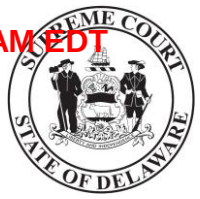


IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETER J. WONG, M.D., and DEDICATED TO WOMEN, OB-GYN, P.A.,	)	No. 133,2018
Defendants Below, Appellants,	)	
v.	)	Court Below C.A. No. N14C-01-185 VLM
MONICA BROUGHTON, individually, and as Parent and Natural Guardian of AMARI M. BROUGHTON-FLEMING, a Minor,	)	
Plaintiffs Below, Appellees.	)	

OPENING BRIEF ON APPEAL OF DEFENDANTS BELOW, APPELLANTS PETER J. WONG, M.D., AND DEDICATED TO WOMEN OB-GYN., P.A.

MORRIS JAMES LLP

Joshua H. Meyeroff (I.D. 5040)
500 Delaware Avenue, Ste. 1500
P.O. Box 2306
Wilmington, DE 19899-2306
(302) 888-6980
Attorneys for Defendants Below, Appellants Peter J. Wong, M.d., and Dedicated To Women OB-GYN, P.A.

Dated: 6/13/18

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

ATTACHMENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT'D)

TABLE OF CITATIONS (CONT'D)

TABLE OF CITATIONS (CONT'D)

NATURE OF PROCEEDINGS

This is a claim for medical negligence filed by Monica Broughton ("Plaintiff"), individually, and on behalf of her son, Amari M. Broughton-Fleming ("Amari"), against Peter J. Wong, M.D. ("Dr. Wong") and his practice, Dedicated to Women OB-GYN, P.A. (collectively, "Defendants). (A-159-164) In this case, Plaintiffs asserted that Dr. Wong breached the standard of care during Amari's delivery on April 9, 2008 when he "used excessive traction during the delivery causing [permanent] damage to [his] right brachial plexus[.]" (Complaint, ¶¶ 8-21, A-160-162) Defendants denied that Dr. Wong applied negligent or excessive traction during Amari's delivery and denied that Amari's injury (brachial plexus palsy) was caused by negligent excessive traction. (A-165-168)

Before trial, Defendants moved to exclude Plaintiff's standard of care expert (Dr. Marc Engelbert) from testifying that Dr. Wong breached the standard of care by allegedly using excessive traction resulting in Amari's injury, and moved to preclude Plaintiff's damages/causation expert (Dr. Scott Hal Kozin) from offering a causation opinion. (A-427-440). The trial judge denied Defendants' Motions. (A-595-597, A-605-607) Copies of the Orders denying these motions are attached as Exhibits A and B.

At the pretrial conference, the trial court also denied Defendants' objection to the use of statistical evidence to establish a breach of the standard of care. (A-608-613) A copy of the trial court's verbal order permitting statistical evidence is attached as Exhibit C.

Trial in this case began September 18, 2017. During trial, Defendants moved for Judgment as a Matter of Law at the close of Plaintiff's evidence and at the close of all of the evidence. (A-1223-1230, A-1794) The trial court denied both motions. *Id.* A copy of the Trial Activity Sheet documenting the trial court's verbal orders denying the motions is attached as Exhibit D.

After the prayer conference, the trial judge denied Defendants' request that the "Actions Taken During Emergency" instruction be read to the jury. (A-1540-1543, A-1825) A copy of the trial court's verbal order denying this request is attached as Exhibit E.

On September 26, 2017, the jury returned a verdict of $3 million for Plaintiff. (A-1857-1858) On October 9, 2017, Defendants renewed their Motion for Judgment as a Matter of Law and also moved for a new trial and remittitur. (A-1863-1869) By Order dated February 15, 2018, corrected February 20, 2018, the trial court denied Defendants' motions. (A-1999-2040) A copy of the trial court's Memorandum Opinion is attached as Exhibit F.

Defendants filed a Notice of Appeal on March 13, 2018. (A-25) At this time, Defendants Below, Appellants Peter J. Wong, M.D., and Dedicated to Women OB-GYN, P.A., submit their Opening Brief on Appeal. For the reasons set forth below, Defendants request that the trial court's rulings discussed herein be reversed and that judgment be entered in Defendants' favor or, alternatively, that a new trial be allowed.

SUMMARY OF ARGUMENT

I. The trial court erred when it denied Defendants' Motion *in Limine* and permitted Dr. Engelbert's unscientific and unreliable opinion that Dr. Wong was negligent based solely on the fact that Amari sustained a permanent brachial plexus injury. Dr. Engelbert's opinion does not satisfy the criteria of *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) and *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787 (Del. 2006). His opinion is contradicted by credible and widely-accepted scientific data and constitutes an impermissible *res ipsa loquitur* opinion which allowed the jury to improperly presume negligence from the fact that an injury occurred.

II. The trial court erred when it denied Defendants' Motion *in Limine* and permitted Dr. Kozin's unscientific and unfounded causation opinion that the only cause of Amari's injury was negligence. Dr. Kozin had no knowledge regarding the specific facts of Amari's delivery and based his opinion solely on the fact that a permanent injury developed over time. His opinion, which is contradicted by scientific data, does not satisfy the criteria of *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) and *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787 (Del. 2006) and constitutes an impermissible *res ipsa loquitor* opinion.

III. The trial court erred when it permitted statistical evidence in violation of *Timblin v. Kent General Hospital (Inc.)*, 640 A.2d 1021 (Del. 1994) and its progeny. Over Defendants' objection, Plaintiff was allowed to elicit statistical evidence from Dr. Wong and his experts to establish the rarity of brachial plexus injuries and then improperly use this evidence to suggest to the jury that Dr. Wong must have been negligent based upon an unusual outcome.

IV. The trial court erred when it refused to instruct the jury on "Actions Taken in Emergency," despite undisputed evidence presented at trial that Dr. Wong faced an obstetrical emergency during Amari's delivery.

STATEMENT OF FACTS

Medical Background and Allegations

Plaintiff Monica Broughton was admitted to Kent General Hospital on April 8, 2008. (A-32) On the evening of April 9, 2008, after Ms. Broughton began delivering, Dr. Wong determined that Amari's right shoulder was lodged under Ms. Broughton's pubic bone, a life-threatening condition known as shoulder dystocia. (A-30-32, A-37) In response, Dr. Wong performed various maneuvers and was able to relieve the shoulder dystocia and deliver Amari (without any brain damage) in approximately three minutes. (A-30-32, A-37) While Amari's family members (who are not medically trained) mistakenly perceived that Dr. Wong pulled Amari's head during delivery, Dr. Wong and a nurse testified, and Dr. Wong's delivery note supports, that "[a]t no time was any traction placed/applied to [Amari's] fetal neck/head." (A-37, A-731, A-1044, A-1103, A-1128, A-1131, A-1138-1139, A-1151, A-1159-1162, A-1167-1168, A-1180, A-1279-1280)

After delivery, Amari was diagnosed with a right brachial plexus palsy injury. Dr. Scott Hal Kozin, a pediatric orthopedic surgeon, performed two operations which have restored substantial function to Amari's right arm and shoulder. (A-785-790, A-795, A-803-811)

Pretrial Deposition Testimony of Plaintiff's Experts

Plaintiff designated one standard of care expert, Dr. Marc Engelbert (OBGYN). (A-169-170) Plaintiff also designated Dr. Scott Hal Kozin as a damages/causation expert. (A-170-171) Both experts were deposed prior to trial so that Defendants could ascertain their opinions and the underlying bases for their opinions.

