



IN THE SUPREME COURT OF THE
STATE OF DELAWARE

LAURA COONEY-KOSS and JEROME	)	
KOSS,	)	
	)	No. 162,2013
Plaintiffs Below-Appellants,	)	
	)	
v.	)	Appeal from the Superior Court
	)	of the State of Delaware in and
JENNIFER H. BARLOW, M.D.,	)	for New Castle County
	)	
Defendant Below-Appellee.	)	C.A. No. N10C-10-230 WCC

A. DIANE MCCRACKEN, M.D., and ALL)	
ABOUT WOMEN OF CHRISTIANA)	
CARE, INC.,)	No. 161,2013
	)
Defendants Below,)	
Appellants,)	Appeal from the Superior Court
	of the State of Delaware in and
v.)	for New Castle County
	)
LAURA COONEY-KOSS and JEROME)	
KOSS,)	
	)
Plaintiffs Below,)	C.A. No. N10C-10-230 WCC
Appellees.)	

DEFENDANTS BELOW, APPELLANTS A. DIANE MCCRACKEN, M.D.'S
AND ALL ABOUT WOMEN OF CHRISTIANA CARE, INC.'S
OPENING BRIEF ON APPEAL

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Dated: August 19, 2013

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NATURE OF PROCEEDINGS

This is a claim for medical negligence filed by Laura Cooney-Koss (“Ms. Koss”) and her husband, Jerome Koss (“Mr. Koss”) (collectively, the “Kosses”) against Christiana Care Health Services, Inc., who was voluntarily dismissed on February 7, 2012, and A. Diane McCracken, M.D. (“Dr. McCracken”), Jennifer Barlow, M.D. (“Dr. Barlow”) and All About Women of Christina Care, Inc. (“AAW”), their employer (collectively, the “AAW Defendants”). (A0019-A0024) The Kosses claimed damages resulting from Dr. Barlow negligently performing a cesarean section on April 22, 2010 and from Dr. McCracken negligently performing a hysterectomy on May 2, 2010. (A0019-A0024) The AAW Defendants¹ denied all claims of negligence. (A0025-A0030)

On August 15, 2012, the Superior Court precluded Tak Liu, M.D., a treating anesthesiologist, from testifying at trial. (A0227) A copy of the Order sought to be reviewed is attached as Exhibit A.

On August 30, 2012, the Superior Court excluded Ms. Koss’s May 2012 treatment records, evidence of any bleeding disorder, and records documenting blood transfusions. (A0230-A0235, A0274, A0276) Copies of the Orders sought to be reviewed are attached as Exhibit B.

¹ For purposes of this brief, the “AAW Defendants” will hereinafter refer to Dr. McCracken and AAW alone, since Dr. Barlow was dismissed by Court Order dated August 29, 2012. (A0013)

On September 6, 2012, the AAW Defendants filed a Motion to Supplement their Rule 26(b)(4) Expert Disclosure to add a hematology expert. (A0286-A0305) On September 10, 2012, the Superior Court denied the motion. (A0320-A0343) A copy of the Order sought to be reviewed is attached as Exhibit C.

Trial proceeded forward on September 17, 2012. (A0344, A1510-A1514) On September 26, 2012, the Superior Court denied the AAW Defendants' motion for judgment as a matter of law. (A1400-A1401) A copy of the Order sought to be reviewed is attached as Exhibit D. On September 27, 2012, the jury returned a verdict in favor of the Kosses. (A1515-A1516)

On February 28, 2013, the Superior Court denied the AAW Defendants' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a new trial. (A1552-A1561) A copy of the Order sought to be reviewed is attached as Exhibit E.

The AAW Defendants filed a timely notice of appeal on March 28, 2013 and (A0016) The Kosses filed a notice of cross-appeal as to Dr. Barlow on March 29, 2013. (A0016) The Supreme Court consolidated the appeals on May 3, 2013.

This is Defendants Below, Appellants A. Diane McCracken, M.D.'s and All About Women of Christiana Care, Inc.'s Opening Brief on Appeal.

SUMMARY OF ARGUMENT

- I. The Superior Court erred when it excluded the testimony of Tak Liu, M.D., a treating physician whose testimony was material and essential to Dr. McCracken's care and treatment decisions.
- II. The Superior Court erred when it excluded relevant and probative medical records and testimony relating to Ms. Koss's credibility, her claims of damages, and causation.
- III. The Superior Court erred when it did not permit the AAW Defendants to impeach William Spellacy, M.D. with medical literature.
- IV. The Superior Court erred when it did not grant the AAW Defendants' Motion for Judgment as a Matter of Law where the Kosses' standard of care expert agreed that Dr. McCracken made an appropriate medical judgment.
- V. The Superior Court erred when it denied the AAW Defendants' motion for a new trial despite the Kosses' counsel improper closing argument that unfairly prejudiced the AAW Defendants.

STATEMENT OF FACTS

Medical Background Facts

On April 22, 2010, Dr. Barlow, an employee of AAW, performed a cesarean section at Christiana Hospital on Ms. Koss to her deliver baby without complications, and Ms. Koss was discharged on April 25, 2008. (A1044-A1046)

On May 2, 2010, Ms. Koss developed an acute vaginal hemorrhage between 9:15 and 9:30 a.m. and spoke to Dr. McCracken, the on-call AAW physician, on the telephone to report “a lot of [continuous] blood coming out”. (A0497-A504) Ms. Koss arrived at Christiana Hospital by ambulance at about 10:34 a.m. (A0503, A0536) At about 11:18 a.m., Ms. Koss was given cytotec (a medication to contract her uterus) by Dr. Estelle Whitney, a Christiana Hospital physician, and scheduled for a dilatation and evacuation (D&E) due to the large amount of blood clots and debris in her uterus. (A0504-A0505) Dr. Whitney informed Dr. McCracken of the patient’s condition at approximately 11:40 a.m., at which time Dr. McCracken drove immediately to the hospital. (A0584-A0595)

