THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS

JOHN FALLON, Administrator of the Estate of JENNA LYNN FALLON	:	**CIVIL TRIAL DIVISION**
Plaintiff	:	**DECEMBER, 2006 No. 2910**
v.	:	
HAHNEMANN HOSPITAL UNIVERSITY MEDIVAC, TENET HEALTHSYSTEM HAHNEMANN, LLC, ST. MARY MEDICAL CENTER AND ISAAC ABIR, M.D.	:	**Superior Court Docket No. 56 EDA 2011**
Defendants	:	

O P I N I O N

PROCEDURAL HISTORY

Plaintiff appeals from this Court's Findings and Order dated March 1, 2010 sanctioning Plaintiff for improperly certifying this action under Pa.R.C.P. 1042.3(a)(1) and (2) against Defendants Tenet Health System Hahnemann, LLC and University Medvac[1] (hereinafter collectively "Hahnemann"). In addition, Plaintiff appeals from the Order of December 6, 2010, wherein this Court entered sanctions in the amount of $26,667.33.

FACTUAL BACKGROUND

Jenna Fallon (hereinafter Decedent) was born with a blood abnormality diagnosed as hereditary spherocytosis.[2] (Complaint, ¶7). In 1995, Decedent underwent a

[1] incorrectly designated as "Hahnemann Hospital University Medivac."
[2] Also known as spherocytic anemia: a hematological disorder inherited as an autosomal dominant trait and characterized by hemolytic anemia caused by the presence of red blood cells that are spheric rather than

splenectomy as part of the treatment for her hereditary spherocytosis. (Complaint, ¶8). After the removal of her spleen, Decedent was administered prophylactic antibiotics for a period of two (2) years while under the care of her attending pediatrician, Dr. Isaac Abir. (Complaint, ¶¶5-8).

On December 27, 2004, Decedent returned home, but she was not feeling well. (Complaint, ¶11). Later that evening and throughout the next day she began to vomit, have diarrhea, chills and became fatigued. (Complaint, ¶12). At approximately 9:30 p.m. on December 28, 2004, Decedent developed a petechial rash and was immediately transported by her father to St. Mary Medical Center (St. Mary's). (Complaint, ¶15).

According to Plaintiff, Decedent arrived at St. Mary's at 11:40 p.m. waiting for forty (40) minutes before she was intubated and ventilated. (Complaint, ¶16). She then became hypoxemic. (Id.). At 1:15 a.m. on December 29, 2004, decedent was transported by Hahnemann Medvac to Children's Hospital of Philadelphia (CHOP). (Complaint, ¶17). During the transport via Medvac, Decedent was tended to by EMT personnel. (Complaint, ¶18). Plaintiff contends that when Decedent arrived at CHOP she was more hypoxemic. (Id.). Subsequent to her admission to CHOP, Decedent died from post-splenectomy sepsis. (Complaint, ¶19, Hahnemann Defendants Motion for Sanctions, pg. 2).

On December 22, 2006, Plaintiff commended this medical malpractice action against Defendants Dr. Isaac Abir, St. Mary Medical Center, Tenant Health System Hahnemann, LLC and Hahnemann Hospital University Medvac.

---

round and biconcave. The cells are fragile and tend to hemolyze in the oxygen-poor peripheral circulatory system. Episodic crises of abdominal pain, fever, jaundice, and splenomegaly occur. Because repeated transfusions are often needed to treat the anemia, siderosis may develop. Splenectomy may then be necessary. Mosby's Medical Dictionary (6th edition, 2002).

Plaintiff's Complaint alleges that asplenic individuals are particularly prone to post-splenectomy sepsis (PSP) and must be sternly warned and educated about PSP and advised of potentially fatal infections, which require immediate administration of antibiotics. (Complaint, ¶¶8-10). Plaintiff contends that Dr. Abir failed to provide any instruction or warnings concerning the dangers of PSP in an asplenic individual. (Complaint, ¶10).

Plaintiff also contends that St. Mary's, by and through its agents, servants and employees was negligent for failing to intubate, ventilate and transport Decedent in a timely manner. (Complaint, ¶22). A count of corporate liability was also included in Plaintiff's Complaint generally stating that St. Mary's was negligent in the maintenance of its facilities, hiring of physicians, the supervision of patient care and failed to ensure quality care to patients. (Complaint, ¶28).