During his deposition, Dr. Engelbert testified that in cases where permanent brachial plexus injuries exist, the only potential cause of the injury is the application of excessive lateral traction during delivery which, according to Dr. Engelbert, establishes a breach of the standard of care. (A-6, A-169-170, A-354-355) While he testified that he reviewed Amari's records prior to his deposition, Dr. Engelbert agreed that "all [he] really needed to [know] to form [his] opinions was the fact that there was existence of a dystocia, and ultimately there was a permanent injury[.]" (A-355) Dr. Engelbert testified that breach of the standard of care occurs only if a child develops a permanent injury – something which cannot be known until at least 1 year after the delivery. (A-55, A-369-370, A-393, A-594-595) Dr. Engelbert could not quantify the amount of traction necessary to cause a permanent injury (and therefore constitute a breach of the standard of care), stating only that his opinion "comes with experience, doing deliveries." (A-370)

Dr. Engelbert agreed that available data indicates that temporary or transient injuries can be caused by numerous non-negligent forces at play during labor and delivery, but testified that it is his opinion that the only cause of a permanent brachial plexus injury is excessive (and therefore negligent) traction. (A-383-384) Dr. Engelbert agreed that had Amari not developed a permanent injury months following his delivery, it would be his opinion that Dr. Wong did not do anything wrong and did not breach the standard of care. (A-393)

In support of his opinion, Dr. Engelbert disclaimed reliance on any particular scientific literature and testified that he relied instead on his "education, knowledge, [and] my experience over the years". (A-348) He was then confronted with The American College of Obstetricians and Gynecologists (ACOG) Monograph titled "Neonatal Brachial Plexus Palsy" (the "Monograph"), a peer-reviewed compendium publication of hundreds of articles that has established that "[n]o published clinical or experimental data exists to support the contention that the presence of persistent, as opposed to transient or temporary, NBPP [neonatal brachial plexus palsy] implies the application of excessive force by the birth attendant." (A-38-158, A-81) Dr. Engelbert testified simply that the Monograph was not "credible" without elaboration or identification of any scientific literature to rebut the Monograph's

contrary conclusion. (A-51, A-81, A-90, A-347, A-361-363, A-382-383, A-389-390, A-392-393)

Defendants next deposed Dr. Kozin, Amari's treating orthopaedic surgeon, who developed a "very close relationship with Amari." (A-172-331, A-544-545) Dr. Kozin was designated to testify, and testified during his deposition, that Amari's injuries could "only result from excessive traction applied onto the baby's head during the delivery". (A-170-171, A-212-215)

During his deposition, Dr. Kozin repeatedly acknowledged that he is not an OBGYN, does not perform deliveries, and is not qualified to provide standard of care opinions. (A-202-203, A-252) Dr. Kozin further acknowledged that he formed his causation opinion without reviewing Amari's delivery records or any depositions regarding the events of the delivery. (A-204-205, A-218-219, A-224-225, A-235-236) He agreed that he is not an expert on movements that babies make in the birth canal; that he does not know whether any given amount of traction is appropriate or inappropriate; and that he is not qualified to testify that the alleged traction used by Dr. Wong was excessive. (A-212-213, A-226, A-244-245) Dr. Kozin acknowledged that other causes for a permanent brachial plexus injury may exist, yet he failed to offer any reliable differential diagnosis or explanation as to why Amari's injury could only have been caused by Dr. Wong's alleged use of excessive

traction. (A-215-221, A-237-238, A-246) During his deposition, Dr. Kozin cited no medical literature to support his causation opinion in this case. (A-202, A-223, A-225-227, A-231-234)

Trial Testimony of Plaintiff's Experts

Over Defendants' objections, Dr. Engelbert testified at trial that Amari's injury could only have happened "at the time of this shoulder dystocia delivery by [Dr. Wong] exerting excessive downward lateral traction that caused a tearing of these two nerves and his permanent injury." (A-898) He reiterated this opinion numerous times. (A-900, A-902, A-926) Dr. Engelbert agreed that but for the development of Amari's permanent injury, it would be his opinion that Dr. Wong complied with the standard of care. (A-955) He agreed that it was "a fair statement" that all he needed to know to form his opinion "was the fact that there was an existence of a dystocia, and, ultimately, there was a permanent injury." (A-958)

At trial, Dr. Engelbert testified that if a physician applies excessive traction during delivery but luck intervenes over a 1-2 year period and the nerve subsequently recovers, a breach of the standard of care did not occur:

> Q. If the fact there had not been ultimately a permanent injury, reading those records, would he have met the standard of care?
>
> A. If there was no permanent injury, yes, sir.

Q. So that everything he [Dr. Wong] wrote down, everything he said in his deposition, had there not been a permanent injury, you would have said he would have met the standard of care; correct?

A. Again, you can cause an injury to the brachial plexus that resolves itself, and that implies that the force was not past [sic] the standard of care to – in the face of shoulder dystocia, absent the rare instance of infection, or cancer, or things of that nature. In this case, the standard of care was breached because the force was enough to permanently damage nerves.

Q. And, as you have said, sometimes you don't know that for over a year. And, in fact, in the other case we were here on last year, the Lewis case, it was two years before one knew whether it was permanent?

A. Usually it's about a year to 18 months. But agreed.

Q. So after [you do] a delivery and there is a dystocia, using your science, one cannot know whether there was a breach of the standard of care until they have waited one or two years?

A. It – and it obviously makes sense, because it takes that amount of time to know whether the injury is permanent or not. You can cause – you can use excessive traction and cause a temporary injury. *And obstetricians get lucky all the time because most of those heal. It doesn't mean that I didn't use too much traction, it just wasn't enough to tear out two nerves or permanently injury the plexus.*

(A-955) (emphasis added).

Although he agreed that shoulder dystocia is an obstetrical emergency that can cause brain damage or death if not relieved, Dr. Engelbert, without citing any

scientific support, disputed that the natural forces of labor, including a mother's pushing, could cause a permanent injury like Amari's. (A-928-929, A-933-934, A-937-938, A-951, A-964-966, A-987) When confronted at trial with the ACOG Monograph that disputes his position, Dr. Engelbert testified without explanation that the Monograph's conclusion is "flawed" because it does not distinguish between permanent and temporary injuries. (A-965, A-978-979) Despite Plaintiff's counsel's attempt to feed various articles to Dr. Engelbert during his trial testimony, Dr. Engelbert still acknowledged that he formed his opinion without relying on any literature and agreed, even at trial, that he could not cite any articles supporting his theory that the critical distinction in determining whether excessive (and therefore negligent) traction was used depends upon whether a permanent or temporary injury develops:

> Q. A year ago here, just about a year ago, you couldn't cite me an article that does distinguish between permanent and temporary. Do you recall that?
>
> A. Correct.
>
> Q. . . . If it's temporary, it's not a breach; if it's permanent, it's a breach. You don't have an article that says that specifically, correct?
>
> A. Correct. It's obvious.

