

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MARGARET A. DUNNING and	:	
CHRISTOPHER DUNNING,	:	
	:	C.A. No. 98C-02-045
Plaintiffs,	:	
	:	
v.	:	
	:	
SIDNEY B. BARNES, M.D. and	:	
BOLASNY, GLENN & BARNES,	:	
M.D.'s, P.A.,	:	
	:	
Defendants.	:	

Submitted: January 5, 2001

Decided: February 2, 2001

Upon Plaintiffs' Motion to Exclude
Expert Testimony. Denied.

Stephen A. Hampton, Grady & Hampton, P.A., Dover, Delaware, Attorneys for the
Plaintiffs.

Anne L. Naczi, Griffin & Hackett, P.A., Georgetown, Delaware, Attorneys for the
Defendants.

WITHAM, J.

ORDER

Dunning v. Sidney B. Barnes, M.D., et al.
C.A. No. 98C-02-045
February 2, 2001

Margaret A. Dunning and Christopher Dunning ("Plaintiffs") bring this motion to exclude Dr. Smoot, Defendants' medical expert, from testifying at trial. The case at hand is a medical malpractice action alleging negligence by Dr. Barnes, the surgeon who removed Mrs. Dunning's gallbladder. Specifically, Plaintiffs claim that Dr. Barnes failed to adequately identify the cystic duct and common duct prior to removing Mrs. Dunning's gallbladder. This mis-identification of anatomy led to the cutting of the common duct instead of the cystic duct which caused significant harm to Mrs. Dunning. Plaintiffs have retained Dr. Steven Goldstone to testify as their medical expert and Defendants have retained Dr. Roy Smoot to testify as their medical expert.

Dr. Smoot testified during his deposition that there must have been some variation in the anatomy for Dr. Barnes to have cut the wrong duct. Plaintiffs argue that Dr. Smoot does not have a sufficient basis for his opinion that there must have been an anatomical variation for this mistake to have occurred. Defendants claim that while Dr. Smoot's opinion is that he doesn't know what specific anatomical variation caused the injury, he may give his opinion that the injury was caused by variation in the anatomy to a reasonable medical probability. Dr. Smoot testified at deposition that "there were multiple variations in the anatomy", but that he could not be "specific" about the anatomical variation that caused the error in this case. Later in the deposition, Dr. Smoot testified that "the fact that there's no identifiable variant in the remnants that are left behind doesn't speak to the issue at all." According to the doctor, the key to determining what variant existed was in the segment that was

Dunning v. Sidney B. Barnes, M.D., et al.
C.A. No. 98C-02-045
February 2, 2001

removed during the surgery. Later in the deposition, Dr. Smoot was asked the following by Plaintiffs' counsel:

Q: ...you say there is abnormal anatomy and maybe I'm not making myself clear, but the bottom line is you think it's abnormal anatomy because there isn't any other reason for them to have clipped the common duct?

A: Yes.

Q: If it was normal anatomy, they wouldn't have clipped the common duct, correct?

A: Yes.

Plaintiffs argue that the above sequence illustrates that Dr. Smoot is stating an opinion for which he has no basis. Defendants argue that the doctor's opinion is based upon his knowledge, experience and well-founded scientific writings. According to the Defendants, Dr. Smoot is saying that his evaluation of the records in this case shows that the doctors were operating within the appropriate standard of care when the wrong duct was cut; therefore, his explanation for the mistake that occurred is some variation in the anatomy. By suggesting some variation in the anatomy, he is making a "presumption" that there were irregularities present. Dr. Goldstone, the Plaintiffs' expert, examined the same records and concluded that Dr. Barnes did not appropriately identify all of the anatomy which violated the standard of care for this procedure.

Plaintiffs claim that *D.U.R.E.* 403, 702 and 705(b) demonstrate that Dr. Smoot's testimony must be excluded for having an insufficient basis. Dealing with expert

Dunning v. Sidney B. Barnes, M.D., et al.
C.A. No. 98C-02-045
February 2, 2001

testimony requires the Court to begin with *Superior Court Civil Rule 702* which states that "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." There is no dispute concerning Dr. Smoot's qualifications to testify as an expert. Thus, prong 1 has been met. However, Plaintiffs argue that under *D.U.R.E. 705(b)*¹ Dr. Smoot does not have a sufficient basis for his opinion. Without a sufficient basis for his opinion, the testimony could confuse or mislead the jury. Evaluating expert witness opinion evidence is difficult because there

¹***D.U.R.E. 705(b) Objection.* An adverse party may object to the testimony of an expert on the ground that he does not have a sufficient basis for expressing his opinion. He may, before the witness gives his opinion, be allowed to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based.**

Dunning v. Sidney B. Barnes, M.D., et al.
C.A. No. 98C-02-045
February 2, 2001

is a great deal of debate as to what the Plaintiff's anatomy presented to the Defendant during the surgery.² Thus at issue are prongs 2 through 5.

When an expert has been determined as needed in a case, the Court must weight the following factors to determine whether that expert is qualified to render expert testimony:

1. The witness is qualified as an expert by knowledge, skill, experience, training or education.
2. The evidence is relevant and reliable.
3. The expert's opinion is based upon information reasonably relied upon by experts in a particular field.
4. The expert testimony will assist the trier of fact to understand evidence or to determine the fact in issue.

²This problem was carefully pointed out in Judge Quillen's tour de force opinion in *Minner v. American Mortgage & Guaranty Company, et al.*, Del. Super., C.A. No. 96C-09-263, Quillen, J. (4/17/00)(OPINION AND ORDER).

Dunning v. Sidney B. Barnes, M.D., et al.
C.A. No. 98C-02-045
February 2, 2001

5. The expert testimony will not create unfair prejudice nor will it confuse or mislead the jury.³

This Court must evaluate the testimony as a gatekeeper to ensure that it is relevant and reliable. In performing this function and based on the information provided to the Court, it appears that it cannot be definitely stated by either party's expert whether or not any anatomical variation was present. Accordingly, both experts will be performing a similar function for the jury, in that each expert will testify as to their opinion of what the medical record means. Dr. Smoot testified at deposition that the gallbladder surgery was performed according to the appropriate standard of care. His explanation for the injury that occurred is that there must have been a variation in the anatomy. This opinion is based upon information that has been relied upon by experts, although it certainly can be questioned. Dr. Smoot's opinion is based upon his knowledge, training and experience coupled with his examination of the medical records. Thus prongs 2 through 5 are met by Dr. Smoot. Plaintiffs will have the opportunity to show the jury any weakness in the doctor's opinions during cross-examination.

The Court finds that the opinion of Dr. Smoot in this case will assist the trier

³*Daubert v. Merrell Dowell Pharmaceuticals, Inc.*, 509 U.S. 579 (1992). See also *Duphily v. Delaware Electric Co-Op, Inc.*, Del. Supr. 662 A.2d 821 (1995).

Dunning v. Sidney B. Barnes, M.D., et al.
C.A. No. 98C-02-045
February 2, 2001

of fact and is based upon his experience, knowledge and study. Therefore, Plaintiffs' motion to exclude Dr. Smoot from testifying is *denied*.

IT IS SO ORDERED.

J.

dmh

oc: Prothonotary
xc: Order Distribution
File