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

MATTHEW BRITT	**:**	**CIVIL TRIAL DIVISION**
	:	**December Term, 1999**
vs.	**:**	**No. 3206**
	:	**Superior Court #554EDA 2003**
THOMAS C. PEFF, M.D., F.A.C.S.	**:**	

O P I N I O N

Before the Court is the Appeal taken by Plaintiff Matthew Britt from the Order of this Court that, on January 21, 2003, denied his Motion For Post-Trial Relief In The Nature Of A Motion To Remove A Non-suit. On October 23, 2002, the Nonsuit was granted in favor of Defendant Dr. Thomas C. Peff.

On January 9, 1998, Matthew Britt was involved in an argument with his girlfriend, Helene. The argument quickly turned violent when Helene's uncle struck Britt in the leg with a baseball bat. (Notes of Testimony, October 22, 2002, at 165-166; hereinafter "N.T.") Britt was then taken by ambulance to Nazareth Hospital, in Philadelphia, Pennsylvania. About four hours after being admitted to Nazareth, the Defendant Dr. Thomas C. Peff performed emergency surgery on Britt's lower left leg. Dr. Peff performed a closed reduction of Britt's left tibia-fibula fracture by applying a long-leg cast. (N.T., 10/22/02, at 44, 115) As Britt was emerging from surgery, Helene had a protection order served on him. (N.T., 10/22/02, at 165-166, 171) A subsequent visit was scheduled for Dr. Peff to

follow up on the surgery.

In Britt's medical chart at Nazareth Hospital, Dr. Peff noted that Britt had tested positive for drugs. He testified that he learned that Britt's blood had been tested for the presence of drugs and that certain drugs were found in his system. (N.T., 10/22/02, at 116; *see* N.T., 10/22/02, at 162-163) Dr. Peff grew concerned that Britt might have a drug problem. That concern was enlivened when Britt subsequently requested repeated prescriptions for percocet. (N.T., 10/23/02, at 117)

(Britt's brother, Timothy, testified in deposition and in court that he had been strongly advising Britt to enter a drug rehabilitation program before the baseball bat incident occurred. Timothy was concerned that Britt had developed a drug dependency problem because of his abuse of marijuana and methamphetamine. N.T., 10/22/02, at 167-168, 163-164; *see* Britt's Mot. Lim. Prevent Def. From Showing Prior Drug Use; *see* Dr. Peff's Answer To Mot. Lim.)

On January 15, 1998, Britt followed up with an office visit to Dr. Peff, at which time Dr. Peff wrote a prescription for percocet. On January 20, 1998,Britt telephoned Dr. Peff's office for a renewal of fifty more percocets. Before prescribing that renewal, Dr. Peff insisted that Britt present at his office so he could evaluate his patient more accurately. Britt did appear, and Dr. Peff renewed the prescription. Almost immediately thereafter, Britt called Dr. Peff's office again, this time saying that his new quantity of pills had been stolen from his car. (N.T., 10/22/02, at 117)

During cross examination, Dr. Peff testified:

QUESTION: You said in your earlier testimony that that was a red flag to you about certain indications. What did you mean by that. Sir?

ANSWER: Well, it's a red flag inasmuch as patients sometimes will say the pills were stolen from the car or I lost my prescription or the dog are my something or other. And it's a red flag to indicate that it's an explanation as to

why they have to get another prescription filled.

QUESTION: Are physicians concerned about the prescription of narcotics medication to their patients, physicians in your situation?

ANSWER: Yes.

QUESTION: Is percocet addicting?

ANSWER: Percocet is an addictive narcotic.

(N.T., 10/22/02, at 118, 64-65)

At subsequent visits to Dr. Peff's office, Britt alleges that x-rays were taken, that a new half-leg cast was put on, and that pain medication was given. At later visits, Britt alleges that he told Dr. Peff that he was feeling intensifying pain, that he felt movement in his leg, and that his toes were purple and numb. Britt further alleges that Dr. Peff declined to prescribe any more pain medication and that the doctor stated that the x-rays showed the fracture was healing.

