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 Delaware Superior Court 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.	)	

REPLY 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: 7/27/18

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT'D)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT'D)

TABLE OF CITATIONS (CONT'D)

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.

In their Answering Brief, Plaintiffs fail to address in any meaningful fashion, if at all, the issues raised in Defendants' Opening Brief. Plaintiffs' Brief is silent as to Defendants' argument that Dr. Engelbert's testimony constitutes an improper *res ipsa loquitor* opinion. Plaintiffs' Brief relies on very few facts from the Record[1] and overlooks the sworn testimony of Dr. Engelbert (set forth in detail in Defendant's Opening Brief with cites to the Record) wherein he acknowledges that he presumed negligence from the fact of injury, that he did not rely on the medical records to form his opinions, and that he is not aware of scientific literature which supports the underlying premise for his opinion – the distinction between a permanent and transient injury. Plaintiffs' Brief also fails to address or distinguish the applicable legal authorities, including *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579

[1] In discussing the underlying facts of the case, Plaintiffs failed to cite to the record in any manner as required. (Ans. Br. at 7); Sup. Ct. R. 14(b)(v) (requiring "A concise statement of facts, with supporting references to appendices or record, presenting succinctly the background of the questions involved.").

(1993) and *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787 (Del. 2006), wherein the gate-keeping role of the trial court concerning expert testimony is defined. These cases are not discussed or cited at all in Plaintiffs' Brief.

Dr. Engelbert testified in this case 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) He testified further that "luck" can define negligence. (A-955-956) During his deposition and at trial, Dr. Engelbert was unable to identify any scientific studies distinguishing between a permanent and temporary injury as the sole measure for determining if excessive traction was applied during delivery. (A-896, A-966) At trial, Dr. Engelbert testified: "Correct. It's obvious". (A-966) In their Answering Brief, Plaintiffs make no attempt to address these issues and, in fact, fail to identify any reliable basis for Dr. Engelbert's opinions, any methodology employed by him, or any scientific evidence that Amari's injury must have been caused by Dr. Wong's alleged negligence.

Defendants note at the outset that Plaintiffs' insinuation that adequate objections were not made regarding the opinions of Dr. Engelbert is rebutted by the Record. Plaintiffs acknowledge that Defendants objected to Dr. Engelbert's opinions in a timely pretrial motion *in limine*, at the pretrial conference, and post-

trial, but they dispute that Defendants objected at trial. (A-434-444, A-587-A597, A-744-750, A-1863-1869, A-1905-1983, A-1986-1988) As noted in their Opening Brief, Defendants objected to both experts' testimony during trial, and the Court agreed that those objections were preserved. (A-837) Even if the trial court's agreement to preserve Defendants' objections is insufficient, which is denied, a timely pretrial objection is sufficient to preserve the issue. *Clawson v. State*, 867 A.2d 187, 191 (Del. 2005).

Plaintiffs' other arguments are also without merit. In their Brief, Plaintiffs highlight the standard of review to argue that affirmance is appropriate. (Ans. Br. at 9) Although a trial judge has discretion to admit expert testimony, the trial court may not admit otherwise inadmissible testimony that prejudices a defendant's right to a fair trial. *M.G. Bancorporation, Inc. v. LeBeau*, 737 A.2d 513, 522 (Del. 1999); *Green v. A.I. duPont Inst. of the Nemours Found.*, 759 A.2d 1060, 1063 (Del. 2000); *Davis v. Maute*, 770 A.2d 36, 42 (Del. 2001). Trial courts are also obligated to abide by the principles set forth in *Daubert* and *Bowen*, *supra*. Here, the admission of Dr. Engelbert's unreliable, unscientific, and unfounded belief that Amari's permanent injury must have been caused by excessive downward lateral traction was incorrect, prejudiced Dr. Wong by allowing the jury to evaluate his conduct based on unreliable and invalid information, and warrants reversal.

