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The Trier Of Fact Can Disbelieve Uncontradicted Testimony

by Kathleen J. St. John

Recently, a hospital sought summary judgment as to its nurse-employee's negligence in failing to timely contact the on-call physician because the physician testified she would have done nothing different had the nurse contacted her earlier. Citing *Albain v. Flower Hospital*,[1] the hospital contended the doctor's testimony conclusively established the nurse's negligence was not a proximate cause of the plaintiff's injury. Although the case resolved before a ruling was made, the hospital's motion raises an interesting question. *Must a doctor who testifies she wouldn't have done anything different had she been called earlier be believed?*

More than one-hundred-fifty years of Ohio case law suggests the answer to this question is "no." To the extent *Albain* suggests otherwise, it can be distinguished on its facts.

I. *Albain* Revisited.

Albain was a birth injury/wrongful death action in which the plaintiffs alleged the infant's death was due to delay in diagnosing a placental abruption and in performing a caesarian section. The events leading to the infant's birth began when his mother, eight months pregnant, experienced vaginal bleeding. She was taken to Flower Hospital at 2:00 p.m., and admitted to the obstetrical unit. As her obstetrician did not have privileges there, the on-call obstetrician, Dr. Abbo, was called. The hospital's employee/nurse informed Dr. Abbo that the mother's vital signs, blood pressure, and CBCs, as well as the fetal heart tones and ultrasound results, were all normal, but failed to mention the mother's pad was saturated with bright red blood. Dr. Abbo, who was seeing patients in her office, told the nurse she would be in to evaluate the patient at 5:30 p.m., after her office hours were over. This call occurred at 3:50 p.m.; the nurse did not call Dr. Abbo again until 7:00 p.m, to tell her they'd been expecting her since 5:30 p.m.

When Dr. Abbo arrived, the decision was made to transfer the patient to Riverside Hospital, where the baby was delivered by caesarean section at 11:49 p.m. The infant suffered complications of neonatal asphyxia and died two months later.

In the ensuing lawsuit, the parents named, *inter alia*, Flower Hospital and Dr. Abbo. Summary judgment was granted to Flower Hospital, and an interlocutory appeal was taken. The most well-known aspect of this case is the plaintiffs' attempt to hold Flower Hospital liable for Dr. Abbo's alleged negligence on an agency-by-estoppel theory. Although the Supreme Court in *Albain* rejected that argument on the facts before it by narrowly construing that doctrine,[2] that aspect of the holding in *Albain* was overruled four years later in *Clark v. Southview Hosp. & Family Health Ctr.*[3]

The other aspect of the holding in *Albain*, which wasn't overruled, involved the hospital's liability for the nurse's negligence in failing to keep Dr. Abbo fully informed of the patient's condition. The hospital contended that even assuming the nurse breached this duty, the plaintiffs could not prove proximate cause because Dr. Abbo testified that even if she had gone to the hospital earlier,

she would not have done anything differently.

In affirming summary judgment for the hospital on this issue, the Court found Dr. Abbo's testimony crucial to the issue of proximate cause because the plaintiffs' expert testified the irreversible damage to the infant occurred between 4:00 and 5:00 p.m. Then, analyzing the evidence, the Court stated:

> Dr. Abbo testified that even if she had been informed of Sharon's bleeding at 3:50 p.m., she would not have arrived at the hospital until 5:30 p.m. as promised. Moreover, it is further instructive*** that even when Dr. Abbo arrived at the hospital and examined Sharon at 8:00 p.m., she did not believe that the child was in imminent danger or that a cesarean section was immediately required. In her deposition, Dr. Abbo testified that in her opinion Sharon was in stable condition when she was transferred to Riverside Hospital at approximately 8:45 p.m., and Dr. Abbo determined up through that time that a vaginal delivery was still to be contemplated.
>
> *** Based on the above testimony*** we hold that appellees failed to establish a genuine issue of material fact as to Flower Hospital's derivative liability for the alleged negligence of the nurses for failing to fully inform Dr. Abbo regarding Sharon's condition. The above testimony demonstrates that even if the nurses were so negligent, such negligence was not the proximate cause of the terrible loss suffered by appellees.[4]

The Court in *Albain* did not expressly hold that Dr. Abbo's testimony as to what she would have done had she been contacted earlier must be believed and was conclusive on that issue. That, however, is how the defense interpreted *Albain* in the summary judgment motion referenced at the outset of this article. But do the facts in *Albain* justify that interpretation?

