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IN THE

Supreme Court of the State of Delaware

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

APPELLANT'S REPLY BRIEF

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I. ADMISSION OF THE VIDEO ANIMATION CONSTITUTED AN ABUSE OF DISCRETION WARRANTING A NEW TRIAL

A. Timeliness

Hospital Defendants claim, quite remarkably, that the animation was produced to Plaintiff in the ***usual course*** of pre-trial disclosure, and that Plaintiff was not prejudiced by the timing of the disclosure, which occurred after hours on the last business day before trial started[1]. Hospital Defendants' Answering Brief at p. 16. Both of those assertions are wrong.

With regard to timeliness, Plaintiff asserts that appropriate ***usual course*** of pre-trial disclosure requires that the animation be produced on or before the expert discovery deadline, which was October 7, 2013 (AR 1). Although this Court has never before been asked to decide whether animation produced to opposing counsel after hours on the last business day before trial may be properly admitted, it has long condemned "unfair surprise" through a failure to abide by the rules. *Concord Towers Inc. v. Long*, 348 A.2d 325 (Del. 1975) (finding the trial judge abused his discretion by admitting a witness statement that was withheld from opposing counsel until trial). Moreover, at least one appellate court has

[1] Hospital Defendants state that Plaintiff's counsel received the animation five days before trial. The actual date of receipt was the evening of November 27, 2013, which was the day before Thanksgiving. Thanksgiving and the day after Thanksgiving were legal holidays in the year 2013 (AR 4). The late disclosure guaranteed that the Plaintiff would not be able to raise the admission of the videotape with the Court before trial commenced the Monday after the Thanksgiving holiday.

excluded animation first produced on the eve of trial. *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876 (Mo. 1993) (upholding the trial judge's refusal to admit animation where party did not give notice of it to opponent until last business day before trial, hindering opponent's ability to challenge its admission or cross-examine experts who prepared it).

In an attempt to escape their failure to comply with the discovery deadlines set forth in the governing case scheduling order, the Hospital Defendants seek to characterize the animation as simply a demonstrative exhibit.[2] Plaintiff disagrees, and respectfully submits that Hospital Defendants' attempt to categorize the animation as simply a demonstrative misses the mark. This Court has not yet been asked to define what constitutes a demonstrative exhibit.[3] Hospital Defendants rely on *Balan v. Horner*, 706 A.2d 518, 521 (Del. 1998) in support of their argument that the animation is merely a demonstrative. In *Balan*, this Court held that the trial judge did not abuse his discretion in allowing an expert to use

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[2] While the trial judge did not decide during the pretrial conference which date demonstratives were required to be exchanged (Plaintiff's proposed due date was November 22, 2013 and Defendants' proposed due date was November 25, 2013), the animation was produced after hours on November 27, 2013. That late disclosure alone warranted exclusion of the animation.

[3] Demonstrative evidence has been defined as "objects which illustrate some verbal testimony and has no probative value itself, such as maps or photographs depicting a crime. *State v. Diaz*, 445 N.Y.S. 2d 888 (N.Y Sup.Ct. 1981)

slides depicting several laparoscopic procedures during his testimony, even though they were not produced until the morning of the expert's testimony. *Id*.[4]

Balan, however, is readily distinguishable from this case give the difference between still slides and this animation. The still slides did not attempt to recreate the specific patient's injury and the expert in *Balan* merely used them to explain the procedure at issue in that case. The animation (which actually lasted a minute and twenty seconds and is included in Appellants' Reply Appendix at AR 34), [5] depicts a person of Mr. Divita's gender, age, race, and body habitus (including distended abdomen), sleeping with his mouth open while using a CPAP machine. It is captioned "REGURGITATION AND ASPIRATION OF STOMACH CONTENTS DIRECTLY INTO THE LUNGS." As he is breathing, the animation shows the patient's stomach completely filling with a green and bubbly fluid (presumably vomit), which then goes up his esophagus, stops abruptly before reaching his mouth, makes a turn and goes down the trachea, and continuously and completely fills both lungs over a period of twenty-six seconds. While the lungs are filling with green vomit, there are multiple arrows moving and pointing down the trachea and into the lungs, leaving the impression that there are

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[4] The demonstratives in *Balan* were similar to the demonstratives used by Plaintiff during trial, which included still photos of the Plaintiff, Mr. Divita, and their son (AR 32), as well as the charts referenced by Hospital Defendants in their Answering Brief (AR 5). Plaintiff did not, as Hospital Defendants allege, use a power point demonstration in her opening statement.