(A-896, A-966).

Dr. Kozin similarly testified, over Defendants' objections,[1] that maternal forces did not cause Amari's injuries. He conceded that he formed this opinion without any review or knowledge of Amari's medical records or deposition testimony. (A-823, A-825-826, A-848-850) Although Dr. Kozin disclaimed reliance on medical literature during his deposition, Plaintiff's counsel was allowed to review various studies with him at trial that demonstrated that clinician-applied forces can cause permanent injuries (a contention that was never in dispute) but, significantly, failed to show him any literature that excluded maternal forces as a potential cause. (A-826-832, A-838-840) At trial, Dr. Kozin also acknowledged that until he had a fairly recent and seemingly unexplained "epiphany," he used to testify under oath that endogenous (maternal) forces *could* cause brachial plexus injuries:

> Q. And you were asked whether you used to believe endogenous forces in a case of shoulder dystocia and anterior shoulder impaction can cause a global brachial plexus injury. And your answer was it could be caused by endogenous forces up until about three or four years ago, is that right?
>
> A. Let me back up a second. So the question is did I used to think that it could be, and the answer is yes. And that the question is do I believe it now. And the answer is absolutely, positively

[1] At trial, Defendants requested "a stipulation that our objections to the portions of the testimony today that were overruled, that we get a continuing objection so we don't need to keep jumping up," and the Court agreed. (A-837)

> no. When that precise moment occurred, or this epiphany occurred, I don't have an exact time, or day, or year.

(A-855-856).

Defendants' Evidence

Defendants called four experts to testify at trial: two standard of care experts (Dr. Gordon Sherard and Dr. Dwight Rouse) and two causation experts (Dr. Edwin Trevathan and Dr. Suneet Chauhan). (A-412-426) Contrary to Dr. Engelbert, Dr. Wong's experts testified that whether a physician like Dr. Wong met the standard of care is determined at the time of delivery, not by a future outcome. (A-1336, A-1582, A-1722) They testified that Amari's shoulder dystocia presented Dr. Wong with a life-threatening situation, as studies have shown that brain damage can occur if it is not timely relieved. (A-1317-1318, A-1591-1592, A-1133-1134, A-1441-1442)

Unlike Plaintiff's experts, who relied solely on their "experience" or their "epiphany," Defendants' experts explained that the wealth of peer-reviewed scientific literature demonstrates multiple causes for permanent brachial plexus palsy injuries, including maternal forces, and that there is no medical literature to support Dr. Engelbert's position that a *permanent* brachial plexus injury necessarily and always means that the physician applied excessive downward lateral traction.

(A-1341-1342, A-1434, A-1464, A-1469, A-1581-1582, A-1600, A-1712-1714) In particular, Defendants' experts' opinions were supported by the Monograph published by The American College of Obstetricians and Gynecologists and American Academy in 2014. (A-40-53) The Monograph was prepared by a Task Force, which was established in 2011, charged "[t]o review and summarize the current state of the scientific knowledge, as set forth in the peer-reviewed and relevant historical literature, about the mechanisms which may result in neonatal brachial plexus palsy. The purpose of conducting such review [was] to produce a report which will succinctly summarize the relevant research on the pathophysiology of neonatal brachial plexus palsy." (A-46) The Monograph is an evidence-based report derived from information and data from hundreds of peer-reviewed studies and articles published in the scientific literature. (A-46-48) Its findings were endorsed by multiple organizations through their own peer review processes, including the American College of Obstetricians and Gynecologists, the Child Neurology Society, the American Academy of Pediatrics, the Society for Maternal Fetal Medicine, and other organizations from multiple hemispheres. (A-49)

On cross-examination, Plaintiff's counsel (over Defendants' objections) used statistical evidence and questioned Defendants' experts and Dr. Wong regarding the number of deliveries they had performed, the number of their deliveries involving

shoulder dystocia, and the number of their deliveries resulting in permanent brachial plexus injuries. (A-1479-1482, A-1257-1259, A-1398-1399, A-1732-1735)

Other Relevant Events at Trial and Post-Trial

At trial, Defendants moved for judgment as a matter of law at the close of Plaintiff's evidence and after Defendants' evidence. (A-1223-1230, A-1794) Defendants' Motions were based on the following grounds: (1) Dr. Engelbert admitted that he presumed negligence from Amari's permanent injury months later, not by Dr. Wong's conduct at the time of Amari's delivery (A-1223-1224); (2) Dr. Engelbert agreed that Dr. Wong met the standard of care but for Amari's permanent injury (A-1227-1228); and (3) Dr. Engelbert agreed that the use of excessive downward lateral traction is appropriate in a lifesaving situation (A-1229, A-1230). The Court denied Defendants' motions. (A-1230, A-1794-1795)

After the verdict, Defendants renewed their Motion for Judgment as a Matter of Law and also moved for a new trial. (A-1863-1869) Defendants' post-trial motions were based upon the following grounds: (1) Dr. Engelbert agreed that Dr. Wong met the standard of care but for his bad "luck" in Amari suffering a permanent injury; (2) Dr. Engelbert failed to offer a scientific basis for his opinion and, instead, relied on an improper *res ipsa loquitor* theory, which should have been precluded;

(3) the jury disregarded the law and presumed negligence based on Amari's injury; (4) Dr. Kozin's lack of foundation should have precluded his causation opinion; (5) Plaintiff used statistical evidence improperly; (6) the trial court failed to instruct the jury on acts taken during emergency situations, and (7) the verdict was against the greater weight of the evidence. (A-1863-1869, A-1971-1972) These Motions were denied. (A -1989-2014, A-2015-2040)

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR (ENTITLING DEFENDANTS TO JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, A NEW TRIAL) WHEN IT PERMITTED DR. ENGELBERT'S UNSUPPORTED *RES IPSA LOQUITOR* OPINION, WHICH CONFLICTS WITH ACCEPTED SCIENTIFIC DATA, THAT DR. WONG WAS NEGLIGENT BASED SOLELY UPON THE DEVELOPMENT OF A PERMANENT BRACHIAL PLEXUS INJURY AFTER AMARI'S DELIVERY.

A. Question Presented

Did the trial court err when it allowed Dr. Engelbert to testify, in the absence of any scientific basis and in contrast to widely-accepted scientific evidence to the contrary, that Dr. Wong was negligent because Amari suffered a permanent brachial plexus injury?

Defendants preserved this issue by filing a pretrial motion *in limine*, objecting to this evidence during the pretrial conference, objecting to this evidence at trial, when they moved for judgment as a matter of law during and after the trial, and when they moved and argued for a new trial subsequent to the verdict. (A-434-444, A-587-A597, A-744-750, A-837, A-1863-1869, A-1905-1983, A-1986-1988)

B. Scope of Review

This Court reviews a lower court's decision to admit expert testimony for an abuse of discretion. *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513, 522 (Del.

