optometrist in an office setting, and 4) failed to carry out precautionary measures to insure that Watkins did not lose the use of his eye.

Sullins and Eyecare Clinics, P.C., filed a Motion for Summary Judgment, asserting they were entitled to a judgment because Sullins never deviated from the standard of care.

Sullins filed the Affidavit of Dr. Daniel Burishkin, who stated that he was licensed as a physician in Tennessee and North Carolina, and was familiar with the standard of care for emergency room physicians in Etowah, McMinn County, Tennessee and similar communities. He stated that Watkins arrived at the emergency room at 1:55 p.m. on March 5, 2000, and he examined him at 2:27 p.m. He stated that his differential diagnosis was a penetrating eye injury, but that he was desirous of a second opinion, so he called Dr. Sullins, who was the on-call physician at the hospital for eye injuries. Burishkin said that Dr. Sullins came to the Emergency Room, examined Watkins, and called an ophthalmologist for further examination and treatment. Watkins was referred to Drs. Bierly and Mann, and he left the Emergency Room to go to their office.

Sullins also filed the Affidavit of Dr. Randall Funderburk, who stated that he examined Watkins on the evening of March 5, 2000, at the request of Dr. Bierly. Funderburk stated that when he saw Watkins, the puncture wound had been closed, and there was some inflammation in the eye. He stated he saw no evidence of infection at the time, but started Watkins on antibiotic drops and intravenous antibiotics. He saw Watkins again on March 6, 2000, and noted his eye was more inflamed, and Watkins complained that his vision was worsening. Funderburk then took Watkins to surgery and performed a vitrectomy, where he removed the gel from the cavity of the eye, and injected the eye with antibiotics. The gel was sent to the lab for testing, and the results showed traumatic endophthalmitis, and showed strep bacteria as well as bacillus cereus. Funderburk saw Watkins again on March 7, 8, 9, 10, and 11, when he was discharged.

Funderburk stated it was his opinion that if he had seen Watkins any earlier on March 5, his evaluation and treatment would not have been any different, and that his opinion, within a reasonable degree of medical certainty, was that had he seen Watkins earlier, the outcome would have been no different, and that nothing between the initial injury and his evaluation put Watkins in any worse condition.

Sullins also attached an Affidavit of Dr. John Bierly, who stated that he was licensed as a physician in Tennessee, Georgia, Kentucky, and California, and had practiced ophthalmology since 1992. Bierly stated that as a result of Watkins' injury, his eye became infected with bacteria, including bacillus cereus, which almost always leads to removal of the eye, even with a virtually immediate vitrectomy. Bierly stated that the provision of intravenous antibiotics to Watkins while

in the ER “was not medically causative nor would it have changed nor made a difference in the outcome of Mr. Watkins’ condition.”

Sullins also filed the Affidavit of Dr. Deborah DiStefano, who stated she was licensed to practice in Tennessee and had practiced as an ophthalmologist since 1982. DiStefano stated that she was familiar with the standard of care for an ophthalmologist practicing in Etowah, McMinn County, Tennessee, and opined that the provision of intravenous antibiotics to Watkins while in the ER “was not medically causative nor would it have changed nor made a difference in the outcome of Mr. Watkins’ condition.”

Sullins attached his own affidavit, which stated that he knew the standard of care for optometrists in the Etowah community, and that he never deviated from same during his care of Watkins.

Plaintiffs countered with the Affidavit of Dr. Michael Lett, who stated that he was an ophthalmologist who practiced in Athens, Tennessee, and that he treated Watkins after his injury, and eventually performed the enucleation. Lett opined that if Watkins had received appropriate care earlier on March 5, 2000, he would not have lost his eye, and that had antibiotics been instituted earlier in the day, it likely would have broken the cycle of infection and Watkins would have been left with some vision.

