IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND CIVIL DIVISION

FELICIA (BROWN) BARR AND
MARCELL BARR — PLAINTIFFS

vs. — NO. CV-2002-5986

WOMEN'S COMMUNITY HEALTH CENTER
and THOMAS TVEDTEN, M.D. — DEFENDANTS

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Comes now Separate Defendant, Thomas Tvedten, M.D., by and through his attorneys, Mitchell, Williams, Selig, Gates & Woodyard, and for his Brief in Support of Motion for Summary Judgment, states the following:

I. INTRODUCTION

On June 7, 2002 Plaintiff filed a medical malpractice lawsuit against the Defendants, wherein Plaintiff alleged that Dr. Tvedten's actions on or about June 10, 2000 caused Plaintiff to suffer a medical injury. Specifically, Plaintiff alleges that during a second trimester surgical abortion she suffered a uterine perforation which resulted in an emergency hysterectomy. While Plaintiff and her expert acknowledge that a uterine perforation is a known non-negligent complication that can occur during a second trimester surgical abortion without any negligence on the part of the physician and that this risk was fully explained and consented to prior to the procedure, Plaintiff alleges that Dr. Tvedten was negligent in his choice of a cervical dilator instrument. Plaintiff claims Dr. Tvedten chose a dilator that was too large which then caused her uterine perforation.

The problem with Plaintiff's expert opinion is it is based on a standard of care that is contradictory to the local standard of care in Arkansas. In fact, Plaintiff's expert admitted in his

evidentiary deposition that he is unaware of what size dilators physicians in Arkansas performing second trimester surgical abortions are using, and admitted that if all the physicians in Arkansas performing these advanced procedures use the same size dilator that Dr. Tvedten used, then Dr. Tvedten would have been practicing within the local standard of care in this case. There is only one other physician, in the state of Arkansas, Dr. Jerry Edwards, performing procedures as advanced as the one performed by Dr. Tvedten. Dr. Edwards has provided his sworn testimony that he, too, uses number 71 dilators on occasion when performing these procedures. Moreover, Plaintiff's expert has only testified to the standard of care applicable to an OB-GYN, a specialty that is far more advanced than Dr. Tvedten's specialty which is that of a General Practitioner.

Based on the foregoing, it is clear that Plaintiff's only expert is incompetent to testify regarding the applicable standard of care to this locality or to Dr. Tvedten's specialty. As such, given this undeniable deficiency, summary judgment is not only proper, but mandated. *Robson v. Tinnin,* 322 Ark. 605, 911 S.W.2d 246 (1995).

II. LEGAL STANDARD

"The law is well settled that summary judgment is to be granted by a trial court only when it is clear that there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law." *Linn v. NationsBank,* 341 Ark. 57, 61, 14 S.W.3d 500, 503 (2000). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* (citing *Wallace v. Broyles,* 331 Ark. 58, 961 S.W.2d 712 (1998)). Summary judgment is proper when "the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court." *Parkerson v. Lincoln,* 347 Ark. 29, 61 S.W.2d 146 (2000). The

Arkansas Supreme Court has ceased referring to summary judgment as a drastic remedy. *Bank of Arkansas, N.A. v. MANA Corp.*, 349 Ark. 469, 58 S.W.3d 366 (2001).

III. FACTUAL BACKGROUND

Despite the allegations found in Plaintiff's Complaint, Plaintiff has produced only one expert witness, Dr. James Dingfelder, who has only one criticism of Dr. Tvedten; his choice of cervical dilators. Dr. Dingfelder, a semi-retired OB-GYN physician from Raleigh, North Carolina, has given two depositions in this case and each time has clearly testified that his only criticism of Dr. Tvedten is his choice of cervical dilator. In short, Dr. Dingfelder believes the standard of care required Dr. Tvedten to use a dilator no larger than 51 millimeters in circumference, which is called a number 51 dilator. Dr. Tvedten, however, used a number 71 dilator which is 71 millimeters in circumference. This is the sole issue in controversy as established by Dr. Dingfelder's most recent deposition:

> Q: Now, my understanding, unless anything has changed since your last deposition, is—is that you are not critical of any aspect of Dr. Tvedten's care of Miss Bar except his choice in size of dilator
>
> A: Correct.
>
> Q: All right, sir. So from the time Miss Barr arrived on the morning of June 10th of 2000 until the time the medical records reflect she was sent to University Hospital, all of the care that Dr. Tvedten provided, you are not critical of that except for that one particular decision on the size dilator.
>
> A: Yes.

