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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Christiana Barger Individually and as Parent and Legal Guardian of Colton Barger and Colton Barger, Plaintiffs v. Michael Grossberg, M.D. and The Practice of Pediatrics, P.C., Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2009-2792

HEADNOTES

Motion for Summary Judgment

1. Summary judgment is designed to dispose of cases where, though the pleadings may state a valid cause of action, a party fails to make out a claim or defense after completion of relevant discovery. Miller v. Sacred Heart Hosp., 753 A.2d 829, 833 (Pa. Super. Ct. 2000); Amiable v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977).

2. A party may move for summary judgment in part or in whole after the relevant pleadings are closed but within such time as to not unreasonably delay trial. Pa. R.C.P. 1035.2.

3. A party bearing the burden of proof at trial is entitled to summary judgment if "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa. R.C.P. 1035.2(1).

4. A party who will not have the burden of proof at trial is entitled to summary judgment "if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa. R.C.P. 1035.2(2).

5. A party responding to a motion for summary judgment cannot rest upon the pleadings, but rather must identify one or more issues of material fact (1) arising from evidence in the record controverting the evidence cited in support of the motion; (2) by challenging the credibility of the witness or witnesses testifying in favor of the motion; or (3) identifying record evidence essential to the claim or defense that the motion avers was not produced. Pa. R.C.P. 1035.3(a).

6. In determining whether summary judgment is appropriate, the Court must view the record in the light most favorable to the non-moving party. Manzetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001).

7. "Medical malpractice consists of a negligent or unskillful performance by a physician of the duties which are devolved and incumbent upon him on account of his relations with his patients, or of a want of proper care and skill in the performance of a professional act." Stimmler v. Chestnut Hill Hosp., 981 A.2d 145, 154 (Pa. 2009).

8. Medical malpractice is grounded in negligence and therefore to make out a *prima facie* case a plaintiff must demonstrate that "(1) the physician owed a duty to the patient; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient, and (4) the damages suffered by the patient were the direct result of that harm." Billman v. Saylor, 761 A.2d 1208, 1211-12 (Pa. Super. Ct. 2000).

9. "With all but the most self-evident medical malpractice actions there is also the added requirement that the plaintiff must provide a medical expert who will testify as to the elements of duty, breach, and causation." Griffin v. Univ. of Pittsburgh Med. Ctr.-Braddock Hosp., 950 A.2d 996, 1000 (Pa. Super. Ct. 2008). That is, in a medical malpractice case

expert testimony is required "'where the circumstances surrounding the malpractice claim are beyond the knowledge of the average layperson.'" Id.

10. A plaintiff in a medical malpractice claim is required to present an expert who will testify "to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." Mitzelfelt v. Kamrin, 584 A.2d 888, 892 (Pa. 1990).

11. Because expert testimony is required to establish a medical malpractice claim, if a plaintiff fails to provide expert reports during the discovery process summary judgment may be entered against them. Billman, 761 A.2d at 1212.

12. When determining whether the expert reports are rendered to a reasonable degree of medical certainty we must consider them in their entirety. Stimmler, 981 A.2d at 155; Griffin, 950 A.2d at 1000.

13. The central point of inquiry for this Court to determine in the instant case is whether Plaintiffs have produced enough evidence to establish the element of proximate cause.

14. Generally, in addition to establishing that a defendant's conduct was negligent, medical testimony is required to show that the injury "did, with a reasonable degree of medical certainty, stem from the negligent act alleged." Hamil v. Bashline, 392 A.2d 1280, 1285 (Pa. 1978).

15. A "reasonable degree of medical certainty" refers to a medical expert's opinion comprised of certainty sufficient to make an everyday medical judgment. Id. "[A]n expert fails this standard of certainty if he testifies 'that the alleged cause 'possibly', or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." Griffin, 950 A.2d at 1000.

16. Notwithstanding the general standard of proof of direct causation the courts have recognized that in some cases it is an impossible standard where "irrespective of the quality of the medical treatment, a certain percentage of patients will suffer harm." Billman, 761 A.2d at 1212. However, in these types of cases if the plaintiff's expert can show with a reasonable degree of medical certainty that the defendant's acts or omissions increased the risk of harm the question of causation should be submitted to the jury.

17. The increased risk of harm standard applies "where it is impossible to state with a reasonable degree of medical certainty that the negligence actually caused the injury." Vogelsberger v. Magee–Womens Hosp. of UPMC Health Sys., 903 A.2d 540, 563 (Pa. Super. Ct. 2006).

18. When evaluating whether a plaintiff establishes causation in a medical malpractice claim we must determine: (1) whether the plaintiff's expert witness could testify with a reasonable degree of medical certainty that the acts or omissions could cause the type of harm that the plaintiff suffered; and (2) whether the acts or omissions caused the actual harm suffered by the plaintiff. Mitzelfelt, 584 A.2d at 894.

19. The second prong is where the relaxed standard comes in when the circumstances dictate that the increased risk concept should be employed. Mitzelfelt, 584 A.2d at 894.

