SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

August 19, 2009

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Re: ***Vogel v. Duran, et al.***
C.A. No. 08C-02-034-RFS

Dear Counsel:

This is a wrongful death medical malpractice action arising from the death of a newborn, Kyle Vogel ("Vogel"). After his birth on September 28, 2006 at Nanticoke Memorial Hospital, he suffered from hypoglycemia. Vogel was sent to Kent General Hospital ("KGH") where an umbilical venous line ("UVL") was inserted to treat that condition. A Neonatal Nurse Practitioner ("NNP") is privileged by KGH protocol to insert UVLs and to review chest x-rays to confirm safe placement. Three x-rays were taken between September 29 and October 1, 2006, and they showed that the UVL was

misplaced. A major dispute exists whether the line was actually readjusted to pull it back from a dangerous position and, if readjusted, whether the UVL migrated. On October 1, 2006, Vogel suffered cardiac arrest and tampanade which resulted in his death.

The parties filed motions in limine. After considering them and the positions expressed at oral argument on Tuesday, August 11, 2009, the following rulings are made:

(i) Defendant's Motion to Exclude Plaintiffs' Standard of Care Expert - Denied.

Dr. Harris Jacobs is Plaintiffs' sole standard of care expert. Delaware law requires an expert to testify about the appropriate standard of care and how it was violated in order to present a medical malpractice claim. 18 *Del.C.* § 6853(e). Dr. Carlos Duran was the attending neonatologist. The crux of this matter is whether he was required to read an x-ray taken of Vogel on September 30, 2006. The x-ray showed the catheter was improperly placed and posed a significant risk. Dr. Jacobs stated that it was within the standard of care for Dr. Duran to rely on NNPs to place the UVL, including their review of x-rays and necessary line adjustments. Defendant agrees that Dr. Jacobs stated that the doctor remained responsible for their errors or omissions. However, he contends that it was effectively a commentary on vicarious liability rather than a statement of a medical standard of care.

Defendant argues that he cannot be responsible vicariously because Christiana Care Health Services, Inc. ("Christiana Care") is the actual employer for the NNPs. Plaintiffs have already settled with Christiana Care. At oral argument, Plaintiffs asserted

that no claims are being asserted against Defendant on vicarious liability principles including the borrowed servant doctrine.

Plaintiffs disagree with Defendant's characterization of Dr. Jacobs's testimony. They contend that his complete position is that Defendant was responsible to review the x-ray. This responsibility arose from Defendant's status as Vogel's treating physician. The Defendant had access to x-rays taken of the infant as read by two NNPs when he left the hospital after making his rounds. A disputed question of fact exists whether or not the Defendant knew a second x-ray had been taken and was available before another physician, Dr. Attunes, began a new shift.

The question is whether Dr. Jacobs states a medical standard of care that he contends Defendant violated without digressing into legal theory about vicarious liability. 18 *Del. C.* § 6853(e) states:

> No liability shall be based on asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death…

In *Simmons v. Bayhealth Medical Center, Inc.*, 950 A.2d 659, 2008 WL 2059891, (Del. May 15, 2008) (TABLE), the Court reversed a Superior Court decision for excluding an expert's testimony. The trial court felt the opinion was conditional and did not clearly state that Bayhealth had deviated from the standard of care. *Id.* at *2-3. There, the standard of care was only breached if the patient had not been alert where injuries were suffered after a slip and fall in a hospital room. The Court held that this fact

did not make the opinion conditional. Rather, it simply gave the jury a basis with which to decide whether or not the duty was breached. The jury could then decide whether the patient was alert or not. *Id.* at *3.

In *Green v. Wiener*, 766 A.2d 492 (Del. 2001), the Court held that Section 6853 "does not require medical experts to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with 'magic words.'" *Id.* at 495. All that is required is credible evidence of each element of a negligence claim from which a reasonable jury could return a verdict. *Id.* The substance of the expert's testimony is evaluated as a whole; the jury weighs it; inconsistencies are resolved. *Id.* Contradictory statements are not fatal where the expert does not repudiate an opinion finding a standard and violation. *Froio v. Dupont Hospital for Children*, 816 A.2d 784, 787 (Del. 2003).

Part of Dr. Jacobs's testimony states that Defendant was within the standard of care in relying upon a NNP to read a chest x-ray and to reposition an UVL.

