EFiled: Nov 18 2015 04:08PM EST
Filing ID 58184418
Case Number 312,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KAY A. MARTIN,	)	
	)	
Plaintiff Below,	)	
Appellant	)	
	)	
v.	)	No. 312,2015
	)	
DOCTORS FOR EMERGENCY SERVICES, P.A., and CHRISTIANA CARE HEALTH SERVICES, INC.,	)	
	)	
Defendants Below,	)	
Appellees	)	C.A. No. Below: N12C-06-187 EMD

Appeal from the Superior Court of the State of Delaware,
In and For New Castle County, C.A. No.: N12C-06-187 EMD

APPELLANT'S REPLY BRIEF

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Dated: November 18, 2015

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PRELIMINARY STATEMENT

A. Misstatements of Fact

In both its Statement of The Nature of Proceedings and Statement of Facts the Appellees (Defendants Below) err in describing significant facts material to the litigation. At least twelve (12) times Defendants state that "a provider in blue scrubs in the hallway … removing her collar and backboard" (Emphasis added, Ans. Br. p. 1, etc.). These are two separate procedures, each involving distinct prescribed care standards. (1) Backboard removal is accomplished with a four-person team performing a "logroll" to move the patient off the uncomfortable backboard that was used in the transport to the hospital. (A 351)[1]. After backboard removal, the patient "must remain on C-spine precautions until evaluated and cleared by physician." (Ibid.). (2) C-spine precautions mean cervical collar and stabilization. (A 128-9). Cervical collar removal has its own mandated standard-of-care procedure as testified to by Defendants' Physician Assistant, Chris Giaquinto (A 79-81).

Why Defendants persistently lump these two separate procedures together and attribute them to the "blue scrubs provider" is puzzling. If, indeed, the one person did both at the same time the violations of standard of care would only be more egregious. The precautions involved here to guard against worsening

[1] The only inference permitted by the trial evidence is that Ms. Martin was moved from the backboard before she was wheeled into the hallway on a gurney.

(potentially catastrophic, as here) of a suspected cervical spine injury are well known, especially to anyone who watches NFL games.

At another point (Ans. Br. p. 5) Defendants state that Ms. Martin's "hand pain could reasonably have been explained by the fact that she fell on both of her hands when she passed out. (B 82)" The citation is to counsel's question, not the evidence of what occurred. The evidence was she stood up, fainted, hit her head on furniture, and had "tingling of both hands" (A 93). Defendants dwell on the pain in both hands to suggest she tried, after fainting, to brace her fall and, at the same time, ignore the tingling which is an alarming symptom of neurologic deficit.

B. Misstatement of Issue

Defendants' attempt to ignore the negligent hallway collar removal by stating the only "identified issues" became whether Ms. Martin was appropriately evaluated and whether imaging studies were ordered (Ans. Br. at p. 3). This argument that addresses events three (3) hours after the breaches of care, in effect a subsequent remedial event, is based on Mr. Giaquinto's unremembered description of his chart entries, and could bear only on the causation issue, which the jury never reached (A 425).

Defendants' own Physician Assistant provider, Chris Giaquinto, P.A., its Rule 30(b)(6) witness, Linda Jones, and teaching physician Dorothy Dixon, M.D. all acknowledged the careful standard of care steps that must be adhered to by

qualified providers, and documented when taking off a collar from a patient with a suspected neck injury (A 79-81, 238, 240-241, A 122, 125, 128-9). This was a central point of trial contention from opening statements to closing arguments. Defendants' effort to eliminate it at this stage of the litigation, at a minimum, is irresponsible.

SUMMARY OF ARGUMENT

I. There were no existent "facts" (or data) to provide the requisite foundation for Dr. Van Rooyen to tell the jury that in his professional opinion the medical standard of care had been satisfied in the removal of the patient's rigid cervical collar. The only "facts" established that (a) an unknown hospital aide removed, improperly, a cervical stabilizing collar from a patient with a suspected spinal cord injury, did not document the removal, and then (b) a physician assistant who did not know she had arrived in cervical stabilization because of a suspected neck injury, later discharged her without diagnosis or treatment of the injury and without any evaluation by a physician. The trial court violated D.R.E. 702(1) and abused its discretion when it permitted the jury to hear Dr. Van Rooyen's opinion that the standard of care had been met: a reply to Appellees' contrary contention.