Dr. McCracken arrived at the hospital around 12:00 p.m. and met with the Kosses around 12:15 p.m., just before the patient was taken to the operating room at 12:32 p.m. (A0510, A0584-A0586) Ms. Koss had continued to bleed since 9:15 a.m. (A0537-A0539) Dr. McCracken performed the D&E procedure at approximately 12:52 p.m. to attempt to stop the bleeding. (A0606-A0607, A0618-

A0620) During that procedure, Dr. McCracken massaged the uterus and administered a dose of methergine (a medication used to attempt to contract the uterus) to attempt to stop the hemorrhage. (A0607-A0608, A0702) Those methods were unsuccessful, and Laura continued to bleed at the same rate. (A0707)

At 1:10 p.m., Dr. McCracken converted the D&E to an exploratory laparotomy (an open surgical procedure) to try to stop the bleeding. (A0608, A0634, A0637-A0638, A0714-A0715) Dr. McCracken made the first incision at 1:26 or 1:27 p.m. after spending 16-17 minutes to sterilize the surgical field and speak with Mr. Koss about his wife's condition. (A0607-A0609, A0625, A0634-A0635, A0643, A0708, A0717, A0721) During the laparotomy, Dr. McCracken again massaged the uterus. (A0716)

Shortly after the first incision, the anesthesia team treating Ms. Koss informed Dr. McCracken that she had lost about 1,000 ml of blood in 30 minutes and had a hemoglobin level of 7.2 or 7.6. (A0631-A0632, A0712-A0714) Because Ms. Koss had already lost more than 1/3 of her blood volume, because the other techniques had not worked to slow or stop the bleeding, because Dr. McCracken was afraid that Ms. Koss might die, and because Dr. McCracken had no reasonable expectation that other techniques to stop the patient's bleeding from the uterus would work, Dr. McCracken performed a hysterectomy to save the patient's life. (A0632-A0633, A0689, A0707-A0708, A0723-A0725, A0748)

Evidence of Prior and Subsequent Blood Transfusions

In late June/early July 2012, the AAW Defendants received Ms. Koss' hospital records from April 29, 2012 to May 7, 2012 (the "May 2012 Records"). (A0322-A0323; A1562-A1576) The May 2012 Records show that Ms. Koss needed massive blood transfusions (at least 13 units of packed red blood cells (PRBCs), 3 units of platelets, 6 units of fresh frozen plasma (FFP), and 2 units of cryoprecipitate) to address bleeding from her rectum and needed emergent surgery to remove a portion of her colon when conservative measures to stop the bleeding failed. (A1562-A1576). At that time, Ms. Koss reported that she "[h]as never had acute episodes with this amount of significant bleeding in the past." (A1575)

Based on her review of the May 2012 Records which were forwarded in late June/early July 2012, Janice Bird, M.D., a board-certified gynecologist, testified at deposition that Ms. Koss' genetic biochemistry caused her to have a propensity to bleed. (A0222-A0225)

In the Pretrial Stipulation, the AAW Defendants identified the May 2012 Records. (A0259, A0276) The AAW Defendants argued that the May 2012 Records were relevant to credibility, causation and damages. Based on the Kosses' objections, the Superior Court held that the records were too prejudicial without an expert identifying a bleeding disorder (despite Dr. Bird's testimony). (A0231-A0235) The Court further ruled that Dr. Bird, as a gynecologist, would not be

permitted to testify on this issue. (A0230-A0231, A0239) The Court did, however, permit the AAW Defendants to apply for relief. (A0234-A0237)

On September 6, 2012, one week after the Pretrial Conference, the AAW Defendants moved to identify Lawrence Lessin, M.D., a board-certified hematologist, who opined to a reasonable degree of medical probability that Ms. Koss “has an underlying bleeding disorder which predisposes her to significant hemorrhage that is recalcitrant to conservative measures designed to treat it.” (A0286-A0305) The opinion was offered to address causation, not standard of care, to show that alternative treatment methods short of a hysterectomy would, more likely than not, have failed to stop the bleeding. (A0321-A0341) Nonetheless, the Superior Court excluded Dr. Lessin on the bases that he could not identify a specific etiology of the blood disorder, that his opinions were irrelevant because they did not impact Dr. McCracken’s treatment decisions, that the testimony would complicate trial, and that the AAW Defendants could have taken “reasonable action” earlier. (A0321-A0341; A0385-A0393, A0489-A0492) The Superior Court further excluded the May 2012 Records, all references to a bleeding disorder, and all references to blood transfusions.² (A0273)

² After the Kosses objected to a May 2010 progress note that referenced Ms. Koss’s pre-May 2010 massive blood transfusions, Dr. McCracken removed this note from evidence. (A0489-A0493; A0654-A0683) Had the Court ruled that references to blood transfusions were

Admissibility of Tak Liu, M.D.'s Testimony

Tak Liu, M.D., the treating anesthesiologist during the May 2, 2010 procedure, testified at deposition that he would be concerned for Ms. Koss's condition in view of her low hemoglobin level, her total blood loss of 1,600 milliliters, and the need to administer 4.5 liters of fluid based on his review of the records. (A0089, A0100, A0103, A0108, A0110-A0111, A0114) He further testified that Ms. Koss's one liter of blood loss in about thirty minutes, shortly before the hysterectomy, "alarms me greatly" because it would be difficult to keep up with bleeding at that rate. (A0108) He also corroborated Dr. McCracken's testimony that he would have relayed his concern about the patient's instability to her before the hysterectomy. (A0108-A0110)

