No. 33308 *Jonathan Brian Walker v. Tara C. Sharma, M.D.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice., dissenting:

I fear that the majority, although it purports to enunciate rules of law consistent with our prior holdings, has actually served to obliterate the gatekeeping function of the circuit court by ignoring the obvious factual distinctions on which this case turns. The case *sub judice* does not merely involve an expert who testified about a method of urethral dilation that he possessed the requisite expert knowledge about, but simply chose not to use. Rather, this case involves an expert who was clearly not qualified to render an opinion regarding the national standard of care about a particular method of urethral dilation, because he did not possess the requisite formal training and study, or prior clinical experience in utilizing that method.

Unquestionably, an expert testifying in medical professional liability cases must possess the fundamental knowledge and expertise in the subject at issue as well as the national standard of care. W. Va. Code 55-7B-7 (2003); *Kiser v. Caudill*, 210 W. Va. 191, 196, 557 S.E.2d 245, 250 (2001). In order to be qualified as an expert witness in a medical professional liability action, it must be shown that, "(3) the expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of

care to which his or her expert opinion testimony is addressed; . . .” W. Va. Code §55-7B-7.

This Court has previously held that “[i]n determining who is an expert, a trial court should conduct a two-step inquiry. First, a circuit judge must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, the circuit court must determine that the expert’s area of expertise covers the ***particular opinion as to which the expert seeks to testify***. ***There must be a match***.” *Gentry v. Mangum*, 185 W. Va. 512, 525, 466 S.E.2d 171, 184 (1995) (citing *Cargill v. Balloon Works, Inc.*, 185 W. Va. 142, 405 S.E.2d 642 (1991)). (Emphasis added).

West Virginia Code §55-7B-7(a) expressly provides that in order to establish the standard of care, an expert witness must possess the specialized knowledge and expertise in the issue presented. “[T]o qualify a witness as an expert on that standard of care, the party offering the witness must establish that the witness has ***more than a casual familiarity with the standard of care and treatment*** commonly practiced by physicians engaged in the defendant's specialty.” *Gilman v. Choi*, 185 W. Va. 177, 181, 406 S.E.2d 200, 204 (1990)(overruled on other grounds, *see Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (*quoting Greene v. Thomas*, 662 P.2d 491, 493 (Colo.Ct.App. 1982)). (Emphasis added). “A medical witness may acquire sufficient knowledge to qualify as an expert through ***practical experience, recent formal training and study or a combination of***

these factors." *Id*. (Emphasis added). It is well settled that "knowledge gained only in the context of litigation does not meet the threshold requirement of competency 'under the same or similar circumstances.'" W. Va. Code §55-7B-3 (2003); *Hicks v. Chevy*, 178 W. Va. 118, 121, 358 S.E.2d 202, 204 (1987).

In the instant case, the majority finds that Dr. Lewis, as a practicing urologist who had performed numerous urethral dilation procedures, had the requisite knowledge of the applicable standard of care based on the fact that the pleadings in this case framed the issue generally in terms of "the standard of care not being met for an attempted urethral dilation procedure and the failure to employ appropriate surgical techniques." The majority reasons that if this case had been specifically pled and framed as the failure to properly employ the Bard instrument set while performing a urethral dilation, instead of being generally pled, the result in this case might be different. However, regardless of whether the pleadings in this case were initially framed in more generalized terms, it is evident that the specific issue to be decided at trial was whether Dr. Sharma correctly used the Bard instrument set in attempting to dilate the constricted area of the Appellant's urethra. Because the Appellant's expert was not qualified to discuss the standard of care regarding this particular issue, I believe the circuit court's ruling was appropriate.

It is evident that the Appellant's expert, Dr. Lewis, had nothing more than a casual familiarity with the Bard method. Dr. Lewis admitted that he had no knowledge of

the Bard method prior to litigation. In fact, the first time he learned of the Bard method was after the case was filed and in preparation for his deposition. He actually had to read the package insert directions to become familiar with the Bard instrument set in order to testify about the procedure. Dr. Lewis also had no clinical experience using the Bard method at the time he testified at trial, and he conceded that he would have to make assumptions as to that which constitutes the applicable standard of care in the clinical circumstances present in this case.

The majority reasons that the trial court went astray in making its ruling when it equated Dr. Lewis' lack of familiarity with a particularized instrument system with lack of knowledge as to the standard of care that applied to use the set of instruments. However, I believe this holding ignores the facts of this case, and particularly how such facts apply to our well-established law. Because Dr. Lewis had neither the ***practical experience*** nor the ***recent formal training and study*** of the Bard method, it was appropriate for the circuit court, in that specific connection, to properly conclude that the Appellant failed to meet his burden of proof on the issue of standard of care and causation. Obviously, how could Dr. Lewis testify regarding the national standard of care applicable to the Bard method when he has nothing more than casual familiarity with this dilation procedure?

I acknowledge that because of the "liberal thrust" of our rules of evidence pertaining to experts, this Court, in erring on the side of expert admissibility, has previously

held that "[d]isputes as to the strength of an expert's credentials, *mere differences in methodology*, or lack of textual authority for the opinion go to weight and not to the admissibility of their testimony." *Gentry v. Mangum*, 195 W. Va. at 527, 466 S.E.2d at 186. (Emphasis added). However, this Court has not held, nor should it now hold, that an expert who lacks both formal training and study *and* clinical experience regarding a particular methodology, when it is the *sole* particular issue to be decided at trial, can adequately testify as to the national standard of care in a medical professional liability action.

Our law is clear that where the plaintiff's expert lacks the experience or knowledge of the method chosen by the defendant health care provider, and the only evidence to be presented concerning the method is by and through the defendant health care provider, the plaintiff has not met the requisite showing of malpractice and judgment as a matter of law is warranted. W. Va. Code §55-7B-3; *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). Accordingly, because the Appellant failed to meet his burden of proof on the specific issue of whether Dr. Sharma violated the national standard of care in using the Bard instrument set, I believe the circuit court properly granted the Appellee's motion for judgment as a matter of law.

For these reasons, I dissent.