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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEATHER E. TURNER, *Plaintiff below,* *Appellant,* v. DELAWARE SURGICAL GROUP, P.A., ERIC D. KALISH, M.D. and MICHAEL K. CONWAY, M.D. *Defendants below,* *Appellees*	))))))))))))	No. 410, 2012 APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, C.A. No. 09C-07-219 RRC

ANSWERING BRIEF OF DEFENDANTS BELOW, APPELLEES
DELAWARE SURGICAL GROUP, P.A.,
EDWARD D. KALISH, M.D., AND MICHAEL K. CONWAY, M.D.

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Dated: February 1, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

NATURE OF PROCEEDINGS

Plaintiff below, Appellant is appealing Superior Court's June 26, 2012 decision following a trial on the merits, granting judgment in favor of Defendants below, Appellees.

SUMMARY OF THE ARGUMENT

The unnumbered first paragraph of Appellant's Summary of the Argument is denied.

Superior Court's decision to grant the defendant's motion in limine, barring evidence and testimony that Dr. Michael K. Conway, M.D. violated a rule of Christiana Hospital mandating that operative reports be dictated with twenty-four hours of the procedure was proper and not an abuse of discretion. The decision was proper because there was no evidence which demonstrated that the twenty-four-hour rule was relevant in any way to the issues in the case. The plaintiff failed to show that there was anything factually incorrect about Dr. Conway's report, nor did she show any causal connection between this supposed violation of the rule and the plaintiff's claimed damages.

Further, even if the evidence had some probative value, that value was grossly outweighed by the possibility of jury confusion and prejudice to the defendants.

Further, the trial court was correct to deny the plaintiff's motion for reargument which was primarily based on the evidence's value for impeachment as a grounds for permitting the evidence. First, the plaintiff did not identify any legal principles the trial judge overlooked or key facts his misapprehended.

Paragraph b of Appellant's Summary of the Argument is denied.

The Plaintiff primarily argued the evidence's value for impeachment, but failed to demonstrate how the alleged failure to follow the twenty-four-hour rule could work to impeach any of the evidence in the case. It was inadmissible to attack Dr. Conway's testimony, nor would it be proper to admit the material for impeachment on motive, because to do so invite the jury to speculate. Further, it could not to impeach the testimony of the defense expert, Dr. Matt L. Kirkland, as there is nothing in his testimony which was dependent upon the timing of the operative report and because Dr. Kirkland's opinion was bolstered by the pathology report.

It was also proper for the trial judge to overrule the plaintiff's objection to the presentation of the testimony of Dr. Eric D. Kalish, M.D. related to the pathology report which was produced after the August 2, 2007 surgery. The testimony by Dr. Kalish was primarily factual testimony which he derived as a result of his role as a physician in the plaintiff's treatment. However, to the extent that Dr. Kalish presented expert testimony, his identity was fully disclosed well before trial. Moreover, the opinions which Dr. Kalish expressed at trial concerning the condition of the plaintiff's bowel and the need

for resection were the same opinions he held and expressed in his deposition. Therefore, the plaintiff was fully aware of his opinions and fully capable of responding to them.

As such, because the trial judge did not abuse his discretion in precluding the testimony concerning the twenty-four-hour rule and in permitting Dr. Kalish's testimony, this Court is requested to affirm those decisions.

STATEMENT OF FACTS

The underlying basis of this appeal is a series of surgeries on the plaintiff, Heather Turner. [A7-A12] On July 24, 2007, the plaintiff underwent a laparoscopic appendectomy, performed by Dr. Eric D. Kalish, M.D. [A637-A644] The plaintiff was readmitted to Christiana Hospital on August 1, 2007 and was diagnosed with a partial small bowel obstruction. [A645-A649] Dr. Kalish performed a surgery to correct the problem on August 2, 2007 and in the course of doing so, performed a small resection, as medically indicated. [Id.]

On August 8, 2007, the pathology report on the portion of the bowel which was resected was issued and affirmed the damaged state of the tissue. [Id.]

On November 30, 2007, the plaintiff was again admitted to Christiana Hospital and diagnosed with a small bowel obstruction. [A657-A661] The plaintiff was under the care of Dr. Michael D. Conway. [Id.] Surgery revealed that adhesions had formed at the site of the previous surgeries and was constricting the bowel. [Id.] Consequently, the adhesions were severed and a section of bowel was resected as medically indicated. [Id.]

The pathology report issued after the November 30, 2007 surgery indicated that the specimen was received intact,

indicating that there was no spillage of intestinal contents during that surgery. [Id.]

