STATE OF NORTH DAKOTA	**DISTRICT COURT**
COUNTY OF BURLEIGH	**SOUTH CENTRAL JUDICIAL DISTRICT**
Chenille Condon, Plaintiff, vs. St. Alexius Medical Center, Allen Michael Booth, M.D., Defendants.	Case Type: Medical Malpractice **PLAINTIFF'S TRIAL BRIEF** Court File No. 08-2014-CV-1904

INTRODUCTION

This is a medical negligence case. Days after Chenille Condon gave birth to her fourth child, Defendant Michael Booth, M.D. rushed her into an unnecessary surgery, during which he negligently cut the innominate artery which supplies blood to the right side of the brain. Chenille Condon suffered a stroke because of the damage to the artery.

FACTUAL BACKGROUND

Defendant Michael Booth, M.D. told Ms. Condon that she needed surgery in order to rule out cancer in some lymph nodes in her chest. But it was extremely unlikely Chenille Condon had cancer, as evidenced by lab work and pathology from the day after delivery of her son. Moreover, lab tests from blood drawn five days prior to surgery confirmed the enlarged lymph nodes were explained by a fungal infection, treatable with medication. Dr. Booth did not review or await these lab results, though he concedes that the surgery was not urgent.

Instead, Dr. Booth took Ms. Condon into surgery just seven days post-partum, and less than 24 hours after first meeting her. Within minutes of starting the procedure—a mediastinoscopy—Dr. Booth inexplicably cut into a major vessel in Ms. Condon's neck. Dr.

Booth claims this artery, the right innominate, was in a different location than where he expected it. Yet Dr. Booth agrees that the location of the artery was plainly visible on a CT scan taken of Ms. Condon the week before the surgery, a CT scan he reviewed three times before the surgery. He could not explain how he missed it.

Cutting into Chenille Condon's innominate artery created a life-threatening emergency. Dr. Booth first attempted to repair the vessel on his own, unsuccessfully. Chenille Condon lost blood and she lost time. He then called for help from an additional surgeon. When Boyd Marts, M.D. arrived from the operating room next door, Chenille Condon was hypotensive and chest compressions were started. Drs. Booth and Marts began an emergency sternotomy (where the sternum is divided or "cracked," allowing access to the heart and lungs). They attempted to repair the vessel through suturing. In doing so, they clamped three major vessels in the area, which deprived Ms. Condon of blood supply to the brain. After completing this repair and unclamping the vessels, they found that the artery had "kinked," allowing inadequate blood flow to the brain. They therefore had to clamp again, undo this repair, and suture on a patch, which finally restored the supply of blood to Ms. Condon's brain. Ms. Condon was transferred to ICU in critical condition. There, it was confirmed that she had developed a clot fully occluding (blocking) blood flow in her right common carotid artery. The stroke Ms. Condon suffered—on account of Dr. Booth's negligence—killed large portions of brain tissue in the right side of her brain.

Chenille Condon continues to suffer from stroke-related partial paralysis of her left arm and leg. She has limited functional use of her left arm, and the inadequate function of her left leg and foot results in frequent trips and falls. Neuropsychological tests confirm that

the stroke caused significant loss of executive functioning of the brain, as well as a critical loss of IQ. It will be four years this June since Dr. Booth's botched surgery.

LIABILITY WITNESSES

Plaintiff's principal liability witness, Dr. Michael King, is a board-certified cardiothoracic surgeon. It is his opinion that Dr. Booth was negligent in the following respects:

1. Informed Consent. Dr. Booth was negligent in telling Ms. Condon that she needed the surgery, not providing reasonable alternatives, and in overstating her risk for cancer. Dr. Booth was negligent in failing to recommend that Ms. Condon await the results of the pending blood tests and undergo a PET scan. Dr. Booth was also negligent in failing to inform Ms. Condon that she almost certainly had enlarged lymph nodes because of an infection rather than cancer, and that the best course of action would be to do a PET scan, await the results of the bloodwork and the PET scan, then follow up in 1-3 months with additional imaging to see if her lymph nodes had changed in size or appearance.
2. Dr. Booth negligently performed the surgery. It is a critical safety rule that the surgeon must locate the innominate artery before dissecting anywhere close to it. Dr. Booth testified that he never did locate the innominate artery until he had already cut into it.
3. Dr. Booth was negligent in first trying to repair the innominate artery on his own, without any help from anyone else, and without performing a sternotomy. Then, Dr. Booth was negligent in clamping Ms. Condon's major vessels without administering

Heparin. This decision caused a blood clot that deprived Ms. Condon of blood to the right side of her brain.

