



IN THE SUPREME COURT OF THE
STATE OF DELAWARE

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

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

PLAINTIFFS BELOW-APPELLEES/CROSS APPELLANTS
LAURA COONEY-KOSS AND JEROME KOSS'
REPLY BRIEF ON CROSS APPEAL

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ARGUMENT

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT-BELOW APPELLEE JENNIFER BARLOW, M.D.

Defendant-Below Cross-Appellee, Jennifer Barlow, M.D. (“Dr. Barlow”) admits for the purpose of the appeal that she was negligent in suturing Ms. Koss' uterus after the Cesarean Section surgery ("C-section surgery") for childbirth on April 22, 2010. Plaintiffs' medical expert William Spellacy, M.D. ("Dr. Spellacy") testified in deposition that Dr. Barlow breached the standard of care by failing to properly suture the incision to Ms. Koss' uterus after the C-section surgery on April 22, 2010. (A049-A051)

Dr. Spellacy testified that the failure to properly suture the uterus incision caused bleeding from that incision site to go into Ms. Koss' peritoneal cavity. (A050-A051) Specifically, Dr. Spellacy answered the question at deposition by Defense Counsel as follows:

Q: Okay. So you can't state to a reasonable degree of medical probability one way or the other whether it played a role or didn't play a role. Is that accurate?

A: **Well, its pretty common if you get a defect early in the post-operative period, it bleeds. So I think there was some blood probably coming from that defect in the scar, but the volume of blood that she**

was losing exceeds that probably, though.

Q: Okay. When you say the volume she was losing exceeds that, you're referring to the hemorrhage 10 days later?

A: **Yes. Right.**

(A0051) (emphasis added)

The failure to properly suture the uterus incision also caused the large hematoma on the outside of Ms. Koss' uterus which was found on May 2, 2010 when Appellant A. Diane McCracken, M.D. ("Dr. McCracken") opened Ms. Koss' abdomen (A060) Dr. Spellacy opined that Ms. Koss was still bleeding at that uterus incision at the time that Dr. Barlow completed the C-section surgery. *Id.* Dr. Spellacy also testified that the failure by Dr. Barlow to properly suture the uterus incision also ultimately caused there to be a hole in Plaintiff's uterus which caused and allowed blood to go from inside the uterus into Plaintiff's abdominal cavity. (A061) Dr. Spellacy did not know if these injuries contributed to Ms. Koss' uterine atony. *Id.*

At the hearing on Dr. Barlow's Motion for Summary Judgment, Plaintiffs presented the above quoted testimony of Dr. Spellacy to the Trial Court and asserted that Dr. Barlow's negligence caused a defect which caused bleeding into Plaintiff's abdomen. (A0160) Plaintiffs acknowledged that Dr. Spellacy agreed that he cannot say quantitatively how much of the blood going into Ms. Koss'

abdomen was from the defect caused by Dr. Barlow's negligence. As well, it was agreed that the bleeding from the unsutured hole in the uterus was not the primary cause of blood flow into the abdomen. *Id.* However, Plaintiffs presented the argument being presented here, that Dr. Spellacy did opine that the defect caused by Dr. Barlow's negligence was its own source of bleeding into Plaintiff's abdomen. (A0161) The Trial Court granted Dr. Barlow's Motion for Partial Summary Judgment on August 29, 2012. (B086-092).

Appellants assert that Plaintiffs made a judicial admission at the deposition of expert Berto Lopez, M.D., who was ultimately not called as a witness at trial, on June 28, 2012. Specifically, Plaintiff's Counsel intended to inform Defendants that Dr. Lopez was not asserting any breaches in the standard of care as against Defendant Dr. Barlow. (B024) As explained in Plaintiffs' Response to Dr. Barlow's Motion, Counsel's statement on the record was not well stated or precise, and appeared to be more broad than was intended. (B031-B033)

