

FILED
Court of Appeals
Division III
State of Washington
4/1/2019 3:15 PM
NO. 362591

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

CAYDEN RICHTER, a minor, by and through his natural parents,
SARAH ANN RICHTER AND TYSON RICHTER, SARAH ANN
RICHTER, individually, and TYSON RICHTER, individually,

Appellants/Plaintiffs,

v.

KEVIN HARRINGTON, M.D., and GENERATIONS OB/GYN, PLLC
et al.,

Respondents/Defendants.

Appeal from the Superior Court of Washington
for Yakima County
(Cause No. 15-2-02506-5)

BRIEF OF APPELLANTS

SIMS G. WEYMULLER,
WSBA #33026
SCHROETER, GOLDMARK
& BENDER
810 Third Avenue
Seattle, WA 98104
(206) 622-8000

KENNETH M LEVINE,
pro hac vice
KENNETH M. LEVINE &
ASSOCIATES, LLC
32 Kent Street
Brookline, MA 02446
(617)566-2700

TABLE OF CONTENTS

I. INTRODUCTION	3
II. ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE	4
a. Parties and Claims	4
b. Factual Background	5
i. Cayden's labor and delivery	5
ii. Cayden's injury	7
c. Juror Selection	9
IV. ARGUMENT	13
a. Standard of Review	13
b. The Trial Court should have excluded every juror for cause that had a child delivered by Dr. Harrington because a juror who underwent the same event, child birth, attended by Dr. Harrington could simply not remain unbiased.	15
c. Defendants' expert Dr. Scher was allowed to testify as to expert opinions that he was unqualified to give.	21
V. CONCLUSION	22

TABLE OF AUTHORITIES

Cases

<i>Family Medical Bldg, Inc. v. State</i> , 37 Wn. App. 662, 684 P.2d 77 (1984)	16-17
<i>Pon Kwock Eng v. Klein</i> , 127 Wn. App. 171, 110 P.3d 844 (2005)	21
<i>State v. Aguirre</i> , 168 Wn.2d 350, 229 P.3d 669 (2010).	14
<i>State v. Aiken</i> , 72 Wn.2d 306, 434 P.2d 10 (1967)	13-14
<i>State v. Arndt</i> , 5 Wn. App. 2d 341, 426 P.3d 804 (2018)	14
<i>State v. Finlayson</i> , 69 Wn. 2d 155, 417 P.2d 624 (1966)	16
<i>State v. Gilcrist</i> , 91 Wn.2d 603, 590 P.2d 809 (1979)	13-14
<i>State v. Rohrich</i> , 149 Wn.2d 647, 71 P.3d 638 (2003)	14
<i>State v. White</i> , 60 Wn.2d 551, 374 P.2d 942 (1962)	19
<i>White v. Kent Medical Ctr.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991)	21

Statutes

RCW § 2.36.100	16
RCW § 4.44.170	16-17

Treatises

A. K. Tegland, Wash. Prac., Evidence (3d ed. 1989)	21
--	----

I. INTRODUCTION

This is a medical malpractice case involving a permanent injury to Plaintiff Cayden Richter's brachial plexus nerves at birth. Plaintiffs alleged that Defendant Kevin Harrington, M.D. deviated from the standard of care in utilizing excessive lateral traction on Cayden Richter's head and neck in the presence of a shoulder dystocia. This case was tried before a Jury in Yakima County Superior Court between June 11, 2018 and June 19, 2018 and the Jury found in favor of Dr. Harrington by a vote of ten to two.

On appeal, Plaintiffs assert that the Trial Court erred in not rejecting for cause each potential juror that had an infant delivered in the past by Dr. Harrington and for allowing one of Dr. Harrington's expert witnesses, a pediatric neurologist, to give obstetrical opinions about the standard of care that he was not otherwise qualified to give.

