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

ARLENE T. PARKER, Individually and as the Administrator of the Estate of JOSEPH A. PARKER, Deceased, and ERIC GAINES, a minor, by his parent and natural guardian, ARLENE T. PARKER and JARMAR ROANE, a minor, by his parent and natural guardian, ARLENE T. PARKER,	)	
Plaintiffs,	)	
v.	)	**CA No. 98C-12-075-JEB**
HOWARD WILK, M.D. and ST. FRANCIS HOSPITAL, INC.,	)	
Defendants.	)	

Submitted: October 28, 2003
Decided: December 22, 2003

OPINION

Upon Defendant Howard Wilk's Motion for Summary Judgment.
Granted.

Appearances:

Michael D. Becker, Esquire, Marks, Feiner & Fridkin, P.C., Wilmington, Delaware.
Attorney for Plaintiffs.

Mason E. Turner, Esquire, Prickett Jones & Elliott, Wilmington, Delaware.
Attorney for Defendant Howard Wilk, M.D..

JOHN E. BABIARZ, JR., JUDGE.

This is the Court's decision on Defendant Dr. Howard Wilk's motion for

summary judgment. For the reasons explained below, Defendant's motion is Granted.

FACTS

On January 7, 1997, Dr. Wilk performed an out-patient hernia repair operation on Mr. Joseph Parker at St. Francis Hospital. Mr. Parker went home the same day, but he returned to the hospital three days later complaining of abdominal pain. Dr. Wilk performed exploratory surgery on January 12. Mr. Parker died during the night of January 17, 1997, from bilateral pulmonary thromboembolism.

Plaintiffs filed suit raising a wrongful death claim and a survival claim based on the negligence of both defendants during Mr. Parker's readmission to the Hospital. This Court granted the Hospital's motions for summary judgment on both claims. Dr. Wilk now moves for summary judgment, arguing that Plaintiffs cannot present expert testimony as to the appropriate standard of care.

STANDARD OF REVIEW

On a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party.[1] Summary judgment may be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2]

---

[1] *Billops v. Magness Construction Co.*, 391 A.2d 196, 197 (Del. 1978).

[2] *Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 1997).

DISCUSSION

Defendant Wilk argues that Plaintiffs' expert witness, Dr. Lloyd Bergner, M.D., cannot testify as to the appropriate standard of care because he is not familiar with the practice of medicine in Delaware. Dr. Bergner has been deposed three times and provided two reports in connection with this case. When he was first deposed on March 14, 2001, Dr. Bergner acknowledged that he had no familiarity with Delaware hospitals, practice or protocols, or the standard of medical/surgical care in Delaware.[3] In his second deposition, taken on July 19, 2002, Dr. Bergner stated that his opinions were based on the standard of care in New York State.[4] On July 1, 2003, Dr. Bergner gave his third and final deposition. He stated that he was able to offer an opinion on the Delaware standard of care because he had read a nurse's deposition.[5] Defendant asserts that none of these responses meets the requirements for standard of care evidence under the statute governing medical malpractice suits in 1997.

Plaintiffs acknowledge that although Dr. Bergner was not acquainted with Delaware practices and protocols, he testified at length that the applicable standards are national and are equally applicable in Israel where he has also practiced.

---

[3]Bergner Deposition 1 at 22-23; 70.

[4]Bergner Deposition 2 at 90.

[5]Bergner Deposition 3 at 6.

Plaintiffs have not offered a bridge witness to establish a nexus between the national standard described by Dr. Bergner and the standard of care in Delaware.

The question before the Court is whether Plaintiffs must present expert testimony as to the standard of care in Delaware in 1997 or may present evidence as to current national or international standards. This question arises because in 1998 the General Assembly amended the definition of medical malpractice by renaming it "medical negligence" and, more importantly, by deleting the locality requirement from a plaintiff's case. The pertinent portion of the amended definition provides as follows:

> The standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed in the same or similar field of medicine as defendant, and the use of reasonable care and diligence.[6]

Under this definition, a plaintiff must present evidence of the standard of care in the same or similar field as a defendant but need not show violation of a local standard of care. As a change in the substantive definition of medical malpractice, this amendment may not be applied retroactively.[7]

Plaintiffs assert that because the amendment was effective July 7, 1998, and the

---

[6]DEL. CODE ANN. tit. 18, § 6801(7) (1999).

[7]*Tyler v. Dworkin*, 747 A.2d 111, 125 (Del. Super.), *aff'd* 741 A.2d 1028 (Del. 1999).

Complaint was filed on December 8, 1998, the case is governed by the amended statute and they need not present evidence of a local standard of care. However, the controlling statute is the one in effect at the time of the alleged negligence, not at the time of the filing of a lawsuit. The events in question took place in January 1997, and the prior law therefore controls.

Under the previous statute, the definition of medical malpractice required every medical practitioner to use the "degree of skill and care ordinarily employed, under similar circumstances, by members of the profession in good standing in the same community or locality. . . ."[8] Thus, Plaintiffs in this case must be able to show that the purported national standard of care was also the applicable standard in Delaware. As stated above, Dr. Bergner acknowledged that he was not familiar with medical practices in Delaware and that he was testifying according to the standard of care in New York. When he did address the Delaware standard of care in his third deposition of July 2003, he based his opinion on his review of a "nurse's deposition."[9] He did not identify which of the ten nurses' depositions he had reviewed, nor did he explain how such a deposition could adequately inform him as to a medical or surgical standard of care. In his report dated September 10, 2000, Dr. Bergner analyzed

---

[8]DEL. CODE ANN. tit. 18, § 6801(7) (1980).

[9]Bergner Deposition at 6.

several deviations from "good standard medical practice," but this phrase does not have the same legal definition as standard of care.[10]

In Dr. Bergner's third deposition, dated July 1, 2003, he stated for the first time that Mr. Parker would have had a greater than 90 percent chance of survival but for the negligence of both the Hospital and Dr. Wilk.[11] He again based this opinion on his reading of a single, unidentified nurse's deposition, and he stated that the standard he applied was "national and international."[12] He did not refer to any Delaware surgical or medical protocols. Plaintiffs have not offered another medical witness to provide bridging testimony that the national standard of care which Dr. Bergner described is the standard applied in Delaware.[13]

Based on the totality of these facts, the Court finds that Plaintiffs are not able to present medical evidence of any violations of the applicable standard of care in 1997, which is the skill ordinarily employed by "members of the profession in good standing in the same community or locality."[14]

---

[10] *Tyler v. Dworkin*, 747 A.2d at 122 (instructing the jury as to the legal distinction between "good medical practice" and "standard of care").

[11] Bergner Deposition 3 at 8.

[12] *Id.* at 6.

[13] *See McKenzie v. Blasetto*, 686 A.2d 160, 163 (Del. 1996).

[14] DEL. CODE ANN. tit. 18, § 6801(7) (1980).

CONCLUSION

For all these reasons, Defendant Howard Wilk's motion for summary judgment is ***Granted.***

It Is So ORDERED.

_____
John E. Babiarz, Jr.

JEB,jr/bjw/rmp
Original to Prothonotary