On February 10, 1998, Britt was seen by Dr. Jelen, an orthopedic surgeon who covers for Dr. Peff when Dr. Peff is not available to his patients, and Dr. Jelen wrote for an additional thirty tablets of percocet. (N.T., 10/22/02, at 64) On February 17, 1998, in a follow-up visit with Britt, Dr. Peff repeated his treatment plan that Britt remain in the long leg cast and continued to advise that Britt remain in a non-weight-bearing condition in order to immobilize Britt's knee. (N.T., 10/22/02, at 119)

Despite Dr. Peff's urging that Britt continue in a non-weight-bearing condition, on March 1, 1998, Britt drove a car, got into an accident, and broke his hand. He then presented at the emergency room of Frankford Hospital for treatment of his hand. (N.T., 10/22/02, at 120-121, 169-170) On March 3, 1998, Britt made an office visit to Dr. Peff, who took two more x-rays, one of his hand. (N.T., 10/22/02, at 67) On March 20, 1998, Britt returned to the emergency room of Frankford to have his hand re-examined, apparently driving himself again. (N.T., 10/22/02, at 121-122)

On April 2, 1998, Dr. Peff recommended weight-bearing to facilitate the healing of Britt's fracture. (N.T., 10/22/02, at 125, 131). He also recommended aquatic treatment at the Philadelphia Aquatic Rehabilitation Center because such therapy helps patients recover from atrophy that sets in when patients are in long leg casts (N.T., 10/22/02, at 78, 125-126) Further, it was the doctor's belief that such therapy assists in the treatment of RSD. (N.T., 10/22/02, at 127)

On two separate occasions, and unknown to Dr. Peff, Britt himself modified his cast, first removing the top part of his cast and, on April 8, 1998, the entire cast. He then drove himself to Frankford Hospital. According to Britt's account, Frankford Hospital personnel x-rayed Britt, irrigated the knee wound, and instructed Britt to return to Dr. Peff. At Frankford, Britt admitted to the emergency room doctor that he had taken off his own cast (N.T., October 23, 2002, at 15).

Clearly placing weight and pressure on the leg without first consulting with Dr. Peff and then removing his own cast was contrary to any medical advice Dr. Peff would have given Britt, as Dr. Peff's testimony made evident:

> QUESTION: Did there come a time when Mr. Britt actually modified his long leg cast on his own without consulting you?
> ANSWER: Yes.
> QUESTION: What was the first time he did that?
> ANSWER: I believe he did it twice. It was in April.
> QUESTION: When we say long leg cast, the cast that you installed went above the knee, did it not?
> ANSWER: That's correct.
> QUESTION: And your April notations indicate that Mr. Britt on his own cut down the cast?
> ANSWER: Yes.
> QUESTION: And on April 9, does your note indicate that in fact Mr. Britt took his cast off?
> ANSWER: Yes.
> QUESTION: On his own?
> ANSWER: Yes.

QUESTION: Without your knowledge or permission or consent?
ANSWER: Yes.
QUESTION: Now, you put these casts on for what reason?
ANSWER: Well, you're the treating physician so you put the cast on to treat the fracture. And you hopefully anticipate patients will comply with your treatment.
QUESTION: Would modify or taking off your cast affect the ability of the fracture to heal?
ANSWER: I wouldn't recommend it.
(N.T., 10/22/02, at 120-121)

QUESTION: Would a person who modifies his own cast, removes his cast, drives a car while in a non-weight bearing status, gets in a crash, be described by you as a non-compliant patient?
ANSWER: Yes.
(N.T., 10/22/02, at 122)

On April 9, 1998, Britt visited Dr. Peff for the last time before leaving his service for another orthopedic surgeon, Dr. Leonard Brody. (N.T., 10/22/02, at 94) Dr. Peff testified that he had recommended that Britt pay a follow-up visit to him after he had left his care. Although several attempts were made to contact Britt to this effect, Britt never returned to Dr. Peff. (N.T., 10/22/02, at 123) At trial, Dr. Peff testified that Dr. Brody had been treating Britt in exactly the same way he had been treating him. (N.T., 10/22/02, at 124-125)

On July 13, 1998, Britt visited yet another orthopedic surgeon, Dr. John L. Esterhai, Jr., who, Britt alleges, took oblique x-rays and diagnosed a non-union of the tibial fracture, as well as RSD. (On October 10, 2002, Dr. Esterhai was deposed, and his testimony was presented to the jury by videotape.) On August 4, 1998, Britt underwent a surgical procedure of open reduction and internal fixation of the left tibia. This surgery included a bone graft from the iliac crest, plating, and osteotomy of the fibula. Although Britt's fracture has healed, Britt alleges that he suffers from third-stage RSD, with wasting of affected muscles, and severe and

chronic pain. Britt alleges further that he is now permanently disabled, receiving social security disability benefits, walking with a limp, and in constant pain.