II. ASSIGNMENTS OF ERROR

Plaintiffs respectfully state that the Trial Court made the following errors in the trial of this matter:

1. The Trial Court erred in not excluding all potential jurors that had children delivered by the Defendant Dr.

Harrington for cause, and that the Trial Court's failure to do so deprived Plaintiffs of a fair trial; and

2. The Trial Court erred in allowing one of Defendant Dr. Harrington's expert witnesses, a pediatric neurologist, to testify as to obstetrical opinions even though he had no personal knowledge of the facts to support these opinions.

III. STATEMENT OF THE CASE

a. Parties and Claims

This is a medical malpractice case involving an injury to Cayden Richter, during birth. Plaintiffs Sarah Ann Richter and Tyson Richter are husband and wife. ARP 108.¹ Cayden Richter² is their son. ARP 108. Cayden suffered a permanent left brachial plexus injury at birth. BRP 275. Defendant Kevin Harrington, M.D. was the

¹ The Verbatim Report of Proceedings was transcribed by two separate transcribers, Joan A. Anderson and Patricia Bell, and each transcriber has separate pagination. References to "ARP" refer to the Verbatim Report of Proceedings transcribed by Joan A. Anderson and references to "BRP" refer to the Verbatim Report of Proceedings transcribed by Patricia Bell. References to Plaintiffs' Designation of Clerk's Papers are "CP."

² For reference, when Plaintiffs are referenced individually, their respective first names will be used.

delivering obstetrician and Defendants Generations OB/GYN, PLLC is his medical practice. BRP 279.

b. Factual Background

This is a birth injury case in which the minor Plaintiff, Cayden Richter, was caused to suffer a severe birth injury to his left brachial plexus (the nerves running from the cervical spine to his upper extremity). BRP 290. Plaintiffs alleged that Cayden's permanent left brachial plexus injury occurred as a result of a birth trauma inflicted upon him by the Defendant obstetrician, Dr. Kevin Harrington, during Cayden's delivery in April 2013. CP 10.

i. Cayden's labor and delivery.

Sarah was 25 years old, gravita 2 para 1, with an estimated delivery date of April 8, 2013. CP 213. She was followed by Dr. Harrington at Generations OB-GYN. CP 213. She had her first prenatal visit on September 24, 2012 at 11.6 weeks gestation. CP 213. Her pre-pregnancy weight was reported as 150 pounds and she gained approximately 28 to 30 pounds during this pregnancy. CP 213. She had a one hour 50 gm glucose tolerance test on August 30, 2013 which was 107 (60-140). CP 213. She had another one hour 50 gm glucose tolerance test on January 21, 2012 which was 147 (60-140). CP 213. She had a three-hour glucose test on

January 28, 2013 with values of 150, 135 and 135 at 1, 2, and 3 hours. CP 213. Her fasting result was 105. CP 213. On February 26, 2013, Dr. Harrington obtained informed consent for a trial of labor after cesarean. CP 213.

On April 12, 2013, Sarah's nonstress test was reactive and an ultrasound to determine her amniotic fluid index and estimated fetal weight was scheduled for April 15, 2013. CP 213. On April 15, 2013, the estimated fetal weight by ultrasound was 8.5 pounds (3,944 grams) with decreased fluid, but deepest pocket of 3.2 centimeters. CP 213. Sarah was instructed to make an appointment for delivery. CP 213. Dr. Harrington performed an induction assessment for postdates with a score of 9. CP 213.

On April 19, 2013, Sarah presented to Yakima Valley Memorial Hospital for a trial of labor after discussion. CP 213. On admission, she was 1-2 cm dilated, 75% effaced, with a vertex station of -1. CP 213. She was allowed to go into spontaneous labor with artificial rupture of membranes. CP 213. She progressed to complete dilatation and began pushing at 7:30 pm. C 213.

