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Case Number 133,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETER J. WONG, M.D., and DEDICATED TO WOMEN, OB-GYN, P.A.,	:	No. 133.2018
Defendants Below, Appellants,	:	
v.	:	Court Below
	:	Delaware Superior Court
MONICA BROUGHTON, Individually, and as Parent and Natural Guardian of AMARI M. BROUGHTON-FLEMMING, A Minor,	:	C.A. No.: N14C-01-185 (VLM)
Plaintiff's Bellow, Appellees.	:	

APPELLEES' AMENDED ANSWERING BRIEF

Dated: September 28, 2018

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NATURE AND STAGE OF PROCEEDINGS

This is an appeal by the attendant birth managers of a vaginal delivery that resulted in permanent injury to the child, Amari Broughton Fleming. The Appellants are the delivering physician and his corporate professional practice (hereafter referred to as Dr. Wong or Defendants). The delivery occurred on April 9, 2008. The Appellees are Amari Broughton Fleming and his mother, Monica Broughton (hereafter referred to as Plaintiffs or Amari).

The injury occurred during a vaginal delivery when the child's right shoulder became impacted under the mother's pubic bone and the delivering doctor pulled on the baby's head in an attempt to dislodge the shoulder. Shoulder impaction, also referred to as shoulder dystocia, is a long-recognized complication of natural deliveries, which birth attendants, physicians and midwives are trained to recognize and manage in order to avoid or minimize injury to the nerve complex in the child's neck and shoulder. This nerve complex is called the brachia! plexus and an injury can occur as a result of lateral (off-axis) tugging and pulling on the child's emerging head. If too much force is exerted by the birth attendant brachia! plexus nerves can be stretched and tom beyond the point where they can self-repair or regenerate. This physician applied force referred to as "excessive traction", which is below the standard of care, and can cause a permanent loss of use of the affected muscles in the shoulder, arm and

hand. Nerves are elastic and can tolerate some degree of stretching by force applied either by the birth attendant or the "natural forces of maternal labor" in a normal vaginal delivery. When the nerve(s) recover it is termed a temporary or transient brachial plexus injury. The diagnosis of most temporary or permanent injuries involves the passage of some period of time and close follow-up observation.

Trial in this case commenced on September 18, 2017 and resulted in a jury verdict in favor of Plaintiffs on September 26, 2017. Two medical experts testified on behalf of Plaintiffs, Marc Engelbert, M.D. on causation and the standard of care applicable to a birth attendant assisting in a vaginal delivery, and Scott Kazin, M.D. on the cause of injury to Amari's brachia! plexus nerves at C-5, C-6, C-8, T-1 and damages, including permanent loss of muscle function and deformity of his right arm. The Defendants objected to admission of these experts' testimony in Motions in Limine (A 434, 427). Plaintiffs opposed the Motions in Limine (A 441, 445). The Trial Court denied the objections. (A 475, 477). The testimony was admitted. The jury deliberated and returned a verdict in favor of Plaintiffs. (A 1857).

Following the verdict Defendants filed a Renewed Motion for Judgment as a Matter of Law or in the alternative, a Motion For New Trial under Superior Court Civil Rule 59, focusing on the admissibility into evidence of Dr.

Engelbert's testimony, and two other issues (A 1989-2013). Defendants did not however renew their pre-trial objections to Dr. Kozin's opinion testimony. (A 1992).

Dr. Kozin is a pediatric orthopedic surgeon who specializes in pediatric upper extremity treatment and surgery (A 181). He has operated on Amari twice and has seen him 23 times. (A 1787). The Defendants presented four expert witnesses, on both standard of care and causation. The Trial Court denied the Motions on February 15, 2018. (A 2039).

This Appeal by Defendants followed with the principal focus on the issue of admissibility of expert medical witness testimony, not its weight. Plaintiffs' argument concerning the admission of this evidence will address both witnesses' testimony since the governing legal standard is the same-whether the Trial Court abused its discretion while performing its gatekeeping function. Two other issues raised will also be addressed in this Answering Brief.

SUMMARY OF ARGUMENTS

I and II. The Trial Court did not abuse its discretion by admitting into evidence the medical opinions of Plaintiffs' two physician experts. A reply to Defendants' arguments I and II, which involve the same governing legal standard: whether the Trial Court abused its discretionary gatekeeping role under D.R.E. 702.

