

IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

PAULA J. SMITH)
)
 Plaintiffs,)
)
 vs.) No. 99C-9999
)
 RONALD N. WILSON, M.D. and)
 MURFREESBORO SURGICAL)
 ASSOCIATES, PLC)
)
 Defendants.)

PLAINTIFF’S RESPONSE TO DEFENDANT’S MOTION *IN LIMINE* NO. 5

Defendant has moved this Court for an Order to exclude questioning of any medical witnesses regarding that witness’s personal practice, personal standard, or what “he/she would do” under certain circumstances. For a witness testifying as an expert on the standard of care, evidence of the witness’s own practices under similar circumstances is relevant to establishing the standard of care and to the witness’s credibility to testify regarding that standard of care. Defendant incorrectly relies on cases that state a witness’s own practices are insufficient to prove the requirements of a medical malpractice action *without additional supporting evidence*. Evidence of an expert witness’s own practices is relevant, although not conclusive without additional evidence. Because Tennessee law does not support Defendant’s argument, Plaintiff requests the Court deny Defendant’s Motion.

Argument

In a medical malpractice case, the defendant’s actions or omissions are judged by the recognized standard of acceptable professional practice in the defendant’s profession and specialty in the same or similar community. Tenn. Code Ann. § 29-26-115(a)(1). The standard of care thus requires that the Defendant provide the same skill, knowledge and care as that of

other reputable bariatric surgeons in the same or a similar community and under similar circumstances. *See generally* Tennessee Pattern Jury Instruction, Civil 6.11; *Allesio v. Crook*, 633 S.W.2d 770, 775-76 (Tenn. App. 1982). Without question, then, the actual practices of bariatric surgeons under similar circumstances are probative of the standard of care expected of the Defendant, and thus relevant and admissible. *See* Tenn. R. Evid. 401, 402. In this case in particular, all but one of the Rule 26 witnesses disclosed by the parties on the issue of the standard of care do practice in the same community as the Defendant – Nashville, Tennessee – and thus the witnesses’ own practices are especially pertinent to the standard of care that the Defendant was required to provide to Ms. Smith.

The Defendant overlooks the relevance of the witnesses’ own practices by confusing the concepts of relevant evidence and sufficient evidence. Tenn. R. Evid. 401 defines “relevant evidence” as “evidence having *any* tendency to make the existence of” a material fact “more probable or less probable than it would be without the evidence.” It must be stressed that evidence may be relevant even if it is insufficient, in itself, to satisfy a party’s burden of proof. Neil P. Cohen, et al., *Tennessee Law of Evidence*, § 4.01(4) (4th ed. 2000). Indeed, evidence may be relevant if it is only slightly helpful to the trier of fact. *Id.*

The Defendant’s argument ignores Rule 401 and erroneously assumes that evidence of an expert witness’s own practices must conclusively prove a plaintiff’s medical malpractice case in order to be relevant and admissible. The cases cited by the Defendant state only that an expert witness’s testimony of what he or she would do under similar circumstances is not sufficient *by itself* to establish the statutory requirements for a medical malpractice action. *See Jennings v. Case*, 10 S.W.3d 625, 631-632 (Tenn. App. 1999) (ruling that treating physician’s testimony that he would not have acted differently even if referring physician had provided patient’s complete

medical history was insufficient to prove a lack of causation for summary judgment); *Roddy v. Volunteer Medical Center*, 926 S.W.2d 572, 578 (Tenn. App. 1996) (ruling that physician's affidavit which failed to state that the plaintiff had suffered injuries from the defendant's negligence which would not otherwise have occurred therefore failed to prove causation); *Lewis v. Hill*, 770 S.W.2d 751, 754 (Tenn. App. 1988) (ruling that nothing was cited from physician's testimony which would satisfy the statutory requirement that the plaintiff prove standard of care and a deviation from that standard). Despite Defendant's assertion to the contrary, however, not one of the cases cited by the Defendant states or even suggests that a physician's testimony as to what he or she would do under similar circumstances is irrelevant or inadmissible. On the other hand, there are numerous examples in Tennessee case law where testimony regarding an expert's own practices was admitted into evidence.¹ Though these cases do not specifically address the admissibility of the testimony, they militate against the Defendant's illogical argument.

The logical conclusion is that, while a standard of care may not be established solely by the testimony of expert witnesses as to their own personal practices, testimony concerning an expert's personal practice is relevant if the expert also testifies concerning the applicable standard of care. *Accord Wallbank v. Rothenberg*, 74 P.3d 413, 416 (Colo. App. 2003) (case attached). Moreover, testimony regarding an expert's personal practices may either bolster or impeach the credibility of that expert's testimony concerning the standard of care. *Wallbank* at 417.

¹ Cf., e.g., *Ashe v. McDonald*, 2002 WL 597315, *5 (Tenn. App. 2002) (case attached) (ruling testimony of plaintiff's expert, which included the expert's own practices, was relevant to the standard of care issues in the case); *Pierce v. State*, 1998 WL 312822, *9 (Tenn. App. 1998) (case attached) (noting testimony of defendant's expert witness in the record that the defendant adhered to the standard of care, while the expert himself may have administered additional precautionary treatment beyond the standard of care); *Veal v. Knoxville Urology Clinic, P.C.*, 1990 WL 113831, *2 (Tenn. App. 1990) (case attached) (noting defendant's expert testified that, although the expert would have acted differently, defendant's actions were within acceptable standards of practice and a matter of medical judgment).

Defendant closes his Motion by asserting that the evidence should be excluded because of a danger of unfair prejudice, confusion of the issues, and misleading the jury, but does not provide any basis for those arguments. Simply put, no such basis exists. Evidence of the personal practices of an expert in the same specialty under similar circumstances is directly on point, and there is no reason to prevent the jury from hearing what a specialist actually does. Certainly, the probative value is not substantially outweighed by any non-existent danger to implicate Tenn. R. Evid. 403.

Conclusion

Defendant has moved the Court for an Order to exclude questioning of any medical witnesses regarding that witness' personal practice, personal standard, or what "he/she would do" under certain circumstances. While not sufficient by itself to prove a medical malpractice action, evidence of how an expert witness on the standard of care would act under similar circumstances is relevant to both the standard of care and the witness's own credibility. Defendant incorrectly relies on cases stating only that the expert's own practices are not sufficient evidence *standing alone* to prove a medical malpractice action, but the cases do not say that the evidence is irrelevant or inadmissible. Defendant also fails to provide any basis for his assertion that the probative value of the evidence is substantially outweighed by the dangers listed in Tenn. R. Evid. 403, as no such basis exists. For the foregoing reasons, Plaintiff asks that the Court deny Defendant's Motion.

Respectfully submitted,

John A. Day, No. 9416
Rebecca C. Blair, No. 17939
Brandon E. Bass, No. 22014
BRANHAM & DAY, P.C.
5300 Maryland Way
Suite 300
Brentwood, TN 37027
(615) 742-4880

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of _____, 2004, a true and correct copy of the foregoing has been sent via fax and U.S. Mail proper postage prepaid to:
