



IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEATHER E. TURNER,

Plaintiff Below
Appellant,

v.

DELAWARE SURGICAL GROUP, P.A.,
ERIC D. KALISH, M.D. and
MICHAEL K. CONWAY, M.D.,

Defendants Below
Appellees,

No. 410, 2012

Court Below: Superior Court
of New Castle County
C.A. No. 09C-07-219 RRC

APPELLANT'S SECOND CORRECTED OPENING BRIEF

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I. NATURE OF THE PROCEEDINGS

Plaintiff-below, appellant Heather Turner ("Turner") brings this appeal from a verdict in favor of defendants below-appellees Michael Conway, M.D., ("Dr. Conway") Eric D. Kalish, M.D., ("Dr. Kalish") and their practice, Delaware Surgical Group, P.A., in a medical negligence action following a jury trial that lasted more than a week. On August 3, 2007, Turner was suffering from appendicitis, and Dr. Kalish, who was on call at Christiana Hospital, performed what he described as a routine laparoscopic appendectomy, without complications. Following that uneventful appendectomy, performed by a surgeon that Turner had never met before, Turner was forced to undergo four major surgical procedures: two bowel resections, a third surgery to remove a contaminated mass on her liver, and a fourth to repair an extensive abdominal hernia caused by the incisions from the two bowel surgeries. Dr. Kalish performed the first bowel resection and his partner Dr. Conway the second. At trial, it was undisputed that Turner suffers from a permanent bowel disorder and unsightly abdominal scarring as a result of those two bowel surgeries.

Although this appeal will be decided under the "abuse of discretion" standard, this is the exceptional case in which the standard is met. First, Turner was denied a fair trial when the trial court prohibited her from cross-examining Dr. Conway or examining any other witnesses about the timeliness and completeness of Dr. Conway's operative report for the second bowel surgery, which he dictated 52 days after the surgery, in violation of a long-standing rule at Christiana Hospital (and all accredited hospitals), which requires

surgeons to dictate their reports before there is a change in the patient's level of care and preferably within 24 hours. The rule is intended to assure the accuracy and completeness of dictated operative reports, and the availability of a detailed surgical record in the event of complications or the need for additional care. Second, in contravention of this Court's decision in *Barrow v. Abramowitz*, 931 A.2d 424 (Del. 2007), the trial court abused its discretion by permitting Dr. Kalish to testify as an expert on critical matters related to his own liability. Dr. Kalish had been identified as a possible expert, but the expert disclosure did not identify any opinions that he was expected to offer at trial, and he did not disclose any such opinions or his anticipated expert testimony during his pretrial deposition. Therefore, his expert testimony came as a complete surprise in the midst of the trial. Turner respectfully submits that these errors independently, and taken together, entitle her to a new trial.

II. SUMMARY OF ARGUMENTS

The trial court abused its discretion by prohibiting the plaintiff from offering relevant evidence during the cross-examination of Dr. Conway, and the examination of other testifying General Surgeons, including the experts for the plaintiff and the defense, about a) the existence and importance of a longstanding written rule at Christiana Hospital (and all accredited hospitals), which requires operative reports to be dictated before the patient is transferred to the next level of care and preferably within 24 hours, b) the practice of the testifying surgeons in timely dictating operative reports, and the reasons for the rule's adoption as a standard for accredited hospitals, c) the fact that the compliance rate at Christiana Hospital exceeds 90%, d) the fact that Dr. Conway had performed at least 27 surgeries between the time he performed Turner's bowel resection and the date he dictated the operative report for her surgery 52 days later, e) Dr. Conway's pretrial deposition testimony in which he denied knowledge of any such rule (even though it is a nationally recognized standard and all of the other surgeons who were asked about it prior to trial acknowledged the rule and its significance), and f) deposition testimony of Dr. Joseph Bennett, a General Surgeon who removed a contaminated mass from Turner's liver (negligently left behind by Dr. Conway), to the effect that he and other surgeons at Christiana are familiar with the rule, and he follows the rule, because surgeons cannot recall the details of a surgery 30 surgeries later. The operation was a central issue in the trial and Dr. Conway's operative report was relied upon by the defense

expert in opining that there was no breach of the standard of care by Dr. Conway or Dr. Kalish. **A123-234; A276-85; A342-46; A371-73; A493-94; A550-52.**

b. Under this Court's decision in *Barrow v. Abramowitz*, 931 A.2d 424 (Del. 2007), the trial court abused its discretion by permitting Dr. Kalish to present expert testimony about his interpretation of a pathology report created after the surgery he performed and how it proved he was not negligent, where there was no disclosure of his expert opinions and testimony prior to trial.

A500-501.

III. STATEMENT OF FACTS

a. Relevant Hospital Course

On July 24, 2007, Dr. Kalish performed a routine laparoscopic appendectomy on Heather Turner at Christiana Hospital. A637-38. Turner was readmitted to Christiana approximately one week later, on August 1, 2007, for abdominal pain and diagnosed with a partial small bowel obstruction. A649. Although partial small bowel obstructions can be treated conservatively without surgery, Dr. Kalish prematurely decided to perform a second surgery on August 2, 2007, and removed a mere 2 centimeters (about one inch) of Mrs. Turner's small bowel. A404(33:6-13); A510; A645. Turner's expert Dr. Howard Beaton, a highly qualified General Surgeon, opined that Dr. Kalish breached the standard of care when he negligently performed an unnecessary surgery on August 2, 2007, because the one-inch segment of small bowel did not have to be removed. A140-42.

On November 30, 2007, Turner was again admitted to Christiana Hospital and diagnosed with a small bowel obstruction. A661. The obstruction was at the same location on the small bowel where Dr. Kalish unnecessarily removed the one inch segment on August 2, 2007. A419. On December 2, 2007, Dr. Conway addressed the obstruction surgically by removing a substantial portion of Turner's small bowel. A657-60. Dr. Conway did not dictate his operative report for the surgery until January 23, 2008.

