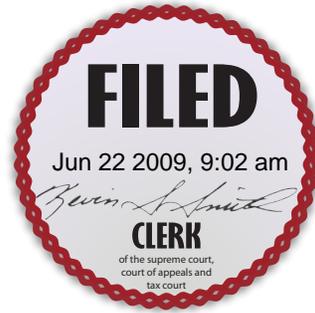


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES ASHBURN and LYNETTE ASHBURN,)
Individually and on Behalf of Their Minor Child,)
CHLOE ASHBURN and CHLOE ASHBURN,)

Appellants/Plaintiffs,)

vs.)

No. 71A03-0808-CV-414)

MEMORIAL HOSPITAL OF SOUTH BEND,)
DR. JEANNE E. BALLARD, M.D., and)
HOUSER-NORBORG-MacGREGOR)
MEDICAL CORPORATION,)

Appellees/Defendants.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jenny Pitts-Manier, Judge
Cause No. 71D05-0504-PL-151

June 22, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants/Plaintiffs James, Lynnette, and Chloe Ashburn appeal from the trial court's grant of summary judgment in favor of Appellees/Defendants Memorial Hospital of South Bend ("Memorial"), Dr. Jeanne E. Ballard, M.D., and Houser-Norborg-MacGregor Medical Corporation ("the Group"). The Ashburns contend that the trial court abused its discretion in striking the affidavit of Dr. Thomas Hegyi, M.D. We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

At 3:10 a.m. on July 20, 2002, Lynette was admitted to Memorial after having been in labor for approximately two hours. Lynette's water broke at approximately 6:30 a.m., and Dr. Ballard, a member of the Group, first saw Lynette at approximately 8:30 a.m. At approximately 10:30 a.m., Dr. Ballard told Lynette to resume pushing, which she did for approximately one hour, to no avail. In Dr. Ballard's view, Lynette could not "get enough push" to deliver the child, Chloe, on her own. Appellant's App. p. 816.

Dr. Ballard's version of the following events is as follows: Dr. Ballard spoke with Lynette regarding using vacuum extraction to assist in the delivery, and Lynette agreed. After one unsuccessful application of the vacuum extraction cup, due to a nurse not hearing Dr. Ballard's request to apply adequate vacuum pressure, the cup was reapplied and Chloe

was delivered easily. Carmen Maes, Lynette's sister-in-law, however, averred that she did not hear Dr. Ballard advise Lynette regarding vacuum extraction, the extraction cup "pop[ped] off" at least three times before delivery, and "[a]fter the cup popped off of Chloe's head, it looked like a Dixie Cup." Appellant's App. pp. 671-72. Lynette averred that she heard the vacuum cup pop off three times, Dr. Ballard did not advise her of alternatives to vacuum extraction, and she would not have agreed to the procedure had she known of the risks. On Chloe's second day of life, she suffered a subdural hematoma with brain shift. Surgery was performed on Chloe to evacuate the subdural hematoma, and Chloe now suffers from a seizure disorder.

On April 21, 2005, the Ashburns filed a medical malpractice complaint against, among others, Dr. Ballard, the Group, and Memorial. On June 5, 2007, a medical review panel of the Indiana Department of Insurance opined that "[t]he evidence does not support the conclusion that the defendants ... failed to meet the applicable standard of care as charged in the complaint." Appellant's App. p. 28. Soon thereafter, Dr. Ballard, the Group, and Memorial filed motions for summary judgment.

On October 18, 2007, the Ashburns filed a response to the Defendants' motions for summary judgment and designated, *inter alia*, an affidavit from Dr. Hegyi, who opined that Dr. Ballard's vacuum extraction of Chloe was the proximate cause of her subdural hematoma and seizure disorder. On April 14, 2008, the Defendants filed a motion to strike Dr. Hegyi's affidavit. On May 27, 2008, Dr. Ballard and the Group filed a second supplemental

designation of evidence, which consisted of the transcript of Dr. Hegyi's deposition, taken on January 25, 2008.

Dr. Hegyi had practiced in the field of neonatology for thirty or thirty-one years and had treated at least six infants with subdural hematomas. Dr. Hegyi testified that most, if not all, of those instances had been "caused by some sort of appliance that was put on the baby's head, whether it was a vacuum or forceps." Appellant's App. p. 1052. Dr. Hegyi further testified that he had reached his conclusion regarding the cause of Chloe's subdural hematoma in this case because "the likelihood of a vacuum causing a subdural hematoma is fairly high compared to not having a vacuum ... [a]nd there was some disruption of difficulties in the technique whereby the vacuum was applied a number of times unsuccessfully and pulled." Appellant's App. p. 1053. Dr. Hegyi elaborated that the basis of his conclusion was "the fact that this infant had a fairly specific injury that's always or often associated with vacuum extraction, okay. And the circumstances certainly suggest a fairly direct cause and effect relationship between a vacuum delivery and injury that the baby suffered." Appellant's App. p. 1056. On July 21, 2008, the trial court granted Dr. Ballard's and the Group's motion for summary judgment and Memorial's motion for summary judgment.

