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IN THE  
**Supreme Court of the State of Delaware**

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JENNIFER F. DIVITA, Individually and  
as Administratrix of the Estate of  
BENNY DIVITA II, Deceased, and as  
Parent and Next Friend of BECKETT  
DIVITA, a Minor,

Plaintiff-Below, Appellant,

v.

BAYHEALTH MEDICAL CENTER (at  
Kent General Hospital), a Delaware  
Corporation,

Defendant-Below, Appellee.

No. 225,2014

APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE IN AND  
FOR SUSSEX COUNTY

C.A. No. S10C-03-030

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**APPELLANT'S SECOND CORRECTED OPENING BRIEF**

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## NATURE OF PROCEEDINGS

Appellant Jennifer Divita, individually, and as administratrix of the estate of Benny Divita and as parent and next friend of Beckett Divita (the “Plaintiff”), filed a wrongful death complaint alleging medical negligence in the Superior Court of the State of Delaware on March 24, 2010 against, *inter alia*, Bayhealth Medical Center, Inc. (the “Hospital Defendants”), Michael Sweeney, MD and his practice Internal Medicine of Dover, P.A. (the “Physician Defendants”). (A24-A34). The case proceeded to a jury trial on December 2, 2013.

After 5:00 PM on the last business day before trial was set to begin, Plaintiff’s counsel received a twenty-six second video animation that purported to depict Plaintiff’s decedent, Benny Divita, aspirating vomit into his lungs.<sup>1</sup> On December 2, 2013, Plaintiff filed a motion *in limine* that sought an order excluding the animation on the grounds that it was untimely produced and speculative. (A125-A132). On December 2, 2013, the trial judge deferred a ruling on Plaintiff’s motion, but ordered that the animation not be used until the motion could be decided. Plaintiff rested her case on December 5, 2013. The next day, on December 6, 2013, the Physician Defendants filed a written opposition to Plaintiff’s motion *in limine* regarding the animation. (A358-A363).

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<sup>1</sup> Plaintiff’s counsel received an electronic version of the animation via email. Because the software used to create the animation was not compatible with Plaintiff’s counsel’s computer network, a “thumb drive” of the animation was hand-delivered later that evening.

On December 10, 2013, Defendants requested that the trial judge decide Plaintiff's motion in *limine*, informing the trial judge that they intended to use the animation during the testimony of one of their retained expert witnesses, Richard Schwab, MD. After the trial judge viewed the animation, and following a brief period of *voir dire* of Dr. Schwab and argument on the motion, the trial judge admitted the animation. (A388). Thereafter, the animation was played to the jury during Dr. Schwab's testimony and during closing argument.

On December 12, 2013, the jury returned a verdict finding that the Hospital Defendants were negligent, but finding that there was no proximate causation.<sup>2</sup> (A484-A487). On December 20, 2013, Plaintiff filed a motion for a new trial, arguing that the trial judge abused his discretion in admitting the late-disclosed and speculative animation. (A488-A502). On January 7, 2014, Hospital Defendant filed its response (A503-A537) and on January 10, 2014, Plaintiff's counsel filed a rebuttal. (A538-A543).

By letter on April 14, 2014, the trial judge denied Plaintiff's motion, attached hereto as Exhibit A. (A544-A545). This is Plaintiff's appeal from the verdict regarding proximate causation and the trial judge's order of April 14, 2014 holding that he did not err in admitting the animation.

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<sup>2</sup> The jury returned a verdict in favor of the Physician Defendants, finding that they were not negligent. Plaintiff does not appeal that portion of the verdict.

