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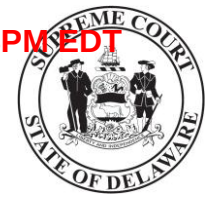


**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| TRICIA MOSES, | : | No. 357, 2014 |
| | : | Court Below: Superior Court of the |
| Plaintiff below, | : | State of Delaware, Kent County |
| Appellant, | : | |
| | : | C.A. No. K13C-04-010 WLW |
| v. | : | |
| | : | |
| AARON DRAKE, | : | |
| | : | |
| Defendant below, | : | |
| Appellee. | : | |

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# APPELLANTS' OPENING BRIEF

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Dated: August 15, 2014

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## NATURE OF PROCEEDINGS

Plaintiff, Tricia Moses, filed a Complaint against Defendant, Aaron Drake in the Superior Court in and for Kent County, on April 3, 2013. This Complaint alleged the Defendant's negligent operation of a motor vehicle caused a motor vehicle collision on April 6, 2011. Plaintiff was 26 weeks pregnant at the time of this collision. Her viable fetus was born premature at 31 weeks. Initially, the Complaint sought damages for Tricia Moses and her prematurely born daughter, Sa' Relle Moses. In accordance with a modified Case Scheduling Order, trial of this matter was scheduled for February 9, 2015. Discovery completion was scheduled for October 8, 2014, and Plaintiffs' medical expert report was due January 31, 2014. On January 31, 2014, Plaintiff Tricia Moses provided a report from Dr. Stephen Ogden regarding her personal injury claims. No report was provided for the minor, Sa' Relle Moses and Plaintiffs' have conceded that Sa' Relle Moses has no claim arising from this motor vehicle incident.

On April 16, 2014, Defendant moved to dismiss Plaintiffs' claims. Plaintiff filed a Response in Opposition to this Motion on May 1, 2014. By Order of May 13, 2014, the Superior Court granted Defendant's Motion to Dismiss as a Motion for Summary Judgment. Plaintiff filed a timely Motion for Reargument on May 20, 2014. Plaintiff's Motion for Reargument was denied by Order of the Superior Court on June 10, 2014. Plaintiff filed a timely appeal to this Court on July 1,

2014, which seeks review of the above-mentioned Superior Court Orders. This is the Plaintiff, Tricia Moses', Opening Brief in support of her appeal.

## SUMMARY OF ARGUMENT

1. Plaintiff's personal injury claim arising from a rear-end motor vehicle collision caused by Defendant's negligence was established by the medical opinions of her treating physician, Dr. Stephen Ogden. Dr. Ogden's opinions of record included his finding that: "Since to the best of my knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, it is more likely than not that these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011" (A8).

This opinion by using the very definition of "reasonable medical probability" satisfies this phrase's standard and was legally sufficient to deny Defendant's Motion for Summary Judgment on his claim that the doctor's opinion was legally deficient.

2. If Plaintiff does not prevail on Argument I, then Plaintiff claims the lower court abused its discretion when it denied Plaintiff's Motion for Reargument as to the legal sufficiency of Dr. Ogden's opinions regarding injuries caused Plaintiff by the motor vehicle incident of April 6, 2011. Since trial of this matter was not scheduled to occur until February of 2015 and the discovery cutoff date was set for October 2014, there was more than ample time to consider Dr. Ogden's clarifications of his initial opinion regarding the feasibility of the motor vehicle collision to have caused Plaintiff's low back complaints. The lower court's refusal

to consider legally sufficient opinions stated with "reasonable probability", was unreasonable under these circumstances since the decision resulted in a dismissal of the Plaintiff's claim. The lower court should have considered and should have found that Dr. Ogden's opinions of April 26, and May 16, 2014, which identified the motor vehicle collision as the cause of Plaintiff's low back complaints, based upon "reasonable medical probability" and a finding of "more likely than not", entitled Plaintiff to take her claim to trial (A8, A9).

## STATEMENT OF FACTS

Tricia Moses and Aaron Drake were the operators of motor vehicles involved in a rear-end collision on April 6, 2011 (A99). Mr. Drake's vehicle struck the rear of Ms. Moses' vehicle in an exit lane from the Dover Mall property in Dover, Delaware (A100). The front of Mr. Drake's vehicle struck the rear area of the Moses vehicle (A101-A103). Mr. Drake went to the Plaintiff's vehicle and observed Ms. Moses shaking while seated in her vehicle (A104). Ms. Moses was taken from the scene by ambulance (A105, A116). Mr. Drake pled guilty to a motor vehicle citation for following a motor vehicle too closely and he admitted that the collision was caused by the way he was operating his vehicle and that he was following the Moses vehicle too closely (A105, A106).