It was not the intent of Plaintiff's counsel to convey that Plaintiff's other expert, Dr. Spellacy, was not presenting the opinions that were identified in the expert disclosure as against Dr. Barlow. *Id.* Dr. Spellacy's deposition had already been scheduled to be taken on July 26, 2012 at the time of the statement on the record at Dr. Lopez' deposition. (A041) At that point in time, it was understood by counsel for Plaintiff that Dr. Spellacy would testify that Dr. Barlow breached

the standard of care as to her closing of the uterus incision at the time of the C-section surgery. There was no mention of Dr. Spellacy or his opinions at Dr. Lopez' deposition when the statement by Plaintiffs' Counsel occurred. (B024). Defendants were also aware that Dr. Spellacy may still testify that Dr. Barlow was negligent and caused some injury to Plaintiff as evidenced by their letter dated July 27, 2012 (acknowledging that they understood that Dr. Spellacy had not yet been deposed and requesting Counsel's thoughts on a dismissal of Dr. Barlow). (B029)

Plaintiffs certainly agree that they were bound to the representation that Dr. Lopez would not present opinions at trial as to the negligence of Dr. Barlow. However, Plaintiffs dispute that they waived the right for Dr. Spellacy to give those opinions as to Dr. Barlow. Dr. Spellacy specifically gave the opinions as to the negligence of Dr. Barlow at his July 26, 2012 deposition.

The scope of judicial admission by counsel for a party is restricted to unequivocal statements as to the matters of fact which otherwise would not require evidentiary proof. *AT&T Corp. v. Lillis*, 953 A.2d 241, 257 (Del. 2008). Judicial admissions do not extend to counsel's statement of his concept of the legal theory of a case or statements of opinion or conclusions. *Id.* The Trial Court may exercise its discretion to relieve a party of the conclusiveness of the judicial admission. *Merritt v. UPS*, 956 A.2d 1196, 1202 (Del. 2008).

Here, as evidenced by Dr. Spellacy's testimony on the breaches by Dr. Barlow, Plaintiffs' Counsel intended to state on the record that Dr. Lopez would not be giving opinions as to Dr. Barlow, not that the claims were abandoned altogether. To the extent that the statement of Plaintiffs' Counsel is deemed a judicial admission, Plaintiffs should be relieved of the admission because of the clear intention to present the opinions of Dr. Spellacy against Dr. Barlow. The Trial Court properly decided Dr. Barlow's Motion for Summary Judgment on grounds other than an alleged binding judicial admission.

The Trial Court erroneously held that there were no issues of material fact as to the claims against Dr. Barlow. Dr. Spellacy testified that because of Dr. Barlow's negligence Ms. Koss sustained a large hematoma to her uterus as well as a hole in her uterus, both of which contributed to the blood entering Ms. Koss' peritoneal cavity. According to Dr. Spellacy, those injuries are distinct, stem directly from the alleged negligence of Dr. Barlow, and would have required surgical repair had Ms. Koss' womb not been improperly removed.

Dr. Spellacy's opinion that the negligence of Dr. Barlow contributed to the bleeding from the uterus, albeit the outside of the uterus, into the abdomen is significant to consider in the context of the argument put forth by the defense as to the unnecessary hysterectomy. Essentially, Dr. McCracken's defense at trial was that she removed Ms. Koss' womb because of alleged excessive bleeding. Dr.

Spellacy testified at deposition that the negligence of Dr. Barlow caused at least some of the bleeding into the abdomen, and the jury could certainly find that Dr. Barlow's negligence was a proximate cause of bleeding and ultimately the unnecessary removal of the womb. As such, it was in the province of the jury to decide the extent of Plaintiffs' damages from the injuries caused by Dr. Barlow, including the extent to which Dr. Barlow's negligence contributed to the unnecessary removal of Ms. Koss' womb.

CONCLUSION

WHEREFORE, the Appellees respectfully request that this Court affirm the decisions of the Superior Court below, and in the alternative, request the Court to reverse the decision of the Superior Court granting Summary Judgment for Defendant Barlow.

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