The Kosses moved to exclude Dr. Liu's testimony on the basis that he did not specifically recall the procedure, only relying on what his routine practice would be, and that his testimony was therefore speculative. (A0082-A0130, A0164-A0165, A0168-A0169, A0171) The AAW Defendants argued that his testimony was relevant, material and "essential" to Dr. McCracken's defense because "[t]he whole case comes down to stability". (A0131-A0156, A0165-A0167) Specifically, because the focus of the Kosses' case was that no reasonable

admissible, the AAW Defendants would not have agreed to exclude this record.

physician would believe that this patient was unstable, the anesthesiology team's expressed concern about her instability supported Dr. McCracken's decision to proceed with the hysterectomy. (A0165-A0167) The AAW Defendants further argued that any lack of specific recall by Dr. Liu goes to weight, not admissibility, because Dr. Liu can testify as to his practice and protocol. (A0167) Despite the testimony's relevance, the Superior Court ruled that Dr. Liu could not testify unless the Kosses argued that "there would be no reason for anyone to tell her [Dr. McCracken] at the point in time when she's making these decisions that there is some concern about the stability of this patient". (A0169-A0172)

At trial, Dr. McCracken testified that the anesthesia team reported a low hemoglobin of 7.6 and 1,000 milliliter blood loss in thirty minutes to her and that this information was "absolutely important" in her decision to perform the hysterectomy. (A0632-A0634, A0711-A0713) In contrast, the Kosses' anesthesiology expert, Rafael Cartagena, M.D., testified that Ms. Koss was stable during the procedure and that the 1,000 milliliter blood loss in a short period of time was not a "catastrophe". (A0837, A0879, A0902) Thus, the AAW Defendants renewed their request to have Dr. Tak Liu testify on September 24, 2012. (A0926-A0927) The Superior Court denied the request because Dr. Liu would be "guessing" as to what happened in the operating room. (A0927) The Superior Court, however, permitted Alphonsine Sahou, a certified registered nurse

anesthetist (CRNA) who assisted during the surgery, to testify (over the AAW Defendants' objection) even though she, like Dr. Liu, had no recollection of the surgery. (A0204, A0371-A380)

Testimony of William Spellacy, M.D.

The Kosses called William Spellacy, M.D. to opine that Dr. McCracken breached the standard of care. (A0928-A1029) At trial, Dr. Spellacy agreed that Dr. McCracken tried a number of conservative measures, including medications and surgery, that failed to stop the bleeding before proceeding to a hysterectomy. (A0976-A0981, A0988) Dr. Spellacy further testified that, after surgical techniques fail, it is reasonable to do "something aggressive" like a hysterectomy:

- Q. Okay. If a physician has done the appropriate conservative measures and given them enough time and opportunity to work and they fail, do you agree, Doctor, that you need to go onto something more aggressive?
- A. Yeah, which may be another procedure.
- Q. Which may also be a hysterectomy. Is that correct?
- A. If you're at the end of your line, you've used everything else, probably that's right, and the bleeding is significant.
- Q. And, ultimately, this is something that comes down to medical judgment, correct? You need to see where the patient is at that point in time and where the patient has been before and what you've done. Is that fair?
- A. And what you've done, yes.
- Q. The medical literature in general, Doctor, states that a hysterectomy would be appropriate for intractable uterine atony. In other words, the bleeding won't stop. Do you agree with that statement?

- A. If the bleeding is excessive and the uterus can't be medically managed to stop it, at some point you're going to have to take out the uterus, but that's very rare.

(A0988, A0997-A0998) Defendants moved for judgment as a matter of law on the basis that Dr. Spellacy agreed that Dr. McCracken tried a number of procedures, that a hysterectomy would be appropriate when conservative measures failed, and that, in her medical judgment, a hysterectomy was appropriate. (A1400-A1401) The Superior Court denied the motion and held that there was evidence that Dr. McCracken failed to employ appropriate conservative measures. (A1401) Nonetheless, the Superior Court instructed the jury as follows:

When a doctor chooses between appropriate alternative medical treatments, harm resulting from a doctor's good-faith choice of one proper alternative over the other is not medical negligence. The Plaintiffs cannot prove that Defendant A. Diane McCracken, M.D. committed medical negligence merely by showing that another healthcare provider would have acted differently from Defendant A. Diane McCracken, M.D.

(A1459, A1487-A1488)

Impeachment Evidence

At the pretrial conference, the AAW Defendants agreed that they would not affirmatively use any medical literature in their case-in-chief except with William Curtin, M.D. (who was ultimately not called). (A0245, A0257) They specifically reserved the right, however, to use impeachment evidence. (A0257)

At trial, the AAW Defendants attempted to impeach Dr. Spellacy's testimony through the use of certain medical literature that he agreed was reasonably reliable at his deposition. (A0045, A0998) The Kosses objected on the basis that it had not been produced. (A0998-A0999) The Superior Court held that the AAW Defendants could voir dire Dr. Spellacy outside the presence of the jury so that it could evaluate the impeachment evidence, thereby disclosing their cross-examination to the Kosses. (A1001-A1023)

During voir dire, Dr. Spellacy testified as follows:³

Q. *Te Linde's Operative Gynecology* is also a book that you find to be reasonably reliable?

A. Yes.

Q. *Te Linde's* states that: *Hysterectomy usually is the safest procedure and also the quickest that can be performed for refractory bleeding*. Do you agree with that statement?

A. Yeah, I would agree it's the quickest, but I don't think it's the most satisfactory when you have a young woman who may want more children.