Later in 2008, Turner again experienced abdominal pain and a mass was found on her liver. A667-68. On September 26, 2008, Dr. Joseph Bennett, a General Surgeon, removed the mass through a laparoscopic

surgical procedure. *Id.* In a letter to Turner's Gastroenterologist, Dr. Bennett said that the mass "raised the concern about something that had spilled out from prior surgeries..." A804-806. Dr. Beaton agreed with Dr. Bennett about the spillage and opined that it occurred during Dr. Conway's bowel surgery and constituted negligence. A142.

On January 10, 2012, Turner underwent yet another surgery, performed by Dr. J. Wesley Clayton, III, a General Surgeon, and Dr. Lawrence Chang, a Plastic Surgeon. The surgery repaired a large ventral incisional hernia caused by her prior two laparotomy surgeries by Dr. Kalish and Dr. Conway. A424; 671-75.424.

b. 24-Hour Rule

Christiana Care has a written rule that requires operative reports to be dictated "before the patient goes to another level of care (e.g. PACU) and preferably within 24 hours of surgery [the "24-hour rule]." A63. At Christiana Care, the 24-hour rule is met in about 90% of surgery cases. A71-77. The dictated operative report (also sometimes referred to in the record as a dictated operative note) is intended to contain details about the surgeon's findings and the procedure that was performed. It is much more extensive than the surgeon's handwritten post-operative note, which is not dictated, and is prepared post-surgery on a preprinted hospital form.

Dr. Kalish dictated his operative reports for the laparoscopic appendectomy and the bowel resection surgeries the following day. A637-38, 678, 645, 680. Dr. Joseph J. Bennett, a General Surgeon, who removed the contaminated mass from Turner's liver at Christiana on September 26, 2008, dictated his operative report the same day. A667-

668. Dr. J. Wesley Clayton, a General Surgeon, who co-performed Turner's incisional hernia repair surgery at Christiana on January 10, 2012, dictated his operative report the same day. A673-78.

Dr. Conway made a handwritten operative note on December 2, 2007, the day of Turner's second bowel surgery. A681. However, he waited until January 23, 2008 to dictate the operative report. A657-58.

Dr. Conway's dictated operative report was the subject of opinions and testimony of Dr. Matt Kirkland, the defense expert in General Surgery. Dr. Kirkland testified about liability on behalf of both Dr. Kalish and Dr. Conway. At his deposition, he testified that in opining that there was "[n]o spillage of gastrointestinal contents described," during Dr. Conway's bowel resection surgery he was relying upon two things, "[o]ne is the dictated operative report" by Dr. Conway; the second was the pathology report. A208.

Plaintiff's expert in General Surgery was Dr. Howard Beaton. Dr. Beaton served his internship and residency in General Surgery at The New York Hospital-Cornell Medical Center from 1976-80. A628-9. He was Chief of Surgery and Emergency Services at NYU Downtown Hospital from 1994 to 2003, and was Chairman of the Department of Surgery at North General Hospital from 2004 to 2008. A627. He has also been an Attending in Surgery at NYU Medical Center (1995-2004), Mount Sinai Medical Center (2004-10), and New York Downtown Hospital (1994 to present). A627. Dr. Beaton has served as a Clinical Associate Professor of Surgery at NYU School of Medicine (1995-2004), an Associate Clinical Professor of Surgery at Mount Sinai School of Medicine (2004-11) and at Cornell University Medical College (1994-

95), and a Clinical Associate Professor of Surgery at Weil Cornell Medical College (2011 to present). A628.

Dr. Beaton discussed Dr. Conway's dictated operative report in his November 29, 2010 report, expert interrogatory answers and deposition testimony. A244-52. In his November 29, 2010 expert report, Dr. Beaton wrote:

The findings of a closed loop obstruction and ischemic small bowel by Dr. Conway only three months later on December 2, 2007 raise questions concerning the technical performance of the previous surgery. However, Dr. Conway's operative note is not sufficiently descriptive for me to form an expert opinion as to the etiology of this obstruction.

A142. In his February 11, 2011 deposition, Dr. Beaton stated:

My concerns in general relate to the fact that a small segment of the terminal ileum was removed [by Dr. Kalish] which creates an area of adhesion and scarring right next to the appendix which had been removed and that puts two areas that can both be inflamed and be joined to create a potential for obstruction. I looked through Dr. Conway's operative notes for a description as to why he thought the etiology of this obstruction was, and I said I just don't have enough information to determine that.

A191(62:9-21).

On October 11, 2011, Turner filed an answer to the defendants' expert interrogatories, which provided, in part:

In addition, Dr. Beaton is expected to testify about the rule at Christiana Care which requires an attending physician to dictate an operative report before the patient goes to another level of care and preferably within 24 hours of surgery, his familiarity with such rules in other hospitals, the Joint Commission on the Accreditation of Hospitals and its role in the promulgation and monitoring of such rules, the purposes of the rule, and the importance of compliance with the Rule.

A247-48. The expert interrogatory answer further provided:

Dr. Beaton is expected to testify about the [24-hour] rule and matters referred to in the answer to interrogatory 1 a.

above, including whether Dr. Conway complied with the rule. He will also testify about the lack of detail in Dr. Conway's operative report for the December 2, 2007 surgery, which was dictated on January 23, 2008.

A249.

On April 27, 2012, Dr. Beaton was deposed for a second time and testified as follows:

Q. Do you feel that Dr. Conway's dictated operative report is in any way inaccurate?

A. I have no reason to presume it is anything other than accurate.

* * * *

Q. Do you have any opinion as to whether Heather Turner's medical care was at all altered due to the timing of Dr. Conway's operative report?

A. It does not appear to have been so.

A269(119:22-24, 120:1-13).

While, admittedly, Dr. Beaton could not properly opine about Dr. Conway's veracity or the accuracy of the limited information in the operative report, he was prepared to testify about its lateness, its lack of detail, the significance of the 24-hour rule, the rule's national acceptance, and Dr. Conway's violation of the rule at Christiana.

