IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

ANGELY MARIE BAEZ, ET AL.	**:**	**CIVIL TRIAL DIVISION**
	:	
	:	**NOVEMBER TERM, 1999**
VS.	**:**	**No. 903**
	:	
TEMPLE UNIVERSITY HOSPITAL, ET AL.	**:**	**Superior Court Docket No. 925 EDA 2003**

OPINION

At approximately 2:47 a.m. on November 23, 1997[1] Plaintiff Maria Barber arrived in the Triage Unit of Temple University Hospital close to delivery of a child. Ms. Barber was not registered as a patient with Temple Hospital. Ms. Barber's medical history included no prenatal care throughout her pregnancy, along with marijuana and cigarette use. In fact, Ms. Barber's history made her a high-risk pregnancy (N.T. 8/21/02 pg. 113). After a brief interview by the triage nurse Evelyn Pidlalon, Dr. Andrew Rosen was contacted at approximately 3:00 a.m. (N.T. 08/21/02 pg. 199-200). Ms. Barber was initially given a physical examination by Dr. Rosen. Dr. Rosen was a first year resident four months into his internship at Temple Hospital (N.T. 8/22/02 pg. 150, 8/21/02 pg. 47). Dr. Rosen found Barber to be approximately thirty-seven (37) weeks into gestation and 7cm dilated (N.T. 8/22/02 pg.146). Although Dr. Rosen initially diagnosed Ms.

Barber as a footling breech[2], he later indicated he did not want to call it a complete breech[3] and be incorrect, so to be on the safe side he gave the "worse case scenario" diagnosis of footling breech (N.T. 8/22/02 pg. 150). Dr. Rosen would later admit that he incorrectly diagnosed Ms. Barber with a footling breech and that he agreed with the attending physician's subsequent diagnosis of a complete breech (N.T. 8/22/02 pg. 149). In fact, it is the attending physicians ultimate responsibility for determining the position of any fetus at the time of presentation and labor (N.T. 8/21/02 pg. 44).

Subsequent to Dr. Rosen's diagnosis, nurse Pidlalon contacted Dr. Rosen's supervising physicians Dr. Phuong Kim Dang and Dr. Mohammad El-Mallah and had Ms. Barber transported to the Labor and Delivery floor at 3:45 a.m. (N.T. 8/21/02 pg. 198, 216). Dr. Dang was in her third year residency, while Dr. El-Mallah was a senior resident. Both doctors were doing their residency in Obstetrics and Gynecology. After a subsequent physical examination, Dr. El-Mallah determined that, contrary to Dr. Rosen's initial diagnosis, this was not a footling breech (N.T. 8/19/02 pgs 142, 145). The supervising physicians then contacted Dr. Valeria Whiteman who became Ms. Barber's treating physician. Dr. Whiteman is board certified in Obstetrics and Gynecology with a sub-specialty in maternal-fetal medicine and a specialist certified in high risk pregnancies (N.T. 8/19/02 pg.36). At approximately 4:30 a.m.[4], Dr. Whiteman performed an ultrasound examination on Ms. Barber, which disclosed that the baby was in a flexed – head position with a complete breech, not footling breech, presentation (N.T. 8/21/02 pg.

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[1] The dispute made by Mr. Armenti regarding the timeline of events beginning with Maria Barber's arrival at Temple University Hospital until the time the birth was completely inaccurate and clearly a fallacious assumption on his part (N.T. 8/21/02 pgs 55-70).

[2] A footling breech refers to a position in which one or both feet are folded under the fetus's buttocks.

[3] A complete breech is a position of the fetus in the womb in which the buttocks and feet are toward the birth canal.

[4] N.T. 8/20/02 pg. 105.

45, 8/20/02 pg. 105). After a discussion about the results of the Dr. Whiteman's examination and the risks involved, Ms. Barber determined she preferred an assisted vaginal delivery[5] over cesarean section (N.T. 10/21/02 pg. 27-28, 47-48). Both vaginal delivery and cesarean section are acceptable means of delivery in a complete breech presentation (N.T. 8/21/02 pgs. 30-31, 45-48).

At 4:45 a.m., Ms. Barbers membranes ruptured and she began delivery (N.T. 08/21/02 pg. 222; 8/19/02 pg. 192). At 4:47 a.m., approximately two hours after her first presentation, Angely Baez was delivered (N.T. 8/21/02 pg. 35, 36; 8/19/02 pg. 193-193). Drs. Whiteman, El-Mallah and Dang were all present and assisted in the delivery (N.T. 8/21/02 pg. 33).

Although it is Plaintiff Barber's contention that during the delivery she heard a pop and one of the doctors say to the other "you're not supposed to do that," Dr. El-Mallah testified that she does not remember any conversations or sounds in the delivery room (N.T. 8/19/02 pg. 191). In fact, both Drs. Whiteman and El-Mallah testified that it was "an ideal birth" and no difficulties arose at any time during the delivery (N.T. 8/19/02 pg. 173, 8/21/02 pg. 50). Piper forceps were used during the delivery in order to keep the baby's head in a flexed position and prevent a spinal cord injury. Piper forceps are the only forceps that are ever used for a vaginal breech delivery (N.T. 10/21/02 pg. 32). At no time whatsoever did the doctors use any method of extracting or pulling the fetus during the delivery process, which could harm the fetus's spinal cord (N.T. 8/19/02 pgs. 165-166).

[5] An assisted vaginal delivery is where forceps are used to assist the head. No extraction or pulling is used in the process (N.T. 8/19/02 pgs 165-166).

After Angely Baez was delivered she was then handed over to the pediatricians (N.T. 8/20/02 pg. 87). Despite some head lag, hypotonia, and a weak cry, Baez's Apgar scores showed that she was physiologically stable (N.T. 8/22/02 pg. 134-135). She was then taken to the Intensive Care Nursery (ICN) where she was monitored for six days. Dr. Bernice Duesler, who is the attending physician in ICN, indicated that baby Baez improved in the first five (5) hours in the ICN and showed no signs of respiratory distress (N.T. 8/22/02 pg. 113). On November 26, 1997 baby Baez was given a physical examination by Dr. Bernice Duesler. Dr. Duesler noted that, although she was hypotonic (lacked muscle tone), her reflexes and limb movements were normal (N.T. 8/22/02 pg.110). At no time was Baez's neck immobilized because, as Dr. Duesler indicated, it is an unheard of procedure in newborns (N.T. 8/22/02 pgs. 115-116). On November 27, 1997, Dr. Levent Kahraman performed a neurological evaluation on Baez (N.T. 8/22/02 pgs. 136). Dr. Kahraman noticed that Baez had a lack of tone in the lower extremities, but was still awaiting the results of the Computerized Tomography (C.A.T.) Scan and other tests to determine the reason for the hypotonia and head lag (N.T. 8/22/02 pg. 142). On November 28, 1997, Dr. Duesler determined, after viewing the tests that he wanted further neurological tests performed and transferred baby Baez from Temple University Hospital to Saint Christopher's Hospital For Children (N.T. 8/21/02 pg. 171). On that same day Baez was given an MRI of her cervical spine which demonstrated a spinal cord condition at C-7 through T-1 (which is the area of the spine beginning at the bottom of the neck and extending into the area level with your shoulder blades).

Angely Marie Baez, a minor, by and through her parent Maria Barber and Maria Barber in her own right (hereinafter referred to as "Plaintiffs") instituted a medical

malpractice action against Temple University Hospital and Doctors Valerie Whiteman, M.D., Bernice Duesler, M.D., Mohammad El-Mallah, M.D., Shonda Perry-Davis, M.D., Phuong Kim Dang, M.D., Andrew Rosen, M.D., Kent Bonney, M.D., Geoff Capraro, M.D., Janet Shen, M.D. Ashley Block, M.D., Levent Kahraman, M.D., Toni Tuzio, M.D., Suda Raurshankan, M.D. and Joan Taulane, M.D. and Temple Neonatology Associates (hereinafter referred to as "Defendants") by Complaint filed on November 5, 1999. Plaintiffs alleged in their complaint: negligence in failing to properly evaluate, diagnose and treat Plaintiffs, negligent infliction of emotional distress, battery (for lack of informed consent) and res ipsa loquitur. The plaintiffs' lack of informed consent claim was subsequently dismissed by Order of Summary Judgment dated 1/11/02. In addition, Defendants Drs. Perry Bonney, Shen, Capraro, Kahraman, Block, Tuzio and Ravishankar were subsequently released from the action.

The matter proceeded to trial on August 19, 2002. Plaintiffs presented three (3) experts at trial: Pediatric Neuroradiologist, Dr. Mary K. Edwards-Brown, Pediatric Neurologist, Dr. John Seals and Neonatologist Dr. Stephen Minton. Neither Dr. Seals nor Dr. Minton could testify with a reasonable degree of medical certainty that plaintiff Baez suffered secondary spinal cord damage while in the ICN at Temple University Hospital. Dr. Seals testified he could not support the theory that a failure to immobilize a newborn would result in a spinal cord injury and decline in health condition:

> Mr. Armenti: Is there any – doctor, in your experience with a newborn who has a spinal cord injury and given this decline, can any part of this decline result from the fact that the child was not immobilized?
>
> Mr. Fitzpatrick: Objection.
>
> The Court: Overruled. I will let him answer.