## **SUMMARY OF ARGUMENT**

1. The trial judge erred and abused his discretion when he admitted the late-produced and speculative animation.

## STATEMENT OF FACTS

On April 4, 2008, Plaintiffs' decedent, Benny Divita II ("Benny Divita"), age 35, was admitted to Kent General Hospital, operated by the Hospital Defendants, with a chief complaint of nausea and vomiting and right upper quadrant pain. (A103). During the course of his admission, Dilaudid 2mg IV prn every 2 hours was ordered for pain, and between approximately 5:20 PM on April 4, 2008 and 1:15AM on April 5, 2008 (less than 8 hours), Benny Divita received 9mg of Dilaudid. (A103). It was undisputed that the side effects of Dilaudid can include nausea and vomiting and sedation. (A168-A169)

Monica Myles, LPN ("Nurse Myles"), one of the Hospital Defendant's nurses who was caring for Benny Divita on the shift in question, testified that at approximately 4:00 AM on April 5, 2008, she saw Benny Divita using a full-face CPAP mask and machine, which was brought in from home. (A268).

Nurse Myles testified, however, that she did not obtain a doctor's order for Mr. Divita's use of CPAP after she saw Benny Divita using his CPAP breathing machine at 4:00 AM (A266).<sup>3</sup> Nurse Myles also testified that it was her responsibility to obtain a physician's order. (A269). Nurse Myles further testified that she was not concerned about Benny Divita's use of a full-face CPAP mask,

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<sup>3</sup> The Hospital Defendant's internal policy required a physician's order before CPAP could be used. (A546-A552). Defendant Physician testified that "for the safety of the patient" (A149), the hospital's CPAP policy requires that "caution should be used in patients with a recent history of nausea and vomiting." (A148-A149).

and that she told her supervising registered nurse, Marjorie Berna, that she was going to wait until the morning to obtain a doctor's order. (A268). Finally, she testified that she was unaware that Benny Divita was hospitalized for nausea and vomiting. (A275).

At approximately 6:55 AM, and before a physician's order for CPAP was obtained, Benny Divita was discovered in cardiopulmonary arrest. Resuscitation efforts could not return spontaneous circulation and Benny Divita was pronounced dead at approximately 7:18 AM. The undisputed cause of death was aspiration of gastric contents. (A386). Benny Divita is survived by his wife, Jennifer Divita, who at the time was eight months pregnant with their first child, later named Beckett.

As stated above, hospital policy required a physician's order before CPAP could be used. (A546-A552). Defendant Physician testified that "for the safety of the patient" (A149), the hospital's CPAP policy requires that "caution should be used in patients with a recent history of nausea and vomiting." (A148-A149) (emphasis added). Defendant Physician also explained that a patient is more likely to aspirate if the patient has "a mask over their face and [] they start to vomit." (A150).

Prior to the testimony of Physician Defendants' expert pulmonologist, Dr. Schwab, the Court heard *voir dire* regarding the animation. During *voir dire*, Dr.



Schwab testified he first saw the animation two or three weeks prior to trial (A377). Dr. Schwab admitted that the animation was inaccurate, in that it depicted all of the lobes of Mr. Divita's lungs being filled with vomit. (A386). Dr. Schwab also admitted that "we don't really understand aspiration, to be fair" (A383) and that no one has actually watched the physical process of a patient aspirating, which would include the speed by which it occurs. (A379). Finally, Dr. Schwab admitted that aspiration can include vomit going into the patient's mouth and, in fact, testified that "I've seen it happen both ways." (A382).

The video animation at issue was titled "Regurgitation and Aspiration of Stomach Contents Directly into the Lungs." (emphasis added). As mentioned earlier, it was produced after 5:00 PM on the last business day before trial. It was not listed as an exhibit on the pre-trial order and it was not mentioned during the pretrial conference. (A103-A124). The animation depicted, in the span of 26 seconds, gastric content coming up from the stomach, stopping at the top of the esophagus, making a turn into the trachea, and then flooding all of the lung lobes. The animation did not depict vomit coming up into Mr. Divita's mouth.

## ARGUMENT

### **I. QUESTION PRESENTED**

Is a video animation that is speculative and produced on the last business day before trial admissible? The answer to that question, based on settled principles of Delaware law and the facts and circumstances of this case, is an unequivocal no. This question was preserved for appeal in Plaintiff's motion *in limine*. (A125-A132).

