NOTICE
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FOURTH DIVISION
September 27, 2007

No. 1-07-0614

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JULISSA ARIAS, a minor, by her mother, and next friend, HELIA L. ARIAS and HELIA L. ARIAS, individually, Plaintiffs-Appellees, v. CAREY M. BACALAR, M.D., Defendant-Appellant, and HOLY FAMILY MEDICAL CENTER, an Illinois not-for-profit corporation, Defendant.	Appeal from the Circuit Court of Cook County. No. 02 L 6150 Honorable Patricia Banks, Judge Presiding.

ORDER

This appeal arises out of a medical malpractice action brought individually and on behalf of the minor plaintiff, Julissa Arias, by her mother, Helia L. Arias, against defendant Dr. Carey Bacalar. The jury returned a verdict in favor of plaintiff in the amount of $1,030,767.47, of which $100,000 was for the present cash value of Julissa's reasonably certain future medical expenses incurred after the age of 18. Julissa was nine years old at the time of the verdict. The trial court later entered a remittitur of the damage award for future medical expenses incurred after the age

of 18 from $100,000 to $70,106.40. Defendant appeals, contending: (1) the trial court erred by barring plaintiff's expert witness from testifying to causation; and (2) the trial court abused its discretion by granting an inadequate remittitur. We affirm.

This case arises from an injury to Julissa's brachial plexus nerves suffered during her birth on April 25, 1997. Defendant was the attending physician at the delivery of Julissa. The plaintiffs' complaint alleged that defendant had "[f]ailed to use appropriate traction and/or force in the delivery of Julissa Arias" and that he had "[f]ailed to properly utilize appropriate delivery techniques to overcome shoulder dystocia in the delivery of Julissa Arias."

During discovery, defendant disclosed his intention to call biomechanical engineer Michele Grimm to testify to her expert opinions regarding the cause of Julissa's injury. Those opinions included her view that Julissa's brachial plexus injury "was caused due to maternal expulsive forces in combination possibly with normal amounts of physician-applied traction to facilitate delivery." As one basis for her opinions, Dr. Grimm used a computer-based mathematical model to evaluate the mechanisms of injuries and injury risks.

Plaintiffs moved in limine to bar Dr. Grimm from testifying, claiming that Dr. Grimm's methodology did not meet the standard for admissibility set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The trial judge held a Frye hearing, at which Dr. Grimm was the only witness. At the conclusion of the hearing, the trial court granted plaintiffs' motion in limine and barred Dr. Grimm from testifying at trial.

The cause proceeded to trial, and the jury eventually awarded a verdict in favor of plaintiffs in the amount of $1,030,767.47, that later was reduced to $784, 996.10. The verdict

form included a separate line item for the future medical expenses Julissa would incur after she turns 18, for which the jury awarded exactly $100,000. The trial court later ordered a remittitur of those medical expenses to the sum of $70,106.40.

On appeal, defendant first contends that the trial court erred by barring Dr. Grimm from testifying at trial regarding her opinion that Julissa's injury was the result of "maternal expulsive forces in combination possibly with normal amounts of physician-applied traction to facilitate delivery." The trial court determined, after a Frye hearing, that Dr. Grimm's mathematical modeling did not meet the Frye standard for admissibility. Defendant contends that: (1) there was no basis for holding a Frye hearing because the methodology of mathematical modeling used by Dr. Grimm was generally accepted in the scientific community and was not novel; and (2) the evidence at the Frye hearing established that the mathematical modeling used by Dr. Grimm was a generally accepted scientific methodology.

We need not address the merits of defendant's argument, as the error, if any, was harmless where Dr. Grimm's testimony would have been cumulative to the testimony of defense expert Dr. Thomas Meyers. Dr. Meyers testified in relevant part:

"Q. In your obstetrical experience, do all brachial plexus injuries result from shoulder dystocia condition?

A. No.

Q. And why do you say that?

A. Well, the literature shows that probably only 50% of brachial plexus injuries are due to shoulder dystocia, are related to shoulder dystocias, I should say.

Q. What other types of mechanisms are there for a brachial plexus injury?

A. Well, there is--you know, it has been described in Cesarean sections where, obviously, there is no shoulder dystocia because you're not delivering through the bony pelvis. It has been described in breech presentations quite frequently. There [have] been incidences where there has been no evidence of any shoulder dystocia in precipitous labor and delivery, that is, a quick delivery of the baby where there is brachial plexus injuries and no problems with delivery of the shoulders.