DISCUSSION

Whether the Trial Court Erred in Granting the Defendants' Motions for Summary Judgment

Summary Judgment Standard of Review

When reviewing the grant or denial of a summary judgment motion, we apply the

same standard as the trial court. *Merchs. Nat'l Bank v. Simrell's Sports Bar & Grill, Inc.*, 741 N.E.2d 383, 386 (Ind. Ct. App. 2000). Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Ind. Trial Rule 56(C). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmoving party. *Id.* To prevail on a motion for summary judgment, a party must demonstrate that the undisputed material facts negate at least one element of the other party's claim. *Id.* Once the moving party has met this burden with a prima facie showing, the burden shifts to the nonmoving party to establish that a genuine issue does in fact exist. *Id.* The party appealing the summary judgment bears the burden of persuading us that the trial court erred. *Id.*

Indiana Medical Malpractice in General

“In general, a plaintiff must prove each of the elements of a medical malpractice case, which are that: (1) the physician owed a duty to the plaintiff; (2) the physician breached that duty; and (3) the breach proximately caused the plaintiff's injuries.” *Sawlani v. Mills*, 830 N.E.2d 932, 938 (Ind. Ct. App. 2005) (citing *Mayhue v. Sparkman*, 653 N.E.2d 1384, 1386 (Ind. 1995)), *trans. denied*. “In medical malpractice cases, it is well-established that when the medical review panel opines that the plaintiff has failed to make a prima facie case, she must then come forward with expert medical testimony to rebut the panel's opinion in order to survive summary judgment.” *Brown v. Banta*, 682 N.E.2d 582, 584 (Ind. Ct. App. 1997), *trans. denied*. Here, all parties agree that Dr. Hegyi's affidavit dealt with the issue of proximate cause only. The question becomes, then, whether the trial court correctly struck it,

thereby leaving the Ashburns with no expert evidence regarding proximate cause, necessitating summary judgment against them.

**A. Whether the Trial Court Abused its Discretion
in Striking Dr. Hegyi's Affidavit**

“A trial court has broad discretion in ruling on a motion to strike.” *Sun Life Assur. Co. of Can. v. Ind. Dep't of Ins.*, 868 N.E.2d 50, 57 (Ind. Ct. App. 2007), *trans. denied*. Decisions to strike or admit affidavits in support of summary judgment motions are reviewed only for an abuse of that discretion. *See Starks Mech., Inc. v. New Albany-Floyd County Consol. Sch. Corp.*, 854 N.E.2d 936, 939 (Ind. Ct. App. 2006). “Thus, we reverse a trial court’s decision only if that decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.” *Sun Life*, 868 N.E.2d at 57.

1. Indiana Evidence Rule 702

Dr. Hegyi’s affidavit was offered and rejected under Indiana Evidence Rule 702, which governs opinion testimony by experts. Rule 702 provides:

(a) 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.

(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

By its own terms, Indiana Evidence Rule 702 differs from the similar Federal Rule of Evidence 702 in that only in the case of *scientific* testimony must the trial court satisfy itself regarding the reliability of the scientific principles on which it is based. *See Malinski v.*

State, 794 N.E.2d 1071, 1085 (Ind. 2003) (explaining distinction between expert opinion based on scientific knowledge and expert opinion based on knowledge, skill, experience, training, or education and clarifying that Indiana Evidence Rule 702(b) only applies to the former). If an expert opinion is based solely on knowledge, skill, experience, training, or education, the reliability requirement of Indiana Evidence Rule 702(b) simply does not apply.

Here, we conclude that Dr. Hegyi's expert opinion, as expressed in his affidavit and deposition, is not governed by scientific principles and, therefore, is not subject to Indiana Evidence Rule 702(b)'s reliability requirement. As explained in his affidavit and deposition testimony, Dr. Hegyi's opinion was based solely on the knowledge and experience accumulated during his three decades in neonatology and not on scientific principles whose reliability need be established. In other words, Dr. Hegyi's opinion that vacuum extraction caused Chloe's injury was based solely on his knowledge regarding evidence of possible difficulties in Chloe's delivery that may have caused unusual stress and his experience that most such injuries in newborns were, in fact, caused by vacuum extraction.¹ So, while it is true that "[a]n expert's opinion must be based on more than subjective belief or unsupported speculation[,]" Dr. Hegyi's opinion meets that standard. *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 550 (Ind. Ct. App. 1999) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)), *trans. denied*. Moreover, it is undisputed that the subject matter of the testimony at issue, neonatology, concerns a field beyond the knowledge of lay persons. *See*

¹ If, for instance, Dr. Hegyi had relied on a clinical study establishing a causal link between vacuum extraction and subdural hematoma, his evidence would have been based on scientific principles and therefore subject to the additional reliability requirement of Indiana Evidence Rule 702(b).

