

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

ROBERT C. WILLIAMS, JR. and )  
ELISA D. WILLIAMS, HIS WIFE )

Plaintiffs, )

v. )

THOMAS J. DESPERITO, M.D., )

ST. FRANCIS HOSPITAL, INC., ) C.A. No. N09C-10-164 CLS

FRANCIS J. SCHANNE, M.D., )

JAMES KOZUB, P.A.-C and )

UROLOGICAL SURGICAL )

ASSOCIATES )

OF DELAWARE, P.A., )

Defendants. )

Date Submitted: October 14, 2011

Date Decided: October 24, 2011

On St. Francis's Motion *in Limine* to Preclude Myron Murdock, M.D., From  
Giving Expert Opinions Regarding Hospital Advertisements and Medical Ethics  
**GRANTED.**

**ORDER**

Michael C Rosendorf, Esq., Robert C. Morgan, Esq., 221 Main Street, Stanton,  
Delaware 19804. Attorney for Plaintiffs.

Dennis D. Ferri, Esq., Morris James, LLP 500 Delaware Avenue, Suite 1500, P.O.  
Box 2306, Wilmington, Delaware 19899. Attorney for Defendant, St. Francis  
Hospital.

**Scott, J.**

## Introduction

Before this Court is Defendant, St. Francis Hospital's ("Defendant" or "St. Francis"), Motion *in Limine* to Preclude Myron Murdock, M.D., ("Dr. Murdock") from Giving Expert Opinions Regarding Hospital Advertisements and Medical Ethics. For the reasons that follow, the Defendant's Motion *in Limine* is **GRANTED**.

## Facts

This case arises from robotic surgery performed on Plaintiff, Robert C. Williams, Jr. ("Mr. Williams") by one of the Defendants, Thomas J. Desperito, M.D. ("Dr. Desperito"). Mr. Williams underwent a needle biopsy of his prostate. The pathology report indicated that the biopsy results were positive and Mr. Williams was diagnosed with prostate cancer. Dr. Desperito performed a da Vinci-assisted laparoscopic prostatectomy on July 31, 2007.

Mr. Williams fell during his discharge from St. Francis Hospital. His fall was a result of weakness in his leg. He suffered permanent injury that caused orthopedic consultations and additional surgery. There, Mr. Williams learned that his femoral and/or obturator nerve was injured from his prostatectomy.

On October 16, 2009, Mr. Williams and his wife, Elisa D. Williams ("Mrs. Williams") filed this medical malpractice action arising from the care and treatment

rendered to Mr. Williams. Count I is a medical negligence claim and Count II is a loss of consortium claim brought on behalf of Mrs. Williams.

Plaintiffs identified Dr. Murdock as an expert in the field of urological surgery with opinions on the standard of care and causation regarding the care rendered by Defendants. He was not identified by Plaintiffs as an expert in medical ethics.

*Dr. Murdock's Deposition*

A deposition of Dr. Murdock was held on May 26, 2011. In this deposition, St. Francis asked Dr. Murdock whether St. Francis breached the standard of care. Dr. Murdock believes St. Francis breached the standard of care on robotic advertising because of false advertising. Specifically, Dr. Murdock states in his deposition that: (1) by St. Francis advertising robotic surgery, they indicate they have qualified, competent surgeons;<sup>1</sup> (2) Dr. Desperito is not qualified because he has not done enough cases, yet St. Francis can advertise if Dr. Desperito has performed zero cases;<sup>2</sup> (3) the practices are unethical but no rules are cited to support this proposition;<sup>3</sup> and (4) he has not reviewed St. Francis's bylaws or their credentialing process for surgeons.<sup>4</sup>

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<sup>1</sup> Def. Mot. *in Limine*, Ex. F, at 113.

<sup>2</sup> *Id.* at 114.

<sup>3</sup> *Id.* at 114-15, 110-11.

<sup>4</sup> *Id.* at 110-11.

*Dr. Murdock's qualifications*

Dr. Murdock is a Surgeon at Metropolitan Ambulatory Urological Institute; he is also a Principal Investigator/Medical Director for Myron I. Murdock M.D. LLC. He received his B.A. in Biology at Boston University and his M.D. at George Washington University, School of Medicine. Dr. Murdock received additional education at Columbia University for Uro-pathology, Holy Cross Hospital for Prostate Brachytherapy, University of Indiana for Extracorporeal Shock Wave Lithotripsy and Doctors Community Hospital for Cryotherapy of the Prostate and PVP Laser.

