

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

CHRISTINA BENEFIELD and  
GUILLERMO MATEO, as  
Co-Personal Representatives of the  
ESTATE OF DIANA CHRISTINE MATEO,

Plaintiffs,

VS.

JENKINS L. CLARKSON, M.D.,

Defendant.

**MEMORANDUM OF LAW IN  
OPPOSITION TO PLAINTIFFS'  
MOTION TO EXCLUDE AND  
DISQUALIFY DR. BAHA SIBAI**

---

Plaintiff counsel's argument to exclude Doctor Baha Sibai as an expert witness under North Carolina law, while well crafted, is incomplete and, therefore, incorrect. The plaintiff argues that because Doctor Sibai judged this case based on a national standard and didn't know anything about the medical community in Murphy, North Carolina, he should be disqualified. As counsel for plaintiffs acknowledge, and as North Carolina courts have made clear, an expert witness in a medical case who testifies from a "national standard of care" perspective is not per se disqualified.<sup>1</sup> As long ago as 1974, the North Carolina Supreme Court recognized applicability of a national standard of care under some circumstances. In that year, the court held an expert witness acceptable who testified to "no difference in the standards of treatment of gunshot wounds to the lower extremities" in accredited hospitals in the United States.<sup>2</sup>

Disqualification in North Carolina of an expert witness who testifies from a national standard of care perspective does not occur simply because the witness has invoked a national standard, but happens because of a lack of other qualifying conditions.<sup>3</sup> Of necessity, the national standard of care rule applies on a case by case basis. An example of this is Leatherwood v. Ehlinger, 151 N.C. App. 15 (2002), rev. den., 357 N.C. 164 (2003). Leatherwood was a birth injury case tried in Swain County, North Carolina. The defense sought disqualification of

---

<sup>1</sup> Pitts v. Nash Day Hospital, Inc., 167 N.C. App. 194 (2004), aff'd, 359 N.C. 626 (2005)

<sup>2</sup> Rucker v. High Point Memorial Hospital, Inc., 285 N.C. 519 (1974)

<sup>3</sup> Pitts, Supra. ". . . the critical inquiry is whether the doctor's testimony, taken as a whole, meets the requirements of N.C.G.S. § 90-21.12."

plaintiff's expert witness since the testimony of the witness related only to a national standard of care. As plaintiffs' counsel has done in this case, the defendant cited as support, Henry v. Southeastern OB-GYN Associates, P.A., 145 N.C. App. 208 (2001), aff'd, 354 N.C. 570 (2001), where an expert witness, relying on a national standard, was disqualified because there was no linkage of that national standard to the local community. The Court of Appeals distinguished the Henry and Leatherwood decisions on their respective facts emphasizing the expert in Leatherwood testified that, with respect to the management of shoulder dystocia, "Asheville and other communities that size practice in the same national standards." 564 S.E.2d at 888.

One year after Leatherwood was decided, the North Carolina Court of Appeals reversed a trial court's disqualification of an expert witness for the plaintiff on the grounds that where the standard for the issue at trial in the case was the same across the nation, based on board certification,<sup>4</sup> and if the witness is familiar with that standard, his testimony is acceptable despite a lack of knowledge of the defendant's community. Cox v. Steffes, 161 N.C. App. 237 (2003), rev. den., 358 N.C. 233 (2004).

Another equally important exception to the "same or similar community" rule in North Carolina is found in Marley v. Graper, 135 N.C. App. 423 (1999), cert. den., 351 N.C. 358 (2000).<sup>5</sup> Appealing a malpractice defense verdict, plaintiff in that case challenged the decision of the trial judge allowing a defense expert witness to testify who was not familiar with the standard of care for Greensboro, North Carolina. The court upheld the verdict stating the expert's testimony that the defendant met any standard of care obviated the need for familiarity with local community standards. The impact of the decision upholding the expert's "any standard" testimony cannot be overstated inasmuch as the decision rests on the premise that if the standard of care for Greensboro matched the highest standard in the country, the physician's treatment of plaintiff met that standard, and if the standard in Greensboro was lower, the physician's treatment of the plaintiff exceeded the local standard. Under either test, the court said the requirements of N.C.G.S. § 90-21.12 were met.

The focus of this lawsuit against Doctor Clarkson is his alleged failure to properly manage the post delivery care of Ms. Mateo to discover the cause of her bleeding and prevent her

---

<sup>4</sup> Both Doctor Sibai and Doctor Clarkson are board certified in obstetrics and gynecology (see Sibai Depos. p. 25).

<sup>5</sup> Cited with approval but distinguished factually in Treat v. Roane, 634 S.E. 2d 273 (2006). Treat is relied upon by plaintiff counsel (see p. 5 of plaintiffs' memorandum).

death.<sup>6</sup> Doctor Sibai is prepared to support Doctor Clarkson's care, and he qualifies as an expert witness under the rationale of the Leatherwood, Cox and Marley decisions cited above.