Lastly, Plaintiff asserts that Hahnemann Medvac was negligent through its agents, servants and employees because it failed to maintain and monitor Decedent's medical condition during transport to CHOP. (Complaint, ¶31).

Plaintiff did not file certificates of merit within the initial time period, but was granted a sixty (60) day extension, or until June 9, 2007, to file Certificates of Merit. On June 4, 2007, Plaintiff's counsel, Jonathan Wheeler, Esquire, filed Certificates of Merit against Hahnemann Defendants and Dr. Abir. (Hahnemann Motion for Sanctions, pg. 2). In his Certificate of Merit, Plaintiff's counsel certified:

> …that the claim that this defendant Hahnemann University Hospital Medvac/Tenet Health System Hahnemann, LLC, deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for who this defendant is responsible deviated from an acceptable professional standard and an appropriate

> licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited …fell outside acceptable standards and that such conduct was the cause in bringing about the harm.

Plaintiff's Certificate of Merit as to Hahnemann Defendants.

Plaintiff did not file a Certificate of Merit as to St. Mary's Medical Center and on June 12, 2007, St. Mary's filed its Praecipe for Entry of Judgment of Non Pros pursuant to Pa.R.C.P. 1042.6.

On August 21, 2008, Hahnemann Defendants filed their Motion for Summary Judgment based on Plaintiff's failure to submit a requisite expert opinion critical of Hahnemann Defendants' care. Plaintiff did not oppose Defendants' Motion for Summary Judgment which substantiates Defendants' contentions that there was no merit to Plaintiff's allegations against them.

On November 12, 2008, this Court granted Hahnemann Defendants' Motion for Summary Judgment. On December 24, 2009, Hahnemann Defendants filed their Motion for Sanctions due to Plaintiff's counsel's failure to comply with Pa.R.C.P. 1042.3. The subject of the Motion for Sanctions was that Plaintiff's counsel violated Pa.R.C.P. 1042.3 when he improperly certified that an appropriate licensed professional supplied a proper expert written statement that Hahnemann Defendants deviated from an acceptable professional standard that the care fell outside acceptable standards and was a cause in bringing about Plaintiff's harm. (Hahnemann Defendants' Motion for Sanctions, pgs. 4-8).

On January 13, 2009, upon request by Hahnemann Defendants, Plaintiff's counsel proffered a written statement from Gerald Kaplan, M.D. (Hahnemann Defendants'

Motion for Sanctions, pg. 4). Dr. Kaplan is also an attorney. Dr. Kaplan's statement was on his letterhead and was marked "Confidential Work Product Re: Jenna Fallon" and the letter begins "Allow me to attempt to provide as many answers as I am able to your potential litigation questions…" (Hahnemann Defendants' Motion for Sanctions, Exhibit E). The letter ends:

> There are therefore some outstanding facts that could affect an overall assessment of this matter as to its litigation merit. (At this point, I would suggest there will likely not be merit to be found). There are also facts that will remain outstanding forever and thus prevent us from putting all the family's questions to rest. That however may just be the nature of the disease and/or the state of the records. But that is all we have to work with.

Id.

On June 9, 2009, Plaintiff's counsel forwarded a copy of Dr. Kaplan's curriculum vitae. (Id.). A review of Dr. Kaplan's credentials reveals that he is not qualified as "an appropriate licensed professional" under the MCare Act (40 P.S. §1303.512) to provide a Certificate of Merit pursuant to Pa.R.C.P. 1042.3(a)(1). (Hahnemann Defendants' Motion for Sanctions, pg. 7). Dr. Kaplan did not possess an unrestricted license to practice medicine and has not been in the active practice of medicine or teaching in the relevant field of medicine for over twenty (20) years.

Additionally, Dr. Kaplan's written statement was not critical of the care provided by Hahnemann Defendants. (Hahnemann Defendants Motion for Sanctions, pg. 7). Dr. Kaplan opined that "…it seems unlikely that she [Jenna Fallon] would have survived even with the best of care." (Hahnemann Defendants Motion for Sanctions, Exhibit E). Dr. Kaplan's written report concluded "At this point, I would suggest there will likely not be merit to be found." (Id.).

