In the Supreme Court

Appeal from the Court of Appeals
Presiding Judge Jessica R. Cooper

ANTONIO CRAIG, by his Next Friend,
KIMBERLY CRAIG,

Plaintiff-Appellee,

v

OAKWOOD HOSPITAL,

Defendant-Appellant,

and

HENRY FORD HOSPITAL d/b/a HENRY FORD HEALTH SYSTEM, ASSOCIATED PHYSICIANS, P.C., ELIAS G. GENNAOUI, M.D., and AJIT KITTUR, M.D.,

Defendants.

Docket No. 121419

Court of Appeals No. 206951

Wayne County Circuit Court
Case No. 94-410338-NH
Honorable Carole Youngblood

DEFENDANT-APPELLANT OAKWOOD HOSPITAL'S REPLY BRIEF

DICKINSON WRIGHT PLLC
Barbara H. Erard (P31892)
Phillip J. DeRosier (P55595)
Appellate Counsel for Defendant-Appellant
Oakwood Hospital
500 Woodward Avenue, Suite 4000
Detroit, Michigan 48226
(313) 223-3500

SAURBIER & SIEGAN, P.C.
Scott A. Saurbier (P19914)
Trial Counsel for Defendant-Appellant
Oakwood Hospital
400 Maple Park Boulevard, Suite 402
St. Clair Shores, MI 48081
(586) 447-3734

RECEIVED
JAN 26 2004
CLERK SUPREME COURT

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Testimony of Plaintiff's Experts Fails to Describe a Causation Theory That Is Supported By The Established Factual Record 2

B. Plaintiff Inaccurately Characterizes The Defense Witnesses' Testimony As Supportive Of The Theory That Antonio Craig Suffered A Traumatic Injury To His Head And Brain During Labor 4

C. Contrary To Plaintiff's Response, The Defense Witnesses Did Not Testify That Pitocin Was Improperly Administered 8

D. Plaintiff's Experts' "Re-interpretation" Of Facts Reflected In The Established Medical Record Is, At Best, Inadmissible Speculation 9

INDEX OF AUTHORITIES

Cases

People v Young, 418 Mich 1, 21 n 7; 340 NW2d 805 (1983) 2

Rules

MRE 702 1

MRE 703 1

I. INTRODUCTION

In what appears to be an attempt to convince this Court that this case involves nothing more than a legitimate factual dispute properly submitted to a jury, Plaintiff's Response Brief ("Response") materially distorts and mischaracterizes the trial testimony of defense witnesses in an effort to fill the obvious void left by the unreliable and factually unsupported causation theory advocated by his experts. This Reply addresses these distortions and accurately characterizes the trial record.

Plaintiff's experts' testimony that severe uterine contractions during labor caused Antonio Craig's head to be "pounded" and "ground" into some unidentified part of his mother's pelvic anatomy during labor, resulting in severe brain injury that was neither outwardly apparent nor manifest during neurological testing at birth, is "junk science" at its worst. Plaintiff's many inaccurate assertions that ***defense*** witnesses actually supported Plaintiff's experts' testimony is only further confirmation that such testimony lacks any independent, objective validation outside a courtroom and the requisite support in the admissible factual record inside the courtroom.

Contrary to Plaintiff's assertions in his Response, none of the defense experts ever found Plaintiff's experts' causation theory even to be anatomically possible, much less the ***probable*** cause of Antonio Craig's cognitive impairment. Had the trial court discharged its fundamental gatekeeping responsibility in accordance with MRE 702, MRE 703, and the applicable case authorities cited in Oakwood's Brief on Appeal to ensure that expert opinion as to causation is independently validated outside the courtroom and supported by substantial factual evidence presented in the courtroom, Plaintiff's case would have been recognized as predicated on junk science and unsuitable for jury consideration.[1]

---

[1] While Plaintiff argues at length in his Response Brief that Oakwood has not properly preserved its challenge to the admissibility of the causation theory advanced by Plaintiff's

Footnote continued on next page ...