During his deposition, Dr. Clayton, the General Surgeon who performed the complex incisional hernia repair on Turner along with Dr. Chang, testified that he was familiar with the 24-hour rule, and that at least since the 1990s, Christiana has had a rule that requires surgeons to dictate an operative report before the patient goes to another level of care and preferably within 24 hours. A281-283. When asked whether the rule was familiar to other surgeons who operate at Christiana, Dr. Clayton testified, in part:

The rule is available certainly to them. It's in the rules - the bylaws of the hospital refer to the rules of the medical/dental staff which refer to the rules of the OR. So that information is available. It's a closed town. We have all trained pretty much together.

A283(32:19-24).

Dr. Conway and Dr. Kalish have worked together since 1994. A467(72:13-17). They have been practicing medicine together at Delaware Surgical Group, P.A. for more than ten years A131.

According to Dr. Conway, Christiana Care is the 17th busiest surgical hospital in the country. A533-34. Dr. Conway performed the December 2, 2007 small bowel resection surgery four months after Dr. Kalish removed about one inch of Turner's small bowel on August 2, 2007. After he performed his extensive bowel resection surgery, Dr. Conway did not dictate the operative report until 52 days later. A657-660. Between December 2, 2007 and January 23, 2008, he performed at least 27 surgeries. A176-77.

Dr. Conway has performed surgery at Christiana for more than 15 years, and served as the Chief of the Section of General Surgery at Christiana, Medical Director to Physician's Assistants, Medical Director of the Surgeons for Emergency Care, and a member of the Board of Trustees of the Medical Society of Delaware. A532-33. At trial, in response to questions posed by his own defense counsel, Dr. Conway testified that the lawsuit was an attack on his character, his professionalism and ethics. A540(113:9-15).

At his deposition, Dr. Conway testified that he did not believe that there is any requirement at Christiana Hospital to have operative reports completed within any set time period, he was unaware of any

rule about dictating operative reports within 24 hours of surgery, and it was not uncommon for such reports to be dictated "down the road." A132-33, A137-38. He did not agree that his recollection would be better if his operative report was dictated closer to the time of surgery. A134-45.

c. Procedural History of Motion Practice on the 24-Hour Rule.

On August 29, 2011, Dr. Conway and Dr. Kalish filed a motion in limine "to Preclude Plaintiff from Asserting Negligence at Trial Based Upon Time in Which Operative Reports Were Dictated." A1-93. They argued that Turner had no cause of action related to the operative report, and that she had not offered expert testimony that the failure to dictate the operative report timely as prescribed by the Christiana Rule was a breach of the standard of care that caused her injury. A1-5. Because the trial was continued, the motion was not fully briefed. On April 16, 2012, Dr. Conway and Dr. Kalish filed a supplemental motion in limine asserting the same arguments. A94-123.

Turner responded on April 30, 2012. A123-200. She conceded that Dr. Conway's failure to dictate the operative report timely did not, in itself, cause her any physical injury. A125. However, she noted that the defense expert Dr. Kirkland relied heavily upon it to support his opinions, and the report was lacking in detail. A125-26. Turner argued that the 24-hour rule demonstrated a recognized need within the medical community for accurate and complete operative reports. *Id.* She argued that Dr. Conway's violation of the 24-hour rule was evidence of negligence because he was too pressed for time to prepare it. His surgical schedule was such that he hurried Turner's surgery, leading

to spillage. Also, the 52-day delay implied bias and an intent to omit key facts to protect himself and his partner, Dr. Kalish. *Id.*

Turner cited to DRE 607 on impeachment, indicating her intent to use the evidence, not only to support her claim of negligence, but also to impeach Dr. Conway and attack the report. A125. She argued that his refusal to admit the existence of the 24-hour rule was impeached by the hospital rule, itself. A125-126. It was also undermined by the critical deposition testimony of Dr. Bennett, a fellow General Surgeon, who testified at deposition that he is aware of and complies with the 24-hour rule, the rule is discussed in the Department of Surgery at Christiana, and that the Department Chair encourages compliance. A124.

Turner also cited Rule 616, signifying her intent to use the 24-hour rule and related evidence to further establish Dr. Conway's bias and willingness to violate an established hospital rule to protect himself and Dr. Kalish. A126. The defendants did not contend or establish that the evidence would cause prejudice. A1-5, A94-96.

At the pretrial conference on May 2, 2012, Turner argued that "[t]he accuracy and completeness of the report is an issue. A339(34:18-19). "[T]his is really an issue for cross-examination of Dr. Kirkland, Dr. Conway, who wrote the report." A342(37:14-16).

The trial court granted the defendants' motion in limine stating that "the defendants can't be shown to have improperly or untimely completed the operative reports." A343-45(40:14-16). The court excluded all evidence of the 24-hour rule and its violation because there was no proof that the delay in dictation caused Turner's

injuries. *Id.* The court did allow the plaintiff to establish that the Dr. Conway's report was not dictated until 52 days after the surgery.

On May 9, 2012, Turner timely moved for reargument. A201-34. She argued that, in addressing the 52-day delay, plaintiff's expert Dr. Beaton should be permitted to explain the reasons why operative reports must be dictated promptly and accurately, his own practice in that regard, and his professional experience in hospitals where he had performed surgery. A202. In addition, Turner again noted the relevance of the evidence for impeachment, although in greater detail, as the defendants' motion papers specifically objected to the use of the 24-hour rule as proof of negligence. A202-203.

On June 14, 2012, the Court denied the motion for reargument on the following grounds: 1) there is no claim of causation to prove negligence; 2) the 24 hour rule's probative value is substantially outweighed by prejudice and misleading the jury; 3) plaintiff's argument on impeachment came too late. A371-73. On that note, the court stated:

[I]mpeachment as a reason was barely mentioned by plaintiffs in their original response to the defendant's motion in limine and, as I reviewed the argument on May 2, barely mentioned at oral argument but it is, more or less, the centerpiece of the motion to reargue. So I think the key argument of impeachment comes too late since it wasn't argued to begin with.