Dr. King will testify that these breaches of the standard of care were all a substantial contributing factors in Ms. Condon undergoing the surgery and/or suffering the stroke that was caused by the surgery. Defendant Booth, and his expert, Dr. Eales, both agree that Ms. Condon suffered her stroke as a direct consequence of Dr. Booth cutting into the innominate artery.

We expect to call Dr. Booth in our case in chief to support the liability claims described above. The Court's informed consent instruction notes that Dr. Booth had "a duty to disclose sufficient information to permit a patient to make an informed and intelligent decision on whether to submit to a proposed course of treatment or surgical procedure," adding that a physician is "required to disclose material risks." The informed consent standard in North Dakota was examined in detail by the North Dakota Supreme Court in *Jaskoviak v. Gruver*, 638 N.W.2d 1 (N.D. 2002). The Supreme Court held that while expert testimony "may be necessary under the lay standard, at least to establish the existence of a risk, its likelihood of occurrence, and the type of harm in question . . . after that, however, expert evidence may not be required." 638 N.W.2d at 19-20. During our case in chief, Plaintiff will rely on Dr. King—as well as on Dr. Booth—to advise concerning the material risks of this surgery, whether it was necessary, what the alternatives were, etc. After that, the jury will be in a position to decide whether Dr. Booth gave Ms. Condon appropriate information for her to make an "informed and intelligent decision" on whether to consent to the surgery. Ms. Condon will obviously testify about what she was told—and not told—by Dr. Booth, and how that affected her decision to proceed with the surgery.

After the surgery, Dr. Booth admitted to three different people, on three different occasions, that what happened was his fault: Father John Floberg, an Episcopal priest from Ms. Condon's parish; Chenille Condon, the plaintiff; and Joanna White Hat, Chenille Condon's aunt. Each of these witnesses will testify to Dr. Booth's admission.

DAMAGES WITNESSES

Plaintiff's damages witnesses will include a mix of lay and expert witnesses. Ms. Condon will, of course, testify. In addition to Ms. Condon, the following witnesses will testify to the harms and losses this stroke has caused Ms. Condon: Father John Floberg, pastor at Chenille Condon's church; Sonja Willard, a friend from Fort Yates who also provided in-home assistance to Ms. Condon in the aftermath of her stroke; Joanna White Hat, Chenille Condon's aunt, who has observed substantial differences in Ms. Condon's functioning and mental outlook before and after her stroke; and Ariana Gates, Ms. Condon's 17-year-old daughter, who has insights on the effects this stroke has had on her mother.

There will also be substantial damages evidence presented by expert witnesses. Dr. James Andrews, whose testimony will be presented at trial by videotape deposition, will testify concerning Ms. Condon's stroke-related functional limitations. He will also explain thalamic pain syndrome, an intractable, near-constant pain condition, and pseudobulbar affect, a condition in which a patient is prone to crying with very little provocation. Both of these conditions are the direct result of Ms. Condon's brain injury. Dr. Andrews will also testify that the life care plan prepared by Certified Life Care Planner Ann Endy is appropriate and medically necessary for Ms. Condon regarding future medical expenses.

Plaintiff's Life Care Planner Ann Endy will describe what future medical care Ms. Condon will need, as well as the home adaptations and personal care assistance Ms. Condon

requires on account of her inability to independently perform certain activities of daily living (e.g. open prescription medication bottles, put her hair in a ponytail, fasten ber bra, and many activities that require the use of two hands). Ms. Endy has a long nursing background, and has been certified as a life care planner for many years. In addition to describing Ms. Condon's future care needs, Ms. Endy will provide the cost of such future care needs, an expertise she has developed as part of her training in certified life care planning.

Plaintiff's expert neuropsychologist Rodney Swenson, M.D. will testify concerning Ms. Condon's brain injury: he will show the brain damage on MRI, describe the functions provided by those areas of brain that were damaged, and will in general describe the functional and cognitive limitations suffered by Ms. Condon as a consequence of her stroke. He will describe that his testing shows a substantial loss of intelligence and executive functioning as a direct result of the stroke. He will also explain to the jury how and why Ms. Condon's stroke predisposes her for early-onset dementia as described in the medical literature.

Kevin Schirado, a mental health professional who treated Ms. Condon in 2015 at West Central Health Services in Bismarck, will testify to the state of Ms. Condon's mental health as of the time of he treated her and what mental health consequences she has suffered as a result of her stroke.