On February 22, 2000, Britt filed a Complaint against Dr. Peff, alleging negligence and, in a second Count, assault and battery, as well as lack of informed consent. For each Count, Britt demands judgment in excess of $50,000.00.

Specifically, Britt alleges that an orthopedic standard of care required Dr. Peff to take an oblique x-ray of his leg, in addition to the several anterior, posterior, and lateral x-rays that he did take. (Compl. ¶ 25(n)) He further alleges additional negligence in that Dr. Peff failed to diagnose RSD, which today is called complex regional pain syndrome. (Compl. ¶ 25(c), (h), (p), and (s))

On April 27, 2000, this Court issued a Case Management Order in which it ordered, *inter alia*, that Britt identify and submit a curriculum vitae of and an expert report from all expert witnesses intended to testify at trial to all other parties not later than August 6, 2001. On July 11, 2001, this Court granted Dr. Peff's Petition For Extraordinary Relief; and on July 18, 2001, it issued a revised CMO in which it ordered that Britt submit his expert reports not later than October 1, 2001. On August 22, 2001, this Court granted, *inter alia*, Dr. Peff's Motion To Compel Evaluation Of Plaintiff By The Defense's Vocationalist.

On October 1, 2002, Dr. Peff filed a Motion In Limine to preclude Britt from offering expert medical testimony at trial. On the next day, Britt filed a Motion In Limine to prevent Dr. Peff from attempting to show his prior drug use. On October 21, 2002, this Court denied Dr. Peff's, as well as Britt's Motion In Limine. On October 22, 2002, Dr. Peff filed a Supplemental Motion In Limine For A Nonsuit Against Britt.

During an in camera discussion, on October 23, 2002, Britt acknowledged that he had no medical expert to support his case after this Court ruled to preclude his proffered expert Dr. Moshen Vahedi and his treating physician Dr. John L.

Esterhai. Since Britt rested his case, Dr. Peff moved for the entry of a compulsory nonsuit. (N.T., 10/23.02, at 91-92) This Court granted Dr. Peff's motion for a nonsuit and dismissed the case. (N.T., 10/23/02. at 100-101). It also marked as moot Dr. Peff's Supplemental Motion In Limine on grounds of the nonsuit.

On October 28, 2002, Britt filed a Motion For Post-trial Relief To Remove The Nonsuit; and on November 7, 2002, Dr. Peff filed an Answer to Britt's Motion. On January 21, 2003, this Court denied Britt's Motion For Post-trial Relief.

On February 10, 2003, Britt filed an Appeal from this Court's denial of his Motion For Post-trial Relief. On February 27, 2003, this Court directed Britt to file a Pa.R.C.P. 1925(b) Concise Statement Of Matters Complained Of Upon Appeal. On March 6, 2003, Britt made timely filing of his 1925(b) Statement. In his 1925(b) Statement, Britt avers that this Court erred when:

1) it failed to allow a board-certified General Surgeon with cross-over training in orthopedics to testify in a medical malpractice case that involved both orthopedic and non-orthopedic issues;
2) it failed to allow a board-certified General Surgeon to testify that he agreed with the prior admissible testimony of plaintiff's board-certified orthopedic treating surgeon that oblique x-rays were necessary;
3) it failed to allow, hear, or consider any testimony from plaintiff's board-certified General Surgeon after he properly qualified as a medical expert;
4) it overruled Defendant's Pre-Trial Motion To Disqualify Plaintiff's Expert and then refused to allow that same expert to testify on the same subject matter outlined in Plaintiff's answer to said motion;
5) it did not allow Plaintiff's expert to testify to the necessity for the Defendant doctor to take oblique x-rays;
6) it failed to allow Plaintiff's board-certified Surgeon to testify to the failure of Defendant doctor to recognize the onset of RSD and the complications it may cause;
7) it failed to consider before granting a non-suit demonstrative

evidence shown by oblique x-rays that clearly displayed a non-union and non-healing fracture coupled with the testimony of Dr. Esterhai explaining its significance;

8) it granted Defendant's request for a non-suit.

This Court dismissed Plaintiff Britt's case against Defendant Dr. Peff because Britt did not provide sufficient expert testimony to sustain his medical malpractice allegations. This matter involved a specialized practice of orthopedic surgery. Britt alleged that he suffered harm as a result of an orthopedic surgeon's negligent treatment of his fractured tibia and fibula. After hearing the voir dire testimony of Britt's expert, Dr. Vahedi, this Court determined that Dr. Vahedi lacked the necessary qualifications to offer a competent expert opinion on orthopedic medicine.

