

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

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**Re: *Tiffany R. Lewis, Individually and as the Parent and Natural
Guardian of Tyra Curtis, a minor, v. A. Diane McCracken,
M.D. and All About Women of Christiana Care, Inc.***
C.A. No. N13C-10-175 RRC

Submitted: November 3, 2016
Decided: November 7, 2016

On Defendant's "Motion in Limine to Preclude Testimony
by Marc Engelbert, M.D." **DENIED.**

Dear Counsel:

This is the decision of the Court regarding Defendant's "Motion in Limine to Preclude Testimony by Marc Engelbert, M.D." filed on October 17, 2016. In

their motion, Defendants seek to preclude Plaintiff's standard of care and causation expert from testifying at trial. In support of their motion, Defendants submit that Defendants' expert has not satisfied the Rule 702 requirements to testify as an expert set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and its progeny.¹ After considering the parties' positions in their papers and at oral argument, the court **DENIES** Defendants' motion.

I. FACTS AND PROCEDURAL HISTORY

This is a medical negligence case in which Plaintiffs allege that Defendant Dr. A. Diane McCracken, Plaintiff's obstetrician, caused Plaintiff Tiffany Lewis's daughter, Tyra, to suffer permanent brachial plexus palsy (a/k/a/ Erb's Palsy) during childbirth. Erb's Palsy is a medical disorder in which the brachial plexus nerve—located near the shoulder—is stretched and/or torn, causing impaired neurological function of the corresponding arm. While delivering Tyra, Dr. McCracken determined that, after delivering Tyra's head, the delivery of her left shoulder was impeded by her mother's pubic bone, a medical condition known as "shoulder dystocia." Upon making this determination, Plaintiff alleges that Dr. McCracken pulled on the baby's head in an attempt to deliver the shoulder, an obstetric maneuver known as applying "traction."

Following her birth, Tyra was diagnosed with permanent Erb's Palsy. Plaintiff subsequently filed suit against Dr. McCracken and the various organizations to which she belonged in her capacity as an obstetrician and gynecologist. In support of their position that Dr. McCracken committed medical negligence during the birth of baby Tyra, Plaintiffs seek to have Dr. Marc Engelbert, M.D. testify to causation and standard of care. Dr. Engelbert is a board-certified obstetrician and gynecologist. In the expert disclosure required under the Super. Ct. Civ. R. 26(b)(4), Plaintiffs stated that Dr. Engelbert would testify that:

the standards of care applicable to the Obstetrical and Gynecological patient during vaginal deliver[y] were not complied with by Defendant A. Diane McCracken, M.D. and that Defendant McCracken's breaches in the applicable standards of care caused permanent injury to the baby Tyra Curtis. Dr. Engelbert will testify that baby Tyra Curtis's brachial plexus injury would not have occurred in the absence of excessive traction on baby's

¹ 509 U.S. 579 (1993).

head by Defendant McCracken during the delivery. The application of excessive traction was a violation of the standard of care in vaginal delivery. Dr. Engelbert's testimony will explain the significance in the delivery maneuvers Defendant McCracken employed in this vaginal delivery that contributed to the baby's permanent brachial plexus injury. Dr. Engelbert is further expected to testify that Defendant McCracken's deposition testimony that she only applied gentle traction to the baby's head is inconsistent with the brachial plexus nerve avulsion. The only manner in which the baby in this case could have suffered a brachial plexus avulsion injury during this vaginal delivery is with excessive application of traction on the baby's head by the delivering provider. There is no credible documented case in medical literature of an avulsion injury being caused by the mother's force of labor alone.²

At the deposition of Dr. Engelbert taken by Defendants on October 7, Defendants probed Dr. Engelbert for information on how he came to this conclusion. Defendants' counsel asked Dr. Engelbert:

Q: Would you agree that—is it your opinion that downward lateral traction leads to transient brachial plexus palsy?

A: Downward lateral traction can lead to both transient brachial palsy. [sic] If it comes [sic] excessive downward lateral traction, it can cause a permanent brachial plexus injury

Q: Is there ever a situation, in your opinion, that non-excessive downward lateral traction can lead to a permanent brachial plexus palsy?

A: Yes. There are instances, and it's rare cases, but there are instances of cancer in the region of the brachial plexus, infection in the region of the brachial plexus,

² Pl's Resp. to Def.'s Mot. in Lim., Ex. 2.

uterine anomalies that can cause permanent injury. Chronic in utero malpositioning of a baby can cause permanent injury where you see muscle atrophy at birth. So, there are other causes of permanent brachial plexus injuries.

...

Q: Is it fair to say, then, that all you have to see, basically, is a permanent brachial plexus injury to allow you to decide that there was violation [sic] of the standard of care with respect to the amount of traction exerted by delivering physician [sic]?