I. Marc Engelbert, M.D. (Argument I)

The medical standard of care and causation expert opinion of Marc Engelbert, M.D., a board certified obstetrician with thirty years of experience, was properly admitted. Dr. Engelbert is actively practicing obstetrics, stays abreast of the medical literature and science, is trained in and experienced in the proper management of shoulder dystocia in normal deliveries. His opinion was that excessive traction was used in the delivery of Amari Broughton-Fleming on April 09, 2008 and the resulting force caused the degree and severity of the injury to Amari's brachia! plexus nerve complex. His opinion was based on the facts and records of this delivery, including eye witness testimony, his experience and training and reliable medical literature. The denial of Defendants' motions was proper and well supported by the record in this case.

II. Scott Kozin, M.D. (Argument II)

The medical causation and damages expert opinion of Scott Kozin, M.D. was

properly admitted into evidence. Dr. Kozin is a practicing pediatric orthopedic surgeon who is the Chief of Staff at Shriner's Hospital for Children in Philadelphia. (A-177). Fifty to sixty percent of his practice involves brachia! plexus injuries with eighty to ninety percent of those cases being birth-related. (A-181). He has published peer-reviewed articles on this subject. (A 201). He first operated on Amari's brachia! plexus when he was six months old. (A 1795) and again at age three (Ibid). He follows Amari on a regular schedule. (A 1787). In Dr. Kozin's opinion Amari's brachia! plexus was injured when traction was applied to his head after his right shoulder impacted his mother's pubic bone. (A 803-830).

The denial of Defendants' motions to exclude his testimony under D.R.E. 702 was proper and well-supported by the record in this case.

In their post-trial motions Defendants did not renew their objections to the admission of Dr. Kozin's testimony. (A 1992).

III. The Trial Court did not err when it admitted into evidence the professional experiences of Dr. Wong and testifying expert witnesses who had performed vaginal deliveries involving a shoulder dystocia. There was no violation of this Court's holding in *Timblin v. Kent General Hospital, Inc.* A reply to Defendants' Argument III.

IV. The Trial Court did not err when it refused to instruct the jury that

obstetricians performing a vaginal delivery involving a shoulder dystocia are excused from adherence to the standard of care stated in 18 Del. C. § 6801 (7). A reply to Defendants' Argument IV.

STATEMENT OF FACTS

Amari Broughton Fleming suffered an irreparable complete tear of his nerves at C-5 and C-6 and stretching of C-7, C-8 and T-1 during the course of his delivery on April 9, 2008. The injuries to C-5 and C-6 are permanent. (A 2018). There was eyewitness testimony from Amari's father and grandmother (A 2018) that the delivering physician, Dr. Wong, yanked and tugged on Amari's head during delivery after his right shoulder became impacted on his mother's pubic bone. (Ibid).

The crux of the dispute at trial was whether Dr. Wong applied "excessive traction", which is below the standard of care, after the baby's head emerged and the right shoulder became impacted on his mother's pubic bone, or whether the mother's natural forces of labor could cause the tearing of the nerves. (A 2022). There was no dispute that the baby's injury was permanent. Nor was there any dispute that excessive traction could cause the injury Amari suffered. (Ibid).

The jury heard D.R.E. 702 opinion testimony from two medical experts for Plaintiffs, Drs. Engelbert (A 2025, 30-31) and Kozin (A 2022), and from four experts for the Defendants. Dr. Wong testified that he applied no traction whatsoever to the baby's head. (A 2021).

ARGUMENTS I AND II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING INTO EVIDENCE THE MEDICAL OPINIONS OF PLAINTIFFS' TWO PHYSICIAN EXPERTS. A REPLY TO DEFENDANTS' ARGUMENTS I AND II, WHICH INVOLVE THE SAME GOVERNING LEGAL STANDARD: WHETHER THE TRIAL COURT ABUSED ITS DISCRETIONARY GATEKEEPING ROLE UNDER D.R.E. 702.

A. Question Presented. Whether the Trial Court erred when it admitted into evidence the expert opinion testimony of Drs. Engelbert and Kozin.

B. Scope of Review. This Court reviews a trial court's decision to admit expert testimony for an abuse of discretion. *MG. Bancorporation, Inc. v. Le Beau,* 737 A. 2d 513, 522 (1999).