Directly relevant to this case is the Medical Care Availability and Reduction of Error Act, known as the Mcare Act, which became effective on May 13, 2002.

§ 1303.512 of the Mcare Act addresses, in relevant part, the matter of expert qualifications:

> (a) General rule.--No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.
>
> (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. Provided, however,

> the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.
>
> (c) Standard of care.--In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following qualifications:
>
> (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
>
> (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).
>
> (3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).
>
> (d) Care outside specialty.—A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:
>
> (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and
>
> (2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence.
>
> 40 P.S. § 1303-512. Expert qualifications.

In the present case, this Court undertook a straight-forward application of the relevant sections of the Mcare Act. Britt offered Dr. Vahedi, who is a general surgeon, as his expert witness to testify about the standard of care distinctive of the subspecialty of orthopedic surgery practiced by Defendant surgeon Dr. Peff. Nothing in Dr. Vahedi's voir dire testimony before this Court on October 23, 2002 suggests that, pursuant to the general rule of § 1303.512(a), Dr. Vahedi possesses

sufficient education, training, knowledge, and experience in orthopedic surgery to provide credible, competent testimony against Defendant orthopedic surgeon Dr. Peff. Further, Dr. Vahedi fails to qualify as a § 1303.512(b) exception to the general rule by virtue of his inadequate education, training, and experience in orthopedic surgery. Dr. Vahedi also fails the test of § 1303.512(c)(1) in that he is not substantially familiar with the orthopedic standard of care for the specific care and treatment required by and given to Britt. (N.T, October 23, 2002, at 86-88; *contra* Id. at 68-70) As a general surgeon, Dr. Vahedi does not practice in the same subspecialty of orthopedics as Dr. Peff, nor does his specialty of general surgery have a substantially similar standard of care for orthopedic patients as does the subspecialty of orthopedic surgery. (N.T., 10/23/02, at 83-84) Dr. Vahedi thereby also fails the demand of § 1303.512(c)(2). Dr. Peff is certified by an approved medical Board in orthopedics. Yet Dr. Vahedi is certified by neither the same Board, nor by a similar approved Board as Dr. Peff, as required by § 1303.512 (c)(3) (See N.T., 10/23/02, at 77) Britt argues that the Court should allow Dr. Vahedi's testimony as a waiver of the Mcare Act's subspecialty requirement, pursuant to § 1303.512(d)(1)(2). (*See* Britt's Answer Def.'s Mot. Lim. Preclude Expert's Report ¶ 12) Britt avers that Dr. Vahedi had sufficient cross-over training to qualify him as an expert competent to testify in this matter. (Britt's Mot. Post-Trial Relief To Remove Non-Suit, ¶ 7) This Court has found, however, that Dr. Vahedi failed the requirement of § 1303.512(d)(1) in that he is not "trained in the diagnosis or treatment of [Britt's orthopedic] condition," a fact that his own voir dire testimony made readily clear when he admitted that he did not undergo a residency program in orthopedics, although he had pursued a residency program in pediatrics. (N.T. 10/23/02 at 76-77)

In his voir dire testimony, Dr. Vahedi expressly conceded that he is not substantially familiar with the standard of care applicable to orthopedic surgeons.

He admitted that he has virtually no education, training, or experience in orthopedic surgery. And he acknowledged that he is not board certified in orthopedic surgery and that he never practiced in the subspecialty of orthopedic surgery:

> QUESTION: You are not an orthopedic surgeon, Sir, am I correct?
> ANSWER: No.
> QUESTION: You made reference to the fact that you took a residency, did you not?
> ANSWER: Yes.
> QUESTION: And your residency was following the completion of medical school, was it not?
> ANSWER: Yes.
> QUESTION: And your residency was dedicated to a particular specialty, was it not?
> ANSWER: Yes.
> QUESTION: What is that particular specialty that you were dedicated to?
> ANSWER: General surgery.
> QUESTION: General surgeons take out gallbladders, fix[] the bowel, do[] appendix [sic], things of that nature, is that correct?
> ANSWER: General surgeon residency training includes training in orthopedics and neurosurgery, plastic surgery, vascular surgery, all other fields of surgery, but the main concentration is on general surgery.
> QUESTION: You do a rotation. You do two weeks of gynecology, two weeks of neurosurgery, two weeks of obstetrics, two weeks of orthopedics, two weeks of--that's what you're talking about?
> ANSWER: A month.
> QUESTION: A month?
> ANSWER: A month.
> QUESTION: In that work you might work with the orthopedist and say some of the things that might happen, you can break your arm, your leg, your back, and a general surgeon gets a little bit of knowledge of orthopedics to complete that training. That's what we're talking about, isn't it?
> ANSWER: More or less.
> QUESTION: Now, there's a residency program in orthopedics, is there not?
> ANSWER: Yes.
> QUESTION: You didn't go through that residency, did you?