A: No, sir. I would take a case and review all specifics of the case and to see—make a differential diagnosis to see if there are other possible causes of a permanent brachial plexus injury. But in the case, like we said, of a shoulder dystocia of a large baby, the overwhelming majority of those cases that lead to permanent injury is going to be caused by downward lateral or excessive downward or lateral traction.³

In preparation for this deposition, Defendants Dr. Engelbert with Notice of Deposition *duces tecum* requesting he bring with him to the deposition all medical literature upon which he relied. However, Dr. Engelbert did not bring any literature with him to the deposition. When asked about whether he brought the literature upon which he relied to the deposition, Dr. Engelbert stated, “Again, there’s no specific publication that I’m going to rely on other than general knowledge, experience, and just reading over the years. So, I didn’t bring anything specific to that. . . . There was no one specific journal article that I’m going to rely on. So, I didn’t bring any specific journal articles with me.”⁴

Following the required 26(b)(4) disclosures and the deposition taken by Defendants, Defendants filed this motion in limine to preclude Dr. Engelbert from

³ Pl.’s Resp. to Def.’s Mot. in Lim., Ex. 1, at 18:15-19:10, 22:2-16.

⁴ Pl.’s Resp. to Def.’s Mot. in Lim., Ex. 3, at 8:2-6, 8:22-25.

testifying as to both standard of care and causation.⁵ Plaintiff filed a response to Defendants' motion on October 28, 2016. The Court heard oral argument on the motion at the Pretrial Conference held on November 1. Following argument, the Court directed Defendants to file a reply to Plaintiff's response, which was filed on November 3. Jury selection is scheduled to take place on November 9 and the trial is to begin on November 14.

II. DISCUSSION

Defendants contend that Dr. Engelbert's opinion to which he will testify does not meet the requirements set forth by D.R.E. 702 and *Daubert*. D.R.E. 702 requires that: (1) the opinion is based upon "sufficient facts or data;" (2) the opinion is "the product of reliable principles and methods;" and (3) the witness reliably applied the principles and methods to the facts of the case.⁶ In evaluating whether an expert opinion is admissible under D.R.E. 702, "the Trial Judge acts as the gatekeeper to ensure that the scientific testimony is not only relevant but reliable."⁷ If evidence appears to be "shaky," rather than inadmissible, *Daubert* instructs that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."⁸

A. Dr. Engelbert's Opinion is Based upon His Sufficient Review of Facts and Data Pertaining to Tyra's Birth

D.R.E. 702 requires that an expert's opinion be based upon "sufficient facts or data."⁹ The Delaware Supreme Court held in *Perry v. Berkley* that "an expert's conclusions are necessarily dependent upon an understanding of the factual foundations of the case on which he or she is to opine."¹⁰ Further, the Delaware Supreme Court held that "where an expert opinion is 'fundamentally unsupported by the facts of the case,' it should be excluded on 'the ground that it will be of no assistance to the fact finder in deciding the case.'" Quoting *Weinstein's Federal Evidence*, the Court stated that "[t]o be admissible, expert opinions must be based

⁵ In their motion, Defendants acknowledged that should their motion be granted, the motion would be dispositive as Dr. Engelbert is Plaintiff's only expert on causation and standard of care.

⁶ D.R.E. 702.

⁷ *Minner v. American Mortg. & Guar. Co.*, 791 A.2d 826, 844 (Del. Super. 2000).

⁸ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 578, 596 (1993).

⁹ D.R.E. 702.

¹⁰ 996 A.2d 1262, 1268 (Del. 2010).

on sufficient facts or data. Thus, an expert's opinion is inadmissible if it is based on suppositions rather than facts."

In the case at bar, Dr. Engelbert has reviewed at least minimally sufficient facts and data in formulating his opinion. In his deposition, Dr. Engelbert stated that he reviewed medical records—Tyra's baby records—and the deposition of two witnesses, the Plaintiff and her sister, Nicole (a birth witness), and the deposition of Dr. McCracken. With respect to deposition testimony, Dr. Engelbert reviewed the transcript of Nicole's deposition in which she said that she believed Dr. McCracken was pulling on baby Tyra so hard that she was "scared the head would pop off."¹¹ He also considered the transcript of Plaintiff's deposition, stating, "she was told to push again, and th[e] baby didn't come, Tyra didn't deliver. . . . she describes either seeing or feeling—and also being told by Tyra's dad and Tiffany's sister seeing Dr. McCracken pulling—tugging on Tyra's head."¹² In determining what weight to give the testimony of such lay witnesses, Dr. Engelbert stated, "you take [such testimony] with a grain of salt." With respect to the other medical information he used to form his opinion, Dr. Engelbert stated he disagreed with Dr. McCracken's testimony in which she stated she only used gentle traction. Further, Dr. Engelbert stated:

Again, when you take all the aspects of the case and all the information out there and look at the baby record that says suspected paralysis due to birth trauma, and you put all the information together, yes, I disagree, understanding that Tyra Curtis suffered tearing of two nerves in a permanent injury in a shoulder dystocia, and Tyra weighed 4,082 grams, and had Apgar scores at one minute of four and nine.¹³

Based upon this deposition testimony and the materials available to Dr. Engelbert (*i.e.*, medical records and deposition transcripts), Dr. Engelbert reviewed sufficient facts and data in forming his opinion.