Subsequent to these surgeries, in September 26, 2008, the plaintiff underwent another procedure to remove a mass on her liver, and, on January 10, 2012, another surgery to repair an incisional hernia from the previous surgeries. [A667-677] The plaintiff claimed that the liver mass was the consequence of spillage during one of the previous surgeries, a contention which the defendants denied and the jury rejected.

The plaintiff filed suit against Drs. Conway and Kalish and their medical group, Delaware Surgical Group, P.A., on July 22, 2009. [A7-A12] The plaintiff alleged medical negligence against the surgeons, arguing that the decision to perform the two surgeries for the bowel obstructions and the manner the procedures were performed fell below the applicable standard of care. [Id.]

During discovery, the plaintiff took the deposition of Dr. Kalish. [Defendants' Exhibit 1] He testified, inter alia, about the surgery he performed, why resection of the bowel was appropriate and indicated, and what would have been the result had he not performed the resection. [Id.] Moreover, Dr. Kalish, along with Dr. Conway, were identified as experts in the defendants' Expert Disclosure, with their opinions being

identified as those "set forth in his deposition and the medical records." [A735]

On August 29, 2011, the defendants filed a pre-trial motion in limine. [A1-93] They sought to preclude the plaintiff from introducing evidence and testimony that Christiana Hospital had in effect a rule which required that surgeons complete a dictated operative report within twenty-four hours of the procedure. [Id.] In addition, the motion sought to preclude testimony and evidence that Dr. Conway failed to comply with this reporting requirement after the operation which he performed. [Id.] The basis of the motion was simply that the evidence was irrelevant, because the plaintiff presented no evidence which established any causal connection between this alleged failure and the plaintiff's damages. [Id.] A Supplemental Motion was submitted in light of the plaintiff's change in experts. [A94-122]

The motion was granted by the trial judge on May 2, 2012. [A342-344, 37:22-38:21] The trial judge found that the evidence was not relevant because there was no causal connection between the violation of the twenty-four-hour rule and the plaintiff's claimed damages and because any relevance it might have was substantially outweighed by potential for prejudice and confusion of the issues. [Id.]

The plaintiff filed a motion for reargument on May 9, 2012, claiming that the evidence was relevant for impeachment purposes. [A201-234] After the defendants filed a response, [A235-A275], the trial judge denied the motion for reargument on June 14, 2012. [A371-A373, 2:6-4:4] The trial judge found that the plaintiff did not meet the standard for reargument and found that there was no basis to find the report to be not credible or biased, especially given the plaintiff's expert's statement to that effect. [Id.]

Between June 14, 2012 and June 26, 2012, trial was held before Judge Cooch and a jury. [A370-A561] During the trial, each side presented, inter alia, expert testimony concerning whether Drs. Conway and Kalish violated the appropriate standard of care. [Id.] At the conclusion of the trial, the jury rejected the claims of the plaintiff and her experts and found that the defendants did not breach the medical standard of care in their surgeries on the plaintiff. [Plaintiff's Exhibit 7]

The plaintiff then filed this appeal, arguing that the trial judge abused his discretion in precluding the testimony of the twenty-four hour rule and permitting certain testimony of Dr. Kalish as expert testimony.

ARGUMENT

I) THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN GRANTING THE DEFENDANTS' MOTION IN LIMINE AND BARRING EVIDENCE OF THE ALLEGED FAILURE OF DR. CONWAY TO COMPLY WITH A RULE OF CHRISTIANA HOSPITAL REQUIRING OPERATIVE REPORTS TO BE DICTATED WITHIN TWENTY-FOUR HOURS.

A) Questions Presented

Whether the trial court committed an abuse of discretion in granting the motion in limine precluding evidence of the alleged untimeliness of Dr. Conway's operative report concerning the December 2, 2007 surgery, where the plaintiff failed to demonstrate that the evidence was relevant in any way, because the plaintiff could not demonstrate anything factually false or incorrect in the report and because there was no causal connection between the report and the plaintiff's alleged damages; where any relevance which the evidence might have is significantly outweighed by the potential prejudice and risk of confusing the issues before the jury; where the plaintiff failed to demonstrate that the evidence could constitute proper impeachment evidence; and where the plaintiff failed to support her motion for reargument with a claim that the trial judge overlooked legal principles or misapprehended key facts.

B) Standard of Review

The standard of review on the admission of evidence is abuse of discretion. Wright v. State, 25 A.3d 747, 752 (Del. 2011). This Court has stated:

> We review the Superior Court's evidentiary rulings for abuse of discretion. An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice. In reviewing evidentiary rulings, we recognize that the trial judge is in a unique position to evaluate and balance the probative and prejudicial aspects of the evidence.

