IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LETONI WILSON, Mother and Next Friend of, TIRESE JOHNSON, a minor child, Plaintiffs, v. DR. PHYLLIS JAMES, NEW CASTLE FAMILY CARE, and MICHELE MONTAGUE, Defendants.	)	C.A. No. 07C-04-025 PLA

UPON PLAINTIFF'S
MOTION TO VACATE JUDGMENT
DENIED

Submitted: October 20, 2010
Decided: October 22, 2010

This 22nd day of October, 2010, it appears to the Court that:

1) In this medical malpractice action, Plaintiff Letoni Wilson alleged that her son, Tirese Johnson, developed brain damage as a result of the defendants' delays in diagnosing and treating him for jaundice. The Court dismissed Defendant Michelle Montague, a licensed physician's assistant who examined Tirese during an office appointment, on the basis that Plaintiff's sole standard-of-care expert, Howard Bauchner, M.D., lacked

knowledge of the standard of care applicable to Delaware physicians' assistants. As the Court explained in its decision granting Montague's motion *in limine* to exclude Dr. Bauchner's testimony against her:

> [N]either Dr. Bauchner's report nor his deposition offer an opinion as to the standard of care required of a physician's assistant. At his deposition, Dr. Bauchner professed that he was unaware of what the "scope of practice of physician's assistants" was under Delaware law, or of how a physician's assistant's training and duties differed from those of a nurse practitioner; indeed, Dr. Bauchner did not know that Michele Montague was acting as a physician's assistant during the litigated events, having mistaken her for a nurse practitioner.[1]

Accordingly, the Court concluded that Dr. Bauchner was unqualified to opine as to the standard of care applicable to Montague. Following Montague's dismissal from the case, Plaintiff proceeded to trial against Defendants Dr. Phyllis James and New Castle Family Care and obtained a $6.25 million verdict.

2) After the trial, Plaintiff's counsel undertook to represent Dr. James in a separate suit against her insurer and her counsel in this case, alleging breaches of contract and fiduciary duties in their handling of her defense.[2] During discovery in Dr. James's suit, the defendants disclosed a

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[1] *Wilson v. James*, 2010 WL 1107787 (Del. Super. Feb. 19, 2010), *aff'd*, 2 A.3d 75 (Del. 2010) (TABLE).

[2] *See* Pl.'s Am. Compl., *James v. Preferred Prof'l Ins. Co.*, C.A. No. N10C-04-212 (Del. Super. June 2, 2010).

letter written by Dr. James's attorney in this action, which referenced alleged alternations Montague made to Tirese Johnson's medical records. Apparently, Montague initially noted that Tirese had yellowed skin extending to his abdomen, but revised the chart to indicate that the yellowing extended to his sternum. According to Plaintiff, only the revised note was provided during discovery in this case. When questioned about the revised note during her deposition, Montague stated that she took no additional notes about her physical examination and never mentioned the existence of the original note that described the yellowing as extending to Tirese's abdomen.

3) Plaintiff has moved to vacate the Court's order dismissing Montague on the basis of newly-discovered evidence or fraud, misrepresentation, or misconduct. Plaintiff argues that Dr. Bauchner was selected as an expert because his opinion with regard to Montague's alleged breaches was more forceful than those offered by other experts consulted by Plaintiff's counsel prior to trial. Plaintiff alleges that "the alteration that Montague made to her original note was material to the issue of whether she violated the standard of care."[3] Plaintiff's counsel asserts that "[u]pon information and belief, an expert reviewing the original note would have

[3] Pl.'s Mot. to Vacate 3.

been more likely to conclude that yellowing skin extending to the abdomen was a more clinically significant finding that should have been recognized by Montague as requiring testing and treatment that she did not recommend."[4]

4) In opposition to Plaintiff's motion, Defendant Montague states that the original note was essentially a draft prepared before Montague reviewed and finalized her documentation with her supervising physician, Dr. James. Montague asserts that Dr. James suggested that she alter the word "abdomen" to "sternum" to accurately reflect her observation that the yellowing extended to the sternum, consistent with the description of the examination she gave during her deposition. Furthermore, Montague explains that she was never served with any request for production in this case, and that "had such a request been filed that covered the draft note, it would have been produced."[5] Montague thus argues that Plaintiff cannot show that the original note was likely to have changed the result, nor that it could not have been discovered by the exercise of due diligence.