II. The jury verdict in favor of Defendants was contrary to the great weight of the evidence, indeed contrary to all the evidence (excepting the speculative Van Rooyen testimony), regarding the standard of care. The uncontradicted evidence established that:

(1) The Plaintiff was admitted to Defendants' Emergency Department with a suspected spinal cord injury;

(2) Detailed Emergency Department written safety policies were not followed in the management of a patient with a potential spinal cord injury:

(3) An unknown hospital aide removed the collar in violation of detailed safety policies while Plaintiff was in a hospital hallway awaiting evaluation and care;

(4) The Plaintiff was subsequently examined by a Physician Assistant who did not know (due to lack of documentation) she had arrived fitted with stabilization devices, did not suspect a spinal cord injury, did not order imaging studies of her neck that would have revealed the injury, and did not diagnose a spinal cord injury;

(5) The Plaintiff was discharged ambulatory without evaluation by an Emergency Medicine physician and without diagnosis and/or treatment of a spinal cord injury.

The trial court abused its discretion when it refused to grant a new trial as authorized by Superior Court Civil Rule 59(a) when the jury verdict was against the great weight of the evidence: a reply to appellees' contrary contention.

ARGUMENT

I. ARGUMENT I

THE TRIAL COURT ERRED WHEN IT ADMITTED EXPERT OPINION TESTIMONY IN THE ABSENCE OF SUFFICIENT FACTS TO SUPPORT THE OPINION. ADMISSION OF THIS UNRELIABLE TESTIMONY IN A JURY TRIAL VIOLATED DELAWARE RULE OF EVIDENCE 702(1): A REPLY TO APPELLEES' CONTRARY CONTENTION.

Dr. Van Rooyen's trial testimony in its entirety is included at A 242 to 345. He states, erroneously, the patient was taken off the backboard in the hallway, and that it was done in accordance with the standard of care (A 300, 307). He also says that the collar was removed in a "fairly protocolized way" (A 311). While Plaintiff agrees there is a standard protocol for evaluation of a suspected neck injury and removal of a rigid collar, there is no evidence here that the protocol was followed. As stressed in the Opening Brief (pages 14 to 19), there are no "sufficient facts" to provide a foundation for Dr. Van Rooyen's opinion, and, hence, the jury should never have heard that. The only evidence concerning the collar removal was that the protocol was violated. This is the plain error which requires reversal.

Defendants argue that the Van Rooyen testimony is reliable if it is based on "good grounds" (Ans. Br. at p. 16). That is the point – here there are no grounds.

The only direct evidence of the collar removal collides head-on with the Defendants own description of the (universal) standard of care. Without a supporting factual predicate the Van Rooyen testimony dissolves into guesswork and speculation, or worse.

Defendants also herald (nine (9) times) Dr. Van Rooyen's credentials, a fact not disputed. But these credentials only enhance the harm caused by allowing the jury to hear his guesswork. As previously referenced in Appellant's opening brief (p. 15), this Court has cited with approval a Virginia Supreme Court decision reversing a trial court's admission of "Expert testimony founded on assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter experts; it is inadmissible," and "error subject to reversal on appeal." *Vasques v. Mabini*, 269 Va.177, 606 S.E. 2d 809 (Va.2005). At page 1269.

Defendants do not dispute the legal standards governing the admissibility of expert opinion testimony. Rather, they proclaim the "sufficient facts" predicate exists. (Ans. Br. pages 17 to 19). But there is no cornerstone here; to argue there is, is sophistry.

The opinion of Dr. Van Rooyen should not have been allowed to mislead the jury. For this reason the verdict and judgment of the court below should be reversed.