A372(3:13-19). The trial court then held that

the plaintiffs can tell the jury and get into evidence the date of the operative report. I'm not going to exclude that date. The jury can draw its own conclusions about that. But there should be no mention of the so-called 24-hour rule...

A371-72(2:23-3:4).

The case was tried from June 18-25, 2012. Turner was prohibited from eliciting any information from her expert Dr. Beaton about the 24-hour rule or related matters, including his practice in dictating operative reports, the practice at hospitals where he has performed surgery, the standards of the Joint Commission on Accreditation of Hospitals, the reasons why operative reports need to be dictated promptly and timely, the fact that accredited hospitals monitor compliance, and the importance of timely reports for patient treatment and safety.

Turner was also prevented from cross-examining Dr. Bennett, who was called by the defense, about his and other surgeons' familiarity with the 24-hour rule at Christiana, the rule's importance, or the reasons why he dictates operative reports within 24 hours. A493-494. Plaintiff was thus prevented from eliciting the following deposition testimony given by Dr. Bennett:

I try and view the operative report as part of the surgery itself and do in general try and do my operative reports at the time I do the surgery because I think it's the most accurate recollection, as opposed to doing it 30 surgeries later.

A219(77:18-24). At sidebar, during Dr. Bennett's cross-examination, the trial court stated: "I will allow the date that he issued his operative report to be asked about but nothing further from that." A493(177:10-12).

Excerpts from the deposition testimony of Dr. Wesley Clayton were read to the jury. Under the trial court's ruling, approximately 7 pages were redacted. A587-95. The 7 pages address when Dr. Clayton dictates his operative reports, the fact that the 24-hour rule is a

longstanding rule known to surgeons at Christiana, and why operative reports need to be dictated timely. A279-85.

The cross-examination of Dr. Conway was also limited under the trial court's ruling:

Q. Then, I asked you the question: "It indicates that the date of the surgery was December 2, 2007. Is that correct? Your answer was: "Correct."

A. Correct.

Q. And, then I asked you the question: "It says on the second page, the report was dictated on January 23, 2008." And you answered: "Correct." See that?

A. Yes.

Q. And I asked you: "Is that when it was dictated? And you answered: "Yes." Is that correct?

A. Correct.

Q. Did I read all of that correctly?

A. Correct.

Q. Now, I would like you to read from that point forward to the end of page 15. I don't want you to read it out loud. I don't intend to read all of that testimony, so we want to just be limited to what we are focusing on now; okay?

A. All right.

...

Q. Page 14, Line 21.

Mr. Goewert: Your Honor, if we could approach.

A550.

The defense objected to questions about the timing of the report and the number of surgeries performed before the report was dictated because "there's no evidence the report was inaccurate." A550-52. The trial court sustained the objection, because "there's no expert or person on causation." *Id.* The trial court then expanded its original

decision by precluding Turner from asking specific questions to establish that Dr. Conway had performed 27 surgeries between the date of Turner's surgery and the date the operative report was dictated, and Conway's alleged lack of knowledge of the 24-hour rule. A345, A371-73, A551. Turner was not permitted to argue in closing the implications of waiting 52 days to dictate the operative report.

d. Expert Testimony

At trial, over the objection of Turner's counsel, Dr. Kalish gave expert testimony, despite not having disclosed the testimony or the grounds for it prior to trial. A500-501. He opined about his own liability by interpreting an August 8, 2007 pathology report from his bowel resection surgery. The report was dated after Turner was discharged from the hospital on August 7, 2007, and analyzed the one-inch piece of bowel Dr. Kalish removed. *Id.* A647-49.

Discussing the microscopic description on the pathology report, he opined that microscopic:

doesn't mean minute and it doesn't mean subatomic. It's a section under the microscope. These are things that the naked eye can see. This is not a super incredibly small nothing, I mean, this is not a normal bowel.

A501(208:5-10). He then testified as to the meaning of the report including opining that all layers of the bowel had an abnormality. *Id.* (208:18-20). He concluded that if he had waited "with a bowel like this,"

then you get the purplish discoloration, the dark purple, black, what's called liquefaction. That's when the tissue becomes soft and truly does, you grab it and it just melts. If you operate and see that, you are in there too late.

A501(209:17-21).

Dr. Kalish's testimony contradicted the properly admitted testimony of Dr. Beaton, plaintiff's expert in General Surgery. A421-22.

Although Dr. Kalish was identified as a possible expert in an April 12, 2011 disclosure, the defense never disclosed his anticipated testimony or the grounds, as the disclosure merely stated:

C. Eric Kalish, M.D.: To the extent deemed necessary under Court rules for expert witness disclosure requirements, where the opinions of Dr. Kalish may be considered expert opinions, he will testify accordingly and as set forth in his deposition and the medical records.

A735. The "disclosure" did not state that Dr. Kalish would be opining that the August 8, 2007 pathology report supported his removal of one-inch of small bowel. The disclosure did not identify any opinions whatsoever. And while the defense listed Dr. Kalish as a "(fact and expert)" witness in the Pretrial Stipulation and Order, his anticipated testimony was not disclosed. A298. Dr. Kalish did not testify at deposition about the post-surgery pathology report, or his conclusions based upon the report. No medical records state that Dr. Kalish had an opinion based upon the pathology report.

At trial, Dr. Kalish admitted that he did not have the benefit of the pathology report prior to performing the surgery. A500-501(204:9-14; 206:23-207:3). The pathology report, a written analysis of the 2 cm section of small bowel that was removed by Dr. Kalish, was dated one day after Turner was discharged from Christiana and Dr. Kalish did not use it to treat her. A502 (207:6-8); 647-48.

At trial, Turner objected to the expert testimony of Dr. Kalish, because he was never identified as an expert witness opining as to the

meaning or interpretation of the pathology report. A500-501. The court overruled the objection, stating:

He is one of the defendants, he performed the surgery. It's not uncommon for a treating physician, which he was, in part to, or most entirely in part to express expert opinions when it directly relates to something they know about and is relevant to the case, so I'm going to overrule plaintiffs objection and allow the doctor to discuss the pathology report to the extent he's able to.