Dr. Harrington noted that the baby was initially in an occiput posterior presentation ("OP") but had rotated over the course of the second stage. CP 213. On delivery of the head, it was apparent that

there was a shoulder dystocia. CP 213. Dr. Harrington noted this was managed primarily with McRoberts' maneuver and the shoulder dystocia lasted 50 seconds. CP 214. Sarah was encouraged to push. CR 214. At 9:07 pm, Sarah delivered a 9 pound, 13 ounce (4,456 gram) male infant with Apgar scores of 6 and 9. CP 214. There was a second-degree midline laceration, which was repaired. CP 214. The infant had facial bruising and left arm injury. CP 214.

ii. Cayden's injury.

The brachial plexus is a series of nerves that emanate from the neck and run beneath the clavicle. BRP 269-70. These nerves control all motion and all sensation. BRP 269. The nerve roots are called C5 -- "C" being cervical or in the neck -- C6, C7, C8, and T1. "T" refers to thoracic. BRP 270. These brachial plexus nerves come out with the spinal column. BRP 270. The C5 and C6 nerves are considered the "upper trunk" and control the upper arm, as well as the elbow. BRP 271. The C7, C8, and T1 nerves control hand function and lower arm function. BRP 271. These nerves utilize myelin to allow for the conduction of nerve impulses from the brain to the spinal cord to control activities. BRP 271. While the brachial plexus nerves can stretch, traction causes a stretch that exceeds the nerve's ability to withstand such a stretch. BRP 300.

A neonatal brachial plexus injury occurs in approximately one to two per thousand births. BRP 265. Severe brachial plexus injuries are ten times less common than the typical brachial plexus injury. BRP 265.

Cayden had a permanent injury to his C5 and C6 nerves. BRP 275. After birth, Cayden had numerous remedial procedures done to minimize the injury to the extent possible. BRP 286. Cayden was casted for over seven weeks in an attempt to immobilize the shoulder. BRP 286. Cayden then underwent Botox injections in an attempt to relax muscles to assist the shoulder socket in recovery. BRP 286. Cayden then underwent a nerve graft surgery at nine months of age, which required him to be in a cast for an additional two months. BRP 287.

Despite these procedures, Cayden continued to suffer an abnormality in his C5 and C6 brachial plexus nerves. BRP 288. Cayden cannot lift his arm completely over his head. BRP 288. Cayden can only lift his left arm approximately 90 degrees, versus 180 degrees with his right arm. BRP 288. Cayden has a scapula (where the shoulder bone wings out because the surrounding muscles are too weak to maintain it in a stable location) in the left shoulder. BRP 289-90. Cayden also has some atrophy on his left

arm, which will likely lead to an arm length discrepancy as he grows.
BRP 290.

The permanent injury Cayden suffered at the C5 and C6 nerves will cause him future limitations on activities of daily living.
BRP 292. Cayden will likely be unable to undertake occupations that require bilateral strength in both arms, such as lifting heavy objects and climbing a ladder. BRP 291.

c. Juror Selection.

During juror selection, numerous potential jurors indicated during voir dire that they were familiar with Dr. Harrington or partners at Generations OB/GYN, LLC, Dr. Harrington's medical practice.
BRP 48-49, 52-53, 57, 61, 85, 89, 98, 103-05, 119.

In addition to being familiar with Dr. Harrington, multiple potential jurors had been patients of Dr. Harrington, and specifically had had children delivered by Dr. Harrington. Juror No. 25³, who had seat number 10 on the Jury, was seated even though Plaintiffs' counsel moved to have him excused for cause. BRP 54-55, 172.

THE COURT: [...] So apparently Dr. Harrington delivered your son.

JUROR NO. ?: Yes, he delivered my second son.

THE COURT: Okay, and when was that?

³ Juror No. 25 is referred to in the transcript as "Juror No. ?."

JUROR NO. ?: 14 years ago.

THE COURT: Okay. And is that going to cause you to be less than fair and impartial in this matter?

JUROR NO. ?: No.

THE COURT: Okay. Are you confident of that?

JUROR NO. ?: Yes.

THE COURT: Okay. All right. Mr. Levine, do you have any inquiries?

MR. LEVINE: Oh, thanks. Good afternoon, sir, how are you? (Unintelligible). Just -- you know, when we start these cases we like to have -- kind of a level spot (inaudible -- coughing) starts at the same zero (inaudible).