Tricia Moses, a mother of four, from Townsend, Delaware is the Regional Operations Director for the Boys and Girls Club of Delaware (A108, A109). She has no history of work injuries nor any prior automobile accidents (A110, A111). She was leaving the Dover Mall to go home when she felt a bang in the back of her car (A112). She remembers her seatbelt tightening when she felt the bang of the collision (A113-A115). At the time of the collision, Ms. Moses was 26 weeks pregnant (A117). Due to her past history of two miscarriages, one stillbirth and previous breech births, Ms. Moses was in a program for high-risk pregnancies (A117). Dr. Stephen Ogden was her family physician (A118).

Subsequent to the motor vehicle collision, Ms. Moses delivered her child prematurely. Both she and her newborn, Sa' Relle Moses, encountered significant medical conditions related to this premature birth. However, neither the complications of Ms. Moses pregnancy, nor the premature birth of her child are medically related to the motor vehicle collision.

Tricia Moses received medical care at Kent General Hospital on the day of the incident. Initially, she was treated in the emergency department and then transferred to the L&D (Labor and Delivery) department for further observation, examination and monitoring of her condition (A36). Her primary diagnosis from the emergency department noted that she was the driver in a motor vehicle rear-end accident and that she had pain involving the lower back (A36). At discharge from the emergency department, she was transferred and admitted to L&D. She was monitored for four hours, underwent an ultrasound to rule out a placenta abruption and was instructed at discharge to follow up with her OB (A37, A51).

On January 31, 2014, Plaintiff provided the defense with an opinion of Ms. Moses' family physician, Dr. Stephen P. Ogden, D.O. The opinion stated as follows:

> "My former patient, Tricia Moses was in a motor vehicle accident on 4/6/2011. She subsequently came to my office with complaints of back pain. She was treated with anti-inflammatory medication and Physical Therapy. It is feasible that the complaints she 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. Her injuries were treated with conservative measures and at the time I treated her, no surgery was needed and no permanent impairment was sustained." (A7)

On April 16, 2014, Defendant filed a Motion to Dismiss Ms. Moses' claim on the basis that Dr. Ogden's opinion statement was legally insufficient because he used the word "feasible" which Defendant claimed is defined as possible (A11, A12).

In response to this Motion, Plaintiff provided medical records and dictionary definitions of "feasible" and "possible". The definitions are different for these words. Feasible means, "Capable of being done or carried out; capable of being used or dealt with successfully; suitable; reasonable; likely. In addition to consideration of the definition of the word "feasible", Plaintiff offered a clarifying statement of Dr. Ogden dated April 25, 2014. In this statement, Dr. Ogden stated that:

> "To clarify my letter of January 15, 2014, since to the best of my knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, it is more likely than not, that these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011."

The lower court considered both of these statements by Dr. Ogden and found them to be insufficient as a matter of law because a doctor's opinion must use the term "reasonable medical probability" to survive a Motion for Summary Judgment, see Exhibit "A" attached. Since Dr. Ogden's opinions did not use the phrase

"reasonable medical probability", the Court dismissed Tricia Moses' personal injury claim.

Plaintiff's Motion for Reargument sought reconsideration by the Court of its ruling since the term "more likely than not" is the very essence of the definition of "reasonable medical probability". Further, Dr. Ogden provided another statement on May 16, 2014, which provided the following:

> "To further clarify my letter of January 15, 2014, since to the best of my knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, based upon reasonable medical probability, these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011."

The lower court denied the Plaintiff's Motion for Reargument and ruled that the doctor's statements of April 25, 2014, and May 16, 2014, came too late for the Court's consideration. This Order denying Plaintiff's Motion for Reargument was made on June 10, 2014, approximately eight months prior to the scheduled trial date of February 9, 2015.

## ARGUMENT I

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT OF DISMISSAL BECAUSE PLAINTIFF'S MEDICAL EXPERT'S OPINION WAS SUFFICIENT TO ALLOW PLAINTIFF'S CLAIM TO MOVE TO TRIAL.

(1) QUESTION PRESENTED

Were the opinions of Dr. Stephen Ogden sufficient to establish a causal relationship between Plaintiff's injuries and the rear-end motor vehicle collision of April 6, 2011, caused by Defendant Drake's negligent driving? *See*, Plaintiffs' Response In Opposition To Defendant's Motion To Dismiss (A27-A71).

