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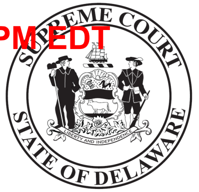

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAUREN E. SCOTTOLINE, Individually, and as Parent and Guardian of J.S.S, a Minor, and STEPHEN SCOTTOLINE, Parent of J.S.S, a Minor,	№ 48,2024
Plaintiffs Below, Appellants,	
v.	Court Below C.A. № N19C-08-135 FWW
WOMEN FIRST, LLC, and CHRISTIANA CARE HEALTH SYSTEM, INC.	
Defendants Below, Appellees.	

REPLY BRIEF OF APPELLANT

Dated: March 6, 2024

Hudson, Castle & Inkell, LLC

/s/ Bruce L. Hudson
Bruce L. Hudson, Esquire (#1003)
Joshua J. Inkell, Esquire (#5620)
2 Mill Road, Suite 202
Wilmington, DE 19806
(302) 428-8800
Bruce@HCIlaw.com
Josh@HCIlaw.com
Daniel@HCIlaw.com
Attorneys for Appellants

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ARGUMENT

I. SINCE DR. ADLER'S OPINION IS WITHIN HIS AREA OF EXPERTISE, CONSISTENT WITH OTHER PRACTITIONERS IN HIS FIELD AND IS ADMISSIBLE UNDER *DAUBERT,* EXCLUDING HIS TESTIMONY VIOLATES THIS COURT'S PRECEDENT IN *NORMAN* AND *WONG.*

a. Defendants continue to misrepresent the logical structure of Dr. Adler's opinion and by extension the opinion itself.

Dr. Adler reviewed all of the child's medical records, examined the child three times during a four-year period, produced three expert reports, and has been deposed once by Defendants. Although the trial court recommended that Defendants take additional discovery to clarify his opinions, Defendants failed to do so.[1] Throughout his involvement, it has been Dr. Adler's opinion that the long term and permanent neurological and neurodevelopmental disabilities incurred by J.S.S. were caused by HIE and not Autism Spectrum Disorder (hereinafter "ASD"). The opinion may be seen as a two-part causation opinion. First, the Hypoxic Ischemic Encephalopathy (HIE brain injury resulting from deprivation of oxygen) caused the permanent neurological and neurodevelopmental disabilities which currently prevent J.S.S. from being educated in a regular classroom population and will in the future continue to bar him from normal daily activities including

[1] A-359 at 49:8-21.

employment. Second, some of the symptoms of the HIE injury could also meet the criteria for the diagnosis of Autism Spectrum Disorder (ASD).

Throughout Dr. Adler's involvement in this case, Defendants have repeatedly tried to apply a reductive gloss to his opinion by simplistically stating that he believes HIE is *the* cause of ASD. In addition to this not being Dr. Adler's expert opinion, it is not a factor requiring analysis from this Court when deciding whether Dr. Adler should be allowed to testify at trial. Defendants have most fervently focused on this second portion of Dr. Adler's opinion, where only the first part of his opinion is pertinent.

Defendants' attempts to reframe Dr. Adler's opinion serve only to confuse the issue. ASD is acknowledged to be a multi-factorial complex neurodevelopmental disorder that can have many causes which does not eliminate the possibility that HIE can produce several symptoms which would also serve as criteria for the diagnosis of ASD. ASD is not simply one disorder, nor is the diagnosis of it a simple matter. [2]

Ultimately this case is about the cause of the injuries J.S.S. has sustained and the life that he must lead because of them. Dr. Adler has consistently testified that the HIE injury caused the symptoms and disabilities that J.S.S. experiences no

[2] A-374-379.

matter what labels Defendants may apply. Defendants' persistence in trying to distract with reductive summations of Dr. Adler's analysis serve only to obfuscate his clear opinion that the HIE birth injury is the cause of J.S.S.'s long term and permanent neurological and neurodevelopmental disabilities.

In issuing his third report, Dr. Adler attempted to clarify and explain his opinion which was clearly mischaracterized by Defendants and misunderstood by the court below.[3] To the extent Defendants claimed it was "the same opinion" they are correct only in so far as it arrives at similar conclusions. This demonstrates the integrity of Dr. Adler's position. The third report is notable for the pains Dr. Adler takes in walking the reader through the determinations that he makes and the strong grounds and sound methodology of his reasoning.

