IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL NESS, Executor of the Estate of DONALD R. NESS, Deceased and RUTHETTA NESS,	:	
Plaintiffs,	:	
v.	:	C.A. No. 05C-02-130 SCD
BAYHEALTH MEDICAL CENTER, INC. d/b/a MILFORD MEMORIAL HOSPITAL GLENN E. GRAYBEAL & AKANA, p/a/, and DAVID A. FOLEY, M.D.	:	
Defendants.	:	

Submitted: August 7, 2006
Decided: August 10, 2006

O R D E R

The plaintiffs have filed a Motion in Limine to preclude defendants from impeaching Frank H. Boehm, Jr., M.D. ("Dr. Boehm") with evidence regarding his professional disciplinary history. Upon consideration of the motion, and the response from defendants Glenn E. Graybeal, MD and Graybeal & Akana, P.A., (collectively "Dr. Graybeal") it appears:

1. This case arises out of a fall which occurred on May 19, 2003, when Donald Ness ("Ness") fell while coming down from the roof of his home. He lost consciousness briefly. He was taken by ambulance to Milford Memorial Hospital Emergency Department. He was treated by defendant, Dr. Graybeal, and was released.

2. Later the same day, at about 11:00 p.m., Ness was again taken by ambulance to the same facility. He was treated in the Emergency Department by defendant, Dr. David Foley

("Dr. Foley"), who had telephone contact with Dr. Graybeal. Ness was admitted to the hospital, and moved to a room around 4 a.m. on May 20, 2003.

3. At about 8:30 a.m., May 20, 2003, Dr. Graybeal saw Ness and discharged him. Ness was ultimately rendered a quadriplegic. The plaintiffs allege that the quadriplegia was a result of the conduct of Dr. Graybeal and Dr. Foley in failing to diagnose and treat Ness's injuries. Two years and ten months after the fall, Ness died. His son was substituted as his Executor. Mrs. Ness has a claim for loss of consortium.

4. The plaintiffs offer the testimony of Dr. Boehm as an expert in neurosurgery to testify on their behalf at trial. Dr. Boehm was deposed on March 22, 2006. At that deposition it was determined that Dr. Boehm graduated from medical school in 1984; completed his residency in Neurosurgery in 1991; and became Board Certified in Neurosurgery in 1996. He has been a practicing Neurosurgeon in New York State since that time. He is a member of various medical associations. He also testified regarding a prior disciplinary incident.

5. The records obtained by the plaintiffs following the deposition of Dr. Boehm reflect that in November 1994, Dr. Boehm signed an Application for Consent Order related to a proceeding filed with the New York State Board for Professional Medical Conduct. In the Consent Order, Dr. Boehm agreed that: (1) his medical license in New York State would be suspended for a period of twenty-four months, with the final twenty-two months of the suspension stayed so long as he complied with the conditions imposed by the Board (accordingly Dr. Boehm's license was suspended for two months); (2) he would pay a $10,000 fine; (3) his practice of medicine would be monitored for a period of twenty-four months under conditions imposed by the Board; and (4) he would comply with certain other conditions.

6. Based on his deposition testimony and the exhibits attached to the motion papers, it appears that Dr. Boehm prescribed pain medications to his dying mother, and to his fiancé, who was apparently addicted to pain medications. Dr. Boehm said his fiancé suffered from chronic pain due to Lyme's disease. A part of Dr. Boehm's violation related to the failure to maintain records regarding the prescription of controlled substances. The conduct in question occurred prior to August 1993.

7. The pertinent rule of evidence is D.R.E 608(b).

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness…concerning the witness' character for truthfulness or untruthfulness. . ..

8. The issue here is whether past conduct bears on the defendant's credibility. "If all that can be said is that the past conduct was improper, illegal or immoral, the requisite foundation under Rule 608(b) has not been met."[1]

9. The trial judge should consider:

> (1) whether the testimony of the witness being impeached is crucial; (2) the logical relevance of the specific impeachment evidence to the question of bias; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence is cumulative.[2]

The court may also consider the temporal proximity of the prior misconduct to the testimony to be proffered.[3]

10. The defendants cite *Cunningham v. McDonald*[4] for the proposition that it is appropriate to elicit testimony regarding the employment status of a medical expert.