II. ARGUMENT II

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT A NEW TRIAL PURSUANT TO CIVIL RULE 59(A) ON THE GROUND THAT THE JURY VERDICT FOR THE DEFENSE WAS AGAINST "THE GREAT WEIGHT" OF THE EVIDENCE. THIS REFUSAL WAS AN ABUSE OF DISCRETION: A REPLY TO APPELLEES' CONTRARY CONTENTION.

Although the jury heard Dr. Van Rooyen's opinion that the collar removal satisfied the standard of care, the verdict still collapses under the great weight of the evidence criterion. The admissions of Mr. Giaquinto, Dr. Dixon and Linda Jones, RN, all experts on management of a suspected neck injury, are binding on Defendants. All of their testimony announces a violation of the standard of care – only an unreasonable jury could ignore or overlook that undisputed evidence coming from Defendants themselves.

Defendants Conclude Part B of their argument by commenting on Defendants' Policies 127 and 1002, both of which had been concealed throughout the litigation and produced only under court order days before commencement of trial. Both specifically address suspected neck injuries caused by trauma. At the time of Defendants' 30(b)(6) witness deposition, taken on August 20, 2013, eighteen months before trial and read at the trial, this exchange occurred:

Linda Jones: So, it just so happens, when I'm reading No. 1 (the algorithm, A 346-7), the clinical practice guideline related to the emergency department for trauma patients wearing a rigid cervical collar, there's a CMG, a Clinical Management Guideline – that's what the trauma program calls them – related to that No. 1.
Mr. Castle: QUESTION: You're pointing to the algorithm that Mr. Galperin put in front of you.
ANSWER: That's correct.
QUESTION: Are there any other guidelines dealing with that particular problem?
ANSWER: Not that I'm aware of.
QUESTION: How would we check that?
ANSWER: I'd have to look at the computer, and I did because I saw that I needed this piece. The only thing we have is this…But this is the only thing we have available that I'm aware of.
QUESTION: Now, this guideline we're talking about refers very specifically to a rigid cervical collar. Is there a different guideline if I had ordered that in terms of Clinical Practice Guidelines applicable to the CCHS emergency department for trauma patients with a suspected spinal cord injury? Would there be a different guideline?
ANSWER: There would not be a different guideline.
QUESTION: It would be the same one?
ANSWER: Yes. (A 236-238)

To call these answers a canard is charitable. Defendants argue that Plaintiff's expert did not comment on these hidden documents, and therefore they are not relevant. To further compound the miscarriage of justice Defendants argue these Policies are not reflective of the standard of care. This is semantics at its worst. (Ans. Br. at p. 30). These policies are binding admissions on the Defendants and entitled to the same meaning and significance as the touted Algorithm. Although Defendants contended that Kay Martin was not a "Trauma Patient" and thus not entitled to the

protection of these Policies, this contradicts the testimony of their own 30(b)(6) witness. The New Castle County EMS transport record categorizes her as "Patient Care Report – Trauma/Medical" and goes on to describe "Trauma Details," "Trauma Type: Fall," "Fell from a Height of Ground level onto a surface of Hard Surface" (A 89-90). To claim throughout repeated discovery requests (A 348-52), and now in this Court, that Kay Martin was not a trauma patient and that her lawyers were not entitled to discover Policies 127 and 2002 is not acceptable. [2]

Defendants state that "Dr. Van Rooyen's opinion concerning the care provided by the individual in the hallway to Ms. Martin was factually, medically and logically supported, and was largely uncontradicted" (Ans. Br. at p. 30). Quite the contrary: there was no evidentiary support that the standard of care was met in the hallway in fact or medically and certainly not "logically." The jury's verdict was unreasonable, and against "the great weight of the evidence."

[2] Especially in the context of Superior Court Civil Rules 26(b)(1) and 11(b).

CONCLUSION

For the reasons stated here and in her Opening Brief Appellant respectfully requests this Court to reverse the judgment of the court below and remand for trial.

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