IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TRISHA MOSES and SA'RELL MOSES, a Minor, by and through her Next Friend, Trisha Moses,	:	C.A. No. K13C-04-010 WLW
Plaintiffs,	:	
v.	:	
AARON DRAKE,	:	
Defendant.	:	

Submitted: May 2, 2014
Decided: May 13, 2014

ORDER

Upon Defendant's Motion to Dismiss.
Granted.

William D. Fletcher, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for Plaintiffs.

Arthur D. Kuhl, Esquire of Reger Rizzo & Darnall, LLP, Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

Before the Court is Defendant's motion to dismiss Plaintiffs' complaint. The Court has carefully considered the parties' submissions and the applicable legal authority. For the reasons set forth below, Defendant's motion shall be treated as a motion for summary judgment, and is **GRANTED** in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On April 6, 2011, Plaintiff Trisha Moses (hereinafter "Trisha") was involved in a rear-end vehicle collision with Defendant Aaron Drake (hereinafter "Defendant") while Trisha was stopped at the intersection of U.S. Route 13 and the Dover Mall's north exit in Dover. Trisha was twenty-six weeks pregnant at the time of the accident.

Trisha was admitted to Kent General Hospital on the day of accident for complaints of lower back pain and for monitoring of her pregnancy. According to Trisha's complaint, Trisha was initially hospitalized on April 6 and 7, 2011 immediately following the accident, then was treated on April 18 and again on April 27, 2011 for pregnancy-related complications. On May 15, 2011, Trisha prematurely gave birth to Plaintiff Sa'Rell Moses (hereinafter "S.M." and together with Trisha, collectively "Plaintiffs").

Trisha's complaint alleges that Defendant's negligence proximately caused Trisha's injuries, pregnancy complications and the premature birth of S.M. The complaint also alleges that S.M. was born with multiple physical and mental deficiencies and dysfunctions as a result of the accident.

On January 31, 2014, Plaintiffs identified Dr. Stephen Ogden (hereinafter "Dr.

Ogden") as their medical expert for trial. Dr. Ogden treated Trisha following the accident. Dr. Ogden's report, dated January 15, 2014, states in pertinent part: "It is feasible that the complaints [Trisha] presented with are causally related to her motor vehicle accident and to the best of knowledge were not related to a previous injury or illness." Dr. Ogden's report does not address any alleged medical condition of Trisha or S.M. other than Trisha's lower back pain.

On April 16, 2014, Defendant filed the instant motion, styled as a "motion to dismiss" without any reference to a particular rule of the Superior Court Rules of Civil Procedure that provides a basis for the motion. Defendant references the "raw medical records" produced during the course of discovery as well as Dr. Ogden's expert report. Defendant argues that these documents do not support the specific allegations in Plaintiffs' complaint regarding induced premature birth or S.M.'s alleged developmental disabilities. Defendant contends that all claims related to any prenatal injuries must be dismissed due to lack of any expert medical opinion, and further argues that Dr. Ogden's report does not provide a sufficient basis for his expert report.

Defendant focuses on Dr. Ogden's use of the term "feasible," and contends that because the dictionary definition of "feasible" is synonymous with "possible," this does not rise to level of "reasonable probability" needed for expert medical testimony. Plaintiffs do not oppose dismissal of all claims pertaining to S.M., because Trisha has chosen to no longer pursue any claims on S.M.'s behalf. Plaintiffs oppose dismissal of Trisha's claims for physical injuries sustained in the accident and for the

hospitalization and monitoring of her pregnancy condition. Plaintiffs also seek damages for Trisha's mental suffering, distress and anxiety caused by her concerns over her pregnancy complications, and oppose dismissal of those claims as well.

Plaintiffs contend that the medical records of Trisha's hospitalization supports her claims pertaining to her pregnancy monitoring and related stress. Plaintiffs also argue that Dr. Ogden's use of "feasible" provides a sufficient basis for his opinion, and contends that simply because "feasible" is synonymous with "possible" does not mean that Dr. Ogden intended to state that it was only possible that Trisha's back pain was caused by the accident. Plaintiffs argue that a medical expert's failure to use "magic words" does not render the opinion inadmissible. Plaintiffs have also provided a supplemental report by Dr. Ogden dated April 25, 2014 in which Dr. Ogden states it is "more likely than not" that Trisha's complaints of back pain were causally related to the accident.

