COMMWONEALTH OF KENTUCKY
GREENUP CIRCUIT COURT
CASE NO. 04-CR-00076

COMMONWEALTH OF KENTUCKY

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING COMMOWEALTH'S EXPERT WITNESS TO OFFER OPINION OF "SHAKEN BABY SYNDROME"

VS.

RAYMOND MARTIN

In the above style case the child, Evan Galloway, presented to Our Lady of Bellefonte Hospital after becoming limp. Hospital doctors diagnosed the child with a subdural hematoma and bilateral ocular bleeding. In a subsequent Daubert Order the court ruled that the Commonwealth could not have an expert witness testify that the child was injured as a result of "shaken baby syndrome", unless he suffered from a subdural hematoma and/or bilateral ocular bleeding, and had additional symptoms such as long-bone injuries, a fractured skull, bruising, or other indications that abuse had actually occurred. On October 4, 2006, the court heard evidence to determine if the child had additional symptoms of any other indicia of abuse.

The Hon. Melvin Leonhart and the Hon. Maridelle Malone were present representing the Commonwealth. The Hon. Samuel Weaver was present representing the defendant.

The court received evidence in the form of two depositions of Dr. Philip Scribano and Dr. Mary McGregor on behalf of the Commonwealth. The defendant offered evidence from one witness, Dr. Ronald H. Uscinski.

FINDINGS OF FACT

On December 19, 2003, Raymond Martin, father of Evan Galloway, presented Evan to Our Lady of Bellefonte Hospital stating, "the baby began crying very hard... [and] became limp." (Defendant's Exhibit #1) Dr. Christopher Huerta examined the child and came to the conclusion that there, "is no bruising. There are no obvious signs of trauma to the patient." (Defendant's Exhibit #1) Dr. Huerta diagnosed subarachnoid bleeding, that is, bleeding inside the head. Dr. Huerta transferred the child to Children's Hospital located in Columbus, Ohio. Evan Galloway's birthday is August 24, 2003.

Dr. Philip Scribano was a consulting physician at Children's Hospital. Dr. Scribano found the child's, "examination was significant for a small abrasion over the left forehead." (Deposition of Dr. Scribano, page 13) Dr. Scribano testified that the small abrasion was, "non specific. It was small, not very descriptive. It implies some contact to the head, but that's about all you can say about it." Assistant Commonwealth Attorney Maridelle Malone asked Dr. Scribano, "Would it—could it indicate that there was some impact to the head?" Dr. Scribano answered, "Yes." (Deposition of Dr. Scribano, page 24)

Wendi R. Beauseau was a nurse who took care of the child while he was at Children's Hospital. She made a note in her chart that read, "Small bump with raised area noted on right front part of temporal region." (Commonwealth's Exhibit #1) Mrs. Malone asked Dr. Scribano about the significance of the small bump to which he replied, "my sense is it's a relatively insignificant, potentially insignificant finding." (Deposition of Dr. Scribano, page 26)

Dr. Scribano testified that there were, "no external signs of impact." (Deposition of Dr. Scribano, page 48) Dr. Scribano also testified that the only injury they found on the child was the subdural hematoma, and that nobody wrote down any external signs of trauma on the child. (Deposition of Dr. Scribano, page 50-51)

Dr. Scribano testified that the child was also diagnosed with a chronic subdural hematoma. (Deposition of Dr. Scribano, page 55) Dr. Uscinski explained that chronic means old blood in the subdural hematoma. In other words old and fresh blood were seen in the head indicating a prior bleeding. Dr. Scribano testified that the oldest blood in the injury pre-dated December 19, 2003. (Deposition of Dr. Scribano, page 60) Dr. Scribano also testified that given the established time frame in which the child was in the care of the mother, the mother would be included in the time frame in which the chronic bleeding started. (Deposition of Dr. Scribano, page 76)