[5] Hospital Defendant mistakenly states the animation was only 26 second long it their Answering Brief.

waves of vomit going down the trachea into all of the lung space. While the viewer is watching, captions appear, including one that states "DURING REGURGITATION STOMACH CONTENTS FLOW DOWN THE TRACHEA."

The animation is not in any way similar to the late-disclosed slides used by the expert in *Balan*, but rather a one-sided piece of stand-alone evidence that is speculative and inaccurate, designed to convince the jury that Mr. Divita could not have been saved, despite the negligence that the jury found the Hospital Defendants committed. Plaintiff respectfully requests that this Court reject the Hospital Defendant's attempt to justify the late disclosure by arguing the animation was simply a demonstrative, like the slides in *Balan*.

The Hospital Defendants also rely on *Balan* to argue that the timing of late disclosure on the eve of trial did not cause prejudice to Plaintiff. The prejudice, to the contrary, is obvious. Plaintiff was unable to depose Dr. Schwab, the expert during whose testimony the video was played. That alone warrants its exclusion. *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876 (Mo. 1993). Because the animation was not produced by the expert discovery deadline, Plaintiff was also (1) unable to develop her own rebuttal animation; (2) unable to adequately challenge it; and (3) because of the medium on which it was produced (on a "flash drive," and not electronically) she was unable to show it to her experts until after trial started. The trial judge, moreover, was deprived of an

opportunity to review the animation before trial and consider its admissibility, and waited until after Plaintiff rested her case to take up the issue.[6] As set forth above, the animation should have been excluded on timeliness grounds alone, and Hospital Defendants have failed to provide this Court with any authority that would provide otherwise.

B. The Animation Was Overly Prejudicial, Speculative and Unsupported by Dr. Schwab's Discovery Deposition

Hospital Defendants also erroneously claim that the animation was not speculative or prejudicial. Although this Court has not yet been asked to set forth the parameters required for admission of an animation, the Illinois Supreme Court has held that before an animation can be played at trial, the following requirements must be met:

> (1) a foundation must be laid, by someone having personal knowledge of the filmed subject, that the film is an accurate portrayal of what it purports to show; and
>
> (2) the animation's probative value cannot be substantially outweighed by the danger of unfair prejudice.

Cisarik v. Palos Community Hosp., 579 N.E.2d 873 (Ill. 1991). An expert, of course, can testify to matters beyond his personal knowledge. Del. R. Evid. 703. That being said, the expert's opinion must be based on sufficient facts or data. *Id*.

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[6] Hospital Defendants allege that Plaintiff did not ask the trial judge "to decide the issue" before her case-in-chief began. That is simply incorrect. Plaintiff filed her motion *in limine* the night before trial, and raised the issue with the trial judge before opening statements. The trial judge deferred the motion, but held that the animation could not be shown until he had time to consider the motion.

Since the animation was played during Dr. Schwab's trial testimony, it was required to be based on sufficient facts, and as set forth above, its probative value cannot be substantially outweighed by the danger of unfair prejudice.

The animation, in graphic detail, leaves the impression that the aspiration of vomit into the lungs continued unabated for twenty six seconds, with waves of vomit flowing up the esophagus, down the trachea and repeatedly filling both lungs in their entirety. The problem, however, is that there is simply no evidence that would support that Benny Divita aspirated vomit in such an extreme and grotesque manner, or for that length of time. Absent such evidence, the animation is not based on sufficient facts that would allow it be played to the jury.

Dr. Schwab, in fact, specifically testified in his deposition that this event "***happened in a second***." (A 65).[7] Furthermore, contrary to argument in Hospital Defendants' Answering Brief, Dr. Schwab never testified in his pretrial deposition that vomit did not go into the patient's mouth or throat. To the contrary, he merely testified it does not ***"come out their mouth***." (*sic*). He never testified, as depicted in the animation, that the vomit stops at the top of the esophagus, turns ninety degrees to the left, and then flows down the trachea.[8] Given those

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[7] At trial, Dr. Schwab increased his pretrial opinion from "***a second***" to "***three to five seconds***." (A 381). The animation depicts Mr. Divita vomiting for ***twenty six seconds***.