20. If the plaintiff establishes *prima facie* case of increased risk through an expert opinion the question of whether the acts or omissions by the defendant were a "substantial factor" in bringing about the harm to the plaintiff is a question for the jury, not the medical expert. Mitzelfelt 584 A.2d at 894; Gradel v. Inouye, 421 A.2d 674, 679 (Pa. 1980).

21. In support of his motion for summary judgment Defendant argues that Plaintiffs cannot establish: (1) that the vaccines were not kept at the recommended temperature; (2) that the vaccines lost their potency as a result of being kept at the incorrect temperature; (3) that the actual vials given to Colton lost their potency; (4) that Colton suffered from bacterial

pneumonia as opposed to viral pneumonia; (5) if he did suffer from bacterial pneumonia, that the bacteria was one of seven possible serotypes addressed by Prevnar 7; (6) that Platiniffs' experts' opinions are not sufficiently certain; and (7) that Plaintiffs' experts' opinions have no basis.

22. When viewed in the light most favorable to Plaintiffs it is clear that a jury could find that the vaccines which were given to Colton by Dr. Grossberg were stored at the incorrect temperature.

23. Expert testimony is not required for a jury to conclude that the temperature in the refrigerator was set to the wrong setting. Rather, a jury can conclude from the temperature logs that the ambient temperature within the refrigerator was off and further, it can conclude that Colton's vaccines were kept at the incorrect temperature based on the time period of Colton's vaccinations and the dates of the temperature logs.

24. To establish that the vaccines stored in the refrigerator lost their potency as a result of being stored at the incorrect temperature Plaintiffs must utilize expert testimony, as it is the type of question that is beyond the knowledge of the average layperson.

25. Both of Plaintiffs' experts concluded in their reports that vaccines stored in Dr. Grossberg's refrigerator lost their potency as a result of storing them at the improper temperature.

26. If a jury believes the testimony of Plaintiffs' experts that any vials stored in the refrigerator lost their potency because they were stored at the incorrect temperature the jury is free to find on its own, without the need for expert medical testimony, that the actual vials given to Colton lost their potency. There is sufficient evidence to support such a finding based on: the temperature logs indicating a time period which coincides with the dates that Colton received his vaccinations from Dr. Grossberg; Dr. Ganeshananthan's report indicating that Colton's Hib titers were .89 and he was unprotected from 10 of the 14 serotypes that Prevnar 7 protects against; and the June 29, 2007 letter that Dr. Grossberg sent out warning Ms. Barger about possible compromised vaccines.

27. Whether Colton suffered from bacterial pneumonia, and if he did, whether the bacterium was one of seven possible strains addressed by Prevnar 7 is a question that must be addressed by expert testimony.

28. While it cannot be indisputably stated that Colton's sicknesses were caused from Dr. Grossberg's alleged negligence, medical experts can assert that such negligence increased Colton's risk of developing those sicknesses pursuant to the Bashline standard.

29. Dr. Wust-Smith's report read in its entirety necessarily asserts that Colton could have suffered from bacterial infections as a result of ineffective administration of the vaccines he received from Dr. Grossberg and that Dr. Grossberg's failure increased the risk of injury to Colton.

30. A plain reading of Dr. Weiss's report indicates that he believes to a reasonable degree of medical certainty that Dr. Barger's alleged failure to keep the vaccines stored at the correct temperature, along with the untimely administering of the vaccines increased Colton's risk of developing his recurrent episodes of pneumonia. If a jury chooses to believe Dr. Weiss's opinion it could find that Dr. Grossberg's negligence was a substantial factor in bringing about Colton's harm.

31. When considered in their entirety Dr. Wust-Smith's and Dr. Weiss's reports sufficiently establish a *prima facie* case of negligence pursuant to the Bashline standard.

32. An alternative basis supporting our finding that Plaintiffs have demonstrated *prima facie* evidence of negligence is Plaintiff's experts' assertions that Dr. Grossberg's failure to administer the vaccines outside of the AAP's recommended time periods increased the risk of Colton suffering from his illnesses.

33. Expert testimony "is incompetent and may not be admitted into evidence if the expert's opinion is based upon mere conjecture." Hussey v. May Dep't Stores, Inc., 357 A.2d 635, 637 (Pa. Super. Ct. 1976).

34. Here, "[i]t is clear that these physicians consulted multiple records and other sources prior to giving their respective opinions." Stimmler, 981 A.2d at 157. Dr. Weiss's opinion is based on Colton's medical records, the refrigerator temperature logs, the letter from Dr. Grossberg to Ms. Barger, and the deposition testimony of Dr. Grossberg and Ms. Barger. Dr. Wust-Smith bases her opinion on Colton's medical records and the letter from Dr. Grossberg to Colton's parents.

35. "[B]ased on the record as a whole and considering the requirements for entitlement to summary judgment, this case is not free from doubt that genuine issues of material fact exist." Stimmler, 981 A.2d at 161.