Dr. Scribano testified, "I believe that it is possible to sustain enough force to the brain to create what's referred to as the injury threshold, to have bleeding in the brain, from shaking alone. The problem in 2006 is that we don't have enough science to consistently demonstrate that, and it has to do with models, biomechanical models. We continually get better and better all the time, but there are problems in any biomechanics assessment based on certain assumptions that are being made. So, we are still very theoretical in that understanding." (Deposition of Dr. Scribano, page 42)

Dr. Mary McGregor first examined the child on December 22, 2003. (Deposition of Dr. McGregor, page 8) She found that the child had retinal hemorrhaging in both eyes. However, she stated, "This child is not suffering from any medical problem that we can account for. This child, also, had a sixth cranial nerve palsy. One of the eyes could

not move outward. So, there's, also, a crossing of the eyes, which was related to high pressure on the brain. When you have bleeding of the brain, that doesn't necessarily mean you are going to have high pressure in the brain, but you can, also, have cerebral edema, which is, also, a sign of brain injury, and when you have cerebral edema, it pushes on the nerves that control other things, and the sixth cranial nerve controls the outward movement of each eye." (Deposition of Dr. McGregor, page 16)

CONCLUSIONS OF LAW

The child sustained a medical condition known a subdural hematoma (bleeding between two of three linings of the brain) and bilateral ocular bleeding (bleeding behind both eyes). The issue in this case is what caused the bleeding in the child's head. The Commonwealth alleges through its indictment that the defendant, Raymond Martin, intentionally inflicted the injury through a shaking of the child. The defendant denies that he shook the child and contends that he did not inflict any injury whatsoever on the child. In order to answer this question the court held that it would require the Commonwealth to produce other evidence of abuse on the child such as long-bone injuries, fractured skull, bruising, or other indications that abuse had actually occurred. The court made this ruling in its Daubert order and amended order as a result of a controversy that is currently raging in the medical community questioning whether "shaken baby syndrome" is a valid mechanism through which children are being injured.

Dr. Huerta of Our Lady of Bellefonte found no obvious signs of trauma to the child and diagnosed the child with a subarachnoid bleed (bleeding in the head).

Dr. Scribano, the consulting physician at Children's Hospital, testified to a small abrasion over the left forehead, and the small bump with raised area reported by the

nurse. He opined that these were insignificant findings that could not account for the serious subdural hematoma and bilateral ocular bleeding. Dr. Scribano concluded that there were not external signs of impact that could explain the serious medical condition of bleeding in the head.

Even more troublesome with this case is the fact that the chronic hematoma pre-dated December 19, 2003, that would have placed the child in the care of the mother before the father had him when the acute hematoma started causing problems.

Dr. McGregor opined that the child was suffering from a medical condition that they could not account for except through "shaken baby syndrome." Dr. McGregor explained that the crossing of the eyes was the result of the bleeding that was occurring in the child's head, and not a separate injury.

In summary, the treating and consulting doctors found no evidence of trauma to the head, or any other part of the child's body. The small abrasion over the left forehead and small bump on right front of the temporal region of the head were insignificant findings unable to explain the serious medical condition experienced by the child. The court can only conclude that none of the evidence of other injuries arises to the level of other indications of abuse. Therefore, the Commonwealth will be precluded from allowing its experts from offering an expert opinion that the child received injuries as a result of being shaken.

ORDER

IT IS THE ORDER OF THE COURT THAT, the Commonwealth will be precluded from allowing its experts from offering an expert opinion that the child

received injuries as a result of being shaken or more commonly know as "shaken baby syndrome."

Entered this the 10th day of October 2006.

Lewis D Nicholls

LEWIS D. NICHOLLS
CIRCUIT JUDGE
20TH JUDICIAL CIRCUIT

It is hereby certified that a true and correct copy of this order has been mailed to:

1. Hon. Clifford Duvall
   Commonwealth Attorney
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✓4. Hon. Samuel Weaver
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5. Hon. Amy Craft
   108 28th Street
   Catlettsburg, Ky. 41129

This 10th day of October 2006.

ALLEN REED, CLERK
GREENUP CIRUIT COURT

BY: Debbie Robins D.C.