> Dr. Seals: I don't think we have the data to support that one way or another (N.T. 8/20/02 pg. 57).

Likewise, Dr. Minton could not say whether baby Baez suffered any harm as a result of the care rendered by Drs. Taulane and Duesler:

> Mr. Fitzpatrick: Now, you'll agree with me, sir, that you don't know whether or not Angely suffered any harm as a result of the care that Drs. Duesler and Taulane rendered to this patient, isn't that correct?
>
> Dr. Minton: I only know that it increased the risk. I do not know the percent.
>
> Mr. Fitzpatrick: You do not know whether there was any harm, correct?
>
> Dr. Minton: I can't say that there was any harm (N.T. 8/21/02 pgs. 163-164).

Additionally, Dr. Edwards-Brown, a radiologist, who often works with children's imaging studies, examined Baez's radiological reports. Dr. Edwards-Brown testified that her interpretation of the Baez's spinal cord studies show swelling in the spinal cord indicating an condition which could have occurred approximately one week prior to the study dated November 28, 1997:

> Mr. Fitzpatrick: Doctor, isn't it true that if you take your definition of a week for [the swelling] to go down, that could place the time of this injury on the 20th or the 21st or 22nd of November, isn't that true, doctor?
>
> Dr. Edwards-Brown: That's what I said and I will reiterate (N.T. 8/19/02 pg. 123-124).

Another plaintiff expert that was scheduled to testify at trial was Dr. Frank Manning, a Maternal Fetal Medicine expert. The Court initially estimated that the plaintiffs' case should be finished by Thursday, August 22, 2002 (N.T. 8/20/02 pg.110). At the beginning of trial plaintiffs' counsel represented to the Court that Dr. Manning could possibly testify on Tuesday, August 20, 2002 (N.T. 8/26/02 pg.12). On this date, plaintiffs failed to have sufficient witnesses available in Court to testify and the trial

ended after a half-day of testimony. At this time, plaintiffs' counsel represented that he was going to try to have Dr. Manning in Court to testify on either Friday (August 23, 2002) or Monday (August 26, 2002). The Court cautioned plaintiffs' counsel that at the rate the trial was going his case would now probably be finished by Friday (August 23, 2002) and, at the very latest, Monday (August 26, 2002) (N.T. 8/20/02 pg.146). Plaintiffs' counsel suggested possibly videotaping Dr. Manning over the weekend (N.T. 8/26/02 pg. 6). Defense counsel, Charles Fitzpatrick III, informed the Court and Mr. Armenti at jury selection that both he and assistant counsel, Michael Sabo, would be away the weekend of August 24th and 25th . On both, Thursday and Friday the trial was adjourned early due to the fact that Mr. Armenti did not have any witnesses to testify. The Court offered to end early Friday, August 23, 2002 to allow plaintiffs to videotape Dr. Manning (N.T. 8/26/02 pg. 6). Instead, plaintiffs' counsel informed the Court that Dr. Manning would be in Court to testify live on the morning of Monday, August 26, 2002 (N.T. 8/22/02 pg. 128).

On Saturday evening, August 24, 2002, plaintiffs' counsel contacted the home of Mr. Sabo and informed Mr. Sabo's mother that he was working with Mr. Sabo on this case an that there had been a fourth change[6] of plans and the parties would need to videotape Dr. Manning via satellite conference on Monday, August 26, 2002 at 6:30 a.m. because he was not able to appear on Monday to testify "live" (N.T. 8/26/02 pg. 4). Mr.

[6] Mr. Armenti initially planned to have Dr. Manning testify on Tuesday, August 20, 2002, but Dr. Manning was unavailable (N.T. 8/26/02 pg.12). After Dr. Manning was not produced on Tuesday, Mr. Armenti stated that he would have Dr. Manning in Court to testify on either Friday (August 23, 2002) or Monday (August 26, 2002). After again failing to produce Dr. Manning on Friday, Mr. Armenti assured the Court that Dr. Manning would be in Court to testify live on the morning of Monday, August 26, 2002 (N.T. 8/22/02 pg.128). Mr. Armenti then unsuccessfully attempted to coordinate a satellite deposition of Dr. Manning at 6:30 a.m. Monday morning (N.T. 8/26/02 pg. 4). On Monday, Dr. Manning was unavailable to testify in Court for the forth time (N.T. 8/26/02 pg. 8). Mr. Armenti again asked the Court to extend time to procure the Doctor.

Sabo received this message at approximately 8:00 p.m. and immediately contacted plaintiffs' counsel to voice defendants' objection to same (N.T. 8/26/02 pg. 4). Both defense counsel were out of town and their materials were locked in the Courtroom rendering them unable to prepare for a satellite video conference deposition of Dr. Manning on Monday morning (N.T. 8/26/02 pg. 7). At that time Plaintiffs' counsel then requested the Court to allow a substitute expert, Dr. Joseph Finkelstein, to testify he agreed with Dr. Manning's report (N.T. 8/26/02 pg. 8-9). Mr. Armenti indicated that he received an affidavit from Dr. Finkelstein on Saturday regarding Dr. Manning's report (N.T. 8/26/02 pg. 8). Since the first contact by Mr. Armenti was not made until approximately 8:00 p.m. Saturday, this indicated that Mr. Armenti made arrangements to have Dr. Finkelstein testify even before he contacted counsel or the Court (N.T. 8/26/02 pgs. 8-9). Despite this, Mr. Armenti failed mention this arrangement of Dr. Finkelstein to Mr. Sabo when they spoke after 8:00 p.m. Saturday (N.T. 8/26/02 pg. 4). Furthermore, Dr. Finkelstein was never identified or listed in the pretrial order (N.T. 8/26/02 pgs.8-9). The Court denied Mr. Armenti's subsequent request to have Dr. Finkelstein testify based in part on the prejudice stated by defense counsel:

> Mr. Fitzpatrick: It prejudices me because I don't know who this fellow is. I don't have his C.V. I have to do an investigation to see what I can find out about him. And secondly, he hasn't been identified as the witness in the case. I don't even have his report (N.T. 8/26/02 pgs. 28-29).

On Monday, August 26, 2002, at the start of the day's proceedings, the Court held a conference on the record with counsel and inquired as to what transpired over the weekend (N.T. 8/26/02 pgs. 3-22). Plaintiffs' counsel indicated that he became aware on Friday August 23, 2002 at approximately 3:00 p.m. that Dr. Manning would not be available to testify at trial on August 26, 2002. Although both defense counsel and the

Court were available, plaintiffs failed to communicate this information to them thus setting into motion the other events about to occur. Specifically, Plaintiffs' counsel took it upon himself, rather than notify the Court or defense counsel, to unilaterally schedule a satellite video conference. Notification of this satellite video conference was not given to defense counsel until the evening of Saturday, August 24, 2002, while defense counsel was out of town and unable to access their files. After hearing the explanations of events that transpired over the weekend the Court informed plaintiffs' counsel that his conduct was tantamount to bad faith and to delay the trial further would prejudice the defendants and the presentation of their case (N.T. 8/26/02 pgs.25-51). The Court again indulged Plaintiffs' counsel by extending its 12:00 p.m. deadline for Dr. Manning's appearance to testify, until 1:00 p.m., otherwise plaintiffs would be forced to rest their case (N.T. 8/26/02 pg.32, 34, 36). Shortly thereafter, plaintiffs' counsel indicated that Dr. Manning would be unable to appear 1 p.m. but sometime later. The Court reiterated that it stood firmly at its 1:00 p.m. deadline. At 1:00 p.m. Dr. Manning was unavailable to testify and plaintiffs' counsel rested. Defendants thereafter made a motion for Compulsory Nonsuit.

After six (6) days of trial and the closure of Plaintiffs' case, this Court granted Defendants' Motion for Compulsory Nonsuit pursuant to Pa.R.C.P. 230.1 as to all remaining defendants and claims for Plaintiffs' inability to establish causation, on behalf of defendants, for Plaintiffs' injuries. The Plaintiffs filed a Motion for Post-Trial Relief on September 4, 2002. On March 5, 2003, the Court denied the motion with the instruction that Nonsuit shall not be removed and a New Trial not ordered. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), Plaintiffs filed a Statement of Matters Complained of Upon Appeal.

This Court will only address those issues raised in the Statement of Matters.

ISSUES

Pursuant to Plaintiffs' Statement of Matters Complained of Upon Appeal, the following issues were raised on Appeal which this Court will address accordingly:

1. Whether the trial Court abused its discretion and/or committed an error of law in granting defendants' Motion for Compulsory Nonsuit on the basis that the plaintiffs failed to make out a prima facie case on any of its negligence claims.

2. Whether the trial Court abused its discretion and/or committed an error of law in granting defendants' Motion for Compulsory Nonsuit on the basis that the plaintiffs failed to make out a prima facie case of negligence based on the res ipsa loquitur theory of circumstantial evidence.

3. Whether the trial Court abused its discretion and/or committed an error of law in granting a Motion for Compulsory Nonsuit where plaintiffs' contest the fact that Ms. Barber's labor diagnosis was a "complete breech" and that all evidence presented indicated a complete breech and contradicted plaintiffs' theory of a "footling breech" diagnosis.

