

JOYCE A. BLAIR, individually and as the	:	IN THE COURT OF COMMON PLEAS OF
Executrix of the Estate of BRENDA BLAIR,	:	LYCOMING COUNTY, PENNSYLVANIA
deceased, JOSEPH BLAIR, individually, and	:	
CHARLES SZYBIST, ESQ., as Trustee for	:	
Bankruptcy Estate of CATHERINE WINNIE,	:	
Plaintiffs	:	
	:	
vs.	:	NO. 03-00,954
	:	
PANKAJ G. MEHTA, M.D.; WOMEN'S	:	
HEALTH CARE ASSOCIATES, P.C.;	:	CIVIL ACTION
AARON D. SIMMS, M.D.; BUPHINDER S.	:	
DATTA, M.D.; GORDON A. HASKELL,	:	
M.D.; ALHASHIMI HAHER, M.D.; WEST	:	
BRANCH EMERGENCY PHYSICIANS;	:	
NEW JERSEY/PENNSYLVANIA EM-1	:	
MEDICAL SERVICES, P.C.; JOHN/JANE	:	
DOE, SURGEON, DEMETRI T. POULIS,	:	
M.D.; SURGIAL ASSOCIATES OF	:	
WILLIAMSPORT; SUSQUEHANNA	:	
PHYSICIAN SERVICES; THE	:	
WILLIAMSPORT HOSPITAL and	:	
MEDICAL CENTER; and SUSQUEHANNA	:	
HEALTH SYSTEM,	:	
Defendants	:	MOTION IN LIMINE

*Date: December 16, 2005*

**OPINION and ORDER**

Before the court for determination is the Motion to Limit Expert Testimony of Defense Expert Emanuel Rubin filed October 12, 2005. The motion will be denied.

**I. BACKGROUND**

**A. Facts**

The present case arises out of the medical care the decedent, Brenda Blair, received from June 19, 2001 to June 25, 2001. Plaintiffs have alleged a medical malpractice cause of action against Defendant Pankaj G. Mehta, M.D. concerning the medical care for abdominal

pains and problems Dr. Mehta rendered Brenda Blair during that period. The autopsy report indicates Brenda Blair's cause of death as "complications from fulminant inflammatory bowel disease including mesenteric thrombophlebitis with bowel infarction." Plaintiffs attribute Brenda Blair's death to, inter alia, Dr. Mehta's negligent failure to timely diagnose and treat the bowel disease thereby allowing and/or increasing the risk of the bowel becoming necrotic. In defense of the medical malpractice cause of action, Dr. Mehta has produced the expert reports of Emanuel Rubin, M.D. and Paul Collier, M.D.

In his August 4, 2005 report, Dr. Rubin opines that Brenda Blair did not suffer from inflammatory bowel disease or any of its associated complications. Rather, Dr. Rubin opines that Brenda Blair suffered from mesenteric ischemia and that this was the cause of her death. In support of this opinion, Dr. Rubin cites to the findings of the autopsy performed on Brenda Blair. Dr. Rubin states, "The INR of 1.75, demonstration of air in the mesenteric veins, the gross description of thromboses in the distal branches of the mesenteric arteries and veins, the microscopic demonstration of such thromboses, and the presence of ischemic changes of the small bowel and colon all attest to mesenteric ischemia as the cause of this patient's death." Dr. Rubin also states that Brenda Blair did not manifest any extra-intestinal complications of bowel disease.

As to the cause of Brenda Blair's mesenteric thrombosis, rather than the negligent treatment Plaintiffs ascribe to Dr. Mehta, Dr. Rubin states that a precise cause could not be determined at the present time. But as a possible cause, Dr. Rubin states that there exist certain risk factors for hypercoagulability. There are societal risk factors which include the intake of oral contraceptive agents, cigarette smoking, and obesity. There are also genetic risk factors.

In this regard, Dr. Rubin specifically states, “She may also have had inborn risk factors, e.g. factor V Leiden, although a search for this abnormality was not made.” It is this statement to which Plaintiffs object.

### **B. Plaintiffs’ Argument**

Plaintiffs assert that Dr. Rubin may not testify that Brendan Blair may have had inborn factors which put her at risk for hypercoagulability. Plaintiffs assert that the record is devoid of facts which establish that Brenda Blair had any such factors. As such, Plaintiffs argue that Dr. Rubin’s statement is mere speculation and may not be presented to the jury.

### **II. ISSUE**

Whether Dr. Rubin may testify that Brenda Blair may have had inborn factors for hypercoagulability when there are no facts of record that Brenda Blair had any such factors?

### **III. DISCUSSION**

The court will deny Plaintiffs’ motion to limit the expert testimony of Dr. Rubin.<sup>1</sup> Dr. Rubin is not required to base his opinions on facts of record. Accordingly, Dr. Rubin may testify that Brenda Blair may have had inborn risk factors for hypercoagulability.

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<sup>1</sup> A motion in limine is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered. *Commonwealth v. Johnson*, 758 A.2d 166, 169 (Pa. Super. 2000), *app. denied*, 781 A.2d 140 (Pa. 2001); *Meridian Oil & Gas Enterprises, Inc. v. Penn Central Corp.*, 614 A.2d 246, 250 (Pa. Super. 1992), *app. denied*, 627 A.2d 180 (Pa. 1993). The admissibility of evidence is within the sound discretion of the court, and its decision in this regard will not be overturned absent an abuse of discretion *Johnson*, 758 A.2d at 169; *Delpopolo v. Nemetz*, 710 A.2d 92, 94 (Pa. Super. 1998), *app. denied*, 1999 Pa. LEXIS 706. “An abuse of discretion exists when the court has rendered a judgment that is manifestly unreasonable, arbitrary or capricious, or was motivated by partiality, prejudice, bias or ill will.” *Harman v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000).

