

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

February 28, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

MARJORIE ELNORA SPANGLER and) C/A NO. E1999-01501-CVRK
husband THOMAS SPANGLER,)
Plaintiffs-Appellants,) KNOX CIRCUIT
vs.) HON. HAROLD WIMBERLY,
EAST TENNESSEE BAPTIST) JUDGE
HOSPITAL, a/k/a BAPTIST HEALTH)
SYSTEM, J. MICHAEL MCCOY, D.D.S.)
P.C., d/b/a UNIVERSITY ORAL)
SURGEONS, JAMES E. GLEAVES, JR.,)
M.D., and T. PRESTON SHEPHERD,)
d/b/a KNOXVILLE UROLOGY CLINIC,)
P.C.,) AFFIRMED
Defendants-Appellees.) AND
) REMANDED

J. MIKEL DIXON, Knoxville, for Plaintiffs-Appellants.

R. FRANKLIN NORTON, GARY G. SPANGLER and CATHERINE B. COFFEY,
NORTON & LUHN, P.C., Knoxville, for Defendant-Appellee Baptist Hospital of
East Tennessee, Inc.

DARRELL E. BAKER, JR. and DEBORAH WHITT BAKER, BAKER & WHITT,
PLLC, Memphis, for Defendant-Appellee J. Michael McCoy, D.D.S.

J. DOUGLAS OVERBEY and CYNTHIA K. MANCEBO, ROBERTSON, INGRAM
& OVERBEY, Knoxville, for Defendant-Appellee James E. Gleaves,Jr., M.D.

EDWARD G. WHITE and B. CHASE KIBLER, HODGES DOUGHTY & CARSON,
Knoxville, for Defendant-Appellee, T. Preston Shepherd.

O P I N I O N

Franks, J.

In this action for medical malpractice, the Trial Judge granted all

defendants summary judgments, after ruling that plaintiffs' expert was not qualified to testify as a medical expert witness in this case.

Defendants filed motions for summary judgment, along with supporting affidavits which stated that defendants did not deviate from the applicable standard of care in their treatment of Marjorie Spangler.

In response to the motion, plaintiffs presented a Dr. DiBianco from Washington, D.C.¹ as an expert witness, who opined that all of the defendants had deviated from the appropriate standard of care, which caused plaintiff's injuries. Dr. DiBianco's affidavit stated as follows:

. . . all medical standards, which form the basis of my opinions, are not standards which vary from community to community. Unless otherwise indicated, the opinions expressed in this affidavit are based upon a standard of care which involves certain basic medical issues which would not be dependent upon the degree of sophistication, medical equipment, facilities, or medical practice in a particular community. To the extent that there are any medical standards which may be subject to variation from community to community, those have been determined by specific reference to the medical practices in this case in order to determine an appropriate local standard of care.

The Trial Court ruled that Dr. DiBianco should not testify as an expert witness because he was not familiar with the applicable standard of care for the defendants in the community in which they practice or a similar community, and had not otherwise satisfied the evidentiary standards of Tenn. R. Civ. P. 56.06 and Tenn. Code Ann. §29-26-115.

Plaintiffs then filed a Motion Pursuant to T.R.C.P. Rule 59, and attached a supplemental affidavit of Dr. DiBianco. In the supplemental affidavit, Dr. DiBianco simply states that he is "familiar with the recognized standard of acceptable professional practice for the defendant health care providers in the community in which the defendant health care providers practice or in a similar community," which is conclusionary and simply tracks the language of Tenn. Code Ann. §29-26-115. Dr. DiBianco's supplemental affidavit does not provide any substantive factual basis for this claimed knowledge. In overruling the motion, the Trial Judge said that he had considered the supplemental affidavit, but concluded it was legally insufficient and reaffirmed his order granting summary judgment to defendants.

¹

The Trial Judge waived the contiguous State requirement.

Plaintiffs insist that the Trial Court was in error in refusing to admit Dr. DiBianco's affidavits.

It is well settled in this jurisdiction that malpractice actions deal with matters not within the common knowledge of lay persons, and expert testimony is required. *Bowman v. Henard*, 547 S.W.2d 527 (Tenn. 1977.) Tenn. Code Ann. §29-26-115 requires that a plaintiff in a malpractice action prove that the defendant failed to comply with the standard of care in the community in which he practices or a similar community, which the Supreme Court has described as a “broadened definition of the geographic component.” *Sutphin v. Platt*, 720 S.W.2d 455 (Tenn. 1986). Thus, plaintiffs were required to provide expert testimony that defendants failed to comply with the proper standard of care in Knoxville or a similar community, by an expert who is familiar with that standard of care.

In this case, plaintiffs' expert claimed to be familiar with the standard of care in Knoxville, because he felt the standard of care did not vary from community to community.² He presented no other factual basis for his belief that he was familiar with the local standard of care, and there is no proof whatsoever in the record that would explain how the witness, a physician from Washington, D.C., would be familiar with the standard of care in Knoxville. It is clear the Trial Court has broad discretion in determining the qualifications for admissibility of testimony of expert witnesses. We find no abuse of that discretion in this case. *Mabon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826 (Tenn. Ct. App. 1997). See also *Osler v. Burnett*, 1993 WL 90381 (Tenn. Ct. App. March 30, 1993); *Bryant v. Bauguss*, 1996 WL 465539 (Tenn. Ct. App. August 16, 1996); *Swift v. Schoettle*, 1996 WL 730286 (Tenn. Ct. App. December 20, 1996); *Hopper v. Tabor*, 1998 WL 498211 (Tenn. Ct. App. August 19, 1998).

Tenn. R. Civ. P. 56.06 requires that “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” The rule further states that a response to a summary judgment motion must set forth “specific facts showing that there is a genuine issue for trial.” Plaintiffs' response failed to meet the requirements of this Rule, and the Trial Court's grant of summary judgment was appropriate and we affirm.

This cause is remanded to the Trial Court with costs of the appeal assessed to the appellants.

²

An expert's testimony that the standard of care does not vary nationwide does not set forth “specific facts” to prove the standard of care for a particular community. *Mabon v. Jackson-Madison County General Hosp.*, 968 S.W.2d 826 (Tenn. Ct. App. 1997).

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

D. Michael Swiney, J.