C. Merits of Argument.

I. Standard of care and causation opinion regarding delivery of a baby by practicing obstetrician is admissible into evidence. The Trial Court did not abuse its discretion in deciding to admit this evidence under Delaware Rule of Evidence 702. In *Sturgis v. Bayside Health,* 942 A. 2d 579 (Del. 2007), a brachial plexus injury case, this Court reviewed an appeal from a defense verdict. There the Trial Court excluded an expert opinion. On appeal this Court said:

> "We review a Judge's decision to exclude expert testimony for abuse of discretion. This deferential standard of review is simply a recognition that trial judges perform an important gatekeeping function, and, thus must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."

See also *Bush v. The HMO of Delaware, Inc.* 702 A. 2d 921 (Del 1997); *Smith v. Harry Grief,* 106 A. 3d 1050 (Table) (Del. 2015).

As gatekeeper the trial judge sits in the best position to decide whether an expert's testimony should be admitted.

The principal focus of Defendants' appeal is the admission into evidence of the standard of care opinion of Marc Engelbert, M.D. concerning the delivery of Amari Broughton Fleming on April 9, 2008. While Defendants spend much effort arguing the weight of this evidence and procedural events prior to the admission of the evidence, those arguments do not overcome the analysis, rationale and decision of the Trial Court, described in the post-trial decision denying Defendants' Motions. (A 1989).

While Defendants repeatedly argue that the expert opinion testimony of Drs. Engelbert and Kozin should not have been allowed, they never once acknowledge the Trial Court's gatekeeping role or the deference that role deserves.

Dr. Engelbert is a Board Certified obstetrician who has been practicing obstetrics for over thirty years (A 887). He teaches residents, serves on the Quality Assurance Committee at his hospital and keeps abreast of all developments in his field of medicine (A 889-92). He was trained in the management of vaginal deliveries, the recognition and diagnosis of shoulder

dystocia, and the established protocols for its management by the birth attendant. He has encountered shoulder dystocia in his practice on a yearly basis. In his opinion, stated in terms of reasonable medical probability, that condition was not managed by Dr. Wong in this case in adherence to the recognized standard of care and this was the cause of Amari's permanent nerve injury. (A 898). There was no objection to this opinion at trial.

The trial focused on the distinction between a permanent and a transient injury to the brachial nerve complex which governs control over the muscles in the shoulder, arm and hand. A transient or temporary stretching of these nerves can occur according to long recognized obstetrical experience and reliable studies and literature as a result of the normal maternal forces of labor and delivery (A 789). A permanent tearing or extreme stretching of these nerves is a result of excessive off- axis force or traction applied to the baby's head when its shoulder gets stuck on the mother's pubic bone. (A 825). The use of excessive force or traction is below the standard of care and has been acknowledged as the cause of permanent brachia! plexus injury in the medical literature and science for over a hundred years (A 826). Whether an injury to these nerves is temporary or permanent is not readily apparent to the birth attendant at the time of delivery (A 786-89). Defendants here make light of the fact that Dr. Engelbert ascribes permanent injury to the passage of a year without recovery. That was Dr.

Engelbert's conservative measure of the period of time required to be sure that recovery will not occur. [1]

Under these circumstances the only rational decision a trial court could reach under D.R.E. 702 and the Delaware post-Daubert decisional law was to admit Dr.

Engelbert's opinion testimony, its weight to be determined by the trier of fact. A decision to exclude that opinion testimony would, in Plaintiffs' view, have been erroneous.

Kumho Tire Co. v. Carmichael, 526 U.S.137,147-149(1999), followed in Delaware, makes clear that experts may testify on the basis of experience alone. See Fed. R. Evid. 702 advisory committee's note, that "experience alone-or experience in conjunction with other knowledge skill, training or education may provide "a sufficient foundation for expert testimony". See also *Brown v. Walmart Stores, Inc.,* 402 F. Supp. 2d 303 (USDC Maine, 2005). Dr. Engelbert testified on the basis of his training, his many years of experience, the long-recognized cause of permanent brachia! plexus injuries occurring during vaginal delivery, and governing recognized authority (A 1998).

[1] Here Dr. Kozin operated on Amari 6 months after delivery and knew that nerves C-5 and C-6 had been torn and would not recover. There would be no reason for the delivering attendant to know that at that time.

