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NO. 16-0125

IN THE SUPREME COURT OF TEXAS

DEBRA C. GUNN; OBSTETRICAL AND GYNECOLOGICAL ASSOCIATES, P.A.; OBSTETRICAL AND GYNECOLOGICAL ASSOCIATES, P.L.L.C.

***Petitioners*,**

v.

ANDRE MCCOY, AS PERMANENT GUARDIAN OF SHANNON MILES MCCOY, AN INCAPACITATED PERSON,

Respondent.

On Petition for Review from the
Fourteenth District Court of Appeals, Houston, Texas
No. 14-14-00112-CV

BRIEF OF AMICUS CURIAE, AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, AMERICAN MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The American Medical Association ("Amicus Curiae") appears as Amicus Curiae and respectfully submits its Brief of Amicus Curiae in Support of Petitioner's Petition for Review, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, and urges this Court to reverse the judgment of the court of

appeals and trial court in this case, and render a take-nothing judgment in Petitioners' favor or, alternatively, remand for a new trial.

IDENTIFICATION AND INTEREST OF AMICUS CURIAE

The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including Texas.

The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts. The Texas Medical Association is a member of the Litigation Center.

Amicus curiae have compensated the law firm of Norton Rose Fulbright US, LLP, for the preparation of this brief.

INTRODUCTION

Amicus Curiae, for purposes of this Brief, adopts the Statement of the Case, Statement of Jurisdiction, Issue No. 1 Presented, Statement of Facts, Summary of the Argument and Argument and Authorities contained in the Petitions for Review (hereinafter "Petition") filed by Debra C. Gunn, M.D., Obstetrical and Gynecological Associates, P.A., and Obstetrical and Gynecological Association, P.L.L.C. (hereinafter "Petitioners" or "Dr. Gunn").

ARGUMENT AND JOINDER OF AMICUS CURIAE

In the interest of time and to prevent unnecessary duplication, the AMA files this joinder of the previously filed Brief of the Amici Curiae, the Texas Alliance for Patient Access and Texas Medical Association, and adopts all arguments contained therein by reference. *See Appendix Exhibit 1*.

CONCLUSION AND PRAYER

THEREFORE, Amicus Curiae respectfully urges this Court to reverse the judgment of the lower courts, and render a take-nothing judgment in Petitioners' favor or, alternatively, remand for a new trial.

Respectfully submitted,

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I hereby certify that this Brief of Amicus Curiae was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, as amended) is 398 words.

/s/ Erin E. Lunceford
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I hereby certify that a true and correct copy of the above and foregoing Brief of Amicus Curiae was served via e-filing or email to the following counsel on the 7th day of February:

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APPENDIX

Exhibit 1: Brief of Amici Curiae Texas Alliance for Patient Access and Texas Medical Association

EXHIBIT 1

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BRIEF OF AMICI CURIAE, TEXAS ALLIANCE FOR PATIENT ACCESS AND TEXAS MEDICAL ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Texas Alliance for Patient Access and Texas Medical Association (collectively "Amici Curiae") appear as Amici Curiae and respectfully submit their Brief of Amici Curiae in Support of Petitioner's Petition for Review, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, and urge this Court to reverse

the judgment of the court of appeals and trial court in this case, and render a take-nothing judgment in Petitioners' favor or, alternatively, remand for a new trial.

INTEREST OF AMICI CURIAE

The Texas Alliance for Patient Access ("TAPA") is an association of over 250 health care interests providing medical care to Texas residents. Its members include physicians, hospitals, nursing homes, physician groups, physician liability carriers, and charity clinics, as well as other entities that have an interest in assuring timely and affordable access to quality medical and health care. TAPA seeks to improve access to health care by supporting meaningful and sustainable health care liability reforms and to assure that reforms find their proper interpretation and application in any and all jurisprudence affecting health care liability and liability insurance procurement and costs in the State of Texas.

The Texas Medical Association ("TMA") is a private, voluntary, non-profit association representing more than 48,000 Texas physicians and residents. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention, and cure of disease, and improvement of public health. Today, TMA's maxim continues in the same direction: Physicians caring for Texans. TMA's diverse physician members practice in all fields of medical specialization. TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

Amici curiae have compensated the law firm of Norton Rose Fulbright US, LLP, for the preparation of this brief.