Along this vein, Dr. Jacobs testified:

> Q. Okay. Now, is it your testimony that Dr. Duran has to look at each follow-up chest x-ray himself and do an independent evaluation of that x-ray as opposed to relying on the nurse practitioners pursuant to this protocol to do that evaluation and take whatever necessary steps need to be done in response to that evaluation?
>
> A. I would phrase it by saying that he is responsible for the consequences of the interpretation and actions. And if he chooses to accept the interpretation and actions of someone else in place of his own, then that's fine but he's still responsible for what they do.

* * *

Q. So from September 30th at approximately 12 or 1 o'clock the responsibility would have been on Dr. Attunes to have supervised whatever the nurse practitioners were doing, not Dr. Duran, correct?

A. Yes.

Q. So to the extent that that x-ray was available to be reviewed at the time Dr. Attunes made his rounds, the responsibility would be on Dr. Attunes to have done that?

A. Yes.

Q. And if Dr. Attunes chooses not to do it, that would not be a breach in the standard of care. But to the extent that the nurse practitioner made a mistake in either not responding to the x-ray or responding but not appropriately responding, it would be his responsibility, because he is the person in charge, correct?

A. Yes. Although I think in this case you have to talk about it being a breach in the standard of care because it is his responsibility to look at the x-ray. Well, it's not a breach if he is going to accept whatever they do.

Def. Ex. C, p. 58, 63-64.

However, Dr. Jacobs says that the doctors "can rely on [nurses] to actually do the procedures but they are, -- it's still necessary for them to review the x-ray at the end." Pl. Ex. A p. 26. He also says "It's reasonable for [Defendant] to rely on [the nurse] to make an adjustment in the catheter position as needed but it is still incumbent upon him to actually look at the films that were done." Pl. Ex. A p. 51. He also says that "since Dr. Duran is the physician who is responsible, he needs to look at these films." Pl. Ex. A p. 53-54.

There is controversy as to whether or not Defendant was made aware that the x-ray

had been done; however, that is a trial issue for the jury. Dr. Jacobs does accuse Defendant of failing to meet the standard of care in his testimony by not personally looking at the x-ray and causing Vogel's death. His testimony does meet the minimal standards set forth in Section 6853. A question of fact is also raised as to what a reasonable time to read an x-ray would be under the circumstances.

(ii) Defendant's Motion to Preclude Plaintiffs from Eliciting Expert Testimony Beyond the Criticisms offered by Dr. Jacobs - Moot.

At oral argument, Plaintiffs reported that no request was being made to expand the standard of care opinions of Dr. Jacobs as set forth in his deposition of March 3, 2009 to include the subject matter of questions (a) through (e) as outlined in paragraph 4 of Defendant's motion. Plaintiffs also reported that their case on the standard of care was set forth in the whole of Jacobs' deposition. As I understood Plaintiffs' counsel, there would be no arguments beyond the criticisms offered by Dr. Jacobs. The question posed in (e) concerning information about the risk of migration of the UVL is a causation type of question and can be asked on cross-examination.

(iii) Defendant's Motion to Preclude Plaintiffs from Introducing Evidence of FDA Guidelines - Moot

At oral argument, Plaintiffs' counsel withdrew his intent to introduce Federal Drug Administration (FDA) guidelines and statistical evidence that was the subject matter of the motion.

(iv) Plaintiffs' Motion to Limit Expert Testimony of Defendant's Experts, Albert L. Pizzica, M.D. and June M. Deacon, R.N.C. - Denied.

The Defendant has offered an explanation that the catheter migrated after it had been repositioned by nurses Savon and Bears, both NNPs. Whether they, especially Bears on September 30th, actually repositioned the catheter, is a question of fact for the jury to decide. Bears claims she reviewed the second x-ray on September 30th around 10 o'clock in the morning and pulled the catheter back because it was misplaced. The catheter was too high, and it caused the death of the child by piercing and introducing fluid into the space where the heart is located with fatal consequences.

Plaintiffs argue that evidence of migration should not be permitted because it is merely speculative. During Dr. Pizzica's deposition, the following exchange occurred:

> Q: Insofar as migration, that is again your theory but there is no medical evidence to support it other than as you've explained your theory?
>
> A: Correct. Pl. Ex. B p. 99.