ANSWER: Not an orthopedic resident program.
QUESTION: You went through your general surgery residency, and you said to the jury that you are certified?
ANSWER: Yes.
QUESTION: You are certified in the field of general surgery?
ANSWER: Right.
QUESTION: There is a certification process for orthopedics, is there not?
ANSWER: For orthopedic surgeons, yeah.
QUESTION: You have not sat for that board nor been qualified as an expert in orthopedic surgery, isn't that correct, Sir?
ANSWER: That's correct.
(N.T., 10/23/02, at 75-77)

QUESTION: You're a general surgeon?
ANSWER: Yes.
QUESTION: You're not an orthopedist?
ANSWER: Yes.
(N.T., 10/23/02, at 86)

QUESTION: They [i.e., emergency room personnel] would not consult you for your ideas on the proper way to treat a tibia fracture, that's a fair statement, isn't it?
ANSWER: Yes.
QUESTION: And that's because you're not trained or experienced as your hospital defines in the treatment of tibia fractures. That's true, isn't it?
ANSWER: No. It's because that I don't do orthopedics, not that I don't know how for them to take care of an orthopedic fracture.
QUESTION: But certainly you would agree with me that you are not an orthopedic surgeon?
ANSWER: Yes.
QUESTION: And to take it one step further, insofar as the management of tibia fractures primarily, that's not something that you do as a part of your practice, correct?
ANSWER: Yes.
QUESTION: It's not part of your practice to follow up tibia fractures currently or in the past, that's true, isn't it?
ANSWER: Correct.
(N.T., 10/23/02, at 83-84)

In addition to not satisfying the statutory requirements of the Mcare Act, the proffered expert fails to qualify under existing Pennsylvania case law. In Pennsylvania, it is well established that, to make out a prima facie case for medical malpractice, a plaintiff must establish four elements that go to negligence, as well as present a medical expert's report in support of the allegations. *See Toogood v. Rogal, D.D.S.*, 2003 WL 21241255 (Pa.).

In *Toogood*, our Supreme Court held that

> "[T]o prevail in a medical malpractice action, a plaintiff must 'establish a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and the damages suffered were a direct result of the harm.' Because the negligence of a physician encompasses matters not within the ordinary knowledge and experience of lay persons a medical malpractice must present expert testimony to establish the applicable standard of care, the deviation from that standard, causation and the extent of the injury. The expert testimony in a medical malpractice action means that a plaintiff must present medical expert testimony to establish that the care and treatment of the plaintiff by the defendant fell short of the required standard of care and that the breach proximately caused the plaintiff's injury. Hence, causation is also a matter generally requiring expert testimony. '" Toogood, 2003 WL 21241255 at 3 (citation omitted.) (internal citations omitted.) (*See Cruz v. Northeastern Hospital, et al.*, 801 A.2d 602, 607 (2002 Pa. Super. 185) (*citing Mitzelfelt v. Kamrin*, 526 Pa. 54, 62, 584 A.2d 888, 891 (1990))

Our Supreme Court has consistently recognized that "[a] very narrow exception to the requirement of expert testimony in medical malpractice actions applies 'where the matter is so simple or the lack of skill or care so obvious as to be within the range of experience and comprehension of even non-professional persons.'" *Toogood*, 2003 WL 21241255 at *3. The present matter clearly involves medical and surgical technicalities that no layperson could reasonably comprehend, however. Britt does not persuade this Court that laypersons can judge standard of care matters with respect to the taking of x-rays of his fractures. (Britt's Mot. Post-Trial Relief To Remove Non-Suit, ¶ 11(a))