II. ARGUMENT

A. The Testimony of Plaintiff's Experts Fails to Describe a Causation Theory That Is Supported By The Established Factual Record

Plaintiff's Response is packed with allusions to testimony acknowledging that the misuse of Pitocin can, under certain circumstances, cause injury to the fetus during labor. What is missing from Plaintiff's Response and from the trial record, however, is the required expert testimony, well-founded in medical science and in the established facts of the case, supporting the causation thesis essential to Plaintiff's case: that an overdose of Pitocin was given to Ms. Craig, producing extremely strong uterine contractions that "pounded" and "ground" Antonio Craig's head against a hard part of the pelvic anatomy, resulting in permanent, traumatic brain injury to the baby. Oakwood and the defense witnesses have never disputed that an overdose of Pitocin (like an overdose of any substance) ***can cause*** harm. However, Plaintiff has mischaracterized the defense witnesses' acknowledgement of this obvious fact to suggest that the defense witnesses actually supported Plaintiff's case.

Plaintiff's case was balanced on the testimony of his two experts, Dr. Gatewood and Dr. Gabriel, but their theories of how Antonio Craig suffered a brain injury during labor are inconsistent with both recognized medical knowledge and the established medical record in this case. (See Oakwood's Brief on Appeal, pp 20-21). The admissible facts of this case – reflected in the established medical record – reveal an unremarkable, normal labor and the birth of a

---

Footnote continued from previous page ...

experts, such a claim is belied by the fact that Oakwood supported its motion for a Davis-Frye hearing with the testimony of Plaintiff's own expert pediatric neurologist, Dr. Ronald Gabriel, in which he could not cite any medical or scientific literature to support his "pounding and grinding theory." At that point, the trial court was obligated to discharge its gate-keeping function in accordance with People v Young, 418 Mich 1, 21 n 7; 340 NW2d 805 (1983), as well as the other numerous authorities cited at pp 39-42 of Oakwood's Brief on Appeal. The trial court refused to do so, and, contrary to Plaintiff's claim, Oakwood raised the issue during trial in its motion for a directed verdict (442a-443a), and then again in its motion for JNOV.

healthy baby with no signs of any neurological problems. Indeed, neither of Plaintiff's experts was even able to describe a logical sequence of cause and effect to explain, much less establish, as ***probable*** how the brain injury could have occurred and did in fact occur in Antonio Craig's case. (See Oakwood's Brief on Appeal, pp 40-44).

As Oakwood has more fully explained in its Brief on Appeal at pages 22-26, Dr. Gatewood, Plaintiff's obstetrical expert, theorized that a Pitocin overdose was given to Ms. Craig, producing severe, prolonged uterine contractions and thereby resulting in a reduction of blood flow through the umbilical cord and hypoxia (lack of adequate oxygen flow to the brain). However, Dr. Gatewood expressly acknowledged that he could not offer an opinion as to how this hypoxia caused injury to Antonio Craig's brain. Instead, Dr. Gatewood deferred to Plaintiff's pediatric neurology expert, Dr. Gabriel, to supply the necessary logical sequence of cause and effect by which the hypoxic episode caused the brain injury. (209a-210a).

Contrary to Dr. Gatewood's expectation, Dr. Gabriel rejected Dr. Gatewood's hypoxia theory (245a-251a), and hypothesized instead that Plaintiff suffered a traumatic brain injury as a result of some vaguely described "grinding experience with the head in the pelvic rim." (234a-235a). Yet, Dr. Gabriel was unable to provide the critical sequence in the causation theory – how the "grinding experience" in the pelvic region traumatized the baby's head and brain. Dr. Gabriel repeatedly testified that he was unqualified even to identify what part of the mother's pelvic anatomy the baby's head was "pounded" and "ground" against during labor. (251a-252a; 242a-244a; 255a-258a).[2] Thus, while Plaintiff represents that Dr. Gabriel and Dr. Gatewood

---

[2] Dr. Gabriel's admitted lack of expertise sufficient to render a reliable opinion as to the mechanism by which a baby could plausibly suffer brain injury as a result of the normal forces of labor and delivery apparently has not stopped Dr. Gabriel from rendering the exact same opinion in numerous other cases around the country, a practice which has drawn the attention of his fellow pediatric neurologists, some of whom recently requested that the

Footnote continued on next page …

were actually in agreement as to the alleged cause of Antonio Craig's brain injury (Plaintiff's Response, pp 4-5, 16-17), a review of the record reveals otherwise.