Appearances:

Robin J. Marzella, Esq., *Counsel for Plaintiffs*

Joseph G. Zack, Esq., *Counsel for Defendant Michael Grossberg*

Kevin E. Osborne, Esq., *Counsel for Defendant The Practice of Pediatrics, P.C.*

OPINION

Before Herman, P.J.

This case involves a medical malpractice claim by Christiana Barger ("Ms. Barger") and her son Colton Barger ("Colton") (collectively "Plaintiffs") filed against Michael Grossberg, M.D. ("Dr. Grossberg" or "Defendant") and The Practice of Pediatrics, P.C. (collectively "Defendants"). Plaintiffs claim that Colton suffered preventable illnesses as a result of untimely vaccinations by Dr. Grossberg that were improperly stored thereby rendering them ineffective. Before the Court is Defendant's Motion for Summary Judgment. Defendant contends that Plaintiffs have not established a *prima facie* case of negligence. Specifically, Defendant claims that Plaintiffs have not demonstrated through expert testimony the element of causation. For the reasons that follow the Court denies Defendant's motion.

PROCEDURAL HISTORY

Plaintiffs commenced this action by filing a Writ of Summons on June 25, 2009 followed by a Complaint in Civil Action on September 4, 2009. Defendant filed an Answer with New Matter on September 15, 2010

and Plaintiffs filed a Response to New Matter on October 15, 2010. Plaintiff subsequently filed an Amended Complaint on March 22, 2013 to which Defendant filed an Answer with New Matter and Counterclaim on April 17, 2013. After a scheduling conference the Court issued a Case Management Order on January 2, 2014 directing that Plaintiffs provide any expert reports by April 10, 2014 and Defendants provide expert reports by May 26, 2014. Plaintiffs provided expert reports from Marlena J. Wust-Smith, M.D. ("Dr. Wust-Smith")[1] and David W. Weiss, M.D. ("Dr. Weiss")[2] . Defendant provided expert reports from Jeffrey P. Bomze, M.D. ("Dr. Bomze")[3] and Michael Radetsky, M.D. ("Dr. Radetsky")[4] . On June 30, 2014 Defendant filed a Motion for Summary Judgment with a brief in support. On July 28, 2014 Plaintiffs filed a Response to Motion for Summary Judgment along with a brief. Argument was held on September 22, 2014. This matter is now ready for a decision.

FACTUAL BACKGROUND

Colton was born on April 28, 2003 and shortly after birth he was diagnosed with congenital heart disease, artrial septal defect, and pulmonary artery stenosis. From approximately May 5, 2003 to January 5, 2004 Colton was treated by Dr. Grossberg who administered standard vaccinations to Colton including pneumococcal vaccine, Prevnar 7 and Haemophilus influenza vaccine, Hib. In 2007 upon inspection of Dr. Grossberg's vaccine refrigerator the Department of Health notified Dr. Grossberg that the temperature in the refrigerator was outside the recommended specifications. On June 29, 2007 Dr. Grossberg sent a letter out to Ms. Barger as a result of temperature logs which evinced temperature readings outside the recommended range for the vaccines. The letter stated that "[i]t has come to our attention that some vaccines stored and used at The Practice of Pediatrics were exposed to [incorrect][5] refrigeration temperatures on some days during the period [of] mid-2003 to June 2006." The letter further notified Ms. Barger that "[b]ecause the vaccines were not stored in the recommended temperatures at all times, the vaccines may be compromised in their ability to prevent disease."[6] It also recommended that shots given during that time period be repeated to ensure that the child was protected and such shots would be provided free of charge. On the advice of Colton's then current physician, Ms. Barger opted not to get any

1 Mot. for Summ. J. of Def. Ex. F.
2 Pls.' Resp. to Mot. for Summ. J. of Def. Ex. B.
3 Mot. for Summ. J. of Def. Ex. G.
4 Mot. for Summ. J. of Def. Ex. H.
5 It appears that the sentence as it is written in the June 29, 2007 letter is missing a word which would describe the vaccine refrigeration temperatures as incorrect or faulty. We make this inference based on the context of the entire letter and based on the fact that we must construe all facts and inferences therefrom in favor of Plaintiffs in our determination of Defendant's Motion for Summary Judgment.
6 Mot. for Summ. J. of Def. Ex. B.

repeated vaccinations. The alleged injuries suffered by Colton include primarily pneumonias and chronic lung problems. In 2009 immunologist Dr. Ganeshananthan conducted immunologic studies on Colton which revealed that Colton's Haemophlus influenza B lgG titers were .89 (1.0 indicates long-term protection) and a Streptococcus pneumoniae 14 panel showed that Colton did not contain anti-bodies against 10 of the 14 serotypes.