(2) SCOPE OF REVIEW

On appeal from a grant of summary judgment, this Court reviews the matter *de novo*. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009). The "Court must undertake an independent review of the record and applicable legal principles 'to determine whether, after viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that no material issues of fact are in dispute and it is entitled to judgment as a matter of law.'" *Dabaldo v. URS Energy & Constr.*, 85 A.3d 73, 77 (Del. 2014) (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).

(3) MERITS OF ARGUMENT

The opinions of Dr. Stephen Ogden of record and before the Court for consideration were legally sufficient to deny Defendant's Motion for Summary Judgment. Specifically, the doctor's January 15, 2014 opinion states that:

> "It is feasible that the complaints she 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."

Such a statement clearly conveys the opinion that the motor vehicle collision was capable of causing Plaintiff's back complaints. The opinion further states that there are no other known injuries or illnesses that these complaints can be attributed to. When read in its entirety, this statement attributes Ms. Moses' back complaints to the motor vehicle accident caused by the Defendant's negligence and not to any other injury or illness. The attribution of her medical condition to the motor vehicle accident is not mere speculation nor is it a mere possibility. A dictionary definition of "feasible" states that feasible refers to being capable of being done or carried out, capable of being used or dealt with successfully, and something that is reasonable or likely (A59). Further, in considering the definitions of the word "possible", it contains definitions that are not found for "feasible". For instance, "possible" can apply to "something that may or may not occur" or "being something that may or may not be true or actual". These definitions of "possible" are akin to the type of speculation that is insufficient to

establish a legally acceptable expert opinion. However, these definitions of "possible" do not appear in the definition of "feasible" (A59, A60). Further, in using these words, "possible" implies that a thing may certainly exist or occur given the proper conditions. On the other hand, "feasible" applies to what is likely to work or be useful in attaining the end desired. "Feasible" is a characteristic that is more definite and expected than "possible" (A60). At best, Dr. Ogden's initial opinion may contain some ambiguity as to the extent something is "reasonably probable". However, for Summary Judgment purposes, such ambiguities warrant further inquiry to clarify the application of the law to the circumstances. *Ebersole v. Lowengrub,* 180 A.2d 467, 468-69 (Del. 1962). Clarification of this initial opinion was provided by Dr. Ogden and considered by the lower court on Defendant's Motion for Summary Judgment. Dr. Ogden's clarification statement of April 25, 2014, provided:

> "Since to the best of my knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, it is more likely than not that these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011." (A8)

This opinion of Dr. Ogden clearly places it within the realm of reasonable probability. The legal definition of the phrase "reasonable medical probability" states:

> "In proving the cause of an injury, a standard requiring

> a showing that the injury was more likely than not cause by a particular stimulus, based on the general consensus of recognized medical thought."

Black's Law Dictionary, Tenth Edition, Pg. 1457 (A120). Since Dr. Ogden's causality opinion utilizes the phrase "more likely than not" which is the very essence of the meaning of "reasonable medical probability", this clarification to his original opinion meets the requisite legal standard established by the Delaware Courts for medical expert opinions.

In *Diamond Fuel Oil v. O'Neal*, 724 A.2d 1060 (Del. 1999), this Court held a doctor's opinion to be legally sufficient for finding a causal relationship between a worker's disease and his work environment when the phrase "more likely than not" was employed. A testifying doctor's opinion stated that :

> "The hydrocarbon exposure 'would seem more likely than not' the cause of his kidney condition and that it was the 'most probable cause'."

Further, in distinguishing such opinions from those found to be legally insufficient in *Anderson v. General Motors Corp.,* 442 A.2d 1359 (Del. 1982), the *Diamond* Court noted that:

> "The medical experts testifying on O'Neal's behalf did not couch their testimony in terms of expectation or suspicion but in terms of 'reasonable medical probability', 'more likely than not', and 'most probable'."
> *Id.* at pg. 1065, 1066.

In *State v. Perkins,* 2005 Del. Super. LEXIS 375 (Nov. 19, 2005), the Superior Court, in footnote 14, cited Black's Law Dictionary definition of the term "reasonable medical probability" which spoke about a standard where the injury was "more likely than not" caused by a particular stimulus. *State v. Perkins,* pg. 4 footnote 14. Thus, Dr. Ogden's April clarification brings his opinions within the meaning of the term "reasonable medical probability".

In considering the sufficiency of a medical expert's opinion regarding causation, it has long been the practice of Delaware Courts to consider the substance of the opinion rather than the use of any particular word or phrase. In *General Motors Corp. v. Freeman,* 164 A.2d 686, 689 (Del. 1960), the Court held that a doctor's statement including the word "possible" can satisfy the legal standard of probability when the totality of the evidence is considered. The Court noted at page 689 that:

> "It is a matter of general knowledge among those of us who are at all familiar with the testimony of physicians that at times one doctor will use words denoting 'possibility' while another may use words denoting 'probability' when actually they mean the same thing. We think that such testimony should be considered in the light of all the evidence, particularly where the injury occurred directly and uninterruptedly after the trauma."