### **II. ADMISSION OF THE VIDEO ANIMATION CONSTITUTED AN ABUSE OF DISCRETION WARRANTING A NEW TRIAL**

#### **A. Standard and Scope of Review**

The standard and scope of review is whether the trial judge abused his discretion by admitting the animation and then refusing to order a new trial. *Berry v. Cardiology Consultants, P.A.*, 935 A.2d 255 (Del. 2007).

#### **B. The Merits**

A party is entitled to a new trial when evidence or argument that should have been precluded is admitted. *Deangelis v. Harrison*, 628 A.2d 77 (Del. 1993). A new trial against the Hospital Defendants on proximate cause and damages is warranted because the video animation should have been excluded as untimely and because it is speculative and prejudicial.

##### **1. Timeliness**

Due to the last-minute disclosure on the eve of trial, Plaintiffs had no

opportunity to depose the opposing causation experts, including Dr. Schwab, on the specific contents of the animation. Plaintiffs were also deprived of the opportunity to prepare a competing animation or to challenge the accuracy of the animation from an anatomical or physiological standpoint. Because the trial judge did not rule on Plaintiff's motion in *limine* until December 10, 2013, which was after the Plaintiff's case closed, Plaintiff was unable to have her experts rebut the animation.

Had the tables been turned, and this case involved a motor vehicle collision, the Plaintiff would never be permitted to use animation purporting to show her version of how an accident occurred if the animation was withheld and not produced until the eve of trial. The defense would rightly object because they would need time to review the animation, challenge the expert's underlying opinions and assumptions at the deposition of the accident reconstructionist and would need additional time to prepare rebuttal animation. The late disclosure of the animation alone warrants its exclusion.

According to defense expert Richard Schwab MD, he reviewed the animation two or three weeks prior to trial. Despite the animation being produced to Dr. Schwab two or three weeks prior to trial, it was withheld from Plaintiff until the last business day before trial. The trial judge recognized the inherent unfairness of the late production, noting that he was "not thrilled with this coming

to the plaintiff's attention when it has come to the plaintiff's attention." (A388). Despite the trial judge's well-founded concerns expressed on the record, he sidestepped that argument and failed to address the timeliness of the disclosure in his order denying a motion for a new trial. (A544-A545).

The animation, by its nature and its narration by Dr. Schwab, contained opinion testimony that was also not properly disclosed. Defendant's Rule 26 expert disclosure for Dr. Schwab's causation opinion provided only as follows: "Mr. Divita's OSA [Obstructive Sleep Apnea] and/or CPAP usage were not the proximate cause of Mr. Divita's death." (A35-A37). Dr. Schwab, in his discovery deposition, offered no opinions regarding whether the vomit stopped at Benny Divita's esophagus, such that it and did not go into his mouth or mask. (A39-A102). Because the video was not produced before Dr. Schwab's testimony, Plaintiffs were prevented from questioning him about those opinions before trial. As such, the animation (and the opinions connected to it) should not have been admitted.

## 2. The Animation is Speculative and Prejudicial

Even had the animation been timely produced, the speculative nature and prejudicial effect of the animation warrants its exclusion. The Physician Defendants posited, and the trial judge accepted, that the animation was designed simply to show how aspiration occurs. (A370). If the reason for playing the

animation was simply to show the jury how aspiration occurs, the animation had no probative value because the parties stipulated that aspiration was the cause of death. (A386).

The animation, however, by way of its title, text, and the contemporaneous narration by Dr. Schwab, could not be separated from defendants' arguments about how Mr. Divita died – namely, that his lungs filled very quickly after one “massive” episode of vomiting and that he did not vomit into his mouth.<sup>4</sup> Specifically, the animation showed Mr. Divita with a tight-fitting full-face CPAP mask. His mouth was closed and he was breathing through his nose. The animation then showed vomit coming up from the stomach, but abruptly stopping at the top of the esophagus, making a 90 degree turn, and then going down the trachea and completely filling both lungs.<sup>5</sup>

If the jury accepted the animation as being factually accurate, it likely would have concluded that the CPAP mask (and lack of monitoring and caution in the use of a tight-fitting full-face mask) did not contribute in any way to Mr. Divita's death. The problem here lies in the fact there is no evidence that the vomit did not go into the patient's closed mouth and, because it was closed and he was wearing a

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<sup>4</sup> The use of the word “massive” to describe the aspiration originated with defense expert Dr. Schwab. The treating pathologists never used that term in their autopsy reports.