Therefore, in matters that go beyond the ordinary comprehension of average lay persons, Pennsylvania law has long required a plaintiff to produce a medical expert's report. "Because the negligence of a physician encompasses matters not within the ordinary knowledge and experience of lay persons a medical malpractice plaintiff *must* present expert testimony to establish the applicable standard of care, the deviation from that standard, causation and the extent of the injury." *Toogood*, 2003 WL 21241255 at *3 (citation omitted) (italics added) (*see Lambert v. Soltis*, 422 Pa. 304, 221 A.2d 173 (1966), ruling that the only exception to this otherwise invariable rule is in cases where the matter under investigation is so simple, and the lack of skill or want of care so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons.) The *Hamil* Court expressly noted that "it is generally acknowledged that the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson." *Hamil*, 481 at 267, 392 A.2d at 1285 The Court in *Hamil*, accordingly, ruled, "For a plaintiff to make out his cause of action in such a case, therefore, the law requires that expert medical testimony be employed." *Id.*, 392 A.2d at 1285

The Pennsylvania Supreme Court has ruled that "[i]n Pennsylvania, a liberal standard for the qualification of an expert prevails." *Commonwealth of Pennsylvania v. Marinelli*, 570 Pa. 622, 640, 810 A.2d 1257, 1267, 2002 WL 31655159, ***7 (*See Bindschusz v. Phillips, et al.*, 771 A.2d 803, 807 (2001 Pa. Super.) "Generally, 'if a witness has any reasonable pretension to specialized knowledge on the subject matter under investigation he may testify and the weight to be given to his evidence is for the [fact finder].'" *Id.*, 810 A.2d at 1267, 2002 WL 31655159 at ***7 (citations omitted) "It is also well established that an expert may render an opinion based on training and experience; formal education on the subject matter is not necessarily required." *Id.*, 810 A.2d at 1267, 2002 WL

31655159 at ***7 (citations omitted)

Nevertheless, "[a]s explained by our supreme court in *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968), the standard of care in medical malpractice actions is first and foremost what is reasonable under the circumstances." *Joyce v. Boulevard Physical Therapy & Rehabilitation Center, P.C., et.al.*, 694 A.2d 648, 656 (1997) Pennsylvania courts have ruled that "it may appear that the scope of the witness's experience and education may embrace the subject in question in a general way, but the subject may be so specialized that even so, the witness will not be qualified to testify." *Dambacher v. Mallis, et. al.*, 336 Pa. Super. 22, 43, 485 A.2d 408, 419 (1984)

"While it is the law in Pennsylvania that a physician, testifying as an expert, should not be barred from testifying merely because he is not a specialist in the field about which he is rendering an opinion, Pennsylvania has not thereby opened the door to such an extent that any doctor can testify about any medical subject without limitation." *Arnold v. Loose*, 352 F.2d 959, 962 (1965) (internal citations omitted; references omitted) "[T]he attorney who presents a medical expert has the initial burden of establishing his qualifications to render an opinion in a particular field." *Id.*, 352 F.2d at 962.

Here, Britt offered Dr. Vahedi as an expert to opine on Dr. Peff's alleged negligence (Mot. Post-Trial Relief Remove Non-Suit, ¶ 7a,b,c). Britt maintained that Dr. Vahedi should be allowed to testify as a competent expert in orthopedic matters because of Dr. Vahedi's cross-over training. (Id.) Dr. Vahedi's cross-over training amounted to several weeks of training in orthopedics while he was doing a residency in the United States from 1984 to 1991 (N.T., 10/23/02, at 66, 77-78). During a month-long rotation of his residency program, he did have some occasion to fix some fractured or broken legs of emergency room patients in his capacity as an on-call house surgeon. (N.T., 10/23/02. at 66, 76) From 1993 to

1997, Dr. Vahedi worked as a surgical house physician at Frankford Hospital, in Philadelphia, Pennsylvania. He then entered upon a solo practice in general surgery, in Delaware County, Pennsylvania. (N.T., 10/23/02, at 81) (Dr. Vahedi's curriculum vitae conflicts with that statement. The curriculum vitae states that he was in this capacity at Frankford Hospital from "Oct.93-Present.") While a surgical house physician at Frankford, he did perform some emergency surgeries. Dr. Vahedi testified, however, that he would refer orthopedic patients to orthopedic specialists for the specialized orthopedic treatment they would subsequently require (N.T., 10/23/02, at 78-83).

