No. 35452 – *In re: Faith C., Sophia S. and Madelyn S.*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting.

I dissent from the majority opinion. Based upon my review of the record, I conclude that the circuit court's findings were not supported by the credible evidence of record and that such findings were clearly erroneous when the record is viewed as a whole. It is not often that I do not defer to the trial court in such matters and these certainly are difficult cases, but here I believe the conclusion that this young child scalded herself is inconsistent with the facts of the record and the opinions of Sophia S.'s treating physicians. Sophia S. received second-degree scalding-type burns to her feet and legs. Her mother contended that these burns were the result of an accidental immersion, as opposed to an intentional act on the part of her mother.[1] On appeal, I believe my colleagues fail to give sufficient weight to the medical opinions of the two treating emergency room physicians as well as that from the medical personnel treating the child at a specialized out-of-state burn clinic which supported the conclusion that Sophia S.'s burns were the result of the mother's intentional act.

[1] There is no dispute that the child's mother was the sole adult individual present at the time the child's feet and legs were burned. The mother presented a defense that the twenty-two month old child climbed up onto the bathroom sink, turned on the hot water and placed her feet and legs into the scalding water and held them there. The mother was on the phone at the time of this incident, immediately outside of the family's living quarters, where she had to go to get a usable signal on her cell phone.

The circuit court's findings of fact on this issue were based upon the opinion testimony of Greg Porter, a physician's assistant, who was hired by the mother to review medical records and to provide expert testimony. Mr. Porter was not involved in the treatment of this child. The State and the guardian *ad litem* relied upon the expert medical testimony of two treating physicians at the Cabell Huntington Hospital Burn Center, Eduardo Pino, M.D., and David Henchman, M.D. The State and the guardian *ad litem* also relied upon the medical opinion, by way of statement, of Gail E. Besner, M.D., Sophia S.'s treating physician at Nationwide Children's Hospital, a nationally-recognized children's medical facility in Columbus, Ohio. The combined expert opinions of Drs. Pino, Henchman and Besner concluded that Sophia S.'s immersion burns were the result of an intentional act by the mother. The opinions of these medical doctors was based upon years of experience with the treatment of burns on an emergency basis and upon their actual examination of Sophia S.

We have held that "[i]n determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court 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, and (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171

(1995). If one accepts for the moment that the physician's assistant was competent herein to give medical opinion testimony regarding causation,[2] the role of the circuit court as the fact-finder in this abuse and neglect proceeding was to assess and weigh the differences between the treating medical doctors' evidence and that of the retained physician's assistant. Based not only upon the overwhelming difference in expertise and experience of these witnesses, but also on the manner in which Sophie S. was burned, I believe that the circuit court failed to give sufficient weight to the opinions of the treating medical doctors. As the majority correctly notes, our standard of review of the findings and conclusions of the circuit court is deferential. Moreover, these are admittedly difficult cases for all involved. Here, however, when the record is reviewed as a whole, I believe the findings of the circuit court on the accidental nature of the child's burns to be clearly erroneous.

[2] I believe it appropriate at some point for this Court to visit the evidentiary issue of the minimum standards of competency which should be present where a given witness seeks to render opinion testimony of a certain nature. A physician assistant certainly has more training of a medical nature than does a laborer, yet that training and experience is far different from that of a medical doctor. At what point should our judicial system permit or prohibit non-physicians with some level of medical expertise (such as physician assistants, nurses, nurse practitioners, and emergency medical response personnel) from rendering opinion testimony of a medical causation nature? This question carries over to other areas of expertise. I believe it appropriate for us to revisit these basic gate-keeping matters.