DISCUSSION

Defendant moves this Court for summary judgment based on the essential element of causation. In support of his position Defendant claims that Plaintiffs cannot establish: (1) that the vaccines were not kept at the recommended temperature; (2) that the vaccines lost their potency as a result of being kept at the incorrect temperature; (3) that the actual vials given to Colton lost their potency; (4) that Colton suffered from bacterial pneumonia as opposed to viral pneumonia; (5) if he did suffer from bacterial pneumonia, that the bacteria was one of seven possible serotypes addressed by Prevnar 7; (6) that Plaintiffs'' experts' opinions are not sufficiently certain; and (7) that Plaintiffs' experts' opinions have no basis. We disagree. Based on the expert reports of Dr. Wust-Smith and Dr. Weiss, along with the other medical records and the pleadings, Plaintiffs have established a *prima facie* case of negligence.

I. Summary Judgment Standard

Summary judgment is designed to dispose of cases where, though the pleadings may state a valid cause of action, a party fails to make out a claim or defense after completion of relevant discovery. Miller v. Sacred Heart Hosp., 753 A.2d 829, 833 (Pa. Super. Ct. 2000); Amiable v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977).

A party may move for summary judgment in part or in whole after the relevant pleadings are closed but within such time as to not unreasonably delay trial. Pa. R.C.P. 1035.2. A party bearing the burden of proof at trial is entitled to summary judgment if "there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa. R.C.P. 1035.2(1). A party who will not have the burden of proof at trial is entitled to summary judgment

> if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action

> or defense which in a jury trial would require the issues to be submitted to a jury.

Pa. R.C.P. 1035.2(2). A party responding to a motion for summary judgment cannot rest upon the pleadings, but rather must identify one or more issues of material fact (1) arising from evidence in the record controverting the evidence cited in support of the motion; (2) by challenging the credibility of the witness or witnesses testifying in favor of the motion; or (3) identifying record evidence essential to the claim or defense that the motion avers was not produced. Pa. R.C.P. 1035.3(a); see Phaff v. Gerner, 303 A.2d 826, 829 (Pa. 1975); Accu-Weather, Inc. v. Prospect Commc'ns, Inc., 644 A.2d 1251, 1254 (Pa. Super. Ct. 1994).

In determining whether summary judgment is appropriate, the Court must view the record in the light most favorable to the non-moving party. Manzetti v. Mercy Hosp. of Pittsburgh, 776 A.2d 938, 945 (Pa. 2001). Furthermore, "[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence." Turner v. Valley Hous. Dev. Corp., 972 A.2d 531, 537 (Pa. Super. Ct. 2009). In granting summary judgment the Court may not rely solely on oral testimony.[7] Penn Center House, Inc. v. Hoffman, 553 a.2d 900, 903 (Pa. 1989). However, summary judgment may be granted if the oral testimony upon which it is based constitutes an adverse admission by a nonmoving party. Com., Office of Atty. Gen. ex rel. Corbett v. Richmond Twp., 2 A.3d 678, 681 (Pa. Commw. Ct. 2010).

II. Medical Malpractice Claim

Defendant moves this Court for summary judgment. Therefore, we are tasked with viewing the evidence in the light most favorable to Plaintiff and deciding whether the evidence demonstrates a *prima facie* case of medical malpractice. "Medical malpractice consists of a negligent or unskillful performance by a physician of the duties which are devolved and incumbent upon him on account of his relations with his patients, or of a want of proper care and skill in the performance of a professional act." Stimmler v. Chestnut Hill Hosp., 981 A.2d 145, 154 (Pa. 2009). Medical malpractice is grounded in negligence and therefore to make out a *prima facie* case a plaintiff must demonstrate that "(1) the physician owed a duty to the patient; (2) the physician breached that duty; (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient, and (4) the damages suffered by the patient were the direct result of that harm." Billman v. Saylor, 761 A.2d 1208, 1211-12

7 A party is not entitled to summary judgment if the motion is based upon its own witnesses' testimony. Pa. R.C.P. 1035.3(a) (citing Nanty-Glo v. Am. Sur. Co., 163 A. 523 (Pa. 1932)); Porterfield v. Trs. Of Hosp. of Univ. of Pa. 657 A.2d 1293, 1294-95 (Pa. Super. Ct. 1995).

(Pa. Super. Ct. 2000) (quoting Eaddy v. Hamaty, 694 A.2d 639, 642 (Pa. Super. Ct. 1997)). Furthermore, "[w]ith all but the most self-evident medical malpractice actions there is also the added requirement that the plaintiff must provide a medical expert who will testify as to the elements of duty, breach, and causation." Griffin v. Univ. of Pittsburgh Med. Ctr.-Braddock Hosp., 950 A.2d 996, 1000 (Pa. Super. Ct. 2008). That is, in a medical malpractice case expert testimony is required "'where the circumstances surrounding the malpractice claim are beyond the knowledge of the average layperson.'" Id. (quoting Vogelsberger v. Magee–Womens Hosp. of UPMC Health Sys., 903 A.2d 540, 563 n. 11 (Pa. Super. Ct. 2006)); see also Hamil v. Bashline, 392 A.2d 1280, 1285 (Pa. 1978) ("complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson" and therefore expert medical testimony is generally required). A plaintiff in a medical malpractice claim is required to present an expert who will testify "to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." Mitzelfelt v. Kamrin, 584 A.2d 888, 892 (Pa. 1990). Because expert testimony is required to establish a medical malpractice claim, if a plaintiff fails to provide expert reports during the discovery process summary judgment may be entered against them. Billman, 761 A.2d at 1212. When determining whether the expert reports are rendered to a reasonable degree of medical certainty we must consider them in their entirety. Stimmler, 981 A.2d at 155; Griffin, 950 A.2d at 1000.

