

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

WARREN W. HOMAN, ESQ., )  
Executor of the Estate of Wayland A. Lucas, )  
deceased, on behalf of the Estate and on behalf )  
of the heirs of Wayland A. Lucas, deceased, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MEADOW WOOD BEHAVIORAL HEALTH )  
SYSTEM and JOHN DOES (1-15), )  
 )  
Defendants. )

Civil Action No. 99-302 GMS

**MEMORANDUM**

**I. INTRODUCTION**

On May 12, 1999, Warren W. Homan (“Homan”), as executor of the estate of Wayland A. Lucas (“Mr. Lucas”) brought this wrongful death and survival action against Meadow Wood Behavioral Health System (“Meadow Wood”) pursuant to 10 Del. C. §§ 3701 and 3724. The complaint alleges that Meadow Wood was negligent in its medical treatment of Mr. Lucas, in violation of the Delaware Medical Negligence Act (the “Act”), 18 Del. C. § 6801, *et seq.* Presently before the court is Meadow Wood’s Renewed Motion for Summary Judgment. For the following reasons, the court will grant the motion.

**II. BACKGROUND**

Mr. Lucas was diagnosed with Alzheimer’s disease in 1997 and entered the Millcroft Assisted Living Facility (“Millcroft”) as a permanent resident on February 20, 1998.<sup>1</sup> On February 26, 1998,

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<sup>1</sup> Alzheimer’s disease, a form of dementia, is a degenerative brain disease that usually begins gradually, causing a person to forget recent events or familiar tasks. How rapidly it advances varies from person to person, but the brain disease eventually causes confusion, personality and behavior changes, and impaired judgment.

Mr. Lucas was transferred from Millcroft and admitted to Meadow Wood, a psychiatric hospital in Wilmington, Delaware, after exhibiting behavioral problems and causing concern among the staff at the Millcroft.<sup>2</sup> Upon his admittance to Meadow Wood, Mr. Lucas' dementia was described by the staff as moderate to severe, so his psychiatric medications were increased. Sometime on February 26, 1998, after falling asleep in a chair, Mr. Lucas attempted to rise from the chair and fell, avulsing (*i.e.* tearing off) the distal portion of his "pinky" finger. Mr. Lucas was treated for this injury at Christiana Hospital ("Christiana"), in Wilmington, Delaware, and returned to Meadow Wood the same night.

Mr. Lucas was prescribed and administered a diuretic and psychotic medications, while living at Millcroft. On February 27, Mr. Lucas was administered two diuretics instead of one: a daily use diuretic, Lasix; and a chronic use diuretic, Dyazide, that was prescribed at Millcroft and continued to be administered at Meadow Wood. The medical record is not clear, but the additional diuretic seems to have been administered because Mr. Lucas exhibited extensive peripheral edema (*i.e.* swelling). Mr. Lucas was also prescribed three sedatives, Risperdal (at a dose of 0.5 mg, twice daily), Depakote (at a dose of 250 mg, twice daily), and Haldol (administered on an as needed basis).

From February 28 to March 1, Mr. Lucas became increasingly unresponsive and exhibited a diminished oral intake – that is, Mr. Lucas became more sedated and stopped eating. Because he was not eating, the nurses at Meadow Wood administered his food through "syringe-feeding." Shortly after the syringe-feeding, Mr. Lucas was observed to be lethargic, and had a continuous cough.

On March 2, Mr. Lucas became completely unresponsive and was transported from Meadow Wood to Christiana for an evaluation that included a computed tomography scan ("CT scan") of his lung. The CT scan showed a foreign body airway obstruction in his lung that was consistent with a

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<sup>2</sup> The alleged negligent acts occurred after Mr. Lucas was admitted to Meadow Wood, between February 26, 1998 and March 2, 1998.

diagnosis of aspiration pneumonia.<sup>3</sup> Mr. Lucas' psychiatric medications were discontinued and he was treated for the pneumonia. He responded poorly to the treatment and was subsequently transferred to Southgate Health Care Center ("Southgate") on March 9. He expired at Southgate on March 10. An autopsy was performed and pneumonia was documented as the cause of death on the autopsy report. The manner of death was listed as "accident[al]."

On May 12, 1999, Homan initiated this law suit alleging that Meadow Wood was negligent because it departed from the standard of care in its treatment of Mr. Lucas and, ultimately, caused his untimely death. According to Homan, Meadow Wood and its staff breached the standard of care when they failed to document the use of a fall precaution plan at the time Mr. Lucas fell and avulsed his finger. Meadow Wood's nursing staff is also alleged to have breached the standard of care when they monitored Mr. Lucas' medications inadequately and failed to ask a psychiatrist to reevaluate the psychoactive and diuretic medications he was taking.<sup>4</sup> Additionally, the nursing staff is accused of breaching the standard of care when they administered the syringe-feeding that caused Mr. Lucas' aspiration pneumonia.

