

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
BRYSON CITY DIVISION  
CIVIL NO. 2:06 CV 2

ESTATE OF DIANA CHRISTINE MATEO, By And  
Through Her Co-Personal Representatives,  
GUILLERMO MATEO and CHRISTINA  
BENEFIELD, and GUILLERMO MATEO  
and CHRISTINA BENEFIELD, Individually;

Plaintiffs,

VS.

**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO  
EXCLUDE AND DISQUALIFY  
DR. BAHA SIBAI**

JENKINS L. CLARKSON, MD,

Defendant.

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**ARGUMENT**

North Carolina General Statute §90-21.12 provides as follows:

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the *same or similar communities* at the time of the alleged act giving rise to the cause of action. (emphasis added)

N.C.G.S. §90-21.12 has thus been interpreted as codifying a “same or similar community” standard of care applicable when North Carolina courts are faced with the task of determining the liability of North Carolina health care providers. *Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984). It follows that in order to qualify as an expert

witness under N.C.G.S. §90-21.12, a medical expert must be able to show that he is familiar with the standard of care in the community which the alleged malpractice took place, or that of a similarly situated community. *Tucker v. Meis*, 127 N.C. App. 197, 487 S.E.2d 827 (1997). Put another way, a physician may:

Testify regarding the applicable standard of care...when that physician is familiar with the experience and training of the defendant and either (1) the physician is familiar with the standard of care in the defendant's community, or (2) the physician is familiar with the medical resources available in the defendant's community and is familiar with the standard of care in other communities having access to similar resources.

*Henry v. Southeastern OB-GYN Associates, P.A.*, 145 N.C. App. 208, 213-213, 550 S.E.2d 245, 248-49 (Greene, J., concurring), *aff'd*, 354 N.C.570 (2001).

**A. DR. SIBAI FAILED TO DEMONSTRATE THAT HE IS FAMILIAR WITH THE STANDARD OF CARE IN MURPHY, NORTH CAROLINA, OR THE STANDARD OF CARE IN SIMILAR COMMUNITIES.**

In the case at hand, while Defendant's expert Dr. Baha Sibai's deposition testimony demonstrates that he is vaguely familiar with the Defendant's experience and training,<sup>1</sup> it also reveals that he is not by any stretch of the imagination familiar with the standard of care applicable to Murphy, North Carolina. Moreover, he is clearly not familiar with the medical resources available in Murphy. Dr. Sibai testified at his deposition:

Q When Miss Mateo -- have you ever been  
10 to Murphy, North Carolina?

11 A I don't know. I have lectured  
12 several places there, so I really don't know where  
13 exactly in relation to which city is that.

14 Q Do you know where Murphy, North  
15 Carolina, is?

16 A It's in North Carolina I know.

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<sup>1</sup> See Deposition of Dr. Sibai at pp. 24-25, 125. All of Dr. Sibai's testimony regarding the Defendant's experience, education and/or training appears to be derived from his review of the Defendant's deposition in this matter as well as his CV.

17 Q Do you know in which part of North  
18 Carolina?

19 A I don't know exactly.

20 Q Do you know if it's near the coast or  
21 in the mountains?

22 A I don't know that.

23 Q Did you -- do you have -- have you  
24 received or reviewed any information with regard to  
25 the demographics of Murphy, North Carolina, or

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1 Cherokee County, North Carolina?

2 A No.

3 Q Do you know anything about the  
4 medical community in Murphy, North Carolina?

5 A In what way?

6 Q Anything about it other than the  
7 names that appear in this case?

8 A No.

9 Q Have you done any independent  
10 investigation of Murphy, North Carolina, or Cherokee  
11 County, North Carolina, and the standard of care of  
12 medicine there outside of the materials that you've  
13 reviewed?