Pennsylvania courts have long held that at times "the witness is qualified to testify even though he has no particularized knowledge of the subject as such; for he will be able to reason from the knowledge he does have." *Dambacher v. Mallis*, 336 Pa.Super.22, 42, 485 A.2d 408, 418 (1984) "Other times it may appear that the scope of the witness's experience and education may embrace the subject in question in a general way, but the subject may be so specialized that even so, the witness will not be qualified to testify." *Id.*, 336 Pa. Super. at 43, 485 A.2d at 419. "Thus, every doctor has a general knowledge of the human body." *Id.*, 485 A.2d at 419 In the present case, this Court finds that Dr. Vahedi's experience and education in general surgery does not qualify him in the specialized area of orthopedic surgery. He testified that he never underwent a residency program in orthopedics and he has never worked as an orthopedic surgeon.

Also, this Court holds that Britt's expert witness additionally failed to satisfy the relevant requirements of the Mcare Act by failing to be substantially familiar with an orthopedic standard of care for Britt's surgery, and by failing to practice in Dr. Peff's subspecialty of orthopedics or in a subspecialty with a standard of care similar to Dr. Peff's subspecialty.

Despite Pennsylvania's well-established liberal standard for qualifying

witnesses as competent experts, the instant matter specifically involves a general surgeon's opining about the care and treatment offered by an orthopedic surgeon, that is, about Dr. Peff's failure to take oblique x-rays of Britt and his failure to diagnose and treat Britt's RSD. Britt avers that a witness need have only a reasonable pretension to specialized knowledge to qualify as a witness. Britt further argues that Pennsylvania courts do recognize the fact that specialties do sometimes overlap in medicine, and that a medical practitioner may be knowledgeable in more fields than one.

Yet, as this Court pointed out in the above analysis of the Mcare Act, during the voir dire portion of the trial, Dr. Vahedi admitted that he was a general surgeon only and not an orthopedic surgeon; that he lacked experience in the treatment of tibia fractures of the kind suffered by Britt; and that he was not qualified to opine as a competent witness about an orthopedist's care and treatment of an orthopedic patient. (N.T., 10/22/02, at 75-77)

At a sidebar conference, this Court communicated its holding to the attorneys:

> THE COURT: I will find as a matter of law that the doctor is not qualified to testify as an expert in this area of orthopedic surgeon [sic]. He lacks the necessary skill, training, and qualifications and experience to opine on the treatment of an orthopedic injury and the result that will come, the common complications from that injury.
>
> The doctor is not qualified to testify as an expert.
>
> MR. LONDON: Well, I thought we were going under the old law with respect to qualifications.
>
> THE COURT: We are. There is no old law or new law. This is based upon--
>
> MR. LONDON: This man has testified that he has crossover training, that he worked in a trauma center.
>
> THE COURT: I heard all the testimony. He lacks the necessary expertise to opine in this case against the treatment of this doctor.
>
> MR. LONDON: This is not only an orthopedic question. This is a--

THE COURT: It is.
MR. LONDON: This is a question of the care and treatment of--

...

MR. LONDON: This is the question of the care and treatment of a patient after surgery. He's not offering an opinion with regard to--
THE COURT: I heard your argument and I know your argument. This is a critical issue involving the neurological complications resulting from the multiple fracture of the tibia and fibula. It's an orthopedic issue pure and simple. He lacks the necessary qualifications to opine in that area.

I've made my ruling.

MR. LONDON: What about the area of RSD?
THE COURT: He doesn't have the necessary expertise, experience or qualifications as an RSD resultant from a multiple orthopedic fracture. He doesn't have any experience or qualifications.
MR. LONDON: He says he treats patients with RSD.
THE COURT: I heard him. He does not have the orthopedic specialty. And forget about the statute. I'm not even basing it upon the requirement of the statute. I'm basing it upon the current law as it stands requiring him to have the necessary training, expertise, qualifications, to opine in this area. He lacks the basics [sic] skills and any of the other required components that would allow him to criticize this orthopedic surgeon's work, and when I err, I err on the side of caution.

In this case I think that the testimony is clear, abundantly clear that he is not capable of opining in this area. (N.T., 10/23/02, at 87-89)

Further, during an in camera discussion the parties returned to the issue of Dr. Vahedi's qualifications:

MR. LONDON: …The second issue is a question of an x-ray.
THE COURT: It has to be an orthopedic question because RSD developed in conjunction with an orthopedic trauma and an orthopedic injury.
MR.LONDON: But it develops in a lot of cases. And this Dr. Vahedi said he has patients that have RSD.
THE COURT: That's just the problem. He has to be qualified to speak

> about RSD developing in conjunction with this orthopedic injury and the trauma to the tibia and fibula and he has—he doesn't even have minimal qualifications to begin addressing that.
>
> I was quite clear on it. And again, if I err, I'll always err on the side of letting it in and allowing the jury, but in this case he doesn't even meet the minimal qualifications to criticize and opine on Dr. Peff's standard of care and treatment here.
>
> It's not even a close call for me….
>
> (N.T., 10/23/02, at 99-100)

Consequently, on the basis of an analysis of the qualifications of Dr. Vahedi's as they were presented during Dr. Vahedi's voir dire testimony, this Court found that Dr. Vahedi failed the requirements of the Mcare Act, § 1303.512, as well as the demands of Pennsylvania's case law pertaining to medical experts in a medical malpractice cause of action.