See Exhibit B, Deposition of Dr. Dingfelder, pgs. 38-39 taken July 8, 2009

Dr. Dingfelder was very adamant in his opinion that the use of any cervical dilator above a number 51 is a breach in the standard of care. In fact, Dr. Dingfelder went so far as to say that he cannot conceive of any circumstance in which a cervical dilator above a number 51 would ever be appropriate. *See Exhibit B, Deposition of Dr. Dingfelder, pgs. 50-51 taken*

July 8, 2009. As an aside, it should be noted that Dr. Dingfelder has never even seen a number 71 dilator, *see Exhibit B, Deposition of Dr. Dingfelder, pg. 45 taken July 8, 2009,* and is not aware of how much larger it actually is from a number 51, *see Exhibit B, Deposition of Dr. Dingfelder, pgs. 45-46 taken July 8, 2009.* In reality there is only a quarter inch difference in diameter between the two dilators, however, Dr. Dingfelder was unaware of this fact since he has never even seen a number 71 dilator and envisioned it as being much larger.

It should also be noted that Dr. Dingfelder has produced no medical literature to support his claim that it is *ipso facto* negligence to use a cervical dilator larger than a number 51. Perhaps this is because of the fundamental irrationality of such a statement in light of the fact that cervical dilators used for pregnancy terminations are made in sizes greater than 51. Why would such medical equipment be made if it is never appropriate to use such equipment? It seems that at worst this "nothing above a number 51 dilator" rule is something Dr. Dingfelder created out of whole cloth and at best it is based on his understanding of a national standard care, that has no application to Arkansas. Either way, the testimony is incompetent as a matter of law and must be excluded.

In his first deposition Dr. Dingfelder very openly admitted that his opinion was based on what he believed to be the national standard of care:

Q. Do you assume, then, that there is a national standard of care that covers all physicians performing abortions across the country?

A. Yes.

Q. And that standard of care doesn't differ between localities in the country?

A. Not in the usual major components of practice.

Q. And your opinions here today are all based on that assumption, that the standard of care that applies to physicians performing abortions is the same throughout the – throughout the country?

A. That is my personal belief.

Q. And that's what your opinions as we sit here today, we're about to explore in detail, are based on, correct?

A. Yes.

Q. Do you know any physicians in Little Rock who perform abortions?

A. No.

Q. Do you know how many physicians in Arkansas perform elective abortions?

A. No.

Q. Do you know how many clinics in Arkansas perform elective abortions?

A. No.

Q. Have you made any assumptions about that information such as assumed that there is a certain number?

A. No.

Q. Do you think that is importation information in any way to know – In forming your opinions, is it important for you to know how many physicians in Arkansas perform these procedures and how many clinics in Arkansas perform these procedures?

A. No, it isn't. I don't see how it makes any difference.

Q. Okay. And is that going to back to your opinion that there's just a national standard of care that covers all physicians performing these procedures?

A. Yes.

See Exhibit A, deposition of Dr. Dingfelder, pgs. 55-56, taken April 25, 2005

Over the last four (4) years, Dr. Dingfelder has re-thought his position on a "national standard of care" and now believes the "nothing over a number 51 dilator" rule is consistent with the local standard of care applicable in Arkansas. Incredulously, however, he bases this new opinion on no more information than he had four (4) years earlier. As recently as July 8, 2009, Dr. Dingfelder stated:

Q. Okay. And I believe we went through this before in your deposition, but you don't know any of the physicians in Arkansas who perform second trimester terminations, do you?

