IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND CIVIL DIVISION

FELICIA (BROWN) BARR AND
MARCELL BARR — PLAINTIFFS

vs. NO. CV-2002-5986

WOMEN'S COMMUNITY HEALTH CENTER
and THOMAS TVEDTEN, M.D. — DEFENDANTS

MOTION IN LIMINE

COMES Defendant, Thomas Tvedten, M.D. (hereinafter designated as "Defendant"), by and through his attorneys, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., and move that the Court order Plaintiffs' counsel to avoid direct or indirect mention of or allusion to the following issues and, further, that Plaintiffs' counsel be ordered to instruct witnesses accordingly with respect to the following issues, to-wit:

1. That there be no statements or innuendo to the alleged fact that doctors in Arkansas will not testify against one another, or that there is a "conspiracy of silence," as there is no evidence or basis for any such statement or innuendo and, would therefore, be inappropriate comments to be heard by the jury in addition to being untrue and irrelevant. Ark. R. Evid. 102, 103, 104, 401, 402 and 403.

2. That there is a "national" standard of care. Such an assertion is contrary to Arkansas law, and Arkansas Model Jury Instruction No. 1501 which will provide the definition of standard of care to the jury. Ark. R. of Evid. 102 and 103.

3. Plaintiffs and all other lay witnesses should be precluded from giving testimony of any kind which is medical in nature or which expresses a medical opinion as to the standard

of care applicable to Dr. Tvedten, negligence, causation or alleged medical damages in this case. Such opinions may only be given by witnesses qualified as experts under Arkansas Law. Ark. R. Evid. 702.

4. Any hearsay statements of physicians, nurses, medical technicians, or any other healthcare providers, or clinic employees, who are not identified and providing sworn testimony at trial. Included within this hearsay would be any alleged verbal comments by physicians and written statements contained in correspondence between the physicians or healthcare providers and correspondence or notes which are contained in medical files, but which are not actually a part of the patient's medical record or chart. Ark. R. of Evid. 801, *et seq.*

5. The fact that Dr. Tvedten has been a defendant in any other alleged medical malpractice lawsuits or had other allegations of negligence made against him is irrelevant, immaterial, and would be highly prejudicial in this case. Ark. R. Evid. 401, 402 and 403. Where the issue is one of negligence or non-negligence on the part of a person on a particular occasion, other acts of negligence are not admissible. *See*, *Dalrymple v. Fields*, 276 Ark. 185, 189, 633 S.W.2d 362, 364 (1984), *citing, Myers v. Martin*, 168 Ark. 1028, 272 S.W. 856(1925). The mere fact that allegations of negligence may have been made against Dr. Tvedten does not make it more probable than not that Dr. Tvedten was negligent in this case. Included within this prohibition would be the disposition of any such lawsuits.

6. Any reference that any of the defense attorneys or their law firms "specialize" in defending medical malpractice lawsuits would be inappropriate as there is no evidentiary foundation for any such statement or innuendo. Ark. R. Evid. 102, 103, 104, 401, 402 and 403.

7. Any reference to the fact that any defendant physician or healthcare provider has professional liability insurance is irrelevant and improper. Plaintiffs' counsel should specifically

be directed to avoid any mention of medical malpractice insurance or professional liability insurance at any point in the presence of the jury, including when he is allowed to voir dire the jury on the issue of owning stock in an insurance company. Included within this prohibition would be any contact or communications between Dr. Tvedten and his professional liability insurance carrier.

8. Plaintiffs should be prohibited from arguing or inferring to the jury that a verdict for the Plaintiffs will have no adverse affect on Dr. Tvedten's practice of medicine or his license to practice medicine. Dr. Tvedten's counsel will not argue or infer that an adverse verdict will cause Dr. Tvedten to lose his medical license or hospital staff privileges; however, it is entirely inappropriate for Plaintiffs to affirmatively state that a verdict will have no affect since the law requires that a physician who has been sued for malpractice report a case and its disposition to the Arkansas State Medical Board and also to the National Practitioner Data Bank. Both the Medical Board and the Data Bank information can influence and affect the insurability of a physician, their licensing and the extension of privileges to them.

9. Plaintiffs and their witnesses should be precluded from testifying or suggesting in any form or fashion that any abnormality, condition, or alleged injury that occurred to Felicia Brown Barr is somehow evidence of negligence on the part of Dr. Tvedten in this case. Arkansas Model Instruction 603 expressly states that the fact an injury occurred is not, of itself, evidence of negligence or fault on the part of anyone. Testimony to the contrary by the Plaintiffs or their witnesses will most likely mislead and confuse with respect to the applicable law in this case. Allowing such testimony would unfairly prejudice this Defendant and should be excluded under Ark. Rule Evid. 403.