In his 1925(b) Statement, Britt further averred that this Court erred by failing to consider the evidence in Britt's behalf offered by Dr. John L. Esterhai, Jr. during his videotaped deposition taken on October 10, 2002.

As this Court set forth in detail above, to sustain a cause of action for medical malpractice, Britt must offer a competent medical expert to testify on the standard of care at issue. Yet Britt offered Dr. Esterhai not as an expert witness to opine about orthopedic standards of care in the instant matter, but as his current treating orthopedic physician. Dr. Esterhai expressed no opinion on the standard of care in this case nor on causation, except to say that Britt's RSD derived ultimately from the baseball bat incident. Britt never took "the next step and say that as a result of [Dr. Peff's failure to take an oblique x-ray and his failure to diagnose RSD early on], that Mr. Britt's current injury is related to" those failures. (N.T., 10/23/02, at 97)

> THE COURT:… There was no critical element of Dr. Esterhai's testimony, and Dr. Esterhai's testimony on causation related the current neurological problems to the original trauma of the baseball bat, and that went in to the

> original injury at length during his deposition, and as part of preparation for receiving his deposition, I reread those critical parts, and I also had to read it in conjunction with your supplemental Motion In Limine.
> ...
> THE COURT: Dr. Vahedi's testimony would have been at odds with Dr. Esterhai's testimony on the issue of causation. And I mention that because as a result of having that motion, I focused on Dr. Esterhai's testimony, and he supplied no causation, and very little criticism, if any, of Dr. Peff's medical treatment so that that issue cannot be submitted to the jury based upon either Dr. Peff's testimony on your eliciting of testimony from him as of cross or Dr. Esterhai's.
> (N.T., 10/23/02, at 95-96)

Britt has failed to produce an expert competent to testify about medical matters. As this Court held during the in camera discussion, since this issue "involves a complication, neurological complication of RSD to a trauma, to an orthopedic trauma, it's not something that would be in the ken of the ordinary lay person such that they could understand it. I'll grant the motion for involuntary nonsuit." (N.T.,10/23/02, at 100-101) Thus, after Plaintiff Britt rested his case during the in camera discussion, this Court formally granted Defendant's motion for compulsory nonsuit.

In Pennsylvania, "[i]n an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, at the close of the plaintiff's case on liability, the plaintiff has failed to establish a right to relief." 42 Pa.R.C.P. 230.1 (a)(1) Pennsylvania courts have likewise held that "[t]he purpose of a motion for compulsory nonsuit is to allow the defendant to test the sufficiency of the plaintiff's evidence." *Dietzel v. Gurman, M.D.*, 806 A.2d 1264, 1268 (2002 PA Super) (citation omitted). "A trial court's entry of compulsory nonsuit is proper where the plaintiff has not introduced sufficient evidence to establish the necessary elements to maintain a cause of action, and it is the duty of the trial

court to make a determination prior to submission of the case to a jury." *Id.* (citation omitted) "In determining whether to grant a compulsory nonsuit, the trial court must give the plaintiff 'the benefit of every fact and all reasonable inferences arising from the evidence and all conflicts in evidence must be resolved in plaintiff's favor.'" *Id.* (citation omitted)

In the present case, Britt failed to provide an expert competent to testify about his orthopedic condition. Britt thus failed to meet the elements necessary to go forth with a medical malpractice suit, which requires both an expert's report, as well as evidence of causation. Britt offered neither.

Accordingly, this Court granted the Defendant's motion for involuntary nonsuit.

CONCLUSION

For the reasons set forth above, this Court respectfully requests the Superior Court to affirm its January 21, 2003 denial of Plaintiff Matthew Britt's Motion For Post-Trial Relief In The Nature Of A Nonsuit.

BY THE COURT:

_____

ALLAN L. TERESHKO, J.

_____

DATE

cc:

Joseph L. London, Esq. for Plaintiff
Michael McGilvery, Esq. for Defendant