A500.

Turner rebutted defense arguments that a disclosure had been made and pointed out that, although Dr. Kalish was listed as a potential expert, the disclosure was not proper because it merely gave Dr. Kalish's name and did not identify his anticipated testimony or the grounds for it. A501(206:1-9). The trial court stated:

I still think its permissible for this witness to give at least this testimony on the pathology report. Being the treating physician, it's within his competence to do so, you can test that on cross-examination.

Id. (206:13-17).

Dr. Kalish's testimony that if he had waited to remove the one inch section of bowel it would have changed to "purplish discoloration, the dark purple, black, what's called liquefaction," was admitted. A501(209:17-21).

IV. ARGUMENT

i. QUESTIONS PRESENTED

Whether it was an abuse of discretion to deny plaintiff-below, appellant, the right to cross-examine witnesses, including defense expert Dr. Kirkland, defense witness Dr. Bennett, and defendant-below, Dr. Conway, concerning the untimeliness of Dr. Conway's operative report created 52 days after surgery in contravention of a Christiana Hospital rule, where the operation was a central event in the trial and key evidence of the operation was Dr. Conway's, operative report, which all experts relied upon in opining about liability of both defendant-below, appellee, Dr. Kalish (August 2, 2007 surgery) and Dr. Conway (December 2, 2007 surgery). **A123-234; A276-85; A342-46; A371-73; A493-94; A550-52.**

ii. SCOPE OF REVIEW

The "Court applies an abuse of discretion standard of review as to the trial court's... evidentiary rulings." *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000). To determine whether "the trial court erred as a matter of law or abused its discretion in certain evidentiary rulings, [the] Court will first consider whether the specific rulings at issue were correct." *Cuonzo v. Shore*, 958 A.2d 840 (Del. 2008). Once the Court finds abuse of discretion or error as a matter of law, it must then determine whether the abuse or error caused "sufficient prejudice that [Mrs. Turner] was denied a fair trial." Id.

iii. MERITS OF ARGUMENT:

1. The Application of the 24-Hour Rule is Relevant and Relevant Evidence Is Admissible.

Evidence rules are written to permit relevant information to be presented to the jury, unless there is a specific exclusion to admissibility. See D.R.E. 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." D.R.E. 401.

It is relevant and undisputed that Christiana Care has a written rule which requires operative reports to be dictated before a change in the level of care and preferably within 24 hours, and that Dr. Conway violated the rule. A63, A657-58. Other facts are also relevant and undisputed, for example, that a) under the standards of a national Joint Commission, all accredited hospitals have adopted a comparable rule, b) the rule was adopted nationally to guide patient treatment and provide for patient safety, c) Dr. Beaton, Dr. Kirkland, and other General Surgeons whose testimony was presented at trial are familiar with the rule, understand its purposes, and endeavor to comply with it, where feasible, d) Dr. Conway denied knowledge of the rule at deposition, and indicated that he was at liberty to dictate the operative report when he deemed appropriate "down the road," e) his operative report was considered by Dr. Beaton to be lacking in detail, and f) Dr. Conway had performed *at least 27* surgeries between the time he operated on Turner and dictated his operative report 52 days later. The deposition testimony of Dr. Joseph Bennett, a defense witness and

colleague of Dr. Conway, provided the perfect counterpoint to Dr. Conway, when he explained why he complies with the rule:

I try and view the operative report as part of the surgery itself and do in general try and do my operative reports at the time I do the surgery because I think it's the most accurate recollection, as opposed to doing it 30 surgeries later.

A219(77:18-24). Dr. Bennett's testimony would have been highly useful at trial, but was excluded by the trial court. A493-94.

The medical records establish that Dr. Conway handwrote an operative note on 12/2/07, which does not contain details about the surgery or the findings normally found in a dictated operative report. A681. He did not dictate the operative report for the December 2, 2007 surgery until January 23, 2008, 52 days after Mrs. Turner was transferred to another level of care. A657-58. During the interim, Dr. Conway performed at least 27 surgeries. A176-77.

Dr. Kirkland, the defense expert in General Surgery, stated that in reaching his opinion regarding the non-liability of Dr. Kalish, he was relying upon two things. "One is the dictated operative report" by Dr. Conway. The second was the pathology report. A208. Regarding the same operative report, Dr. Beaton stated the following at his deposition:

My concerns in general relate to the fact that a small segment of the terminal ileum was removed [by Dr. Kalish] which creates an area of adhesion and scarring right next to the appendix which had been removed and that puts two areas that can both be inflamed and be joined to create a potential for obstruction. I looked through Dr. Conway's operative notes for a description as to why he thought that the etiology of this -- as to what he thought the etiology of the obstruction was, and I said I just don't have enough information to determine that.

A191(62:9-21).

Conway and Kalish have been in business together since 1994. A467(72:13-17). Conway performed the December 2, 2007 small bowel resection surgery, four months after Kalish performed a resection on the same area of small bowel on August 2, 2007. A637-38, A657-68.

Given this relevant evidence, a jury could reasonably conclude that Dr. Conway did not timely and completely report the details of his December 2, 2007 surgery. A jury could reasonably conclude that Conway's memory was not as detailed as it would have been in the 24-hour period after the surgery. And a jury could reasonably conclude that Dr. Conway may have been attempting to cover-up his own negligence and the negligence of Dr. Kalish, and in doing so, violated an important rule recognized not only at Christiana, but also nationally. Turner had a right to medical care consistent with the rules at Christiana and a right to prove any deviation by the defendants from the rules related to her care.