Dr. Gatewood testified that the baby suffered brain injury from hypoxia, but Dr. Gatewood could not explain how the hypoxia caused the brain injury. Dr. Gabriel testified that head trauma, not hypoxia, caused the brain injury, but because Dr. Gabriel is not an obstetrician, he acknowledged he was unqualified to describe the mechanism by which the baby's head and brain were traumatized inside the pelvic structure. Thus, whether evaluated independently or together, Plaintiff's experts' causation theories are inconsistent and do not even describe a complete, logical sequence of cause and effect leading from the (presumed) severe uterine contractions to the (presumed) neonatal brain injury.

Moreover, even if Plaintiff's two experts had been able to coordinate their testimony so as to describe a logical sequence of cause and effect, still there is no basis in medical science or the record facts that would permit such testimony to be presented to a jury.

B. Plaintiff Inaccurately Characterizes The Defense Witnesses' Testimony As Supportive Of The Theory That Antonio Craig Suffered A Traumatic Injury To His Head And Brain During Labor

Plaintiff's Response fails to appreciate and address the lack of independent, objective validation for his experts' causation testimony and the lack of any support (much less the required ***substantial*** support) in the factual record for reasonable minds to accept such expert theory as "probable." It is not surprising that, in the absence of reliable support for Plaintiff's experts' causation theory in either the established medical record or in recognized science outside the courtroom, Plaintiff resorts to mischaracterizations of the defense witnesses' testimony in an effort to fill that void.

Footnote continued from previous page ...

American Academy of Neurology investigate and discipline Dr. Gabriel for giving testimony that is neither recognized nor validated in his specialized field. (See 567a-568a).

For example, Plaintiff cites excerpts of defense witness testimony in support of a representation that Antonio Craig experienced "repeated and severe decelerations" during labor indicating a deprivation of oxygen. The trial record reveals otherwise. Dr. Gennaoui testified that he observed "a few" "early decelerations" which are common and "harmless" (288a),[3] and he explained that fetal heartbeat decelerations are an expected part of labor. (286a). Dr. Gennaoui further testified that "variable decelerations" were recorded during Ms. Craig's labor and that such decelerations commonly occur as a result of the compression of the umbilical cord intermittently throughout the labor process. (288a-289a).[4] Dr. Gennaoui explained that variable decelerations are normal, that they are not ordinarily associated with any bad outcome, and that they only become a concern when they are persistent and unremitting over a relatively long period. (508a, 509a-510a). As Dr. Gennaoui and other defense witnesses explained, stronger "severe" decelerations typically take place during the last stage of labor when the mother herself intensifies the compression on the baby by "pushing" just before delivery. Likewise, in the case of Ms. Craig's labor, the records reflect occasional variable decelerations and stronger or more "severe" decelerations at the time Ms. Craig was "pushing" just before delivery. (See 511a-524a).[5] As Dr. Gennaoui and other defense witnesses explained, the decelerations recorded

---

[3] Early decelerations represent decreases in fetal heart rate at the beginning of the contraction of the uterus which return to normal at the end of a contraction when the pressure on the baby ceases. These early decelerations occur normally during the course of labor when the pressure from uterine contractions intensifies. (286a).

[4] Even in the absence of a contraction, variable decelerations can be caused by the position of the baby in the uterus. For example, the cord can be squeezed temporarily as the baby moves in the tight space of the uterus. (509a).

[5] In an apparent attempt to further mislead the Court as to the import of Dr. Gennaoui's testimony, Plaintiff also cites portions of Dr. Gennaoui's **deposition** testimony in which he acknowledged some "severe" variable decelerations as though it provides evidence that may be relied upon to support Plaintiff's case **at trial**. Even more important, Plaintiff fails to disclose to the Court that at trial Dr. Gennaoui explained that his previous characterization of

Footnote continued on next page ...

during Ms. Craig's labor were ordinary, expected, and never an indication of fetal distress. (See 525a; 508a-1).

Consistent with the testimony of Dr. Gennaoui, the testimony of Dr. Mitchell Dombrowski, then Chairman and Chief of Obstetrics at Wayne State University, confirmed that Ms. Craig's labor was normal and that the external fetal heart monitor record showed "[l]ots and lots of variability" (529a-530a), which Dr. Dombrowski explained reflects normal, irregular fluctuations of the cardiac rhythm in response to the progress of labor. Indeed, as Dr. Dombrowski explained, such fluctuations in cardiac rhythm in response to the process of labor would not be manifest in a baby who was suffering brain injury or was otherwise compromised during labor. (See 526a-528a; 542a-543a).[6] Finally, contrary to Plaintiff's Response, Dr. Dombrowski expressly rejected the theory that the baby suffered a traumatic deprivation of oxygen or any injury whatsoever during labor and delivery, testifying that there was "no indication whatsoever" that such an event occurred. (539a).[7]