1999). The Court must first determine whether the trial judge's ruling was correct. *Green v. A.I. duPont Inst. of the Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000). If incorrect, the Court must then determine whether the ruling significantly prejudiced the party so as to deny the party a fair trial. *Davis v. Maute*, 770 A.2d 36, 42 (Del. 2001). Where the evidence goes to "the very heart" of the case and "might well have affected the outcome" of the trial, a new trial should be awarded. *Green*, 759 A.2d at 1063.

C. Merits of Argument

Permitting Dr. Engelbert's unreliable, unscientific, and unsupported *res ipsa loquitor* opinion was an abuse of discretion that prejudiced Defendants. The trial judge erred when she permitted Dr. Engelbert's standard of care opinion to be offered to the jury, as it should not have been deemed legally sufficient to support Plaintiff's case.

Pursuant to D.R.E. 702 and *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), the trial court is tasked with the responsibility of excluding unreliable and unscientific expert testimony. *M.G. Bancorporation, Inc.*, 737 A.2d at 521-22 (adopting *Daubert* to govern D.R.E. 702). The trial court cannot simply accept the expert's opinion because of experience; instead, the proponent of the expert

testimony must establish that the expert's testimony is based on sufficient facts and is the product of reliable methods that are applied reliably to the case at issue. D.R.E. 702; *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. Ct. 2000); *Clark v. Tabata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir. 1999) ("A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are reliable and relevant under the test set forth by the Supreme Court in *Daubert*."). Simply, "*Daubert* demands that [the expert] employ intellectual rigor in the consideration of scientific data, including the evaluation and discounting of studies that are not supportive of [the expert's] opinion." *Scaife v. Astrazeneca, L.P.*, 2009 WL 1610575, at *19 (Del. Super. Ct. June 9, 2009).

In *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787 (Del. 2006), this Court held that in addition to following the guidelines set forth in *Daubert*, the following five-step test must also be satisfied before expert testimony is allowed at trial:

1. The witness qualifies as an expert by knowledge, skill, experience, training, or education,

2. The expert's opinion and evidence is relevant,

3. The expert's opinion is based upon information reasonably relied upon by experts in the particular field,

4. The expert's testimony will assist the trier of fact to understand the evidence or determine a material fact in issue, and

5. The expert's testimony will not create unfair prejudice or confuse or mislead the jury.

Id. at 795.

In this case, Dr. Engelbert failed to meet these requirements on multiple fronts. During his deposition, Dr. Engelbert testified that Amari's medical records and sworn witness testimony did not matter to him because all he "needed to have to form [his] opinions was the fact that there was existence of a dystocia, and ultimately there was a permanent injury[.]" (A-355) Dr. Engelbert testified at deposition and at trial that Dr. Wong complied with the standard of care but for the fact that Amari suffered a permanent injury, which can take at least 1 year to identify.[2] (A-369-370, A-393, A-955-956, A-958) He testified that it is his opinion that all permanent brachial plexus injuries are caused by excessive downward lateral traction, and that no other cause exists. (A-355, A-898, A-900, A-902-904, A-914-915, A-926-928) Dr. Engelbert's testimony reveals that he did not, in order to reach his opinion, employ *any* methodology, let alone a reliable methodology. The trial court's conclusion to the contrary was error.

[2] The Monograph refers to a persistent injury as one that lasts "12 or more months after birth." (A-55)

Dr. Engelbert's opinion that *luck* (wherein a baby's nerve recovers after delivery) can prevent a physician from subsequently being deemed negligent demonstrates how unreliable and unscientific his opinion is. (A-355, A-955-956, A-958) "Luck" is not part of the scientific method, nor is it "reasonably relied upon by experts in the particular field." D.R.E. 702; *Quinn v. Woerner*, 2006 WL 3026199, at *2 (Del. Super. Ct. Oct. 23, 2006) (expert must employ scientific method to rule out other potential causes of injury to render opinion admissible); *Bowen*, 906 A.2d at 795. As demonstrated by Defendants' experts, a reliable and admissible methodology requires consideration of the wealth of science and reevaluation of one's own beliefs, as things that seem to be "common sense" are often disproved when evaluated with evidence-based medicine and empirical testing. (A-1341-1342, A-1433, A-1464, A-1469, A-1581-1582, A-1600, A-1712-1714)

Nor was evidence presented by Plaintiff to establish that Dr. Engelbert's opinion is "supported by appropriate validation" as required by *Daubert*. The evidence establishes the opposite and shows that his opinion amounts to nothing more than inadmissible *ipse dixit* or subjective testimony. *McLaren v. Mercedes Benz USA, LLC*, 2006 WL 1515834, at *3 (Del. Super. Ct. Mar. 16, 2006); *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). The trial court failed to recognize that his opinion has no standards to control its accuracy and has not been accepted

as reliable. The trial court further failed to recognize that Dr. Engelbert's conclusions have been subjected to peer review (the Monograph) and rejected. (A-38-158, A-81)

Plaintiff was required to establish all of this before being allowed to present Dr. Engelbert's opinion to the jury. *Daubert*, 509 U.S. at 593-9. The trial court in this case, in error, accepted Dr. Engelbert's distinction between a temporary and permanent injury without any credible, current and reliable scientific literature and without a proper showing of any literature disputing his conclusions, as set forth in the widely-accepted Monograph.[3] *Perry v. Berkley*, 996 A.2d 1262, 1268 (Del. 2010) (expert opinion based on insufficient research or that ignores obvious factors is inadmissible). The Monograph concluded that permanent brachial plexus injuries can occur in the absence of excessive downward lateral traction. (A-38-158, A-81) Dr. Engelbert's conclusory statement that the contradictory conclusions of the Monograph are not "credible" or are "flawed" (without citing a single piece of

[3] Defendants objected to Dr. Engelbert providing a differential diagnosis, as one was never disclosed pretrial, and the Court agreed that this would "certainly not" be allowed. (A-744-751) Despite this statement, the trial court allowed Dr. Engelbert to attempt to fashion one at trial. His testimony that no other causes explain Amari's injury was no more reliable at trial, however, than it was pretrial, given his failure to identify any scientific basis for rejecting the scientifically-recognized maternal forces theory of permanent injury set forth in the Monograph. (A-926-928, A-959-960)

supporting literature) is insufficient under *Daubert*.[4] (A-348, A-361-363, A-383-384, A-392-393, A-928-929, A-937-938, A-978-979). *McDowell v. Brown*, 392 F.3d 1283, 1299-1300 (11th Cir. 2004) (citation to one article which was distinguishable was insufficient to establish reliable methodology); *Berk v. St. Vincent's Hosp. and Med. Ctr.*, 380 F. Supp. 2d 334, 354-355 (S.D.N.Y. 2005) (rejecting *ipse dixit* of expert without supporting literature); *Hendrix ex rel. G.P. v. Evenflo Company, Inc.*, 609 F.3d 1183, 1201–02 (11th Cir. 2010) (affirming exclusion of expert's opinion that was unsupported by medical literature).