Fullman v. State, 32 A.3d 988, 2011 Del. LEXIS 638 *6 (Del. 2011)(internal citations omitted.)

C) The Argument On The Merits

1) The Preclusion Of Evidence Regarding The Untimeliness Of Dr. Conway's Operative Report Was Not An Abuse Of Discretion, As The Evidence Was No Relevant, Did Not Constitute Proper Rebuttal And Any Probative Value Would Have Been Greatly Outweighed By Prejudice And Potential For Jury Confusion.

This Court should affirm the decision of the trial court to preclude testimony on the case concerning the side issue of Dr. Conway's knowledge of and adherence to the twenty-four-hour rule for dictating post-operative reports.

The trial court first granted the defendants' motion that the evidence concerning the twenty-four-hour rule had no relevance to the case, in light of the fact that there is no causal connection between the failure to adhere to the rule and

the plaintiff's claimed damages. Further, the trial judge found that whatever relevance it might have is outweighed by its ability to prejudice the defendant. There was no abuse of discretion in that decision.

Further, the plaintiff's reargument motion primarily raised the issue of whether the evidence was proper impeachment testimony. However, the trial judge found that this was not a proper ground for reargument because the plaintiff did not claim that the judge overlooked legal principles or misinterpreted key facts. He further found that the plaintiff could not demonstrate that it was proper impeachment evidence, as the plaintiff could not show that the report was incorrect or lacked credibility. As such, reconsideration was properly denied. There was no abuse of discretion in the trial court's actions.

Delaware law has defined what constitutes "relevant evidence" and its importance:

> Evidence must be relevant to be admissible at trial. Delaware Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." We have explained that the definition of relevance encompasses materiality and probative value. Evidence is material if the fact it is offered to prove is "of consequence" to the action. Evidence has probative value if it "advances the probability" that the fact is as the party offering the evidence asserts it to be.

Watkins v. State, 23 A.3d 151, 155 (Del. 2011). In this case, the evidence concerning Dr. Conway's knowledge of and compliance with the twenty-four-hour rule is in no way relevant evidence. The basis of the plaintiff's case was the allegation that the surgical procedures which were performed by Dr. Conway and Dr. Kalish were negligently performed and that the physicians failed to "employ proper surgical techniques and proper surgical procedures." [A10; A11]

However, there was no evidence placed before the trial judge to demonstrate that the evidence concerning the timing of the operative reports, Dr. Conway's beliefs concerning the existence of a twenty-four-hour rule, the knowledge and opinion of other physicians, or any other evidence concerning the existence of that rule or the circumstances regarding the number of procedures done by Dr. Conway between the time of the plaintiff's procedure and the date the report was dictated are, in any way, material or probative to the issues applicable to the plaintiffs' cause of action.

None of the evidence the plaintiff wished to present demonstrated any causal connection between the operative report and the allegations of negligence or even proffered a theory whereby any damage alleged by the plaintiff could have been caused by the alleged delay in reporting and violation of the twenty-four-hour rule. The plaintiff's experts did not offer any testimony critical of the operative note at issue nor did

they offer any testimony demonstrating any causal connection between the report and the plaintiff's condition.

First, the testimony of Howard Beaton, M.D., specifically notes that the he had no criticism of Dr. Conway's operative notes and the manner which Dr. Conway conducted the surgery. He testified:

> Q: ...Are you critical of the surgery performed by Dr. Conway on December 2, 2007?
>
> A: No. If I can just qualify that a little bit. ***If we are talking about his operative note and the manner in which he conducted the surgery I found no criticism.***

[A37; 65:1-7, emphasis supplied.] Nowhere in his deposition testimony did Dr. Beaton express any criticism of the time in which it took to complete the operative report nor did his suggest in any way that the damages alleged by the plaintiff were caused by the timing of the report.

Similarly, the opinion of Dr. Maxwell Chait was devoid of any assertion concerning the timing of the operative note, that it breached any standard of care or that the timing of the completion of the note in any way caused injury or damage to the plaintiff. Expert testimony is necessary under Delaware law to demonstrate that the alleged failure regarding the timing of the report both constitutes a breach of the standard of care applicable to physicians and that such a breach would be causally connected to the plaintiff's damages. 18 Del. C. §

6853(e). See, also, Russell v. Kanaga, 571 A.2d 724, 732 (Del. 1990) (noting that medical malpractice action requires a showing of a "deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury.") The fact that the plaintiff has provided no such expert testimony demonstrates that the evidence is not relevant to this medical malpractice action.