Plaintiffs also filed an Affidavit of Dr. Dennis O’Day (who opined that Sullins breached the standard of care), and the depositions of Drs. Lett, Bierly, Burishkin, O’Day and Sullins, the deposition of Watkins, and the depositions of David Hill and David Sutherland. Sullins asserted that no expert had opined that Sullins deviated from the standard of care for an optometrist in McMinn County, and in his Statement of Undisputed Material Facts, he said that Dr. Burishkin called Dr. Sullins and told him he had a patient with an eye injury that was a possible penetrating eye injury, and Sullins told him that if it was a penetrating eye injury, he could not treat it. Further, that Dr. Lett, plaintiff’s expert, testified in his deposition that he was not “taking the role of what an optometrist ought to do in this case,” and that Dr. Lett testified that if Sullins told Burishkin when he called that he could not treat a penetrating eye injury, but could only diagnose and refer, then Lett would have no complaints against Sullins. Also, Lett stated that if an ophthalmologist was called before 4:00 p.m., he had no criticism of the care, and the records support these facts. The Statement goes on to state that Dr. O’Day testified in his deposition that he could not testify as to the standard of care of an optometrist in McMinn County.

Plaintiffs’ Statement of Undisputed Material Facts, stated that Sullins had delayed Watkins’ treatment. Sullins filed a response, stating that numerous factors delayed Watkins’ treatment, including the fact that no ophthalmologist was on call, that the nearest ophthalmologist who could be located was 45 minutes away, and that Watkins waited for over an hour for his brother-in-law to come and take him to Chattanooga, rather than having his wife drive him.

The court entered an Order on December 1, 2005, granting Sullins’ Motion for

Summary Judgment.

Plaintiff appealed, and raises these issues:

1. Did the trial court err in failing to accept the testimony of an ophthalmologist as to the standard of care required in treating a penetrating eye injury, just because the health care provider who chose to treat the injury was an optometrist?
2. Is there a genuine issue of material fact as to whether Mr. Watkins suffered an injury which would not have otherwise occurred as a result of the decision of an unqualified optometrist to treat a penetrating eye injury?

As we have previously held, medical malpractice cases may be adjudicated by summary judgment in proper circumstances. *See Church v. Perales*, 39 S.W.3d 149, 156-158 (Tenn. Ct. App. 2000). An observation in *Church* is applicable here:

Apart from the straightforward cases involving a single issue such as the application of the statute of limitations, medical malpractice cases customarily involve issues and questions that would be greatly illuminated by the trial court's explanation of its decision. The evidentiary standards uniquely applicable to medical malpractice cases ordinarily give rise to subtle and complex evidentiary questions for which some elucidation of the exact reasons for ending a case summarily will almost always be helpful. In this case, we are left to soldier on without guidance from the trial court.

In this case, the Trial Court simply stated that it found sufficient proof to support the motion for summary judgment. The parties have framed the issues as whether the Court erred in failing to accept the opinion of an ophthalmologist because Sullins is an optometrist, and/or whether there was a genuine issue of fact regarding whether Watkins suffered an injury due to Sullins' actions, and thus these are the issues that we address on appeal.

The parties agree the Trial Court rejected the affidavit of Dr. O'Day, an ophthalmologist and plaintiffs' expert, wherein Dr. O'Day opined that Dr. Sullins breached the applicable standard of care. As we have previously explained, affidavits must be made on the affiant's personal knowledge, the affiant must be competent to testify, the statements must be otherwise admissible in evidence, and the affidavit must create a genuine dispute as to a fact that is legally material to the outcome of the case. *Church*.

In medical malpractice cases, there are five other requirements imposed on expert affidavits:

- 1) the affiant must demonstrate that he or she meets the geographical and durational residence and practice requirements;

- 2) the affiant must demonstrate that he or she practices in a profession or specialty that makes the affiant's opinion relevant to the issues in the case;
- 3) the affiant must demonstrate that familiarity with the recognized standard of professional practice in the community where the defendant practices or in similar communities;
- 4) the affiant must give an opinion concerning whether the defendant physician met or failed to meet the relevant standard of professional practice; and
- 5) the affiant must opine whether the defendant physician's negligence more likely than not caused the patient injuries that he or she would not otherwise have suffered.

