## IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

C.A. No.: N10C-10-200 ALR	
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Date Submitted: November 8, 2013 Date Decided: January 27, 2014

## **Upon Defendants' Motions in limine:**

Defendants' Motion to Exclude Testimony of DR. DAVID E. DAVID – DENIED

Defendants' Motion to Limit Testimony of DR. ALAN FINK – GRANTED

Defendants' Motion to Limit Testimony of ROBERT MINNEHAN – DENIED

Lisa C. McLaughlin, Esquire, Phillps Goldman & Spence, P.A., Attorney for Plaintiffs.

Joshua H. Meyeroff, Esquire, Wharton Levin Ehrmantraut & Klein, Attorney for Defendants.

Rocanelli, J.

This matter arises from alleged injuries sustained by Holly Mulrooney ("Plaintiff Holly") as a result of alleged negligence by All About Women of Christiana Care ("AAW"). Plaintiff Holly was a patient of AAW. On October 15, 2008, Plaintiff Holly contacted AAW regarding questions about having missed her menstrual cycle since May 2008. Plaintiff Holly had an appointment with AAW on October 20, 2008 and met with Claire Szymanski ("Szymanski"), a certified nursing midwife, during this visit.

On October 24, 2008, Plaintiff Holly returned to AAW to undergo an ultrasound of her uterus. On October 28, 2008, Plaintiff Holly received a call from AAW informing her that two prescriptions had been called into her pharmacy and that she should take those medications as prescribed. On November 6, 2011, Plaintiff Holly began to feel ill and complained of a migraine headache. On November 8, 2011, Plaintiff Holly complained of right-sided numbness and was taken to Christiana Hospital. She was diagnosed as having suffered a stroke.

Plaintiffs allege that AAW failed to properly screen Plaintiff Holly for contraindications to the medications prescribed, failed to discuss the risk factors involved in taking the prescribed medications, failed to provide adequate information regarding the medications and side effects, and failed to discuss alternative treatment options. Plaintiffs further allege that Defendants actions were the actual and proximate cause Plaintiff Holly's stroke.

The Defendants have filed the following motions *in limine* to limit or exclude the testimony of the Plaintiffs' experts. At the trial level, it is the role of the Court to perform

a gatekeeping function with expert testimony.<sup>1</sup> The admissibility of such testimony is governed by Delaware Rule of Evidence 702, which provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>2</sup>

Delaware has adopted the *Daubert* standard to determine whether an expert has a reliable basis in the knowledge and experience of the relevant discipline. Under this standard, the trial judge may consider the following factors: 1) whether the theory or technique has been tested; 2) whether it has been subjected to peer review and publication; 3) whether a technique has a high known or potential rate of error and whether there are standards controlling its operation; and 4) whether the theory or technique enjoys acceptance within a relevant scientific community.<sup>3</sup>

In addition to the *Daubert* factors, Delaware requires the trial judge to consider an additional 5-step test to determine admissibility of expert testimony.<sup>4</sup> The trial judge must determine that:

- (1) the witness is qualified as an expert by knowledge, skill, experience, training or education;
- (2) the evidence is relevant;
- (3) the expert's opinion is based upon information reasonably relied upon by experts in that particular field;
- (4) the expert testimony will assist the trier of fact to understand the evidence or determine a material fact in issue; and

<sup>&</sup>lt;sup>1</sup> Sturgis v. Bayside Health Ass'n, 942 A.2d 579, 583 (Del. 2007).

<sup>&</sup>lt;sup>2</sup> D.R.E. 702

<sup>&</sup>lt;sup>3</sup> Sturgis, 942 A.2d at 584 (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

<sup>&</sup>lt;sup>4</sup> *Id*.

(5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.<sup>5</sup>

Testimony by an expert that is 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.<sup>6</sup> An expert's qualifications alone do not grant the witness the ability to express *ipse dixit* rather than a properly supported expert opinion.<sup>7</sup> An expert's failure to explain an important inference requires the exclusion of that opinion.<sup>8</sup> It is the burden of the party seeking to introduce the expert testimony to establish its admissibility by a preponderance of evidence.<sup>9</sup>

## **Defendants' Motion to Exclude Testimony of Dr. David E. David:**

Upon the foregoing Defendants' Motion *in Limine* to Exclude the Testimony of David E. David, it is the decision of this Court that the motion is hereby **DENIED**.

Defendants' challenges go to the weight and credibility of the testimony. Weight and credibility challenges relate to an expert's skill or knowledge in being able to tie the facts of the case to the opinion he or she plans to give. Dr. David is competent to testify as an expert and Defendants' challenges go to the weight rather than the admissibility of the evidence. Therefore, Defendants' motion is denied.

## **Defendants' Motion to Limit Testimony of Dr. Alan Fink:**

Upon the foregoing Defendants' Motion *in Limine* to Limit Testimony of Dr. Alan Fink, it is the decision of this Court that the motion is hereby **GRANTED**.

<sup>6</sup> Perry v. Berkley, 996 A.2d 1262, 1271 (Del. 2010).

<sup>&</sup>lt;sup>5</sup> *Id*.

<sup>&</sup>lt;sup>7</sup> Slicer v. Hill, 2012 WL 1435014, at \*5 (Apr. 20, 2012 Del. Super.).

<sup>&</sup>lt;sup>8</sup> *Id* 

<sup>&</sup>lt;sup>9</sup> Sturgis, 942 A.2d at 583.

<sup>&</sup>lt;sup>10</sup> Perry v. Berkley, 996 A.2d 1262, 1270–71 (Del. 2010).

Dr. Fink is a neurologist that has never had experience in the field of obstetrics or

gynecology practice. Defendants argue, and this Court agrees, that Dr. Fink is not

qualified to testify regarding the standard of care in the field of obstetrics and/or

gynecology. Therefore, Defendants' motion to exclude Dr. Fink's testimony regarding

the applicable standard of care in this case is granted.

**Denfendants' Motion to Limit Testimony of Robert Minnehan:** 

Upon the Defendants' Motion in Limine to Limit Testimony of Robert Minnehan,

it is the decision of this Court that the motion is hereby **DENIED**.

Defendant challenges that Minnehan's testimony regarding damages should be

excluded because Plaintiffs' counsel provided much of the data that Minnehan used to

form his opinion. Generally, the factual basis of an expert opinion goes to the credibility

of the testimony not the admissibility of the evidence and it is for the opposing party to

challenge the factual basis of the expert opinion on cross-examination. 11 Therefore,

Defendants' motion is denied.

IT IS SO ORDERED this 27th day of January 2014.

Andrea L. Rocanelli

Honorable Andrea L. Rocanelli

<sup>11</sup> *Id*.

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