Further, absent some indication that an expert was opining that the delay in the report constituted a breach of the standard of care which caused injury to the plaintiff, the evidence that plaintiff could proffer that the report was late or in violation of the twenty-four-hour rule would not be relevant because the fact of the report's lateness would not be a matter "'of consequence' to the action." As such, it would fail the test of materiality. Watkins, supra.

The materiality test is also not met here because the plaintiff could not demonstrate that there was anything wrong with the report, that the report was inaccurate or failed to properly detail the events of the surgery. Without such a showing, evidence which merely showed that the report was late and in violation of the twenty-four-hour rule which Dr. Conway should have known about, would not be probative of the claims of medical malpractice which had been asserted. Evidence which establishes that the report was late but not in any way

inaccurate and which does not demonstrate professional negligence, fails to demonstrate that the evidence has probative value because it could not "advance the probability" that medical malpractice had been committed.

As a result, there was no error in the trial judge granting the motion in limine.

Further, even if the plaintiff could somehow demonstrate that the evidence has some relevance, it was properly precluded as its potential prejudice of the evidence or confusion of the issues substantially outweighs any possible relevance, as the trial judge properly concluded. [A343; 38:4-16.]

Under Rule 403 of the Rules of Evidence, evidence that is relevant may be precluded where the risk of prejudice substantially outweighs any probative value the evidence has. Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1254 (Del. 2011). Rule 403 provides, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." D.R.E. 403.

Any probative value which the evidence concerning the delay in the completion of the operative report would be far outweighed by the danger of prejudice to the defendants and

confusion of the jury. Simply put, the question which this jury had to answer was whether the plaintiff's claimed damages were caused by a violation of the physician's standard of care. 18 Del. C. § 6853 (e)

The evidence that the plaintiff wished to present would have asserted that Dr. Conway had a duty under hospital rules to dictate a report within twenty-four hours and that he breached that duty. Clearly, this presents an overwhelming and unacceptable risk of confusing the jury as to the issues before it, because there was no evidence whatsoever of any causal connection between the plaintiff's damages and the twenty-four-hour rule.

Permitting this evidence would have presented an enormous risk of jury confusion, as it would have heard extensive evidence concerning a duty and the breach of that duty which had no causal connection, whatsoever, with the damages alleged. It would have set the stage for jury confusion and potentially finding the defendants to be negligent for Dr. Conway's failure to follow the twenty-four-rule when that it had no connection to the plaintiff's damages. Such a decision would have presented extreme prejudice to the defendants, as it would result in a finding of liability without liability being properly established under the law. See, Archy v. State, 976 A.2d 170 (Del. 2009)(table)(holding proper for trial judge to preclude

evidence where potential prejudice outweighed limited probative value.)

As such, the trial judge's decision to preclude the evidence of the twenty-four hour rule was no abuse of discretion and should be affirmed.

There was also no error in the trial judge denying the plaintiff's motion for reargument. In that motion, the plaintiff raised a new basis for denying the motion: the alleged relevance of the evidence as impeachment evidence. However, the trial judge properly found that the plaintiff did not assert proper grounds for reargument. He further correctly found that the plaintiff offered no basis to find the report lacked credibility or was appropriate for impeachment. There was no abuse of discretion in that decision. Hessler, Inc. v. Farrell, 260 A.2d 701, 702 (Del. 1969) ("A motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment...")

The trial judge in this case indicated that he reviewed both the plaintiff's opposition to the motion in limine and the argument on the motion and concluded that the primary basis for the motion for reargument – the supposed use of the evidence for impeachment – was not substantively addressed. As such, as the motion for reargument was not aimed at having the trial judge reconsider findings of fact or conclusions of law, but, rather,

to raise essentially a new point, the motion was properly denied.

Moreover, even the merits, the motion was properly denied. The evidence of the violation of the twenty-four-hour rule would have been improper for purposes of impeachment of Dr. Conway. In essence, the plaintiff sought to present evidence of a bad act to permit the jury to infer conformance with that bad act as a basis for finding negligence, in the hope that the jury would find that he committed negligence regarding the surgery because he failed to file his report timely. This was wholly improper. Under the Rules of Evidence, a party may not present specific acts or conduct of the witness for purposes of attacking his credibility, though the introduction of extrinsic evidence, where the witness's propensity toward truthfulness is not at issue. Manna v. State, 945 A.2d 1149, 1155-1156 (Del. 2008) (holding that limitation in D.R.E. 608(b) "is designed to avoid 'mini-trials' into the 'bad acts' of a witness which would require the use of extrinsic evidence to prove such acts."); Scott v. State, 642 A.2d 767, 770 (Del. 1994).