Phillip Haber, Ph.D., a vocational expert, will testify that based on his examination and testing of Ms. Condon, the stroke has caused Ms. Condon a substantial loss of earning capacity. Dr. Haber will explain that on the basis of Ms. Condon's current level of education and function, she is able to work in her current position as a residential aid, whereas if she hadn't suffered a stroke, she could have obtained a 4-year degree and a job as a dietitian. The

difference in lifetime earning capacity is approximately $800,000. Dr. Haber will also testify concerning what his testing revealed concerning physical and mental health consequences from her stroke.[1]

These are the main witnesses Plaintiff expects to present at trial.

ANTICIPATED TRIAL ISSUES

The Court has made prompt rulings on many motions *in limine*. We anticipate that Defendants will continue at trial to attempt the introduction of the type of information that the Court has ruled should be excluded. We anticipate that the defendants will argue that Plaintiff has "opened the door" in presenting her evidence regarding damages. We ask that the Court instruct defense counsel to ask for a sidebar anytime they intend to introduce impeachment evidence with the kinds of sensitive, inflammatory information Plaintiff moved to exclude *in limine*. Otherwise, defense counsel may have already introduced objectionable information in his or her question, and we will have no opportunity to "unring that bell."

BIAS AT TRIAL

We are concerned about how Chenille Condon's race may affect the jurors. The process of selecting fair and impartial jurors in both civil and criminal cases goes to the very heart of the principle of trial by jury that the founders enshrined in the Sixth and Seventh Amendments. Courts have been aware of explicit bias for years, and have attempted to

[1] Plaintiff again requests a jury instruction specific to loss of earning capacity. Plaintiff requested such an instruction as her proposed Supplemental Instruction No. 4, derived specifically from an instruction actually given in a case, and approved by the North Dakota Supreme Court. This was raised during the pretrial conference on April 11, but there appeared to be some confusion whether the Court actually received our proposed instruction No. 4.

address it through the process of voir dire. Implicit or latent biases[2], on the other hand, are unstated and unrecognized: operating outside of conscious awareness. While they are hidden, cognitive, and automatic, social scientists recognize that implicit biases are pervasive and powerful.

By their nature, implicit biases are much more difficult to ascertain than explicit or overt biases. The Court no doubt has some thoughts about and some experiences with how to approach this sensitive issue. In the hope that it may prove helpful, we will include some of our thoughts for possible approaches here.

A. Voir Dire

Often, when facing the question of whether a particular juror can remain impartial, a trial judge will ask a question such as "can you set aside that belief to be fair and impartial in this case?" According to U.S. District Court Judge Mark W Bennett (Northern District of Iowa), the trial judge should resist asking this question, as it does not begin to address implicit bias, which by definition is not consciously known to the prospective juror. *Unraveling the Gordian Knot of Implicit Bias in Jury Selection*, 4 Harv. L & Pol'y Rev. 149, 160 (2010). Similarly, the Minnesota Supreme Court instructed trial judges on their duty in voir dire:

> "Jurors, in order to be qualified, should be indifferent both as to the parties and the cause to be tried . . . . Courts are vigilant to preserve the impartiality of the jury. The Court, and not the juror, must be satisfied that a challenged juror is free from bias. ***The Court is governed by the facts shown, and not by the opinion of the juror as to the affect thereof***."

[2] According to the North Dakota Commission to Study Racial and Ethnic Bias in the Courts, "Most racial and ethnic bias occurs in a pervasive yet subtle manner, referred to as implicit bias. Implicit bias has been described as a preference for one race or group over another that develops from cultural stereotypes generally learned in youth and continued into adulthood, in which the biased inclination often remains unexamined and unaddressed. Having absorbed certain cultural stereotypes, individuals lack conscious awareness of their bias and do not have a conscious intention to engage in biased behavior."

State by Youngquist v. Wheeler, 230 N.W. 91 (Minn. 1930) (emphasis added). Should a juror's impartiality be questionable, further inquiry will be required.