14 A No. As I said, I expect the standard  
15 of care would be similar.

Deposition of Dr. Sibai, at pp. 23-24. From this testimony, it is clear that Dr. Sibai has no knowledge of Murphy, North Carolina, or of Cherokee County. He does not know where in North Carolina Murphy is located. He knows nothing about the demographics of Murphy or Cherokee County, including the population. He admits to having performed no investigation whatsoever into the medical community in Murphy or Cherokee County as a whole, and as a result clearly has no information regarding the medical resources available there. Thus, he cannot possibly be familiar with the standard of care in communities having similar resources, because he does not know what resources are available in Murphy.

Notwithstanding the above argument, Dr. Sibai unequivocally testified that his opinions in the matter at hand are based on a national standard of care. He testified at his deposition:

7 Q Tell me when you wrote your report  
8 and you used that phrase "standard of care," what  
9 definition were you using for that phrase?

10 A What a physician of similar training  
11 and experience will do in a similar situation.  
12 Which is if I had some of our residents who are in  
13 North Carolina who are practicing there, he did what  
14 one of our residents I have trained will be doing.

15 Q Is the standard of care that you are  
16 using to define this case and the treatment provided  
17 by Dr. Clarkson, is that the same here as where Dr.  
18 Clarkson was?

19 A I don't understand your question.

20 Q Is there -- is there any difference  
21 in your mind between the standard of care that  
22 you've just defined for me what a physician of  
23 similar training and experience would do in a  
24 similar situation, is there any difference in your  
25 mind as to how you applied your definition as to

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1 where Dr. Clarkson was, whether it be North  
2 Carolina, Ohio or Virginia?

3 A No. There is a national standard  
4 given in the situation where he is.

5 Q And you are using the national  
6 standard of care with regard to your review and  
7 opinions in this case?

8 A Yes.

Deposition of Dr. Sibai, at pp. 22-23. As a threshold matter, The Plaintiff acknowledges that a potential expert witness, by applying a national standard of care, in and of itself, does not per se disqualify the potential expert witness. *Pitts v. Nash Day Hosp., Inc.*, 167 N.C. App. 194, 107, 605 S.E.2d 154, 156 (2004), *aff'd*, 359 N.C. 626, 614 S.E.2d 267 (2005). In contrast, "...the critical inquiry is whether the doctor's testimony, taken as a

whole, meets the requirements of N.C.G.S. §90-21.12.” *Id.* In the present matter, Dr. Sibai’s testimony, taken as a whole, does not meet the requirements of §90-21.12.

The recent unpublished opinion of the North Carolina Court of Appeals in *Treat v. Roane*, 2006 N.C. App. LEXIS 1875, provides a thorough analysis of North Carolina law, and specifically N.C.G.S. §90-21.12, as it relates to the application of a national standard of care. In *Treat*, the Court found that the Plaintiff’s experts were not qualified pursuant to N.C.G.S. §90-21.12, despite Plaintiff’s argument that these experts were applying a national standard of care. The Court, relying on *Pitts* and *Henry, supra*, stated that:

...[P]laintiff’s experts failed to demonstrate that either (1) they were familiar with the standard of care practiced in Defendant’s community, or (2) they were familiar with the medical resources available in Wake County and were familiar with the standard of care in other communities with similar resources. *In fact, Plaintiff’s experts demonstrated that they knew little about Wake County or WakeMed in order to make this comparison.*

*Treat*, 2006 N.C. App LEXIS 1875, at 13. Likewise, in the case at hand, Defendant’s expert Dr. Sibai has failed to demonstrate that he either (1) is familiar with the standard of care practiced in Murphy, or (2) that he is familiar with the medical resources available in Murphy. In fact, as demonstrated above, his testimony shows that knows absolutely nothing, and has made no attempt to inquire into, Murphy, North Carolina, or the medical resources available there.

Furthermore, despite defense counsel’s best efforts during his examination of Dr. Sibai, he was unable to establish that Dr. Sibai in fact did know the standard of care in Murphy, North Carolina, or the medical resources available there and the standard of care in similar communities. *See* Deposition of Dr. Sibai at pp. 122-127. Rather, Dr.