This case is a perfect example of that principle in action. Nothing in the fact that Dr. Conway did not produce a dictated report within twenty-four hours, even if a clear policy requiring one is assumed, would form a basis to find that his testimony concerning the plaintiff's surgery lacked credibility,

especially given the fact that the plaintiff presented absolutely no evidence that the report was in any way false or inaccurate. Even if it assumed for the sake of argument that the rule exists, applied in this case and that Dr. Conway failed to follow it, none of that would be relevant to show that he committed malpractice in any way in the performance of the surgery.

The plaintiff's suggests that the evidence could have been used to demonstrate to the jury that Dr. Conway was "attempting to cover-up his own negligence and the negligence of Dr. Kalish" [Plaintiff's brief at 22] or that he was "bush and hurried through Turner's surgery." [Plaintiff's brief at 29] But there was simply no basis to conclude that these things had any basis in reality, whatsoever.

The plaintiff's assertion that the jury could interpret the delay in reporting in these wild and unsupported ways is nothing short of a request to permit the jury to engage in pure speculation. This is simply not permitted. See, Farmer v. State, 698 A.2d 946, 949 (Del. 1997) (reversing based on the admission of evidence which permitted the jury to speculate concerning key fact of the case); Redden v. State, 281 A.2d 490, 491 (Del. 1971) (decrying jury speculation). There is no basis to believe that any of these wild insinuations are true, so this evidence would not be supporting the jury's conclusion on that

point. Rather, it would be an improper attempt to generate that conclusion without any support whatsoever,

The plaintiff also suggests that the evidence is appropriate to impeach the testimony of Dr. Matt L. Kirkland, who testified that the sentence in his expert report to the effect that "[n]o spillage of gastrointestinal contents was described," as a result of the second bowel resection surgery, was based on two things: Dr. Conway's operative report and the pathology report. He noted that the pathology report "states that the pathologist received these specimens, quote, unopened, which means that the specimen was intact." [A208].

Testimony and evidence that the report was produced late could not, in any way, impeach Dr. Kirkland's testimony on this point, absent some evidence to suggest that the report was, in any way, incorrect or wrong. In fact, as the trial judge recognized, there is no testimony or evidence showing that the report was not credible or that there was anything incorrect in the operative report. That conclusion is bolstered by the pathology report, which affirms the very point upon which Dr. Kirkland testified. So not only is there no basis to believe that the evidence concerning the timing of the report could rebut Dr. Kirkland's testimony, but the point is confirmed by the pathology report.

Therefore, the decision by the trial judge to bar preclude testimony concerning the timing of the operative report was not an abuse of discretion.

2) Summary

Because the evidence concerning the twenty-four hour rule was not relevant to any issue in the case, because its probative value was far outweighed by the potential for prejudice an jury confusion, and because there was no showing that the operative report was incorrect or a basis for impeachment, the trial judge's decisions were appropriate and should be affirmed.

II) SUPERIOR COURT DID NOT COMMIT REVERSIBLE ERROR IN OVERRULING THE PLAINTIFF'S OBJECTION TO THE TESTIMONY OF DR. KALISH, IN LIGHT OF HIS DISCLOSURE AS AN EXPERT AND HIS DEPOSITION TESTIMONY.

A) Questions Presented

Whether the trial court committed an abuse of discretion in permitting the defendant/physician to give fact testimony and to express expert opinions where the defendant/physician was identified in the Expert Disclosure and where the substance of his expert opinions mimicked those to which he testified during his deposition? If the admission of the testimony was an error, was it harmless error?

B) Standard of Review

The questions of the admission of evidence is generally left to the discretion of the trial court. Fullman, supra. Further, the admission of expert testimony requires that the

party proffering the expert to first disclose the witness's identity and the substance of his opinion. Bush v. HMO of Delaware, 702 A.2d 921, 923 (Del. 1997).

C) The Argument On The Merits

1) The Admission Of The Testimony Of Dr. Kalish Was Not Erroneous, As He Testified To Factual Information And Because Both His Identity and The Substance Of His Opinion Were Disclosed.

The plaintiff next asserts that it was error for the trial court to permit the testimony of Dr. Kalish concerning the post-surgical pathology report which detailed the pathology findings of the portion of the plaintiff's bowel removed during the initial surgery to repair the bowel obstruction.

