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Sanctions over expert requires evidence

BY PETER VIETH

A lawyer who was ordered to pay defense costs for identifying a gynecologist expert in what the judge believed was strictly an obstetrical case has had his sanctions overturned by the Supreme Court of Virginia.

The decision appears to signal that the party seeking sanctions has the burden to put on fresh evidence as to how the proffered expert falls short.

The court's ruling came in a brief, March 28 unpublished order in *Blazer v. About Women OBGYN PC* (VLW 019-6-017).

Evidence fell short, court said

Attorney John A. Blazer of Fairfax, representing a female patient with a medical malpractice claim, identified as an expert a board-certified obstetrician/gynecologist who had given up obstetrics some five years prior.

Although the Supreme Court order does not describe the procedural posture, Blazer reportedly nonsuited the case after the defense challenged the qualifications of his expert, moved to strike the pleadings and asked for sanctions.

The defendants alleged Blazer violated the good faith pleading statute, Va. Code § 8.01-271.1, in identifying gynecologist Chauncey Stokes as his expert.

The Virginia Medical Malpractice Act, in § 8.01-581.20, requires that an expert have an active clinical practice in the defendant's field of medicine or a related field within a year of the alleged negligent treatment.

Judge Alfred D. Swersky, sitting in Prince William County, said: "As a matter of law" gynecology is not a "related field" to obstetrics for purposes of that standard. Swersky imposed a $5,000 sanction based on defense fees and costs.

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The justices reversed the award of sanctions. Whether an active clinical practice is in a related field of medicine is a question of fact – not law – that looks past a general overview of the medical fields, the court said. The proper focus is on the medical procedure at issue and whether the proffered expert has performed that procedure, the court continued.

"The circuit court in the present case, however, heard no evidence regarding the specific medical procedure at issue (i.e., the diagnosis and treatment of placental insufficiency and low amniotic fluid), the nature of Dr. Stokes' gynecological practice, or whether he had performed that procedure at issue at some point," the court wrote.

The only evidence considered was that the expert had retired from obstetrics in January 2012, the court said. Swersky's ruling was an abuse of discretion, the Supreme Court decided.

The right to be wrong

Under questioning by Justice D. Arthur Kelsey, Blazer's attorney acknowledged at oral argument that an attorney may be sanctioned for a blatantly deficient expert designation, even after nonsuit. But Danny M. Howell contended Blazer acted properly in withdrawing his client's claim once a challenge emerged.

A condition a gynecologist would have treated in the first trimester required an obstetrician in the third trimester, evidence showed. The patient in question had her water break in the third trimester. Howell contended a sanctions award required a showing that the expert would never have treated a patient for the medical condition at issue, while the case at hand presented a much closer question.

"We have summary judgment motions on expert witness designations all the time. And as attorneys, we make the best assessments we can. And we are wrong, lots of times. In this case, the difference between a first- and third-trimester analysis is just somebody being right or wrong," Howell told the justices.

Justice William C. Mims picked up on that distinction with a question to J. Jonathan Schraub of Richmond, counsel for the defendant health care providers. Mims said the issue might govern whether the expert was allowed to testify. "I don't see how it relates to sanctions," Mims said.

"It goes to the heart of the issue" of whether the expert had an active clinical practice within a year of the defendants providing that care, Schraub responded.

"We introduced sworn testimony from Dr. Stokes as to what he didn't do during that period of time," Schraub said, referring to Stokes' deposition transcripts from other cases.

"It's a different practice. It's a different set of concerns. It's a different set of parameters. For this purpose, it's a different field of medicine," Schraub told the justices. "We introduced the evidence. They introduced nothing, despite multiple opportunities," Schraub argued.

In an interview March 28, Howell said the decision shows a sanctions motion calls for more than a batch of prior deposition transcripts from the expert.

"Finally, we've got something that says there has to be evidence presented," Howell said. "The other side can't just come in and say, 'We won on demurrer. You have to prove your case or be sanctioned.'"

If that were the rule, defense lawyers would say, "I'm going to file this every time," Howell said.

It was not clear at press time whether the defendants would petition for rehearing.

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