Sibai was adamant that his opinions in this matter are based on a national standard of care. When questioned again by Plaintiff's counsel, Dr. Sibai testified:

RE CROSS EXAMINATION [sic]

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20 Q And do you -- do you still say that  
21 Dr. Clarkson complied with the way that you had  
22 defined the standard of care as a national standard  
23 of care?

24 A Yes.

25 Q And that's the standard that you're

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1 using to define the standard of care and offer your  
2 opinions; is that accurate?

3 A Yes.

4 Q And that's because you think it's the  
5 same everywhere?

6 A I think, you know, there is a  
7 national standard.

8 MR. MELROSE: That's all the questions I  
9 have.

Deposition of Dr. Sibai, at pp. 128-129. Nevertheless, as shown above, Dr. Sibai's lack of knowledge about Murphy, North Carolina and the medical resources available there compel that this Court disqualify and exclude him as an expert witness in this matter, whether he applies a national standard or not.

**B. DR. SIBAI PRESENTED NO EVIDENCE THAT A NATIONAL STANDARD OF CARE IS THE SAME STANDARD PRACTICED IN MURPHY, NORTH CAROLINA.**

Moreover, Dr. Sibai failed to present any evidence that the national standard of care on which he relied to formulate his opinions in the present matter is the same standard practiced across the country, or, more specifically, in Murphy, North Carolina. In *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E.2d 430 (1984), the North Carolina

Court of Appeals stated that “[W]here the standard of care is the same across the country, and expert witness familiar with that standard may testify despite his lack of familiarity with the defendant’s community.” *Id.* at 736.

Particularly analogous to the case at hand is *Smith v. Whitmer*, 159 N.C. App. 192, 582 S.E.2d 669 (2003). In *Smith*, the expert in question, a Dr. Heiman, testified that he had never visited Tarboro or Rocky Mount, had never spoken to any health care practitioners in the area, and was not “acquainted with the medical community in Tarboro.” *Id.* at 196. Rather, Dr. Heiman stated:

...the standard of care for orthopedic surgeons all over the country is very, very similar’ and that he could ‘comment on the standard of care as far as a reasonably prudent orthopedic surgeon anywhere in the country regardless of the medical community in Tarboro, North Carolina might do.

*Id.* However, although Dr. Heiman stated that he was familiar with a national standard of care, there “was no evidence that a national standard of care is the same standard of care practiced in the defendant’s community.” *Id.* at 197; *see also Henry, supra* at 210 (holding that there was no evidence that the national standard of care is the standard practiced in Wilmington, North Carolina); *see also Treat, supra* at 16 (stating that “...Plaintiff’s experts offered no more than a belief that the national standard applied to Defendants....”) Likewise, in the case at hand, Dr. Sibai presented not a scintilla of evidence that his national standard of care applies in Murphy, North Carolina. Rather, he simply offered his belief that such a national standard applies nationwide and in Murphy, North Carolina. Deposition of Dr. Sibai, at pp. 23 and 129.

**Conclusion**

Ultimately, Dr. Sibai's testimony is insufficient to qualify him as an expert witness under N.C.G.S. §90-21.12. While it is clear that Dr. Sibai is basing his opinions in the present matter on a national standard of care, he has failed to meet the requirements set out in *Pitts, Henry, and Treat, supra*, for applying such a national standard. Dr. Sibai knows absolutely nothing about Murphy, North Carolina, and further knows nothing about the medical resources available there. Moreover, he supplies no basis in his testimony for his proposition that a national standard of care applies to Dr. Clarkson's actions and/or omissions in this matter. For these reasons, the Court should exclude and disqualify Dr. Sibai as an expert witness in the present matter.

This the 10<sup>th</sup> day of October, 2006.

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