Plaintiffs argue that Dr. Engelbert's (and Dr. Kozin's) experience alone is sufficient to render his testimony admissible – an argument that, in and of itself, recognizes that the other qualifying criteria set forth in *Daubert* and *Bowen* are lacking in this case. (Ans. Br. at 9) That Dr. Engelbert is a qualified obstetrician was never questioned or disputed. Defendants object, instead, to Plaintiffs' use of Dr. Engelbert's qualifications as the sole justification to offer his unscientific, unfounded, misleading opinions to the jury. As the party proffering the expert, Plaintiffs had to do more than merely show that Dr. Engelbert (or any expert) was qualified; they needed to demonstrate, in addition, that his opinion was relevant, based on information reasonably relied upon by experts in obstetrics, that the testimony would assist the jury, and that it would not create unfair prejudice or mislead the jury. *Bowen*, 906 A.2d at 795.

As recognized by this Court, an expert's opinion, to be admissible, must be based on more than just his qualifications - it must be, *inter alia*, "based upon information reasonably relied upon by experts in the particular field." *Bowen*, 906 A.2d at 795. While Defendants do not dispute that excessive downward lateral traction has been shown to cause a permanent brachial plexus injury, this does not support Dr. Engelbert's assumption that the contemporaneous medical records' statements and testimony of Dr. Wong and Nurse Wedel that excessive downward

lateral traction was not used in Amari's delivery had to be wrong because, per Dr. Engelbert, the only cause of Amari's injury could be excessive downward lateral traction. This contention, widely rejected by the wealth of peer-reviewed literature and the scientific community (as well as a number of courts), should not have been permitted to reach a jury because neither Dr. Engelbert nor Dr. Kozin cited any information (including medical literature) "reasonably relied upon by experts in the particular field" to support this position. D.R.E. 702; *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826, 843 (Del. Super. Ct. 2000).

The cases cited by Plaintiffs, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999) and *Brown v. Walmart Stores, Inc.*, 402 F. Supp. 2d 303 (U.S. Me. 2005), demonstrate that the trial court erred in this case. The U.S. Supreme Court in *Kumho Tire Co.* recognized that for expert testimony to be admissible, it must "have a reliable basis in the knowledge and experience of his [the expert's] discipline." *Kumho Tire Co. v. Carmichael*, 526 U.S. at 148 (citing *Daubert*, 509 U.S. at 592).

In *Brown v. Wal-Mart Stores, Inc.*, 402 F. Supp. 2d 303 (D. Me. 2005), the Court explains why Dr. Engelbert's experience, on its own, is insufficient to satisfy the criteria for the admission of expert opinion testimony. While the *Brown* Court notes in a footnote that experience alone may be sufficient, the next two sentences

of the court's opinion, which Plaintiffs neglect to include in their Brief, specifically caution as follows:

> However, "[i]f the [expert] witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." FED. R. EVID. 702 advisory committee's note. The gate-keeping function of the trial court requires more than merely "taking the expert's word for it." *Id.* (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995)) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough.").

Brown, 402 F. Supp. 2d at 308. Indeed, in *Brown*, the Court excluded the expert testimony at issue because it was "precisely the type of *ipse dixit* expert testimony the *Daubert* trilogy intended to eliminate." *Id.* at 310. Defendants contend that this is what the trial court should have done with Dr. Engelbert's *ipse dixit* opinion in this case which, similarly, had no reliable methodology or basis.[2]

Plaintiffs' suggestion that the maternal forces of labor theory has been "debunked" is particularly disingenuous in this case. (Ans. Br. at 11-12) Not only was there no evidence of this from Dr. Engelbert or Dr. Kozin at trial or during their depositions, Plaintiffs also failed at trial and during depositions to offer a single

---

[2] This is what caused Dr. Engelbert's exclusion in *McGovern ex rel. McGovern v. Brigham & Women's Hosp.*, 584 F. Supp. 2d 418, 424-46 (D. Mass. 2008). Plaintiffs fail to address *McGovern* or the fact that Dr. Engelbert offered another unsupported conclusion that was inadmissible under *Daubert*.

article or scientific document "debunking" the Monograph's peer-reviewed conclusions which have been endorsed by a number of national and international organizations. Indeed, with the exception of Dr. Engelbert, all experts who testified (including Dr. Kozin) agreed that permanent injuries can be caused by the maternal forces of labor. (A-852-853, A-867) Neither of Plaintiffs' experts presented any peer reviewed literature or other evidence published subsequent to the publication of the Monograph which rebuts its chief finding that the presence of persistent injury does not equate to excessive traction.