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[1] *State v. Watson*, 846 A.2d 249, 253 (Del. Super. 2002) (citations omitted)
[2] *Id*.

Cunningham is distinguishable. The witness testifying therein was the Chief Medical Examiner who was, at the time the testimony was offered, under indictment for charges in federal court. The Supreme Court held that the plaintiff should have been permitted to develop the fact that his "employment status [was] the subject of pending litigation and that his future employment as Chief Medical Examiner" was uncertain.[5] The issue here is not Dr. Boehm's current employment status. It is his misconduct some thirteen years prior to the time set for trial.

11. Defendant also cites *Greene v. Beebe Medical Center, Inc*.[6] *Greene* considered the admissibility of evidence of a prior suspension in a medical malpractice claim against the doctor and the hospital. The claim against the doctor was negligence; the claim against the hospital was negligent supervision. The trial court held that the suspension of the defendant doctor was properly excluded because it had no bearing on the doctor's credibility, *as he did not testify as an expert*. The evidence was also deemed inadmissible against the hospital because the prejudice outweighed the probative value. While *Greene* suggests that the analysis might be different when the prior disciplinary evidence is used against a defendant offering expert testimony, the comment is dicta.

12. *Hayes v. Manchester Memorial Hospital*[7] is also distinguishable. *Hayes* claimed negligence regarding the failure to read and interpret x-rays, and the failure to take necessary x-rays. The trial court excluded the cross-examination of the medical expert witness, Goodman, because of a lawsuit then pending against him with similar allegations. The plaintiff argued that the lawsuit was relevant to attack Goodman's credibility, bias and motive. Plaintiff argued that

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[3] *Id* (citing *United States v. Merida*, 765 F.2d 1205, 1216-17, (5th Cir. 1985)
[4] *Cunningham v. McDonald*, 689 A.2d 1190 (Del. 1997)
[5] *Id.* at 1196.
[6] *Greene v. Beebe Medical Center, Inc.*, 663 A.2d 487 (Del. 1995).
[7] *Hayes v. Manchester Memorial Hosp.* 661 A.2d 123, 125 (Conn. App. 1995).

evidence of the suit was relevant because it was "in Goodman's best interest to give the opinion that he did [on standard of care] and that it would have been contrary to his interest to testify that there had been a deviation" in the case.[8] *Hayes* has no application here as there is nothing in the record to suggest that any opinion offered by Dr. Boehm has relevance to any current personal challenge of his competence.

13. Defendant also cites *Navarro de Cosme v. Hospital Pavia*.[9] Mrs. Cosme alleged that the treatment she received during the last weeks of her pregnancy caused the *in utero* death of her child. Plaintiffs presented the testimony of an expert medical doctor. On cross-examination the defendant was permitted to ask the doctor about another case in which he had testified under oath that he had submitted an inflated invoice for expert witness fees. The doctor was also asked, and admitted his license as a notary was suspended for failure to submit the required reports, and that he had been a defendant in three medical malpractice cases. The appeals court concluded, without analysis, that the trial court's ruling that all the matters related to the witness's credibility as a witness, and were not error. The paucity of facts makes it difficult to attribute any weight to this case.

14. Reviewing the factors for consideration, I find that the witness's testimony is crucial. I do not find a logical relevance of the specific impeachment evidence to the question of bias. I find there is a great danger of unfair prejudice. I am not aware that the evidence will be cumulative. Stated differently, the facts presented do not persuade me that this thirteen year-old incident is probative of truthfulness or untruthfulness. I find that the probative value is outweighed by its prejudicial effect.

The plaintiffs' motion in limine is GRANTED.

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[8] *Id.*at 125.

IT IS SO ORDERED.

/s/ Susan C. Del Pesco
Judge Susan C. Del Pesco

[9] *Navarro de Cosme v. Hospital Pavia*, 922 F.2d 926 (1st Cir. 1991).