

IN THE CIRCUIT COURT OF THE 11TH  
JUDICIAL CIRCUIT, IN AND FOR  
MIAMI-DADE COUNTY, FLORIDA

RANDELL WALDEN and MIOSHA  
MIXON, Individually, and as parents and  
natural guardians of JADELL WALDEN, a  
minor

Plaintiff,

CIVIL DIVISION

CASE NO: 08-35036 CA(13)

v.

MAYRA de LOURDES ZENO, M.D.;  
OLGA MARIA QUIROS, M.D.; KIDZ  
MEDICAL SERVICES, INC.; LIFEMARK  
HOSPITALS OF FLORIDA, INC. d/b/a  
PALMETTO GENERAL HOSPITAL;  
PABLO A. VALENCIA, M.D.; SHERIDAN  
CHILDREN'S HEALTHCARE SERVICES,  
INC. and VARIETY CHILDREN'S  
HOSPITAL d/b/a MIAMI CHILDREN'S  
HOSPITAL

Defendants.

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**PLAINTIFFS' MOTION TO STRIKE DEFENSE EXPERT DR. SCHELLER OR TO  
LIMIT HIS OPINIONS AT TRIAL**

Plaintiffs, RANDELL WALDEN and MIOSHA MIXON, individually, and as parents and natural guardians of JADELL WALDEN, a minor, move the Court to strike defense expert Joseph Scheller, M.D., as a witness at trial in this matter, or to limit his opinion testimony at trial, and as grounds therefore, state as follows:

1. One of the Defendants, OLGA MARIA QUIROS, hired a neurologist, Joseph Scheller, M.D., as an expert, in order to have him opine on Jadell Walden's life expectancy at the trial in this matter. Should the remaining Defendant, VARIETY CHILDREN'S HOSPITAL d/b/a MIAMI CHILDREN'S HOSPITAL (hereinafter "Defendant Hospital"), attempt to call Dr.

Scheller to testify at the trial in this matter, he should be stricken as a witness, or his testimony should be limited.

2. Dr. Scheller will testify that Jadell Walden will have a reduced life expectancy based upon medical literature he has reviewed. However, Dr. Scheller has neither examined nor seen Jadell Walden, and as such has no basis to render expert opinions other than his review of medical literature. “Although an expert witness is entitled to render an opinion premised on inadmissible evidence when the facts and data are the type reasonably relied on by experts on the subject, the witness may not serve merely as a conduit for the presentation of inadmissible evidence.” *Smithson v. V.M.S. Realty, Inc.*, 536 So.2d 260, 261-262 (Fla. 3d DCA 1988) (citations omitted). Published articles and studies constitute hearsay and are inadmissible when used to bolster a party’s own expert, or when the expert is used as a means to present such inadmissible evidence to the jury. *See, e.g. Green v. Goldberg*, 630 So.2d 606, 609 (Fla. 4th DCA 1993). *See also Nixon v. State*, 694 So.2d 157 (Fla. 4th DCA 1997) (proposed testimony of expert excluded on other ground “may have been inadmissible as hearsay, insofar as it involved the expert relating the contents of articles that he had read. The expert may not serve as a conduit for placing inadmissible evidence before the jury.”). Nor can such literature be used to bolster the testimony of an expert on direct examination. *Quarrel v. Minervini*, 510 So.2d 977, 978 (Fla. 3d DCA 1987), *rev. denied*, 519 So.2d 987 (Fla. 1988).

3. In addition, Dr. Scheller has failed to produce or disclose the underlying data making up his opinions and calculations, and thus, they should be stricken. Dr. Scheller was deposed on October 26, 2009. He testified that in his opinion Jadell Walden will not live to age twenty.

A. Right. So I will say that certainly I'm not a prophet, and certainly I'm not a prognosticator, or anything like that, but I believe more likely than not, based on my experience and understanding of the literature and training, that – that Jadell won't make it to age twenty.

Scheller Depo, at 72.

4. At best, this is mere speculation with no evidence of the methodology utilized to obtain this approximation. Dr. Scheller even admits that in his entire career as a neurologist, he has only cared for approximately nine patients with an injury characterized as similar to Jadell Walden's. Scheller Depo, at 20. Therefore, with his own limited personal experience, he is coming to his opinions based on insufficient data. Dr. Scheller has also never even seen a life expectancy report limited to kids with kernicterus, the rare neurologic condition that Jadell Walden suffers from. Scheller Depo, at 41.

5. Because Dr. Scheller's experience with children who have the same neurologic injuries as Jadell Walden is, at best limited, any opinions he would express at trial on that issue would only serve to convey the inadmissible hearsay contained in the literature upon which he relied. Thus, his opinions at trial would be improper.

WHEREFORE, the Plaintiffs respectfully request this Court to enter an order striking defense expert Joseph Scheller, M.D., as a witness at trial in this matter, or limiting his opinion testimony.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was sent via U.S. mail and facsimile this \_\_\_\_ day of November, 2009 to all counsel on the attached Service list.

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