In the present matter, Ms. Moses was diagnosed in the emergency room with back pain (A36).

In *Air Mod Corporation v. Newton,* 215 A.2d 434 (Del. 1965), this Court noted in discussing the sufficiency of medical expert testimony at page 438 that:

> "In the thinking and reasoning of a physician, we realize, the realm of probability and the realm of possibility often overlap. Semantics must give way in the search of a fair and just result; and the distinction between the words like 'possible', 'probable', 'reasonable', 'certainty', and the like, may not be over emphasized. A 'could have' answer of a medical witness such as we have here, may not be isolated and considered alone; it must be considered in the light of all the other evidence in the case."

In *Air Mod*, though the testifying doctors did not use the term "reasonable medical probability", the Court found sufficient medical evidence to support the claimant's alleged loss.

In *Green v. Weiner*, 766 A.2d 492, 496 (Del. 2001), this Court found a doctor's testimony to be legally sufficient in regard to a vein injury caused by the removal of a guide wire. The doctor testified:

> "That he had 'no other way of explaining [the rip in Green's vein] other than operator dependent vascular injury occurred and in my view should have been recognized or anticipated and as a result possibly and probably avoided."

This Court found such opinions to be based upon an analysis of the circumstances of the case and not mere speculation.

In a challenge to the testimony of a medical expert in *Flood v. Riley*, 2002 Del. Super. LEXIS 525 (Dec. 31, 2002), the Court addressed testimony which

never used the term "reasonable medical probability". However on page 2 of its opinion the Court noted that:

> "However, this principle does not necessarily require that the witness utter the words 'reasonable medical probability' in order for his testimony to be admissible. When Dr. Katz' testimony is considered in its entirety, it is clear that his opinions are based on reasonable probability as opposed to mere possibility or speculation."

As in *Flood*, there is nothing in Dr. Ogden's opinion to indicate that it is based upon mere possibility or speculation. Rather, he has used the legal definition of "reasonable medical probability".

Consistent with the principle that substance of an expert's opinion prevails over any alleged deficiency in form is this Court's ruling in *Barriocanal v. Gibbs*, 697 A.2d 1169 (Del. 1997). In reversing a lower court's exclusion of a medical expert's testimony regarding informed consent in a medical negligence case, the Court noted at pages 1172, 1173 that:

> "We conclude that the Superior Court's interpretation of Section 6852 erroneously required an expert to articulate certain 'magic words'. This interpretation would exalt form over substance. Rather, the trial Court should have evaluated the substance of the proffered testimony as a whole to determine if it was sufficiently reliable to present to the jury...
>
> The expert witness, Dr. Yadlon, is a physician, not a lawyer. The fact that he did not express his medical opinions in perfect 'legalese' should not preclude him from being able to present expert testimony regarding Delaware's standard of care....".

The case cited by Defendant to the lower court and relied upon by that court for granting Defendant's summary judgment is *O'Riley v. Rogers,* 60 A.3d 1007 (Del. 2013). However, Defendant and the lower court misread and misapplied the holding in *O'Riley.* To validate his argument, Defendant must claim that *O'Riley* overrules all of the aforementioned precedents and established a rule of law that exalts form over substance. The Defendant and the lower court have concluded that the term "reasonable medical probability" must be found in the wording of a medical expert's opinion to be legally sufficient. Yet, there is nothing in the *O'Riley* opinion which suggests this Court intended to overrule or reject its prior opinions that the sufficiency of a medical expert's opinion will be judged by the substance of the opinion and not by the use of any particular words.

*O'Riley* concerned the standard to be utilized on cross-examination of a medical expert. Was that standard permitted to be of a lesser degree than that required on direct examination? The *O'Riley* decision said "no". In *O'Riley*, the lower court initially disallowed two questions posed to a doctor on cross-examination. Both of those questions started with "possibility" phrasing; "And is it possible, doctor" and "so it's possible at least". The doctor's response to the first question began, "very possibly right". His second full answer was, "It's possible, yes." Id. at 1009,1010. Such mere possibilities were found by this Court to be

speculation or conjecture and therefore, inadmissible. The Court stated at pg. 1011:

> "A doctor's opinion about 'what is possible' is no more valid than the jury's own speculation as to what is or is not possible".

