

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

DEBORAH L. SPICER, individually and as Parent)
and Natural Guardian of BRITTANY SPICER, a)
minor,)
)
Plaintiffs,)
)
v.)
)
ABIMBOLA OSUNKOYA, M.D., DELAWARE)
PRIMARY CARE, LLC, STEPHEN COOPER,)
M.D., ENT & FACIAL PLASTIC SURGERY,)
P.A., DELAWARE SURGERY CENTER,)
)
Defendants.)

C.A. NO. 08C-04-218 MJB

Submitted: November 22, 2010
Decided: March 7, 2011

Upon Plaintiff's Motion *in Limine*.
GRANTED.

OPINION AND ORDER

Gilbert F. Shelsby, Jr., Esq. Shelsby & Leoni, P.A., Stanton, Delaware, Attorney for Plaintiffs.

John D. Balaguer, Esq., Dana Spring Monzo, Esq., White and Williams LLP, Wilmington, Delaware, Attorneys for Defendants.

BRADY, J.

INTRODUCTION

This is a medical malpractice action. Deborah L. Spicer (“Ms. Spicer”) filed this suit on behalf of her minor daughter, Brittany Spicer (“Brittany”), alleging that the Defendants’ negligent conduct caused Brittany “severe and debilitating brain damage.”¹ Before the Court is Plaintiffs’ Motion *in Limine*, which seeks to limit the testimony of Beth Greenbaum, Ph.D, a life care planner. The issue raised is whether Dr. Greenbaum is qualified to provide an expert opinion regarding Brittany’s eligibility to receive benefits under the State’s Medicaid Acquired Brain Injury Waiver Program (“ABI Program”). For the reasons set forth in this Opinion, Plaintiffs’ Motion is **GRANTED**.

FACTUAL BACKGROUND

Following a tonsillectomy, Brittany allegedly suffered an anoxic brain injury, which required her to be hospitalized for nearly three months. Brittany’s medical condition will require considerable care for the rest of her life. Both parties intend to offer expert testimony from a certified life care planner regarding the cost and extent of care that will be required during Brittany’s lifetime. According to Defendants, their expert, Dr. Greenbaum, “will testify about the extent to which the level of care Brittany requires can be paid through the Delaware Medicaid Waiver for Acquired Brain Injury.”² Plaintiffs seek to limit Dr. Greenbaum’s testimony, so that a jury will not consider any evidence regarding Brittany’s potential receipt of financial assistance from the ABI Program.

¹ Pl.’s Mot. In Limine. 1.

² Def.’s Resp. 5.

PARTIES' CONTENTIONS

Plaintiffs contend that Dr. Greenbaum's testimony regarding Brittany's potential admission into the ABI program and receipt of public assistance should be excluded for two reasons. First, they contend that 18 *Del. C.* §6853 does not permit evidence of potential public assistance to be presented to a jury when it is of a speculative nature. Second, Plaintiffs contend that Dr. Greenbaum is not qualified to provide an expert opinion regarding Brittany's eligibility for ABI benefits because it is speculative, and based on her own, and other's, subjective beliefs.³

In response, Defendants contend that 18 *Del. C.* §6853 allows evidence of Brittany's potential eligibility for ABI benefits to be presented to the jury. In addition, Defendants argue that Dr. Greenbaum is a qualified expert, whose opinion is based upon sufficient facts and data of the kind relied upon by experts in her field. Defendants claim that her opinion regarding Brittany's ABI eligibility has a reliable basis in her knowledge and experience and should be presented to the jury.

DISCUSSION

I. Dr. Greenbaum is not qualified to provide an expert opinion regarding Brittany's eligibility for public assistance from the ABI program.