4. Whether the trial Court abused its discretion and/or committed an error of law precluding the testimony of Lorraine Buchanan and Dr. Frank McNesby.

5. Whether the trial Court abused its discretion and/or committed an error of law in denying Plaintiffs' Motion for Partial Summary Judgment against defendants on the issue of liability.

6. Whether the testimony and report of Dr. Manning should have been precluded because it was based on pure conjecture and premised on facts which were either absent or unsupported in the record.

7. Whether the trial Court abused its discretion and/or committed an error of law in precluding the testimony of Dr. Manning, where plaintiffs' counsels' repeated acts of misrepresentation and bad faith throughout trial were not only responsible for Dr. Manning's preclusion but also amounted to legal malpractice.

8. Whether the trial Court abused its discretion and/or committed an error of law in precluding the testimony of Dr. Finkelstein, who was asked by plaintiffs' counsel to testify in substitution for Dr. Manning.

DISCUSSION

I. NEGLIGENCE

A cause of action for Medical Malpractice requires proof of four elements: (1) that the medical practitioner owed a duty to the patient, (2) that the practitioner breached that duty, (3) that the breach was a proximate cause of, or a substantial factor, in bringing about the harm suffered by the patient, and (4) that the damages suffered by the patient were a direct result of the harm. ***Mutzelfelt v. Kamrin***, 526 Pa. 54, 584 A.2d 888 (1990). Where the events and circumstances of a malpractice action are beyond the knowledge of the average lay person, the Plaintiff must present expert testimony that the acts of the medical practitioner deviated from good and acceptable medical standards, and that such deviation was a substantial factor in causing the harm suffered ***Cohen v. Albert Einstein Medical Center***, 405 Pa. Super. 392, 592 A.2d 720 (1991). The plaintiff must provide

sufficient evidence for each element of their claim at the completion of their case so as to survive a defendant's Motion for Compulsory Nonsuit.

Rule 230.1 of the Pennsylvania Rules of Civil Procedure governs Motions for Compulsory Nonsuit:

> (a)(1) In an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, at the close of the plaintiff's case on liability, the plaintiff has failed to establish a right to relief.
>
> (2) The court in deciding the motion shall consider only evidence which was introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff's case.

The purpose of a Motion for Compulsory Nonsuit is to allow the defendant to test the sufficiency of the plaintiff's evidence, and is proper only if the fact finder, viewing all the evidence in favor of the Plaintiff could not reasonably conclude that the essential elements of a cause of action have been established. ***Biddle v. Johnsonbaugh***, 444 Pa.Super. 450, 664 A.2d 159 (1995). A trial Court may enter a Nonsuit if the Plaintiff has failed to produce sufficient evidence to meet his or her burden of proof. ***Morena v. South Hills Health Sys.***, 501 Pa. 634, 462 A.2d 680 (1983). An order denying a motion to remove a Compulsory Nonsuit will be reversed on appeal only for abuse of discretion or error of law. ***Dietzel v. Gurman, M.D.***, 2002 Pa.Super. 291, 806 A.2d 1264. (*citing* Alfonsi v. Huntington Hospital, Inc., 798 A.2d 216, 221 (Pa.Super.2002)).

In light of the foregoing argument, plaintiffs failed to establish the elements of a claim for medical malpractice.

Plaintiffs contend that they had established a viable cause of action for medical malpractice through expert testimony of Dr. Stephen Minton, Mary K. Edwards-Brown, and Dr. John Seals. However, as stated previously in the facts none of the doctors could

establish that any of the defendants were the proximate cause of the spinal cord condition to Angely Baez.

Dr. Seals, an expert in pediatric neurology, was offered to testify that plaintiff Baez suffered subsequent spinal cord damage while in the ICN at Temple University Hospital and under the supervision of Dr. Taulane and Dr. Duesler. The plaintiffs' theory was that Baez's further decline in medical condition was a result of failure to immobilize the child after initial signs indicating physical irregularities. Dr. Seals could not support the theory that Drs. Taulane, Duesler, or Temple University Hospital caused further harm to Baez resulting from the lack of immobilization:

> Mr. Armenti: Is there any – Doctor, in your experience with a newborn who has a spinal cord injury and given this decline, can any part of this decline result from the fact that the child was not mobilized?
>
> Dr. Seals: I don't think we have data to support that one way or another. (N.T. 8/20/02 pg. 57).

Likewise, Dr. Minton, an expert in neonatology, could not testify as to causation of any harm as a result of the care rendered by Drs. Taulane and Duesler:

> Mr. Fitzpatrick: Now, you'll agree with me, sir, that you don't know whether or not Angely suffered any harm as a result of the care that Drs. Duesler and Taulane rendered to this patient, isn't that correct?
>
> Dr. Minton: I only know that it increased the risk. I don't know percent.
>
> Mr. Fitzpatrick: You do not know whether there was any harm, correct?
>
> Dr. Minton: I can't say that there was any harm. (N.T. 8/21/02 pgs. 163-164).

Lastly, Plaintiff's expert Mary K. Edwards-Brown, a radiologist, was offered as an expert in Pediatric Neuroradiology. Dr. Edward-Brown testified that her interpretation of the baby Baez's spinal cord studies show swelling in the spinal cord which indicates

her condition could have existed approximately one week prior to the study dated November 28, 1997:

> Mr. Fitzpatrick: Doctor, isn't it true that if you take your definition of a week for it to go down, that could place the time of this injury on the 20th or the 21st or 22nd of November, isn't that true, Doctor?
>
> Dr. Edwards-Brown: That's what I said and I will reiterate. (N.T. 8/19/02 pg. 125).

The theory in Dr. Edwards-Brown's case indicates that a condition could have occurred up to three (3) days prior to the birth of Angely Baez. This is especially critical in light of the discussion of res ipsa loquitur below (See Discussion II).

The aforementioned testimony of these three witnesses fails to establish that there is sufficient evidence proving that either Temple University Hospital or any of its employees were the cause or increased the risk of harm to baby Baez during birth. Therefore, the trial Court did not abuse its discretion or commit error in granting Defendants' Motion for Compulsory Nonsuit.

II. NEGLIGENCE - RES IPSA LOQUITUR

At the beginning of trial, plaintiffs' contended that defendants were negligent in failing to properly evaluate, diagnose and treat plaintiffs. More specifically, the plaintiffs' theory of the case was that the doctors, as well as, Temple University Hospital breached the standard of care by performing a vaginal delivery rather than a cesarean section, and this breach was the proximate cause of Baez's conditions. However, as trial progressed, Plaintiffs' counsel began to see that they would be unable to provide sufficient expert testimony to prove the causation as a necessary element. Subsequently, on the fifth day of trial (August 23, 2002), plaintiffs' counsel changed his theory of the

case to that of res ipsa loquitur (N.T. 8/23/02 pgs. 11-20). Plaintiffs' counsel, Mr. Armenti, in an apparent failure to appreciate his own experts' (Dr. Manning) report on the theory of liability interjected the contention that Baez's condition would not have occurred without the existence of negligence. Mr. Armenti further argued that Dr. Manning's and Dr. Seal's testimony would prove res ipsa loquitur. (N.T. 8/23/02 pg. 16-19). However, the Court determined that none of plaintiffs' witnesses adequately presented the issue of res ipsa loquitur because they never ruled out all other possible causes for Baez's condition such as lack of prenatal care, cigarette and drug use. (N.T. 8/23/02 pgs. 22-23). In addition, Dr. Manning's findings were erroneously based on the fact that Ms. Barber presented with a footling breech, rather than a complete breech. The error substantially compromised the witnesses theory of the requisite standard of care in this case because, with a complete breech, either vaginal delivery or cesarean section is permitted (N.T. 8/21/02 pgs. 30-31, 45-48).

Plaintiffs assert that under the doctrine of res ipsa loquitur they provided sufficient evidence to survive Defendants' Motion for Compulsory Nonsuit. Res ipsa loquitur is neither a doctrine of substantive law nor a theory of recovery; rather, it is a rule of circumstantial evidence. ***Toogood v. Rogal, D.D.S.***, 824 A.2d 1140, 1146 (Pa. 2003). In ***Toogood***, the Pennsylvania Supreme Court adopted the Restatement (Second) of Torts § 328D criteria for proving res ipsa loquitur. The Court stated three conditions must be met before the doctrine of res ipsa loquitur may be invoked in a medical malpractice case:

> (1) either the lay person is able to determine as a matter of common knowledge, or an expert testifies, that the result which has occurred does not ordinarily occur in the absence of negligence, (2) the agent or instrumentality causing the harm was within the exclusive control of the defendant, and (3) the evidence offered is

> sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event. ***Toogood*** 824 A.2d at 1148.

Instead of directly proving the elements of ordinary negligence, the plaintiff would provide evidence of facts and circumstances surrounding his injury that make the inference of the defendant's negligence reasonable. ***Id***. at 1146. The Pennsylvania Superior Court, in ***Magette v. Goodman M.D.***, 771 A.2d 775,778 (Pa.Super. 2001), held that the plaintiff must also produce evidence that sufficiently eliminates other possible causes for the injury. The Court went on to say that the Restatement does not require plaintiff to disprove all other causes beyond a reasonable doubt; he must prove "that negligence is the more probable explanation" ***Magette*** 771 A.2d at 778.