<sup>5</sup> Dr. Schwab admitted the animation inaccurately portrayed the entire left lung being filled with gastric contents. (A375). To the contrary, the autopsy report indicated that the left upper lobe was only partially affected. *Id.*

full face mask, then go back down his throat when he gasped for air after being unable to vomit.

As set out above, defense expert Dr. Schwab admitted during *voir dire* that “we don’t really understand aspiration, to be fair.” (A383). He also admitted that no one has actually watched the physical process of a patient aspirating, which would include the speed by which it occurs. (A379). Finally, Dr. Schwab admitted that aspiration can include vomit going into the patient’s mouth and, in fact, testified that “I’ve seen it happen both ways.” (A382). As such, the animation is speculative and should have been precluded.

In his order denying a new trial, the trial judge framed the issue as follows:

The critical question in this case is why was Mr. Divita unable to rouse himself when he vomited. The plaintiffs argued that it was because the defendants gave Mr. Divita too much of the pain medication Dilaudid, leaving him unable to respond. The defendants’ experts testified that, while they did not know what caused Mr. Divita to vomit and choke to death from a lack of oxygen, they were certain that Dilaudid not cause this to happen to him. The jury apparently agree with the defendants’ experts.

(A544-A545). While the critical question raised by the trial judge was certainly an issue for the jury, it was by far not the only issue.<sup>6</sup>

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<sup>6</sup> The jury rejected that claim, which was directed at the Physician Defendants, not the Hospital Defendants. The Physician Defendants were found not negligent for their Dilaudid orders. Plaintiffs also alleged that the non-physician staff were negligent for not getting an order for

To the contrary, the use of a tight-fitting full-face CPAP mask without a doctor's order and with no precautions was very much another central issue in the case. The Hospital Defendant's own policy required a doctor's order for CPAP and that caution be used when applying a snug or tight-fitting full-face CPAP mask to a patient with nausea and active vomiting. (A546-A552). In this case, no special caution was taken and no order for CPAP was obtained. Again, if the jury concluded that the CPAP mask was irrelevant based on the animation (because it showed vomit stopping at the esophagus in the animation), than that would explain why the jury found negligence against the Hospital Defendants but not causation.

To prevail on a motion for new trial, a Plaintiff need only show that the objectionable evidence possibly affected the jury's view of the case. *Berry v. Cardiology Consultants, P.A.*, 935 A.2d 255 (Del. 2007). In *Berry*, the Delaware Supreme Court reversed and remanded a case for a new trial due to the erroneous publication of four treatise pages because the Court was not "confident that the exhibits did not inappropriately affect the outcome." *Id.* The rationale underlying the error in *Berry* is similar to this case, *viz.* the "evidence" at issue was highly suggestive that it had an authoritative basis and, therefore, there was a very real chance it unfairly affected the jury's view of the case.

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CPAP and for not exercising any caution, including increased monitoring, once it was applied. The jury found the Hospital Defendants negligent, but found that such negligence was not a proximate cause of Mr. Divita's death.

In fact, the trial judge's error is demonstrated by the fact that the only expert to testify about the animation readily admitted that "we don't really know how aspiration happens" and that aspiration can include vomit going into the patient's mouth or stopping at the esophagus, since he has "seen it happen both ways." (A382). Because it is very possible that the jury's finding of no causation was influenced by the untimely and speculative animation, Plaintiff respectfully requests that a new trial on causation and damages be ordered.

### **CONCLUSION**

For the reasons stated above, Appellant Jennifer Divita respectfully requests that the trial judge's order of April 14, 2014 denying her motion for a new trial on causation and damages against the Hospital Defendants be reversed.

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