A. Legal Standard For Expert Opinion Testimony

Rule 702 of the Delaware Uniform Rules of Evidence permits a party to offer expert testimony from a qualified witness "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

³ In her report, Dr. Greenbaum concludes, based on her review of Brittany's "medical records, expert analyses, phone conversations with individuals knowledgeable about the ABI Waiver, her education, history and my independent assessment, [that] ...based upon reasonable life care planning probability ... [Brittany] should meet all the medical and financial components to be accepted into the State of Delaware's Acquired Brain Injury Waiver Program."

issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.” The testimony must be based upon sufficient facts or data, be the product of reliable principles and methods, and the witness must apply the principles and methods reliably to the facts of the case.⁴ In addition, the facts or data in which the expert relies upon need not be admissible into evidence as long as the information is of the kind that is reasonably relied upon by experts in the particular field.⁵

The Delaware Supreme Court has adopted a five-part test to determine the admissibility of expert testimony⁶:

- (1) Is the witness qualified as an expert by knowledge, skill, experience, training, or education/
- (2) Is the evidence relevant and reliable?
- (3) Is the expert’s opinion based upon information reasonably relied upon by the experts in the particular field?
- (4) Will the specialized knowledge being offered assist the trier of fact to understand the evidence or determine a fact in issue
- (5) Will the expert testimony create unfair prejudice or confuse or mislead the jury?⁷

These factors are not exhaustive, rather, the “inquiry is intended to be flexible and the trial judge has broad discretion to determine whether the Daubert factors are the appropriate measure of reliability in a given case.”⁸ The court’s role is to act as a gatekeeper and ensure that the expert’s testimony will be reliable and relevant.⁹

⁴ D.R.E., Rule 702

⁵ D.R.E. 703.

⁶ The Delaware Supreme Court extended the *Daubert* holdings to all expert testimony pursuant to the U.S. Supreme Court’s holding in *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999).

⁷ *Crowthorn v. Boyle*, 793 A.2d 422, 430 (Del. 2002), citing, *Nelson v. State*, 628 A.2d 69, 73-74 (Del. 1993).

⁸ *Crowthorn*, 793 A.2d 422, 430.

⁹ *Id.*

The issue before the Court is whether Dr. Greenbaum is qualified to offer an expert opinion regarding Brittany's potential eligibility for ABI program benefits. The Court finds that she is not for several reasons.

B. Analysis

- i. Dr. Greenbaum is not qualified to offer an expert opinion regarding Brittany's medical eligibility for ABI program benefits.*

In order to receive ABI Program benefits, an individual must meet several medical requirements. To be eligible, the candidate must have been diagnosed with an acquired brain injury as defined by regulations developed by the Center for Disease Control and Prevention that are reviewed and updated by the State of Delaware periodically. The injury must not be hereditary, congenital, degenerative, or induced by birth trauma.¹⁰ The individual must also meet nursing facility level of care standards established by the State's preadmission screening process; be at least 18 years old; exhibit medical, emotional, behavioral, and/or cognitive deficits resulting from their brain injury; and have between a five and eight rating on the Rancho Los Amigos Level of Cognitive Functioning Scale.¹¹

In this matter, the parties dispute whether or not Brittany would have between a five and eight rating on the Rancho Scale as the State requires in order to receive ABI benefits. In her deposition testimony, Dr. Greenbaum admitted that she is unable to determine exactly where Brittany would place on the Rancho scale,¹² and further stated

¹⁰ Def.'s Resp. Ex. E.

¹¹ Both parties have discussed the State's use of the Rancho Scale in determining medical eligibility for ABI Program benefits, however, the record does not include the specific diagnostic criteria used to apply the Rancho Scale. The record is also void of the specific financial criteria used to determine eligibility.

¹² Dr. Greenbaum's Dep. p. 64, ln. 1-5.

that she is not qualified to determine what level Brittany is on the Rancho scale.¹³ Dr. Greenbaum does state that, in her opinion, Brittany would fall within a range of five to eight on the Scale, and that according to an administrator of the ABI program, Franklin Jones, the State uses the Rancho Scale liberally.¹⁴

Plaintiff's contend that Dr. Greenbaum is neither a nurse nor a physician. She relied upon information from a State employee in reaching her conclusion, who stated that Delaware uses the Rancho Los Amigos Level of Cognitive Functioning Scale liberally. Plaintiffs contend that the employee is not an expert, was speculating on how the State would use the Rancho scale, and will not testify in this case.

Defendants claim that Dr. Greenbaum's inability to determine when, and to what extent, Brittany will require skilled nursing in the future is a limitation of her opinion, one that can be handled on cross-examination, but does not make the opinion inadmissible.

