Control No. 18040401

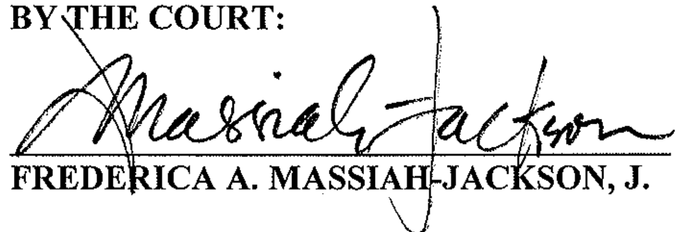
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

Amira N. Barnhill	:	
Plaintiff	:	June Term, 2016
	:	
v.	:	No. 3690
	:	
Phillip B. Storm, M.D.,	:	
The Children's Hospital of Philadelphia,	:	
The Children's Hospital of Philadelphia	:	
Practice Association,	:	
CHOP Clinical Associates, Inc. c/o The	:	
Children's Hospital of Philadelphia,	:	
Children's Health Care Associates, Inc., and	:	
Children's Surgical Associates, Ltd.	:	
Defendants	:	

ORDER

And Now, this 1st day of June, 2018, after consideration of the Motion for Partial Summary Judgment on the Issue of Corporate Negligence filed by Defendant, The Children's Hospital of Philadelphia, and Plaintiff's Response thereto, and for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that Defendant's Motion is **DENIED in its entirety**.

BY THE COURT:



FREDERICA A. MASSIAH-JACKSON, J.

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Amira N. Barnhill **Plaintiff**	:	June Term, 2016
v.	:	No. 3690
Phillip B. Storm, M.D., The Children's Hospital of Philadelphia, The Children's Hospital of Philadelphia Practice Association, CHOP Clinical Associates, Inc. c/o The Children's Hospital of Philadelphia, Children's Health Care Associates, Inc., and Children's Surgical Associates, Ltd. **Defendants**	:	DOCKETED JUN 1 2018 F. BROWN DAY FORWARD

MEMORANDUM in SUPPORT OF ORDER DENYING SUMMARY JUDGMENT ON THE ISSUE OF CORPORATE NEGLIGENCE

MASSIAH-JACKSON, J.

June 1st, 2018

A. INTRODUCTION

Defendant-Children's Hospital of Philadelphia ("CHOP") has filed a Motion for Partial Summary Judgment on the Issue of Corporate Negligence. First, the Defendant asserts that the expert report submitted by Plaintiff-Amira Barnhill is based on speculation and conjecture and is inadmissible. Further, CHOP asserts that the negligence, if any, claimed by Plaintiff was a decision made by Co-Defendant, Phillip B. Storm, M.D., to surgically resect into Ms. Barnhill's brain on December 15, 2014, without the use of intraoperative angiography. Thus, CHOP claims that the Defendant-Hospital is not directly/corporately negligent for an independent action by the physician.

After careful consideration of the issues presented, it is apparent that material facts are in dispute; that sufficient evidence exists to make out a *prima facie* case; and, there is sufficient evidence where a jury might find in favor of the non-moving party. This Court is unable to conclude that Summary Judgment is appropriate as a matter of law.

B. LEGAL DISCUSSION

1. CHOP's Challenge to the Expert Report Goes to Weight Not Admissibility.

Rule 703 of the Pennsylvania Rules of Evidence states:

> "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."

Plaintiff's expert, Eric R. Trumble, M.D., Pediatric Neurologist, described the "institutional failure" and the individual deviations of care in his report, dated March 5, 2018, pages 5-6.

Defendant-CHOP disagrees with the conclusions reached by Dr. Trumble. This challenge to the weight of an expert report is not a viable challenge to its admissibility for purposes of pre-trial dispositive motions. See, Bernstein, Pa. Rules of Evidence, Comments 4-7, Pa. R.E. 703 (Gann).

Rule 705 of the Pennsylvania Rules of Evidence states:

> "If an expert states an opinion the expert must state the facts or data on which the opinion is based."

Contrary to Defendant-CHOP's notion that Dr. Trumble "simply ignores Dr. Storm's testimony", the expert did provide the basis for his conclusions that Dr. Storm's deposition testimony did not make medical sense. The opinions and conclusions of Dr. Trumble are properly based on a review of pre-trial discovery and depositions, medical records and materials which pediatric neurologists reasonably rely on, laboratory and diagnostic films and testing reports, hospital records, nurses' reports, etc.

At trial, through cross-examination and/or hypothetical questions, all counsel will have the opportunity to explore the basis of the expert opinions. The jury will hear and assess conflicting expert opinions from Robert Keating, M.D. who reviewed the same documents and arrived at a different conclusion.