Under Leatherwood and Cox, an expert witness can qualify by imposing a national standard of care upon a local community and demonstrating through his testimony, familiarity with similar communities and why that national standard, as to a particular issue, is practiced in all those communities. In substance, this rule recognizes that highly qualified specialists such as Doctor Clarkson receive basically the same training which is then carried back to the communities where they practice. Doctor Sibai pointed this out in his deposition in describing Doctor Clarkson's "step analysis approach" to post delivery care issues, an approach taught in major medical institutions.<sup>7</sup> Under this process, conclusions reached may be different by different physicians, but the approach and analysis is the same no matter the size of the community. This is the qualified national standard rule, best illustrated in Cox's "board certification linkage".<sup>8</sup>

An expert whose testimony rests only upon a conclusory opinion that a national standard applies in a community with regard to medical procedures under scrutiny falls short. Linkage of a national standard to familiarity by the expert with the community in question or a similar community is required. Treat v. Roane, 634 S.E.2d 273, 2006 WL 2528490 (N.C. App. unpublished). Doctor Sibai has clearly satisfied the linkage requirement. He now teaches and practices the specialty of obstetrics at a major medical center, the University of Ohio in Cincinnati where he described his outreach practice as touching small towns and small communities in Ohio and Kentucky.<sup>9</sup> Before that, when he taught and practiced obstetrics in Memphis, Tennessee, in another university setting, not only did he draw patients from small communities all over Tennessee, Mississippi and Kentucky, he also practiced obstetrics in small communities in those areas, some with populations of 400, some with 5,000 and some with 10,000<sup>10</sup> – a demographic and population range into which Murphy, North Carolina, obviously fits. He has also trained many young doctors who practice in North Carolina's small towns<sup>11</sup>,

---

<sup>6</sup> No problems were encountered in the delivery of a healthy boy (see medical record).

<sup>7</sup> Sibai Depos. pp. 95-96; p. 116, line 3-5; p. 117, line 7.

<sup>8</sup> "It is clear from Cox that the expert's opinion regarding the standard of care was based on the defendant's status as a board certified surgeon". Treat v. Roane, supra, at p.4.

<sup>9</sup> Sibai Depos. p. 121-122.

<sup>10</sup> Sibai Depos. p. 122

<sup>11</sup> Sibai Depos. p. 123, line 5.

and he has testified as an expert medical witness in North Carolina.<sup>12</sup> His background provides the linkage or qualifying conditions required by North Carolina courts for an expert witness to meet the requirements of N.C.G.S. § 21.12-11.

Another non-linkage requirement rationale adopted by North Carolina courts under which Doctor Sibai qualifies is illustrated by the Marley case embodying the following principle: If the expert witness testifies that the defendant physician adhered to the highest standard of practice applicable anywhere, qualification occurs regardless of a lack of familiarity with local standards. Marley, Supra, 135 N.C. App. At 521.

Doctor Sibai testified that Doctor Clarkson not only adhered to local community standards but to the highest standard of all, that of a tertiary care center such as the University of Ohio in Cincinnati.<sup>13</sup> Under this line of reasoning, local community considerations are swept aside as unnecessary since the care received in any case was at the highest level. Plaintiffs' counsel made this point quite clear in his examination of Doctor Clarkson, the defendant in this case. When deposing Doctor Clarkson, the following exchange occurred at Page 25, Line 15 through Line 25.

“Q. Doctor, were there any factors about the location in Murphy that distinguished what was done to discover the cause of Ms. Mateo’s bleeding from what would have been done in a place that was a higher level hospital?

A. No.

Q. Would there have been any other kind of equipment at a teaching hospital or university hospital or something like that?

A. Not that would have helped Ms. Mateo.”

Through Doctor Clarkson, plaintiffs’ counsel succeeded in establishing there were no distinguishing factors between standards of practice in Murphy or a teaching hospital in a university setting. Add to that Doctor Sibai’s testimony that Doctor Clarkson’s care “. . . satisfied every standard of care I can think of . . .”<sup>14</sup> brings the case squarely within the Marley decision.

---

<sup>12</sup> Sibai Depos. p. 11, line 6.

<sup>13</sup> Sibai Depos. p. 127, line 13.

<sup>14</sup> Sibai Depos. p. 95, line 18.

Therefore, it is respectfully submitted that the court should not disqualify Doctor Sibai as an expert witness in this case.

Dated this 20<sup>th</sup> day of October, 2006.

s/ Charles E. Burgin

Charles E. Burgin

N.C. Bar Number: 00620

Attorney for Defendant Jenkins L. Clarkson, M.D.

Dameron, Burgin, Parker, Lorenz, & Jackson, PA

P.O. Box 1049

Marion, North Carolina 28752

Telephone: (828) 652-2441

Fax: (828) 652-9579

Email: [cburgin@dameronburginlaw.com](mailto:cburgin@dameronburginlaw.com)

**CERTIFICATE OF SERVICE**

I, Charles E. Burgin, hereby certify that on 10/20/2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

[seago@mountainverdict.com](mailto:seago@mountainverdict.com)  
[melrose@mountainverdict.com](mailto:melrose@mountainverdict.com)  
[cburgin@dameronburginlaw.com](mailto:cburgin@dameronburginlaw.com)  
[pjackson@dameronburginlaw.com](mailto:pjackson@dameronburginlaw.com)

This 20<sup>th</sup> day of October, 2006

s/ Charles E. Burgin  
Charles E. Burgin  
N.C. Bar Number: 00620  
Attorney for Defendant Jenkins L. Clarkson, M.D.  
Dameron, Burgin, Parker, Lorenz, & Jackson, PA  
P.O. Box 1049  
Marion, North Carolina 28752  
Telephone: (828) 652-2441  
Fax: (828) 652-9579  
Email: [cburgin@dameronburginlaw.com](mailto:cburgin@dameronburginlaw.com)