Meadow Wood alleges that it is entitled to summary judgment because Homan cannot support his medical negligence claims.

### **III. STANDARD OF REVIEW**

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<sup>3</sup> Aspiration is defined as entry of a foreign substance, solid or liquid, into the respiratory tract or inhalation of fumes and vapors. Aspiration pneumonia is caused by impaired airway protection, which occurs in patients with an altered level of consciousness and/or abnormal swallowing reflexes. The risk is extremely high in any patient with an altered mental status.

<sup>4</sup> Homan also seems to allege that Meadow Wood breached the standard of care because Mr. Lucas' psychiatrist prescribed two diuretics instead of one and because Mr. Lucas was prescribed multiple psychotic medications that were administered in tandem rather than sequentially. However, during the relevant period, Mr. Lucas' psychiatrist was not employed by Meadow Wood and was not an agent of Meadow Wood, or in any way associated with Meadow Wood, so as to render him liable for any failings in Mr. Lucas' treatment.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56©; *see also Boyle v. County of Allegheny Pa.*, 139 F.3d 386, 392 (3d Cir. 1998). Thus, summary judgment is appropriate only if the moving party shows there are no genuine issues of material fact that would permit a reasonable jury to find for the non-moving party. *Boyle*, 139 F.3d at 392. A fact is material if it might affect the outcome of the suit. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986)). An issue is genuine if a reasonable jury could possibly find in favor of the non-moving party with regard to that issue. *Id.* In deciding the motion, the court must construe all facts and inferences in the light most favorable to the non-moving party. *Id.*; *see also Assaf v. Fields*, 178 F.3d 170, 173-74 (3d Cir. 1999).

When a plaintiff initiates a law suit for medical negligence pursuant to the Delaware Medical Negligence Act (the “Act”), 18 Del. C. § 6801, *et seq.*, he or she is required to provide expert medical testimony as to the defendant’s alleged deviation from the standard of care and the causation of the alleged personal injury or death because these are issues which a plaintiff bears the burden of proof at trial. *See* 18 Del. C. § 6853; *McCusker v. Surgical Monitoring Assoc., Inc.*, 299 F. Supp. 2d 396, at 398-99 (D. Del. 2004). If the plaintiff fails to provide the expert medical testimony required by 18 Del. C. § 6853, then summary judgment for the defendant is proper. *See McCusker*, 299 F. Supp. 2d at 398-99.

#### **IV. DISCUSSION**

Meadow Wood asserts that it is entitled to summary judgment because Homan has not provided expert medical testimony supporting his claims of medical negligence, as required by 18 Del. C. § 6583. Meadow Wood first argues that Homan’s medical expert, Dr. Jeffrey T. Berger (“Dr. Berger”),

lacks familiarity with the local standard of care as required by Delaware law.<sup>5</sup> See *Tyler v. Dworkin*, 747 A.2d 111 (Del. Super. Ct. 1999). Under Delaware law, Homan is required to present expert testimony that Meadow Wood's care of Mr. Lucas deviated from the standard of care applicable to a psychiatric hospital in Delaware in 1998.

Homan contends that Dr. Berger is familiar with the local standard of care. In support of his contention, Homan submits, in addition to Dr. Berger's expert report and deposition testimony, an affidavit signed by Dr. Berger that purports to demonstrate his familiarity with the local standard of care. In his affidavit, Dr. Berger states that the specialty of geriatric medicine informs and guides all professional medical healthcare specialties, including psychiatry, psychiatric nursing, and applicable institutional hospital standards in connection with the treatment of the elderly. He opines that Meadow

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<sup>5</sup> 18 Del. C. § 6801, *et seq.*, was enacted in 1976 in response to a perceived malpractice crisis in medical care in Delaware. *DiFilippo v. Beck*, 520 F. Supp. 1009 (D. Del. 1981). The Act includes several sections that address the requirement for expert medical testimony in a healthcare negligence lawsuit and the competency expert medical witnesses. See 18 Del. C. §§ 6853-54. Section 6801, which defines medical malpractice, originally stated:

“Malpractice” means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient. The standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed, under similar circumstances, by members of the profession in good standing in the same community or locality, and the use of reasonable care and diligence.