2. Jurors Should Not Be Denied Opportunities to Hear Impeachment Evidence That May Undermine a Witness' Credibility.

Because critical evidence was excluded at trial, for example, of the 24 hour rule, itself, the reasons for and importance of the rule, its recognition nationally, the high degree of compliance at Christiana, Dr. Conway's denial of the rule, and the number of surgeries Conway performed prior to dictating the report (at least 27), the jury was not given a full opportunity to evaluate the credibility, bias and motives of Dr. Conway and Dr. Kirkland or the accuracy and completeness of the January 23, 2008 operative report. A339-40. Jurors were not given an opportunity to evaluate whether

Conway's performance of 27 surgeries between his surgery on Turner and the dictation of the operative report caused it to be inaccurate or incomplete. A340-41; A551-52. The jury was not given an opportunity to consider the bias or motives of Dr. Conway in waiting 52 days to complete the operative report, when an express rule required the report to be completed before a change in the level of care and preferably within 24 hours of surgery. A340-41. And the jury was not given an opportunity to fully evaluate the credibility of Dr. Kirkland, the defense liability expert, who relied upon Dr. Conway's report, without question, in reaching his conclusion that neither Dr. Conway nor Dr. Kalish were negligent. A342.

The evidence rules explicitly state that "the credibility of a witness may be attacked by any party..." and that "[f]or the purpose of attacking credibility of a witness, evidence of bias, prejudice or interest of the witness for or against any party to the case is admissible." D.R.E. 607; 616.

Assessment of bias, motives, credibility, accuracy and completeness are clearly within the purview of the jury. Yet the court's decisions denied them essential inquiries into the credibility of Dr. Conway and the December 2, 2007 operative report. While a trial court has discretion to limit the extent of such proof, that discretion is not absolute. The trial court "cannot foreclose a legitimate inquiry into a witness' credibility." *Weber v. State*, 457 A.2d 674, 681 (Del. 1983) *citing Davis v. Alaska*, 415 U.S. 308 (1974).

"Jurors should be afforded every opportunity to hear impeachment evidence that may undermine a witness' credibility." *Atkinson v.*

State, 778 A.2d 1058 (Del. 2001). It is so important to permit full cross-examination of witnesses, because “[c]ross examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Jackson v. State*, 770 A.2d 506, 515 (Del. 2001).

Cross-examination is not limited to facts strictly related to the incident when it is meant to address bias, credibility or prejudice of the witness. *Brady v. Suh*, 2009 WL 6305964 (Del. Super.) For example, in *Brady v. Suh*, cross-examination was permitted on extrinsic evidence of misconduct, namely, providing false information to the police. Similarly, in *Weber v. State*, it was considered reversible error for the trial court to preclude evidence of bias on the part of state witnesses, even though there was no information to suggest that the money they accepted for new clothes altered their testimony. 457 A.2d 674, 681 (Del. 1983)

Even when the adverse witness invokes the Fifth Amendment and precludes inquiry into the details of direct testimony, cross-examination should be permitted or the witness precluded from testifying. See *Bentley v. State*, 930 A.2d 866, 873-75 (Del. 2007) (Trial court abused its discretion and new trial granted where ruling precluded defense from exploring bias of prosecution witness.)

The 52-day delay in creating the operative report in contravention of an acknowledged and longstanding rule at Christiana should have been presented to the jury through cross-examination of Dr. Bennett, Dr. Kirkland, Dr. Kalish and Dr. Conway, as well as through the testimony of Turner’s expert Dr. Beaton and the deposition

testimony of Dr. Clayton. And the jury should have been permitted to know that Dr. Conway denied knowledge of the rule under oath at his deposition. The Christiana Hospital rule requires that operative reports be completed timely a) so the operation is fresh in the surgeon's mind and presumably as accurate as possible (A63, 219), and b) the information contained in the report is sufficiently detailed so that the surgeon, and other physicians, may refer back to it at a later date and rely upon its information. A484(138:3-6). And the timely dictation of the operative report prevents the surgeon from skewing the report in the event complications develop post-surgery.

Conway took 52 times longer to write his report than the 24 hour time period prescribed by the 17th busiest hospital in the country. Dr. Kalish, Dr. Bennett, and Dr. Clayton dictated their reports timely.¹ A532-33. Dr. Conway's delay seriously calls into question the accuracy of the operative report placed in evidence for the jury and relied upon by Dr. Conway and Dr. Kirkland in their testimony. A531-45. The operative report and other medical records were treated by the defense as accurate representations of the surgical procedures, and were presented as such to the jury. *Id.* No questions were permitted on cross-examination of any witnesses to challenge the accuracy of the operative report or testimony relying upon it.

On cross-examination of Dr. Conway, the following occurred:

Q. Then, I asked you the question: "It indicates that the date of the surgery was December 2, 2007. Is that correct? Your answer was: "Correct."

A. Correct.

¹ Operative report dictated on 1/10/12. A673.

Q. And, then I asked you the question: "It says on the second page, the report was dictated on January 23, 2008." And you answered: "Correct." See that?

A. Yes.

Q. And I asked you: "Is that when it was dictated? And you answered: "Yes." Is that correct?

A. Correct.

Q. Did I read all of that correctly?

A. Correct.

Q. Now, I would like you to read from that point forward to the end of page 15. I don't want you to read it out loud. I don't intend to read all of that testimony, so we want to just be limited to what we are focusing on now; okay?

A. All right.

...

Q. Page 14, Line 21.

Mr. Goewert: Your Honor, if we could approach.

A550.

At sidebar, the defense then objected to further testimony regarding the timing of the report and the number of surgeries performed before it was dictated because "there's no evidence the report was inaccurate." A550-52. The trial court sustained the objection, because "there's no expert or person on causation." *Id.* The trial court then further expanded upon its original decision by precluding Turner from asking specific questions concerning the number of surgeries performed by Dr. Conway between the date of surgery and the date the operative report was created, and Dr. Conway's alleged lack of knowledge of the 24-hour rule. A345; A371-373; A551. This, of

course, was the very evidence that Turner could have relied upon to challenge the completeness and accuracy of the report.

The decision directly contradicts *Weber v. State*, where this Court held that it was reversible error for the trial court to preclude evidence of bias on the part of state witnesses who accepted money from the defendant's mother for clothes prior to trial, even though there was no information to suggest that they altered their testimony as a result. 457 A.2d 674, 681 (Del. 1983).