In the present case it was established that Ms. Barber, in addition to receiving no prenatal care whatsoever, was also a cigarette smoker and marijuana user while pregnant. These factors were established by plaintiffs' own expert, Dr. Minton, in classify Ms. Barber as a "high-risk pregnancy" (N.T. 8/21/02 pg. 113).

> Mr. Armenti: When I ask you these questions I am asking you as a neonatologist, not as an obstetrician. From that prospective was this a high risk pregnancy?
>
> Dr. Minton: I would it a high risk pregnancy for several reasons.
>
> Mr. Armenti: What are those reasons?
>
> Dr. Minton: This mother had no prenatal care. She was a smoker. There is a history of marijuana use associated with no prenatal care, I don't have prenatal labs so I don't know a whole lot about this women prior to the moment that she presented in a very short period of time in the labor and delivery before she delivered.

Dr. Minton further testified, based on his own perception of Baez's conditions at birth, that one of the reasons for baby Baez's weak cry at birth could have been from drugs (N.T. 8/21/02 pg. 118). Dr. Minton said that "Babies who are born to mothers who

have abused drugs may have an abnormal cry at the beginning" (N.T. 8/21/02 pg. 118-119).

It was also Plaintiffs' witness, Dr. Edwards-Brown, who as stated above indicated that the condition could have up to three (3) days prior to the birth of baby Baez (N.T. 8/19/02 pg. 123). Dr. Edwards-Brown also indicated that Ms. Barber's habit of cigarette smoking is known to cause birth complications:

> Mr. Fitzpatrick: Well, was there anything in the record about what was going on with this fetus prior to the time that she arrived at Temple University Hospital at three o'clock in the morning on November 23rd?
>
> Dr. Edwards-Brown: Only that there had been no prenatal care.
>
> Mr. Fitzpatrick: And that she smoked throughout her pregnancy?
>
> Dr. Edwards-Brown: Yes, that was in the record.
>
> Mr. Fitzpatrick: Both cigarettes and marijuana?
>
> Dr. Edwards-Brown: Yes, that was in the record.
>
> Mr. Fitzpatrick: Now, Cigarette smoking is known to cause complications in pregnancies and in birth of children, isn't that correct, doctor?
>
> Dr. Edwards-Brown: Yes, that's true. (N.T. 8/19/02 pgs. 120-121).

This testimony is sufficient evidence to prove that Ms. Barber's lack of prenatal care, cigarette smoking and marijuana use could not be ruled out as the cause of the Baez's condition prior to her presenting at the hospital. Even Plaintiffs' own experts recognized that Ms. Barbers' lack of prenatal care, cigarette smoking and marijuana use could have caused a pre-existing condition.

The testimony of plaintiffs' own experts, Dr. Edwards-Brown and Dr. Minton, create evidence of alternative causes for Baez conditions. Specifically, the fact that her lack of pre-natal care could have resulted in a failure to preliminarily diagnose any pre-

existing birth defects or trauma and that Ms. Barbers' cigarette smoking and marijuana use was the cause of those birth defects. The existence of these circumstances would negate the requirements of res ipsa loquitur that there be no other possible causes of plaintiffs' condition except for the negligence of defendants.

For reasons stated above, res ipsa loquitur is not available as a means for inferring negligence in this case and fails to meet the criteria set forth in ***Toogood***. Thus, the Court did not abuse its discretion or commit error granting Nonsuit on this basis.

III. FOOTLING BREECH v. COMPLETE BREECH

Plaintiffs' contend in their factual background of the case that the type of breech that Ms. Barber was diagnosed with was a "footling breech" and that a vaginal delivery in not the proper procedure for this type of breech (N.T. 8/19/02 pgs. 14-15). However plaintiffs' counsel has been unable to prove that baby Baez was in a footling breech presentation.

When Ms. Barber appeared in the Triage Unit of Temple University Hospital she was initially examined by Dr. Rosen, who was four months into his first-year internship at that time (N.T. 8/22/02 pg. 150, 8/21/02 pg. 47). Although Dr. Rosen initially diagnosed Ms. Barber as a footling breech, he later qualified his diagnosis and said "I didn't want to call her a complete breech and be, you know, wrong, so I called her the worst thing possible with the footling" (N.T. 8/22/02 pg. 150). At trial, Dr. Rosen would ultimately admit that he incorrectly diagnosed Ms. Barber with a footling breech and that he was in agreement with Dr. Whiteman's diagnosis of a complete breech (N.T. 8/22/02 pgs. 148-149). A subsequent physical examination by Dr. El-Mallah, a senior resident,

showed that it was a complete breech, rather than a footling breech (N.T. 8/19/02 pg. 142, 145). The last examination was conducted by the attending physician Dr. Whiteman. Dr. Whiteman premised her diagnosis by saying that the ultimate responsibility for determining the position of any fetus at the time of presentation and labor falls on the attending physician and not the intern (N.T. 8/21/02 pg. 44). Dr. Whiteman performed an ultrasound examination which reiterated the fact that Ms. Barber presentation was that of a complete breech, rather than a footling breech (N.T. 8/21/02 pg. 45; 8/20/02 pg. 105). Dr. Whiteman was called by plaintiff in her case in chief and testified as to the notes made on the fetal monitor slip:

> Mr. Armenti: Now, when you come down to Dr. Dang's note it says "foot seen at introitus." Now doctor, commonly isn't that known as a footling breech?
>
> Dr. Whiteman: It's possible when the breech is just ready to be delivered for the foot and the baby's bottom to be seen simultaneously at the perineum that does not necessarily mean a footling breech.
>
> Mr. Armenti: But Doctor, isn't it true that there is no statement here that a baby's bottom was seen?
>
> Dr. Whiteman: It does not say that the bottom was seen. However, if she had a footling breech, she would never have been laboring she would have been delivered by cesarean section we asked [sic] discussed the fact that she did not have a footling breech. This baby was a complete breech.
>
> Mr. Armenti: That's assuming that you followed the ordinary practice and standard of care, correct? That she would have been delivered by cesarean, is that correct?
>
> Dr. Whiteman: If the baby were in fact in a footling breech presentation, she would have been delivered by cesarean. I will say again this fetus was not in a footling breech presentation at the time of her presentation. As I was stating, if the fetus was in a footling breech presentation that would be one thing, but I will restate again that the fetus was not in a footling breech presentation at the time that Miss Barber came to labor and delivery. The baby was in a complete breech presentation, meaning that the baby's legs were flexed up at the hips and also the knees were flexed so it's possible when the baby is being delivered that the feet

and the bottom will be presenting at the perineum at the same time (N.T. 8/21/02 pgs. 30-31).

Dr. Rosen also stated in his deposition he believed that a footling breech can convert into a complete breech (N.T. 8/22/02 pg. 150). Dr. Rosen wrote a notation on the fetal monitor strip that says "Patient is no longer a footling breech." In response to this Dr. Whiteman testified that it is not humanly possible for a footling breech to convert into a complete breech, it was always a complete breech (N.T. 8/21/02 pg. 23-24).

The only basis by which Plaintiffs' base their argument of a footling breech presentation is the testimony of Dr. Rosen, which was contradicted several times by his peers, as well as, by Dr. Rosen himself after the fact. While consulting his notes of November 23, 1997, Dr. Rosen stated that Ms. Barber's presentation was, "…[W]e felt partially buttocks and the thighs with the feet folded close to the baby so it was a complete breech" (N.T. 8/22/02 pg.149). The fact that there was insufficient evidence to establish Ms. Barber's diagnosis of a footling breech would thereby moot the point of requiring a cesarean section. This is because with a complete breech the patient has a choice of either a vaginal delivery or a cesarean section (N.T. 8/21/02 pgs. 47-48). In a complete breech diagnosis the physician discusses with the patient the risks of delivery in either cesarean or vaginal cases and leaves the ultimate decision to the patient (N.T. 8/21/02 pg.47-48). Ms. Barber determined that she desired a vaginal delivery (N.T. 8/21/02 pg. 27-28).

Plaintiffs base their theory of liability on the faulty premise of a footling breech, which requires a cesarean section. For the reasons previously stated the Plaintiffs failed to establish sufficient evidence that there was, in fact, a footling breech which was a

critical element in plaintiffs' case and therefore an important aspect in granting Defendants' Motion for Compulsory Nonsuit.

IV. NURSE BUCHANAN & DR. MCNESBY WITNESS PRECLUSION

Plaintiffs argue that the trial Court abused its discretion by precluding the testimony of Dr. McNesby and Lorraine Buchanan.

Plaintiffs were going to call Lorraine Buchanan to testify as to the life care needs and medical care that would be required for Baez (N.T. 8/23/02 pgs. 96-97). However, on the day Ms. Buchanan was to be offered Plaintiffs' counsel instead offered Ms. Valerie Krause to testify to requisite life care plan for baby Baez (N.T. 8/23/02 pg. 97). Despite Plaintiffs' contentions, Lorraine Buchanan's was never precluded from testifying in this case because, according to the Court's Order, "Lorraine Buchanan was not offered as a witness." (See Order dated August 26, 2002 on Defendants' Motion In Limine To Preclude Testimony of Valerie Krauss and Lorraine Buchanan). In addition, the trial record is entirely devoid of any testimony precluding Ms. Buchanan from testifying. Ms. Buchanan's failure to testify was a direct result of Plaintiffs' failure to call her as a witness at trial.