The purpose of Dr. Engelbert's deposition was to determine if his opinions were admissible at trial. In this case, Dr. Engelbert's deposition proved that his opinion was fatally flawed under D.R.E. 702 and *Daubert*, yet he was allowed to testify at trial. Even at trial, Dr. Engelbert admitted that all he really needed to know to form his opinion was that a permanent injury existed. (A-957-958) It was and always has been clear that his opinion is not based on scientific literature. Dr.

---

[4] Although the trial court found that Dr. Engelbert performed a differential diagnosis by discounting some "rare" causes of permanent brachial plexus injuries at trial such as cancer or infection, the trial court erred by failing to require that Dr. Engelbert perform a reliable differential diagnosis employing an appropriate methodology to rule out the widely scientifically-accepted position that excessive downward lateral traction is not required. At no time was Dr. Engelbert asked to offer any scientific or other reliable basis for why he discounted the Monograph's conclusions as discussed herein, rendering his opinions flawed and inadmissible under D.R.E. 702.

Engelbert failed to identify any studies that determine the cause of a brachial plexus injury solely upon whether the injury, months later, is deemed to be temporary or permanent. (A-966) Dr. Engelbert's regurgitation of spoon-fed literature at trial after he specifically disclaimed reliance on any literature during his deposition and after he had formed his opinion cannot establish a reliable methodology as required by D.R.E. 702 and *Daubert*.[5] (A-348, A-896)

Here, Dr. Engelbert was not able, at deposition or trial, to cite *any* validating process or *any* scientific literature supporting the distinction for determining breach of the standard of care that he makes based solely upon whether a permanent or temporary injury develops after delivery. This distinction, which is the cornerstone of his opinion, is particularly untenable in this case where Dr. Engelbert acknowledges that three of the nerve branches injured during Amari's delivery *recovered* over time. (A-353, A-898, A-918) Presumably, per Dr. Engelbert, Dr. Wong was only half-lucky and, at most, only half-negligent. Such an outcome is illogical and illustrates the lack of "science" and "process" involved in Dr. Engelbert's opinion.

---

[5] Moreover, the literature discussed during Dr. Engelbert's trial testimony, at best, supports the proposition that excessive downward lateral traction is one mechanism of causing a permanent brachial plexus injury. It does not state that it is the only mechanism and does not address Defendants' contention that maternal forces caused Amari's injuries.

Significantly, Dr. Engelbert was precluded from providing a similar unsupported opinion in *McGovern ex rel. McGovern v. Brigham & Women's Hosp.*, 584 F. Supp. 2d 418 (D. Mass. 2008), where he opined that the defendant's decision to perform a vacuum assisted delivery was negligent and caused a baby to suffer a stroke. He formed his opinion on "his knowledge, education and experience," yet could not cite any literature supporting his opinion or distinguish contrary literature which disputed his opinion. The *McGovern* court found that no basis existed to support Dr. Engelbert's opinion, and that it was based on nothing more than his "saying so". *McGovern*, 584 F. Supp. 2d at 425-26. The court found that Dr. Engelbert's opinion constituted unreliable and inadmissible "junk opinion" under *Daubert* and F.R.E. 702 (D.R.E. 702's counterpart). *Id.* At 424.

In this case, Dr. Engelbert's opinion also amounts to an unreliable, inadmissible "junk opinion." Here, as in *McGovern*, Dr. Engelbert failed to cite any literature supporting his theory and failed to distinguish widely-accepted contrary scientific literature. As in *McGovern*, Dr. Engelbert testified that his theory is based on nothing more than, in essence, his "saying so." For the trial court to draw the opposite conclusion was improper in view of Dr. Engelbert's sworn testimony.

Notably, in denying Defendants' post-trial Motions, the trial court seemingly acknowledged that Dr. Engelbert's opinion sounded like a *res ipsa loquitur* opinion.

(A-1995, A-2000, A-2021, A-2026) The trial court attempted, nonetheless, to salvage it by stating that *Defendants* elicited the testimony from Dr. Engelbert that his opinion is based on the fact that Amari's injury is permanent. (*Id.*) Even if accurate, which it is not, this is a distinction without a difference. Dr. Engelbert acknowledged, at deposition and trial, that while he read Amari's records, all he needed to know to form his opinion was that Amari's injury is permanent. (A-355, A-957-959) The permanency of Amari's injury was the *only* basis provided by Dr. Engelbert to support his standard of care opinion. Plaintiff was required, per D.R.E. 702, *Daubert* and *Bowen*, to provide a reliable basis for Dr. Engelbert's opinion. Dr. Engelbert's blind reliance on the permanency of Amari's injury as the basis for his opinion was not an inadvertent one-time response to a question posed during cross-examination. It was the beginning, middle and end of his opinion that Dr. Wong breached the standard of care and should not have been admitted.

The trial court's reliance on *Lewis v. McCracken*, 2016 WL 6651417 (Del. Super. Ct. Nov. 7, 2016) to save this otherwise inadmissible opinion not only conflicts with Dr. Engelbert's sworn testimony in this case but is misplaced. In *Lewis*, Dr. Engelbert offered a differential diagnosis in that specific case and cited at least some literature to support his testimony. *Lewis*, 2016 WL 6651417 at *2, *5. By contrast and for whatever reason, Dr. Engelbert did not offer a differential

diagnosis for Amari during his deposition, and was unable during his deposition to cite any literature to support his theory. (A-596-597) There was nothing reliable about his methodology, and his opinions should have been excluded. D.R.E. 702.

Dr. Engelbert's testimony in this case is no better than the expert testimony that was rejected in *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579 (Del. 2007), where this Court affirmed the trial judge's exclusion of expert testimony that the only cause of brachial plexus injuries is excess traction. Here, as in *Sturgis*, Dr. Engelbert's opinion, which is based solely on the existence of a permanent injury without any other evidence of alleged breach of the standard of care, improperly shifted the burden to Defendants to establish an alternative cause for Amari's injury. *Id.* at 588. The trial court's conclusion to the contrary was error.

Accordingly, Dr. Engelbert's opinion in this case fails to meet the tests of *Daubert* and *Bowen*. It is not based on any reliable methodology or accepted scientific data and is, at the end of the day, Dr. Engelbert's presumption of negligence from Amari's permanent injury,[6] a presumption that is repugnant to

[6] Plaintiff's counsel acknowledged during the pretrial conference that his experts were, in essence, giving a *res ipsa loquitor* opinion, stating that "in effect, that the injury is proof that the force was exerted." (A-589) And, in closing, Plaintiff's counsel told the jury to "[t]hrow science out the window" and use "simple logic common sense." (A-1804)

science and Delaware law. *Ciociola v. Del. Coca-Cola Bottling Co.*, 172 A.2d 252, 257 (Del. 1961) ("It is a fundamental rule that negligence of a defendant is never presumed from the mere fact of an injury."). *Res ipsa loquitor* opinions are not allowed in medical negligence actions "in which the only proof is the fact that the treatment of the patient terminated with poor results." *DiFilippo v. Preston*, 173 A.2d 333, 338 (Del. 1961); 18 *Del. C.* § 6853(e) (precluding any "inference or presumption of negligence on the part of a health-care provider" except in limited and inapplicable circumstances); D.R.E. 304(b)(1); *Norman v. All About Women, P.A.*, 2017 WL 5624303, at *2 (Del. Super. Ct. Nov. 16, 2017), *reargument denied*, 2017 WL 6507186 (Del. Super. Ct. Dec. 19, 2017), *appeal docketed*, No. 26, 2018 (Del. Jan. 16, 2018) (excluding expert opinion that injury at issue "does not ordinarily occur in the absence of negligence" as unreliable under D.R.E. 702).

