

# Post Script

a publication of Post & Post LLC

February 2017

## In This Edition:

The Superior Court Revisits and Affirms The Standards for The Admissibility of Expert Witness Testimony;

and,

\$45 Million Dollar Verdict Awarded Against Physicians and Abusive Father in Child Abuse Case.



## The Superior Court Affirms Higher Standard of Admissibility for Expert Testimony

In a recent case, Nobles v. Staples, Inc., the Pennsylvania Superior Court affirmed its earlier opinion of Snizavich v. Rohm and Haas Company, regarding the standards for the admissibility of expert witness testimony.

In these cases, the Superior Court held that an expert witness must rely upon and apply scientific authority as a basis for his conclusions, in addition to the customary reliance upon the expert's own training and experience.



In the initial case of Snizavich, the plaintiffs alleged that Mr. Snizavich had developed brain cancer from exposure to chemicals at a Rohm & Haas facility. Mr. Snizavich had worked as a contractor at the facility for many years. Rohm & Haas moved for summary judgment, alleging that the plaintiffs' expert causation testimony was insufficient. Rohm & Haas filed a Frye motion to preclude the testimony of plaintiffs' causation expert, Thomas Milby, M.D.

Dr. Milby's opinion of causation relied almost entirely upon a University of Minnesota study. This study found a statistical correlation between brain cancer and chemical plant workers. However, the study was inconclusive as to the actual cause of brain cancer, and the actual relationship between chemical exposure and the increased occurrence of brain cancer. Dr. Milby did not cite to any other scientific studies or bases upon which to base his opinion.

Judge Gary DiVito, within the Philadelphia County Court of Common Pleas, precluded Dr. Milby's testimony and granted summary judgment for Rohm & Haas.

In his opinion, Judge DiVito stated:

"Indeed, despite Milby initially claiming that his opinion is based on a reasonable degree of medical certainty, he then couches his opinion in numerous terms of ambiguity, vagueness, and uncertainty. Amongst other things, Milby states: I offer this opinion with full knowledge that **neither the responsible causal agent or agents, nor the precise exposure variables can be wholly identified**, and/or characterized. Yet [decedent's] fatal brain cancer **more likely than not** occurred as a consequence of his work at Spring House facility. Moreover, this chain of events leads me to opine, with a reasonable degree of medical certainty that **some-as yet unidentified-brain cancer risk factors are at play at the Spring House facility**. Milby Report, 5." (Emphasis added by Judge DiVito.)

The trial court also noted that the opinion was not based upon any scientific, technical or other specialized knowledge beyond that possessed by an ordinary lay person.

On appeal, the Superior Court affirmed the trial court's decision. The Superior Court stated that the "minimum threshold" for the admissibility of expert testimony, "requires more than simply having an expert offer a lay opinion." The Superior Court also cited the following requirements of admissibility:

- (1) the proffered testimony must rely upon or cite to some scientific authority, such as empirical studies or the expert's original research;
- (2) the expert must apply the scientific authority cited to the facts at issue; and,

(3) the scientific authority must support the expert's ultimate conclusion.

The Superior Court noted that, without these three factors, a trial court, "has no choice but to conclude that the expert opinion reflects nothing more than personal belief."

In the recent case of Nobles v. Staples, Inc., the plaintiff alleged that he was injured by a fall from an allegedly defective office chair purchased from Staples. The chair broke and the plaintiff fell to the floor.

The plaintiff's engineering expert based his opinions upon the manner in which the chair broke and photographs of the broken chair to opine that the chair "failed to meet industry standards," and was therefore, defective. The defense filed a Motion in Limine and Motion for Summary Judgment.

Relying on Snizavich, Judge Colins within the Philadelphia County Court of Common Pleas granted the Motion in Limine and entered judgment for the defendants. Judge Colins cited the lack of scientific basis for the broad opinion of the expert that the chair failed to meet "industry standards." The expert opinion was essentially a net opinion, stating that the chair was defective because it broke. Judge Colins noted,

"The report is notable for what it does not do. It does not state, even in general terms, what the defect is. It does not state or even speculate about how the defect caused the break."

The Superior Court affirmed the trial court decision of Judge Colins.

As of this publication, there is no record of any appeal to the Supreme Court, and the thirty (30) day appeal period has expired.

### **Jury Awards \$45 Million Dollars in Case Alleging Failure to Diagnose Child Abuse**

**A Gloucester County New Jersey Jury Awards \$45 Million But Finds Abusive Father 60% Responsible and Co-Defendant Doctors 35% and 5% Responsible**



On February 17, 2017, a Gloucester County Jury sitting in the suburban / rural community of Woodbury, NJ, entered a \$45 million dollar verdict in a case of alleged failure to diagnose child abuse. The trial of Burgos-Bonilla v. Diorio, et. al. lasted four weeks.

The abusive father had been criminally convicted of the abuse, and was found 60% responsible. The co-defendant physicians were found 35% responsible and 5% responsible, respectively. The jury also found that the physicians were acting as the apparent agents of the Inspira Health System, providing plaintiff with a potential deep pocket for recovery.

On November 27, 2005, the infant had been brought to the ER with complaints that he could not straighten his right leg, and would cry when his right leg was touched. An x-ray was performed, but no fracture was diagnosed by ER doctor (Diorio), or the non-party remote reading radiologist. Plaintiff counsel attributed this to the poor resolution of the remote reading computer system, and described it as "like looking through a dirty window" to the jury.

On November 28, 2005, a hospital attending radiologist re-read the x-ray and diagnosed a possible femur fracture, and recommended further x-rays. The radiologist transmitted this report to Dr. Choudhary, who was then on duty in the ER. Under the hospital's policies, Choudhary was required to notify the parents and arrange for additional studies. No such contact was made. Dr. Choudhary denied ever receiving the report.

The hospital had no further contact with the child until 3 weeks later when he was brought to the ER on December 17, 2005. The child was diagnosed with seizures and an altered mental state. Studies revealed intracranial bleeding, a skull fracture, and again diagnosed the prior femur fracture.

Several days later, the father confessed to police that he had thrown the child into his crib on two occasions and that the child had struck his head. The father was convicted and sentenced to 8 years of incarceration.

The child, now age 12, can feed himself, but suffers from significant cognitive disabilities.

The jury found the father to be responsible for \$27 million in damages, Dr. Choudrey for \$15.75 million in damages and Dr. Diorio for \$2.25 million in damages.

As of the time of publication, it is not known whether an appeal will be filed.

## Featured Photo

The Statue of Liberty



Questions or Comments ?  
Contact Andrew K. Worek, Esq.  
484-913-3038  
[aworek@postandpost.com](mailto:aworek@postandpost.com)

*Give us a call today!*

STAY CONNECTED