In conjunction with Ms. Krauss's proposed testimony as to the future physical care required for Baez, Mr. Armenti offered Dr. McNesby to testify as to Baez's future psychological needs (N.T. 8/23/02 pg.100). However, Dr. Nesby was never listed as a witness in the pretrial order, nor was opposing counsel ever given notice that he would testify. In fact, Dr. McNesby was never mentioned as a potential witness until the 5th day of trial.

According to Pennsylvania Rule of Civil Procedure 212.2:

(a) A pre-trial statement shall contain:

(3) A list of the names and addresses of all persons who may be called as witnesses by the party filing the statement, classifying them as liability or damage witnesses. A reference which does not state the name of the witness shall be permitted when the witness is described by title or representative capacity.

(c) Where the trial judge determines that unfair prejudice shall occur as the result of non-compliance with subdivisions (a) and (b), the trial judge shall grant appropriate relief which may include

(1) The preclusion or limitation of the testimony of:

(i) *any witness whose identity is not disclosed in the pre-trial statement, or*

(ii) *any expert witness whose opinions have not been set forth in the report submitted with the pre-trial statement or otherwise specifically referred to in the pre-trial statement, consistent with Rule 4003.5,* and

(2) the preclusion of exhibits not listed in the pre-trial statement and made available.

Pennsylvania Rule of Civil Procedure 4003.5 provides in part:

(a) Discovery of facts known and opinions held by an expert, otherwise discoverable under the provisions of Rule 4003.1 and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(1) A party may through interrogatories require

(a) any other party to identify each person whom the other party expects to call as an expert witness at trial and *to state the subject matter on which the expert is expected to testify and*

(b) the other party to have each expert so identified by him *state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.* The party answering the interrogatories may file as his answer a report of the expert or have the interrogatories answered by his expert. The answer or separate report shall be signed by the expert.

(b)*If the identity of an expert witness is not disclosed in compliance with subdivision (a)(1) of this rule, he shall not be permitted to testify on behalf of the*

> *defaulting party at trial of the action.* However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.
>
> The principle in Rule 4003.5(b) is restated in Rule 4019 on Sanctions:
>
> (i) *A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action*. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

The purpose of the discovery rules is to prevent surprise and unfairness and to allow a trial on the merits ***Sindler v. Goldman, M.D.***, 309 Pa. Super. 7, 11, 454 A.2d 1054, 1056 (1982). When expert testimony is involved, it is even more crucial that surprise be prevented, since the attorneys will not have the requisite knowledge of the subject with which to effectively rebut unexpected testimony. ***Sindler***, 454 A.2d at 1056. By allowing for early identification of expert witnesses and their conclusions, the opposing side can prepare to respond appropriately instead of trying to match years of expertise on the spot. ***Id***. Thus, the rule serves as a shield to prevent unfair advantage of having a surprise witness testify. ***Id***. In ***Sindler***, the Court found that a failure to file a expert report in violation of Allegheny local rule 212[7] and allowing a doctor to testify in expert capacity denied plaintiffs an opportunity for effective rebuttal and right to fair trial. Furthermore, in ***Moore v. Howard P. Foley Co.***, 235 Pa. Super. 310, 340 A.2d 519 (1975), a new trial was granted because the trial court erroneously allowed a doctor to testify as an expert witness where identity of the doctor was not disclosed in plaintiff's

[7] The Superior Court in ***Sindler***, stated "The Supreme Court of Pennsylvania apparently agrees with the Allegheny County Local Rule 212 as evidenced by the adoption of Pa.R.C.P. §4003.5 which codifies essentially the same principle" ***Id***. at n.4.

answer to defendant's interrogatories and defendant did not learn of it until the first day of trial.

The Pennsylvania Supreme Court also recognized the importance of disclosing the identity of expert witnesses, and the necessity for trial courts to act in accordance with such discovery rules. ***Nissley v. Pennsylvania Railroad Company***, 435 Pa. 503, 259 A.2d 451 (1969). In ***Nissley***, plaintiff refused to answer interrogatories relating to an expert witness and the court found it to be error to permit the witness to testify. In addition, ***Kaminski v. Employers Mutual Casualty Company***, 338 Pa.Super. 400, 487 A.2d 1340 (1985), involves a situation similar to the case *sub judice*. In ***Kaminski***, the Court held that expert witnesses should have been precluded from testifying under Pa.R.C.P. 4003.5 and 4019(i) because: (i) the experts were not identified in discovery, (ii) the experts were not identified as expert witnesses until the sixth day of trial and (iii) extenuating circumstances had not been shown. ***Kaminski***, 487 A.2d at 1340. In concluding that the witnesses should be precluded from testifying the Court stated, "…[W]e cannot allow a party to circumvent the valid purposes of the discovery rules by late retention of expert witnesses which the party then excuses under the guide of ignorance or surprise regarding opposing party's case." ***Id***. at 415-416. The court further reasoned:

> The importance of a party having adequate and accurate information on the eyewitness to be called by an adverse party, is of course, manifest. If the witness's trial testimony is damaging to the uninformed party, he is subject to the vagaries of surprise and attendant detriment in the eyes of the jury; while if the witness is in possession of facts favorable to the uninformed party, the latter is deprived of potentially crucial information. ***Id***. at 1344.

The Pennsylvania Supreme Court would later adopt four factors to consider in determining whether to allow the testimony of a witness, who has not been included in a pre-trial memorandum:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of the other cases in the court, (4) bad faith of willfulness in failing to comply with court's order. ***Feingold v. SEPTA***, 512 Pa. 567, 573, 517 A.2d 1270, 1273 (1986).

In ***Feingold***, the court held that the calling of the physician by the defense as an expert would not prejudice the plaintiff. Although expert was not listed in defendant's pre-trial statement, defendant did list physician as an expert in pre-trial conference and in answers to interrogatories. ***Feingold***, 517 A.2d at 574. The court explained that there is no prejudice because plaintiff had access to the doctor's records and knew what the substance of his testimony would be. ***Id***.

Unlike in ***Feingold***, the defendants did not have *any* prior knowledge that Dr. McNesby would be called as an expert, nor did they have *any* discovery information that would have allowed them to know what the substance of his testimony would be. According to rule 4003.5 and 4019, Plaintiffs' had an obligation to disclose Dr. McNesby as a potential witness and furnish opposing counsel with a copy of his report. Instead plaintiffs failed to provide defense counsel with Dr. McNesby's report prior to trial or have Dr. McNesby listed in the pre-trial order (N.T. 8/23/02 pgs. 100-101). The calling of Dr. McNesby on the 5th day of trial without any prior notice to defense counsel during discovery or thereafter parallels the facts stated in ***Kaminski***. In applying the rationale of ***Kaminski***, permitting Dr. McNesby to testify would hollow the purpose of discovery rules and subject opposing counsel to unfair surprise. From a procedural standpoint, the

degree of prejudice suffered by opposing counsel by their inability to properly cross-examine witness and prepare their case warrants Dr. McNesby's preclusion according to ***Sindler***.

Additionally, plaintiffs failed to state any "extenuating circumstances" that would provide them with an exception to the sanction requirements of Rule 4003.5(b) and 4019 for Dr. McNesby.

Therefore, because of plaintiffs' failure to comply with the rules and case law as stated above the preclusion of Dr. McNesby was proper under the circumstances.

V. DENIAL OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGEMENT

Plaintiffs contend that their Motion for Partial Summary Judgment on the issue of liability was wrongfully denied by the Court.

Pennsylvania Rule of Civil Procedure 1035.2 governs Motions for Summary Judgment. The rule states:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or part as a matter of law:
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of experts reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows that material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense and, therefore, there is no issue to be submitted to the jury. (Pa.R.C.P. Note).

The moving party has the burden of demonstrating that no genuine issue of material fact exists. ***Penn Center House, Inc. v. Hoffman***, 520 Pa. 171, 553 A.2d 900 (1989). All doubts in the record must be viewed in the light most favorable to the non-moving party. ***Id***. The movant can only discharge his burden by showing that his/her opponent could produce no competent evidence to support a contrary position. ***Community Medical Services of Clearfield, Inc. v. Local 2665***, 292 Pa.Super. 238, 437 A.2d 23 (1981).

When reviewing a Motion for Summary Judgment, the court must take the record as a whole and make its determination as to whether there are genuine issues of material fact outstanding. ***White v. Owen-Corning Fiberglass, Corp.***, 668 A.2d 136 (Pa.Super. 1995). Furthermore, when determining the existence of a genuine issue of material fact, the trial court must adhere to the rule set forth in ***Nanty-Glo Borough v. American Surety Co.***, 309 Pa. 236, 163 A. 523 (1932). In that case, our Supreme Court enunciated that summary judgment cannot be granted based upon evidence which depends solely on oral testimony. ***Id***. 163 A. at 524. "However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts...." ***Id***. A witness's credibility is a determination for the jury and necessarily creates a genuine issue of material fact. ***Garcia v. Savage***, 402 Pa.Super. 324, 330, 586 A.2d 1375, 1378 (1991). Hence, the general rule "that flows from ***Nanty-Glo Borough***, is that summary judgment may not be had where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact" ***Garcia v. Savage***, 586 A.2d at 1378.