The trial judge correctly denied the plaintiff's objection, asserting:

> He is one of the defendants, he performed the surgery. It's not uncommon for a treating physician, which he was, in part to, or most entirely in part to express expert opinions when it directly relates to something they know about and is relevant to the case, so I'm going to overrule plaintiff's objection and allow the doctor to discuss the pathology report to the extent he's able to.
>
> * * *
>
> I still think that it's permissible for this witness to give at least this testimony on the pathology report. Being the treating physician, it's within his competence to do so, you can test that on cross-examination.

[A500-A501, 205:14-21; 13-17]. There is no abuse of discretion in that decision. Because Dr. Kalish was a treating physician, his

evaluation of the pathology report, and his interpretation of its contents and meaning, are facts which were relevant to the case, because, as Dr. Kalish, testified, his review of these reports was part and parcel of his treatment of the plaintiff. [A501, 206:23-207:12] Thus, Dr. Kalish's testimony concerning the report, what the substance of the report meant and how it was interpreted by him are all relevant facts for the jury's consideration in this case.

As such, the trial judge did not abuse his discretion in permitting the testimony.

Further, the plaintiff primarily relies upon Barrow v. Abramowitz, 931 A.2d 424 (Del. 2007), where this Court held that a defendant physician who wishes to present any expert testimony at the time of trial must comply with the requirements of Del. Super. Ct. Civ. R. 16(e) and 26(e) and give "notice to an opposing party to give that party a fair opportunity to meet that 'expert' opinion on the same basis as any other expert opinion from a nonparty witness." Barrow, 931 A.2d at 433.

The Barrow Court cited to Bush for the proposition that a party complies with this notice requirement by providing two things: (1) the identity of the proposed expert and (2) the witness's opinion and the basis for that opinion. Barrow, 931 A.2d at 433-434 (citing Bush, at 923.)

In Bush, the plaintiff alleged that the trial court erred in limiting the testimony of her treating physician, Dr. Allen

A. Davies, who was called as a rebuttal witness, to the substance of his pre-trial deposition. Bush, at 922. The plaintiff failed to identify Dr. Davies as an expert during discovery. However, well after Dr. Davies's deposition was taken, the plaintiff identified him in her pre-trial stipulation, listing him as an expert in "liability and proximate cause and fact witness." Id. Nowhere in that deposition did Dr. Davies offer an opinion on whether the defendants had breached the standard of medical care, however. Id.

At trial, when the plaintiff called Dr. Davies as a rebuttal expert witness, the trial judge limited his testimony to that in his deposition, holding that the deposition would constitute the "substance" of the facts and opinions to which he would be expected to testify, as per Super. Ct. Civ. R. 26. This Court held that this was not an abuse of discretion. Id. Thus, Bush establishes that an expert's deposition testimony suffices, in and of itself, as compliance with the notice requirement for the opinions expressed in the witness's deposition.

In this case, Dr. Kalish was identified in the April 12, 2011 Expert Disclosure. Specifically, the disclosure states:

> C. Eric Kalish, MD
>
> To the extend deemed necessary under Court rules for expert witness disclosure requirements, where

> the opinions of Dr. Kalish may be considered expert opinions, he will testify accordingly and as set forth in his deposition and the medical records.

[A735] Moreover, Dr. Kalish was identified as both a fact and expert witness in the May 2, 2012 pre-trial stipulation and order. [A298] Therefore, this disclosure demonstrates that the plaintiff's counsel's assertion that there was no disclosure of any opinion to which Dr. Kalish would testify. Rather, it is clear that the defendants disclosed both Dr. Kalish's identity as an expert and the subject and basis of his testimony.

Further, because the disclosure statement specifically stated that Dr. Kalish's opinion testimony would encompass his deposition testimony and his opinions in the medical records, the plaintiff was well aware of the content of his opinion and was capable of preparing to address it.

The plaintiff cites to Dr. Kalish's testimony at trial concerning the surgical pathology report stemming from the first bowel-resection surgery. He was asked about the pathology report because, as he testified, it is his "normal practice [in the] care of the patient" to review them. [A501] He testified that he has familiarity with the terms used by the pathologist and explained the meaning of the notation on the pathology report that the sample "shows a focal small intestinal ulceration with transmural extension of acute inflammation to the serosa." [A501] Dr. Kalish explained that it means that

the there was a small portion of the interior of the lining of the bowel which has started to die and that the inflammation associated with it was present out to the serosa, which is the membrane enclosing the bowel. [Id.]

