

Cite as 2010 Ark. App. 780

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA09-988

CINDY GILBOW

APPELLANT

V.

FRASER M. RICHARDS, M.D.

APPELLEE

Opinion Delivered November 17, 2010

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT
[NO. CV-2006-418]

HONORABLE JOHN N.
FOGLEMAN, JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Cindy Gilbow, as administratrix of the estate of Dub Sacridier, filed a wrongful-death action against Dr. Fraser Richards, Dr. Jack Havdala, and St. Bernard's Hospital, Inc., d/b/a St. Bernard's Regional Medical Center a.k.a. St. Bernard's Medical Center (St. Bernard's). The complaint alleged that the doctors breached the standards of care for cardiologists and cardiovascular surgeons by proceeding with a coronary-bypass surgery on the decedent without first repairing his mitral valve, resulting in embolic stroke injuries, death, and other damages, which would not have otherwise occurred, as well as mental anguish to his surviving spouse and daughters. The complaint further alleged that the hospital breached its duty of care by allowing methicillin-resistant staphylococcus bacterial infection to exist in the hospital so as to constitute a contaminated field, which resulted in a massive infection, injury, death, and

damages to the decedent, as well as extreme mental anguish for the surviving spouse and daughters.

Appellant appeals from the order granting a directed verdict to Dr. Fraser Richards. On appeal, Gilbow argues that the trial court committed reversible error by permitting Dr. Richards to interrupt the testimony of Gilbow's expert witness and file in open court a written motion in limine and brief to exclude the expert's testimony, having failed to raise such motion during the pretrial hearing; that the trial court abused its discretion and committed reversible error by refusing to permit her expert witness to testify; and that the "same or similar locality rule" violates her right to fundamental fairness, due process of law, equal protection, and the right to a jury trial under state and federal constitutions. We affirm.

Arkansas Code Annotated section 16-114-206(a) provides:

(a) In any action for medical injury, when the asserted negligence does not lie within the jury's comprehension as a matter of common knowledge, the plaintiff shall have the burden of proving:

(1) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant, the degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he or she practices or in a similar locality;

(2) By means of expert testimony provided only by a medical care provider of the same specialty as the defendant that the medical care provider failed to act in accordance with that standard; and

(3) By means of expert testimony provided only by a qualified medical expert that as a proximate result thereof the injured person suffered injuries that would not otherwise have occurred.

In *Gambill v. Stroud*, 258 Ark. 767, 770, 531 S.W.2d 945, 948-49 (1975) (citations omitted), our supreme court stated:

The rule we have established is not a strict locality rule. It incorporates the similar community into the picture. The standard is not limited to that of a particular locality. Rather, it is that of persons engaged in a similar practice in similar localities, giving consideration to geographical location, size and character of the community. The similarity of communities should depend not on population or area in a medical malpractice case, but rather upon their similarity from the standpoint of medical facilities, practices and advantages. The extent of the locality and the similarity of localities are certainly matters subject to proof. Modern means of transportation and communication have extended boundaries but they have not eliminated them. The opportunities available to practitioners in a community are certainly matters of fact and not law and may be shown by evidence under our own locality rule.

“[A]n expert witness need not be one who has practiced in the particular locality or who is intimately familiar with the practice in it in order to be competent to testify if the appropriate foundation has been laid to show that he is familiar with the standards of practice in a similar locality, either by his testimony or by other evidence showing the similarity of localities.” *Id.* at 770B, 531 S.W.2d at 950.

Gilbow’s expert, Dr. Jorge Cheirif, is a cardiologist in Dallas. He testified that there is a national standard of care. He admitted that he had never practiced at any hospital in Arkansas; had never consulted with any Jonesboro cardiologists; had never practiced in a town the size of Jonesboro; had never observed physicians practicing in Jonesboro or a similar community; had never observed the standard of care to which doctors in Jonesboro adhere; that he relied upon a national standard of care; and that he had never observed any standard of care in Jonesboro or a community of its size to determine whether it exceeds, is less than,

or is the same as the “national standard of care.” He admitted that he did not know whether the standard of care in Jonesboro, Arkansas, or a community of its size exceeds, is less than, or is the same as the national standard of care. When asked if he was familiar with Jonesboro or the medical facilities available in Jonesboro, Dr. Cheirif responded that he really could not say that he knew “the way it is practiced over here.”

In *Shaffer v. Yang*, 2010 Ark. App. 97, this court held that the trial court did not err in ruling that testimony that all obstetrician/gynecological physicians in the United States were held to the same standard of care did not sufficiently establish the local standard of care for Hot Springs, Arkansas. In that case, the expert-witness physician was unfamiliar with Hot Springs and the physicians and the medical services available there. In affirming the circuit court’s directed verdict in favor of the physician because of the plaintiff’s failure to establish the local standard of care, this court noted that our supreme court held in *Wolford v. St. Paul Fire & Marine Ins. Co.*, 331 Ark. 426, 961 S.W.2d 743 (1998), that testimony regarding a national standard of care is insufficient where the expert fails to demonstrate a familiarity with the locality where the alleged malpractice occurred.

Here, as in *Shaffer*, the expert demonstrated a total lack of knowledge concerning Jonesboro’s medical community, medical facilities, and local standard of care. For this reason, the circuit court did not err in directing a verdict for Dr. Richards.

Gilbow further complains that the trial court erred in allowing Dr. Richards to interrupt the testimony of Dr. Cheirif and to have Cheirif’s testimony excluded. We disagree.

As Dr. Richards notes, whether a medical malpractice plaintiff meets her burden of proof on the elements of her cause of action is a question of law, and a defendant is not required to challenge the failure of the plaintiff to meet her burden of proof until the directed-verdict stage of the trial. *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002). The *Williamson* court further held, “To require a party to object that the opposing party did not meet its burden of proof during a witness’s testimony would allow the opposing party to then resume questioning to meet that burden.” *Id.* at 312, 72 S.W.3d at 492-93. That is precisely what appellee did in this case. Even though Dr. Richards could have waited until Gilbow had presented her case and then moved for a directed verdict, he raised the issue during Dr. Cheirif’s testimony, thereby giving Gilbow an opportunity to supply proof of the local standard of care (which she was unable to do); the trial court then correctly granted a directed verdict in favor of Dr. Richards.

Finally, Gilbow argues that the same-locality rule violates her right to fundamental fairness, due process of law, equal protection, and the right to a jury trial under the state and federal constitutions. Her attorney, at the close of the trial, stated that “just for the record,” he thought that not allowing Gilbow’s expert witness to testify was a violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, of fundamental fairness, that it treated litigants of equal stature differently, that it gave people who were citizens greater rights than non-citizens, and that it violated his client’s constitutional rights and those of the deceased. Gilbow failed to obtain a ruling on any of these contentions; therefore, the arguments were not preserved for our review, and we cannot address them.

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Affirmed.

PITTMAN and GRUBER, JJ., agree.