Throughout discovery, defendants have disputed plaintiffs' factual assertions and presented evidence to refute plaintiffs' claims. Plaintiffs cite their own expert reports in order to propose the standard of care applicable to the physicians in this matter. On this basis alone, plaintiffs then sought Summary Judgment. However, the defendants have provided their own expert reports by Robert Clancy, M.D. and Gordon Sze, M.D. which clearly raise a viable issue as to liability and included alternate explanations for the minor plaintiff's conditions. This creates factual issues as to both negligence and causation. Plaintiffs also referred to testimony of various lay witnesses, which as stated above would require a jury to determine their credibility.

Therefore, Plaintiffs failed to demonstrate that the Court committed an error of law in denying their Motion for Summary Judgment.

VI. DR. MANNING'S INADMISSIBLE TESTIMONY AND REPORT

Dr. Manning was precluded from testifying in Court because of Plaintiffs' counsel repetitive delay and bad faith in producing Dr. Manning for trial, which resulted in severe prejudice to opposing counsel (see Discussion VII infra.). However, even if Dr. Manning were permitted to testify, both his report and testimony would have been inadmissible because they were based on unsupported factual assertions pursued by plaintiffs' counsel throughout the case. To allow such evidence to reach a jury would have amounted to clear error and warranted a new trial in this case.

Dr. Manning's report was based on two points of speculation: (1) that Ms. Barber's presentation was that of a footling breech and (2) that Ms. Barber heard a "cracking sound" in the delivery room followed by one doctor say to the other "you're

not supposed to do that." Both of these points were either unsupported by the plaintiffs' case or were contested issues of credibility improperly relied upon by the expert.

An expert cannot base his opinion upon facts which are not warranted by the record. ***Collins v. Hand, M.D.***, 431 Pa. 378, 390, 246 A.2d 398, 404 (1968). No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture. ***Collins,*** 246 A.2d at 404. In ***Collins***, the Pennsylvania Supreme Court adopted the rational that:

> It is the function of opinion evidence to assist the jury in arriving at a correct conclusion upon a given state of facts. To endow opinion evidence with probative value it must be based on facts proven or assumed, sufficient to enable the expert to form an intelligent opinion. The opinion must be an intelligent and reasonable conclusion, based on a given state of facts, and be such as reason and experience have shown to be a probable resulting consequence of the facts proved. The basis of the conclusion cannot be deduced or inferred from the conclusion itself. In other words, the opinion of the expert does not constitute proof of the existence of the facts necessary to support the opinion. Id. (*citing* Dreher v. Order of United Commercial Travelers of America, 173 Wis. 173, 180 N.W. 815 (1921)).

In ***Collins***, the Court held that evidence failed to establish that psychiatrist's failure to take or read x-rays to determine that patient suffered bilateral acetabular fractures or that physicians' electroshock treatment was the cause of such fractures. The only proof of negligence on the part of the shock team was the opinion of by Dr. Van der meer that too much restraint to Ms. Collins' legs was improper medical practice. ***Id***. at 404. An examination of the record did not disclose any evidence that Ms. Collins' legs were restrained during the course of electroshock treatment. ***Id***. Dr. Van der meer's opinion assumes (1) that restraints were applied to Ms. Collins' legs and (2) that this restraint was too much. ***Id***. The Court stated that based on the record this testimony can only be classified as mere guess or conjecture and "would be to build a presumption on a

presumption, which would build a smoke ladder into the skies of irresponsible speculation, which, fortunately, the law prohibits" (*citing* Auerbach v. Philadelphia Transprotation Co., 421 Pa. 594, 602, 221 A.2d 163, 170 (1966)). The Court held that Dr. Van der meer's opinion was error and issued a new trial. ***Id***.

In the case *sub judice*, Dr. Manning's conclusions are based on the two presumptions that Ms. Barber was presented with a footling breech and that a "cracking sound" occurred during birth. Neither of these assumptions were established by uncontested evidence in the record. Furthermore, the findings and conclusions of Dr. Manning's entire report are based on these two erroneous premises.

First, Dr. Manning states in the clinical summary portion of his report, "The fetus ultimately presented as a footling breech requiring breech extraction a procedure which was reported to occur 'without difficulty'" (Dr. Manning Report of 8/20/01 pg. 2). Again in his clinical opinion Dr. Manning asserts:

> The intrapartum record is clear in stating that this presented a footling breech…The consensus of opinion and the standard of care in 1997 required that a footling breech at term be delivered by cesarean section whenever possible and further an attempt at vaginal delivery of term infant presenting as a footling breech occur only if the mother was fully aware of the added perinatal risk and consented to this mode of delivery… It was a breach in the standard of care to attempt a vaginal delivery in this patient once the diagnosis of a non-frank (in this instance) breech was made… In summary it is my view that the spinal cord injury this child sustained occurred at the time of vaginal delivery and need not and ought not to have occurred had the usual accepted standards of management of a footling breech at term been met. (Dr. Manning Report of 8/20/01 pgs. 2-3).

Despite Dr. Manning's reliance on the fact that Ms. Barber was diagnosed with a footling breech his assumption is completely without support. The testimony of both Dr. El-Mallah and Dr. Whiteman determined after a physical examination and ultrasound examination that Ms. Barber presented with a complete breech, rather than a footling

breech (N.T. 8/19/02 pg. 145, 8/21/02 pg. 45). It was even the testimony of Dr. Rosen, who earlier misdiagnosed Ms. Barber as a footling breech, that Ms. Barber presented with a complete breech (N.T. 8/22/02 pg.149). Other than the misdiagnosis by Dr. Rosen, the record is devoid of any evidence that Ms. Barber may have presented with a footling breech instead of a complete breech.

The defective quality of Dr. Manning's report is augmented by the fact that his basis for concluding that there was a breach in the defendants' standard of care was that a vaginal delivery should not have been performed in a footling breech delivery. As stated previously by Dr. Manning, "It was a breach in the standard of care to attempt a vaginal delivery in this patient once the diagnosis of a non-frank (in this instance) breech was made" (Dr. Manning's Report of 8/20/01 pg.2). However, Dr. Whiteman illustrated that a complete breech can be delivered via either cesarean section or vaginal delivery (N.T. 8/21/02 pgs. 30-31, 45-48). Since Ms. Barber was diagnosed with a complete breech and not a footling breech she had the option of delivery by cesarean section or vaginally, rather than by cesarean section only (N.T. 8/21/02 pgs. 30-31, 45-48). By performing the delivery vaginally the defendants were operating within the appropriate standard of care required for a complete breech diagnosis. Dr. Manning's report is therefore devoid of any supportive or credible facts because it is based on the improper conjecture of a footling breech diagnosis.

Dr. Manning's also bases his report on the assumption that Ms. Barber heard a snapping or "crack sound" as the forceps were applied and reported that a male physician in the room assisting in the delivery was critical of the resident's actions at the time of delivery (Dr. Manning's Report of 8/20/01 pg. 2). Not only are these accusations highly

prejudicial, but also uncorroborated by further documentary or testimonial evidence on behalf of the plaintiffs.

Despite Ms. Barber's contention, there is a lack of any uncontradicted testimony that a "crack sound" was heard in the delivery room. In fact, both Drs. Whiteman and El-Mallah testified that it was "an ideal birth" and no difficulties arose at any time during the delivery (N.T. 8/19/02 pg. 173, 8/21/02 pg. 50). This situation is similar to ***Collins***, in that Dr. Manning premised his report upon the fact (emphasis applied) that there was a "crack sound" even though there is no uncontradicted evidence of such. To allow experts to draw conclusions on unsupported facts would negate the expert's duty to compose an educated opinion based on facts having probative value. The consideration of Dr. Manning's report or testimony as evidence by a jury would create the potential for a verdict based upon unwarranted presumptions and prejudicial speculation rather than on facts.

Because the basis of Dr. Manning's report and testimony were premised solely on conjecture, Dr. Manning's preclusion was appropriate under the circumstances. By preventing Dr. Manning's report and testimony from reaching the jury the Court avoided an irreversible error which would have warranted a new trial according to ***Collins***. Therefore, regardless of whether Dr. Manning was precluded from testifying based on plaintiffs' counsel's prejudicial conduct, his report and testimony would have ultimately been inadmissible.

VII. PRECLUSION OF DR. MANNING FOR PREJUDICE & BAD FAITH

It is plaintiffs' contention that the preclusion of Dr. Frank Manning's testimony at trial was an abuse of discretion on the part of the trial Court. However, it was plaintiffs' counsel, whose conduct during trial was so vexatious, dilatory and obdurate as to cause defendants the utmost prejudice in preparation of their case. Plaintiffs' counsel's conduct was directly responsible for Dr. Manning's preclusion.

The bad faith misrepresentations of Plaintiffs' counsel with respect to his conduct and mismanagement of trial is twofold.