INTRODUCTION

Amici Curiae, for purposes of this Brief, adopt the Statement of the Case, Statement of Jurisdiction, Issue No. 1 Presented, Statement of Facts, Summary of the Argument and Argument and Authorities contained in the Petition for Review (hereinafter "Petition") filed by Debra C. Gunn, M.D., Obstetrical and Gynecological Associates, P.A., and Obstetrical and Gynecological Association, P.L.L.C. (hereinafter "Petitioners" or "Dr. Gunn").

SUMMARY OF THE ARGUMENT

In medical liability cases, the element of proximate cause must be proven by competent, factually supported medical expert testimony, establishing that the healthcare provider's negligence was a substantial factor in causing the plaintiff's injuries. Expert testimony, ungrounded in facts and based solely on assumptions, is not sufficient to support a verdict and could allow a sympathy-minded jury to render a verdict for the plaintiff simply because of a cause and effect relationship. It is very important to healthcare providers in Texas that the standards for the admission of medical causation testimony be followed, which simply did not happen in this case, where the court of appeals found that the medical expert's testimony was speculative, but yet engaged in their own lay-person analysis of the

underlying medical records in order to uphold a jury verdict probably influenced by sympathy.

ARGUMENT AND AUTHORITIES

I. The Importance of Requiring Competent Causation Testimony

Recent history is replete with scientific "theories" that are nothing more than junk science, unsupported by facts or competent expert testimony. This is the very reason why courts cracked down years ago in the original Daubert case and subsequent Texas opinions adopting the Daubert standard, when they held that in order to be admissible, an expert's opinion must be reliable and based on actual, undisputed facts. *Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.d 2d 713, 726 (Tex. 1998); *Merrell Dow Pharms. V. Havner*, 953 S.W. 2d 706, 714 (Tex. 1997). This Court and Texas intermediate courts have repeatedly held that an expert in a medical liability case cannot merely state his conclusions about the statutory elements; he must explain the basis of his statements made regarding causation and link his conclusions to the medical facts. This rule prohibits the jury's reliance on "junk science."

In the context of a medical liability lawsuit, the danger is magnified because, despite jury instructions to "Not let bias, prejudice or sympathy play any part in your decisions," jurors are human and emotional cases, such as the one at issue, tug at their heartstrings and frequently cause a sympathy verdict, especially in the

presence of weak or absent testimony regarding proximate cause. Unfortunately, sympathy can sometimes affect the hearts of the judiciary too, preventing judges, who are also human, from performing an unemotional assessment of the evidence in a complicated case with a unfortunate outcome to the litigants below.

This is the reason why this amicus is filed, to express the amici's concerns about the importance of maintaining the court's role as gatekeeper of the evidence through a focus on insuring that the standards for admission of medical causation testimony in medical liability cases are recognized and adhered to by trial and appellate judges in Texas.

In medical liability cases, expert medical testimony regarding causation is almost always necessary to help the jury understand complicated medical issues. *Guevara v. Ferrer*, 247 S.W.3d 662, 665 (Tex. 2007). This is because complex medical conditions are "outside the common knowledge and experience of jurors." *Id.* Specific cases which have discussed what constitutes a complicated medical condition include *Ins. Co. of N. Am. V. Myers*, 411 S.W.2d 710, 713 (Tex. 1966) (an "inference that a pre-existing tumor was activated and the deadly effects of a malignancy accelerated by an injury" constituted a "question of science determinable only from the testimony of expert medical professionals"); *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982) (medical testimony was required because

"the diagnosis of skull fractures is not within the experience of the ordinary layman"); *Kaster v. Woodson*, 123 S.W.2d 981, 983 (Tex. Civ. App.—Austin 1938, writ ref'd) ("What is an infection and from whence did it come are matters determinable only by medical experts").

A substantial number of medical liability cases that address what constitutes appropriate expert opinions regarding causation are related to the pre-trial filing of sufficient expert reports under Tex. Civ. Prac. & Rem. Code Ann. § 74.351. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001). Importantly, these expert report cases stress the need for experts to be able to link the alleged negligence of the healthcare provider to the resulting patient's injuries, and emphasize that "Courts cannot fill in missing gaps…by drawing inferences or resorting to guess work." *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002). This Court recently held that an "expert must explain the basis of his statements to link his conclusions to the facts." *Columbia Valley Healthcare System v. Zamarripa*, 526 S.W. 3d 453, 460 (Tex. 2017).

