

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SANDY L. FERGUSON and)
RAYMOND FERGUSON, JR.,)
)
Plaintiffs,)
)
v.) C.A. No. 03C-07-090-MMJ
)
GHASSEM VAKILI, M.D., KARROLL)
L. PAYNE, M.D. and CHRISTIANA)
CARE HEALTH SERVICES, INC., f/k/a)
THE MEDICAL CENTER OF)
DELAWARE, INC.,)
)
Defendants.)

MEMORANDUM OPINION

*Upon Motion for Summary Judgment on Behalf of
Karroll L. Payne, M.D. and Christiana Care Health Services, Inc.,
F/K/A The Medical Center of Delaware, Inc.*

Submitted: January 24, 2005
Decided: February 10, 2005

Beverly L. Bove, Esquire, Erik C. Grandell, Esquire, Wilmington, Delaware,
Attorneys for Plaintiff

Dennis D. Ferri, Esquire, Morris, James, Hitchens & Williams LLP, Wilmington,
Delaware, Attorneys for Defendants Karroll L. Payne, M.D. and Christiana Care
Health Services, Inc. f/k/a The Medical Center of Delaware, Inc.

Jeffrey M. Austin, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell,
Wilmington, Delaware, Attorneys for Defendant Ghassem Vakili, M.D.

This case arises out of surgery performed on plaintiff Sandy L. Ferguson (“Plaintiff”) on November 12, 2001. Defendant Ghassem Vakili, M.D. was the attending physician. Defendant Karroll L. Payne, M.D., a second year resident at the time, assisted Dr. Vakili. The surgery took place in a hospital operated by Christiana Care Health Services, Inc., f/k/a The Medical Center of Delaware, Inc. (“Medical Center”). Plaintiff alleges that the original surgery was performed in a negligent manner and that subsequent surgery in an attempt to repair the injury also was performed in a negligent manner.

The Complaint was filed on July 11, 2003. A Case Scheduling Order was entered on January 5, 2004. The Order provided that Plaintiffs identify experts and provide expert opinions by March 31, 2004. Defendants’ expert opinions were due by May 31, 2004. The Court established a discovery cutoff, for both facts and experts, of June 30, 2004. Trial was scheduled to begin February 7, 2005.

Plaintiffs’ medical expert witness, Marvin A. Krane, M.D., was deposed on September 29, 2004. Dr. Krane concluded: “I absolutely do not criticize or have any opinions as to the hospital or Dr. Payne. This is strictly a Vakili instituted deviation.”

Section 6853 of title 18 of the Delaware Code requires: “No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of this case and as to the causation of the alleged personal injury....” As of this date, Plaintiffs do not have an expert witness who has expressed an opinion that either Dr. Payne or the Medical Center has engaged in negligent conduct with regard to Plaintiffs.

By letter dated October 5, 2004, counsel for Plaintiffs requested a continuance of the February 7, 2005 trial date. The basis for the request was that Mrs. Ferguson’s medical condition had not yet stabilized. Therefore, Plaintiffs needed additional time to determine the complete extent of damages and to obtain permanency opinions. There was no suggestion that the issue of liability would be revisited.

Over the objection of Defendants Dr. Payne and the Medical Center, the Court entered a new scheduling order, extending the discovery cutoff until June 30, 2005 and establishing a new trial date of August 22, 2005. Defendants Dr. Payne and the Medical Center moved for summary judgment on November 4, 2004, on the grounds that Plaintiffs had failed to present expert testimony

regarding any negligence or breach of a standard of care as to the moving defendants.

In their opposition to the motion for summary judgment, Plaintiffs argue:

At the present time discovery is not completed and the parties are in the process of making arrangements to depose additional hospital personnel, including all those present in the operating room at the time the alleged medical negligence occurred, in order to further develop the factual record....These depositions include the deposition of Karroll L. Payne, M.D., a named Defendant, as well as all subordinate staff personnel that are customarily present in the operating room, including but not limited to, scrub persons, nurses, anesthesiologists, and the like.

Under these circumstances, the factual record is not complete and an additional six and one half months of discovery remains before the discovery period will end. The testimony of the other persons in the operating room that will be deposed could form the basis of a supplemental report by the Plaintiffs' medical expert, Dr. Krane, in which he could opine that the moving Defendants could have acted in a negligent manner and/or breached the standard of care. The Defendants' motion is premature.

This case was filed on July 11, 2003. The parties have had ample opportunity to obtain fact and expert testimony on the issue of the liability of Defendants Dr. Payne and the Medical Center. The explicit purpose of Plaintiffs' application for a continuance of the trial date and extension of the discovery cutoff was to enable determination of Mrs. Ferguson's maximum medical improvement, complete damages, and permanency issues. The Court granted the continuance

and extension, over the moving Defendants' objection, for the sole purpose stated in Plaintiffs' letter dated October 5, 2004.

The Delaware Medical Malpractice Act mandates that Plaintiffs' claim for medical malpractice must be supported by expert medical testimony as to both the alleged deviation from the applicable standard of care and the causal connection between the wrongful conduct and the alleged injury.¹ Within the ample time for expert discovery on the issue of liability permitted by the Court, Plaintiffs have failed to produce the required medical expert testimony, an essential element of their case against Defendants Dr. Payne and the Medical Center.²

THEREFORE, the Motion for Summary Judgment on Behalf of Karroll L. Payne, M.D. and Christiana Care Health Services, Inc., f/k/a The Medical Center of Delaware, Inc., is hereby **GRANTED**. Plaintiffs' claims against Defendants Karroll L. Payne, M.D. and Christiana Care Health Services, Inc., f/k/a The Medical Center of Delaware, Inc. are hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

¹*Russell v. Kanaga*, 571 A.2d 724, 732 (Del. 1990).

²*See Burkhart v. Davies*, 602 A.2d 56, 59-60 (Del. 1991).