While the defense repeatedly referred to the ACOG Brachia! Plexus Injury Monograph and the single purported report of a permanent brachia! plexus injury occurring in the absence of shoulder dystocia and traction, inferring that permanent brachia! plexus injuries can be caused by the mother alone, that theory has been debunked.[2] To put it in a different perspective the New York courts have disallowed opinions that the maternal forces of labor could cause these permanent injuries.

The maternal forces of labor causation argument was advanced by the Defendant in *Nobre v. Shanahan*, 42 Misc. 3d 909, 976 N.Y.S. 2d 841 (N.Y. Supreme Court, 2013), a shoulder dystocia delivery resulting in a permanent brachia! plexus injury. The court conducted a thorough review of the medical record, held a hearing on the question of the admissibility of defense expert witness testimony that the maternal forces of labor could cause a permanent injury, and concluded that "Defendant's theory gives way to speculation". (at page 12 of the Opinion). The court precluded admission of the defense expert testimony.

More practically in common sense terms, if the mother's contractions and

[2] Defendants stray from the admissibility issue to comments regarding the ACOG Monograph, which is only relevant to weight. The Monograph was strenuously emphasized by all defense expert witnesses and defense counsel. It is a controversial discussion of brachial plexus birth injuries and has been criticized roundly for not distinguishing between transient and permanent nerve injury. (A-to Engelbert testimony).

pushing alone could cause permanent nerve tears during child birth there would be many such apparent and visible injuries in our population. (A 928). All experts agreed that these injuries occur in only a tiny percentage of vaginal deliveries. Dr. Engelbert's opinion testimony was properly admitted.

II. Treating surgeon's opinion regarding cause of injury 1s admissible into evidence.

Scott Kozin, M.D. is a pediatric orthopedic surgeon with over 20 years professional experience specializing in pediatric upper extremity injuries. (A 771). He is Chief of Staff at Shriner's Hospital in Philadelphia and has as a sub-specialty surgery on brachia! plexus injuries. (A 772). He first operated on Amari Broughton- Fleming on October 30, 2008, six months after Amari was born. (A 795). At that time he identified two nerves, C-5 and C-6 which had been tom and would never regenerate or recover. (A 803, 815). He also identified three nerves, C-7, C-8 and T-1, that had been stretched and would likely recover (which they did). (A 789). Since then he has performed a tendon transfer on Amari in an effort to restore some function to the motion of his right arm. (A 795).

Dr. Kozin was always of the opinion that the cause of the child's tom nerves was the off-axis force applied to his head during delivery after his shoulder became stuck under the mother's pubic bone. This opinion was timely disclosed

to defense counsel, Dr. Kozin was deposed, and there was no objection to his detailed and graphic trial testimony concerning the cause of Amari's injury. (A 823-26). He testified that he had never read any studies that a mother's contractions caused permanent injuries to the infant's brachia! plexus. (A 823). He also noted:

"Traction by the deliverer has been known for hundreds of years to be a potential cause of plexus injuries". (A 826).

It is difficult to think any other medical professional would be more competent to form and express an opinion concerning the cause of his patient's injury.

ARGUMENT III

THE TRIAL COURT DID NOT ERR WHEN IT ADMITTED INTO EVIDENCE THE PROFESSIONAL EXPERIENCE OF TESTIFYING EXPERT WITNESSES. THERE WAS NO VIOLATION OF THE HOLDING IN TIMBLIN V. KENT GENERAL HOSPITAL (INC.) A REPLY TO DEFENDANTS' CONTRARY CONTENTION.

A. Question .Presented. Whether the Trial Court erred when it admitted into evidence testimony concerning the professional experience of expert witnesses in their field of expertise.

B. Scope of Revjew. The Trial Court's decision to admit testimony of experts concerning their experience in their field of expertise was not an abuse of discretion.

C. Merits of Argument. Defendants claim that the Court Below erred when it admitted into evidence each obstetrician witness' experience delivering babies, including the number of deliveries, the number that involved shoulder dystocia and the number that resulted in permanent brachia! plexus injury. Defendants claim that admission of this evidence to which they did not object at trial, violated the proscription against statistical evidence enunciated in *Timblin v. Kent General Hospital*, 640 A. 2d 1021 (Del. 1994). (OB p. 37-40).

The argument is misguided, to say the least. A testifying expert's professional experience, skill and capability is always a proper area of inquiry, whether on direct or cross examination. The Trial Court addressed the Defendants'

contention at pages 2034-36, and Plaintiffs see no reason to try to embellish Court's analysis and decision.