As in the case at hand, there are also a number of medical liability cases in which the jury verdict and resulting judgment have been reversed and rendered due to insufficient, conclusory expert testimony on causation because courts understand the importance of their gatekeeper role to insure that juries have not been swayed by the mere existence of an expert. "A claim will not stand or fall on

the mere *ipse dixit* of a credentialed witness." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009) (quoting *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999)). In a very recent case, this Court confirmed that "an expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of the statements to link the conclusions to the facts." *Bustamante v. Pante*, 529 S.W.3d 447, 462 (Tex. 2017).

II. Dr. Brewer's Causation Opinions Were Based on Speculation

A. The Necessity of Connecting the Dots

As discussed at length above, the general rule in medical liability lawsuits is that when dealing with medical conditions that are outside the common knowledge of the jury, such as the interpretation of complicated medical records, expert medical testimony is necessary to prove causation. *Jelinek v. Casas*, 328 S.W.3d 526, 533 (Tex. 2010). This means more than just having an expert explain to the jury how the plaintiff was injured; the expert must "connect the dots" by establishing how the physician's negligence was a substantial factor in bringing about the plaintiff's injury. *Id.* There are very few cases where the courts have allowed lay evidence to establish causation because jurors are not experienced in the nuances of medicine, and might be inclined to impute causation from a simple correlation of events. *Id.* For the most part, expert causation testimony is an absolute necessity in these cases.

It is not enough to simply present expert medical testimony supporting causation. The expert must be able to establish a basis for his/her opinions; that is, provide factual support through the patient's medical records. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009). Another way of categorizing this important function is to evaluate the assumptions made by the expert, along with his/her opinions, to determine whether the expert's opinions are conclusory and have a factual basis. "When an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment." *Burroughs Wellcome Co., v. Crye*, 907 S.W.2d 497, 499-500 (Tex. 1995). When an expert testifies based on assumed facts, the opinions rendered have zero value and cannot support a conclusion as to causation. Testimony that is conclusory or speculative "is not relevant evidence, because it does not tend to make the existence of a material fact more probable or less probable." *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2009).

As the briefs in this case establish, there is no dispute that Ms. McCoy arrived at the hospital having already experienced a placental abruption with the serious condition of disseminated intravascular coagulopathy (DIC). It is also undisputed that Dr. Gunn did not cause either of these conditions, or her later uterine atony. Instead, the Plaintiff's causation theory is that Ms. McCoy lost a

substantial amount of blood volume (33% to 44%) due to Dr. Gunn's negligence in not curing her DIC quickly enough.

Consequently, the dots that had to be connected in this case were (1) that Ms. McCoy sustained extensive uncontrolled bleeding while she was in the ICU until 2:10 p.m. when she arrived in the OR; (2) which was not addressed sufficiently by Dr. Gunn through replacement fluid and blood products; and (3) which therefore caused her heart failure and hypoxic injury during surgery. If the first dot, the loss of substantial blood volume (30% to 44%), is not supported by the evidence, the entire chain fails, as the dots cannot even start to be connected.

B. Dr. Brewer's Testimony Regarding the Amount of Blood Loss Was Speculative

Dr. Brewer's causation opinions are premised on the fact that Ms. McCoy lost 33% to 44% of her blood volume while she was in the ICU until 2:10 p.m.[1] The court of appeals noted that medical records did not specifically delineate the amount of Ms. McCoy's blood loss. More importantly, the court of appeals noted that

[1] The court of appeals fixes Ms. McCoy's time in the ICU as "between 11 a.m. and 1:00 p.m.; however, the medical records establish that Ms. McCoy was present in the ICU until 2:10 p.m. when she arrived in the OR. (DX 1:164; RR13:167).

- The medical records do not list a specific figure of the approximate blood loss experienced by Ms. McCoy in the ICU between 11 a.m. and 1:00 p.m.; and

- Dr. Brewer's estimate of blood loss in the ICU between 11:00 a.m. and 1:00 p.m. was speculative.