Plaintiff filed his Response and Oral Argument was held on February 9, 2010. This Court issued its Findings and Order dated March 1, 2010, granting Hahnemann Defendants' Motion for Sanctions and directed Defendants to submit supporting Affidavits of all reasonable counsel fees and expenses. (Findings and Order, pg. 3, attached hereto as Exhibit A). Thereafter Hahnemann Defendants filed their Affidavit of Costs and Expenses. Plaintiff did not contest the Affidavit.

By Order dated March 26, 2010, this Court sanctioned Plaintiff pursuant to Pa.R.C.P. 1042.3 in the amount of $26,667.33. This Order was amended on December 6, 2010, to substitute Plaintiff with Plaintiff's counsel, Jonathan Wheeler, Esquire and The Law Offices of Jonathan Wheeler, P.C. as the sanctioned party.

On December 29, 2010, Plaintiff's counsel and his law firm filed their Notice of Appeal to the Superior Court and issued their Statement of Errors Complained of on Appeal thereafter.

The main issue to be addressed on Appeal is:

Whether this Court erred in finding that Plaintiff's counsel and his law firm violated Pa.R.C.P. 1042.3 by submitting a Certificate of Merit based on a statement from an individual who: 1) clearly does not qualify as an expert under§1303.512 of the MCare Act, 2) whose statement was a legal opinion and not a medical opinion and 3) whose statement is not critical of Hahnemann Defendants.

LEGAL ANALYSIS

Prior to addressing the main issue in this case, this Court will address two meritless issues advanced by Plaintiff.

Plaintiff states that this Court erred when it did not conduct a hearing before imposing monetary damages and that Hahnemann presented no evidence of its entitlement to attorney's fees. These alleged errors lack any legal or factual basis.

Pursuant to this Findings and Order dated March 1, 2010, granting Hahnemann Defendants' Motion for Sanctions the Court directed Defendants to submit supporting Affidavits of all reasonable counsel fees and expenses. Thereafter Hahnemann Defendants filed their Affidavit of Costs and Expenses. Plaintiff did not contest the Affidavit.

Plaintiff was given an opportunity to respond to Defendants' Affidavit of Cost, but chose not to do so. Because Plaintiff never responded to the Affidavit of Costs and Expenses, he waived any opportunity to contest the appropriateness of the fees and expenses alleged or to request a hearing to address the same. By not responding to the Affidavit of Cost and Expenses, the validity of its amounts was uncontroverted and accepted by the Court. Plaintiffs now attempt to contest the Costs and Expenses for the first time on Appeal. Issues not raised and objected to at the Trial Court level should be considered waived for purposes of appellate review. *Kaufman v. Campos*, 2003 PA Super 229, 827 A.2d 1209, 1212 (2003).

This Court will next address the main issue of Plaintiff's violation of Pa.R.C.P. 1042.3 and the corresponding sanctions.

Pennsylvania Rule of Civil Procedure 1042.3 governs the requirements for a Certificate of Merit in professional liability actions:

> (a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty

> days after the filing of the complaint, a certificate of merit signed by the attorney or party that either
>
> *Note:* The requirements of subdivision (a) apply to a claim for lack of informed consent.
>
> (1) *an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm,* or
>
> *Note:* It is not required that the "appropriate licensed professional" who supplies the necessary statement in support of a certificate of merit required by subdivision (a)(1) be the same person who will actually testify at trial. *It is required, however, that the "appropriate licensed professional" who supplies such a statement be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find them sufficient to allow that expert to testify at trial. For example, in a medical professional liability action against a physician, the expert who provides the statement in support of a certificate of merit should meet the qualifications set forth in Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.512.*
>
> (2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or
>
> *Note:* A certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care.

(emphasis added).

Pa.R.C.P. 1042.8(b) allows for sanctions against an attorney who violates Pa.R.C.P. 1042.3(a)(1)(2):

> A court may impose appropriate sanctions, including sanctions provided for in Rule 1023.4, if the court determines that an attorney violated Rule 1042.3(a)(1) and (2) by improperly certifying that an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge experienced or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm.

The sanctions permitted under Pa.R.C.P. 1023.4(a)(2)(3) include:

> (a)(2)(i) directives of a nonmonetary nature, including the striking of the offensive litigation document or portion of the litigation document,
>
> (ii) an order to pay a penalty into court, or,
>
> (iii) *if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.*
>
> (3) Except in exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates and employees.

(emphasis added).