10. Plaintiffs should be prohibited from eliciting any evidence or testimony that a medical symptom or condition is "possible" or that it is "important" to perform certain acts in relation to the care and treatment of the patient. Plaintiffs should be limited to inquiring into subject matters which can be responded to within a reasonable degree of medical certainty or probability.

11. Plaintiffs should be prohibited from mentioning the fact that Dr. Tvedten has filed any pretrial motions, including this motion in limine, addressing the admissibility of certain evidence and attempting to exclude certain evidence should not be brought forth in the presence of the jury. Ark. Rule Evid. 401, 402 and 403.

12. Plaintiffs should be prohibited from calling Dr. Tvedten, or any of his employees, or otherwise questioning them in an attempt to compel them against their will to provide expert opinion testimony adverse to themselves, or others, or on various medical issues. Ark. Code Ann. §16-114-207. Although a witness can be compelled to testify regarding facts known to him or her, the rule is different with respect to opinions possessed by an individual qualified to be an expert witness, and Plaintiffs should be prohibited in this regard. *Arkansas State Highway Commission v. Witkowski*, 257 Ark. 659, 529 S.W.2d 743 (1975). Included within this prohibition would be any opinion testimony during depositions having to do with standard of care issues, duties or responsibilities.

13. Any references to or mention of the fact that Dr. Tvedten may or may not have provided a consent to "settle" to the insurance carrier should be excluded. This information is completely irrelevant to any issue in this case. Such information is improper and inadmissible pursuant to Rule 408 of the Arkansas Rules of Evidence. Moreover, this issue improperly injects testimony of insurance into the trial of this matter which is highly prejudicial and improper. For

all the above reasons, this testimony should be excluded pursuant to Ark. R. Evid. 102, 103, 104, 401, 402, 403 and 408. Included within this prohibition would be any testimony or arguments that Dr. Tvedten has "failed to take responsibility", or "failed to the right thing", or "failed to admit his mistake", or similar comments.

14. Any reference to the fact that Dr. Tvedten is not board certified in any medical specialty is irrelevant. Even if it was relevant it should be excluded as it would be more likely to confuse or mislead the jury than be probative of any facts. Board certification is a voluntary process, and certification is not required to obtain a medical license or practice medicine. More to the point, board certification is not necessary to acquire the training, skill, and experience to perform elective terminations of pregnancy. Ark. R. Evid. 401, 402, and 403.

15. Plaintiff has one medical expert witness, Dr. James Ray Dingfelder, who has already provided his trial testimony by way of a video recorded evidentiary deposition. Dr. Dingfelder has a singular criticism of Dr. Tvedten which he believes constituted a violation of the standard of care as defined by Dr. Dingfelder. The standard of care violation, in Dr. Dingfelder's opinion, was the use of a 71 dilator during the termination procedure which Dr. Dingfelder thought was too large, and was the proximate cause of the uterine injury experienced by plaintiff. Accordingly, there should be no testimony, comments, or innuendo that any other act or omission by Dr. Tvedten was inappropriate or negligent. Ark. R. Evid. 401, 402, and 403.

16. Plaintiffs' counsel should be precluded from making speeches in front of the jury while making objections. Objections by Plaintiffs' counsel should be precise and to the point. Otherwise, these Defendants may be unfairly prejudiced under Ark. R. Evid. 403 because the jury will most likely be mislead or confused with respect to the relevant evidence in this case.

17. Any pretrial disputes are for resolution by the Court and not by the jury. Ark. Rule Evid. 401 and 403.

WHEREFORE, premises considered, Dr. Tvedten prays that the Court grant his Motion in Limine and order Plaintiffs' counsel and witnesses to act accordingly, and for all other relief to which they may be entitled.

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
SUITE 1800
425 West Capitol Avenue
Little Rock, Arkansas 72201
Phone: 501-688-8800
Fax: 501-688-8807

Ken Cook

Ken Cook (#78030)

CERTIFICATE OF SERVICE

I, Ken Cook, state that on this 23rd day of July, 2009, I have forwarded a copy of the foregoing pleading first-class mail, postage prepaid, to the following:

Mr. Glenn Wright
Wilson & Wright
Attorneys at Law
Suite 2601
100 North Main
Memphis, TN 38103

Mr. Donald Bacon
Friday, Eldredge & Clark
Suite 2000
400 West Capitol Avenue
Little Rock, Arkansas 72201

Ken Cook

Ken Cook