(A1016) The Superior Court held that, while the Kosses were on notice of the potential impeachment evidence, the AAW Defendants could quote but not reference the texts themselves. (A1022-A1024) Upon questioning before the jury, Dr. Spellacy immediately contradicted his testimony during voir dire:

³ This is one example of several medical literature sources cited by Dr. Spellacy as either reasonably reliable or authoritative that either contradicted his opinions or supported the AAW Defendants' position. (A0045)

Q. Doctor, do you agree with the statement that a hysterectomy is usually the safest procedure and also the quickest that can be performed for refractory bleeding?

A. No.

(A1023) Pursuant to the Superior Court's ruling, the AAW Defendants were precluded from referencing either the specific medical literature or referencing the prior inconsistent statement made under oath but outside the presence of the jury.

Closing Arguments and Jury Verdict

In closing, the Kosses argued repeatedly that the jury should "hold [the AAW Defendants] accountable" because they allegedly rejected accountability for their conduct. (A1412, A1414, A1421) The Kosses also requested damages for pain and suffering, emotional distress, mental damages, and permanent impairment, but they did not admit any evidence of economic damages. (A1426)

The Superior Court instructed the jury that any damages award "must be fair and reasonably determined and may not be determined by a fanciful or sentimental standard". (A1462) Nonetheless, the jury requested "some guidelines [sic] concerning the award of damages to Plaintiffs Laura-Cooney Koss and Jerome Koss." (A1535) The jury was not given any further instructions. The jury ultimately awarded the Kosses \$500,000.00 (\$450,000 for Laura and \$50,000 for Jerome). (A1515-A1516; Ex. E)

ARGUMENT

- I. THE SUPERIOR COURT ERRED WHEN IT EXCLUDED THE TESTIMONY OF TAK LIU, M.D., A TREATING PHYSICIAN WHOSE TESTIMONY WAS MATERIAL AND ESSENTIAL TO DR. MCCRACKEN'S CARE AND TREATMENT DECISIONS.

A. Question Presented

Did the Superior Court err when it excluded the testimony of Tak Liu, M.D., a treating physician whose testimony was material and essential to Dr. McCracken's care and treatment decisions?

The AAW Defendants preserved this issue when they responded to the Kosses' motion *in limine* to exclude Tak Liu, M.D., when they argued against the motion on August 30, 2012, when they identified him as a witness in the Pretrial Stipulation, and when they renewed their request to have Dr. Liu testify at trial. (A0131-A0156; A0165-A0167; A0926-A0927)

B. Scope of Review

This Court reviews a lower court's decision to admit or restrict testimony for an abuse of discretion. *Bush v. HMO of Del., Inc.*, 702 A.2d 921, 923 (Del. 1996). The Court must first determine whether the trial judge's ruling was correct. *Green v. A.I. duPont Inst. of the Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000). If incorrect, the Court must determine whether the ruling significantly prejudiced the party so as to deny her a fair trial. *Davis v. Maute*, 770 A.2d 36, 42 (Del. 2001).

Where the excluded evidence goes to “the very heart” of the case and “might well have affected the outcome” of the trial, this Court should award a new trial. *Green*, 759 A.2d at 1063.

C. Merits of Argument

Dr. Liu, a treating physician, testified that Ms. Koss was unstable, that he was “greatly alarmed” at her significant blood loss immediately prior to the hysterectomy, and that he would have conveyed this concern. Although the testimony was relevant and material to Dr. McCracken’s defense, the Court still precluded Dr. Liu from testifying because of its “speculative” nature. Because Dr. Liu’s lack of specific recall goes to the weight, not admissibility, of his essential testimony, the Superior Court abused its discretion in excluding the testimony.

First, in accepting the Kosses’ criticisms that Dr. Liu’s testimony was “speculative” due to his lack of recall, the Court erred.⁴ Dr. Liu testified that he could “reconstruct” his involvement in this case based on the treatment records, which is sufficient for witness testimony. (A0089); D.R.E. 602 (personal knowledge need not be based on testimony of witness himself). More importantly, a physician may testify based on his routine and practice. *See, e.g.*, D.R.E. 406

⁴ It was incongruous for the Court to exclude Dr. Liu’s testimony on the basis that he had no recall but to permit Ms. Sahou’s testimony where she likewise had no recall.

(evidence of routine practice of person is relevant to prove conduct of person on particular occasion was in conformity with it); *Oberly v. Howard Hughes Med. Inst.*, 472 A.2d 366, 385 (Del. Ch. 1984), *noted to be abrogated on other grounds*, *Staats v. Lawrence*, 576 A.2d 663 (Del. Super. Ct. 1990) (citing *Bennett v. Andree*, 270 A.2d 173 (Del. 1970)), *aff'd*, 582 A.2d 936, 1990 WL 168242 (Del. Oct. 3, 1990) (same); *Aikman v. Kanda*, 975 A.2d 152, 164, 164 n.15 (D.C. Ct. App. 2009) (noting that “[c]ourts in many jurisdictions have allowed evidence of a medical practitioner’s routine practice as evidence relevant to what the practitioner did on a particular occasion.”). That is exactly what Dr. Liu did here when he testified, based on his practice, that he would have told Dr. McCracken that, “if she [Ms. Koss] continued at that rate of blood loss, we’re going to have trouble keeping up”. (A109) That statement goes to the very heart of the AAW Defendants’ theory of the case (i.e., that the hysterectomy was necessary due to the emergent condition of the patient). The jury should have heard this material and relevant testimony, as Dr. Liu’s lack of specific recall goes to weight, not admissibility. *See Debernard v. Reed*, 277 A.2d 684, 686 (Del. 1971) (jury should hear relevant testimony and can evaluate witness’s credibility).