JUROR NO. ?: Yes.

MR. LEVINE: Do you think the fact that you had -- now Dr. Harrington delivered your son, were you happy with the care he gave to you?

JUROR NO. ?: Yes, I was very happy.

MR. LEVINE: All right.

JUROR NO. ?: Yes.

MR. LEVINE: So, the fact that he delivered your son and you were happy and do you think he's a good doctor?

JUROR NO. ?: Uh, yes.

MR. LEVINE: Do you think he's good competent doctor?

JUROR . ?: Uh, at the time, yes.

MR. LEVINE: Right.

JUROR NO. ?: Yes.

MR. LEVINE: But you'd be happy -- you'd have to sit at the trial and hear allegations that he was not a good doctor in this case.

JUROR NO. ?: Correct, I understand.

MR. LEVINE: All right. So don't you think that the fact that, you know, you're here to sit in judgment of someone who you already believe is a good doctor, has already given you good care. You don't think that puts you a little bit on the other side of flat?

JUROR NO. ?: Uh, I could agree with that a little bit, yeah.

BRP 51-52.

Despite Juror No. 25 being seated on the Jury, multiple other potential jurors that Dr. Harrington had delivered one or more of their children were excused for cause, with the Trial Court distinguishing the excused jurors from Juror No. 25 on the basis that they had more recent interactions with Dr. Harrington or his medical practice.

THE COURT: [] So Dr. Harrington delivered both of your children, is that correct?

JUROR NO. 56: That's correct.

THE COURT: Okay, and how old is the youngest?

JUROR NO. 56: 13.

THE COURT: Okay. So your most recent experience was 13 years ago?

JUROR NO. 56: Correct.

MR. LEVINE: What we're trying to figure out is who should be the best jurors for this case, you know, sometimes people are good in one case and not others. So obviously you understand this case

concerns issues of allegations of malpractice with Dr. Harrington and he delivered both your kids, right?

JUROR NO. 56: Right.

MR. LEVINE: Yeah, and you like him, he's a good guy. Did a good job for you, right?

JUROR NO. 56: He did a good job.

MR. LEVINE: All right. And he's a good doctor, right?

JUROR NO. 56: As far as I know he's a good doctor.

MR. LEVINE: He was good for you.

JUROR NO. 56: Correct.

THE COURT: Right. I'm just saying it's -- do you think it's -- I mean, obviously if you were in my shoes, you'd probably ask these questions, I'm sure, too. I mean, it's just hard to think that someone who's -- I mean, you like him, don't you? You think he's pretty (inaudible) --

JUROR NO. 56: I don't mean this to sound really bad but I don't have a lot of memories with him just because it's been so long ago and it was very brief, but I don't dislike anybody here.

BRP 80-82, 85.

THE COURT: Okay. All right. So about your questionnaire. Dr. Harrington delivered a child for you four years ago.

JUROR NO. 57: Correct.

THE COURT: Okay. Have you had any ongoing relationship with his medical practice or --

JUROR NO. 57: No, I haven't been back.

THE COURT: Okay. The child was born in 2014, your youngest child?

JUROR NO. 57: Yes.

THE COURT: Okay, which -- was the fact that Dr. Harrington delivered your daughter four years ago, is that going to affect your ability to be fair and impartial in this matter?

JUROR NO. 57: No.

THE COURT: Are you confident of that?

JUROR NO. 57: I'm very confident, yes.

BRP 88. Both Juror No. 56 and Juror No. 57 were excused for cause. BRP 87, 91.