Here, the trial court's ruling denied the jury an opportunity to evaluate whether a key operative report was accurate and Dr. Conway's testimony reliable. And the jury was denied an opportunity to adequately evaluate the testimony of defense expert Dr. Kirkland, who relied entirely upon the contents of the operative report in reaching his conclusions that Dr. Conway and Dr. Kalish were not liable. A208. Turner suffered prejudice and was denied a fair trial, because the court foreclosed a legitimate inquiry into the credibility of witnesses and documents and jurors were not able to test the truth of the evidence.

3. Denying the Jurors An Opportunity to Hear Evidence that Would Impeach Dr. Conway, Dr. Kirkland and the Accuracy of the Operative Report, Was Particularly Prejudicial to Turner, Because Medical Records and Surgeons Are Considered Trustworthy Sources of Information.

The credibility of Dr. Conway and the accuracy and completeness of the December 2007 operative report are particularly relevant topics of examination, because both surgeons and medical records are presumably given deference and considered trustworthy. This is

suggested by the rules of evidence, themselves, which create a hearsay exception for medical records, D.R.E. 803(4) and (6).

Bias for or against doctors is akin to bias for or against police officers, because both are positions of power, and citizens generally defer to their decisions or instructions. This ultimately may lead jurors to defer to the testimony of general surgeons. The jury should have been permitted to hear cross-examination on issues related to the trustworthiness of the medical records and the physicians who created them. *Garden v. Sutton*, 683 A.2d 1041 (Del. 1996) (Abuse of discretion found where trial court denied cross-examination of former police officer's record of unrelated misconduct, because of real danger that jury ascribed undue weight to his testimony.)

Dr. Conway bolstered his own credibility by highlighting his positions as Medical Director to Physician's Assistants, Medical Director of the Surgeons for Emergency Care, member of the Board of Trustees of the Medical Society of Delaware, and Chief of the Section of General Surgery at Christiana Hospital. A532(84:14-20); A533(85:11-23; 86:1-11). He even complained that the lawsuit was an attack on his character, his professionalism and ethics. A540(113:9-15). And yet, even after this inflammatory testimony, Turner was still not permitted to highlight the reasons why the jury should question his testimony and the January 23, 2008 operative report.

The law is clear that jurors should not be denied opportunities to hear impeachment evidence that may "undermine a witness' credibility," especially a witness or document that a juror might defer to assuming their accuracy or truthfulness. *Atkinson v. State*,

778 A.2d 1058 (Del. 2001); *Garden v. Sutton*, 683 A.2d 1041 (Del. 1996). It was an abuse of discretion to deny jurors that opportunity. As a result, Turner was denied a fair trial, because the jury was not permitted to consider and analyze key evidence on the bias, prejudice and credibility of one of the defendants, Dr. Conway, the credibility of the defense expert, Dr. Kirkland, and the accuracy and completeness of a key trial exhibit, Dr. Conway's dictated operative report.

The trial court erred for several reasons. Dr. Conway's violation of the 24-hour rule is proof of negligence. His undisputed violation of the rule coupled with the undisputed fact that he performed at least 27 surgeries in the ensuing 52 days support an argument that he was busy and hurried through Turner's surgery, leading to the spillage of abdominal contents identified by Dr. Bennett which, in turn, necessitated surgery to remove the contaminated mass on Turner's liver. Furthermore, the rule, its undisputed importance and national acceptance, its denial by Dr. Conway, and its violation, would have been valuable impeachment evidence, especially given Conway's testimony that Turner's lawsuit was an attack on his character. Dr. Conway portrayed himself as a highly conscientious professional, wrongly sued, and Turner was never permitted to impeach his character with evidence that he violated an important, longstanding rule governing her treatment, and she was prevented from fairly challenging a key defense exhibit. Plaintiff raised the impeachment argument in her original opposition, which was limited to four pages, and her motion for reargument was timely.

V. ARGUMENT

i. QUESTIONS PRESENTED

Whether it was an abuse of discretion to permit defendant-below, appellee, Dr. Kalish, a general surgeon, to give expert testimony on matters related to his own liability, where there was no disclosure of his anticipated expert testimony or opinions prior to trial. **A500-501.**

ii. SCOPE OF REVIEW

The "Court applies an abuse of discretion standard of review as to the trial court's... evidentiary rulings." *Wilmington Country Club v. Cowee*, 747 A.2d 1087, 1092 (Del. 2000).

iii. MERITS OF ARGUMENT: A Defendant-Doctor Failing to Comply With Expert Opinion Notice Requirements Must Be Precluded from Opining as an Expert at Trial.

The trial court abused its discretion by permitting Dr. Kalish, to give expert testimony and opinions at trial when he never gave proper notice to Turner in his expert disclosure or deposition. Therefore, Turner was not given a fair opportunity to "meet that 'expert' opinion on the same basis as any other expert opinion from a nonparty witness." *Barrow v Abramowitz*, 931 A.2d 424 (Del. 2007).

In *Barrow*, also a medical negligence case, the defendant doctor opined on causation at trial even though he had not disclosed the substance of his opinions prior to trial, and failed to comply with Rule 16(e) and Rule 26(e) by not disclosing his opinions in response to expert witness interrogatories. *Barrow*, 931 A.2d at 433. In concluding that the trial court abused its discretion, the *Barrow* court specifically addressed and overturned *Rogers v. Case*, 1998 WL

437145 (Del. Super.). The Court refused to adopt the trial court's reasoning that "the distinction between a defendant doctor's role as a fact witness and an expert witness is blurred in medical malpractice cases." *Barrow*, 931 A.2d at 433.