First, Plaintiffs' Counsel Joseph Armenti, changed his theory of the case from proving negligence based on a direct causation theory to a res ipsa loquitur theory of negligence where causation is inferred by circumstantial evidence. Initially, the plaintiffs' theory of the case was that the doctors, as well as, Temple University Hospital breached the standard of care by performing a vaginal delivery rather than a cesarean section, and this breach was the proximate cause of Baez's conditions. On the fifth day of trial, Armenti represented to the Court, for the first time, the position that Dr. Manning's would testify that there were no other possible causes of Baez's condition except for excessive force applied during delivery (N.T. 8/23/02 pgs.10-11). The Court opined to Mr. Armenti's sudden interjection of res ipsa loquitur:

> The Court: Mr. Armenti, you understand your burden here, your burden is to rule out any other possible alternate cause of this injury that's your strong high burden. I know that that's something that cannot be waived and you have not proven that you. You have not proven that yet. I am telling you why you have not proven it because today is the first time that you injected the res ipsa theory into the case. There has been no evidence to support the requirement in a res ipsa case that it could not have occurred from an alternate source and it's clearly an issue in this case because this mother never had prenatal care. No one, all of the witnesses in questions [sic] by the defense to your witness said, you don't know what the baby, what the condition the baby was in when the baby was presented

> with the mother for the first time to any medical provider at the time of delivery. You have not sustained your burden heretofore and you need to sustain that burden (N.T. 8/23/02 pgs. 23-24).

Mr. Armenti then attempted to have Dr. Manning testify in support of the res ipsa loquitur theory. This would require Dr. Manning to testify outside the scope of his report, which is inadmissible. The Court found it impermissible for Dr. Manning to testify as to the issue of res ipsa loquitur:

> The Court: He (Dr. Manning) is not going to (testify). He has his theory. He is bound by the four corners of his report and anything within the reasonable scope of it an explanation, but no one, no one, we are in the fifth day of trial. I have not heard one word in support of the res ipsa theory. You may pull from the various notes, various pieces of testimony certain aspects which say that it occurred as a result of force, but they were never asked a question, is there any other way that this would have occurred an that's what needs to be done. No one has said that (N.T. 8/23/02 pg. 26).

The fact that Mr. Armenti attempted to change his entire theory of the case to res ipsa loquitur on the fifth day of trial would present the defendants with a new set of issues to defend against. The difficulty the defendants would face in properly preparing their case to defend a theory of res ipsa loquitur on such short notice would be arduous, but because the theory had been pled in the complaint the court allowed plaintiffs' counsel to proceed. Mr. Armenti's shift to a theory of res ipsa loquitur was a desperate measure to save his case because he had failed to supply the necessary causation through his previous experts. Further evidence of Mr. Armenti's motive in changing to a res ipsa loquitur theory was the fact that Dr. Manning's report was based upon a defective theory of direct causation and did not address the required elements of res ipsa loquitur. Mr. Armenti attempted to present Dr. Manning to testify outside his report to satisfy these requirements. Had Mr. Armenti been successful in his request to have Dr. Manning testify outside the four corners of his report that the Baez's condition could not have

occurred absence negligence by the defendants this would have prejudiced the defendants further in that they would not have been able to prepare a proper cross-examination of Dr. Manning as to this vital issue.

Secondly, Mr. Armenti's repetitive delay in producing Dr. Manning at trial was an act of bad faith and a further prejudice to defendants' case.

At the commencement of trial, The Court initially estimated that the plaintiffs' case should be concluded by Thursday, August 22, 2002 (N.T. 8/20/02 pg.110). Plaintiffs' counsel, Mr. Armenti, initially represented to the Court that Dr. Manning could possibly testify on Tuesday, August 20, 2002 (N.T. 8/26/02 pg.12). On this date, plaintiffs failed to have sufficient witnesses available in Court to testify and the trial ended after a one-half day testimony. At this time, plaintiffs' counsel claimed that he was going to try to have Dr. Manning in Court to testify on either Friday (August 23, 2002) or Monday (August 26, 2002). The Court cautioned plaintiffs' counsel that at the rate the trial was going his case would now probably be finished by Friday (August 23, 2002) and, at the very latest, Monday morning (August 26, 2002) (N.T. 8/20/02 pg.146). The Court instructed Mr. Armenti about the potential presumption of trial mismanagement and explained that Mr. Armenti needs to make a good faith effort to remedy the situation (N.T. 8/20/02 pg. 120). The Court then gave Mr. Armenti the remainder of the afternoon to try and arrange for his witnesses (N.T. 8/20/02 pg. 146). Plaintiffs' counsel suggested possibly videotaping Dr. Manning over the weekend (N.T. 8/26/02 pg. 6). Defense counsel, Charles Fitzpatrick III, informed the Court at jury selection that both he and assistant counsel, Michael Sabo, would be away the weekend of August 24th and 25th . Mr. Fitzpatrick was going to Pittsburgh and his associate, Mr.

Sabo would be in the Adirondacks (N.T. 8/26/02 pg. 3). On both, Thursday and Friday the trial was adjourned early due to the fact that Mr. Armenti did not have any witnesses to testify. The Court offered to end early Friday, August 23, 2002 to allow plaintiffs to videotape Dr. Manning (N.T. 8/26/02 pg.6). Instead, plaintiffs' counsel assured the Court that Dr. Manning would be in Court to testify live on the morning of Monday, August 26, 2002 (N.T. 8/22/02 pg.128).

On Saturday evening, August 24, 2002, plaintiffs' counsel contacted the home of Mr. Sabo and informed Mr. Sabo's mother that he was working with Mr. Sabo on this case an that there had been a change of plans and the parties would need to videotape Dr. Manning via satellite conference on Monday, August 26, 2002 at 6:30 a.m. (N.T. 8/26/02 pg.4-5). Mr. Sabo received this message at approximately 8:00 p.m.[8] and immediately contacted plaintiffs' counsel to voice defendants' objection to same (N.T. 8/26/02 pg.4). He explained that all of Defense counsels' materials were locked in the Courtroom rendering them unable to prepare for a satellite video conference deposition of Dr. Manning on Monday morning (N.T. 8/26/02 pgs.6-7).

Plaintiffs' counsel indicated that he became aware on Friday August 23, 2002 at approximately 3:30 p.m. that Dr. Manning would not be available to testify at trial on August 26, 2002. Despite Mr. Armenti's knowledge of Dr. Manning's inability to testify on Monday, he failed to contact either defense counsel or the Court until Saturday at 8:00 p.m.

> Mr. Fitzpatrick: Well, he now claims that on Friday at 3:30 that Dr. Manning called him to say this. I didn't get a call about that. I was in my office[] until six o'clock. Michael and I called his office several times that afternoon to see what was going on, to see if there was any more talk about settlement. We never heard back from him to allow this to go on…. (N.T. 8/26/02 pgs. 15-16).

[8] Plaintiffs' Notice of Deposition was not logged in till 7:07 p.m. Saturday evening (N.T. 8/26/02).

> The Court: I just checked my messages on my machine in my office. There were no messages on my machine. I was there until late Friday.
>
> Mr. Armenti: I didn't know that I thought you were leaving early. Besides that
>
> my main concern he told me—
>
> The Court: I checked my messages even if I am at a remote location I access my messages in my office.
>
> Mr. Armenti: That's why I called City Hall.
>
> The Court: This is on Saturday.
>
> Mr. Armenti: Yes
>
> The Court: It's a full day after you had knowledge of this (N.T. 8/26/02 pgs. 28-29).

Plaintiffs' counsel then requested the Court to allow a substitute expert, Dr. Joseph Finkelstein, to testify he agreed with Dr. Manning's report and conclusions, even though Dr. Finkelstein was never identified as a witness in this matter or listed in the pretrial order (N.T. 8/26/02 pgs. 8-9). The Court denied this request. All these measures were taken on Mr. Armenti's own initiative, rather than promptly notify opposing counsel and obtaining leave of Court.

The defendants have suffered extreme prejudice as a result of: (1) their inability to properly cross-examine Dr. Manning on such short notice, (2) their inability to properly prepare for Dr. Manning's substitute expert, Dr. Finkelstein, to testify, (3) their inability to properly prepare defendants' case as a direct result of Plaintiffs' trial mismanagement. Defendants' prejudice from plaintiffs' trial mismanagement is the product of both the defendants' increased burden of preparation for testimony on short notice and the

increased potential of having defendants' witnesses have to reappear to testify or to take videotape depositions.

Mr. Armenti's scheduling of the satellite video deposition at 6:30 a.m. Monday morning after receiving notice at 8:00 p.m. the Saturday before is highly prejudicial to defendants. Mr. Fitzpatrick summarized his prejudice in light of the videotape deposition via satellite:

> Mr. Fitzpatrick: …It's unreasonable and its an annoyance. I would have had to gotten up at four-thirty this morning to try to attend a six-thirty deposition and most of the papers that I would possibly need to do an examination of Dr. Manning were [sic] sitting in this courtroom locked because I thought as I am sure your honor thought he was coming in live this morning. (N.T. 8/26/02 pgs. 7-8).