IV. ARGUMENT

a. Standard of Review

Plaintiffs were denied a fair trial at the Trial Court through being denied challenges for cause to prospective jurors to cause and being forced to undertake a trial in which one member of the Jury had Dr. Harrington deliver one of his children. As the trial of this matter involved an identical medical event, the delivery of a newborn infant, as the medical event in which one juror had already observed Dr. Harrington undertaking, Plaintiffs were denied a fair trial. "The granting or denial of a challenge for cause is within the discretion of the trial judge, and will not constitute reversible error in the absence

of a manifest abuse of discretion." *State v. Gilcrist*, 91 Wn.2d 603, 611, 590 P.2d 809 (1979), *quoting State v. Aiken*, 72 Wn.2d 306, 350, 434 P.2d 10 (1967), *rev'd on other grounds*, 403 U.S. 946 (1971).

In addition, one of Dr. Harrington's expert witnesses was allowed to give expert testimony as to obstetrical opinions, even though he was unqualified to render this testimony and admitted on cross-examination that he had no independent knowledge of the testimony that he was giving. Trial court decisions regarding expert testimony are reviewed for abuse of discretion and will not be disturbed unless the Trial Court "acts on unreasonable or untenable grounds." *State v. Aguirre*, 168 Wn. 2d 350, 359, 229 P.3d 669 (2010). "A "decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Arndt*, 5 Wn. App. 2d 341, 347, 426 P.3d 804 (2018), *quoting State v. Rohrich*, 149 Wn. 2d 647, 654, 71 P.3d 638 (2003) (internal quotations omitted).

- b. The Trial Court should have excluded every juror for cause that had a child delivered by Dr. Harrington because a juror who underwent the same event, child birth, attended by Dr. Harrington could simply not remain unbiased.**

The Trial Court allowed Juror No. 25 to sit on the Jury and deliberate as to the verdict to be rendered in the trial of this matter despite that the Defendant obstetrician Dr. Harrington delivered one of his children 14 years prior to the trial. BRP 172. This is despite that Plaintiffs' counsel sought to excuse them for cause. BRP 54-55. During voir dire, numerous prospective jurors either knew Dr. Harrington and/or one of his partners in Generations OB/GYN. Of the numerous jurors who knew Dr. Harrington or Generations OB/GYN, at least 12 prospective jurors had a doctor/patient relationship with Dr. Harrington and/or one of his partners in Generations OB/GYN. BRP 48-49, 52-53, 57, 61, 85, 89, 98, 103-05, 119.

The Trial Court acknowledged that the fact that Defendant Dr. Harrington delivered a juror's child as a basis for excusing a juror (BRP 94), but arbitrarily made a distinction between the length of time between the time Defendant Dr. Harrington delivered the child and whether the juror could be impartial. Here, the arbitrary distinction (which led to the Trial Court finding a four year period of

time made a juror removable for cause but that a fourteen year period did not) allowed a juror to sit on the Jury based on the time that Defendant Dr. Harrington delivered the juror's child even though the Trial Court implicitly acknowledged that the fact that Defendant had delivered a juror's child could be a basis for removal from the Jury venire. Instead, the Trial Court should have removed all of the jurors that Defendant Dr. Harrington had delivered babies for from the Jury venire for cause as Plaintiff sought during jury selection, and the fact that a juror on the panel had a baby delivered by Defendant prejudiced Plaintiff from obtaining a fair trial.

The purpose "of the jury selection statutes is to provide 'a fair and impartial jury.'" *State v. Finlayson*, 69 Wn. 2d 155, 157, 417 P.2d 624 (1966). RCW § 2.36.100(1) allows the Trial Court to excuse a person from jury service for "any reason deemed sufficient to the court." RCW §4.44.170(1) states that [f]or such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias." While the patient/doctor relationship is not specifically delineated in RCW §2.36.100(1), at least one court has implied that a doctor/patient relationship could give rise to bias in litigation against a physician for an injury. In *Family Medical Bldg, Inc. v. State*, 37 Wn. App. 662,

684 P.2d 77 (1984), *aff'd in part and rev'd in part*, *Family Medical Bldg., Inc. v. Dept. of Social & Health Services*, 104 Wn. 2d 105, 702 P.2d 459 (1985), the court stated that a “juror's faith in his doctor's medical judgment does not translate into unquestioned faith in the doctor's business judgment.” *Id.* at 675. However, if there were facts that suggested that the juror's faith in the doctor's medical judgment demonstrated bias, that juror could be excluded for cause pursuant to RCW § 4.44.170(2). *Id.* at 675-76.