Second, the Superior Court erred when it did not permit Dr. Liu to testify once the Kosses “opened the door” and elicited testimony that Ms. Koss was stable, as this contradicted its prior ruling that would permit Dr. Liu to testify

under this exact scenario. *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990) (citing *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718 (Del. 1983)) (law of the case requires Court to abide by earlier rulings where facts remain constant during litigation); (A0170-A0173). Specifically, the Kosses argued that Ms. Koss’s life “was not in danger” and that, therefore, Dr. McCracken should not have performed the hysterectomy. (A1416-A1417, A1422) The Kosses’ attacks on Dr. McCracken’s belief that Ms. Koss was unstable, including Dr. Cartagena’s testimony, was exactly why Dr. Liu’s testimony was necessary: to corroborate her testimony that the patient was unstable and, therefore, that a hysterectomy was reasonable. (A0166, A0169, A0170, A0172-A0173)

It is of no surprise that the Kosses wanted Dr. Liu’s testimony excluded, as the testimony of a treating physician (rather than a retained expert) is persuasive and would have an “obvious impact”. *Green*, 759 A.2d at 1065. Here, Dr. Liu’s testimony is relevant and material and goes to the “very heart” of Dr. McCracken’s defense, as his concern and alarm supports Dr. McCracken’s decision to perform the hysterectomy to save Ms. Koss’s life. Because excluding Dr. Liu’s testimony significantly prejudiced the AAW Defendants, this Court should reverse the jury verdict, order a new trial, and permit Dr. Liu to testify consistently with his deposition testimony.

II. THE SUPERIOR COURT ERRED WHEN IT EXCLUDED RELEVANT AND PROBATIVE MEDICAL RECORDS AND TESTIMONY RELATING TO MS. KOSS'S CREDIBILITY, HER CLAIMS OF DAMAGES, AND CAUSATION.

A. Question Presented

Did the Superior Court err when it excluded relevant and probative medical records and testimony relating to Ms. Koss's credibility, her claims of damages, and causation?

The AAW Defendants preserved this issue when they identified the May 2012 Records in the Pretrial Stipulation; asked Dr. Bird to address them; addressed the Kosses' objections at the Pretrial Conference; moved to identify a hematologist; addressed the admissibility of the records and testimony on September 10, 2012; and raised the issue after trial. (A0131-A0156, A0222-A0225, A0230-A0240, A0259, A0276, A0330-A0341, A0384-A0393, A0471-A0496; A1517-A1539)

B. Scope of Review

This Court reviews a lower court's decision to admit or restrict testimony and evidence for an abuse of discretion. *Bush*, 702 A.2d at 923; *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988). The Court must first determine whether the trial judge's ruling was correct. *Green*, 759 A.2d at 1063. If incorrect, the Court must determine whether the ruling significantly prejudiced the

party so as to deny her a fair trial. *Davis*, 770 A.2d at 42. Where the excluded evidence goes to “the very heart” of the case and “might well have affected the outcome” of the trial, this Court should award a new trial. *Green*, 759 A.2d at 1063.

C. Merits of Argument

Ms. Koss had significant blood transfusions for her ulcerative colitis in 1999 and in May 2012. Although the AAW Defendants were unable to obtain the 1999 records, the AAW Defendants obtained and timely disclosed the May 2012 Records. The Superior Court held, however, that the May 2012 Records, Dr. Bird’s and Dr. Lessin’s testimony addressing them, and evidence of blood transfusions were inadmissible because they were only relevant to a claimed blood disorder that could not be raised “on the eve of trial” and to the standard of care. (A1557-A1558) As this evidence was relevant to credibility, damages, and causation, the Superior Court abused its discretion in excluding it.

First, the May 2012 Records were relevant to Ms. Koss’s credibility. The May 2012 Records demonstrate that Ms. Koss had significant surgery and that she denied significant bleeding in the past, both of which contradict her characterization of her ulcerative colitis as “flare ups” and the nature of the May 2010 surgery. (A1562-A1576); *Friedel v. Osunkoya*, 994 A.2d 746, 754 (Del.

Super. Ct. 2010) (evidence of prior suicides admissible in wrongful death claim to contradict “much rosier picture” that plaintiffs wished to portray at trial); *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 536 (Del. 2006) (impeachment can be shown through prior inconsistent statement).

Second, the May 2012 Records demonstrated that the May 2012 treatment was a contributing (and more likely) factor in the Kosses’ claim of ongoing damages. This evidence could have been significant where the jury’s award was not based on economic values and where the jury admitted that it needed damages guidelines. *See, e.g., Adams v. Aidoo*, 58 A.3d 410, 413 (Del. 2013) (evidence of conduct that impacts claim for damages is relevant, probative and admissible); *O’Dell v. Fiorucci*, 2011 WL 2083926, at *3 (Del. Super. Ct. May 12, 2011) (admitting records unrelated to defendant’s treatment for causation and damages). Excluding these records also permitted the Kosses to minimize Ms. Koss’s current medical condition, thereby allowing them to portray a “rosier” picture. *See, e.g., Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 n.1 (Del. 1992) (parties required to take the plaintiff as they find her); *Friedel*, 994 A.2d at 754.

Third, the May 2012 records are relevant to causation, as they demonstrate at least two other points in time where conservative measures failed to stop the bleeding, one of which (aside from this case) required surgical removal of the bleeding organ. Said differently, the May 2012 Records support the AAW

Defendants' causation defense that conservative treatment methods would not have worked in May 2010, just as they failed in May 2012.⁵ *Friedel*, 994 A.2d at 752 (prior suicides evidence was relevant to causation defense in wrongful death claim). This causation issue is therefore not "collateral". (A0340) The AAW Defendants further supported this causation argument with the expert testimony of Dr. Bird, who was qualified to opine on this based on her training, knowledge and experience,⁶ as well as Dr. Lessin's testimony (after Dr. Bird's opinion was excluded). *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 877 (Del. 2003) (experienced practicing physician can offer expert opinions as non-specialist).