Id. at 166, citing Tenn. Code Ann. §29-26-115.

Defendant contends that Dr. O'Day's opinion was properly disregarded for numerous reasons, including that he is not qualified to testify regarding the standard of care applicable to optometrists, and that he has failed to satisfy the "locality" rule. The statute requires that the expert must demonstrate that he or she practices in a profession or specialty that makes the expert's opinion relevant to the issues in the case. Tenn. Code Ann. §29-26-115. The statute does not require that the expert must be of the exact practice specialty as the defendant, and other cases have allowed a doctor of a different specialty to testify as an expert so long as the doctor could show that his/her testimony was relevant to the issues in the case. *See Searle v. Bryant*, 713 S.W.2d 62 (Tenn. 1986); *Stokes v. Leung*, 651 S.W.2d 704 (Tenn. Ct. App. 1982). The fact that Dr. O'Day was an ophthalmologist would not automatically disqualify him from testifying in this case, as his testimony regarding the proper treatment for a penetrating eye injury could be relevant.

Regarding the locality rule, however, Dr. O'Day's affidavit states that he practices in Nashville, and that he is "familiar with the standard of care as it applies in this case because I have been advised of numerous statistical factors concerning McMinn County, Tennessee." O'Day goes on to recite the population of McMinn County, Athens, and Etowah, that the county contains two hospitals, and that it contains 50 doctors, 6 ophthalmologists, and 15 optometrists. He further states, "In addition, I have discussed the standard of care and am familiar with several physicians in the McMinn County area including Dr. Michael Lett, Ophthalmologists and Dr. Dean Baggett, Optometrist. I have received referrals from McMinn County, Tennessee and have received referrals from many communities of similar size to McMinn County, Tennessee."

When questioned in his deposition, which was taken before giving his Affidavit, he testified that he had seen patients who came from McMinn County, but he had never practiced there, and that he was unfamiliar with the statistical information regarding the hospitals in McMinn County. When asked if he was familiar with the standard of care of an optometrist or emergency room physician in McMinn County or a similar community, he stated that he was not, and that he

could state what the standard of care for an ophthalmologist would be in Davidson County, “but that’s a different topic.”

To satisfy the “locality rule”, the affiant/expert must demonstrate that he or she is actually familiar with the standard of care for the community in which the defendant practices, or a similar community, by stating a factual basis for that familiarity. *Totty v. Thompson*, 121 S.W.3d 678 (Tenn. Ct. App. 2003). The witness must do more than simply assert that the standard of care is the same in one place as another, or that there is a “national standard”, or that he or she has been apprised of statistical facts related to the community. *Id.* The expert is required to show that the community in question is of similar size and makeup as a community in which the expert is familiar with the standard of care. *Stovall v. Clarke*, 113 S.W.3d 715 (Tenn. 2003); *Wilson v. Patterson*, 73 S.W.3d 95 (Tenn. Ct. App. 2001).

In this case, while Dr. O’Day had obviously obtained statistical information about McMinn County after giving his deposition, he does not state in his Affidavit that McMinn County is similar to any community with which he is familiar, and does not provide a basis to demonstrate how he would be familiar with the standard of care in McMinn County, *vis a vis* to his own practice area of Nashville. The bald assertions in Dr. O’Day’s affidavit is not sufficient to establish his familiarity with the local standard of care for McMinn County, and was adequate reason for the Trial Court’s decision to reject his testimony.