[8] The animation also shows the patient sleeping with his mouth open. There is no evidence as to whether Mr. Divita's mouth was open or closed. Obviously, whether his mouth was open or closed is relevant to whether Mr. Divita gasped for air when he began to vomit, thus causing

inconsistencies, Hospital Defendants' argument that the "***animation did not include any content beyond what Dr. Schwab testified to in his discovery deposition***" and that the "***animation merely demonstrated the testimony that Dr. Schwab had already given in discovery***" is wrong and is poorly taken. Hospital Defendants' Answering Brief at p. 17.[9]

Most damning for the Hospital Defendants' cause, however, is that Dr. Schwab conceded during *voir dire* at trial that "***we don't really understand aspiration, to be fair***."[10] (A 383). 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 and, by extension, the amount of vomit. (A 380). 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." (A 382). Dr. Schwab's trial testimony proves that the animation is speculative and inadmissible because it is not based on sufficient facts. Given this speculation,

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him to aspirate vomit into his lungs as opposed to it coming into his throat and mouth.

[9] Likewise, Hospital Defendants' allegation that Dr. Schwab testified in his discovery deposition that Mr. Divita's condition was "***irreversible***" is incredulous. Hospital Defendants' Answering Brief at p.21. No such testimony was given. To the contrary, he merely testified that a patient "***can die***" if vomit goes into their lungs, not that they will die. (A 64).

[10] Contrary to Hospital Defendants' arguments, the limited *voir dire* in no way makes up for Plaintiffs' lack of an opportunity to take a discovery deposition of the expert regarding the animation, and illustrates why the animation should have been produced in discovery and not the last business day before trial.

Plaintiff respectfully submits that the trial judge abused his discretion in allowing the animation to be played to the jury.

The Hospital Defendants also argue that there was no prejudice to Plaintiff because she conceded that Mr. Divita should have been wearing a CPAP that night. While the Hospital Defendants correctly recite that part of Plaintiff's liability case, [11] they completely omit any discussion of Plaintiff's causation position. With regard to causation, Plaintiff's position was that continuous monitoring would have immediately alerted the nursing staff to Mr. Divita's distress, such that his condition would have been immediately treated, thereby preventing his death. Both of Plaintiff's experts testified accordingly. (B 148-149) (B 64-66).[12]

The animation sought to portray what happened to Benny Divita look as bad as possible so that they could argue he was going to die even if he had been continuously monitored and his condition discovered. That is the prejudice, and Plaintiff submits it is substantial in the context of this case and outweighs any

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[11] Given the high levels of IV narcotic pain medication Mr. Divita received and his chief complaint of nausea and vomiting just hours earlier at admission, Plaintiff's liability position at trial was that her husband required continuous monitoring (via telemetry) as soon as Nurse Myles discovered him sleeping with a full-face, tight-fitting CPAP mask. The jury agreed that the Hospital Defendants were negligent.

[12] At trial, Dr. Schwab testified that Mr. Divita could not be saved, even if his condition had been discovered. (A 461). That opinion was never disclosed before trial. None of Defendants' pretrial expert disclosures contained opinions that Mr. Divita could not have been resuscitated if his condition had been discovered sooner. (AR 7).

probative value the animation may have had.[13] Thus, Plaintiff respectfully requests that this Court, as other courts have done under similar circumstances, reverse the trial judge's decision to admit the animation. *Hutchison v. American Family Mut. Ins. Co*., 514 N.W.2d 882 (Iowa 1994) (affirming trial judge's exclusion of an animation that was designed to amplify, without a factual foundation, their theory of the case); *French v. Springfield*, 375 N.E.2d 438 (Ill. 1976) (holding trial judge committed error by admitting an animation that was prejudicial and inaccurate). *See also Racz v. R.T. Merryman Trucking Inc.*, 1994 U.S. Dist. LEXIS 4349 (E.D. Pa. March 27, 1994) ("Relying upon the old adage, 'seeing is believing,' we conclude that the jury may give undue weight to an animat[ion].").

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[13] As set out in her Opening Brief, the animation had no probative value because the parties agreed Mr. Divita died from aspiration. Moreover, Dr. Schwab's testimony was clear and understandable, such that animation was not necessary and was designed only to poison the jury. *Pino v. Gauthier*, 633 So.2d 638 (La. Ct. of App. 1993) (excluding animation where the expert's testimony was clear).

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 by reversed.

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