Moreover, the AAW Defendants' actions occurred without undue delay. Upon receipt of the May 2012 Records in late June/early July 2012, the AAW Defendants produced them to counsel, forwarded them to the AAW Defendants' experts, and identified them in the Pretrial Stipulation. Dr. Bird's opinion that Ms. Koss had a propensity to bleed, based on her review of the records, was similarly timely.⁷ When the Superior Court excluded the May 2012 Records and Dr. Bird's

⁵ The fact that the AAW Defendants chose not to discuss Dr. McCracken's lack of knowledge of the prior blood transfusions at the time of the hysterectomy is separate and apart from the relevance (discussed *supra* and *infra*) of the subsequent May 2012 Records.

⁶ Dr. Spellacy could similarly rebut Dr. Bird's opinion as a qualified expert. D.R.E. 702.

⁷ Dr. Bird and Dr. Lessin needed more than one complete set of records (which were unavailable

testimony on August 30, 2012 but permitted relief, the AAW Defendants immediately obtained an expert opinion from Dr. Lessin within one week and offered him for a discovery deposition before trial. This was done with the intention of maintaining the trial date, especially where the Superior Court indicated that the case would proceed to trial.⁸ *See Christian v. Counseling Res. Assocs., Inc.*, 60A.3d 1083, 1085 (Del. 2013) (refusing to move trial date where counsel grant informal discovery extensions and requiring discovery to be completed in “a compressed time period”).⁹ As the evidence and testimony was identified without undue delay, the Superior Court erred in excluding the relevant and probative records and testimony on that basis. D.R.E. 403.

It should be emphasized that Dr. Lessin’s inability to identify a specific etiology for the bleeding disorder is immaterial, as Dr. Lessin is a qualified

from 1999 but became available with the May 2012 Records) to compare with the May 2010 records to determine whether Ms. Koss had a bleeding issue. (A10323, A0334, A0336-A0339)

⁸ As a continuance was not offered after the Superior Court denied the AAW Defendants’ request for relief, the AAW Defendants did not (and could not) waive this claim. *See Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289 (Del. 1994) (waiver is established where party voluntarily and intentionally relinquishes known right unequivocally). (A0339-A0341)

⁹ The parties informally agreed to continue discovery through August 17, 2012, despite the fact that trial was one month later and that discovery closed on June 15, 2012. (A0034-A0037)

hematologist, based his opinions on the relevant records, and rendered his opinions to a reasonable degree of medical probability. This is all that D.R.E. 702 requires. Challenges to his opinions, including contrary evidence, are appropriate for cross-examination and go to weight, not admissibility. *Debernard*, 277 A.2d at 686.

In sum, even if the evidence was irrelevant to Ms. Koss's propensity to bleed (which is denied), it was relevant and material to other aspects of the case. *Register v. Wilmington Med. Ctr.*, 377 A.2d 8, 10 (Del. 1977) ("Evidence which is irrelevant for one purpose may be quite relevant for another"); *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 527 (Del. 1987) (admitting cumulative but material evidence). Concerns that the May 2012 Records would be misconstrued without expert testimony¹⁰ or would impact standard of care issues (for which they were not offered) should have been addressed with a limiting instruction (which was not offered) that would cure any perceived prejudice. *State Farm Mut. Auto. Ins. Co. v. Enrique*, 3 A.3d 1099, 2010 WL 3448534, at *3 (Del. Sept. 3, 2010). As the exclusion of this relevant and probative evidence significantly prejudiced the AAW Defendants, the Superior Court abused its discretion, and this Court should reverse the jury's verdict and award a new trial with the evidence admitted.

¹⁰ The records need not be supported by expert testimony to be admitted for non-causation purposes, although experts did establish their relevance to causation.

III. THE SUPERIOR COURT ERRED WHEN IT DID NOT PERMIT THE AAW DEFENDANTS TO IMPEACH WILLIAM SPELLACY, M.D. WITH MEDICAL LITERATURE.

A. Question Presented

Did the Superior Court err when it refused to permit the AAW Defendants to cross-examine and impeach William Spellacy, M.D., the Kosses' only standard of care expert, with medical literature that he agreed was reasonably reliable?

The AAW Defendants preserved this issue when they questioned Dr. Spellacy about reasonably reliable literature at his deposition; reserved the right to identify impeachment evidence in the Pretrial Stipulation; sought to impeach Dr. Spellacy at trial; addressed the Kosses' objections at trial; and raised the claim in their motion for new trial. (A0045, A0257, A0998-A1023, A1520)

B. Scope of Review

This Court reviews a lower court's decision to admit or restrict expert testimony for an abuse of discretion. *Bush*, 702 A.2d at 923. The Court must first determine whether the trial judge's ruling was correct. *Green*, 759 A.2d at 1063. If incorrect, the Court must determine whether the ruling significantly prejudiced the party so as to deny her a fair trial. *Davis*, 770 A.2d at 42. Where the excluded evidence goes to "the very heart" of the case and "might well have affected the outcome" of the trial, a new trial is appropriate. *Green*, 759 A.2d at 1063.

C. Merits of the Argument

To impeach Dr. Spellacy, the Kosses' sole standard of care trial expert, the AAW Defendants sought to cross-examine him with medical literature that he agreed was reasonably reliable. The Superior Court, however, held that the AAW Defendants could not refer to the literature because they had failed to disclose it. By limiting the AAW Defendants' ability to cross-examine the Kosses' main expert improperly, the Superior Court abused its discretion.