More importantly, Dr. O’Day’s opinion fails to establish a genuine issue of material fact. When an expert’s opinion is challenged, the Court is to determine whether the opinion is “based on trustworthy facts or data sufficient to provide some basis for the opinion.” *Church* at 166. We are not to judge the expert’s credibility nor determine the weight to be given to it, but rather, we “merely look to see if the challenged opinion has some legally-acceptable basis from which its conclusions could be rationally drawn.” *Id.* Expert opinions which have no basis can be disregarded because they cannot assist the trier of fact, and cannot create a genuine dispute of material fact. *Id.* at 167.

Dr. O’Day’s Affidavit opines that Dr. Sullins “should not have accepted the referral of this patient with the full knowledge that he had neither the training or skills to treat a penetrating eye injury. Dr. Sullins admits in his deposition that an optometrist does not possess the surgical skills to treat a penetrating eye injury which requires closure of the wound and IV antibiotics. By agreeing to see the patient Dr. Sullins delayed definitive care for several hours. If Dr. Sullins accepts the care of a patient with a penetrating eye injury he too he held [sic] to the minimum standard of care of an ophthalmic patient in general medicine. Dr. Sullins admits he knew the standard of care that is wound closure and antibiotics and he also admits in his deposition that he could not provide that standard of care, yet he insisted on seeing the patient delaying definitive treatment in this case.”

Dr. O’Day goes on to state that with “prompt proper treatment, the development of the infection and subsequent endophthalmitis was not inevitable.” He concludes that as a result of the ER doctor and Dr. Sullins’ actions, Watkins suffered injuries which would not otherwise have

occurred.

Defendant responds that Dr. O'Day's opinion is not based on trustworthy facts, because Dr. Sullins did not try to treat Watkins, and did not "insist" on seeing Watkins, thereby delaying proper treatment. Sullins states that he simply agreed to help Burishkin diagnose whether it was, in fact, a penetrating eye injury, while telling Burishkin that if it was a penetrating eye injury, he could not treat it. Sullins further asserts that he promptly referred Watkins to an ophthalmologist once he determined that it was a penetrating eye injury.

The undisputed proof is that Dr. Burishkin testified that when he examined Watkins' eye (at around 2:30 p.m.), he noted that Watkins' pupil was non-reactive, he could not visualize the back of Watkins' eye, Watkins' vision was decreased, and his eye was very red. He further testified that he felt it was a possible penetrating eye injury, but that these symptoms were also consistent with non-penetrating eye injuries. He testified that he felt he needed a second opinion from an eye doctor, and that the hospital did not have an ophthalmologist on call. He testified that he would not have started antibiotics without the ophthalmologist telling him what to give, because that decision would be up to them, and the standard of care would not require immediate antibiotics.

Dr. Burishkin testified he asked the nurses to contact Dr. Sullins right away, and he spoke to him by phone, and told him "what I had and what I was afraid of and asked if he could see the patient." Burishkin testified he wanted Sullins to give him a second opinion and help him with a referral to an ophthalmologist if necessary. He testified that after Dr. Sullins came to the hospital and examined Watkins, he agreed that it looked like a penetrating eye injury, and suggested they take an x-ray to look for any foreign bodies, and started arranging a referral. Burishkin testified that he did not "turn over" Watkins' care to Sullins.

Dr. Burishkin testified that he was attending to other patients, and thought that Watkins had left the emergency room when he realized after some time had passed that he was still there, and was waiting on his brother-in-law to come and drive him to Chattanooga. Dr. Sullins testified that he did not treat penetrating eye injuries, and would refer such cases to an ophthalmologist for treatment. He testified that on the day in question, he was contacted by the hospital staff and talked to Dr. Burishkin, who told him that Watkins was there and had suffered an injury which Burishkin feared was a penetrating eye injury. Dr. Sullins testified that he was asked to help diagnose the injury, and he informed Burishkin that if it was a penetrating eye injury, he could not treat it, and that a penetrating eye injury required a doctor with surgical skills who could close the wound, i.e. an ophthalmologist.