A New Hampshire court, considering a similar issue, found *Albain* to be distinguishable from cases holding that a doctor's testimony as to what she would have done has to be believed.[5] The difference, the court stated, was that "[i]n *Albain*, there is no indication in the court's opinion that the plaintiffs had expert evidence showing the standard of care would have required the attending physician to come to the hospital and take action prior to the time the baby suffered injury."[6] Such testimony could have discredited the obstetrician's testimony, as it would have tended to suggest the obstetrician would have acted more quickly than she claimed she would have.[7]

Albain is also distinguishable since Dr. Abbo's subsequent conduct after she became aware of the patient's condition corroborates her testimony as to what she would have done had she been informed of it earlier.[8] But such corroborating testimony won't always be available. For instance, a physician who claims never to have been contacted will have no subsequent conduct to bolster her testimony as to what she would have done had she been called.

But assuming, *arguendo*, that *Albain* does support the proposition that a doctor's testimony as to what she would have done is conclusive on that issue, is that conclusion sound? Longstanding Ohio case law suggests it is not.

II. A Witness's Testimony Does Not Have To Be Believed, Even If Uncontradicted.

Ohio law has long held that the trier of fact is the sole judge of witness credibility. This is so even if the witness is not directly impeached or contradicted by other witnesses. As early as 1853, in *French v. Millard*,[9] the Ohio Supreme Court held:

> It is not true in law, that a witness must be credited, unless directly impeached, or contradicted by other witnesses; his manner, the improbability of his story, and his self-contradiction in several parts of his narrative, may justify the jury in wholly rejecting his testimony, though he be not attacked in his reputation, or contradicted by other witnesses.[10]

In 1919, this principle was applied in a personal injury action arising from a motor vehicle collision. In *Henderson v. Wertheimer*,[11] Wertheimer was injured when a vehicle driven by Henderson rear-ended his. Henderson's defense was that *his* vehicle "had been struck by one coming up behind him."[12] Both Henderson and his passenger testified that his vehicle had come to a full stop "and was catapulted by the automobile following it."[13] Wertheimer offered no witness "to contradict directly the statement about the automobile behind Henderson, nor was there any testimony offered attacking the reputation of defendant's witnesses."[14]

On appeal from a verdict for Wertheimer, Henderson argued, "the court can not rightfully reject uncontradicted and unimpeached testimony, and that therefore the statements of the two witnesses for defendant must be regarded as establishing a fact."[15] The First District Court of Appeals rejected this argument based on the above-quoted syllabus from *French v. Millard*.

Sixty years later, the same principle was reiterated in *Darcy v. Bender*,[16] another two car accident. The defendant driver died after the lawsuit was filed, thus precluding the plaintiff from testifying under the then-existing "Dead Man's

Statute." This left, as the only witness to the accident, the plaintiff's nine-year-old daughter, who was six at the time of the accident, and who was a passenger in the plaintiff's car. The daughter testified that her mother was driving on the right side of the road when the defendant's vehicle careened out of its lane to collide head-on with the plaintiff's vehicle. The trial court directed a verdict for the plaintiff based on the daughter's testimony, but the court of appeals reversed, stating:

> The fact that there was no evidence to contradict Tara's testimony does not establish the truthfulness of that testimony.*** Rather, her credibility is a question for the jury.[17]

The child's credibility was called into question based on the "juxtaposition of several factors," including "the witness' youth, her interest in the outcome, her status as sole witness to the negligence, and the crucial nature of that issue."[18]

Two decades later, the same principle was applied by the Tenth District Court of Appeals in *Pearce v. Fouad*.[19] In *Pearce*, a 16 month old girl was badly burned in a fire in her family's apartment. The fire was determined to have been caused by one of two fans, one of which was purchased at a Kmart store. Even though both fans were found in the vicinity of where the fire started, the plaintiff's mother testified that the fire had to have been caused by the Kmart fan because the other fan was inoperable. As Kmart presented no evidence to contradict the mother's testimony and did not challenge her credibility on this issue, the trial court directed a verdict for the plaintiff on Kmart's liability. The Court of Appeals reversed. It noted that although credibility issues typically arise when there is conflicting testimony on a question of fact,

> credibility concerns can also be present where the evidence supporting the party moving for a directed verdict appears to be uncontroverted. This will be the case where the resolution of a factual issue raised on a motion for a directed verdict turns on uncontroverted testimony, but the circumstances surrounding the testimony place the testifying witness' credibility in question.*** For example, uncontroverted testimony may be disbelieved where the witness has an interest in the litigation, the witness' story is improbable, or there are contradictions in the witness' testimony.*** In such cases, the credibility of the witness should be resolved by the trier of fact and not on a motion for a directed verdict.[20]