He opens his *Formulation* section by explaining his credentials and then explains the diagnosis of HIE and its features.[4] He then discusses how cerebral palsy is not the only outcome of neonatal HIE, and how, in the absence of motor impairments, cognitive impairments can arise.[5] He then connects the neurobehavioral and neurodevelopmental disabilities that J.S.S. experiences with those described in the literature.[6] If the Court will not allow an otherwise qualified

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[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

expert to offer these directly connected effects to the uncontested injury, then no causation expert would ever have a method that would satisfy Defendants to be allowed to testify.

b. Defendants' demand that Plaintiffs "prove" HIE causes autism is not only unnecessary but ignores that the burden for admissibility has been met.

In their answering brief Defendants contend that once they challenged Dr. Adler's opinion the Superior Court was within their discretion to examine whether the opinion is "supported by good grounds and [was] arrived at via sound methodology."[7] This is not disputed. What is in controversy is whether Plaintiffs have established these good grounds and sound methodology. Dr. Adler discussed his general causation during his deposition. By explaining the process of how he analyzes the available literature. To wit:

> [F]or example, on what Volpe says, that you do not need to have motor disability to show signs of brain damage; that you can have a behavioral disorder. Volpe doesn't say it can't cause autism. He just says you could have a neurobehavioral disorder from hypoxia where there isn't much in thew ay of motor disability. My opinion is that neurobehavioral disorder includes behaviors in the autistic spectrum. That's my opinion.[8]

And after being pressed on the place where in the literature they could have it perfectly laid out, Dr. Adler explained the broader context of the general causation:

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[7] Def. Ans. Br. at 22 (*relying on Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and D.R.E. 702).
[8] A-172 at 97:24-98:12.

> I don't want to limit it to autistic spectrum disorder. I'm saying any disorder that injures the nervous system, infection, trauma, hemorrhage, hypoxia, in a developing nervous system can produce behavioral variability. In my opinion that statement is a fact.
>
> The next issue is that the wide range of behavioral disorders that can occur includes behaviors within the autistic spectrum. That's my opinion.
>
> But to say there's a paper that says something causes autism, I don't think that those papers necessarily exist. There's an association between cranial injury and behavioral disorders. There's an association between infection and behavioral disorders, et cetera. That's what the papers say.[9]

Defendants have at times inferred that ASD is exclusively a genetic disorder, and claimed that was settled science, but Dr. Adler had a clear-headed response to that as well:

> Q: Can inherited genetic variations cause autistic spectrum disorder?
>
> A: The same answer There are genetic disorders associated with autism, but there's no paper that says that this specific genetic disorder causes autism. It's the same thing. It's associated with a genetic process, not that the genetic process causes autism.[10]

Defendants have instead decided to use the word establish as a synonym for *prove with 100% certainty*. Doctors do not rely solely on medical literature as they go through examinations, run tests, and weigh possible explanations through differential diagnosis when appropriate. Where the literature describes an

[9] *Id*. at 98:18-100:4.
[10] *Id.* at 100:5-14.

association of exposure to lack of oxygen with a disease, a doctor can consider association in making the diagnosis.

Defendants urge that Plaintiffs be required to prove HIE causes ASD as a generally accepted concept in the medical community. Plaintiffs are the only party in this case that has presented sworn expert testimony on the causes of ASD and that HIE is one of the multiple causes. While Defendants are correct to point out that there is not a peer reviewed paper that says that "HIE Causes Autism," Defendants have not disputed that an HIE injury can in general cause the disabilities that J.S.S. suffers. Furthermore, there is no evidence, paper, learned treatise, deposition testimony, or expert report cited by Defendants that injuries to the brain such as HIE cannot cause the behaviors that J.S.S. exhibits. Defendants have simply failed to produce evidence that would exclude Dr. Adler's opinion. Once an expert is considered qualified through their training and experience to offer an opinion that opinion should be considered sound unless there is something to suggest the expert is out of step with the mainstream of their area of expertise. Accordingly, courts should use caution when applying *Daubert* to medical expert testimony, as they are "generally not appropriate for assessing the evidentiary reliability of a proffer of expert clinical medical testimony."[11]

[11] *State v. McMullen,* 900 A.2d 103, 114 (Del. Super. 2006) *quoting, Moore v. Ashland Chem.,* 126 F.3d 679, 688-690 (5th Cir. 1997), *vacated, on reh'g en banc,* 151 F.3d 269 (5th Cir. 1998).