He testified that he did go promptly to the hospital and examined Watkins, at the behest of Dr. Burishkin, and that Watkins had a penetrating eye injury. Sullins testified that he undertook to arrange an appointment with an ophthalmologist, and reached Dr. Bierly, who agreed to treat Watkins, and wanted to see him at his office in Chattanooga. Sullins testified he understood that plaintiff's brother-in-law would be there right away, but it took much longer than he expected, and that he had another conversation with Mrs. Watkins about going to Chattanooga, because Mr.

Watkins needed to be seen urgently.

Watkins testified in his deposition that when Sullins arrived at the hospital and he examined him, he immediately told him “this is out of my reach” and that he needed further care that he could not give. Watkins testified that Sullins, after making phone calls, told him he had found a doctor who would see him in Chattanooga, and that Sullins said it was hard to find a doctor to see him because he had no insurance. Watkins could not remember whether they conveyed a sense of urgency about getting to Chattanooga for treatment. Watkins testified that he met the ophthalmologist in Chattanooga at his office at 7:00 p.m., and was later admitted to Erlanger Hospital that night, and IV antibiotics were started.

Dr. O’Day opined in his affidavit that Dr. Sullins actually undertook to treat Watkins without the proper knowledge, and that Sullins “accepted the care” of Watkins and “insisted on seeing the patient” which delayed proper treatment for several hours and caused injury which would not otherwise have occurred.

The record does not support Dr. O’Day’s conclusions, and there is nothing in the record to indicate that Dr. Sullins insisted on seeing the patient, and did nothing to delay his treatment. The undisputed facts are that Dr. Burishkin asked Sullins to help him determine if it was a penetrating eye injury, and when he immediately diagnosed the penetrating eye injury he began to contact ophthalmologists for treatment. Thus, Dr. O’Day’s opinion that Sullins’ insistence on seeing Watkins delayed his treatment and injured him, is based on untrustworthy facts.

Significantly, although Dr. O’Day opined specifically in his Affidavit that Sullins breached the standard of care by not instituting IV antibiotics, he admitted in his deposition that he could not say whether the earlier introduction of IV antibiotics would have made a difference in the outcome for Watkins. He also stated that Dr. Sullins basically said “I’m not competent, but I’ll come and give you advice”, which he thought was tantamount to giving incompetent advice, but there was no showing that Dr. Sullins gave incompetent advice. Dr. Sullins merely diagnosed the injury and referred Watkins to a specialist.

Dr. O’Day testified no one realized how big the problem was until Dr. Bierly saw Watkins, but it is undisputed that Dr. Sullins diagnosed Watkins as having a penetrating eye injury, and communicated that to Bierly’s partner. When asked if he was going to testify as to the standard of care of an optometrist in McMinn County, Dr. O’Day replied that he could not do so, but thought that when “somebody gives advice knowing that they are incompetent to give that advice, then I think that is misleading to the emergency room physician.” The record does not support this conclusion. As we have explained, Dr. O’Day went on to admit that he did not think Dr. Sullins, as an optometrist, was expected to know about penetrating injuries and bacillus cereus. Apparently, the Trial Court disregarded Dr. O’Day’s opinion because of these inconsistencies in his testimony and his reliance on improper and incorrect facts.

The Trial Court did not err when it rejected O’Day’s testimony. Without such

testimony, there is no dispute at issue of genuine material fact in this record. All the witnesses with knowledge of the facts of the day in question, including Watkins, testified that Sullins merely examined Watkins, diagnosed the penetrating eye injury, and then referred him to an ophthalmologist. While plaintiffs assert in their brief that “If Dr. Sullins could not provide the required treatment he was obligated to refer the patient to doctors who could”, citing *Osborne v. Frazor*, 425 S.W.2d 768 (Tenn. Ct. App. 1968), the proof establishes that this is precisely what the defendant did. Accordingly, the grant of summary judgment by the Trial Judge was appropriate, and we affirm.

The cost of the appeal is assessed to Lee and Christi Watkins.

HERSCHEL PICKENS FRANKS, P.J.