5) Pursuant to Superior Court Civil Rule 60(b)(2), "the Court may relieve a party or a party's legal representative from a final judgment, order,

[4] *Id.* at 4.

[5] Resp. of Def. Montague to Pl.'s Mot. to Vacate ¶ 6.

or proceeding" on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(3) permits the Court to vacate a judgment or order on the basis of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party."

6) To prevail in a Rule 60(b)(2) motion to vacate on the basis of newly discovered evidence, a party must demonstrate that the newly discovered evidence could not have been discovered by the exercise of due diligence prior to the underlying order or judgment; that it is sufficiently material and relevant that it would probably alter the result of the proceeding; and that it is "not merely cumulative or impeaching in character."[6] A party seeking relief pursuant to Rule 60(b)(3) on the basis of fraud, misrepresentation, or misconduct "must present proof of bad faith," as well as a "fair likelihood of success on the merits" if relief is granted.[7]

7) Because Plaintiff has not established a likelihood that the original examination note would change the outcome of the motion to dismiss that arose from her failure to procure a qualified expert opinion, the

[6] *Albu Trading, Inc. v. Allen Family Foods, Inc.*, 2002 WL 531203 (Del. Super. Apr. 4, 2002), *aff'd,* 822 A.2d 396 (Del. 2002).

[7] *Matter of $2,053.00 in U.S. Currency*, 676 A.2d 908, 1996 WL 209896, at *2 (Del. Apr. 23, 1996) (TABLE).

motion to vacate does not satisfy the requisites for relief under subsections (2) or (3) of Rule 60(b). If Plaintiffs had possessed the original examination note during discovery and been able to provide it to Dr. Bauchner, it would not have altered his lack of qualification to opine as to the standard of care applicable to a physician's assistant—at most, it might have made his opinion against Montague more emphatic, but that opinion would have remained inadmissible.

8) Plaintiff suggests that with knowledge of the original note, she might have procured a different expert witness to testify as to Montague's alleged malpractice, but she has not offered any reasoning as to how the existence of the original note might have changed the opinions of the other consulted experts, who offered assessments that were "more equivocal [than Dr. Bauchner's] or declined to support the claim against Montague."[8] Plaintiff's prospective experts were able to review all of the other relevant discovery material in this case, including detailed testimony from Montague's deposition in which she recounted the physical examination and the extent of the yellowing she observed.[9] Plaintiff has provided no information as to the content of those experts' opinions, and no basis from

[8] Pl.'s Mot. to Vacate 3.

[9] Dep. Tr. of Michelle Montague, Nov. 10, 2008, at 20:3-37:4.

which the Court could conclude—or even infer—that they would probably have altered those opinions based on Montague's alteration of her note to read "sternum" rather than "abdomen," particularly when Tirese was also examined by Dr. James immediately after Montague's initial examination. Counsel's conclusory assertions do not suffice to establish a logical link between the original note and the probability of obtaining a different, admissible opinion from one of Plaintiff's propsective experts.

9) In seeking relief under Rule 60(b)(2) and (3), Plaintiff bears the burden of showing that a different outcome was probable; on the basis of her submission, the Court lacks a basis to understand how the new evidence presented would even have made a different result possible. Accordingly, Plaintiff's Motion to Vacate the Judgment is hereby **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Kenneth M. Roseman, Esq.
Mason E. Turner, Jr., Esq.
Richard Galperin, Esq.