Nothing in that testimony was improper expert testimony. Indeed, that testimony was clearly fact testimony, as it was nothing more than an explanation of a document which is typically produced after procedures of this kind and which are reviewed in every case by Dr. Kalish. It is well within Dr. Kalish's competence as a treating physician. S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co., 2010 Del. Ch. LEXIS 191 n.4 (Del. Ch. Sept. 16, 2010)(holding that a treating physician may testify as either a fact or expert witness.)

Further, he was asked about the notation in the report of a section of "denuded epithelium" which he testified was an indication of damage to the internal lining of the mucosa, or the innermost layer of the bowel tissue. [A501] Again, this is fact testimony, in which he explained to the jury what the report meant to him as he reviewed it.

The plaintiff asserts that the testimony on these points contradicted the testimony of her expert, Dr. Beaton, who asserted that these findings by the pathologist had "no meaning whatsoever." [A422, 106:12-13] However, the fact that the witnesses had differencing views on the meaning of these

findings did not demonstrate that Dr. Kalish's testimony should have been barred. Rather, it merely established a conflict which, if necessary, it was the jury's burden to resolve. As they found an absence of negligence, it must be presumed that the jury found in favor of the defendants.

The plaintiff also appears to take issue with the fact testimony which indicated that the section of the bowel was possibly ischemic and that if the surgeon did not perform a resection, the consequences could include the tissue becoming necrotic. [A501]

Besides this fact being part and parcel to his treatment of the plaintiff, Dr. Kalish's deposition testimony included this opinion.[1] In his deposition, Dr. Kalish testified that his decision to resect the bowel was based on his intraoperative judgment and that he based his decision on the fact that the resection is the prudent choice, the fact that the color of the tissue led him to believe that the tissue was not viable, the fact that the lumen – the central cavity in the intestine – was

[1] While the trial judge did not examine Dr. Kalish's deposition and rely on Bush, it is well established that this Court may affirm for reasons other than those stated by the trial court. Riverbend Cmty., LLC v. Green Stone Eng'g., LLC, 55 A.3d 330, 334 (Del. 2012); Colon v. State, 900 A.2d 635, 638 (Del. 2006) ("While the judge articulated a different rationale for his ruling in this case, we may affirm on grounds other than those relied upon by the judge.")

very narrow, and because of the inflammation and appearance of the bowel wall. He testified:

> Q: I want you to talk about why at that point in time you decided to actually resect the bowel as oppose to just leaving it alone and saying it would be fine.
>
> A: That's an intraoperative judgment that's made on every small bowl obstruction and is basically – it's based on potential for that segment of bowel to have a problem afterwards in terms of its viability.
>
> Any portion of small bowel that is stuck in an adhesion, whether it's one inch or six feet, can be damaged in terms of the integrity of the wall of the bowel, and you make the assessment during the surgery as to whether or not that is something that is possibly going to be a problem in the future.
>
> And if you have to think about that for any significant portion of time, the prudent course is to resect it back to healthy bowel because the sequel of not doing that are a breakdown of that portion of the bowel, and that's a very emergent surgery and a completely avoidable complication.

[Defendants' Exhibit 1; 20:2-24]

> Q: What is it about the condition of the small bowel in this circumstance that made you question its viability?
>
> A: The appearance, the color, the potential bruising of the bowel. I don't specifically remember how bruised the bowel looked in this case, but the bowel that's involved in the process such as this can have significantly altered visibility, and that's usually pretty easy to tell visually.

[Id., at 24:14-23]

> Q: What was the length of the small bowl that was compromised, in your opinion?

A: My operative report says "1 inch." It could have been two inches. It could have been three inches. I think the pathology report is fairly indicative of a similar length.

Q: When you say [in the operative report] it "was too narrowed to leave it alone," what did you mean?

A: That's one description of it, narrowed meaning the lumen of it was grossly compromised in terms of its size.

And also I didn't include it in the report, but the acute inflammation and the appearance of the wall of the bowel is – it's a factor in the decision, as well.

[Id., at 33:16-34:6]

Thus, nothing which was testified to at trial had not been previously detailed in Dr. Kalish's deposition. At trial, Dr. Kalish discussed indications of the bowel tissue having been compromised, specifically by ischemia. In his deposition, he indicated that the possibility that such a compromise in the tissue – indicated by the tissue color, the narrowness of the lumen and the inflammation of the bowel wall – led him to conclude that the resection was appropriate.