Plaintiffs attempted to attack one case study of a permanent brachial plexus injury in the absence of excessive downward lateral traction, but what Plaintiffs, and the trial court, failed to appreciate was that the Monograph's conclusions were not based on one case study. The Monograph did not conclude that one study supported its conclusion; it concluded 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-81) (emphasis added) It reviewed and analyzed hundreds of peer-reviewed studies and articles to arrive at this conclusion. (A-46-48) Dr. Engelbert offered no reliable basis whatsoever to discount this vetted, scientifically supportable conclusion.

Rather than address the scientific evidence and litany of cases from across the country that have rejected -- and ruled inadmissible -- opinions like those offered by Drs. Engelbert and Kozin (*see* Defendants' Opening Brief at 29-30), Plaintiffs cite a single New York case, *Nobre v. Shanahan*, 42 Misc. 3d 909, 976 N.Y.S.2d 841 (N.Y. Sup. Ct. 2013), in support of their argument that the trial court's decision in this case was proper. Plaintiffs' reliance on *Nobre*, like their reliance on *Kumho* and *Brown*, is misplaced. Here, too, Plaintiffs ignore the fact that the *Nobre* court, applying the *Frye* standard (not the relevant *Daubert/Bowen* standards), concluded that the maternal forces of labor theory *was* sufficiently supported by scientific evidence to satisfy *Frye*. *Id.* at 922-925. While that court ultimately precluded the defendants in that case from arguing this theory to the jury based upon additional foundational standards imposed by two New York state cases in effect at the time, the decision in *Nobre* was rendered five years ago, without any reference to the Monograph (which does not appear to have been published yet), and applied a different legal standard. At no point do Plaintiffs address the wealth of cases cited by Defendants, including *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d 579 (Del. 2007), which reject Dr. Engelbert's unsupported opinion that maternal forces cannot cause a permanent injury and that the only cause for a brachial plexus injury is excessive traction. (Open. Br. at 29-30)

Plaintiffs' attempt to downplay and misconstrue their experts' emphasis on the importance of permanency to Dr. Engelbert's opinion is noteworthy. As stated above, Plaintiffs' counsel do not address Defendants' *res ipsa loquitur* argument in their Answering Brief at all, and actually acknowledge therein that "[t]he trial focused on the distinction between a permanent and transient injury to the brachial nerve complex". (Ans. Br. at 10). To be clear, Dr. Engelbert testified unequivocally that it was the permanence of Amari's injury, and permanence alone, that defined negligence for him. (A-355, A-957-959) If Amari's injury had recovered (whether within 6 months or 2 years), Dr. Engelbert agreed that there would be no negligence. (A-393, A-955)

To presume negligence from Amari's permanent injury violates Delaware law. *Ciociola v. Del. Coca-Cola Bottling Co.*, 172 A.2d 252, 257 (Del. 1961). Judging Dr. Wong's (or any clinician's) conduct at delivery by what may happen months or years down the road is illogical, unscientific, unreliable, and ultimately unfair.[3] In this case, Dr. Engelbert was allowed to testify as such without any

[3] In Delaware, the standard of care is "established by evidence of the degree of care and competence ordinarily exercised by physicians" in the same or a similar field of medicine as the defendant, not by the patient's outcome. *Timblin v. Kent Gen. Hosp. (Inc.)*, 640 A.2d 1021, 1024 (Del. 1994); 18 *Del. C.* §§ 6801(7), 6853(e). It should be obvious that one cannot judge a clinician's conduct solely by an outcome *months or years* after the treatment was rendered during which time innumerable, and unrelated, factors could have occurred that would change the course and nature of

supporting literature or reliable basis, and without reliance on the medical charting.[4] Here, Dr. Engelbert simply stated (and Plaintiffs argued) that his opinion was valid and that a contrary scientifically-supported view was not "credible" and was "flawed" without any supporting literature. (A-348, A-896, A-978-979).