A. Correct

Q. Do you even know how many physicians there are in Arkansas that perform surgical abortions?

A. I don't know precisely. I think – I've heard there are two others.

Q. Do you have any information or knowledge as to the type of dilators and the size of dilators that the other two physicians practicing in this area of medicine in Arkansas use?

A. No.

Clearly, Dr. Dingfelder knows no more about the local practice for pregnancy termination in Arkansas today than he did in 2005. He assumed, it appears, that the techniques used by Arkansas physicians were similar to the techniques he used when he performed these procedures because he agreed with the following questions:

Q. And out of these three physicians in Arkansas, we know with Dr. Tvedten that on occasion he'll use the number 71 dilator, because we know he did with Miss Barr; correct?

A. Yes.

Q. Okay. If there was evidence and information that these two physicians also, on occasion, used number 71 dilators for second trimester terminations, would you believe that is also in violation of the standard of care?

A Yes.

Q But as we've already established, if all the physicians in Arkansas who are practicing in this area and performing second trimester surgical abortions do on occasion use number 71 dilators, then Dr. Tvedten's actions in this case would be within the local standard of care set by those physicians in Arkansas.

A. Yes.

This testimony from Plaintiff's own expert is fatal to her case because of the affidavit testimony of the only two physicians in this state who perform 20 week pregnancy terminations. *See Exhibits C and D.* This testimony establishes that the only two physicians in our state engaged in the same type of termination procedures at 20 weeks gestation, including Dr. Tvedten, find number 71 dilators acceptable and reasonable to use during 20 week pregnancy termination. In short, the two affidavits of Dr. Edwards and Dr. Tvedten establish that they are the only two physicians in the state of Arkansas who are engaged in the routine practice of performing 20 week pregnancy terminations. In doing so, both physicians on occasion use number 71 dilators and find this a routine and acceptable size dilator to use in 20 week pregnancy terminations in the state of Arkansas. See *Exhibit D, Affidavit of Dr. Thomas Tvedten.* In light of this sworn testimony, Dr. Dingfelder's "nothing over a number 51 dilator" rule is nothing more than a "because I say so" opinion. It is certainly not grounded in the local standard of care applicable in Arkansas, and, therefore must fail as a matter of law. Moreover, the two affidavits establish that Dr. Tvedten's choice of cervical dilator was "within the local standard of care" by Dr. Dingfelder's *own* testimony.

IV. LEGAL ARGUMENT

In *Williamson v. Elrod*, 348 Ark. 307, 72 S.W.3d 489 (2002), the Arkansas Supreme Court held that the burden of proof for a plaintiff in a medical malpractice case is fixed by statute. The statute requires that in any action for a medical injury, expert testimony is necessary regarding the skill and learning possessed and used by medical care providers engaged **in that specialty in the same, or similar, locality**. *Id (emphasis added); Dodson v. Charter Behavioral Health Sys.*, Inc., 335 Ark. 96, 983 S.W.2d 98 (1998). In *Reagan v. City of Piggott*, 305 Ark. 77, 805 S.W.2d 636 (1991). The Supreme Court affirmed summary judgment where the trial court ruled that there was no material issue of fact remaining because the testimony of the plaintiff's expert witness, a physician, did not meet the burden of proof under the Medical Malpractice Act which states:

> (a) In any action for medical injury, the plaintiff shall have the burden of proving:
>
> (1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality;
>
> (2) That the medical care provider failed to act in accordance with that standard; and
>
> (3) That as a proximate result thereof, the injured person suffered injuries which would not otherwise have occurred.[1]

Ark. Code Ann. § 16-114-206 (1987).