2. **Plaintiff's Expert Opined that CHOP's Institutional Failures Caused or Increased the Risk of Injuries to Ms. Barnhill.**

In Rauch v. Mike-Mayer, M.D., 783 A.2d 815 (Pa. Superior Ct. 2001), the Appellate Court reversed the grant of Summary Judgment. That Court noted in order to present a *prima facie* case of corporate negligence, a plaintiff must demonstrate the following elements, 783 A.2d at 827:

> "1. [the hospital] acted in deviation from the standard of care;
>
> 2. [the hospital] had actual or constructive notice of the defects or procedures which created the harm; and
>
> 3. that the conduct was a substantial factor in bringing about the harm."

In the circumstances present here Plaintiff's expert report **(a)** addresses the duty of CHOP to formulate, adopt and enforce rules and policies to ensure quality care for the patients; **(b)** explains why the institutional failures deviated from standards of acceptable medical care in multiple respects; and further, **(c)** that the actions and inactions of CHOP caused Plaintiff Barnhill's injuries or increased the risk of those injuries. Plaintiff's expert, Dr. Trumble, has satisfied the first and third elements of the test articulated in Whittington v. Episcopal Hospital, 768 A.2d 1144 (Pa. Superior Ct. 2001). See, Rauch, supra, 783 A.2d 828.

Defendant-CHOP then relies on a theory, referencing an unpublished Superior Court Memorandum that Plaintiff-Barnhill must demonstrate that CHOP "**knew** its procedures were being violated or **knew** its procedures were inadequate . . . ." (emphasis in original). Defendant's Memorandum, dated May 18, 2018, page 4.

Again, Rauch v. Mike-Mayer, supra; Whittington v. Episcopal Hospital, supra; and, Welsh v. Bulger, 698 A.2d 581 (Pa. 1997) are instructive and hold that neither systemic nor actual knowledge is mandatory. Plaintiff-Barnhill may establish a *prima facie* case of corporate negligence by demonstrating the constructive knowledge of the Hospital.

The Plaintiff and Dr. Trumble point out that according to Co-Defendant Dr. Storm, CHOP does have its own policies, processes and procedures in place to ensure intraoperative angiography as the standard of care at that institution. Plaintiff's Counterstatement of Facts, dated May 3, 2018, Item 45 states:

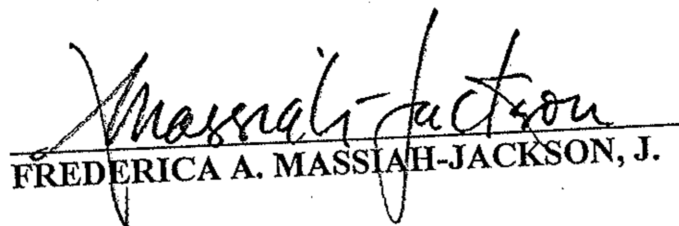
> "45. In the peer review article of which Dr. Storm is an author, Intraoperative cerebral angiogram in arteriovenous malformation resection in children: a single institutional experience, J. Neurosurg Pediatrics 13:222-228 (February 2014), published the very year of Amira's surgery, Dr. Storm and his CHOP co-authors wrote:
>
> > Prior to the availability of intraoperative angiography at our institution, the imaging protocol included diagnostic cerebral angiogram on the first post operative day, followed by additional surgery if required. **Currently intraoperative angiography has replaced early postoperative angiography (within 24 hours) as the standard of care at our institution.**"

Accordingly, whether there were no proper standards in place for intraoperative angiography or whether the physician Co-Defendant failed to conform to the institutional imagining protocols, CHOP is deemed to have received constructive notice of Ms. Barnhill's condition and the negative implications to proceed with surgery on December 15, 2014. Dr. Storm and Hospital nurses and staff must have known there was no intraoperative angiography but they failed to act and re-schedule Ms. Barnhill's operation. CHOP's assertion that Dr. Storm's "independent" decision to proceed without intraoperative angiography relieves the Hospital of liability is meritless. Thompson v. Nason Hospital, 591 A.2d 703, 707 (Pa. 1991). The expert opines that the failure by CHOP to enforce and/or monitor its imaging policies was a deviation of care which caused harm to the Plaintiff. The failure to use intraoperative angiography increased both the risks associated with incomplete resection of the cerebrovascular anomaly and the need for additional surgery.

C. CONCLUSION

For all of the reason set forth above the Motion for Summary Judgment on the Issue of Corporate Negligence is DENIED in its entirety.

BY THE COURT:



FREDERICA A. MASSIAH-JACKSON, J.