Whether J.S.S.'s long term and permanent neurological and neurodevelopmental disabilities were caused by his HIE or autism should be left to the province of the jury, not the trial court and not the parties. Surely the topic will be the subject of vigorous cross examination by Defendants.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' REQUEST FOR A DAUBERT HEARING AFTER RECOMMENDING THAT DEFENDANT SOLICIT ADDITIONAL TESTIMONY FROM DR. ADLER.

a. Defendants' continued contention that Plaintiffs are "distorting" Dr. Adler's opinion demonstrates that a Daubert hearing was necessary.

In their reply brief to the first *Daubert* motion, Defendants accused Plaintiffs of "seek[ing] to confuse the issue by rebranding Dr. Adler's opinions."[12] In their second motion, their accusation was that Plaintiffs "brazenly flout[ed]" the Court's opinion by recycling Dr. Adler's opinion.[13] In their answering brief before this Court they proclaimed Plaintiffs were "distorting" Dr. Adler's opinion.[14]

Plaintiffs have consistently endeavored to explain Dr. Adler's medical opinion within the context of legal reasoning. Instead of "brazenly flout[ing]" the trial court's March 10, 2023, opinion granting a trial continuance to allow additional discovery of Dr. Adler's opinion (which Defendants declined), Plaintiffs framed Dr. Adler's opinion within the law of this State and the law of this case. Plaintiffs' arguments have consistently comported with Dr. Adler's intended meaning in his reports – that J.S.S.'s HIE birth injury is the cause of his long term and permanent neurological and neurodevelopmental disabilities. It is Defendants' insistence on adulterating Dr. Adler's opinion that has created confusion and

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[12] B-165 at 2.
[13] A-384 at 5.
[14] Ans. Br. Heading I.C.2.

misunderstanding of an otherwise straightforward opinion: HIE injury to J.S.S.'s brain during labor and delivery caused long term and permanent neurological and neurodevelopmental disabilities which have and will continue to profoundly impact his daily living.

The most obvious way for the trial court to clear up the resulting confusion regarding Dr. Adler's opinion would have been to hear firsthand from him at the requested *Daubert* hearing rather than having to rely on representations of the parties' attorneys.

b. In granting Defendants' request for a continuance, the trial court specifically recommended that Defendants solicit additional live deposition testimony from Dr. Adler to clarify his opinion and Defendants declined the court's recommendation.

When the first trial court judge assigned to the case continued the trial on March 10, 2023 she specifically commented that a second deposition of Dr. Adler was expected to address any ambiguities in her opinion regarding his opinion.[15] Even though Defendants contend that Dr. Adler's third report following the continuance was insufficiently different from the first two reports, to warrant a second deposition, the court made it clear in its March 10, 2023, ruling that it was granting a trial continuance to allow Defendants' to take further discovery regarding any ambiguities in Dr. Adler's opinion. Over the next several months, a

[15] A-359 at 49:8-21.

second and then a third judge were assigned to this case and Defendants declined to conduct further discovery. After Defendants' second *Daubert* motion was filed on August 3, 2023, the third trial judge was requested by Plaintiffs to conduct another *Daubert* hearing involving live testimony from Dr. Adler since Defendants declined to re-depose him. As previously mentioned, despite the previous recommendation of the first trial judge as a basis for granting the trial continuance request, Defendants failed to conduct any further discovery to clarify Dr. Adler's opinion.

c. The third Dr. Adler report is distinguishable from the first and second reports in substantive ways.

As explained *supra*[16] Dr. Adler's third report made efforts to demonstrate the grounds and methodology of his opinion. While it added important details regarding J.S.S.' third clinical visit with Dr. Adler, it also expanded the *Formulation* section of the report to document the neurobehavioral and neurodevelopmental issues that J.S.S. has as being causally related to the hypoxic ischemic encephalopathy (HIE) injury that he experienced at birth. This report is substantially broader, more comprehensive, and simply cannot be accurately described as the same as the previous two reports. If this generated any question as to the admissibility of his opinion, or its scientific backing, then Dr. Adler should

[16] *Supra* I.C.1.

have been given the opportunity to further explain his opinion at the requested *Daubert* hearing.

III. THE LIFE CARE PLAN HAD SUFFICIENT INDEPENDENT BASIS FOR ADMISSIBILITY OTHER THAN DR. ADLER'S EXCLUDED EXPERT OPINION.

a. Defendants overstate how much the original life care plan relied on Dr. Adler's opinion, and incorrectly apply the same mischaracterization to the revised life care plan by Ms. Masterson.