Gunn v. McCoy, 489 S.W.3d 75, 92 (Tex. App.—Houston [14th Dist.] 2016). Once the Court found the very basis for Dr. Brewer's testimony was speculative, their inquiry should have stopped; however, that did not happen, as the court then found that despite a lack of evidence supporting the first dot (substantial blood loss), the jury could have independently calculated the amount of Ms. McCoy's blood loss from a close examination of her very detailed and complicated medical records. *Id.*

After finding Dr. Brewer's testimony speculative, the appellate court engaged in a detailed analysis of Ms. McCoy's medical records, attempting to demonstrate how the jury itself could have calculated excessive blood loss, thus operating as the replacement expert witness. *Id.* at 92-93. This discussion is directly adverse to multiple opinions from this Court and Texas intermediary courts, which have held that expert medical testimony is necessary to interpret

medical records and support a finding of proximate cause in a medical liability lawsuit. *Guevara* at. 665.

A proper analysis of medical records is simply beyond the ability of laypersons such as jurors or even justices on the court of appeals. *See Kalteyer v. Sneed,* 837 S.W.2d 848, 854 (Tex. App.—Austin 1992, no writ) (holding that a lay evaluation of medical records might cause a lay jury to find that reported symptoms were actually caused by negligent treatment instead of being symptoms of an underlying disorder, even though an actual medical expert would know that the treatment could not have possibly caused the disorder). Non-physicians or other persons without specialized medical knowledge are not trained to analyze medical records to determine not only what they say…but what they tell us about the patient's condition.

This exercise in reading and interpreting complicated, lengthy medical records is even more risky when you consider that the analysis by the court of appeals did not result in a correct interpretation of the records of blood loss and blood products replaced in the ICU. The ICU nursing records for Ms. McCoy contain an intake and output (I&O) record that was not mentioned in the court's analysis. (DX 1:282). This record estimates blood loss ("EBL") in the ICU at 800ml. (DX 1:282). The ICU record also lists a total transfusion of 850ml blood

products (250ml of platelets and 600ml of PRBCs) during this same time period. (DX 1:282). It appears that these records were not considered by Dr. Brewer or the court of appeals. *See further discussion of court of appeals' erroneous interpretation of Ms. McCoy's records contained on pages 25-29 of Dr. Gunn's Reply Brief on the Merits of Her Petition for Review.* This result is to be expected, because this is why expert testimony is necessary to properly interpret medical records for the jury. Without factually supported, competent expert causation testimony, juries can be swayed toward a sympathy verdict, especially in sad cases like this where parents have lost their baby before birth and a husband has lost his wife forever.

III. This Case Merits Review

This Court should reverse the lower courts' judgments, which conflict with numerous decisions by this Court and Texas intermediate courts, which have uniformly recognized that expert causation opinions that are conclusory, or not properly grounded in facts, do not constitute competent expert evidence that would support a verdict. *See Marathon Corp. v. Pitzner,* 106 S.W.3d 724, 727 (Tex. 2003) (per curiam) (holding that a finding of causation cannot be supported by "mere conjecture, guess, or speculation").

Further, this Court should correct the error of law committed by the court of appeals that is of such importance to the state's jurisprudence that it requires

correction. TEX. GOV'T CODE § 22.001(a)(6). The fact that the court of appeals recognized Dr. Brewer's conclusory, unsupported causation opinion about the amount of blood lost by Ms. McCoy, and then performed their own lay-person analysis of the complicated medical records, is especially troubling for Texas health care providers in future cases.

These issues are important to all Texas health care providers, because in the absence of expert testimony sufficiently explaining causation, juries can let their emotions to take control and allow them to deliver sympathy verdicts, eventually causing an increase in health care liability claims in the state of Texas, and confounding a primary goal of the TMLA: making healthcare in Texas more available and less expensive.

CONCLUSION AND PRAYER

THEREFORE, Amici Curiae Texas Alliance For Patient Access and Texas Medical Association respectfully urge this Court to reverse the judgment of the lower courts, and render a take-nothing judgment in Petitioners' favor or, alternatively, remand for a new trial.

Respectfully submitted,

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