In *Williamson,* the doctor never described the degree of skill and learning ordinarily possessed by doctors in good standing in Little Rock or a similar locale. *Williamson, supra.* The statute and case law are specific in stating that there must be an attestation by an expert regarding **this locality or a similar one**, and the Supreme Court has affirmed summary judgments for

[1] Since this cause of action accrued in June, 2000, this case pre-dates the Civil Justice Reform Act and the changes made to the Arkansas Medical Malpractice Act. Nonetheless, the issues in controversey are long standing principals of the Arkansas Medical Malpractice Act and were not affected by the changes made pursuant to the Civil Justice Reform Act.

failure to do so. *See Reagan, supra.* More recently, the Arkansas Supreme Court again affirmed this Trial Court when it granted summary judgment because the expert witnesses were both from Texas and had failed to testify regarding the standard of care in Little Rock, Arkansas. *See Young v. Gastro-Intestinal Ctr., Inc.,* 361 Ark. 209, 205 S.W.3d 741 (Ark. 2005)

The facts in the present case are directly on point with the long line of cases which hold that Arkansas adheres to the locality rule. At no point in his testimony did Dr. Dingfelder ever acknowledge that he is familiar with the standard of care applicable to physicians in Arkansas in good standing who routinely perform second trimester abortions. In fact, Dr. Dingfelder did not even come close. He believes in a national standard of care, has no knowledge of Arkansas, the number of physicians performing abortions in Arkansas, the techniques employed by those physicians, the equipment utilized by these physicians (specifically the size dilators they use) or the kinds of physicians and the backgrounds of these physicians performing these procedures. It is difficult to imagine an "expert" being less familiar with the standard of care applicable in this case. Moreover, all the assumptions Dr. Dingfelder made about the standard of care applicable in this case have now been proven false by the attached affidavits.

In addition to the fact Dr. Dingfelder is utterly unaware of the practices of the physicians in Arkansas performing second trimester termination procedures and the techniques and equipment used in this locality by such physicians, he also failed to express any familiarity with the standard of care applicable to the specialty of Dr. Thomas Tvedten. Specifically, Plaintiff's attorney asked the following questions:

> Q. Are you familiar with the standard of care for an OB-GYN performing voluntary pregnancy termination procedures in Raleigh/Durham, North Carolina?
>
> Ms. Cauley: Object to form.
>
> The Witness: Yes.

Q. In your opinion, is the standard of care in the city of Little Rock, Arkansas, the same or similar to the standard of care in Raleigh/Durham, North Carolina, for an OB-GYN performing voluntary pregnancy termination procedures?

Ms. Cauley: Object to form.

The Witness: Yes, I think it is very similar.

See Exhibit B, deposition of Dr. Dingfleder, Page 20, taken on July 8, 2009

Dr. Tvedten is not, and has never been an OB-GYN. He is a General Practitioner ("GP"). Therefore, even assuming *arguendo* that Dr. Dingfelder has chinned the bar on expressing familiarity with the local standard of care in Little Rock, Arkansas, he has nonetheless fallen far short of having any knowledge of the standard of care applicable to a GP in Little Rock, Arkansas. There is little argument needed to establish that the standard of care for an OB-GYN practicing in Little Rock, Arkansas is not the standard of care that would apply to a GP practicing in Little Rock, Arkansas. The law is well established in this area and without a doubt states that the medical expert testifying against the defendant physician must be engaged in the same type of specialty. An OB-GYN is a specialized field of medicine, and it is not the same specialty as a GP. Simply put, Dr. Dingfelder only expressed an opinion of the standard of care of an OB-GYN practicing in Little Rock which is not applicable to the facts of this case.

V. CONCLUSION

Applying the well settled principles of Arkansas law set forth above to this case demonstrates Plaintiff's complete failure of proof on the essential elements of standard of care. The affidavits of the only physicians in the state of Arkansas performing 20 week pregnancy terminations is not contradicted or rebutted by any proof of record in this case. This failure of proof is fatal, and mandates dismissal of Plaintiff's claims against Dr. Tvedten with prejudice.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 688-8800

By: _____
Ken Cook (Ark. Bar No. 78030)
Michelle H. Cauley (Ark. Bar No. 98146)

CERTIFICATE OF SERVICE

I, Michelle H. Cauley, certify that a copy of the foregoing was mailed, postage prepaid, on the 22nd day of July, 2009, to:

Mr. Glenn Wright
Wilson & Wright
100 North Main
Suite #2601
Memphis, TN 38103

Mr. Don Bacon
Friday, Eldredge & Clark
400 W. Capitol
Suite 2000
Little Rock, AR 72201

_____
Michelle H. Cauley