18 Del. C. § 6801(7) (West 1976). In July 1998, section 6801 was amended to relabel medical malpractice as medical negligence and to redefine medical malpractice/medical negligence. The 1998 amendments replaced the requirement of a “local” standard of care, requiring instead that the standard of care “shall be that degree of skill and care ordinarily employed in the same or similar field of medicine as defendant.” 18 Del. C. § 6801(7) (West 1998). The present case was filed prior to the 1998 amendment, which, under Delaware law, does not apply retroactively. See *Tyler v. Dworkin*, 747 A.2d 111 (Del. Super. Ct. 1999), *aff'd* 741 A.2d 1029 (Del. 1999) (holding that the 1998 amendment to § 6801 cannot be applied retroactively); *Walton v. Galinat*, 759 A.2d 602 (Del. 2000) (applying *Dworkin*). Thus, the court will apply the “local” standard of care requirement.

Wood breached the standard of care in that it and/or its nurses and other staff: (1) failed to document the use of physical fall prevention techniques despite advance warning at the time of Mr. Lucas' transfer of his unsteady gait due to medication; (2) employed duplicative use of diuretics causing dehydration, delirium, and exacerbation of Mr. Lucas's combative state; (3) used syringe-feeding, which was contra-indicated in patients with delirium; and (4) failed to report to Mr. Lucas' psychiatrist a downturn in his physical status. Lastly, Dr. Berger states that the "misguided and deficient care [he] identif[ies] was not appropriate care for an elderly Alzheimer's patient in [the] Wilmington, Delaware area in the early part of 1998." (D.I. 75 Exh. B ¶ 8).

Meadow Wood contends that Dr. Berger's affidavit does not demonstrate that he is familiar with the local standard. Meadow Wood further contends that Homan has made no other attempt to establish Dr. Berger's familiarity with the local standard, citing *Loftus v. Hayden*, 391 A.2d 749 (Del. 1978). In *Loftus*, the Delaware Supreme Court articulated a non-exclusive list of factors that a medical expert could use to show that he fulfilled the "locality" requirement, including: (1) direct observation in Delaware; (2) study in Delaware as a medical student, intern, or resident; (3) care of Delaware patients referred by Delaware physicians; (4) teaching of students who have dispersed to Delaware; (5) readings of Delaware medical records, reports, and journals; (6) consultations with Delaware physicians; and (7) attendance at meetings with Delaware doctors. *Loftus*, 391 A.2d at 753.<sup>6</sup>

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<sup>6</sup> *Loftus* addresses the "locality" requirement under 18 Del. C. § 6854, the section of the Act that sets forth the requirements for qualification of an expert witness offering standard of care testimony. Prior to 1996, § 6854 required medical experts to be familiar with the local standard of care:

(a) No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with that degree of skill ordinarily employed in the community or locality where the alleged malpractice occurred, under similar circumstances, by members of the profession practiced by the health care provider; provided, however, that any such expert witness need not be licensed in the State.

After reviewing Dr. Berger's expert report and affidavit, as well as portions of his deposition testimony, the court concludes that Dr. Berger does not have the requisite familiarity with the standard of care applicable to a psychiatric hospital in Delaware in 1998. Dr. Berger's report addresses Mr. Lucas's treatment at Meadow Wood from February 26, 1998 to March 2, 1998. He opines that Meadow Wood's care of Mr. Lucas deviated from the acceptable standards in pharmacologic management and nursing care, and describes all of the ways in which Meadow Wood deviated from the standard. However, nowhere in his report, does Dr. Berger state the applicable standard of care pertaining to Meadow Wood in 1998. Furthermore, Dr. Berger's affidavit does not state the applicable standard of care, as it contains only the bald assertion that the deficient care provided by Meadow Wood "was not appropriate care for an elderly Alzheimer's patient in [the] Wilmington, Delaware area in the early part of 1998." (D.I. 75 Exh. B ¶ 8). Dr. Berger's deposition testimony also is void of any showing of familiarity with the standard of care.

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(b) Any physician who has been in the active practice of medicine or surgery for at least the past 5 years and who currently practices in the State or within a state contiguous to the State and within a radius of 75 miles of the Capitol of the State shall be presumed to be competent to give expert medical testimony as to applicable standards of skill and care, if it shall be established that the degree of skill and care required of the expert in the locality where the expert practices or teaches is of the same or equivalent standard as the skill and care employed in the community or locality where the alleged malpractice occurred.

In 1996, section 6854 was amended to eliminate the "locality" requirement:

No person shall be competent to give expert medical testimony as to applicable standards of skill and care unless such person is familiar with the degree of skill ordinarily employed in the field of medicine on which he or she will testify.