The Court and counsel will need to explore potential for racial bias among the venire. For many reasons, this type of inquiry may best be suited to the Court's voir dire. While counsel is prepared to address issues of racial bias during Plaintiff's voir dire should the Court not wish to do so, it will likely require some additional time. Some questions the Court may consider include:

1. *Researchers have found that people have implicit biases, which are stereotypes that people are not aware of that can influence their thoughts and behavior. For example, an employer might pass over a Black applicant for a job based on lack of relevant experience and consider a White applicant with a similar experience level, even though that employer does not consciously believe in discriminating against people based on their race. While research suggests that implicit biases arise from the brain's natural tendency to associate categories, the concern is that they may result in unequal treatment when they go unexamined. Not everyone agrees implicit bias has a powerful influence, or that they are personally susceptible to it. I'd like to get a sense of your reaction to the concept of subconscious racial bias and whether you are open to believing it may influence you in your day-to-day decision-making.*

2. *Sometimes in our society we've seen circumstances where someone might have been treated badly or just differently because of their race. Tell me about the most serious time you witnessed, or just knew about, someone being treated differently or badly because of their race.*

3. *Do you agree that people are sometimes treated differently because of their race? How do you feel about that?*

4. *Tell us about the last time you heard other people express racially prejudiced beliefs or opinions. How did you respond?*

5. *What will you do if you notice that some of the arguments in the jury room are being influenced by implicit bias or racism?*

A. Mitigation by Instruction

According to findings of the North Dakota Commission to Study Racial and Ethnic Bias, we all lack conscious awareness of our implicit bias. Final Report and Recommendations at 3 (June 2012) (available at https://www.ndcourts.gov/court/committees/bias_commission/FinalReport 2012.pdf). Data shows that implicit bias has an "automatic character" that bears on individual behavior, and it has implications for the legal and decision-making process. *Id.* at 3. The fact that our biases are often unconscious makes identifying them during voir dire a most difficult task.

Fortunately, evidence suggests that individuals who know they have a proclivity toward certain biased judgments can consciously address and mitigate its effects. *Id.* at 4. For instance, studies have found judges who combine knowledge of implicit bias with careful and deliberate consideration are able to reduce biased outcomes. *Id.* Scientists have found that routinely checking one's thought processes and decisions for possible bias (in other words adopting a deliberate or self-aware process for looking at how one's decisions are made) is an effective intervention strategy. *Helping Courts Address Implicit Bias*, at B-8 (2012) (available at http://www.ncsc.org /~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx).

In light of these findings, we ask that the Court briefly instruct the jury on the danger of implicit bias at the outset of trial. The Court might base its instruction on the one used by Judge Bennett:

> Do not decide the case based on implicit biases. . . . [E]veryone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important

> decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.

Kang, Bennett, et al., *Implicit Bias in the Courtroom*, 59 UCLA Law Rev. 1124, 1182-83 (2012). The Court might also consider administering the pledge against bias that Judge Bennett developed, to all selected jurors:

> I pledge I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies, or generalizations.

DISMISSED PARTIES

Shawn Gates was dismissed as a plaintiff, and Dr. Marts dismissed as a defendant. Any mention that either of these were once a party will only lead the jury to confusion and/or speculation. The court should instruct counsel to refrain from any mention that either were previous parties, and require that counsel inform their witnesses to likewise refrain. With these dismissals coming well before the start of trial, and the court having already changed the caption of the case, there is no reason for either party to introduce any evidence that Gates and Marts were once parties. The jury will have important relevant evidence to evaluate in completing their verdict; they should not be distracted from their task by irrelevant information concerning prior parties.

PLAINTIFF NO LONGER RECEIVING TREATMENT AT ST. ALEXIUS

During the pretrial conference on April 11 the Court learned that Plaintiff is no longer receiving treatment at St. Alexius. This came about as a result of Mr. Schreiner, who was then

representing all defendants, contacting Ms. Flynn Peterson, who was then representing Ms. Condon, and requesting that Ms. Condon no longer seek medical treatment at St. Alexius. Mr. Schreiner apparently explained that Dr. Marts was uncomfortable treating Ms. Condon because of the pending lawsuit. We do not want the jury speculating on why Ms. Condon stopped treating at St. Alexius. We had planned on having Ms. Condon testify concerning the request by defense counsel that she no longer be treated there, but we believe this would be better handled by an instruction from the Court, perhaps at the start of trial. We propose the following instruction: "At the time that Ms. Condon brought this case she was still receiving medical care at St. Alexius. The lawyers for the parties agreed that it would be better if Ms. Condon moved her medical care away from St. Alexius in light of her case. Thereafter Ms. Condon ceased receiving medical care at St. Alexius."

We ask for this instruction to spare either party having to explain why Ms. Condon discontinued medical treatment at St. Alexius in 2014. It will be better coming from the Court and will have no lopsided effect on either party, but will simply answer a question the jury is likely to have if an instruction is not given or evidence not adduced.

Should the Court desire any further information or discussion on any of the above topics, we will be happy to oblige.

Respectfully Submitted,

Dated: *April 20, 2016*

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