Expert testimony that negligence is the only cause of brachial plexus injuries has routinely been excluded and/or deemed legally insufficient (not only in *Sturgis*, *supra*, in Delaware, but also in other jurisdictions). *See, e.g., Bayer ex rel. Petrucelli v. Dobbins*, 885 N.W.2d 173, 181 (Wis. Ct. App. 2016) (recognizing that maternal forces can cause permanent brachial plexus injuries because publications including the Monograph "support the notion that, from a medical perspective, a permanent brachial plexus injury is simply a temporary brachial plexus injury that did not

recover"); *Lawrey v. Kearney Clinic, P.C.*, 2012 WL 3583164 (D. Neb. Aug. 20, 2012), *aff'd sub nom., Lawrey v. Good Samaritan Hosp.*, 751 F.3d 947 (8th Cir. 2013) (finding that "[a]ll credible evidence before this Court suggests that brachial plexus injuries and Erb's palsy can and do occur in a fixed percentage of births where no traction is applied by the birth attendant"); *Castro v. United States*, 2016 WL 5942354, at *6 (M.D. Fla. Oct. 13, 2016) (accepting maternal forces theory and "precluding Plaintiff's experts from testifying that the natural forces of labor is not a possible cause for Plaintiff's injury"); *Cardillo v. Aron*, 2010 WL 986503, at *7 (Mass. Super. Ct. Jan. 6, 2010) (rejecting excessive downward lateral traction as only cause of permanent brachial plexus injuries based on the scientific studies).

In sum, the trial court's admission of Dr. Engelbert's opinions was an abuse of discretion which significantly prejudiced Defendants, denied them a fair trial, and warrants reversal. *Davis*, 770 A.2d at 42. Dr. Engelbert was Plaintiff's sole standard of care expert and, therefore, the only basis upon which the jury could have concluded that Dr. Wong breached the standard of care. *See* 18 *Del. C.* § 6853(e) (requiring medical expert testimony for a finding of medical negligence). As his testimony went to "the very heart" of the case and "affected the outcome" of the trial, the trial court's abuse of discretion mandates a reversal, exclusion of Dr. Engelbert's opinions, and judgment in Defendants' favor as a matter of law or,

alternatively, a new trial. *Green*, 759 A.2d at 1063; 18 *Del. C.* § 6853(e); *Burkhart v. Davies*, 602 A.2d 56, 59-60 (Del. 1991) (lack of expert medical testimony in medical negligence case entitles defendant to judgment as a matter of law).

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR (ENTITLING DEFENDANTS TO JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, A NEW TRIAL) WHEN IT ALLOWED DR. KOZIN'S UNSCIENTIFIC AND UNSUPPORTED CAUSATION OPINION THAT THE ONLY CAUSE OF AMARI'S INJURY WAS EXCESSIVE TRACTION.

A. Question Presented

Did the trial court err when it permitted Dr. Kozin to offer a causation opinion without any foundation or reliable scientific basis?

Defendants preserved this issue by filing a pretrial motion *in limine* objecting to this evidence during the pretrial conference, objecting to this evidence at trial (including at a sidebar conference where the trial court allowed a continuing objection), moving for judgment as a matter of law during and after the trial, and moving and arguing for a new trial subsequent to the verdict. (A-427-433, A-597-607, A-837, A-1223-1230, A-1794, A-1863-1869, A-1905-1983)

B. Scope of Review

This Court reviews a lower court's decision to admit expert testimony for an abuse of discretion. *M.G. Bancorporation, Inc.*, 737 A.2d at 522. The Court must first determine whether the trial judge's ruling was correct. *Green*, 759 A.2d at 1063. If incorrect, the Court must determine whether the ruling significantly prejudiced the party so as to deny the appellant a fair trial. *Davis*, 770 A.2d at 42. Where the

evidence goes to "the very heart" of the case and "might well have affected the outcome" of the trial, this Court should award a new trial. *Green*, 759 A.2d at 1063.

C. Merits of Argument

The admission of Dr. Kozin's causation opinion was an abuse of discretion that significantly prejudiced Defendants and warrants reversal. It is undisputed in this case that Dr. Kozin did not review Amari's delivery records or any sworn testimony regarding Amari's delivery before he formed his causation opinion. As with Dr. Engelbert, Dr. Kozin failed to cite any scientific literature supporting his opinion or rebut widely-accepted scientific literature (including the Monograph) which disputes his opinion. (A-202, A-212-219, A-223-227, A-231-234) Despite these critical deficiencies, present in both his deposition and trial testimony, Dr. Kozin was permitted by the trial court to testify to the jury that Amari's injury could "*only* result from excessive traction applied onto the baby's head during the delivery" by Dr. Wong. (A-202, A-212-219, A-223-227, A-231-234, A-237-238) This testimony should have been precluded, and this Court should reverse this matter for a new trial.

Delaware law is clear that if expert testimony is not based on sufficient facts or data, it is inadmissible. *Perry*, 996 A.2d at 1268. In *Perry*, this Court affirmed

the trial court's decision to exclude an expert's causation opinion because the expert "did not have a correct understanding of the facts of the case, thereby completely undermining the foundation of his expert opinion and not merely his credibility." *Id.* at 1270. The Court noted that an expert who "has engaged in insufficient research, or has ignored obvious factors, . . . must be excluded" under D.R.E. 702, even if the methodology is valid. *Id.* at 1268, 1269 (*quoting* 4 *Weinstein's Federal Evidence* § 792.95[2][b] (2d ed. 2009)).

Dr. Kozin's opinion was not based on any facts of this case. Dr. Kozin had no knowledge whatsoever of what happened during Amari's delivery. (A-224-225, A-605-607) His testimony that he subsequently became "familiar" with Amari does not change the fact that he lacked a proper foundation to render a causation opinion that specific events during Amari's delivery caused his injury.[7] Dr. Kozin's opinion as to the cause of Amari's injuries, formed without any knowledge of the basic factual information about Amari's delivery, was based on "suppositions rather than facts," which is not allowed. D.R.E. 702; *Perry*, 996 A.2d at 1271 ("When the expert's opinion is not based upon an understanding of the fundamental facts of the

[7] The trial court, in essence, disregarded Dr. Kozin's deposition testimony and let him have a "do-over" merely because he treated Amari. This begs the question: what is the value of deposing an expert if, no matter how deficient his testimony, he will be allowed to offer unlimited opinions merely because he treated the plaintiff?

case, however, it can provide no assistance to the jury and such testimony must be excluded.").