Plaintiffs state in their response to the instant motion that it is undisputed that Trisha has a prior history of pregnancy difficulties. The cutoff date for disclosure of Plaintiff's medical experts has already expired. However, the cutoff date for discovery is not until October 8, 2014.

STANDARD OF REVIEW

A motion to dismiss that "relies on materials beyond the pleadings shall be treated as a motion for summary judgment."[1] Summary judgment should only be

[1] *Bracken-Bova v. Liberty Mut. Fire Ins. Co.*, 2011 WL 5316600, at *1 (Del. Super. Oct. 7, 2011) (citing Del. Super. Ct. Civ. R. 12(b)).

granted when the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[2] The moving party bears the initial burden of demonstrating the nonexistence of material issues of fact; the burden then shifts to the nonmoving party to show that there are material issues of fact in dispute.[3] The Court views the record in the light most favorable to the nonmoving party.[4] Summary judgment will not be appropriate when material facts are in dispute or when it seems desirable to inquire more thoroughly into the facts, to clarify the application of the law to the circumstances.[5] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[6] Summary judgment may be denied without prejudice if "discovery is in its nascent stage" and summary judgment would be premature.[7]

DISCUSSION

As an initial matter, the Court notes that Defendant's motion to dismiss must

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[2] *Id.* (citing Del. Super. Ct. Civ. R. 56(c)).

[3] *Fauconier v. USAA Cas. Ins. Co.*, 2010 WL 847289, at *2 (Del. Super. Mar. 1, 2010) (citing *Moore v. Sizemoore*, 405 A.2d 679, 680 (Del. 1979)).

[4] *Id.* (citing *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995)).

[5] *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962) (citing *Knapp v. Kinsey*, 249 F.2d 797 (6th Cir. 1957)).

[6] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[7] *Bracken-Bova*, 2011 WL 6316600, at *1 (citing *Hampton v. Warren-Wolfe Assocs., Inc.*, 2004 WL 838847, at *2 (Del. Super. Mar. 25, 2004)).

be construed as a motion for summary judgment. The focus of Defendant's motion is Dr. Ogden's expert report, which Defendant attached to his motion. The motion also refers to medical records that have been produced in discovery thus far. Plaintiffs have attached these records to their response, and have provided the Court with a supplemental report by Dr. Ogden that further clarifies the expert's opinion. Because both parties are relying on materials beyond the pleadings to litigate this motion, Defendant's motion to dismiss must be analyzed as a motion for summary judgment.[8] The Court also notes that Plaintiffs concede their claims pertaining to S.M. and are not opposing Defendant's motion in regards to any claims being asserted on S.M.'s behalf. Accordingly, summary judgment is granted for Defendant on all claims belonging to S.M.

This leaves the issue of whether summary judgment on Trisha's claims is appropriate. Based on the allegations in Plaintiffs' complaint and their response to the instant motion, Trisha's claims can best be classified into three categories: (1) Trisha's lower back pain; (2) Trisha's pregnancy difficulties and complications subsequent to the accident, and the associated treatment costs; and (3) Trisha's "mental suffering, distress, and anxiety" over concern for her pregnancy following the accident.

[8] The Court notes that Defendant's motion makes no mention of a particular rule of procedure that provides the basis for his motion. The Court was left to assume that Defendant was moving for dismissal pursuant to Rule 12(b)(6). The parties are advised, for future reference, to include in their motion the particular rule of the Superior Court Rules of Civil Procedure that is being relied upon as the basis for the motion.