Simply put, the Trial Court abused its discretion by arbitrarily determining a length of time by which a potential juror could no longer be bias in rendering a verdict in this case. While the Trial Court was correct that a sufficient reason to excuse a person from juror service was because that person had a child previously delivered by Dr. Harrington, the Trial Court's arbitrary decision to determine the length of time in which a potential juror could have waited between the time in which Dr. Harrington delivered their child and the time in which any residual bias remained prejudiced Plaintiffs. The Trial Court was not faced with a choice between potential jurors that thought they could be fair versus jurors who believed their experience might cause them to be biased due to the time elapsed between Dr. Harrington delivering a potential juror's child, because

the potential juror excused for cause because Dr. Harrington delivered their child four years prior to trial still answered in voir dire that they believed they could be impartial. BRP 88. The Trial Court simply decided that a certain period of time eliminated any worry of bias, with no explanation as to what length of time was appropriate, and it resulted in one juror sitting on the Jury that had the experience of Dr. Harrington delivering their child without complication. That experience, however long ago, necessarily must have influenced that juror in rendering the verdict as the juror had specific experience involving Dr. Harrington in a similar factual scenario to the one detailed at trial. Because of this, the Trial Court erred in not excluding all of the persons from juror service that Dr. Harrington had delivered the children of.

The fact that a juror sat on the Jury and determined whether Dr. Harrington was negligent for childbirth was a significantly prejudicial to Plaintiffs, particularly as the Jury's verdict was not unanimous and the juror that had an infant previously delivered by Dr. Harrington voted against Plaintiffs. ARP 584. This trial involved whether Defendant Dr. Harrington deviated from the standard of care in the delivery of Cayden after the occurrence of a shoulder dystocia. There was ample evidence at trial that Defendant Dr. Harrington

deviated from the standard of care during the delivery of Cayden through the use of excessive lateral traction on Cayden's neck after the occurrence of a shoulder dystocia and that that excessive traction caused Cayden's permanent brachial plexus injury. It would have been impossible for any juror to be able to completely ignore that Dr. Harrington successfully and safely delivered their child while considering the evidence that was presented to the Jury. It would also have been impossible for a juror not to look past the reality that Dr. Harrington delivered their child safely when considering the evidence.

A juror must "aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court." *State v. White*, 60 Wn.2d 551, 569, 374 P.2d 942 (1962). The Trial Court understood the type of implicit bias that a potential juror would have in rendering a verdict against a physician that delivered a juror's child, and allowed multiple challenges for cause on those grounds. By arbitrarily deciding that one juror that Dr. Harrington had delivered their child 14 years before trial could look past the implicit bias that the juror would have simply by virtue of Dr. Harrington delivering a child without any injury, particularly the type of injury suffered by

Cayden, demonstrated an abuse of discretion and because of it Plaintiffs were denied a fair trial.

c. Defendants' expert Dr. Scher was allowed to testify as to expert opinions that he was unqualified to give.

Over objection, an expert for Defendants was allowed to give a standard of care opinion as to a specialty of medicine, obstetrics, that the expert did not specialize in, did not practice in, and had no more knowledge of than any medical student.

Mark Scher, M.D. was noticed as an expert witness as a pediatric neurologist and is not an obstetrician. CP 34-35. Dr. Harrington noticed two experts as to the standard of care for an obstetrician in delivering an infant in the face of a shoulder dystocia, R. Steven Brisbois, M.D. and Aaron Caughey, M.D. CP 32-33. Despite not being noticed as an expert witness with respect to the standard of care and being unqualified to giving an expert opinion on obstetrics, the Trial Court allowed Dr. Scher to give testimony as to an obstetrical opinion that Cayden was injured during his movement in the birth canal during the delivery from the occiput posterior position to an occiput anterior position. ARP 328. Dr. Scher was also allowed to testify as to his opinions related to the length of the shoulder dystocia being a "very short" interval of time with respect to

the possibility that Cayden was injured by Dr. Harrington after the shoulder dystocia occurred. ARP 332.