Moreover, like Dr. Engelbert's opinion, Dr. Kozin's opinion was nothing more than an improper, unsupported, and unreliable *res ipsa loquitor* opinion. For the same reasons discussed in the prior section involving Dr. Engelbert, Defendants contend that Dr. Kozin's opinion (which is based solely on the existence of a permanent injury) should have been excluded. *Ciociola*, 172 A.2d at 257; 18 *Del. C.* § 6853(e); D.R.E. 304(b). Like Dr. Engelbert, Dr. Kozin surmised that Amari's injury had to have been caused by alleged negligent and excessive traction because his injury is permanent. This is ironic, as Dr. Kozin admitted that he used to believe that injuries like Amari's *could* be caused by maternal forces – a belief that he held until he had an unexplained "epiphany" several years ago. (A-855-856) There is nothing reliable or scientific about an unsupportable "epiphany" as required by Delaware law.

Dr. Kozin, like Dr. Engelbert, also failed to base his opinion "on information reasonably relied upon by experts" in his field by offering a reliable differential diagnosis or by citing any literature for excluding maternal forces or other causes of Amari's injuries. (A-215-221, A-237-238, A-246); D.R.E. 702; *Quinn*, 2006 WL 3026199 at *2; *Norman*, 2017 WL 5624303 at *2. He, like Dr. Engelbert, did not

effectively distinguish the data set forth in the ACOG Monograph which disputes his opinions. Like Dr. Engelbert, Dr. Kozin's testimony fails to satisfy the criteria of *Daubert* and *Bowen*, *supra*. And, like Dr. Engelbert, Dr. Kozin has also (based on the grounds discussed herein) been excluded from offering the very opinion that he was allowed to provide in this case. *See, e.g., Lawrey v. Kearney Clinic, P.C.*, 2012 WL 3583164 (D. Neb. Aug. 20, 2012), *aff'd sub nom., Lawrey v. Good Samaritan Hosp.*, 751 F.3d 947 (8th Cir. 2013).

Just as the admission of Dr. Engelbert's standard of care opinion significantly prejudiced Dr. Wong, so did the admission of Dr. Kozin's causation opinion. The fact that Dr. Kozin was "familiar" with Amari makes his unfounded opinion arguably even more prejudicial as the jury likely placed additional weight on his opinion due to his relationship with Amari. Dr. Kozin's opinion, like Dr. Engelbert's opinion, involved "the very heart" of Plaintiff's case and "might well have affected the outcome of the trial." As such, the trial court's abuse of discretion by allowing Dr. Kozin's opinion into evidence warrants reversal, exclusion of his opinion, and judgment in favor of Defendants or, alternatively, a new trial. *Barrow v. Abramowicz*, 931 A. 2d 424, 429 (Del. 2007).

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR (ENTITLING DEFENDANTS TO JUDGMENT AS A MATTER OF LAW OR, ALTERNATIVELY, A NEW TRIAL) WHEN IT ALLOWED THE ADMISSION OF STATISTICAL EVIDENCE IN VIOLATION OF *TIMBLIN V. KENT GENERAL HOSPITAL (INC.)* AND ITS PROGENY.

A. Question Presented

Did the trial court err when it permitted Plaintiff to establish the rarity of permanent brachial plexus injuries through statistical evidence in order to suggest to the jury that Dr. Wong was negligent?

Defendants preserved this issue by objecting to this evidence during the pretrial conference, objecting to this evidence at trial, and moving and arguing for a new trial subsequent to the verdict. (A-608-613, A-837, A-1863-1869, A-1905-1983)

B. Scope of Review

This Court reviews a lower court's decision to admit evidence for an abuse of discretion. *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021, 1023 (Del. 1994). The Court must first determine whether the trial judge's ruling was correct. *Green*, 759 A.2d at 1063. If incorrect, the Court must determine whether the ruling significantly prejudiced the party so as to deny her a fair trial. *Davis*, 770 A.2d at 42. Where the evidence goes to "the very heart" of the case and "might well have

affected the outcome" of the trial, this Court should award a new trial. *Green*, 759 A.2d at 1063.

C. Merits of Argument

At trial, Plaintiff's counsel asked Dr. Wong and Defendants' experts how many deliveries they had performed during their careers, how many of their deliveries involved shoulder dystocia, and how many of their deliveries resulted in sustained permanent brachial plexus injuries. (A-1257-1259, A-1339-1340, A-1398-1399, A-1479-1482, A-1732-1735) Plaintiff's counsel, thereafter, used this statistical evidence to argue to the jury that maternal forces were present in all of these deliveries and that "common sense" therefore dictates that maternal forces did not cause Amari's brachial plexus injury given their rarity. (A-1800-1801) The clear intention of eliciting this information was to try to demonstrate that, statistically, Dr. Wong must have been negligent due to the infrequency of these types of injuries. This is improper and warrants a new trial under *Timblin*.

The use of statistical evidence, as it was used in this case, has been addressed by this Court and has been deemed improper and inadmissible. In *Timblin*, *supra*, the defendant's expert testified that the defendant was not negligent because, statistically, the patient was highly likely to suffer an injury. *Timblin*, 640 A.2d at

1022. Even absent an objection, this Court found that the admission of this statistical evidence was prejudicial reversible error because it was "not probative" of whether the defendant deviated from the applicable standard of care and caused the plaintiff's injuries. *Id.* at 1024, 1026. This Court based its ruling on the principle that "a plaintiff cannot use evidence that a medical procedure had an unusual outcome to create an inference that the proper standard of care was not exercised." *Id.* Subsequent decisions applying *Timblin* are in accord. *See, e.g., Pruett v. Lewis*, 2011 WL 882102, at *2 (Del. Super. Ct. Mar. 10, 2011) (statistical evidence creates prejudice because a jury may "decide the case based on what happens normally instead of what happened in the case before it"); *Frey v. Goshow-Harris*, 2009 WL 2963789, at *3 (Del. Super. Ct. Sept. 16, 2009) (precluding use of statistical evidence to show compliance with standard of care because of infrequency of surgeon detecting ureter injury intraoperatively).

In this case, contrary to *Timblin*, the trial court permitted Plaintiff's counsel to seek statistical evidence and use statistics regarding the number of deliveries involving Dr. Wong and his experts so that the jury could infer negligence based upon an unusual outcome. Per *Timblin*, the use of this evidence was improper.[8]

[8] In the Pretrial Stipulation, Plaintiff objected to the use of statistical evidence. (A-453, A-482) Despite an objection by all of the parties, the trial court held that these questions were admissible to respond to Dr. Wong's maternal forces causation

Other deliveries, not involving Amari, and generalities of what "normally happens," had no bearing on what happened during Amari's delivery. *Id.* at 1025-26.

The prejudicial nature of this evidence is so apparent that, while Defendants herein objected to its use at the pretrial conference and at trial, this Court held in *Timblin*, even absent a contemporaneous objection, that its introduction warranted a new trial. (A-608-613, A-837); *Timblin*, 640 A.2d 1023, 1026; *Clawson v. State*, 867 A.2d 187, 191 (Del. 2005) (noting that evidentiary foundation issues may be raised "either by a pretrial motion or by an objection at trial") (emphasis added). In this case, as in *Timblin*, Defendants respectfully contend that the introduction of statistical evidence was a prejudicial error and that Defendants are entitled to a new trial based upon this error.