In the instant case Defendant does not contest that Plaintiffs have not made out a *prima facie* case for the elements of duty, breach, and damages. Therefore, the central point of inquiry for this Court is to determine whether Plaintiffs have produced enough evidence to establish the element of proximate cause. Generally, in addition to establishing that a defendant's conduct was negligent, medical testimony is required to show that the injury "did, with a reasonable degree of medical certainty, stem from the negligent act alleged." Bashline, 392 A.2d at 1285. A "reasonable degree of medical certainty" refers to a medical expert's opinion comprised of certainty sufficient to make an everyday medical judgment. Id. "[A]n expert fails this standard of certainty if he testifies 'that the alleged cause 'possibly', or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." Griffin, 950 A.2d at 1000 (citation omitted).

Notwithstanding the general standard of proof of direct causation the courts have recognized that in some cases it is an impossible standard where "irrespective of the quality of the medical treatment, a certain percentage of patients will suffer harm." Billman, 761 A.2d at 1212. In such cases a

plaintiff cannot establish with a reasonable degree of medical certainty that the defendant's actions or omissions caused the harm. Id. However, if the plaintiff's expert can show with a reasonable degree of medical certainty that the defendant's acts or omissions *increased the risk of harm* the question of causation should be submitted to the jury. Id. In these types of cases the degree of certainty required is "relaxed." Id.

> [T]he expert need not testify with absolute certainty or rule out all other possible causes for the harm suffered by the patient. The expert in these cases has been permitted to testify under the relaxed degree of certainty enunciated in Section 323(a) of the Restatement (Second) of Torts, that the defendant's failure to exercise reasonable care in the diagnosis and treatment increased the risk of harm.

Id. at 1212-13 (quoting Wolloch v. Aiken, 756 A.2d 5, 15 (Pa. Super. Ct. 2000) rev'd on other grounds, 815 A.2d 594 (Pa. 2002)). The increased risk of harm standard applies "where it is impossible to state with a reasonable degree of medical certainty that the negligence actually caused the injury." Vogelsberger, 903 A.2d at 563.[8]

When evaluating whether a plaintiff establishes causation in a medical malpractice claim we must determine: (1) whether the plaintiff's expert witness could testify with a reasonable degree of medical certainty that the acts or omissions could cause the type of harm that the plaintiff suffered; and (2) whether the acts or omissions caused the actual harm suffered by the plaintiff. Mitzelfelt, 584 A.2d at 894 (citing Bashline, 392 A.2d at 1285. The second prong is where the relaxed standard comes in when the circumstances dictate that the increased risk concept should be employed. Id. Under such circumstances a medical opinion can satisfy the second prong of the Bashline test if it demonstrates "with a reasonable degree of medical certainty, that a defendant's conduct increased the risk that the harm sustained by plaintiff would occur." Gradel v. Inouye, 421 A.2d 674, 679 (Pa. 1980). If the plaintiff establishes *prima facie* case of increased risk through an expert opinion the question of whether the acts or omissions by the defendant were a "substantial factor" in bringing about the harm to the plaintiff is a question for the jury, not the medical expert. Mitzelfelt 584 A.2d at 894; Gradel, 421 A.2d at 679.

As alluded to, the increased risk standard has been applied in cases where it could not be shown with a reasonable degree of medical certainty that a healthcare provider's negligence caused the harm. See Mitzelfelt, 584 A.2d at 893-95 (increased risk standard of proof was proper where doctor's allowance of patient's blood pressure to drop below a certain

8 We note that direct causation and increased risk are not mutually exclusive. Klein v. Aronchick, 85 A.3d 487, 495 (Pa. Super. Ct. 2014). Therefore, the jury can be instructed on both alternative theories of recovery. Id.

level during surgery could have caused paraparesis); Jones v. Montefiore Hosp., 431 A.2d 920, 924 (Pa. 1981) (increased risk standard applied where doctor failed to timely diagnose breast cancer because even though with timely detection the woman may still have developed breast cancer the doctor's failure to timely diagnose her increased the risk of harm); Gradel, 421 A.2d at 679 (doctor failed to utilize certain diagnostic procedures in treating a lump on a boys arm and was found liable for increasing the boy's risk of developing cancer even though no direct cause was proved); Klein v. Aronchick, 85 A.3d 487, 496 (Pa. Super. Ct. 2014) (expert report that opined to a reasonable degree of medical certainty that the plaintiff's harm was "consistent" with the defendant's negligence sufficiently established a *prima facie* case of negligence based on increased risk); Vogelsberger, 903 A.2d at 564 (question of causation was properly left to jury where expert testimony demonstrated that nurse's failure to monitor patient post operation increased patient's risk of suffering respiratory depression); Billman, 761 A.2d at 1214 (doctor's failure to administer heparin when it was decided that surgery should be postponed increased the risk of the plaintiff losing his leg).