“So long as a physician with a medical degree has sufficient expertise to demonstrate familiarity with the procedure or medical problem at issue, [o]rdinarily [he or she] will be considered qualified to express an opinion on any sort of medical question, including questions in areas in which the physician is not a specialist.” *White v. Kent Medical Ctr.*, 61 Wn. App. 163, 173, 810 P.2d 4 (1991), quoting A. K. Tegland, Wash. Prac., Evidence § 290[2], at 386 (3d ed. 1989) (internal quotations omitted). “It is the scope of a witness's knowledge and not artificial classification by professional title that governs the threshold question of admissibility of expert medical testimony in a malpractice case,” but an expert witness must be “knowledgeable as to the medical problem at issue.” *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005).

Dr. Scher was allowed to express these expert opinions even though he admitted on cross-examination that he has no understanding of the movement of an infant down the birth canal during the process of labor. ARP 342. Because Dr. Scher admitted he was not a specialist in obstetrics when he testified as to his belief that Cayden could have been injured and as to his belief that the

length of the shoulder dystocia suggested Dr. Harrington could not have caused Cayden's injury, Dr. Scher testified as to knowledge he did not personally have and the Trial Court should not have let him testify to these opinions. This was prejudicial both because Dr. Scher testified as to facts he did not understand and opinions he was not qualified to give, but also because Dr. Harrington had two other expert witnesses testify as to obstetrical opinions. When the Trial Court overruled Plaintiffs' objection and allowed Dr. Scher to be the third expert witness to testify as to obstetrical opinions, it prejudiced Plaintiffs by letting the Jury hear from three separation expert witnesses almost identical testimony as to the length of the shoulder dystocia. Dr. Harrington also had two obstetrical experts that could testify as to the processes of labor.

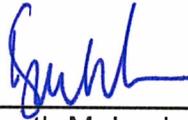
Because Dr. Scher lacked sufficient expertise to comment as to the nature in which he believed Cayden could have been injured, he should not have been allowed to testify and the Trial Court abused its discretion in allowing him to testify as to these opinions.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate the judgment in favor of Defendants in this case and remand it for a new trial.

DATED this 1st day of April, 2019.

KENNETH M. LEVINE & ASSOCIATES, LLC



Kenneth M. Levine, admitted *pro hac vice*
32 Kent Street
Brookline, MA 02445
Phone: (617) 566-2700
Email: klevine@klevinelaw.com

And

SCHROETER, GOLDMARK & BENDER
Sims G. Weymuller, WSBA #33026
810 Third Avenue
Seattle, WA 98104
Phone: (206) 622-8000
Email: sims@sgb-law.com

Counsel for Plaintiffs

SCHROETER GOLDMARK BENDER

April 01, 2019 - 3:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36259-1
Appellate Court Case Title: Sarah and Tyson Richter, et al v. Kevin Harrington, M.D., et al
Superior Court Case Number: 15-2-02506-5

The following documents have been uploaded:

- 362591_Briefs_20190401130551D3447159_0860.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 2019-04-01 Brief of Appellants.pdf

A copy of the uploaded files will be sent to:

- colettef@tkglawfirm.com
- klevine@klevinelaw.com
- lawoffice@klevinelaw.com
- leslievg@tkglawfirm.com
- mkm@tkglawfirm.com
- mwhalen@sgb-law.com
- mwiller@klevinelaw.com
- smiller@klevinelaw.com

Comments:

Sender Name: Marie Whalen - Email: whalen@sgb-law.com

Filing on Behalf of: Sims G Weymuller - Email: sims@sgb-law.com (Alternate Email:)

Address:
810 Third Ave.
Suite 500
Seattle, WA, 98104
Phone: (206) 622-8000

Note: The Filing Id is 20190401130551D3447159