This Court found the lower Court's initial decision to disallow such speculation to have been correct. Thus, the *O'Riley* decision reaffirms the legal principle that a doctor's opinion cannot be based upon mere speculation, conjecture or possibilities. However, it did not rule that to meet the standard of reasonable medical probability, a doctor must include those words in his opinion, which in effect would adopt a *per se* rule that any opinion failing to contain such words was legally insufficient as a matter of law. In the present matter, Dr. Ogden never used the word, "possible". Further, with his clarification statement of April 25, 2014, (A8) the doctor's phraseology used the very definition of "reasonable medical probability". Therefore, at the time of summary judgment, there was no basis to dismiss the Plaintiff's personal injury case since Dr. Ogden's medical opinions were legally sufficient as a matter of law.

## ARGUMENT II

II. THE SUPERIOR COURT ABUSED IT'S DISCRETION WHEN IT REFUSED TO GRANT PLAINTIFF'S MOTION FOR REARGUMENT AS TO THE SUFFICIENCY OF THE OPINIONS OFFERED BY PLAINTIFF'S MEDICAL EXPERT.

(1) QUESTION PRESENTED

Did the lower court abuse it's discretion when it refused to grant Plaintiff's Motion for Reargument of its summary judgment decision since the evidence was legally sufficient to permit Plaintiff to present her personal injury claim at trial? See Plaintiff's Motion for Reargument (A72-A97).

(2) SCOPE OF REVIEW

On appeal from the granting or denying of a post-judgment motion under Superior Court Civil Rule 59, this Court reviews the matter pursuant to an abuse of discretion standard. *Barriocanal v. Gibbs*, 697 A.2d 1169, 1171 (Del. 1997), *Strauss v. Biggs*, 525 A.2d 992, 996-97 (Del. 1987).

(3) MERITS OF ARGUMENT

Plaintiff offers Argument II for the Court's consideration only if the lower court's granting of summary judgment to Defendant is not reversed by this Court. This argument need not be considered if this Court reverses the Summary Judgment Order in favor of Defendant and against Plaintiff. Plaintiff's Motion for Reargument addressed two of Dr. Ogden's opinions. Initially, it addressed his opinion of April 25, 2014, which served to clarify his initial opinion and which the

lower court considered and found deficient when it granted summary judgment to Defendant. Further, in light of the lower Court 's decision that a doctor's testimony must state the words "reasonable medical probability" to be legally sufficient as a matter of law, Plaintiff submitted an additional opinion of Doctor Ogden, which stated:

> "...since to be best of any knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, based upon reasonable medical probability, these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011." (A9)

On Motion for reargument, Plaintiff submitted the legal definition of the term, "reasonable medical probability" from Black's Law Dictionary. Plaintiff also cited the *Diamond Fuel Oil v. O'Neal* case supra and other holdings that the substance of an opinion and not the use of any particular word determine the admissibility of expert testimony under Delaware law, (A73-75). The lower court decision did not analyze the sufficiency of Dr. Ogden's April and May, 2014 opinions. Rather, it noted that his original opinion of January 2014, was legally flawed and the time had passed to cure it.

Since trial of this matter was not scheduled to commence until February of 2015, it was an abuse of discretion for the lower court not to grant reargument to consider the April and May opinions of Dr. Ogden since these opinions clearly met and complied with the definition of "reasonable medical probability". Even as of

June, 2014, approximately eight months remained before trial was scheduled to begin and Defendant would have more than ample opportunity to have an expert evaluate Plaintiff's medical condition and depose Dr. Ogden. Dismissing the Plaintiff's personal injury claim on a record involving a rear-end collision that the Defendant admits his negligence caused, and for which a treating physician opined that the medical conditions of Plaintiff he treated were more likely than not caused by this motor vehicle collision and further stated this opinion with reasonable medical probability was overly harsh and unreasonable and amounts to an abuse of discretion. Plaintiff's Motion for Reargument should have been granted as Plaintiff's medical evidence was sufficient as a matter law to entitle the Plaintiff to have her day in Court.

For these reasons, Plaintiff respectfully requests this Court reverse the lower court's denial of Plaintiff's Motion for Reargument and Order that reargument be granted for consideration of Dr. Ogden's April and May 2014 opinions (A8, A9).

## CONCLUSION

For the aforementioned reasons, the Superior Court's Order granting Summary Judgment to Defendant Aaron Drake as to Plaintiff, Tricia Moses' personal injury claim, should be reversed, and the case remanded to Superior Court for trial by jury. Alternatively, this Court should order the Superior Court to grant Plaintiff's Motion for Reargument and consider the legal sufficiency of Dr. Ogden's April 25, 2014 and May 16, 2014 opinions.

Respectfully submitted,

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BY: _____

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