In supporting its decision that Plaintiff's Certificate of Merit violated Pa.R.C.P. 1042.3(a)(1), this Court relies on its previously issued Findings and Order which detailed it's reasoning for finding that Mr. Wheeler improperly certified that an appropriate licensed professional supplied a statement that the care of defendants fell outside the acceptable professional standards. (Findings and Order, attached hereto as Exhibit A).

In summarizing this Court's prior Findings and Order, it was determined that the statement of Dr. Kaplan did not satisfy Pa.R.C.P. 1042.3 because: 1) the document was never intended to be a medical opinion, rather it was a confidential work product document containing a legal opinion from Dr. Kaplan, who was also an attorney, to Mr. Wheeler (*supra*, pgs. 3-4), and 2) a review of Dr. Kaplan's statement as a whole reveals that there was no reasonable probability that any of the Hahnemann Defendant's medical care was negligent or had anything to do with the death of the Decedent. (Findings & Order, pg. 2-3). In addition to its Findings and Order, this Court also found that Dr. Kaplan was not qualified under the §512 of the MCare Act to give an expert medical opinion.

Plaintiff's Counsel and His Law Firm Violated Pa. R.C.P. 1042.3 Because Dr. Kaplan's Statement Was Not Intended To Be Medical Opinion To Support A Certificate Of Merit

A review of Dr. Kaplan's statement clearly shows that the statement was not intended to be a medical opinion for purposes of issuing a Certificate of Merit.

Dr. Kaplan is both a medical doctor and an attorney. The statement issued by Dr. Kaplan was marked "Confidential Work Product Re: Jenna Fallon" and the letter begins "Allow me to attempt to provide as many answers as I am able to your potential litigation questions…" (Hahnemann Defendants' Motion for Sanctions, Exhibit E). The letter ends:

> There are therefore some outstanding facts that could affect an overall assessment of this matter as to its litigation merit. (At this point, I would suggest there will likely not be merit to be found). There are also facts that will remain outstanding forever and thus prevent us from putting all the family's questions to rest. That however

> may just be the nature of the disease and/or the state of the records. But that is all we have to work with.

Id.

Opinions used to satisfy the requirements for issuing a Certificate of Merit in professional negligence cases are discoverable and are not protected by any privilege. See Pa.R.C.P. 1042.8(a). In contrast, a letter written by a practicing attorney evaluating the legal merits of a case for another attorney would be subject to the work product privilege. *Commonwealth v. Noll*, 443 Pa. Super. 602; 662 A.2d 1123, 1126 (1995). This is corroborated by Dr. Kaplan marking the statement as confidential work product. The fact that Dr. Kaplan also is a doctor, does not convert the contents of his statement as from a legal opinion to that of a medical one in support of a Certificate of Merit.

Plaintiff's Counsel And His Law Firm Clearly Violated Pa.R.C.P. 1042.3(a)(1) Because Dr. Kaplan's Statement Does Not State That The Hahnemann Defendant's Treatment Fell Outside Professional Acceptable Standards

Dr. Kaplan's statement itself does not meet the threshold requirements of 1042.3(a)(1) upon which a Certificate of Merit must be based. Specifically, under 1042.3(a)(1), Dr. Kaplan was required to provide a statement to support that the Hahnemann Defendants' conduct not only fell outside professional standards, but also that it was a cause in bringing about the harm to Decedent.

In his statement, Dr. Kaplan acknowledges that, "In all truth, Jenna was dying when she arrived at St. Mary's." (Hahnemann Defendants' Motion for Sanctions, Exhibit E). With respect to Hahnemann Defendants' care, Dr. Kaplan's most critical statement was, "it does not appear that her ventilation was adequately maintained during her transport to CHOP." Within the same context, Dr. Kaplan then unequivocally makes the

following comments in his closing paragraphs "In all truth, Jenna was dying when she arrived at St. Mary's…it seems unlikely that she could have survived even with the best of care... (At this point, I would suggest there will likely not be merit to be found.)." (Hahnemann Defendants' Motion for Sanctions, Exhibit E, pg.3).

This Statement read in its most favorable light, does not show with reasonable probability that the care or treatment by Hahnemann Defendants fell outside the acceptable professional standards, nor does it establish that any conduct on its part caused Decedent's death. Instead, it demonstrates the complete opposite. In an attempt to avoid any further advancement of this meritless lawsuit, Plaintiff's counsel chose not to oppose Hahnemann's Motion for Summary Judgment. At Oral Argument, Plaintiff's counsel admitted that he was unable to obtain expert testimony to establish causation against Hahnemann Defendants and that Decedent would have probably died regardless of what happened to her. (Motion Transcript, pgs. 14-15).