Here, Defendant's Motion for Summary Judgment alleges that Plaintiffs cannot establish the material element of causation. In support of his position Defendant raises a number of issues with regard to Plaintiffs' ability to meet their burden at trial based on the existing evidence, and particularly the expert reports. Defendant argues that Plaintiffs cannot establish: (1) that the vaccines were not kept at the recommended temperature; (2) that the vaccines lost their potency as a result of being kept at the incorrect temperature; (3) that the actual vials given to Colton lost their potency; (4) that Colton suffered from bacterial pneumonia as opposed to viral pneumonia; (5) if he did suffer from bacterial pneumonia, that the bacteria was one of seven possible serotypes addressed by Prevnar 7; (6) that Platiniffs' experts' opinions are not sufficiently certain; and (7) that Plaintiffs' experts' opinions have no basis. We address each in turn.

When viewed in the light most favorable to Plaintiffs it is clear that a jury could find that the vaccines which were given to Colton by Dr. Grossberg were stored at the incorrect temperature. The temperature logs indicating the ambient temperatures within the refrigerator that held the vaccines along with Plaintiffs' experts' reports which conclude that the temperatures recorded in the temperature logs were not at the recommended temperatures, and Colton's medical records which indicate that he was given vaccines during that time period, are sufficient to submit to the jury the question of whether Colton's vials were kept at the incorrect temperature. Expert testimony is not required for a jury to conclude that the temperature in the refrigerator was set to the wrong setting. Rather, a

jury can conclude from the temperature logs that the ambient temperature within the refrigerator was off and further, it can conclude that Colton's vaccines were kept at the incorrect temperature based on the time period of Colton's vaccinations and the dates of the temperature logs.

To establish that the vaccines stored in the refrigerator lost their potency as a result of being stored at the incorrect temperature Plaintiffs must utilize expert testimony. This is the type of question that is beyond the knowledge of the average layperson. Therefore, we review the expert reports to determine whether they demonstrate that the vaccines stored in the refrigerator during the time period lost their potency. In his report Dr. Weiss states, "[f]ailure to store vaccines at the recommended temperature decreases their potency and efficacy in preventing disease." It is plainly stated in his report that Dr. Weiss believes that vaccines stored in Dr. Grossberg's refrigerator lost their potency as a result of storing them at the improper temperature. Dr. Wust-Smith reaches the same conclusion in her report. She concludes that Dr. Grossberg's "[f]ailure to keep the few vaccines that Colton did receive properly stored *to ensure their potency/efficacy*." (emphasis added). When looked at in the context of her entire expert report, it is evident that Dr. Wust-Smith believes that storing the vaccines at the incorrect temperature caused them to lose their potency. Defendant's experts contend that it is impossible to know whether the vaccines in the refrigerator lost their potency. However, we must take Plaintiffs' experts' opinions as true at this stage and therefore Plaintiffs meet their burden.

Defendant next contends that Plaintiffs cannot establish that the actual vials given to Colton lost their potency. If a jury believes the testimony of Plaintiffs' experts that any vials stored in the refrigerator lost their potency because they were stored at the incorrect temperature the jury is free to find on its own, without the need for expert medical testimony, that the actual vials given to Colton lost their potency. There is sufficient evidence to support such a finding based on the temperature logs indicating a time period which coincides with the dates that Colton received his vaccinations from Dr. Grossberg. Also, Dr. Ganeshananthan's report indicates that Colton's Hib titers were .89 and he was unprotected from 10 of the 14 serotypes that Prevnar 7 protects against, and the June 29, 2007 letter that Dr. Grossberg sent out states in pertinent part that "[o]ur records show that your child received one or more of these compromised shots during this time and, therefore, may not be fully protected against the infectious diseases these shots were designed to protect against." Based on the foregoing evidence, a jury can conclude that the actual vaccines given to Colton lost their potency as a result of being stored at the incorrect temperatures.