The treatment in the present case occurred in 1997. The court, therefore, would be required to apply the amended section 6854. However, Meadow Wood does not contest Dr. Berger's qualifications under § 6854. Rather Meadow Wood asserts that Dr. Berger does not satisfy the "locality" requirement of § 6801(7). This is the same "locality" requirement that applied to § 6854 when *Loftus* was decided. Thus, the court will apply the *Loftus* factors for establishing familiarity with local standards to its discussion.

In addition, applying the *Loftus* factors leads the court to conclude that Dr. Berger has not met the “locality” requirement of 18 Del. C. 6801(7). Dr. Berger’s report and affidavit do not demonstrate any direct observation in Delaware. He currently is the Director of Clinical Ethics and an attending physician in the division of Geriatric Medicine at Winthrop-University Hospital in Mineola, New York, and does not have privileges at any other hospital. Likewise, his deposition testimony does not mention any direct observation in Delaware. Dr. Berger received his Doctor of Medicine degree from S.U.N.Y. Stony Brook School of Medicine, in Stony Brook, New York, and studied as an intern and resident in internal medicine at Winthrop-University Hospital. He, therefore, did not study in Delaware as a medical student, intern, or resident.

Dr. Berger’s report, affidavit, and deposition testimony do not establish that he has satisfied any of the other five *Loftus* factors. Dr. Berger testified at deposition that he teaches residents and is a private practitioner of internal medicine. However, neither his testimony, report, or affidavit links these facts in any way to Delaware. Moreover, the record contains no evidence regarding Dr. Berger’s reading of Delaware medical records, reports, and journals; consultations with Delaware physicians; or attendance at meetings with Delaware physicians. Dr. Berger does not have the requisite knowledge by which to measure the performance of a Delaware psychiatric hospital. Thus, Homan has not, through the proffered testimony of Dr. Berger, met his burden of presenting expert medical testimony regarding the applicable standard of care.

Homan next offers the testimony of Dr. Paul J. Hoyer (“Dr. Hoyer”), the pathologist who performed the autopsy on Mr. Lucas. Homan asserts that Dr. Hoyer has reviewed Mr. Lucas’ medical records and is expected to testify at trial that cumulative overdose of medications prescribed and administered at Meadow Wood caused Mr. Lucas’ untimely death. Dr. Hoyer will also testify that no person may be so heavily or mistakenly medicated to cause a diminution in his or her level of functioning to risk food to be aspirated into the lungs to cause a focal pneumonia – the situation that



occurred in the present case. Homan has included Dr. Hoyer's autopsy report and medical record analysis as support for his position in his opposition to Meadow Wood's summary judgment motion.<sup>7</sup> In response, Meadow Wood contends that Dr. Hoyer has not provided any testimony as to Meadow Wood's breach of the standard of care in connection with Mr. Lucas' death.

After reviewing Dr. Hoyer's autopsy report and medical record analysis, the court concludes that he has not provided an opinion regarding the applicable standard of care. The autopsy report addresses only the cause of death. The medical record analysis addresses the cause of death, as well as referring to the care at Meadow Wood as "sub-optimal." The court will not interpret Dr. Hoyer's single reference to "sub-optimal" care as an opinion regarding Meadow Wood's breach of the standard of care. The court, therefore, concludes that Homan has failed to meet his burden of presenting the requisite expert medical testimony, through Dr. Hoyer.

Homan has failed to provide expert medical testimony demonstrating that Meadow Wood's care of Mr. Lucas deviated from the standard of care applicable to a psychiatric hospital in Wilmington, Delaware, in 1998. This is an element on which Homan bears the burden of proof. Accordingly, Meadow Wood is entitled to summary judgment.

Dated: November 30, 2004

Gregory M. Sleet  
UNITED STATES DISTRICT JUDGE

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<sup>7</sup> It is not clear to the court whether Dr. Hoyer was deposed. However, if Dr. Hoyer was deposed, Homan has not included any excerpts from Dr. Hoyer's deposition as support for his assertions.

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Plaintiff, )

v. )

MEADOW WOOD BEHAVIORAL HEALTH )  
SYSTEM and JOHN DOES (1-15), )

Defendants. )

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**ORDER**

For the reasons stated in the court's Memorandum Opinion of this same date, IT IS HEREBY  
ORDERED that:

1. The defendant's Renewed Motion for Summary Judgment (D.I. 72) is GRANTED.
2. Judgment be and is hereby entered in favor of the defendant.
3. The Clerk of the Court is directed to close this case.

Dated: November 30, 2004

Gregory M. Sleet  
UNITED STATES DISTRICT JUDGE