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Party Does Not Waive Challenge to Expert's Qualifications Even if First Raised at Trial

In *Anderson v. McAfoos*, the plaintiff filed suit in 2002. The plaintiff alleged that the defendant surgeon breached the standard of care in 2001 by causing the plaintiff to suffer an intestinal leak during surgery, failing to properly diagnose and treat the leak and discharging the plaintiff with signs of an infection. About three months after the plaintiff filed suit, the MCARE Act came into effect. One year prior to the 2008 trial, the court ruled that Section 512 of the MCARE Act applied to the case. (Section 512 relates to the required qualifications for standard of care experts) The plaintiff retained William L. Manion, M.D. whose curriculum vitae established that his training, practice and board certifications were in pathology. In Dr. Manion's report, he opined that the defendant surgeon breached the standard of care by discharging the plaintiff when she exhibited signs of a serious infection.

Prior to trial, the court entered a case management order setting forth the deadline for motions *in limine*. Neither party filed a motion addressing Dr. Manion's competency as a general surgery expert. At trial, Dr. Manion was questioned on his qualifications. Dr. Manion testified that he was employed as a pathologist and a medical examiner. His training focused on pathology, and he was board-certified in clinical, anatomical and forensic pathology. Dr. Manion did not perform surgery, did not admit or discharge patients and obtained different training and certifications than general surgeons. Defense counsel objected at the conclusion of *voir dire* contending that Dr. Manion was not competent to render standard of care opinions regarding general surgery under Section 512. Plaintiffs responded, in part, that the challenge was waived because the defendants failed to file a pre-trial motion challenging Dr. Manion's qualifications. The trial judge sustained defendants' objection. Thereafter, the defendants moved for a nonsuit, which the court granted. The plaintiff moved to remove the nonsuit again arguing, *inter alia*, waiver. The trial court denied the motion stating that there was no requirement that a party file a motion *in limine* to preserve an objection to an expert's competency. The Superior Court affirmed.

On appeal to the Supreme Court, the plaintiff argued that the proper method for challenging an expert's competency is a motion *in limine*. The plaintiff argued that the trial court directed pretrial motions to be filed prior to trial and unusual evidentiary questions were to be presented in a pre-trial statement. Further, the plaintiff argued that it was fundamentally unfair to allow the defendants to first assert the objection following *voir dire* on the second day of trial given that such timing fatally undermined plaintiff's case. Plaintiff argued that the defendants had Dr. Manion's CV and report for more than two years prior to trial, and therefore deliberately and strategically delayed in objecting to prevent the plaintiff from obtaining an expert meeting the MCARE Act's competency requirements in time for trial. The defendants argued that it is well-established that an objection to an expert's competency may be made at trial following *voir dire*, and no law requires the objection to be raised earlier to avoid waiver. Further, the defendants argued that the plaintiff was not unfairly surprised because the trial court determined a year prior to trial that Section 512 applied. Therefore, the plaintiff was responsible for ensuring that Dr. Manion met the criteria under Section 512. The Supreme Court agreed that there is no requirement that an objection under Section 512 must be made prior to *voir dire*. Further, the Court determined that a case management order does not create such a requirement. The Court stated that the defendants cannot be faulted for proceeding in accordance with the traditional procedure of testing an expert's qualifications through the *voir dire* process.

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