The fact that Dr. Engelbert formed an opinion wholly divorced from the relevant factual information and based on the patient's outcome alone proves that he did not base his opinion "upon information reasonably relied upon by experts in the particular field" as required. *Bowen*, 906 A.2d at 795. For all intents and purposes, whether this case was about Amari, or another child, or whether the delivery lasted three minutes or three hours, made no difference to him. As long as a permanent injury exists, Dr. Engelbert is ready and willing to opine that the delivering physician breached the standard of care.

Particularly telling is Plaintiffs' final attempt, not only to discredit the accepted maternal forces theory, but to provide support (which is completely

---

injury – including causing an injury to change from transient to permanent (such as a second unrelated trauma or other medical processes and conditions in cases involving babies born with brachial plexus injuries).

[4] Dr. Engelbert testified at deposition that he accepted everything in Dr. Wong's note as accurate except Dr. Wong's statement that he applied no traction to Amari's head or neck. (A-350-351) Dr. Engelbert offered no methodology or reliable basis, nor have Plaintiffs offered any, for Dr. Engelbert's acceptance of all parts of Dr. Wong's note except the one line that suited his belief that excessive downward lateral traction had to be the cause of Amari's injury.

lacking) for the admissibility of Dr. Engelbert's opinion that excessive traction is the only cause of permanent injuries. Plaintiffs argue that Dr. Engelbert's opinion is reliable because, applying "common sense," there would be more permanent injuries due to maternal forces. Plaintiffs argue as such despite that this "common sense" argument (which Plaintiffs made at trial over Defendants' objection) is inadmissible and constitutes reversible error. *Timblin*, 640 A.2d at 1024 (holding 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"). The rarity of a medical outcome does not, and cannot, imply that someone did something negligently in a given situation.

Plaintiffs' "common sense" argument (like their other arguments) acknowledges that their experts do not satisfy the "reliability" requirements of *Daubert* and *Bowen*. To rely solely on purported "common sense" and "throw the science out the window" is, on its face, a rejection of the scientific process that seeks to gain new wisdom and question old assumptions. (A-1804) It is for this very reason that, to be valid, opinions must be supported by reliable science and methodologies and not simply "common sense." The courtroom should not be a place where an opinion, unsupported at trial by scientific support, can be paraded before a jury as valid. *See Clark v. Tabata Corp.*, 192 F.3d 750, 759 n.5 (7th Cir.

1999). For all of these reasons, Dr. Engelbert's opinion, based on nothing more than an injury and his unsupported, outdated assumptions, should not have been admitted, and the trial court's admission of his testimony should, respectfully, be reversed.

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.

For all of the reasons discussed in the prior section of this Reply, Plaintiffs' arguments regarding Dr. Kozin are equally unpersuasive and his testimony should have been excluded. As with Dr. Engelbert, Plaintiffs' reliance on Dr. Kozin's experience (and his post-delivery treatment of Amari) to suggest that he was qualified to causally relate the delivery events to Amari's injury is legally insufficient to satisfy *Daubert* and *Bowen*, *supra*. Here, as with Dr. Engelbert, Plaintiffs fail to address the reality that Dr. Kozin's opinion was necessarily one of *res ipsa loquitor* without a factual basis, which is an inapplicable (and improper) theory of recovery in the context of a medical malpractice case involving a brachial plexus injury. *Ciociola*, 172 A.2d at 257; 18 *Del. C.* § 6853(e); D.R.E. 304(b); *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). As with Dr. Engelbert, Plaintiffs do not identify any reliable methodology, any differential diagnosis, or any scientific basis (and none exist) that Dr. Kozin used to form his causation opinion, rendering his opinions inadmissible. D.R.E. 702; *Quinn v. Woerner*, 2006 WL 3026199, at *2 (Del. Super. Ct. Oct. 23, 2006); *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).