Plaintiff also mischaracterizes the testimony of co-Defendant obstetrician Dr. Ajit Kittur, again in an attempt to suggest that Dr. Kittur agreed that Antonio Craig was deprived of adequate oxygen during his mother's labor. To the contrary, Dr. Kittur testified that there was good overall variability in Plaintiff's heart rate, and, consistent with a typical labor, the more "severe"

Footnote continued from previous page ...

some of the variable decelerations as "severe" at the time of his deposition was mistaken and based on a misunderstanding as to the generally-accepted definition of "severe" decelerations. (511a-524a).

[6] The term "variability" when referring to overall fetal heart rate is not the same as a "variable deceleration" which, as explained above, describes decelerations in the fetal heart rate ordinarily occasioned by periodic compression of the umbilical cord.

[7] As the trial record reflects, Dr. Dombrowski also challenged Plaintiff's counsel's misleading characterizations of isolated portions of the fetal heart monitor strip (a practice in which Plaintiff continues to engage as evident in his Response). (536a-538a).

decelerations were recorded during the last stage of Ms. Craig's labor when she was "pushing." As Dr. Kittur confirmed, these more relatively marked decelerations are "**not at all unusual in [the] second stage of labor especially in somebody with a ruptured membrane. . . . This fetus is tolerating everything very well because even during a deceleration there is good beat-to-beat variability.**" (295b).

Finally, Plaintiff inaccurately asserts that defense witnesses accepted Plaintiff's experts' theory that an overdose of Pitocin was administered to Ms. Craig and agreed that Dr. Gabriel's "pounding and grinding" theory was a "universally held view." (See Plaintiff's Response, pp 35-36). The defense witnesses acknowledged the obvious fact that an overdose of Pitocin could cause harm, but none of them found any evidence that an overdose of Pitocin was given to Ms. Craig, and none of them accepted as even anatomically possible the theory that Antonio Craig suffered brain injury by the "pounding" and "grinding" of his head against some part of his mother's pelvic anatomy. Indeed, Dr. Dombrowski testified that it is "**anatomically impossible for the baby to grind against the pelvic rim.**" (316a). Dr. Humberto Bernal, one of the obstetricians who attended to Ms. Craig during her labor, further confirmed that it is impossible for a baby's head to be traumatized by impact with a hard structure in the pelvic anatomy **because the baby is completely surrounded by soft tissue**. (306a). Maybe defense expert neonatologist Dr. Donn put it best when he declared at trial that Plaintiff's experts' theory simply makes no sense. (548a). Finally, **even Plaintiff's own obstetrical expert, Dr. Gatewood, testified that there was no evidence that Plaintiff had suffered any head trauma. (231a).** As just these few examples make clear, Plaintiff's response brief does not accurately describe the trial testimony and thus should be viewed with corresponding skepticism.

C. Contrary To Plaintiff's Response, The Defense Witnesses Did Not Testify That Pitocin Was Improperly Administered

According to Plaintiff's Response, "Pitocin should not have been used at all – even according to the testimony of defendant and the defense standard of care experts!" (Plaintiff's Brief on Appeal, p 18). In support, Plaintiff asserts, incredibly, that the defense experts in obstetrics, Dr. Dombrowski and Dr. Seymour Ziegleman, testified that Pitocin should not have been administered before the fetal head was fully engaged in the pelvis just prior to delivery. (Plaintiff's Brief on Appeal, pp 17-18). However, as the record confirms, these witnesses clearly explained that Pitocin is properly used to accelerate labor when the mother's membranes have ruptured but contractions have not effectively commenced. Under such circumstances, the acceleration of labor is necessary to avoid the onset of a serious infection. (See 544a).