The standard for admissibility of expert testimony was set forth in *McIlhenney v. Intermatic, Inc.* 2004 WL 440368 at *1 (Del. Super. Mar. 8, 2004). That Court stated:

> The trial court must decide that: (i) the witness is 'qualified as an expert by knowledge, skill, experience, training or education'…; (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based on information 'reasonably relied upon by experts in the particular field'…; (iv) the expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue'…; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury.

The objection is that the opinion is not based on the medical evidence of record. Therefore, it cannot be relevant and reliable under (ii). No objection is made as to the other parts of the Rule.

The question, therefore, is whether the proffered opinion finds support notwithstanding Dr. Pizzica's response. Considering Defendant's Rule 26 disclosure filed on January 15, 2009 together with the deposition, minimal evidence has been supplied. Paragraph 2 i. describes the basis. In large measure it is premised on whether or not Nurse Bears actually adjusted the line.

The parties recognize that migration is a recognized risk in procedures of this nature. For example, literature from the Food and Drug Administration reports that the position of the catheter tip can change through body movement. Prevention of tip migration is one of the of two key elements to protect against cardiac perforation and tampanade; the other element is the tip location. Def. Ex. D. p. 1-4 in Defendant's motion to exclude FDA Guidelines. While Plaintiffs have decided not to use Guidelines, similar FDA materials were authoritative in a case involving improper placement of a catheter. *Ozment v. Wilkerson*, 646 So.2d 4, 6 (Ala. 1994).

In the disclosure and deposition, Dr. Pizzica refers to the tampanade occurring about the time the baby was transferred to her mother for feeding. There was movement of the baby by the nurses. Pl. Ex. B, p. 99. Dr. Pizzica reviewed medical records from the A.I. Dupont Hospital where the baby was last transferred. Although the word

migration was not mentioned, Dr. Pizzica felt the records showed perforation that was consistent with the theory that "the line migrated to a bad position." Pl. Ex. B, p. 92.

An expert's opinion based "on his analysis of the circumstances" is not unreliable, and contentions about speculation would be grist for the jury mill. *Green, supra.* at 496. An expert opinion premised on the existence or not of a fact may still be given. Juries are well equipped to decide whether a physician's vision was obscured in a laparoscopic procedure as in *Balan v. Horner*, 706 A.2d 518, 521 (Del. 1998), whether a patient was alert or not as in *Simmons v. Bayhealth Medical Center, Inc., supra.*, and whether or not the line was actually repositioned as here.

Dr. Pizzica gave contradictory answers in his deposition. He stated that the beating of the heart alone could cause perforation where the catheter was placed too high. This was as possible as the line migrating. Pl. Ex. B, p. 94. His ultimate opinion was not repudiated. A jury can flush out inconsistencies as they can with the testimony of Dr. Jacobs. Information concerning the similar high and dangerous positions of the catheter shown by the x-rays and the failure of the contemporaneous record to reflect migration affect the credibility of the evidence.

My understanding is that the objections concerning the opinions of the NNP expert Jane M. Deacon, R.N.C. are the same as those made against Dr. Pizzica. Consequently, the ruling is the same.

Neither expert will be permitted to testify about the credibility of the NNPs involved in the baby's care. Testimony that it appears likely that any nurse adjusted the line is forbidden. At oral argument defense counsel represented that any questions would relate to causation only and would not invade the province of the jury.

v) Plaintiffs' Motion for Continuance - Denied.

By letter dated July 30, 2009, Plaintiffs have asked that the case be continued because Dr. Jacobs may not be available for a trial deposition. The defense objects by letter dated July 31, 2009. Trial was rescheduled from May 18, 2009 to begin on September 21, 2009. The new trial date was discussed during a phone conference on May 6, 2009 and confirmed by letter dated May 7, 2009. Counsel had the opportunity to check the availability of all witnesses, and the September date was acceptable at the time.

The defense is prepared for trial in September. As Plaintiffs' counsel indicated a scheduling problem would arise after mid-August, a letter dated August 13, 2009 was circulated to advise that these rulings would be forthcoming and that Dr. Jacobs should reserve a time. The request, therefore, is denied.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv
cc: Prothonotary