Defense counsel's prejudice by having a substitute expert (Dr. Finkelstein) testify to Dr. Manning's report was also documented by Mr. Fitzpatrick in this case:

> Mr. Fitzpatrick: …First of all, to have some other witness that I don't have any clue who he is, what he is, or what his report says is completely prejudicial and to now have more delay in this case at substantial expense to myself and to my clients and what am I supposed to do now about bringing them back because I am not putting the[m] on before it finishes. I object to any of it… (N.T. 8/26/02 pg. 16).
>
> Mr. Fitzpatrick: It prejudices me because I don't know who this fellow is. I don't have his C.V. I have to do an investigation to see what I can find out about him. And secondly, he hasn't been identified as the witness in the case. I don't even have his report. I am not going to do that now. That would be unbelievably prejudicial to ask me to do that now… (N.T. 8/26/02 pgs. 28-29).

Lastly, the prejudice defendants suffered by plaintiffs' trial mismanagement:

> Mr. Fitzpatrick: I have two witnesses here that I spent a lot of money to bring here to comply with reasonable trial management. I don't want to videotape them. They have to go back. This is – Judge, the management of this trial has been completely prejudicial to the. They initially told me when I first started to have to get my witnesses lined up for when they would come in. It was going to take him two weeks to put his case on. Initially I was scheduling them for next week. Then it became apparent that he didn't have any witnesses to fill in days. We had two half days last week.

> Moreover, Judge he has not been honest with us about Dr. Manning at all (N.T. 8/26/02 pgs. 14-15).

The Court again indulged Plaintiffs' counsel by extending its 12:00 p.m. deadline for Dr. Manning's appearance to testify, until 1:00 p.m., otherwise plaintiffs would be forced to rest their case (N.T. 8/26/02 pgs. 32, 34, 36). Again, the Court warned Mr. Armenti that his failure to contact opposing counsel immediately upon learning of Dr. Manning's inability to appear was a further evidence of bad faith:

> The Court: Mr. Armenti, these issues that you must deal with and again, by not calling him immediately on Friday raises red flags in my mind that this is not a good faith attempt on your part. If I am in your seat, the first thing I do is call him up and say: Mr. Fitzpatrick, I've just had a bombshell dropped in my lap. You wait until Saturday night when they are both out of town? The more I think of it the more I can see clear signs of bad faith on your part. (N.T. 8/26/02 pgs. 35-36).

> The Court: All of these doctors or defendants, all of their lives are affected. You haven't even gotten a clear case liability here. My suspicion is that your case is going down the tubes in a hurry and my fear is that this is some type of last ditch effort to subvert this trial. I will not countenance that (N.T. 8/26/02 pgs. 36-37).

Shortly thereafter, plaintiffs' counsel claimed that Dr. Manning would now be able to appear, but not before the 1:00 p.m. deadline (N.T. 8/26/02 pgs.37-38). Mr. Armenti stated:

> Mr. Armenti: I have called Dr. Manning. He has over the past hour has rearranged his schedule so he will be free at 1:30 to be picked up at Wall Street Helicopter Port. I am sending a helicopter from Philadelphia to pick him up at that time at which time the helicopter will return to Penn's Landing. There will be a cab waiting for him there for the approximately 45 minute ride to Philadelphia. The cab will bring him to court to testify (N.T. 8/26/02 pgs.37-38).

After considering the severity of the prejudice suffered by defendants' having to reschedule all their witnesses to testify, plaintiffs' counsel's repeated dilatory conduct from case mismanagement and evidence of Mr. Armenti's bad faith conduct in his

representation to the Court and opposing counsel regarding Dr. Manning's production as a witness, the Court decided not to extend any further time to plaintiffs. In doing so the Court expressed its increasing suspicion of plaintiffs' motive for the swiftness in which he scheduled and arranged for Dr. Manning's appearance after initially representing he was unavailable to testify on Monday.

> The Court: You had the responsibility to plan accordingly. The burden is upon both of you. Now, for this sudden reversal of the position that you took this morning that he was not available until Wednesday when forced with what would ultimately be an implied sanction for his failure to appear, a reversal, a sudden change in that status. Mr. Armenti, it goes to my – all it does is reinforce my impression of this case that all of this is in bad faith and an attempt to prejudice the defense. I will not counter it. You have until one o'clock (N.T. 8/26/02 pg. 44).

At 1:00 p.m. Dr. Manning was unavailable to testify and plaintiffs' counsel rested. In answering Mr. Armenti's motion to extend time and informing the jury that plaintiffs' concluded their case the Court once again reiterated to Mr. Armenti:

> The Court: Well, as I indicated to you earlier, the very fact that you were able to get him (Dr. Manning) in here this afternoon, but were not able to get him in here this morning I think speaks volumes as to the management and trial of this case and the obvious clear palpable prejudice to the defendant that has occurred in each of the steps along the way. Not to mention the prejudice that began during trial last week when the Court had to extend the trial over two afternoons where there were no witnesses available or ready and for all of the reasons that I enunciated this morning and during the course of these motions, your motions are all denied (N.T. 8/26/02 pgs. 51-52).
>
> Upon defendants' motion Nonsuit was then granted (N.T. 8/26/02 pg. 83).

Mr. Armenti's conduct was tantamount to bad faith and was prejudicial to defendants' case. Mr. Armenti was warned on two separate occasions about the appearance bad faith in producing Dr. Manning to testify, followed by three acts of indulgence by the Court in extending the time frame for Dr. Manning to appear. Mr.

Armenti was never able to produce a reasonable excuse for not producing Dr. Manning in the prior two times designated. Nevertheless, Mr. Armenti continued to obdurate the process until he realized the imminent demise of his case. Only then was he, quite hastily, able to produce Dr. Manning, albeit, still untimely and without a legitimate excuse. This continuous conduct indicates an appearance of impropriety and bad faith.

It is the duty of Mr. Armenti to inform the Court and opposing counsel promptly and truthfully about the status of his case. The prejudice that resulted from Mr. Armenti's dilatory conduct and misrepresentations regarding Dr. Manning appearance prejudiced the defendants' because they would have been unable to zealously prepare their case and would have been further disadvantaged by trying to reschedule their witnesses to testify and completely reorganizing their defense. To restructure the timing and strategy of their case would result in severe anguish and expense on opposing counsel. Mr. Armenti's last minute attempt to have Dr. Finkelstein testify in Dr. Manning's place would have further prejudiced defendants because they had no notice whatsoever that Dr. Finkelstein would be a witness in this case. Further, the delay in calling Dr. Manning, only to then attempt to have his video deposition taken when Mr. Armenti knew neither of opposing counsel were available suggests an improper motive on Mr. Armenti's part. The motive to gain an unfair advantage through deceit cannot be countenanced by the courts. The repetitious conduct strongly implies purposeful misrepresentations on Mr. Armenti's part to oppress the efforts of defense counsel from zealously advocating for their clients.

VIII. PRECLUSION OF DR. JOSEPH FINKELSTEIN

The substitution of Dr. Finkelstein's testimony would have been improper expert testimony.

The law in Pennsylvania is well-settled that a medical witness may "express opinion testimony on medical matters based, in the expert customarily relies upon in the practice of his profession." ***Allen v. Kaplan, D.P.M***, 439 Pa.Super. 263, 266, 653 A.2d 1249, 1251 (1995) (*citing* Commonwealth v. Thomas, 444 Pa. 436, 445, 282 A.2d 693, 698 (1971)). In providing expert testimony, however, the expert witness may not act "as a mere conduit or transmitter of the content of an extrajudicial source" ***Primavera v. Celotex Corp.***, 415 Pa.Super. 41, 52, 608 A.2d 515, 521 (1992). Experts should not be permitted simply to repeat another's opinion or data without bringing to bear his own expertise and judgment. ***Primavera,*** 608 A.2d at 521. In ***Cooper v. Burns***, 376 Pa.Super. 276, 289, 545 A.2d 935, 941 (1988), the testimony of a personal injury physician that another physician agreed with his diagnosis was inadmissible hearsay and thus entitled defendant a new trial on damages. This was because the physician who gave a second opinion which was not subject to cross-examination and it was hearsay testimony which did not fall within any exception to hearsay exclusion. ***Cooper***, 545 A.2d at 940.

In this case, Dr. Finkelstein would not be permitted to testify because his testimony would be based solely on the reliance of Dr. Manning's report. Dr. Manning's unavailability to testify makes this case similar to ***Cooper***. Using the rationale in ***Cooper***, this would be inadmissible because Dr. Manning was not present for the defendants to cross-examination Dr. Manning to assess his credibility or qualifications. Furthermore,

by allowing Dr. Finkelstein's testimony to be corroborated by Dr. Manning's report would also amount to improper and prejudicial hearsay.

For all the foregoing reasons it would be improper for Dr. Finkelstein to testify at trial based solely on the findings of Dr. Manning's report.

IX. CONCLUSION

For the reasons set for the above, this Court respectfully requests the Superior Court to affirm its September 6, 2002 denial of Plaintiffs' Motion For Post-Trial Relief In The Nature Of A Nonsuit.

BY THE COURT:

_____
Date

_____
ALLAN L. TERESHKO, J.

cc: Joseph R. Armenti for Appellants
Charles A. Fitzpatrick, III for Appellees