Generally, an expert witness may not base an opinion on facts which are unsupported by the record. *Collins v. Hand*, 246 A.2d 398, 390 (Pa. 1968); *Kelly v. St. Mary Hosp.*, 778 A.2d 1224, 1227 (Pa. Super. 2001). The court has been unable to locate any Pennsylvania appellate court decision applying this rule to a defense expert. The closest the court came is the decisions in *Spino v. John S. Tilley Ladder Company*, 671 A.2d 726 (Pa. Super. 1996), *aff'd*, 696 A.2d 1169 (Pa. 1997), and *Neal by Neal v. Lu*, 530 A.2d 103 (Pa. Super. 1987).

In *Spino* and *Neal*, the Superior Court addressed the issue of whether a defense expert witness was required to give his opinion to a reasonable degree of certainty for it to be admissible. The Superior Court held that there was no such requirement of a defense expert witness. *Spino*, 671 A.2d at 738; *Neal*, 530 A.2d at 110. In both cases, the Superior Court found that the opinions rendered by the defense experts were based upon facts in the record. *Spino*, 671 A.2d at 738; *Neal*, 530 A.2d at 110. As such, the Superior Court did not address the issue presently before the court, but the principles relied upon by the Superior Court and its reasoning in those cases is instructive on the matter.

The rule requiring an expert witness to base his opinion on facts that are supported by the record is designed to insure that the expert opinion assists the trier of fact. The purpose of expert testimony is to assist the trier of fact in understanding the evidence or determining a fact or issue in the case. *Collins*, 246 A.2d at 390; *Pantiz v. Behrand*, 632 A.2d 562, 565 (Pa. Super. 1993), *app. denied*, 653 A.2d 1232 (Pa. 1994). A trier of fact must make its determination of the issues based upon the facts before it. In cases requiring expert testimony, the existence of facts and/or the relationship of facts to one another are beyond the knowledge of the average lay person. In such a case, the expert witness uses his specialized knowledge to

give meaning to the facts before the trier of fact, and thereby, enable the trier of fact to reach a proper determination of the issues.

An expert opinion not based on the facts before the trier of fact fails to accomplish this objective. An expert opinion not based on facts of record gives meaning to facts that are beyond the purview of the trier of fact. As such, the expert opinion in no way assist the trier of fact with the task at hand – determining what the facts before it actually mean as would relate to the issues in the case.

The burden of assisting the trier of fact in determining the facts and issues of a case rests with the party asserting those facts and issues. Generally, the party asserting or pleading a fact or issue has the burden of proving that fact or issue. *Commonwealth, Laurelton Ctr., Dep't of Pub. Welfare v. L & L Boiler Maintenance, Inc.*, 407 A.2d 98, 99 (Pa. Cmwlt. 1979); *Hervitz v. New York Ins. Co.*, 52 A.2d 368, 369 (Pa. Super. 1947). As such a defendant in a civil matter is usually not required to prove his innocence of the alleged wrong doing. *Spino*, 671 A.2d at 738; *Neal*, 530 A.2d at 109. “Absent an affirmative defense or a counterclaim, the defendant’s case is usually nothing more than an attempt to rebut or discredit the plaintiff’s case.” *Spino*, 671 A.2d at 738 (quoting *Neal*, 570 A.2d at 109-10). Evidence that rebuts or discredits the plaintiff’s case is not necessarily proof. *Spino*, 671 A.2d at 738; *Neal*, 570 A.2d at 110.

Thus, Dr. Rubin may testify that Brenda Blair had inborn factors for hypercoagulability even though the facts of record do not support that assertion. Plaintiffs bear the burden of

establishing facts to make out their medical malpractice cause of action against Dr. Mehta.<sup>2</sup> Plaintiffs bear the burden of assisting the trier of fact in determining those facts. Dr. Mehta does not have a similar burden. Dr. Mehta has no obligation to assist the trier of fact in resolving an issue or determining a fact. That obligation rests squarely on Plaintiffs.

Accordingly, Dr. Rubin may testify that Brenda Blair may have had inborn risk factors for hypercoagulability.

#### **IV. CONCLUSION**

The motion in to limit expert testimony is denied.

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<sup>2</sup> In order to establish a medical malpractice cause of action, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached that duty; (3) that the breach of that duty was a proximate cause in bringing about the harm suffered; (4) and that the plaintiff suffered harm. *Mitzelfelt v. Hamrin*, 584 A.2d 888, 891 (Pa. 1990); *Rauch v. Mike-Mayer*, 783 A.2d 815, 824 (Pa. Super. 2001). In a medical malpractice case, a plaintiff is generally required to "... establish, to a reasonable degree of medical certainty, that the acts of [the defendant] deviated from acceptable medical standards and such deviation was a proximate cause of the harm suffered." *Mitzelfelt*, 584 A.2d at 891; *Yacoub v. Lehigh Valley Med. Assocs., P.C.*, 805 A.2d 579, 591 (Pa. Super. 2002).

**ORDER**

It is hereby ORDERED that Plaintiffs Motion to Limit Expert Testimony of Defense Expert Emanuel Rubin filed October 12, 2005 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: C. Scott Waters, Esquire  
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