B. Dr. Engelbert's Opinion is Based on Reliable Principles and Methods

¹¹ Pl.'s Resp. to Def.'s Mot. in Lim., Ex. 3, at 45:6-7.

¹² Pl.'s Resp. to Def.'s Mot. in Lim., Ex. 3, at 44:9-16.

¹³ Pl.'s Resp. to Def.'s Mot. in Lim., Ex. 3, at 46:9-17.

Defendants argue that Dr. Engelbert’s opinion—that the only cause of Erb’s Palsy in Tyra is the application of excessive traction—is not based on reliable principles and methods because it is not supported by medical literature. D.R.E. 702 requires that an expert’s opinion must be based on reliable principles and methods.¹⁴ In a case in which an expert is relying on medical literature to support his or her position, “[i]t is not enough for [the expert] simply to say [the expert] referred to the medical literature and then to state generally that it supports [the expert’s] conclusion. *Daubert* demands that [the expert] employ intellectual rigor in the consideration of scientific data, including the evaluation and discounting of studies that are not supportive of [the expert’s] opinion.”¹⁵

Differential diagnosis can be a reliable method of reaching a medical conclusion that has frequently been approved by this Court.¹⁶ In the case at bar, Dr. Engelbert reviewed all the pertinent facts and data when he rendered his differential diagnosis in which he determined that the only possible cause of permanent Erb’s Palsy in Tyra’s case is the application of excessive traction during childbirth. However, Defendants contend that Plaintiff’s expert disclosure under Rule 26(b)(4) means that Dr. Engelbert will testify that the only cause of permanent Erb’s Palsy in any patient is excessive traction. In order to attack Dr. Engelbert’s opinion, Defendants presented a publication from the American College of Obstetricians and Gynecologists (“ACOG”), titled “Neonatal Brachial

¹⁴ D.R.E. 702.

¹⁵ *Scaife v. Astrazeneca, L.P.*, 2009 WL 1610575, at *19 (Del. Super. June 9, 2009). Other jurisdictions have also excluded expert opinions under Rule 702 when the expert’s opinions are contradicted by medical literature produced by the opposing party, and the expert has produced no literature in further support of the expert’s position. See *Hendrix ex rel. G.P. v. Evenflo Company, Inc.*, 609 F.3d 1183, 1201-02 (11th Cir. 2010) (holding that a medical expert’s failure to “rule in” another previously unconsidered cause specified in medical literature when reaching his differential diagnosis constitutes an unreliable medical opinion). Moreover, where a medical expert formulates an opinion based on intuition and speculation and does not consider data, scientific principles, or medical literature, the opinion is not sufficiently reliable to be admitted into evidence. *Cartwright v. Home Depot U.S.A., Inc.*, 936 F. Supp. 900 (M.D. Fla. 1996).

¹⁶ See, e.g., *Pallano v. AES Corp.*, 2016 WL 930545 (Del. Super. Mar. 10, 2016); see also *Kapetanakis v. Baker*, 2008 WL 172003, at *4 (Del. Super. Jan. 18, 2008) (providing that an expert’s testimony is inadmissible because “[the medical expert] did not employ ‘objective diagnostic techniques and sound methodology’ in reaching his conclusion that carpal tunnel syndrome could arise nearly one and a half years after her car accident. Nor did he conduct a thorough differential diagnosis to rule out other causes of the malady.” This holding appears to recognize that differential diagnosis is an accepted reliable method for determining the cause of an injury).

Plexus Palsy,” in which ACOG stated there are other possible causes of permanent Erb’s Palsy.¹⁷

Defendants contend that Dr. Engelbert must cite medical literature in support of his position, especially in light of the ACOG report which states that there may be other causes of brachial plexus injuries. However, Dr. Engelbert stated, albeit in part in a general way, his knowledge of the relevant medical literature. Specifically, Dr. Engelbert referred to a study conducted by Dr. Margareta Mollberg and cited in the ACOG report. In that study, Dr. Mollberg studied over 31,000 births, 2,000 of which presented with brachial plexus injuries, and only eighteen of which resulted in permanent brachial plexus injuries.¹⁸ Dr. Engelbert testified that the study found all instances of permanent brachial plexus injuries resulted from excessive downward traction during childbirth. When asked about whether he relied on the ACOG report in rendering his opinion, Dr. Engelbert stated, “I think that publication doesn’t do enough to differentiate between transient brachial plexus palsies and permanent brachial plexus palsies. So, in regard to temporary injury, I will agree with more of that publication but disagree in regard to permanent brachial plexus injuries.”¹⁹ Accordingly, it appears that Dr. Engelbert is relying on medical literature—the Mollberg study and portions of the ACOG publication—that sufficiently differentiates between the two degrees of severity of brachial plexus injuries, transient and persistent.