Delaware law permits medical literature to be used for impeachment. *See, e.g.,* D.R.E. 803(18); *Berry v. Cardiology Consultants, P.A.*, 935 A.2d 255, 2007 WL 2848035, at *2 (Del. Oct. 2, 2007) (quoting 5 JONES ON EVIDENCE CIVIL AND CRIMINAL, § 35:28, at 317 (7th ed. 2003)); *Abrahams v. Chrysler Group, LLC*, 44 A.3d 921, 2012 WL 1744270, at *3 (Del. 2012). Because a medical expert's (like any witness's) credibility "is always at issue", a party can explore it by, among other things, demonstrating any inconsistency between the opinion and the medical community's consensus. *Weber v. State*, 457 A.2d 674, 681 (Del. 1983); *Burke v. State*, 484 A.2d 490, 499 (Del. 1984); D.R.E. 607, D.R.E. 616. Here, the medical literature was admissible impeachment evidence because: (1) Dr. Spellacy's testimony was crucial to the Kosses' case; (2) the impeachment evidence (some of which Dr. Spellacy authored) was logically relevant to contradict his criticisms of Dr. McCracken's care; (3) the potential impeachment evidence was identified by

Dr. Spellacy at deposition as reasonably reliable, thereby eliminating any unfair prejudice; and (4) the evidence was not cumulative. *Weber*, 457 A.2d at 681.

The Superior Court's decision to preclude the AAW Defendants from referencing medical literature but to allow counsel to quote statements did not cure the error. Medical literature is one element that determines the standard of care. The Superior Court's ruling, however, turned the statements made by the medical community into those made by a lawyer, thereby excising any impact the cross-examination would have. *See, e.g.*, DEL. P.J.I. CIV. § 3.3 (2000), *rev.* Aug. 15, 2006 ("What the attorneys say is not evidence.") (Ex. H). Moreover, requiring the AAW Defendants to voir dire Dr. Spellacy outside the presence of the jury permitted the Kosses and Dr. Spellacy to prepare for the cross-examination ahead of time, thereby defeating its very purpose. *See, e.g.*, *Jackson v. State*, 770 A.2d 506, 516 (Del. 2000) (cross-examination is "the principal means by which the believability of a witness and the truth of his testimony is tested" and "is essential to a defendant's right to a fair trial"); *Stapleton ex rel. Clark v. Moore*, 932 N.E.2d 487, 500-01 (Ill. Ct. App. 2010), *appeal denied*, 943 N.E.2d 1109 (Ill. 2011) (party need not disclose impeachment material because "[i]f the cross-examiner, to use a cliché, must telegraph his punch, cross-examination would lose its effectiveness."). That the AAW Defendants could not demonstrate to the jury that Dr. Spellacy, who knew the questions in advance, changed his sworn testimony from voir dire

minutes earlier further demonstrates the prejudice to the AAW Defendants. *Sammons*, 913 A.2d at 536 (witness may be impeached with prior inconsistent statement). In sum, the Superior Court’s ruling deprived the jury of relevant evidence as to Dr. Spellacy’s credibility. *Jackson*, 770 A.2d at 515 (“Jurors should be afforded every opportunity to hear impeachment evidence that may undermine a witness’ credibility”); *Weber*, 457 A.2d at 681 (trial judge cannot “foreclose a legitimate inquiry into a witness’ credibility”).

The Superior Court’s rulings in this regard appear to be derived from the erroneous premise, urged by the Kosses, that impeachment evidence needs to be disclosed before trial.¹¹ This holding is contrary to Delaware law. *McBride v. State*, 477 A.2d 174, 181-82 (Del. 1984); *State v. Block*, 2000 WL 303351, at *2 (Del. Super. Ct. Feb. 18, 2000). To require disclosure of the impeachment evidence before Dr. Spellacy’s cross-examination eviscerated its effectiveness, precluded a legitimate inquiry into his credibility, and constituted reversible error, warranting a new trial. *Eanes v. Peninsula United Methodist Homes*, 1988 WL 77728, at *4 (Del. Super. Ct. Jul. 1, 1988) (failure to permit cross-examination of witness on crucial issue warranted new hearing).

¹¹ The Kosses’ objection related to the use of literature in the AAW Defendants’ case-in-chief, which did not occur. The AAW Defendants did, however, reserve the right “to rely upon medical literature for purposes of rebuttal and cross-examination of Plaintiffs’ experts”. (A0257)

IV. THE SUPERIOR COURT ERRED WHEN IT DID NOT GRANT THE AAW DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW WHERE THE KOSSES' STANDARD OF CARE EXPERT AGREED THAT DR. MCCRACKEN MADE AN APPROPRIATE MEDICAL JUDGMENT.

A. Question Presented

Did the Superior Court err when it denied the AAW Defendants' motion for judgment as a matter of law where the Kosses' standard of care expert agreed that Dr. McCracken's decision to perform a hysterectomy was appropriate medical judgment, even though he disagreed with it?

The AAW Defendants preserved this issue when they moved for judgment as a matter of law and when they renewed their motion for judgment as a matter of law. (A1400-A1401; A1517-A1539)

B. Scope of Review

This Court reviews a lower court's decision to deny a motion for judgment as a matter of law *de novo*. *Whittaker v. Houston*, 888 A.2d 219, 224 (Del. 2005). The Court must determine "whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the non-moving party, raise an issue of material fact for consideration by the jury." *Triebel v. Sabo*, 714 A.2d 742, 744 (Del. 1998) (citations omitted).

C. Merits of the Argument

The Kosses' standard of care expert, Dr. William Spellacy, agreed that, after a physician attempts conservative measures that fail to stop uterine bleeding, a physician can perform a hysterectomy under the standard of care. He further agreed that Dr. McCracken tried no fewer than six (6) different conservative measures, including surgical options, that failed to stop the bleeding before the hysterectomy. Because the undisputed testimony was that Dr. McCracken made an appropriate and good-faith decision to remove Ms. Koss's uterus, Delaware law precludes a finding of medical negligence. Therefore, the trial judge erred when he denied the AAW Defendants' motion for judgment as a matter of law.