Lytle v. Ford Motor Co., 696 N.E.2d 465, 469-70 (Ind. Ct. App. 1998), *trans. denied*. We conclude that the trial court abused its discretion in striking Dr. Hegyi's affidavit. The consequence of this is that because the Ashburns have, in fact, brought forth admissible expert evidence rebutting the panel's opinion of no negligence, summary judgment in favor of Dr. Ballard and the Group is precluded.²

B. Whether the Trial Court Erred in Granting Summary Judgment to Memorial

The Ashburns contend that Memorial had a duty to monitor Dr. Ballard to ensure that she did not perform an operative procedure without obtaining informed consent from Lynnette. The Ashburns argue that federal and Indiana regulations establish such a duty and that, in any event, Memorial assumed such a duty through a policy requiring its staff to assure written informed consent before such a procedure could be performed. Whether Memorial had a duty to oversee Dr. Ballard in this regard is irrelevant, however, if the record contains no evidence that she did, in fact, fail to satisfy her own duty of care in this regard. If Dr. Ballard did not fail in her duty of care to obtain appropriate informed consent, then there was no medical malpractice in this respect. In this context, Memorial cannot be held vicariously

² The question presented here is similar to that presented in *Malinski*, 794 N.E.2d at 1071, and we reach the same result. In *Malinski*, the relevant question was whether expert testimony regarding photographs of a murder victim was admissible. The photographs, recovered from Malinski's home, showed the partially-nude victim in bondage, with some showing a sexual device inserted into her body. *Id.* at 1075-76. At trial, a Dr. Prahlow, a four-year veteran forensic pathologist, opined that, based on his forensic training and review of the photographs, the victim was an unwilling participant in the activities depicted and was incapacitated, unresponsive, or unconscious in many of the photographs. *Id.* at 1084. The trial court concluded, and the Indiana Supreme Court agreed, that Dr. Prahlow's testimony was admissible, but not subject to Indiana Evidence Rule 702(b), as it was expert testimony based on specialized knowledge and not scientific principles. *Id.* at 1085.

liable for medical malpractice that did not occur, no matter how derelict it may have been in its own duty, even assuming, *arguendo*, that it had one. In the vicarious liability context of *respondeat superior*, this court has observed as follows:

It would seem to be plain, ordinary, common sense to say that the master's liability cannot exceed that of his servant's when liability is based solely upon the doctrine of *respondeat superior*. It is axiomatic that in such a case a verdict discharging the servant automatically discharges the master as there is no negligence, under such circumstances, which can be imputed to him.

Biel, Inc. v. Kirsch, 130 Ind. App. 46, 53, 153 N.E.2d 140, 143-44 (1958). Similarly, if Dr. Ballard is "discharged" here, there is no medical malpractice that can be imputed to Memorial.

Our review of the record reveals no genuine issue of material fact regarding whether Dr. Ballard failed to satisfy her duty of care regarding informed consent. There is no designated evidence that Dr. Ballard fell short in this regard, even if one assumes, as we must, that she did not speak to Lynette of the possible risks of vacuum extraction. Indeed, Dr. Louis Star, M.D., opined that Dr. Ballard's alleged failure to obtain informed consent before performing the extraction did not violate the duty of care. The following dialogue took place during Dr. Star's deposition:

Q So a woman in the stirrups who's been pushing for over an hour is not the kind of patient that you would feel had to sign a[n informed consent form] before you proceeded?

A Yeah. I mean, if I'm being totally honest, I usually don't have them – I mean, that's, again, the way I practice on a daily bas[is].

Q It's nothing you think that the standard of care requires?

A No.

Appellant's App. pp. 1015-16. Dr. Star opined that the relevant duty of care did not require

Dr. Ballard to obtain informed consent before performing the vacuum extraction, and there is no other designated evidence suggesting otherwise. As such, there is no genuine issue of material fact on this question and, therefore, we need not address whether Memorial had a duty of oversight. The trial court properly granted summary judgment in favor of Memorial.

Conclusion

We conclude that the trial court abused its discretion in striking Dr. Hegyi's affidavit. As such, the trial court erred in entering summary judgment in favor of Dr. Ballard and the Group. We remand that claim for trial. We further conclude that the trial court properly entered summary judgment in favor of Memorial, as the record contains no evidence that Dr. Ballard failed to satisfy her duty of care with respect to obtaining informed consent.

The judgment of the trial court is affirmed in part and reversed and remanded in part.

BROWN, J., concurs.

BAKER, C.J., concurring with opinion.

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Appellees-Defendants.)

Baker, Chief Judge, concurring.

I fully concur with the majority opinion. I write separately to explain that, in addition to Dr. Hegyi's affidavit, the Ashburns also introduced the affidavit of Dr. Louis Star. Dr. Star attested that, in his opinion, Dr. Ballard violated the standard of care when providing medical treatment to Lynette and Chloe. Had this affidavit not been introduced by the Ashburns, the admissibility of Dr. Hegyi's affidavit would have been irrelevant, inasmuch as it only concerns proximate cause. But because Dr. Star's affidavit concerned breach of the duty of care, I believe that the result reached by the majority is the right one.