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

LETONI WILSON, Mother and Next Friend of, TIRESE JOHNSON, a minor child, Plaintiffs, v. DR. PHYLLIS JAMES, NEW CASTLE FAMILY CARE, and MICHELE MONTAGUE, Defendants.	)	C.A. No. 07C-04-025 PLA

Submitted: February 17, 2010
Decided: February 19, 2010

UPON DEFENDANT MICHELE MONTAGUE'S
MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY
OF DR. HOWARD BAUCHNER, M.D.
GRANTED

This 19th day of February, 2010, it appears to the Court that:

1. Plaintiff Letoni Wilson brought this medical malpractice suit on behalf of her son, Tirese Johnson, after Tirese developed a form of jaundice-related infant brain damage known as kernicterus. On July 21, 2006, Wilson scheduled a same-day appointment for then-four-day-old Tirese at New Castle Family Care, which is the office of Defendant Dr. Phyllis James.

Wilson was concerned that Tirese had developed yellowing of the skin, a symptom she knew to be potentially serious because her older son had experienced it in the past. Tirese was scheduled to be seen by Defendant Michele Montague, a physician's assistant in Dr. James's office. Dr. James was not expected to be in the office that afternoon.

2. During the examination of Tirese, Montague noted yellowing on the skin of Tirese's face and chest. Because Dr. James had unexpectedly arrived at the office outside her normal hours, Montague was able to consult with Dr. James after the examination. Dr. James issued standard infant-care instructions and did not order any diagnostic testing or treatment. Within two days after the appointment, Tirese was brought to the emergency room and diagnosed with elevated levels of bilirubin. Despite receiving treatment at the hospital, Tirese's hyperbilirubinemia led to kernicterus, which occurs when bilirubin accumulates in the brain. Subsequent to this initial diagnosis, Tirese has been diagnosed with a number of related conditions, including developmental delays and cerebral palsy.

3. Plaintiff filed suit against Dr. James, Montague, and New Castle Family Care, alleging that Tirese's kernicterus was caused by the defendants' failure to identify the yellowing of skin on an African-American infant as a crucial warning symptom that required prompt diagnostic testing

and treatment. Trial is scheduled for March 22, 2010. During settlement negotiations, Plaintiff accepted Dr. James's tender of the $1 million limits of her insurance policy as an advance against any judgment against her. Defendant Montague declined to engage in mediation, on the basis that the "case is one of remote liability against her."[1]

4. Montague's position arises in part from the issue presented in the instant motion *in limine*, in which she seeks to preclude Plaintiff's expert Howard Bauchner, M.D. from testifying as to the standard of care required of a physician's assistant. Montague asserts that Dr. Baunchner's report and deposition testimony fail to establish that he is qualified to offer standard-of-care testimony for a physician's assistant. In response, Plaintiff argues that Montague should be held to the standard of care required of a pediatrician, and that Dr. Bauchner is qualified as a Board-certified pediatrician to testify as to that standard and her alleged breach of it.

5. Delaware Rule of Evidence 702 contemplates that expert opinion testimony may be provided by "a witness qualified as an expert by knowledge, skill, experience, training or education." In medical malpractice cases, 18 *Del. C.* § 6854 provides a further gloss on the requirement that an expert witness be qualified:

[1] Pretrial Stipulation, at 6.

> No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.

The party proffering an expert's opinion bears the burden of establishing its admissibility by a preponderance of the evidence.[2]

6. As Montague's motion outlines, neither Dr. Bauchner's report nor his deposition offer an opinion as to the standard of care required of a physician's assistant. At his deposition, Dr. Bauchner professed that he was unaware of what the "scope of practice of physician's assistants" was under Delaware law, or of how a physician's assistant's training and duties differed from those of a nurse practitioner; indeed, Dr. Bauchner did not know that Michele Montague was acting as a physician's assistant during the litigated events, having mistaken her for a nurse practitioner. Under Delaware law, physicians' assistants and nurse practitioners engage in drastically different scopes of practice.[3] Dr. Bauchner's admitted lack of familiarity with the practices of physicians' assistants in Delaware render him unqualified to articulate the standard of care for a physician's assistant, and by implication he cannot express a competent opinion as to whether Montague violated that standard.

