

reasonable references in that party's favor. [Kenyon v. Handal, 122 S.W.3d 743, 751 \(Tenn. Ct. App. 2003\)](#).

In medical malpractice cases, the plaintiff must offer expert testimony that complies with provisions [of Tennessee Code Annotated \[T.C.A. § 29-26-115\(b\)\(1\)\]](#) which provides the pertinent part as follows:

“The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;”

[In Robinson v. LeCorps, 83 S.W.3d 718 \(Tenn. 2002\)](#), the Supreme Court explained the requirements [of T.C.A. 29-26-115 \(b\)](#) this way:

“A medical expert relied upon by plaintiff must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of a similar standard of professional care in the community that is shown to be similar to the defendant's community.”

[Id.](#) at 724.

An expert witness is only required to have “some knowledge of the practice of medicine in the community at issue or a similar community.” [See Roberts v. Bicknell, 73 S.W.3d 106, 114 \(Tenn. Ct. App. 2001\)](#). The type of information an expert should have or know about the community for which the standard of care applies includes the size of the community, the existence or non-existence of teaching hospitals, and the community's location. [73 S.W.3d at p. 114](#). A plaintiff's expert witness is not required to know by memory the precise details of the defendant's medical community. [See Ledford v. Moskowitz, 742 S.W.2d 645 \(Tenn. Ct. App. 1987\)](#). Tennessee *jurisprudence* does not require that the plaintiff's expert witness practice in the same specialty as the defendant; only that the expert witness be familiar with the professional standard of care of the defendant. [See Searle v. Bryant, 713 S.W.2d, 62 \(Tenn. 1986\)](#).

B. The Trial Court Erred In Granting Summary Judgment By Failing to Consider the Competent Affidavit of Dr. John Mulder

The Defendant's motion for summary judgment was focused on a single issue: "The Plaintiff's remaining Rule 26 witness [Donald Black, P.A.] cannot raise a genuine issue of material fact that the Defendants' alleged negligence caused Mrs. Watkins' death." (T.R. Vol. VII, p. 1056). Plaintiff's four-page memorandum of law in opposition to the motion (T.R. Vol. VIII, p. 1191) and Plaintiff's response to the undisputed statement of facts (T.R. Vol. VIII, p. 1211) pointed out the plain and simple fact that Dr. Mulder's affidavit defeated the motion for summary judgment because even though Dr. Mulder had been excluded at the trial (the mistrial) as a *standard of care witness* (more on this below), his opinion testimony was nevertheless totally admissible and competent on the issue of *causation*.

Under Tennessee's malpractice act and case-law, as long as an expert was licensed and practicing medicine in Tennessee or a contiguous state within one year of the date of the negligent act (and thus meets the requirements of subsection (b)⁶, the expert may address causation and proximate cause without respect to the "same or similar" community requirements of subsection (a). [Payne v. Caldwell, 796 S.W.2d 142, 143 \(Tenn. 1990\)](#) (geographic limitations relating to the competency of an expert witness set forth in [T.C.A. § 29-26-115\(b\)](#) are applicable to a causation expert); [Hinson v. Claiborne & Hughes Health Center, slip op., 2008 WL 544662 \(Tenn. Ct. App., 2008\)](#) (expert physician

⁶ [T.C.A. § 29-26-115\(b\)](#) provides:

(b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

met contiguous state requirement of part (b) of the statute and could render causation opinion in case involving nursing standard of care). As the Court of Appeals cogently explained in [Russell v. Pakkala, 1998 WL 10212 \(Tenn. App., 1998\) at * 5](#):

“The medical expert “must meet the licensing and geographic requirements of Section (b)” in order to be competent to testify as to causation. Payne v. Caldwell, 796 S.W.2d 142, 143 (Tenn.1990). Dr. Hawkins testified that he was licensed to practice medicine in Tennessee and that he had practiced in Tennessee as a general surgeon for over twenty years. Thus, under the statute, he was competent to testify to establish causation under subsection (a)(3), but not negligence under subsections (a)(1) and (2).”

The trial judge completely, and wrongly, ignored Dr. Mulder’s affidavit that thoroughly detailed that the prescribed medications and dosage *caused* Ms. Watkins’ death. Affidavit of Dr. John Mulder, ¶ 3) (T.R. Vol. II, p. 228). *See supra* at pp. 13-14.

C. The Trial Court Erred In Granting Summary Judgment By *Sua Sponte* (And Without Notice) Ruling on the Admissibility of P.A. Black’s Standard Of Care Opinion Testimony

The Defendants’ summary judgment motion and accompanying statement of undisputed material facts was solely directed to the issue of causation. Defendants supported their motion with an affidavit from a pharmacist dealing with the issue of whether the prescriptions and dosages of the medicines prescribed by P.A. Worthington caused or contributed to the death of Amy Watkins. Plaintiff’s counsel filed a four-page response in opposition because, quite simply, Defendants’ motion had completely overlooked the well-accepted principle of Tennessee law that an expert may testify as to causation if the expert meets the requirements of [T.C.A. § 29-26-115\(b\)](#). Thus, Dr. Mulder’s affidavit completely defeated the causation motion. The Defendants did not move for summary judgment on the locality rule, the standard of care or the admissibility of P.A. Black’s testimony.