Jody Masterson, R.N. is a certified life care planner in addition to being a registered nurse. She did not simply have a quick call with Dr. Adler as represented by Defendants and then form an estimate of what of J.S.S.'s care would cost. Her report is a thoughtful analysis of all the HIE injury-related care of the child contemporaneous with her report which included review of all of the medical and therapeutic care of J.S.S. and her careful determinations of what the average care of a child so situated will likely cost in the future. In her first report Ms. Masterson cites 19 sources of information that she reviewed in making the report.[17] She lists Dr. Adler last.[18]

Defendants claimed that Ms. Masterson based her projections "'in large part' based on her discussions with Dr. Adler."[19] This is a tortured and incorrect reading of her deposition testimony. The question by defense counsel and her answer are as follows:

[17] A-135.
[18] *Id.*
[19] Defs. Ans. Br. at 37 (citing B-041 at 36:3-8).

Q: All right. Is it fair to say that the cost projections as outlined in your report are therefore based in part on what Dr. Adler said?

A: A large part of what Dr. Adler said, yes. [20]

Defendants have portrayed this passage as saying a large portion of the report was based on Dr. Adler's words. This is plainly not an accurate interpretation of the passage above. The question frames the issue as whether comments by Dr. Adler played some role in the formation of her cost projections. Ms. Masterson responds by affirming that Dr. Adler did play a role but actually excludes it to some degree by saying, "A large part of what Dr. Adler said," meaning not everything that Dr. Adler contributed made it into some unspecified amount of the formulation of the cost projections. The "large part" that Defendants damningly quote is clearly modifying and thus limiting Dr. Adler's contribution to her report.

Defendants did not re-depose Dr. Adler as recommended by the trial judge when Defendants' trial continuance request was granted in March 2023. Nor did they re-depose Ms. Masterson. Neither they, nor the trial court were then able to further scrutinize Dr. Adler's methodology they claim is so troubling in the revised life care plan which was produced to them in August 2023.[21] Defendants acknowledge that the revised life care plan is not supposed to take into account J.S.S.'s autism. However, they expect her to ignore the relevant and largely

[20] B-041 at 36:3-8.
[21] A-386-412.

uncontroverted medical diagnosis of the HIE birth injury and its related long term neurodevelopmental disabilities. In addition, Ms. Masterson's references to reliance on Dr. Adler's opinion notably only relates to her "cost projections."[22] In her plan, she also identifies the nonfinancial impacts on J.S.S.'s lifestyle caused by the HIE related disabilities.

b. Autism was not considered by Ms. Masterson as the primary disability for J.S.S.

Defendants claim Ms. Masterson confirmed that ASD was the primary disability that J.S.S. was faced with. This is incorrect. Ms. Masterson testified that the public school providing special education for J.S.S.'s neurodevelopmental disabilities used this diagnosis which was reached by three educators in deciding his eligibility for special education services in the school district.[23] Nowhere in the record does Ms. Masterson state that her plan is based on injuries caused by ASD.

c. As Dr. Adler's opinion has evolved, so has Nurse Masterson's.

The third report by Dr. Adler differs from his previous reports and constitutes an admissible expert opinion under *Daubert*. Therefore, any finding by this Court that of Dr. Adler's opinion is admissible should necessarily permit Ms. Masterson's as well.

[22] B-41 at 36:3-8.
[23] B-65 at 60:5-18.

CONCLUSION

For all the aforementioned reasons, orders of the trial court excluding the testimony of Plaintiffs' expert Daniel Adler, M.D., and Jody Masterson, R.N., should be reversed and their testimony permitted at trial. The summary judgment dismissal of Plaintiffs' claim should be reversed and trial should be rescheduled.

Dated: May 6, 2024

Hudson, Castle & Inkell, LLC

/s/ Joshua J. Inkell, Esq.
Bruce L. Hudson, Esquire (#1003)
Joshua J. Inkell, Esquire (#5620)
2 Mill Road, Suite 202
Wilmington, DE 19806
(302) 428-8800
Bruce@HCIlaw.com
Josh@HCIlaw.com
Daniel@HCIlaw.com
Attorneys for Appellants

/s/ JEFFREY M. WEINER, ESQUIRE
JEFFREY M. WEINER, ESQUIRE #403
1332 King Street
Wilmington, Delaware 19801
(302) 652-0505
Of Counsel for Plaintiffs