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[2] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 795 (Del. 2006).

[3] *Compare* 24 *Del. C.* §§ 1770A, 1772 *with* 24 *Del. C.* § 1902(b) (nurse practitioners).

7. The Court's previous ruling that Plaintiff's Affidavit of Merit complies with 18 *Del. C.* § 6853 does not alter its decision. As the Court explained when addressing that issue, the requirements for an Affidavit of Merit are "minimal." The fact that a physician is qualified to provide an affidavit under § 6853(c) prior to discovery by the opposing party does not automatically qualify him to offer an opinion regarding standard of care at trial. Moreover, the Affidavit of Merit contained the opinions of a *different physician*, Michael Miller, M.D. In evaluating the affidavit, the Court was not confronted with sworn testimony from Dr. Miller stating that he was not aware of the standard of care for physicians' assistants.

8. Plaintiff contends that in establishing the applicable standard of care for Montague's conduct, she need not present an expert physician's assistant, but can rely upon the testimony from a physician in the same specialty. The Court agrees with the principle that a physician may act as an expert as to the standard of care for a physician's assistant;[4] however, the expert physician must be "familiar with the degree of skill ordinarily

[4] *See, e.g., Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579 (Del. 2007) (testimony of obstetricians offered regarding standard of care applicable to nurse-midwife); *Simmons v. Bayhealth Med. Ctr., Inc.*, 950 A.2d 659, 2008 WL 2059891 (Del. May 15, 2008) (TABLE) (testimony of physician offered regarding standard of care applicable to nurse).

employed in the field of medicine on which he or she will testify"[5] in order to qualify as competent to opine as to the standard of care in that field. Although § 6854 does not explicitly address cases in which a physician testifies about non-physicians, both the intent of § 6854 and the qualification principles of Rule 702 require that the expert be familiar with the degree of skill ordinarily employed by a practitioner of the type about which he or she will be testifying. Dr. Bauchner, by his own admissions, is not familiar with the standard of care for physicians' assistants.

9. Furthermore, the Court rejects Plaintiff's bewildering assertion that Montague is to be held to the standard of care of a pediatrician because Tirese Johnson was "entitled to receive the same standard of care as a pediatrician would provide, regardless of the status of the healthcare professional who was providing that care."[6] Permitting a physician with the requisite familiarity to opine as to the standard of care for other medical personnel does not mean that non-physician personnel are held to the *physician's* standard of care. Plaintiff asserts that Dr. Bauchner's deposition testimony establishes that Montague "was obligated to provide the same

[5] 18 *Del. C.* § 6854.

[6] Pls.' Resp., at 4.

standard of care as a physician would be required to provide."[7] This summary seems to mischaracterize Dr. Bauchner's testimony, which was to the effect that he did not believe that Tirese Johnson received "the care that would have been appropriate, and whether that's attributable to Dr. James or the physician's assistant, I can't distinguish."[8] To the extent it accurately presents Plaintiff's position with regard to the applicable standard of care, however, it is contrary to Delaware law, which, among other limitations, explicitly prohibits physicians' assistants from performing "any medical act which has not been delegated by a supervising physician," except in emergencies or as specifically authorized by statute.[9] Although common sense might provide a quicker route to the same conclusion, the Medical Practice Act's limitations upon a physician's assistant's scope of practice[10] make clear that the applicable standard of care for a pediatric physician's assistant cannot be identical to the standard of care for a Board-certified pediatrician.

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[7] Pls.' Resp., at 11.

[8] Dep. Tr., Dr. Howard Bauchner, M.D. (Dec. 14, 2009), at 46:7-11.

[9] 24 *Del. C.* § 1772(f).

[10] *See* 24 *Del. C.* §§ 1772, 1773(b).

10. For the foregoing reasons, the Court concludes that Dr. Bauchner is not qualified to offer testimony regarding the standard of care applicable to Montague. Defendant Montague's Motion *in Limine* is hereby **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Kenneth M. Roseman, Esq.
Mason E. Turner, Jr., Esq.