Dr. Murdock's experience in urology also extends from previous work as a Principal Investigator/Medical Director at a urology practice, Urologist at Drs. Werner, Murdock, and Francis, P.A., and Chief Resident of Urology at Boston Medical Center. Murdock worked and continues to work with various pharmaceutical companies and corporations, for example, as a member of Speaker Bureaus and Advisory Boards. His research activities primarily focus on Urology: Acute Urinary Retention, Bacterial Prostatitis, Benign Prostatic Hypertrophy, Bladder Cancer, Bulbar Urethral Stricture Disease, Erectile Dysfunction and Prostate Cancer.

### **Parties' Contentions**

Defendant moves *in limine* to preclude Dr. Murdock's proffered expert testimony concerning hospital advertisements and medical ethics. St. Francis argues that Dr. Murdock's testimony is inadmissible because he is not qualified to give testimony on whether St. Francis' advertising practices are ethical.

Plaintiffs responded in opposition to St. Francis's Motion *in Limine*. They argue that Dr. Murdock is competent to testify about medical ethics and advertisements because he has extensive knowledge and skill as a surgical urologist. Additionally, they argue that medical ethics and advertising are not distinct sub-fields within the practice of medicine. Lastly, Plaintiffs submit that St. Francis's argument goes to the weight and not credibility of the testimony.

### **Standard of Review**

Title 18, Section 6854 provides that "[n]o 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 and skill ordinarily employed in the field of medicine on which he will testify."<sup>5</sup> Delaware Rule of Evidence 702 ("Rule 702") governs the admissibility of expert testimony. Specifically, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

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<sup>5</sup> 18 Del. C. § 6853.

knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise . . . .”<sup>6</sup> Rule 702 sets out three factors in which to aid the Court in determining admissibility: “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”<sup>7</sup>

Rule 702 is similar to Federal Rule of Evidence 702. The United States Supreme Court interpreted Federal Rule of Evidence 702 in *Daubert v. Merrell Dow Pharmaceuticals*<sup>8</sup> and *Kumho Tire Co., Ltd. v. Carmichael*.<sup>9</sup> In these cases, the Supreme Court addressed scientific testimony and its admissibility; this was extended to apply to all expert testimony concerning “scientific, technical or other specialized” matters.<sup>10</sup> The Delaware Supreme Court adopted these holdings in *M.G. Bancorporation, Inc. v. Le Beau*.<sup>11</sup>

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<sup>6</sup> D.R.E. 702. “‘Scientific’ implies a grounding in methods and procedures of science. ‘[K]nowledge’ connotes more than subjective belief or unsupported speculation.” *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 590 (1993).

<sup>7</sup> D.R.E. 702.

<sup>8</sup> 509 U.S. 579 (1993).

<sup>9</sup> 526 U.S. 137 (1999).

<sup>10</sup> *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

<sup>11</sup> 737 A.2d 513 (Del. 1999). “D.R.E. 702 is consistent with the United States Supreme Court’s decisions in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).” D.R.E. 702, cmt.

It is this Court's responsibility and obligation to "ensure that any and all scientific testimony . . . is not only relevant, but reliable."<sup>12</sup> This obligation makes the Court the "gatekeeper" in determining whether the expert's testimony "has a reliable basis in the knowledge and experience of [the relevant] discipline."<sup>13</sup> The United States Supreme Court identified in *Daubert*, and the Delaware Supreme Court adopted, four factors to aid the Court in its role as "gatekeeper."

These factors are:

(1) whether a theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and (4) whether the theory or technique enjoys general acceptance within a relevant scientific community."<sup>14</sup>

These factors are not definitive and must be examined on a case-by-case basis.<sup>15</sup>

The Delaware Supreme Court created a five-prong test in determining admissibility of scientific or technical expert's testimony. Therefore, this Court must determine whether:

(1) the witness is qualified as an expert by knowledge, skill experience, training or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert

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<sup>12</sup> *M.G. Bancorporation*, 737 A.2d at 521.