In *Rogers*, the Superior Court stated: "It seems to me that any Defendant in a malpractice case is going to give mixed testimony involving medical opinion and factual recitation... Of all the physicians, Defendant is usually the one most familiar with the facts and diagnosis in the case and his opinion is inevitably admitted in some form." *Barrow*, 931 A.2d at 433 *citing Rogers v. Case*, 1998 WL 437145 (Del. Super.). This Court disagreed, holding that if a defendant doctor is to provide expert opinions, he "must give notice to an opposing party to give that party a fair opportunity to meet that 'expert' opinion on the same basis as any other expert opinion from a nonparty witness." *Id.*

Here, the defense failed to give notice of Dr. Kalish's expert testimony about the pathology report and its meaning in terms of his own liability. In response to expert interrogatories and under the case schedule, appellees served an April 12, 2011 expert disclosure, stating only:

C. Eric Kalish, M.D.: To the extent deemed necessary under Court rules for expert witness disclosure requirements, where the opinions of Dr. Kalish may be considered expert opinions, he will testify accordingly and as set forth in his deposition and the medical records.

A735. In the Pretrial Stipulation and Order, Dr. Kalish was listed as a "(fact and expert)" witness. A298. However, the defense did not disclose any information whatsoever about his alleged "expert

opinions" and never mentioned that Dr. Kalish would opine that the post-surgery pathology report proved that he was not negligent. A735. At trial, Dr. Kalish necessarily admitted that he would not have had the benefit of the pathology report until days after the surgery was concluded. A500(204:9-14).

At trial, Turner's counsel timely objected to Dr. Kalish's proposed testimony, noting that he was never identified as an expert opining about the interpretation of the pathology report. A500. The court overruled the objection, stating:

He is one of the defendants, he performed the surgery. It's not uncommon for a treating physician, which he was, in part to, or most entirely in part to express expert opinions when it directly relates to something they know about and is relevant to the case, so I'm going to overrule plaintiff's objection and allow the doctor to discuss the pathology report to the extent he's able to.

A500(205:14-21).

Turner argued that, although the defense identified Dr. Kalish as a potential expert, the defense never provided a summary of his anticipated testimony and opinions. Nevertheless, the trial court ruled: "I still think its permissible for this witness to give at least this testimony on the pathology report. Being the treating physician, it's within his competence to do so, you can test that on cross-examination." A501(206:13-17).

Dr. Kalish was then permitted to opine about how he believed the pathology report should be interpreted. During his testimony he stated that the microscopic description

doesn't mean minute and it doesn't mean subatomic. It's a section under the microscope. These are things that the naked eye can see. This is not a super incredibly small nothing, I mean, this is not a normal bowel.

A501(208:5-10). He then testified as to the meaning of the reference in the report to "transmural" opining that all layers of the bowel had an abnormality, even though the language in the report did not support his opinion. A501(208:18-20). His conclusion, of course, was that if he had waited "with a bowel like this,"

then you get the purplish discoloration, the dark purple, black, what's called liquefaction. That's when the tissue becomes soft and truly does, you grab it and it just melts. If you operate and see that, you in there too late.

A501(209:17-21). In analyzing the pathology report, Dr. Kalish was permitted to provide an expert opinion that he was not negligent. He opined that the pathology proved that he was correct in removing one inch of small bowel from Turner's body because the microscopic pathology showed that there was an abnormality in the bowel which could have turned dark purple and black if he had not removed it. His opinion directly contradicted Turner's expert, Dr. Beaton, even though he had not notified Turner of his opinion as required by Rules 16, 26, and 33. A404(34:9-18); A421-422.

The trial court's decision is contrary to *Barrow* and its rationale mirrored that of the *Rogers* court, which was overturned by *Barrow*. *Barrow*, 931 A.2d at 433; *Rogers v. Case*, 1998 WL 437145 (Del. Super.). Admittedly, in *Barrow*, the defense never identified the defendant doctor even as a possible expert. However, identifying a doctor as a possible expert without affirmatively disclosing his opinions is a distinction without a difference. As in *Barrow*, Dr. Kalish's "trial testimony should have been limited to relevant factual

matters and opinions disclosed at his pretrial deposition." 931 A.2d at 434. The defense provided no such disclosures.

Here, as in *Barrow*, the trial court abused its discretion by permitting the defendant doctor to opine about his own liability. In the defense expert disclosure, it stated "[Kalish] will testify accordingly and as set forth in his deposition and the medical records." Dr. Kalish did not testify at his deposition about his interpretation of the pathology report, or any conclusions on liability based upon the report. No medical records indicate that Dr. Kalish had an opinion about the pathology report or its relationship to the case. A647-48, 501(207:6-8).

The trial court's abuse of discretion denied Turner a fair trial. The defense was able to present two experts on liability, Dr. Kalish and Dr. Kirkland. Consequently, Turner was denied the opportunity a) to identify a second expert for trial to contradict Dr. Kalish, b) to prepare an effective cross-examination, c) to prepare her own expert fairly, and d) to take related discovery, for example, the deposition of the pathologist who prepared the report.

VI. CONCLUSION

Plaintiff-below, appellant Turner respectfully submits that this is the exceptional case where the trial court abused its discretion and thereby denied the plaintiff a fair trial. The trial court's errors, independently and taken together, necessitate a new trial. Turner respectfully requests that the evidentiary rulings be overturned and a new trial granted.

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VII. TRIAL COURT JUDGMENTS

The May 2, 2012 Order of the Superior Court of Delaware in and for New Castle County is attached as Exhibit 1 to this Opening Brief.

The May 2, 2012 bench ruling of the Superior Court of Delaware in and for New Castle County is located at pages A342-346 of Appellant's Appendix and attached as Exhibit 2 to this Opening Brief.

The June 14, 2012 bench ruling of the Superior Court of Delaware in and for New Castle County is located at pages A371-373 of Appellant's Appendix and attached as Exhibit 3 to this Opening Brief.

The June 14, 2012 Order of the Superior Court of the State of Delaware in and for New Castle County is attached as Exhibit 4 to this Opening Brief.

The June 20, 2012 bench rulings of the Superior Court of Delaware in and for New Castle County are located at pages A493 and A500-501 of Appellant's Appendix and attached as Exhibit 5 to this Opening Brief.

The June 22, 2012 bench ruling of the Superior Court of Delaware in and for New Castle County is located at pages A550-552 of Appellant's Appendix and attached as Exhibit 6 to this Opening Brief.

The June 25, 2012 jury verdict is attached as Exhibit 7 to this Opening Brief.