Moreover, he specifically testified that what is sought to be avoided by the resection is "a breakdown of that portion of the bowel." While in his trial testimony, Dr. Kalish was much more colorful in his description – describing this breakdown in terms of "purplish discoloration," "liquification" and the tissue turning "soft... you grab it and it just melts," [A501] –

however, in substance his testimony did not differ from that offered in his deposition. In both cases he testified that the appearance and condition of the section of the bowel was such to indicate that it should be resected, and the failure to do so could result in the tissue breaking down and becoming necrotic.

Consequently, the requirement under Bush to identify the identity of the expert and the substance of his opinion. As the opinions were contained within Dr. Kalish's deposition, there was no error in the trial court permitting Dr. Kalish to testify.

2) Even If The Admission Of The Testimony Of Dr. Kalish Was Erroneous, It Was Harmless Error, as Defendants' Expert, Dr. Kirkland, Also Testified About The Pathology Report and The Jury Would Have Heard The Evidence Regardless of Dr. Kalish's Testimony

Finally, even if permitting this evidence was somehow found to be erroneous, it was no worse than harmless error. The evidence and opinions about the microscopic pathology showing necrosis, in the context of the pathology report, about which the plaintiff objects to Dr. Kalish being permitted to testify, was also given by the defendants' expert, Dr. Kirkland. He testified:

> Q: Was it reasonable and within the standard of care for Dr. Kalish intraoperatively to remove that small section of bowel?
>
> A: Absolutely. And the pathology report justifies it.
>
> * * *

Q: Now, you talked about the pathology report as justifying it. Can you just-- I have a copy of it here -- tell the jury, from these sections of the pathology report, what that means?

A: Okay. What I'll do is, I'll read the report and, then, I'll explain what the report means.

Q: Okay.

A: So, "Sections" -- which sections means the pieces that the pathologist cut to put on the microscope slides -- "Sections show focal small intestinal ulceration with transmural extension of acute inflammation to the serosa." I don't need to read the rest of it because they're not important.

And, then, they go on to say, "Some areas of mucosa separate from the ulcer show denuded epithelium." The epithelium is the skin on the inside of the small intestine. It's the most sensitive part to ischemia. In other words, the -- its the part that's most sensitive to not getting an adequate blood supply. So, ulceration is the loss of that epithelium, loss of that skin.

So, that means that she's got partial thickness ischemia, partial thickness bowel dying. Now, the other problem piece of this is, she's got inflammation, which is the beginning of the process of ischemia and the response to ischemia, because when you get ischemia you get this influx of inflammatory cells that extends through full thickness through the bowel. When you have a piece of bowel like this, the odds are that if you don't take it out, it's going to perforate or stricture down and narrow and need a subsequent operation. In other words, perforate means subsequent operation, or stricture means subsequent operation. A piece of the bowel like this is not going to get better on its own.

Q: And it says denuded epithelium. And, then, it says, "Alteration might represent localized ischemic change." Ischemia means -- is the toss of blood supply?

A: Correct It's the loss of blood supply.

Q: Now, it doesn't say necrosis here. Is that -- why is that?

A: Necrosis you can't see because necrosis is what happens when the cells die. The cells die, they liquify, and they kind of just float away. So, unless there's an extensive area of necrosis, they may not see it. Something has to be left behind to see it. Small areas like this, the cells have died and they've floated away and they're off in the formalin the specimen was in or in the processing solutions in pathology.

Q: All right. You talked about, early on in your testimony, about when a surgeon goes in. Is it the surgeon's goal to go in before the tissue actually necroses and dies?

A: The surgeon's goal is to either go In before the tissue necroses and dies, which is a tough call to make, or at the least, go in before the bowel perforates. What you want to do is, you want to get in before you have full-thickness necrosis because that's when it's terrible.

[Exhibit 2, at 146:20-149:16]

Thus, even if Dr. Kalish was barred from giving the testimony, the jury would have heard the same opinions from Dr. Kirkland. Consequently, it was harmless error. See, Del. Super. Ct. Civ. R. 61, ("No error in either the admission or the exclusion of evidence...is ground for granting a new trial or for setting aside a verdict... unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must

disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.")

2) Summary

Because Dr. Kalish's testimony was primarily of a factual nature, and because he was nevertheless identified as an expert and the substance of his opinion was disclosed in discovery, there was no error in the trial judge permitting his testimony. This Court should find no abuse of discretion and affirm that decision.

CONCLUSION

For all the aforementioned reasons, this Court is respectfully requested to affirm the decisions below and the jury's verdict in favor of the Defendants below, Appellees.

Respectfully submitted,

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