Another point of contention is whether Colton suffered from bacterial pneumonia, and if he did, whether the bacterium was one of seven possible strains addressed by Prevnar 7. This question is beyond the knowledge of laymen and therefore implicates the need for medical testimony. Although the parties' experts dispute the exact illnesses Colton suffered from there is no question that Colton suffered from pneumonias and chronic lung problems. The experts disagree on whether the illnesses were bacterial or viral in nature. Both of Defendant's experts agree that a large majority of childhood pneumonias are viral not bacterial and the vaccines Colton received do not protect against viral pneumonias. However, as we have stressed throughout, we must construe the evidence in the light most favorable to Plaintiffs and therefore accept Plaintiffs' experts' reports as true. Dr. Wust-Smith's report read in its entirety necessarily asserts that Colton suffered from bacterial infections as a result of ineffective administration of the vaccines he received from Dr. Grossberg. Dr. Wust-Smith states "[Colton's] recurrent pneumonia, cough and otitis could be the direct result of negligence on the part of Dr. Grossberg." She also concludes that Dr. Grossberg breached the standard of care by failing to vaccinate Colton at the appropriate ages and failing to keep the vaccines that Colton received properly stored to ensure their potency and efficacy. In reaching her conclusion Dr. Wust-Smith reviewed Colton's medical records from Dr. Grossberg including records from Colton's pediatric cardiologist and cardiac surgeon and other records from Chambersburg Hospital, medical records from Franklin County Pediatrics, and the letter from Dr. Grossberg to Colton's parents. Dr. Weiss reaches the same conclusion. In his report Dr. Weiss opines "to a reasonable degree of medical certainty, that Colton's ability to fight serious bacterial infections such as Strep Pneumoniae was compromised . . . resulting in an increased risk of developing recurrent episodes of pneumonia as is documented in his medical records." In reading this statement we can come to no other conclusion than Dr. Weiss believes Colton suffered from bacterial illnesses that were preventable by the vaccines received from Dr. Grossberg. Accordingly, there is *prima facie* evidence that Colton suffered from the type of illnesses that the vaccines were designed to prevent.

Defendant argues that, because the opinions of Dr. Weiss and Dr. Wust-Smith do not unequivocally state that Dr. Grossberg's failure to maintain the proper temperature in the refrigerator where the vaccines were stored caused Colton's sicknesses, Plaintiffs cannot establish causation to the requisite degree of medical certainty. However, the relaxed Bashline standard is applicable to the case at bar. Colton suffered from alleged bacterial pneumonia and lung problems. While it cannot be indisputably stated that Colton's sicknesses were caused from Dr. Grossberg's alleged

negligence, medical experts can assert that such negligence increased Colton's risk of developing those sicknesses. Such circumstances are akin to the increased risk line of cases. Therefore, Plaintiffs must establish with a reasonable degree of medical certainty that Dr. Grossberg's failure to maintain the proper temperature and administering the vaccines outside of the AAP's recommended time periods *could* cause Colton's sicknesses and that such failure *increased the risk* that the Colton's sicknesses would occur. When considering it in its entirety Dr. Weiss's expert report plainly asserts that Dr. Grossberg's alleged negligence could cause recurrent pneumonia and did increase Colton's risk of recurrent pneumonia. Based on the delay in vaccinating Colton and the storage of the vaccines at a temperature not recommended by the manufacturers or the Pennsylvania Vaccines for Children Program ("PVC"), Dr. Weiss opines, "to a reasonable degree of medical certainty, that Colton's ability to fight serious bacterial infections such as Strep Pneumoniae was compromised . . . resulting in an increased risk of developing recurrent episodes of pneumonia as is documented in his medical records." Dr. Weiss bases his opinion on all of Colton's medical records, the refrigerator temperature logs, the letter from Dr. Grossberg to Ms. Barger, and the deposition testimony of Dr. Grossberg and Ms. Barger. Dr. Weiss explains that the American Academy of Pediatrics recommends that vaccines be given at 2, 4, and 6 months. However, Colton received his vaccinations late and they were split up between visits. Further, Dr. Weiss concludes that the vaccines were not stored at the temperature recommended by the vaccine manufacturer or the PVC and importantly, "[f]ailure to store vaccines at the recommended temperature decreases their potency and efficacy in preventing disease." Dr. Weiss does not claim that the potency *could* be lessened. Rather he affirmatively states that it decreases the potency. While Defendant disputes this point, at this stage we must take evidence favorable to Plaintiffs as true. It is apparent from a plain reading of Dr. Weiss's report that he believes to a reasonable degree of medical certainty that Dr. Barger's alleged failure to keep the vaccines stored at the correct temperature, along with the untimely administering of the vaccines increased Colton's risk of developing his recurrent episodes of pneumonia. If a jury chooses to believe Dr. Weiss's opinion it could find that Dr. Grossberg's negligence was a substantial factor in bringing about Colton's harm.