In their Answering Brief, Plaintiffs also ignore Dr. Kozin's sworn testimony that he had no knowledge of the medical facts of Amari's delivery (from any source – records or testimony) and formed his causation opinions without this knowledge. (A-224-225, A-605-607) Plaintiffs offer no basis whatsoever as to how an expert, without knowledge of the underlying facts of the delivery and without any expertise in delivering babies, can reliably testify that Amari's injuries were caused by Dr. Wong rather than some other source or event that occurred during the delivery. Plaintiffs failed (at deposition, at trial, and in their Answering Brief) to demonstrate that Dr. Kozin had "a correct understanding of the facts of the case" when he formed his opinion, revealing that he "engaged in insufficient research, or has ignored obvious factors." *Perry v. Berkley*, 996 A.2d 1262, 1268-70 (Del. 2010). Because Dr. Kozin's causation opinion was formed without any knowledge of the basic facts of Amari's delivery, it was based on "suppositions rather than facts" and should have been excluded. D.R.E. 702; *Perry*, 996 A.2d at 1270-71.

As with Dr. Engelbert, Plaintiffs focus on Dr. Kozin's experience and his post-delivery treatment to suggest that he was able to causally relate the delivery events

to Amari's injury, wholly ignoring his sworn testimony that he had no knowledge of the medical facts of the delivery from medical records or fact witness testimony. (A-224-225, A-605-607) Plaintiffs offer no basis whatsoever to suggest that an expert, without knowledge of the underlying facts of the delivery and without any expertise in delivering babies, can reliably testify that Amari's injuries were caused by Dr. Wong, rather than some other source, during the delivery.[5] Nor do Plaintiffs demonstrate that Dr. Kozin had "a correct understanding of the facts of the case" when he formed his opinion, meaning that he "engaged in insufficient research, or has ignored obvious factors." *Perry*, 996 A.2d at 1268-70. Because Dr. Kozin's causation opinion was formed without any knowledge of the basic facts of Amari's delivery, it was based on "suppositions rather than facts" and should have been excluded. D.R.E. 702; *Perry*, 996 A.2d at 1270-71.

Contrary to Plaintiffs' claim, Defendants renewed their objection to Dr. Kozin's causation opinions in their post-trial motion and preserved their objections at trial. (A-837, A-1223-1230, A-1863-1869, A-1905-1983) Even if they did not, which is denied, it is undisputed that Defendants objected to Dr. Kozin's opinions

[5] Dr. Kozin acknowledged that his job is to "fix the injury itself" rather than engage in research as to the causes of permanent brachial plexus injuries, as causation and whether the traction was excessive to deliver Amari is "not [his] area of expertise." (A-213, A-221, A-225-226) Operating on children like Amari does not give him the experience needed to opine as to causation of what occurred during the delivery.

in a timely pretrial motion *in limine* and at trial, which is sufficient to preserve the objections. (A-427-433, A-597-607, A-837); *Clawson*, 867 A.2d at 191. Accordingly, this issue is properly before the Court, and as Dr. Kozin's testimony was improperly allowed and significantly prejudiced Dr. Wong, Defendants contend that the trial court abused its discretion and Defendants are, therefore, entitled to judgment in their favor 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.

In an attempt to avoid *Timblin's* prohibition of statistical evidence to establish negligence, Plaintiffs contend in their Answering Brief that the statistical questions posed to Defendants' experts and Dr. Wong went to their experience, skill and capability (an argument that, if allowed, would render the Court's holding in *Timblin* moot from this case forward). As discussed in their Opening Brief and herein, the purpose of these questions was not merely to suggest that these injuries are rare (which was uncontroverted); rather, it was to persuade the jury to conclude that the rarity of Amari's injury establishes that Dr. Wong was negligent. The use of statistical evidence in this manner was improper and warrants reversal. *Timblin*, 640 A.2d at 1025-26.