Delaware law precludes a finding of medical negligence when a physician chooses between appropriate alternative medical treatments in good faith. *Riggins v. Mauriello*, 603 A.2d 827, 831 (Del. 1992). An expert's opinion that he would have acted differently is insufficient to establish medical negligence. *See Riggins*, 603 A.2d at 831 (reversing a plaintiff's jury verdict in a medical negligence case where, "while Riggins' [plaintiff's] expert opined to the contrary, there is sufficient evidence upon this record to support Dr. Mauriello's defense that his choice of treatments in each circumstance was within the applicable standard of care").

Viewing the evidence in the light most favorable to the Kosses, all standard of care experts agreed that: (1) Dr. McCracken attempted at least six (6)

conservative measures, including surgical options; (2) Ms. Koss had significant and continued bleeding for more than four hours before the hysterectomy, including losing 1,000 cc of blood in thirty minutes; and (3) it was reasonable for a physician like Dr. McCracken to use her medical judgment to perform an “aggressive” procedure like a hysterectomy after a series of failed conservative measures. (A0976-A0998) That Dr. Spellacy would have tried more conservative measures before performing a hysterectomy, or that he believed that they would have worked, is immaterial; the only question for the jury was whether Dr. McCracken’s good faith choice of appropriate treatments was reasonable. As the experts agreed on this point, the Kosses failed to establish medical negligence under Delaware law. This Court should therefore reverse the lower court’s denial of the AAW Defendants’ motion for judgment as a matter of law, set aside the verdict, and enter judgment in favor of the AAW Defendants.

V. THE SUPERIOR COURT ERRED WHEN IT DENIED THE AAW DEFENDANTS' MOTION FOR A NEW TRIAL IN VIEW OF THE KOSSES' IMPROPER CLOSING ARGUMENT THAT UNFAIRLY PREJUDICED THE AAW DEFENDANTS.

A. Question Presented

Did the Superior Court err when it denied the AAW Defendants' motion for a new trial in view of the Kosses' improper arguments that unfairly prejudiced the AAW Defendants?

The AAW Defendants preserved this issue when they moved for a new trial.
(A1517-A1539)

B. Scope of Review

This Court reviews a lower court's decision to deny a motion for a new trial for an abuse of discretion. *Med. Ctr. of Del., Inc. v. Loughheed*, 661 A.2d 1055, 1060 (Del. 1995). Where counsel do not timely object to an improper argument, this Court reviews the claim for plain error. *Id.* Plain error exists where the asserted error was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.* (citations omitted).

C. Merits of the Argument

In this case, the Kosses' argument that the jury should "hold [the AAW Defendants] accountable" misstated the applicable law, appealed to the jury's

biases improperly, and significantly prejudiced the AAW Defendants' right to a fair trial. (A1412, A1414, A1421) Given the closeness of the case, this Court should reverse the verdict.

Any closing argument that misstates Delaware law is improper and reversible, even where no objection is made. *See Cunningham v. McDonald*, 689 A.2d 1190, 1196 (Del. 1997); *DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993); *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006). In a claim of negligence, asking a jury to "send a message" is improper because the focus of the case is on the plaintiff's injury or loss, not on the defendant's conduct. *Jardel Co.*, 523 A.2d at 528 (citing 22 AM.JUR.2D DAMAGES § 1, at 13 (1965)). Rather, only where punitive damages are claimed should a jury focus on the defendant's conduct to "send a message". *Id.* at 529.

In this case, as the Kosses did not allege punitive damages, the jury should not have considered the "irrelevant" concern to punish Dr. McCracken or hold her "accountable". *See, e.g.*, Jury Instruction on "Verdict/Sympathy", *Ragnis v. Myers*, C.A. No. 09C-05-057 JOH (Del. Super. Ct. Jul. 23, 2012) (jury in medical negligence case should not consider "irrelevant" concerns like "[a doctor's] general professional competence, right to practice medicine or punishment") (Ex. F); Jury Instruction on "Verdict Based on Evidence", *Hodel v. Ikeda, et al.*, C.A. No. 09C-01-227 JOH (Del. Super. Ct. Feb. 22, 2013) (same) (Ex. G). Here, asking

the jury to hold Dr. McCracken “accountable” was improper because it asked the jury to improperly punish Dr. McCracken, contrary to Delaware law. Given the closeness of the case, the centrality of the issue (whether Dr. McCracken was negligent), and the lack of steps taken to mitigate the impact of the improper statements, the argument prejudiced the AAW Defendants’ substantial rights and jeopardized the fairness of the trial process. *Estate of Swan v. Balan*, 956 A.2d 1222, 1226 (Del. 2008). Therefore, this Court should reverse the jury’s verdict and remand this case for a new trial.

CONCLUSION

The trial judge erred when he excluded the testimony of Tak Liu, M.D.; when he excluded relevant and probative records and testimony relating to Laura's credibility, the Kosses' damages and causation; when he limited impeachment of the Kosses' main standard of care expert; when he denied the AAW Defendants' motion for judgment as a matter of law; and when he denied the AAW Defendants' request for a new trial based on the Kosses' improper closing argument. These errors separately and *in toto* caused significant prejudice to the AAW Defendants and affected the outcome of the trial. The AAW Defendants therefore request that this Court reverse the verdict below and enter judgment in favor of the AAW Defendants. In the alternative, the AAW Defendants request that this Court reverse the verdict below and remand this matter for a new trial.

Respectfully submitted,

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