* * *

Q. In your opinion, based on everything that you've read here, have you formed an opinion to a reasonable degree of medical certainty regarding when the most likely time is that Julissa Arias sustained the right brachial plexus injury that she did sustain?

A. I feel it probably occurred on the descent of the baby, which was a fairly rapid, and that probably caused the shoulder to get caught under the [symphysis pubis.] And with the maternal contractions and expulsive effort, which can be quite significant, I believe that probably is what was responsible for the stretch on the nerve.

* * *

Q. Why don't you think the most likely scenario is traction on the head by [defendant]?

A. Well, he doesn't describe that he did very much. He just says he did some mild traction, which is what you do on every delivery. And then he describes doing the McRoberts maneuver with suprapubic pressure and relieving it fairly quickly. So I would

think that was just a standard maneuver and it worked, and I would not expect to see a brachial plexus injury due to that."

As Dr. Meyers' testimony, which was admitted at trial, largely mirrored the excluded testimony of Dr.Grimm, any error in the exclusion of Dr. Grimm's testimony was harmless and not cause for reversal. See Hulman v. Evanston Hospital Corp., 259 Ill. App. 3d 133, 148 (1994) (exclusion of cumulative evidence is harmless error.)

Next, defendant contends that the trial court erred by granting an inadequate remittitur of the jury's $100,000 award for Julissa's future medical expenses after she turns 18. An order of remittitur is reviewed for abuse of discretion. Gomez v. The Finishing Company, Inc., 369 Ill. App. 3d 711, 718 (2006).

Julissa's future medical expenses had two components. The first were the expenses she reasonably will incur from age 9 through age 18, for which her parents will be responsible. The second set of expenses were those she reasonably will incur during the remainder of her expected life, which at age 9 is another 72.7 years. Those expenses will include regular physical therapy. Julissa's treating physician, Dr. Rahul Nath, testified as to ranges of frequency for therapy, stating, "[t]ypical recommendations for this population are therapy two to three times per week until age 20, and then three to four times a year thereafter for a lifetime." Julissa's mother testified that the cost of the therapy was $126 per session.

During closing arguments, plaintiffs' attorney averaged the number of therapy visits in arriving at his recommended figures for future medical care. That is, since Dr. Nath testified that therapy would be two to three times per week until age 20, counsel used the average of 2 and

one-half times per week at $126 per session for purposes of future medical expense calculation. Since Dr. Nath testified that therapy would be three to four times per year after the age of 20, counsel used the average of 3 and one-half times per year at $126 per session for purposes of future medical expense calculation. Using these numbers, counsel came up with a figure of $57,141. The jury, however, returned a $100,000 award for future medical expenses. The trial court subsequently remitted the award down to $70,106.40.

Defendant contends that the remittitur was inadequate, as the evidence does not support an award of $70,106.40. Defendant's argument is unavailing, as the evidence supports the trial court's remittitur. Specifically, Dr. Nath testified that therapy would be two to three times per week until age 20. If therapy of three times per week until the age of 20 is used in the calculation of future medical expenses, the figure for Julissa's future medical care from age 18 to age 20 would be $39,009.60, calculated as follows:

Three visits per week = 12.9 visits per month.

12.9 visits per month = 154.8 visits per year.

154.8 visits per year at $126 per visit = $19,504.80 per year.

Thus, future medical care from age 18 to 20 = $19,504.80 x 2 years = $39,009.60

Dr. Nath testified that from age 20 onward, the recommendation for therapy is three to four times per year. Taking the higher frequency number of four visits per year at $126 per visit, multiplied by Julissa's life expectancy of 61.7 years after the age of 20, yields a figure of $31,096.80.

Adding the $39,009.60 of future medical care from age 18 to 20, to the $31,096.80 of

future medical care after the age of 20, yields a total of $70,106.40, which was the amount awarded after the remittitur.

As there was evidence supporting the amount of the remittitur, we find no abuse of discretion.

For the foregoing reasons, we affirm the circuit court.

Affirmed.

O'BRIEN, J., with NEVILLE, P.J., and MURPHY, J., concurring.