That Plaintiffs wished to emphasize and equate the statistical rarity of Amari's injury with negligence is made clear by Plaintiffs' counsel in their Closing Argument:

> Everyone [sic] of the obstetricians that has testified, I asked them, let me know, best estimate, how many deliveries they have done in their life, in their career, shoulder dystocia, how many permanent brachial plexus cases they had during these deliveries (indicating), and in all but a few questions, were all these internal forces, contractions. . . .

> So, we're looking somewhere between 20,000 and 23,000 deliveries. Again, common sense. Simple. To accept and believe the defense's argument that Amari's two torn nerves were caused by the mother's pushing and contractions, which were present in all 20- to 23,000 of these deliveries, we should be looking at permanent brachial plexus injuries in the thousands if these W[ere] the causes in this case, present in all 20- to 23,000. Why don't we have thousands and thousands of permanent brachial plexus injuries? Simple logic. . . .
>
> Simple logic common sense. This is all you really need. Throw the science out the window. This is their position to evaluate whether their position makes any sense.

(A-1803-1804)

The trial court's conclusion that this testimony was relevant to the experts' background and experience ignores Plaintiffs' argument to the jury. The "rarity" of Amari's injury was not in issue, and evidence regarding the "rarity" of his injury was not necessary or required to qualify or impeach the experts in this case. Plaintiffs' sole purpose for this statistical evidence was to sway the jury to ignore science and conclude that negligence occurred because Amari suffered an unusual outcome. This is the very inference that this Court has rejected as inadmissible and requires reversal. *Timblin*, 640 A.2d at 1024, 1026.

Here, again, Plaintiffs suggest that Defendants did not properly object to this evidence. Plaintiffs argue as such despite the Record revealing that Defendants timely objected to this evidence before, during, and post-trial. (A-608-613, A-837, A-1863-1869, A1905-1983) Most striking about Plaintiffs' "failure to object"

argument as to this issue is that it overlooks that *Plaintiffs' counsel* also objected to the use of statistical evidence pre-trial (but then, at trial, disregarded their objection and improperly used and argued statistical evidence to the jury). (A-453, A-482) To suggest that the issue was not preserved ignores that both parties objected pre-trial, which is sufficient to preserve the issue. *Clawson*, 867 A.2d at 191.

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.

In their Answering Brief, Plaintiffs do not dispute that Amari's shoulder dystocia presented an emergency situation not of Dr. Wong's creation, nor do they dispute that the undisputed testimony at trial was that Dr. Wong necessarily had to react to this emergency situation in order to save Amari's life. Plaintiffs, instead, contend that the "Actions Taken in Emergency" jury instruction "could lead to unnecessary jury confusion." (Ans. Br. at 17)

Instructing the jury to consider Dr. Wong's conduct in the circumstances which were undisputedly facing him was the proper thing to do and, if anything, provided clarity, not confusion, to the jury. The circumstances facing Dr. Wong and his response thereto was the material issue for the jury to consider. This instruction was germane and supported by evidence, and the trial court's refusal to give this instruction was in error and prejudiced Dr. Wong's right to a fair trial.

As with the other cases cited by Plaintiffs in their Answering Brief, *Pugh v. Slover*, 115 A.3d 1215, 2015 WL 2330060 (Del. May 14, 2015), *aff'd sub nom. Pugh v. Slover*, 115 A.3d 1215 (Del. 2015) and *Daub v. Daniels*, 2013 WL 5467497 (Del. Super. Ct. Sept. 30, 2013), *aff'd*, 124 A.3d 585 (Del. 2015) support *Defendants'* position, not Plaintiffs' arguments. In *Daub*, this Court affirmed the Superior

Court's decision to provide the sudden emergency jury instruction because it asked the jury to apply the relevant law to the basic facts of the case and parties' contentions. *Daub*, 2013 WL 5467497 at *4. Likewise, in *Pugh*, this Court affirmed the Superior Court's decision to offer the sudden emergency instruction, as the plaintiff's arguments as to whether there was an emergency went to weight and not admissibility. *Pugh v. Davis*, 2014 WL 4057772, at *2 (Del. Super. Ct. Aug. 12, 2014), *aff'd sub nom. Pugh v. Slover*, 115 A.3d 1215 (Del. 2015).

