

**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: February 2, 2011
Decided: March 7, 2011

Upon Plaintiff's Application For Certification of Interlocutory Appeal.
GRANTED.

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.

In this medical malpractice action, Plaintiffs filed suit against several defendants after Brittany Spicer suffered an anoxic brain injury the day after a tonsillectomy was performed. On January 31, 2011, this Court issued an Opinion and Order granting Defendants' Ambibola Osunkoya, M.D. and Delaware Primary Care, LLC's Motion for Summary Judgment.

This Court held that the moving Defendants were entitled to judgment as a matter of law for two reasons. First, a physician's duty to his or her patient terminates after the patient is referred to a specialist, and that specialist exercises his or her own independent judgment with respect to medical treatment. Second, that under the circumstances of this case, Dr. Osunkoya's conduct was not a proximate cause of Brittany's injuries.

Plaintiffs have filed an Application for Certification of Interlocutory Appeal pursuant to Supreme Court Rule 42. Upon review of the record, and the criteria set forth Rule 42 Plaintiffs' Application is **GRANTED**.

Supreme Court Rule 42(b) states that "[n]o interlocutory appeal will be certified by the trial court or accepted by this Court unless the order of the trial court determines a substantial issue, establishes a legal right." In addition, Rule 42 requires that the trial court's Order meet 1 or more of the criteria set forth in (b)(i)-(v):

(i) Same as Certified Question. Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or

(ii) Controverted Jurisdiction. The interlocutory order has sustained the controverted jurisdiction of the trial court; or

(iii) Substantial Issue. An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right, and a review of the interlocutory order may terminate the litigation,

substantially reduce further litigation, or otherwise serve considerations of justice; or

(iv) Prior Judgment Opened. The interlocutory order has vacated or opened a judgment of the trial court; or

(v) Case Dispositive Issue. A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice.

An interlocutory ruling determines a substantial legal issue if it “relate[s] to the merits of the case,” not to collateral matters such as discovery.”¹ The Court’s Opinion and Order decided a substantial issue, the ultimate liability of the Defendants, and an issue of first impression, one of the criteria set forth in Rule 41, which satisfies Rule 42(b)(i). Therefore, Plaintiffs’ Application is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

¹ *In re CNX Gas Corp. Shareholders Litigation*, 2010 WL 2705147 (Del.Ch. Jul. 5, 2010), Citing *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del.1973).