This evidence, as a whole, clearly reveals that Plaintiff's counsel should have never filed a Certificate of Merit Hahnemann Defendants.

Dr. Kaplan does not qualify as an expert pursuant to §1303.512 of the MCare Act

An expert who supplies a Statement for a Certificate of Merit in a professional liability action is not required to be the expert who testifies at trial. However, according to 40 P.S. §1303.512, the Pennsylvania Rules of Civil Procedure do require that the "appropriate licensed professional," who supplies such a statement must have qualifications such that the trial court would find them sufficient to allow that expert to testify at trial.

Therefore, the author of the Statement for the Certificate of Merit must satisfy the qualifications of 40 P.S. §1303.512 regarding expert qualifications:

> (b) **Medical Testimony**. An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
>
> (1) *Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.*
>
> *(2) Be engaged in or retired within the previous five years from active clinical practice or teaching.* (emphasis added).

> (e) **Otherwise adequate training, experience and knowledge**. *A Court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.* (emphasis added).

Pennsylvania Courts have held that where a proposed medical expert does not satisfy the requirements of §512 of the MCare Act, they should be prohibited from testifying. *Wexler v. Hecht*, 593 Pa. 118; 928 A.2d 973 (2007) (Supreme Court upheld the Trial Court granting a motion in limine where proffered expert never attended medical school and therefore did not qualify as an expert under §512.).

The Comment to Pa.R.C.P. 1042.3(a)(1) extends the application of §512 of the MCare Act as it applies to expert qualifications to certificates of merit:

> *Note:* It is not required that the "appropriate licensed professional" who supplies the necessary statement in support of a certificate of merit required by subdivision (a)(1) be the same person who will actually testify at trial. It is required, however, that the "appropriate licensed professional" who supplies such a statement be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find

> them sufficient to allow that expert to testify at trial. For example, in a medical professional liability action against a physician, the expert who provides the statement in support of a certificate of merit should meet the qualifications set forth in Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.512.

Dr. Kaplan was not qualified under the MCare Act to give a written statement upon which Mr. Wheeler based his Certificate of Merit. Dr. Kaplan does not possess an unrestricted license to practice medicine as required by MCare and holds only an Active-Retired License. (Hahnemann Defendants Motion for Sanctions, Exhibit G). According to the Pennsylvania Board of Medicine, an Active-Retired License is in lieu of keeping an active license and allows physicians to continue to write prescriptions only for themselves or family members. (Hahnemann Defendants' Motion for Sanctions, pg.8). Once a physician surrenders his or her active license to the State Board, the physician is excused from maintaining malpractice insurance and meeting continuing education requirements. (Id., Exhibit H).

In *Cimino v. Valley Family Medical*, 912 A.2d 851 (Pa.Super. 2006), the Court noted that although the MCare Act did not define the meaning of an "unrestricted license," the plain meaning of the term "unrestricted," denotes a medical license subject to no limitations or restraints. 912 A.2d at 885. The *Cimino* Court, which considered whether the license of a physician on probation was "unrestricted," concluded that to qualify under MCare, the physician "must possess a valid license without limitations or conditions which restrict in any way the physician's ability to practice medicine." Under MCare as *Cimino*, Dr. Kaplan does not possess an unrestricted medical license and therefore does not satisfy §512(b)(1) of the MCare Act.

CONCLUSION

In light of the foregoing analysis, this Court did not err in its Findings and Order dated March 1, 2010 in which it held that Plaintiff's counsel and his law firm violated Pa.R.C.P. 1042.3 and issued sanctions pursuant to Pa.R.C.P. 1042.8(b). This Court also did not err in entering its Order of December 6, 2010, requiring Jonathan Wheeler, Esquire, and The Law Office of Jonathan Wheeler to pay Hahnemann Defendants their uncontested Affidavit of Cost and Expenses pursuant to Pa.R.C.P. 1023.4(a)(2)(iii). For these reasons, this Court respectfully requests that it be affirmed.

BY THE COURT:

7/7/2011

_____ _____

Date **ALLAN L. TERESHKO, J.**

cc:
Jonathan Wheeler, Esq.
Ruth R. Wessel, Esq./Lori M. Emrick, Esq.