ARGUMENT IV

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY IN THIS MEDICAL NEGLIGENCE CASE ON "ACTIONS TAKEN IN EMERGENCY". THE JURY WAS PROPERLY INSTRUCTED ON THE STANDARD OF CARE APPLICABLE TO HEALTH CARE PROVIDERS UNDE 18 DEL. C. § 6801(7). A REPLY TO DEFENDANTS' CONTRARY CONTENTION.

A. Question Presented. Whether the Trial Court properly refused to instruct the jury in a medical negligence lawsuit on Actions Taken in Emergency.

B. Scope of Review. This Court reviews a Trial Court's decision to grant or deny a jury instruction de novo, *Chrysler Corporation v, Chaplake Holdings Ltd.*, 822 A. 2d 1024, 1034 (Del. 2003).

C. Merits of Argument. This medical negligence case is governed by Statute, 18 Del. C. Chapter 68. The liability issue is determined by the applicable standard of care. The requested jury instruction, to counsel's knowledge, has never been given in a Delaware medical negligence case.

Medical "emergencies" present in a myriad of circumstances but the controlling measure of liability is always the pertinent standard of care in the particular circumstances of the case. There is no need to add an additional instruction which could lead to unnecessary jury confusion. The Trial Court's ruling on this question was correct.

In *Keith D. Pugh v. Scott Slover,* 115 A. 3d 1215 (Del. ,2015) this Court affirmed by Order a decision by the Superior Court that gave the emergency instruction in a police chase case, stating "The circumstances of that situation should be taken into account in determining whether [police officer] breached the relevant standard of care". (Emphasis added)

The standard of care applicable to health care providers in Delaware is set forth in 18 Del. C. §6801 (7), which provides:

> (7) "Medical Negligence" 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 in the same or similar field of medicine as defendant, and the use of reasonable care and diligence.

"Emergencies" are common to the practice of medicine, from gunshot wounds to appendicitis to heart attacks. That is the rationale for hospital emergency rooms in the first place. The standard for treating these events is set forth in the statute. There are no special exceptions or dispensations as the defense argues here.

When encountering shoulder dystocia in a normal delivery, obstetricians are trained to recognize it and cope with it employing well-recognized maneuvers. Shoulder dystocia does not qualify as an "unexpected emergency"

which excuses the birth attendants from complying with the standard of care in their field of expertise.

In this case the jury was given the standard pattern instruction on Definition of Medical Negligence (A 1837). There was no error in the Trial Court's refusal to give the defense-requested charge on "Emergency".

The most recent Delaware discussion of the "sudden emergency" defense was in *Daub* v. *Daniels* (Del., 2015), in which this Court affirmed a decision by the Superior Court "on the basis of and for the reasons assigned by the Superior Court". That case involved a motor vehicle accident on a high-speed highway when a tailgate flew off a pick-up truck and an oncoming car was not able to avoid striking it. *Daub* v. *Daniels*, 2013 WL 5467497, *1 (Del. Super.). The sudden emergency defense was accepted by the jury. In *Wiggins* v. *East Carolina Health-Chowan*, 760 S.E. 2d 323 (2014) the North Carolina Court of Appeals, in a medical negligence case, reversed a Trial Court's decision to instruct the jury on the "sudden emergency doctrine", stating

> "The standard of care for health care professionals, both at common law and as enunciated in section 90-21.12, is designed to accommodate the factual exigencies of any given case, including those that may be characterized as medical emergencies. Therefore, we hold that the sudden emergency doctrine is unnecessary and inapplicable in such cases, and the trial court's instruction on the sudden emergency doctrine here was likely, in light of the entire charge, to mislead the jury. *Hammel*, 178 N.C.App. at 347,631 S.E. 2d at 177. Because this erroneous instruction likely misled the jury,

we remand for a new trial".

The Trial Court here correctly declined to give the defense-requested exculpatory instruction.

CONCLUSION

For the reasons stated here and by the Court Below in its pretrial rulings and its decision and order dated February 20, 2018, Appellees, Plaintiffs Below, respectfully request this Court to affirm the judgment below.

Dated: September 28, 2018

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CERTIFICATE OF SERVICE

I, Bruce L. Hudson, do hereby certify this 28th day of September, 2018, I have caused the following document to be served, via File & Serve Xpress, upon all counsel of record.

Appellees' Amended Answering brief

Dated: September 28, 2018

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