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Case Number 548,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BARBARA A. MAMMARELLA,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 548,2013
	)	
ALAN B. EVANTASH, M.D.,	)	
ALL ABOUT WOMEN OF	)	
CHRISTIANA CARE, INC., and	)	
CHRISTINE W. MAYNARD, M.D.,	)	
	)	
Appellees.	)	

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No. N11C-12-242 VLR

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Plaintiff presented expert evidence sufficient to establish a *prima facie* case that Defendants' medical negligence allowed a malignant breast tumor to increase in size from 6mm to 8mm over a six-month period. The growth of the tumor caused her harm. The *prima facie* case was established in two ways: (a) the record evidence of the treating oncologist, and (b) through Affidavits of Merit held compliant under 18 *Del. C.* § 6853 which this Court's ruling in *Dishmon v. Fucci*, 32 A.3d 338 (Del. 2011) declared to constitute a *prima facie* case. The Trial Court erred when it ruled as a matter of law under Superior Court Civil Rule 50(a)(1) that no reasonable jury could find in favor of Plaintiff on the medical causation issue.

ARGUMENT

I. The Trial Court Erred When It Ruled As A Matter Of Law Under Superior Court Civil Rule 50(a)(1) That No Reasonable Jury Could Find In Favor Of Plaintiff On The Medical Causation Issue: A Reply To Appellees' (Hereafter "Defendants") Contrary Contentions.[1]

In her opening brief, Appellant (hereafter "Plaintiff") stressed the importance of this Court's decisions in *Green v. Weiner*, 766 A.2d 492 (Del. 2001), and *Barriocanal v. Gibbs*, 697 A.2d 1169 (Del. 1997). In particular, Plaintiff emphasized the "no magic words" aspect of the holdings. Neither Defendant deigns to mention either case. Rather, they harp on the apparent inconsistencies in Dr. Biggs' testimony, which, admittedly, are fruitful cross-examination material. Those inconsistencies do not, however, lead to a conclusion that this case should be decided as a matter of law. The apparent inconsistencies simply highlight the need for the fact-finder to find the truth. The *Green* Court said "…any inconsistencies in (the doctor's) testimony must be resolved by a jury and are thus irrelevant for purposes of ruling on a motion for judgment as a matter of law". *Id.* at 495.

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[1] Although separate Answering Briefs were filed on behalf of the Defendants, this Reply will address the same substantive argument advanced in each Brief.

Defendant AAW cites *O'Riley v. Rogers*, 69 A.3d 1007 (Del. 2013) (AAW-AB 30)[2] for the proposition that, under Delaware law, a medical opinion should be stated in terms of "reasonable medical probability" or "reasonable medical certainty." The *O'Riley* case involved personal injuries sustained in an automobile accident. The medical opinion testimony excluded there was only "speculative" and the Court did not suggest any departure from the holdings of *Barriocanal, supra.*, and *Green, supra*.[3] In addition, that case did not involve seemingly inconsistent statements from the physician as are present here. Dr. Biggs specifically tied the Plaintiff's chemotherapy regimen to the size of the tumor (A 69), which no one disputes increased during the delay period according to the best evidence imaging studies. He then weakens that by talking about a "gray zone". (A 70). This testimony does not paint a clear picture susceptible of decision as a matter of law.

It should also be noted that there is an element of understandable bias when the doctor is testifying about a patient referred to him by the Defendant AAW, a group he works with on a daily basis. Although he confirms he is exercising his best medical judgment, it may also explain why he was unable to answer questions from the Plaintiff when posed in terms of "reasonable medical probability" (A 71),

[2] "(AAW-AB __)" – This citation refers to the Answering Brief of Defendants All About Women of Christiana Care, Inc., and Christine W. Maynard, M.D.

[3] In fact, the *O'Riley* Court cited the *Barriocanal* decision for another point. *Barriocanal*, 69 A.3d at 1010, n.5.

but showed no hesitation when the same phrase was used by defense counsel. (B 45 at 39).

Defendant AAW also objects to the loss of chance argument on both procedural and substantive grounds. The evidence of loss of chance came from Dr. Biggs when he said at his trial deposition: “Her risk of death from metastatic disease over the next years was 17 percent...And so we talked about how adjuvant chemotherapy would reduce that risk by approximately one-third, which for her, you know, one-third of 17 is about 6 to 8 percent...” (A 60). There was no objection to that testimony from either Defendant. (A 60-61). The prognosis claim that AAW trumpets dealt only with metastasis of the cancer, which has not happened, and not with the other consequences of an increase in size of the malignancy. To the extent Defendants rely on a technical pleading gap, the trial court always has the discretionary power to conform the pleadings to the evidence at trial. Super. Ct. Civ. R. 15(b).

Defendants object to the admissibility of the Affidavit of Merit, citing 18 *Del. C.* § 6853(d). The purpose of the confidential nature of the Affidavit of Merit is to preserve the privacy of a physician who may be willing to state an opinion adverse to a colleague without becoming publically embroiled in the litigation. In this case that was not a consideration and the confidentiality is waivable. The doctor could testify at trial consistent with the affidavit language.

Defendants do not address the core holding in *Dishmon v. Fucci*, 32 A.3d 338 (Del. 2011), namely that an affidavit of merit which becomes part of the trial record establishes a *prima facie* case. By definition, a *prima facie* case shifts the burden of proof to the opposing party and postures the case for jury determination. *See Moody v. Nationwide Mut. Ins. Co.*, 549 A.2d 291, 292 (Del. 1988) (*citing Ebersole v. Lowengrub*, 208 A.2d 495, 497 (Del. 1965)). On the simplest facts present here, namely an increase in size of a malignant tumor causing physical and emotional harm, the case is no longer eligible for decision as a matter of law.

CONCLUSION

For the reasons herein stated, Appellant respectfully requests this Court to reverse the Decision and Order of the Trial Court dated September 19, 2013, and remand for further proceedings.

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