Defendants also contend that Dr. Greenbaum's opinion regarding Brittany's expected Ranch scale score is valid, that Dr. Greenbaum's opinion is that Brittany is within the five to eight range, and that the only shortcoming was where within the range her score fell.¹⁵

Dr. Greenbaum's opinion regarding Brittany's medical eligibility is not admissible for two reasons. First, Dr. Greenbaum's testimony is unreliable. She admits that she is not qualified to determine where Brittany will fall on the Scale, although she has opined that she will fall within the qualifying range. While Dr. Greenbaum's

¹³ *Id.* at p. 66, ln. 10-12.

¹⁴ *Id.* at 63, ln. 12-14.

¹⁵ According to Defendants, Plaintiffs' neuropsychological expert, Dr. Greenberg, agrees with Dr. Greenbaum's conclusion. Defendants stated that this expert's opinion would be provided to the Court, however, it was not. Regardless, it is Plaintiffs' burden to provide expert testimony supporting their claim.

opinion regarding Brittany's Rancho Scale score may be an educated guess, it is not sufficiently reliable for a jury to base a determination of this issue upon it.

Additionally, Dr. Greenbaum's testimony is speculative. She has provided an opinion that the State will admit Brittany into the ABI program, based on looking at the program requirements and Brittany's medical history, but her opinion has no bearing on whether or not the administrators of the program will admit Brittany into the program. No one associated with the ABI Program has evaluated Brittany or has provided an opinion regarding her eligibility for the ABI Program. Dr. Greenbaum's opinion in this regard is mere speculation.

ii. Dr. Greenbaum is not qualified to offer an expert opinion regarding Brittany's financial eligibility for ABI program benefits.

A further requirement to receive ABI program benefits, is that the applicant meet certain financial eligibility criteria. In her report, Dr. Greenbaum concludes that Brittany will meet the financial criteria needed for ABI program benefits. In her deposition, Dr. Greenbaum explained that her conclusion was based on a few assumptions.

First, Dr. Greenbaum assumed that the State does not consider any parental income or family resources when calculating financial eligibility. However, this belief was based entirely on a conversation she had with Barbara Lewis, someone familiar with the program.¹⁶ Dr. Greenbaum does not personally know whether or not the Brittany's eligibility is affected by her family's resources. While an expert's opinion can be admitted even though the expert relied upon inadmissible information, the expert's opinion cannot be based solely on the hearsay of others.¹⁷

Second, Dr. Greenbaum's conclusion regarding Brittany's financial eligibility was

¹⁶ *Id.* at p. 67, ln. 9-12.

¹⁷ *See, Conway v. Bayhealth Med. Ctr.*, 2001 Del. Super. LEXIS 115 (Del. Super. Ct. Mar. 26, 2001).

based on the assumption that Brittany has no financial resources of her own. However, Dr. Greenbaum acknowledges she has made no attempt to discover the financial condition of Brittany.¹⁸ Therefore, her opinion is not based upon sufficient facts or data and is mere speculation. An opinion of this kind is hardly helpful to assist a jury in determining Brittany's financial eligibility for ABI program benefits.

Finally, Dr. Greenbaum's conclusion that Brittany will be financially eligible for ABI program benefits rests upon the assumption that if Brittany receives a favorable award in this case, the money would be placed into a special needs trust. Dr. Greenbaum assumes, therefore, that any recovery would not be considered part of her financial resources. However, she points to no program documentation to support her conclusion.

In sum, Dr. Greenbaum's conclusion that Brittany would be financially eligible for ABI benefits is not based on sufficient facts or data, and is not reliable enough to properly inform a jury. Moreover, as with her opinion regarding Brittany's medical eligibility, Dr. Greenbaum's opinion is not relevant. Her opinion will have no bearing on whether Brittany will in fact be determined to be eligible for ABI program benefits, and by an official making that determination for the State of Delaware.¹⁹

¹⁸ Dr. Greenbaum's Dep. p. 68, ln. 5-9.

¹⁹ Having decided that Dr. Greenbaum, is not qualified to offer an opinion regarding Brittany's eligibility for ABI Program benefits, the Court need not consider whether, based on the facts of this case, evidence of Brittany's potential receipt of those benefits is admissible pursuant to 18 *Del. C.* § 6862, which abrogates the common law collateral source rule with regard to medical malpractice claims.