<sup>13</sup> *Id.* at 523.

<sup>14</sup> *Daubert*, 509 U.S. at 590-94.

<sup>15</sup> *Id.* at 591-93.

testimony will not create unfair prejudice or confuse or mislead the jury.<sup>16</sup>

This test is required *in addition* to a *Daubert* analysis.<sup>17</sup>

The proponent of the expert testimony must prove admissibility by a preponderance of evidence.<sup>18</sup> They must only demonstrate, however, that the expert's opinions are reliable.<sup>19</sup> "When a trial court determines that an expert's testimony is reliable, this does not mean that contradictory expert testimony by default is unreliable. *Daubert* permits testimony that is the product of competing principles or methods in the same field of expertise."<sup>20</sup>

### **Discussion**

Plaintiff fails to demonstrate by a preponderance of evidence that Dr. Murdock's testimony on hospital advertisements and medical ethics is admissible. While Murdock is an expert in other respects, his knowledge, skill experience, training or education fail to demonstrate his qualifications at issue and his testimony is not a product of reliable principles and methods.

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<sup>16</sup> *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 795 (Del. 2006); *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006).

<sup>17</sup> *Bowen*, 906 A.2d at 795.

<sup>18</sup> *Id.* at 795.

<sup>19</sup> *In re Asbestos Litig.*, 911 A.2d 1176, 1201 (Del. Super. 2006)

<sup>20</sup> *Id.*



*I. Murdoch Is Not Qualified As An Expert To Testify Regarding The Defendant's Advertisements and Medical Ethics Because He Lacks Knowledge, Skill Experience, Training or Education in That Field.*

Murdoch's testimony on Defendant's advertisements and medical ethics is inadmissible because he is not qualified to offer such opinions. A witness is qualified to testify through any of the following: knowledge, skill, experience, training or education.<sup>21</sup> The Court must "scrutinize an expert's qualifications with 'due regard for the specialization of modern science.'"<sup>22</sup>

Here, Dr. Murdoch does not have the requisite qualifications, formal or otherwise, to opine about Defendant's advertisements and medical ethics. While his Curriculum Vitae is impressive, it does not establish knowledge on advertising or medical ethics. Dr. Murdoch never sat on a medical ethics committee and also testified at his deposition that he was not an expert in medical ethics. Therefore, he does not have the proper qualifications to testify on medical ethics or advertising.

*II. Murdoch's Testimony Regarding Defendant's Advertisements Or Medical Ethics Is Not Relevant, Reliable and Does Not Provide Assistance to a Jury.*

Even assuming *arguendo* that Murdoch is qualified, his testimony regarding the Defendant's advertisements and medical ethics is not admissible

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<sup>21</sup> D.R.E. 702.

<sup>22</sup> *Bowen*, 906 A.2d at 796 (quoting *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002)).

because it is not relevant, it is not based upon reasonably relied upon information and may confuse a jury.

First, Dr. Murdock's opinions are not relevant.<sup>23</sup> The proffered testimony by Dr. Murdock conveys more of a moral and not a legal standard. Thus, his opinions are not relevant to the determination of this action.

Second, his opinions are not based upon reasonably relied upon information. Dr. Murdock states that he has not reviewed the bylaws or credentialing process for St. Francis. Thus, without a proper application of the standards to the facts of this case, his opinions are not based on proper methodology.

Lastly, Dr. Murdock's testimony will not provide assistance and may confuse the jury. "When the expert's opinion is not based upon an understanding of the fundamental facts of the case . . . it can provide no assistance to the jury and such testimony must be excluded."<sup>24</sup> Here, Dr. Murdock indicated in his deposition that Dr. Desperito is not qualified or competent because he has not performed enough cases. He then states that the hospital may advertise even if Dr. Desperito has not performed any cases.

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<sup>23</sup> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. D.R.E. 401.

<sup>24</sup> *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010) (citations omitted).

This conflicting testimony may confuse or mislead the jury and must be precluded.

**Conclusion**

Based on the foregoing, St. Francis's Motion *in Limine* is **GRANTED**.

**IT IS SO ORDERED.**

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**Judge Calvin L. Scott, Jr.**