Additionally, Dr. Engelbert also referred briefly in his deposition to other medical articles and treatises about brachial plexus palsy from which he obtained his knowledge. Specifically, Dr. Engelbert stated that he believes the Williams obstetric series is a “reasonably reliable publication.”²⁰ To further support his position, he stated that he relies upon his knowledge, training, experience, and reading of literature, such as articles by Doctors Edith Gurewitsch, Richard Allen,

¹⁷ Def.’s Reply in Supp. of their Mot. in Lim., Ex. E at 28 (providing, No published clinical or experimental data exist to support the contention that the presence of persistent (as compared to transient) NBPP [(neonatal brachial plexus palsy)] implies the application of excessive force by the birth attendant. A single case report describes a case of persistent NBPP in a delivery in which no traction was applied by the delivering physician and no delay occurred in delivering the shoulders. Therefore, there is insufficient scientific evidence to support a clear division between the causative factors of transient NBPP versus persistent NBPP.).

¹⁸ Pl.’s Resp. to Def.’s Mot. in Lim., Ex. 3, 97:21-98:8.

¹⁹ Pl.’s Resp. to Def.’s Mot. in Lim., Ex. 3, 17:21-18:3.

²⁰ Pl.’s Resp. to Def.’s Mot. in Lim., Ex. 3, 15:7.

and James O'Leary.²¹ Accordingly, it appears that Dr. Engelbert did sufficiently reference articles that form the basis of his knowledge.

In further support of their position, Defendants rely on *Sturgis v. Bayside Health Ass'n Chartered* for the proposition that citation to medical literature is required to support an expert's opinion as to the only causes of a disorder.²² In *Sturgis*, the plaintiff's baby was born with permanent Erb's Palsy, similar to baby Tyra in this case. At trial, the plaintiff sought to admit expert testimony that the only two causes of brachial plexus injuries *in general* are in utero complications and excessive traction.²³ Based on a failure to cite medical literature in support of the conclusion that there were only two causes of brachial plexus injuries, the Delaware Supreme Court affirmed the trial court's decision to exclude the plaintiff's expert's testimony.²⁴ In reaching its holding, the Supreme Court stated that the record reflects that other unknown causes may exist, and that, "[the plaintiff] never introduced any scientific evidence that supported her expert's opinion that in utero and the use of excess traction were the *only* two causes. . . . [The plaintiff] fails to point to any scientific basis for that position."²⁵

The case at bar is distinguishable from *Sturgis*. In *Sturgis*, the trial court excluded the expert's opinion that the only two causes of brachial plexus injuries were in utero complications and excessive traction. In the case at bar, Plaintiff seeks to have Dr. Engelbert testify that, in accordance with his differential diagnosis, the only possible cause of permanent Erb's Palsy *in baby Tyra's case* is excessive traction. Moreover, in his deposition, Dr. Engelbert recognizes that there may be other causes of permanent Erb's Palsy, such as factors that may occur while the baby is in utero. Accordingly, Defendant's reliance on *Sturgis* is inapposite.

C. Dr. Engelbert Applied the Principles and Methods Reliably to the Facts of this Case.

Defendants contend that Dr. Engelbert has not applied the principles and methods to the facts of this case. As stated previously, differential diagnosis can be a reliable method of diagnosing an injury by ruling out other possible causes. Dr. Engelbert's testimony that, having considered and ruled out all other possible

²¹ Pl.'s Resp. to Def.'s Mot. in Lim., Ex. 3, 69:3-10.

²² 942 A.2d 579 (Del. 2007).

²³ *Id.* at 581.

²⁴ *Id.* at 588.

²⁵ *Id.* at 581, 588.

causes of Erb's Palsy, the only cause of permanent Erb's Palsy in this case is excessive traction is admissible at trial. Again, as the United States Supreme Court held in *Daubert*, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."²⁶ In the case at bar, cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the best methods of dealing with such evidence. Accordingly, Dr. Engelbert will be permitted to state his opinion that the only cause of Tyra's injury was excessive traction applied by the birth attendant.

III. CONCLUSION

Therefore, Defendants' Motion in Limine to Preclude Testimony by Marc Engelbert, M.D. is **DENIED**.

Very truly yours,



Richard R. Cooch, R.J.

cc: Prothonotary

²⁶ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993).