Dr. Wust-Smith's report also indicates that Dr. Grossberg's failure to keep the vaccines stored at the correct temperature increased Colton's risk of harm. As alluded to, Dr. Wust-Smith states "[Colton's] recurrent pneumonia, cough and otitis could be the direct result of negligence on the part of Dr. Grossberg." She further concludes Dr. Grossberg was negligent in "failing to vaccinate Colton at the appropriate ages and failing to keep the vaccines

that Colton received properly stored to ensure their potency/efficacy." Dr. Wust-Smith states that "[i]t is my opinion, based upon my training, experience, expertise and review of the records provided that the care and treatment (or lack thereof) rendered to Colton Barger by Dr. Grossberg at The Practice of Pediatrics, P.C. failed to comply with the applicable standards of care, and that this failure *increased the risk of injury* to Colton." A fair and reasonable interpretation of these statements suggests that Dr. Grossberg's alleged negligence could have caused Colton's illnesses and increased the risk of developing such illnesses. While Dr. Wust-Smith did not use the term "reasonable degree of medical certainty," in reading the expert report as a whole we find that Dr. Wust-Smith's opinion was made with the requisite degree of certainty. Although much of the information in her report is not pertinent, Dr. Wust-Smith went through a thorough analysis of each of Colton's visits to Dr. Grossberg. While the experts could not indisputably state that Dr. Grossberg's alleged negligence caused Colton's illnesses, they do opine with a reasonable degree of medical certainty that it increased Colton's risk of developing the illnesses. Therefore, when considered in their entirety Dr. Wust-Smith's and Dr. Weiss's reports sufficiently establish a *prima facie* case of negligence pursuant to the Bashline standard.

We also note that Defendant does not argue that Plaintiffs cannot show that he failed to administer the vaccines outside of the AAP's recommended time periods or that such failure could not be shown to increase the risk of Colton suffering from his illnesses. Both of Plaintiffs' experts assert that such untimely administration of the vaccines deviated from the standard of care and increased the risk of developing illnesses. These assertions by the experts provide an alternative basis supporting our finding that Plaintiffs have demonstrated *prima facie* evidence of negligence.

Lastly, Defendant argues that the expert reports are conclusory and provide no basis for their determinations that Dr. Grossberg's alleged negligence caused Colton's sicknesses. We disagree. Expert testimony "is incompetent and may not be admitted into evidence if the expert's opinion is based upon mere conjecture." Hussey v. May Dep't Stores, Inc., 357 A.2d 635, 637 (Pa. Super. Ct. 1976). Furthermore, "[a]n opinion may be found conjectural because of the manner in which it is expressed." Id. An opinion that does not have an adequate basis in fact may be found to be conjectural. Id. As explained by the Pennsylvania Supreme Court:

> An expert cannot base his opinion upon facts which are not warranted by the record. No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture . . . To endow opinion evidence with probative value it must be

> based on facts proven or assumed, sufficient to enable the expert to form an intelligent opinion. The opinion must be an intelligent and reasonable conclusion, based on a given state of facts, and be such as reason and experience have shown to be a probable resulting consequence of the facts proved. The basis of the conclusion cannot be deduced or inferred from the conclusion itself. In other words, the opinion of the expert does not constitute proof of the existence of the facts necessary to support the opinion.

City of Philadelphia v. W.C.A.B. (Kriebel), 29 A.3d 762, 770 (Pa. 2011) (quoting Collins v. Hand, 246 A.2d 398, 404 (Pa. 1968)).

Here, "[i]t is clear that these physicians consulted multiple records and other sources prior to giving their respective opinions." Stimmler, 981 A.2d at 157. Dr. Weiss's opinion is based on Colton's medical records, the refrigerator temperature logs, the letter from Dr. Grossberg to Ms. Barger, and the deposition testimony of Dr. Grossberg and Ms. Barger. Dr. Wust-Smith bases her opinion on Colton's medical records and the letter from Dr. Grossberg to Colton's parents. While we find that Plaintiffs' experts' opinions are not based on mere conjecture we note that we do not come to this conclusion lightly. Dr. Weiss's report is a mere two pages though it encompasses an ultimate conclusion that Dr. Grossberg's alleged negligence increased Colton's risk of developing his illnesses and provides a factual basis for the opinion. Dr. Wust-Smith's report consists of a vast array of impertinent information and accusations of negligence not alleged in the Complaint. Within her report however she too forms an opinion with a factual basis that Dr. Grossberg's alleged negligence increased Colton's risk of developing the illnesses he suffered from. While the experts' conclusions bear some factual foundation in their respective reports we are skeptical of whether the experts can communicate adequate bases for their opinions at trial absent some further explanation of their findings and reasons for those findings in their reports while not venturing outside the scope of their reports. However, at this stage we must resolve all doubts in favor of Plaintiffs and our skepticism as to the adequacy of the bases for Plaintiffs' experts' reports is not enough to grant summary judgment. "[B]ased on the record as a whole and considering the requirements for entitlement to summary judgment, this case is not free from doubt that genuine issues of material fact exist." Id. at 161.

CONCLUSION

Plaintiffs have established a *prima facie* case of negligence based on their medical malpractice claim. Therefore, Defendant's Motion for

Summary Judgment will be denied. An Order of Court consistent with this Opinion is attached.

ORDER OF COURT

AND NOW, this 10th day of October 2014, upon consideration of the *Motion for Summary Judgment of Defendant Michael Grossberg, M.D.,* Plaintiffs' answer thereto, the parties' briefs in support of their positions, and the parties' arguments presented at oral argument,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is DENIED pursuant to the attached Opinion.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Opinion and Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.