Plaintiff also inaccurately represents that defense witnesses were critical of the amount of Pitocin administered. (See Plaintiff's Response Brief, pp 12, 23). But a review of the testimony of defense witnesses reveals that none testified that Defendants deviated from the standard of practice in the administration of Pitocin or in any other respect. What is more, **Plaintiff's own obstetrical expert, Dr. Gatewood, repeatedly admitted that the incremental doses of Pitocin reflected in the medical records as having been administered during Ms. Craig's labor were appropriate** (See 222a, 467a, 503a). Dr. Gatewood's only criticism was based on his "re-interpretation" (or re-writing) of the medical record: Dr. Gatewood "interpreted" the record to indicate that **two** separate IV bags containing Pitocin were mistakenly administered to Ms. Craig without any one of the doctors and nurses attending Ms. Craig noticing such a flagrant error and its inevitable clinical manifestations.[8] As Oakwood explains fully in its Brief on Appeal, pp 27-

---

[8] Dr. Gatewood admitted that he did not come up with this "interpretation" until after reviewing the records a second time with Plaintiff's counsel before trial (115a-156a).

32, Dr. Gatewood's re-interpretation of the medical record is not only unsupported by any admissible facts in the case, but it is in material conflict with the established, admissible facts as reflected in the medical records.

D. Plaintiff's Experts' "Re-interpretation" Of Facts Reflected In The Established Medical Record Is, At Best, Inadmissible Speculation

The established Oakwood medical record clearly reflects an unremarkable, normal labor and the birth of a healthy baby with no signs of any neurological problems (see Oakwood's Brief on Appeal, pp 20-21). **Dr. Gabriel himself admitted this fact at trial.** (249a-250a). Despite that admission from his own expert, Plaintiff mischaracterizes what is contained in that record, asserting that Antonio Craig was born with severe neurologic deficits that none of the doctors and nurses were able to detect. (See Plaintiff's Brief on Appeal, pp 25-29).

As explained by defense expert neonatologist, Dr. Steven Donn (the Director of Neonatology at University of Michigan Medical Center), the medical record reflects an examination of the baby in the delivery room and that Antonio Craig was found to be a "normal newborn." (559a-561a). As the defense witnesses confirmed, the Oakwood medical record establishes that additional physical and neurological examinations of the baby were also performed and that those examinations revealed no indication of any traumatic injury or other abnormality. (545a-552a (Dr. Donn: no indication in medical records of traumatic injury); 426a (Dr. Dombrowski: same); 247b-248b (Dr. Dombrowski: large cord is a good thing); 563a-565a (Dr. Donn: the color of Antonio Craig's skin was no indication of any abnormality); 562a (Dr. Donn: respiratory rate of 64 is perfectly normal; even Dr. Gabriel admitted that the respiratory rate means nothing "in isolation" and that he could only speculate about its significance (167b)); 540a-541a, 504a-505a, 545a-552a (the noted "molding" of the baby's head was the ordinary result of the newborn's passage through the birth canal which Plaintiff's own expert even acknowledged; Dr. Dombrowski acknowledged that molding might be consistent with trauma **if**

the baby could not fit through his mother's pelvis, which not even Plaintiff claims was the case here); 564a-567a (Dr. Gabriel's "methodology" of diagnosing neurologic deficits on the basis of his observation of a routine newborn photograph (which he claimed revealed a "cortical thumb" and eyes that were "deviated to the right") is quite obviously not recognized in any clinical field; as Dr. Donn explained, it is necessary to personally examine the baby. As defense expert pediatric neurologist, Dr. Michael Nigro, further confirmed, Dr. Gabriel's "observations" do not represent an appropriate methodology for diagnosing brain injury (see 274b-277b; 279b-280b); 506a-507a (Dr. Gabriel admitted that the MRI studies performed 12 years after Antonio Craig's birth say nothing about when the abnormalities revealed in the MRIs occurred).

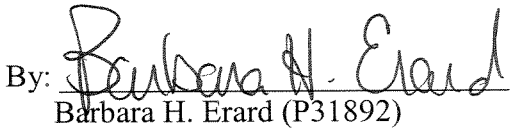
Plaintiff's experts' testimony was medically unfounded and unreliable, unsupported by the admissible factual record, and insufficient as a matter of law to sustain a prima facie case for jury consideration.

VI. Conclusion

For the reasons elaborated above and those presented in Oakwood's Brief on Appeal, Oakwood asks this Court to reverse the decision of the Court of Appeals and enter judgment NOV in favor of Defendants.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

By: 

Barbara H. Erard (P31892)
Phillip J. DeRosier (P55595)
Appellate Counsel for Defendant-Appellant
Oakwood Hospital
500 Woodward Avenue, Suite 4000
Detroit, MI 48226
(313) 223-3500

Dated: January 26, 2004
DETROIT 26589-2 768404v02