This principle was again reiterated in *Spero v. Avny*,[21] a commercial dispute in which the trial court directed a verdict for one of the parties on the amount of damages he claimed to be owed because his opponents "did not present any of their own evidence regarding his damages."[22] In reversing this aspect of the trial court's decision, the Ninth District Court of Appeals held:

> '[t]he fact that there is no evidence to contradict a witness'[s] testimony does not establish the truthfulness of that testimony.'*** Mr. DeAngelis's credibility remained 'a question for the jury.'*** Just because the Avnys did not attempt to impeach Mr. DeAngelis's testimony as to the amount of his damages and did not present any evidence on this issue does not mean that the jury had no choice but to accept his evidence as credible. The trial court, therefore, incorrectly directed a verdict as to the amount of Mr. DeAngelis's damages.[23]

In short, as repeatedly stated by Ohio courts, "the trier of fact is not bound to accept even uncontradicted testimony of a witness, but may consider his interest, the improbability of his story and the contradiction of parts of his story to reject his testimony."[24]

III. The Rule Regarding Witness Credibility Should Apply To Doctors Who Claim They Would Have Done Nothing Different Had They Been Called Earlier.

So how does the rule regarding witness credibility apply when a doctor testifies she would not have done anything different had she been summoned earlier by the hospital's nursing staff?

The answer appears self-evident. Doctors who testify are witnesses; thus, even if their testimony is uncontradicted, it does not have to be believed. Their testimony is subject to the same rules applicable to all witnesses: the jury may consider their interest, the improbability of their story, and contradiction of parts of their story to reject their testimony. As with all credibility determinations, motives matter. A doctor who testifies she would not have done anything different may be trying to protect herself, the hospital, or the nurses. She may be trying to justify what happened in a way that does not reflect badly on the medical profession. She may simply have a strong antipathy for medical negligence cases.

But a witness is a witness, and the same rules should apply to all.

That said, it is worth recalling the New Hampshire court's insight. Testimony from an expert to the effect that any reasonably qualified physician would have acted sooner had the nurses called her earlier can challenge the credibility of the physician's contrary claims. ■

End Notes

1. 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990).
2. *Id.* at paragraph four of the syllabus.
3. 68 Ohio St.3d 435, 1994-Ohio-519, 628

N.E.2d 46 (1994), overruling paragraph four of the syllabus in *Albain.*

4. *Albain*, 50 Ohio St.3d at 265-266.
5. *Landry v. Murphy*, 2009 N.H. Super. LEXIS 91, at n.3.
6. *Id.*
7. *Id.* at *10, discussing dissenting opinion of Justice O'Mara Frossard in *Seef v. Ingalls Memorial Hosp.*, 311 Ill. App.3d 7, 724 N.E.2d 115 (1999).
8. Even if this corroborating evidence is of such force as to render the physician's testimony conclusive as to what she would have done, is that sufficient to destroy proximate cause with respect to the nurse's negligence? Under *Berdyck v. Shinde*, 66 Ohio St.3d 573, 1993-Ohio-183, 613 N.E.2d 1014, whether the physician's subsequent negligence is a superseding cause absolving the hospital of liability for its prior negligence typically presents a jury question.
9. 2 Ohio St. 44 (1853).
10. *Id.*, at the syllabus.
11. 12 Ohio App. 249 (1st Dist. 1919).
12. *Id.* at 250.
13. *Id.*
14. *Id.*
15. *Id.*
16. 68 Ohio App.2d 190, 428 N.E.2d 156 (9th Dist. 1980).
17. *Id.*, 68 Ohio App.2d at 191.
18. *Id.* at 192.
19. 146 Ohio App.3d 496, 2001-Ohio-3986, 766 N.E.2d 1057 (10th Dist. 2001).
20. *Id.* at ¶26.
21. 9th Dist. Summit No. 27272, 2015-Ohio-4671, 47 N.E.3d 508.
22. *Id.* at ¶18.
23. *Id.* at ¶19.
24. *Vlahos v. Pendergrass*, 10th Dist. Franklin No. 91AP-1319, 1992 Ohio App. LEXIS 2338, at *6, 1992 WL 97784, citing *French v. Millard*, *supra*, and *Henderson v. Wertheimer, supra*. See also, *Warren v. Simpson*, 11th Dist. Trumbull No. 98-T-0183, 2000 Ohio App. LEXIS 1073, at *7-8, 2000 WL 286594; *Foster v. Wells-Sowell*, 8th Dist. Cuyahoga No. 103062, 2016-Ohio-4558, at ¶13; *Trimble v. Rossi*, 8th Dist. Cuyahoga No. 108683, 2020-Ohio-3801, at ¶50.

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