Plaintiffs' reliance on *Wiggins v. East Carolina Health-Chowan, Inc.*, 760 S.E.2d 323 (Ct. App. N.C. 2014), where North Carolina's Court of Appeals held that North Carolina's sudden emergency instruction was improper in a medical malpractice claim, is also misplaced. The court's decision in *Wiggins* is not binding on this Court and the instruction involved in *Wiggins* contains different language than the instruction at issue in this case. In its opinion, the court in *Wiggins* recognizes that other jurisdictions do apply the sudden emergency instruction in the medical negligence setting. *Wiggins*, 760 S.E.2d at 329. The court specifically refers to a case where the sudden emergency instruction was deemed proper in a brachial plexus injury case. *See Olinger v. Univ. Med. Ctr.*, 269 S.W.3d 560 (Tenn. Ct. App. 2008). And, as noted in the cases cited by Plaintiffs, Delaware is one of the

jurisdictions where the sudden emergency instruction has been applied in various contexts.

In this case, when viewed with the medical negligence and other instructions provided to the jury, the "Actions Taken in Emergency" instruction would not have altered the definition of standard of care or the burden of proof. It would only have permitted the jury (and properly so) to consider that the circumstances in this case involved an emergency situation and allowed the jury to determine whether Dr. Wong's care complied with the standard of care in an emergency situation. Curiously, Plaintiffs stress the rarity of Amari's situation in all of the other sections of their Answering Brief, only to claim in this section that shoulder dystocia is routine business. (Ans. Brief p 18).

The fact that the "Actions Taken in Emergency" instruction may overlap or further clarify the medical negligence instruction does not render it off-limits in medical malpractice cases – particularly in cases like the instant case which truly involve an emergency situation. Many of the instructions that were given to the jury addressed similar overlapping themes and issues, yet were provided simultaneously to the jury. (*Compare* Credibility of Witnesses – Weighing Conflicting Testimony *with* Prior Sworn Statements *and* Prior Inconsistent Statement by Witness.) (A-1845-1847) As set forth above, all of the experts in this case agreed that shoulder

dystocia is an emergency. In *Sturgis*, *supra*, this Court noted in its opinion that shoulder dystocia is a *life-threatening situation* where a baby's shoulder gets stuck against the mother's pubic bone during delivery. *Sturgis v. Bayside Health Ass'n Chartered*, 942 A.2d at 582.

No one argued in this case that the fact that an emergency exists permits a clinician to ignore the standard of care as suggested by Plaintiffs. (Ans. Br. at 18) The instruction itself does not state or imply as such. The instruction does not conflict with or somehow negate the medical negligence instruction. That Dr. Wong was faced with an unexpected emergency merely permits the jury to evaluate his clinical care in the context that existed – an emergency. It is for this very reason that the "Actions Taken in Emergency" jury instruction exists. For the trial court to deny Dr. Wong "the unqualified right to have the jury instructed with a correct statement of the substance of the law" was error. *Pugh*, 2014 WL 4057772 at *2.

CONCLUSION

In their Answering Brief, Plaintiffs fail to address or rebut the arguments raised by Defendants which Defendants contend establish that the trial court committed reversible error. As a result, for the reasons set forth herein and in their Opening Brief, 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: 7/27/18

CERTIFICATE OF SERVICE

I, Joshua H. Meyeroff, Esquire, hereby certify that on this 24th day of July, 2018, I have caused the following document to be served electronically on the parties listed below: **Reply 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)