Medical expert testimony regarding causation is required when there is a claim for bodily injuries.[9] When a plaintiff seeks to recover damages for mental anguish or emotional distress, the plaintiff must make a sufficient showing of physical injury stemming from the anguish or distress in order to survive summary judgment.[10]

In the recent case of *O'Riley v. Rogers*, the Supreme Court held that when an expert offers a medical opinion, it should be stated in terms of "a reasonable medical probability" or a "reasonable medical certainty" because an expert opinion cannot be based on speculation or conjecture.[11] The Supreme Court has observed that "a doctor's testimony that a certain thing is possible is no evidence at all."[12] In the earlier case of *General Motors Corp. v. Freeman*, the Supreme Court stated "[w]e do not believe that the distinction between the use of the words 'possible' and 'probable', and other words of similar import, should be followed too closely."[13] The *Freeman* Court based this statement on the "general knowledge among those of us who are at all familiar with the testimony of physicians" that medical experts may use the word "possible" to mean "probable," and vice versa.[14]

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[9] *Collis v. Topper's Salon and Heath Spa, Inc.*, 2013 WL 4716237, at *2 (Del. Super. Aug. 29, 2013).

[10] *Roberts v. Delmarva Power & Light Co.*, 2 A.3d 131, 143 (Del. Super. 2009).

[11] *O'Riley v. Rogers*, 69 A.3d 1007, 1011 (Del. 2013) (citations omitted).

[12] *Id.* (citing *Oxendine v. State*, 528 A.2d 870, 873 (Del. 1987)).

[13] *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).

[14] *Id.*

Plaintiffs have only presented expert testimony on Trisha's back pain, and rely on the medical records of Trisha's hospitalization in support of Trisha's other claims. This is not sufficient. Dr. Ogden's report, as well as his supplemental report, only contains an opinion on Trisha's back pain. Dr. Ogden offers no medical opinion whatsoever addressing Trisha's pregnancy complications or S.M.'s premature birth. The deadline for disclosure of Plaintiffs' medical experts has expired, thus Plaintiffs are prohibited from proffering any additional expert testimony on Trisha's pregnancy complications. It follows that Plaintiffs cannot produce the necessary expert testimony needed to establish that Defendant's negligence was the proximate cause of Trisha's pregnancy complications. Trisha's pregnancy complications and premature birth can be appropriately classified as bodily injuries. Thus, summary judgment is granted on Plaintiffs' claims for damages for Trisha's pregnancy complications, premature birth, and associated medical costs.

Plaintiffs' claim for Trisha's "mental suffering, distress, and anxiety" can appropriately be categorized as seeking damages for mental anguish. Plaintiffs have not made the requisite showing of physical injury stemming from that anguish that is required to survive summary judgment. To the extent that Plaintiffs argue that Trisha's premature birth and pregnancy complications constitutes the physical injury, Plaintiffs must still provide medical expert testimony establishing a causal nexus between the injury and the accident. They have failed to do so, and it is too late to identify another expert. Accordingly, summary judgment is granted on this claim as well.

This leaves Trisha's claim for damages pertaining to her lower back pain. The parties quibble over the meaning of the word "feasible" as used by Dr. Ogden in his reports. It should be noted that nowhere in his report or his supplemental report that Dr. Ogden uses the terms "reasonable medical probability" or "reasonable medical certainty." Instead, Dr. Ogden simply uses the term "feasible" in his original report, and the phrase "more likely than not" in his supplemental report.

Plaintiffs argue that under *Freeman* this is acceptable, and contend that the absence of "magic words" does not render an expert's opinion inadmissible. However, *Freeman* was decided over fifty years ago. The more recent Supreme Court decision of *O'Riley v. Rogers*, decided last year, makes it unequivocally clear that use of the phrases "reasonable medical probability" or "reasonable medical certainty" *is* required as to ensure that an expert's opinion is not based on impermissible speculation or conjecture. Neither of Dr. Ogden's reports state that the doctor's opinion is based on a reasonable medical probability or certainty. Accordingly, the opinions within Dr. Ogden's reports are inadmissible.

Even though discovery in this case is still in the early stages, the cutoff for Plaintiffs' medical experts has already passed. Medical expert testimony is necessary to establish that Trisha's back pain was proximately caused by the accident. Dr. Ogden's opinion is inadmissible speculation, and Plaintiffs are precluded from offering any other expert testimony. Accordingly, summary judgment is appropriate on this claim as well.

CONCLUSION

Defendant's motion to dismiss is in essence a motion for summary judgment. Based on the foregoing, there is no material issue of fact pertaining to any of Plaintiffs' claims. Therefore, Defendant's motion for summary judgment is **GRANTED** in its entirety on all of Plaintiffs' claims.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh