IN THE

Supreme Court of Virginia

RECORD NO. 161230

KAYLA HOLT, an INFANT, by and through
her PARENT and NEXT FRIEND,
MICHELE HOLT,

Appellant,

v.

DIANA CHALMETA, *et al*.,

Appellees.

REPLY BRIEF OF APPELLANT

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1. Argument

A. Trial testimony affirmed Dr. Aboderin met the Active Clinical Practice requirement of Virginia Code 8.01-581.20(A)

Holt, by and through her expert witness pediatrician/neonatologist Dr. Aboderin, was critical of the care provided by Dr. Chalmeta in managing her respiratory distress. Dr. Aboderin opined that Dr. Chalmeta breached the standard of care in many distinct ways, and the trial testimony centered on three: (1) assessing respiratory distress in an infant; (2) timely making the decision to secure an infant's airway either through intubation or use of an oral airway; and (3) making the decision to transfer an infant to another facility for better care. Dr. Aboderin testified that she had an active clinical practice in all three areas. (Appendix page 315, lines 5-25; page 312, lines 107; page 332 line 20 through page 333 line 4; and page 339 lines 3-11). It should be noted that the three areas of negligence have been modified in Dr. Chalmeta's Brief in Opposition in an attempt to change the requirements for an active clinical practice. However, the active clinical practice requirement under Code §8.01-581.20(A) must be viewed in reference to the specific act which is alleged to be negligent. Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004).

1. Assessing Respiratory Distress

Dr. Chalmeta attempts to subtly recharacterize the nature of Dr. Aboderin's criticism in order to reshape the active clinical practice required to testify. Dr. Chalmeta incorrectly posits that Dr. Aboderin was required to employ the use of an oxyhood in 2005-2007 in order to meet the active clinical practice requirement by falsely limiting Dr. Aboderin's criticism to Dr. Chalmeta's negligent use of the oxyhood to care for Holt's blocked nasal passage. Dr. Chalmeta 's negligence was in fact much broader than her lack of proper care while using an oxyhood. The alleged act of negligence was Dr. Chalmeta's failure to correctly assess respiratory distress in an infant. This failure in assessment included her failure to monitor Holt's blood gases more closely, her failure to act on her borderline blood gases; the act of weaning supplemental oxygen in the presence of continued respiratory distress; failing to view Holt's arterial blood gas values in light of the clinical picture of the patient, and a host of other activities that occur to provide breathing support to a patient in respiratory distress. (Plaintiff's Revised Amended Complaint). Dr. Aboderin testified that in the 2005 through 2007 timeframe, she took care of sick babies "who had respiratory distress" and further clarified "It doesn't matter whether it's an oxyhood or any other form of breathing support, the management is the

same." (Appendix page 331 line 9 through page 332 line 2). Dr. Aboderin testified directly and unequivocally that in 2006 she had an active clinical practice assessing babies with respiratory distress. (Appendix page 338 line 5-8). Because Dr. Aboderin opined that Dr. Chalemta was negligent in assessing in infant in respiratory distress, he active clinical practice in 2006 assessing infants in respiratory distress met the requirements to testify as a standard of care expert on the subject.

2. Timely making a decision to secure an airway

Dr. Chalmeta likewise attempts to recast her negligent act of failing to make a timely decision to secure an airway in the presence of respiratory distress in order to reshape the active clinical practice required under Virginia Code 8.01-581.20(A). In addition to the negligent assessment of respiratory distress, Holt alleges Dr. Chalmeta was negligent in failing to timely make the decision to secure the infant's airway and securing the infant's airway. A single appropriate act, timely securing the airway, would have allowed Kayla Holt to breathe properly, thus preventing the significant global brain damage she suffered.

Holt, through Dr. Aboderin alleges that Dr. Chalmeta failed to timely make the decision to secure the airway and failed to timely secure the

airway. Just as there is more than one way to deliver supplemental oxygen to a hypoxic infant (blow by, nasal cannula, oxyhood, etc.,) there is more than one way to secure an airway. Had Dr. Chalmeta timely made the decision to secure the airway and then correctly secured the airway, either method would have met the standard of care, and more importantly, prevented hypoxic brain damage. Holt does not allege that Dr. Chalmeta's technique of placing an oral airway guard was negligent. If such was the allegation, then the date of Dr. Aboderin's use of an oral guard would certainly be relevant to her active clinical practice. However, the negligence alleged, and the active clinical practice which must be measured, was timely making a decision that Holt's airway needed to be secured, and actually securing an airway by any method. Dr. Aboderin testified that her active clinical practice in2006 included making the decision of whether or not to secure an infant's airway. She further testified that the same decision making process applied whether one ultimately used an oral airway guard or intubated the baby. (Appendix page 338 lines 9-15). Because the acts at issue were the decision to secure an airway and securing an airway by any means, those are the issues which must have been performed by Dr. Aboderin. Indeed, Dr. Aboderin testified she made such decisions and had secured airways in 2006 (the exact

procedures at issue) thereby meeting the active clinical practice requirement as set forth in Wright v. Kaye.

3. Making the Decision to Transfer an Infant

Yet again, Dr. Chalmeta attempts to reframe her negligence in order to artificially narrow the active clinical practice procedure that qualifies under Code §581.20(A) and Wright v. Kaye. Holt alleges that Dr. Chalmeta breached the standard of care in her failure to timely make the consult decision to transfer the infant to a hospital with a NICU for a higher level of care. Dr. Aboderin testified in trial that when a hospital does not have a NICU, the standard of care sometimes dictates that an infant be transferred so that additional care can be provided. Dr. Aboderin explained that this decision is made *in consultation* between the physician at the transferring facility and the physician at the receiving facility. The consult decision requires both physicians to discuss the care, the limitations, and then make a timely decision. It is not a unilateral act like intubation, but a collaborative discussion in reaching a decision. Dr. Aboderin testified that during the statutory time period she had experience with making this decision while receiving calls from transferring pediatricians (Appendix page 332, lines 20-21). When asked further regarding her experience with making this particular decision, she stated that had an active clinical practice with the

procedure (decision) at issue, and that her experience was "from instructing them, from being consulted on a baby's care." (Appendix page 339 lines 7-8). Dr. Chalmeta attempted to reframe the particular act at issue by limiting the act to making the transfer decision in consultation while standing in the hospital without a NICU rather than making the decision in consultation while standing in the hospital with a NICU. There was no evidence that the standard of care was different because the act at issue is the same, making the transfer decision in consultation. Under Wright v. Kaye, Dr. Aboderin meets the active clinical practice requirement because the act at issue is making the transfer decision during a consult, regardless of the location.

CONCLUSION

For the foregoing reasons, appellant Kayla Holt respectfully requests that this Court reverse the Trial Court and remand this case for a new trial.

Respectfully submitted,

KAYLA HOLT,
by and through Michele Holt, her parent and next friend,
By counsel

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify that on March 10, 2017, the correct number of true and accurate copies of this Reply Brief were hand-filed with the Supreme Court of Virginia and an electronic copy filed via VACES in PDF format, and an electronic copy via email in PDF format was served upon counsel for the appellee:

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