---

argument. (A-612-614)

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR (ENTITLING DEFENDANTS TO A NEW TRIAL) WHEN IT REFUSED TO INSTRUCT THE JURY ON "ACTIONS TAKEN IN EMERGENCY" DESPITE SUPPORTING EVIDENCE.

A. Question Presented

Did the trial court err when it refused to instruct the jury on "Actions Taken in Emergency" when undisputed evidence was presented at trial that Dr. Wong was faced with an obstetrical emergency during Amari's delivery?

Defendants preserved this issue when they submitted jury instructions, argued for this jury instruction at the prayer conference, objected to the lack of the "Actions Taken in Emergency" instruction at trial, and when they moved and argued for a new trial after the verdict. (A-1514, A-1540-1543, A-1825, A-1864, A1943)

B. Scope of Review

This Court reviews the Superior Court's decision to refuse to instruct the jury on a requested instruction *de novo*. *North v. Owens-Corning Fiberglas Corp.*, 704 A.2d 835, 837 (Del. 1997). Where the instruction applies to the facts and law of the case, the trial court must "submit all the issues affirmatively to the jury." *Id.*

C. Merits of Argument

At trial, all experts agreed that Dr. Wong faced an obstetrical emergency situation when Amari encountered shoulder dystocia during delivery. Shoulder dystocia was a situation that Dr. Wong did not create, which required Dr. Wong to deliver Amari quickly, as babies can sustain neurological injuries within five minutes, with some studies showing as few as two minutes. (A-99, A-932-934, A-1317-1318, A-1441, A-1542-1543, A-1590-1591) Plaintiff's expert, Dr. Engelbert, agreed that excessive downward lateral traction is "to be avoided unless it's a lifesaving situation." (A-966-967) (emphasis added). *See also Sturgis*, 942 A.2d at 582 (shoulder dystocia is a life-threatening situation where a baby's shoulder gets stuck against the mother's pubic bone during delivery).

Based upon this evidence, during the prayer conference, Defendants requested that the "Actions Taken in Emergencies" instruction be provided to the jury. (A-1540-1543) The proposed instruction reads as follows:

> When a person is involved in an emergency situation not of his own making and not created by his own negligence, that person is entitled to act as a reasonably prudent person would under similar circumstances. Therefore, if you find that Dr. Wong was confronted by an emergency situation when Amari Broughton-Fleming presented with shoulder dystocia, you should review Dr. Wong's conduct in light of what a reasonably prudent person would have done under those circumstances.

(A-1540-1541)

The assessment of Dr. Wong's conduct in an emergency situation was a material issue for the jury to consider. While the trial court in this case agreed that evidence that Dr. Wong faced an emergency situation was presented at trial, the trial court refused to provide the instruction to the jury. (A-1542-1543, A-1825) The jury should have been instructed that it should weigh or judge Dr. Wong's conduct in light of what a reasonably prudent person would have done under similar emergency circumstances.

The trial court's refusal to give this instruction was in error and deprived Defendants of the ability to have the issues in this case determined by the jury based upon a complete and correct statement of the applicable law.[9] Given the relevancy and appropriateness of the instruction requested, the trial court's refusal to provide the instruction to the jury was a material omission that prejudiced Defendants and warrants a new trial. *R.T. Vanderbilt Co. Inc. v. Galliher*, 98 A.3d 122, 127 (Del.

---

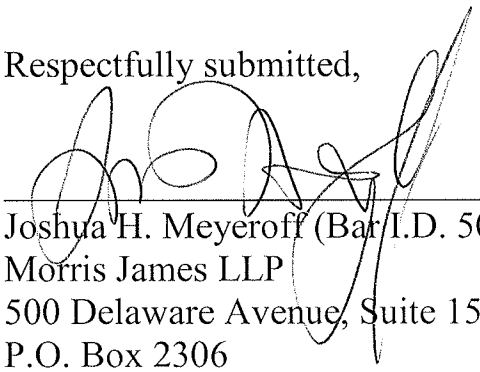
[9] To the best of defense counsel's recollection, the trial court concluded that this instruction did not apply to medical negligence cases. It is unclear why this ruling was not transcribed. Defendants requested that all testimony, rulings and arguments during trial be transcribed. (D.I. 2) Even without a transcript, however, it is clear from the record that Defendants requested this instruction and the trial court did not give it over Defendants' objection as discussed *supra*, and this issue is therefore preserved.

2014); *North*, 704 A.2d at 839 (failure to instruct jury on issues of material fact is not a harmless error).

CONCLUSION

For the reasons set forth above, Defendants respectfully request as follows: that Dr. Engelbert's testimony be stricken and that judgment be entered in Defendants' favor as a matter of law or, alternatively, that a new trial be ordered; that Dr. Kozin's testimony be stricken and that judgment be entered in Defendants' favor as a matter of law or, alternatively, that a new trial be ordered; that a new trial be ordered based upon the trial court's error of admitting improper statistical evidence; and that a new trial be ordered based upon the trial court's refusal to instruct the jury on "Actions Taken in Emergency" despite that evidence was presented at trial supporting this instruction.

Respectfully submitted,



Joshua H. Meyeroff (Bar I.D. 5040)
Morris James LLP
500 Delaware Avenue, Suite 1500
P.O. Box 2306
Wilmington, DE 19899-2306
Telephone: (302) 888-6800
Email: jmeyeroff@morrisjames.com

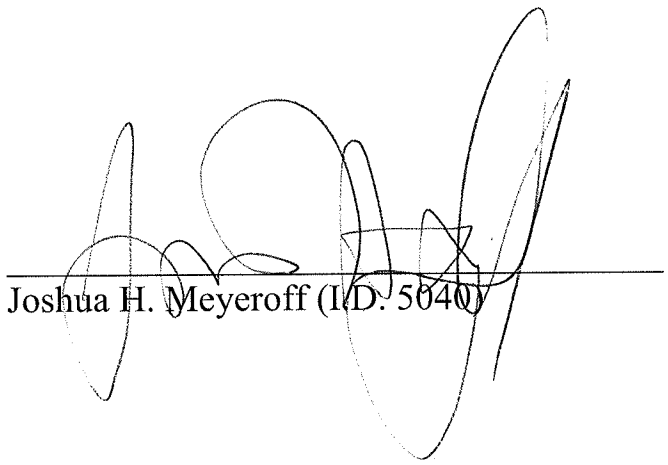
Dated: 6/13/18

CERTIFICATE OF SERVICE

I, Joshua H. Meyeroff, Esquire, hereby certify that on this 13th day of June, 2018, I have caused the following document to be served electronically on the parties listed below: **Opening Brief on Appeal of Defendants Below, Appellants, Peter J. Wong, M.D., and Dedicated to Women OB-GYN, P.A.**

Online service to:

Bruce L. Hudson, Esquire
Ben T. Castle, Esquire
Hudson and Castle Law Office
2 Mill Road, #202
Wilmington, DE 19806



Joshua H. Meyeroff (I.D. 5040)