

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JOHN R. MILLER and JANET L. MILLER,	:	
husband and wife,	:	
Plaintiffs	:	
	:	
v.	:	No. 04-00,691
	:	CIVIL ACTION
	:	
ROBERT E. PURCELL, JR., M.D.,	:	
JOHN T. BURNS, M.D., SUSQUEHANNA	:	
GASTROENTEROLOGY ASSOCIATES,	:	
LTD., RUDY J. NICHOLS, M.D., AND	:	
LOCK HAVEN HOSPITAL,	:	
Defendants	:	POST-TRIAL RELIEF

OPINION AND ORDER

Before this Honorable Court, is the Plaintiffs’ March 24, 2006 Motion for Post Trial Relief in the form of a Motion for a New Trial as to Defendants Rudy J. Nichols, M.D. and Lock Haven Hospital. The Plaintiffs contend that this Court’s pre-trial and mid-trial limitations on their expert Lawrence A. Cooperstein, M.D.’s testimony was an error severe enough to warrant their request for a new trial. For the following reasons, the Court disagrees with the Plaintiffs’ contention.

I. Background

In April 2002, Defendant gastroenterologist, John T. Burns, M.D., referred his patient, Plaintiff John R. Miller, a sufferer of Crohn’s disease since 1998 or before, to have a CT Scan performed. Mr. Miller had the scan performed at Defendant Lock Haven Hospital that same month. Defendant Nichols, an alleged ostensible agent of Defendant Hospital, interpreted the scan. His interpretation/impression stated, in relevant part: “. . . [m]arkedly distended urinary bladder with fluid and air. This is of unknown etiology. This should be correlated with clinical findings. . .” Report of Dr. Nichols, May 2, 2002. It was later determined that what Defendant

Nichols' had interpreted as a "markedly distended urinary bladder" on Plaintiff John Miller's CT scan was actually an abscess.

In preparation for trial, Plaintiffs' expert radiologist, Lawrence A. Cooperstein, M.D., prepared an expert report that stated, in relevant part:

In my opinion, [Mr. Miller's] CT scan demonstrates a large abscess in the lower abdomen and pelvis. This abscess contains fluid and air and measures about ten centimeters in diameter. The abscess has a slightly irregular wall. Dr. Nichols interpreted this abnormality instead to be a markedly distended urinary bladder. This interpretation is incorrect in my opinion. I believe that this interpretation falls below the expected standard of care. In my opinion an abscess should have been diagnosed from this scan.

In December 2005, all Defendants filed Motions to Preclude Improper Expert Opinions as to the Plaintiffs' expert Dr. Cooperstein. After argument, the Honorable Dudley N. Anderson issued the following order:

. . . Dr Cooperstein shall not be permitted to testify at trial that "[h]ad the abscess been diagnosed on 4/30/02, the eventual sequela in this case would not have been as severe. The abscess required prompt treatment and delay in such treatment in my opinion directly lead to the patient's further problems." Dr. Cooperstein has failed to set forth in his report the specifics of and the basis for this opinion.

Order of 12/29/06, ¶ 2.

Dr. Cooperstein's scant report remained a contentious issue throughout the pre-trial proceedings where Defense counsel alerted the Court to the likelihood that Dr. Cooperstein's trial testimony would exceed the fair scope of his report, and continued throughout the trial where Dr. Cooperstein did in fact repeatedly attempt to, and in some cases succeeded in, testifying beyond the fair scope of his report.

II. Discussion

Pa.R.C.P. No. 4003.4 "favors the liberal discovery of expert witnesses and disfavors unfair and prejudicial surprise." *Jones v. Constantino*, 429 Pa. Super. 73, 83, 631 A.2d 1289,

1294 (Pa. Super. Ct. 1993) citing *Augustine v. Delgado*, 332 Pa.Super. 194, 199, 481 A.2d 319, 321 (1984). In furtherance of this goal, Rule 4003.5(c) provides:

To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, *the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings as set forth in the deposition, answer to an interrogatory, separate report, or supplement thereto.* However, the expert shall not be prevented from testifying as to facts or opinions on matters on which the expert has not been interrogated in the discovery proceedings.

(emphasis added). Although there is no bright line rule employed to determine what testimony is or is not within the fair scope of an expert's report, the Superior Court of Pennsylvania has opined that, "the determination must be made with reference to the particular facts and circumstances of each case. The controlling principle which must guide us is whether the purpose of Rule 4003.5 is being served." *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc. v. Caladie*, 348 Pa. Super. 285, 290, 502 A.2d 210, 212 (Pa. Super. Ct. 1985).

Instantly, the Plaintiffs' contend that the "jury was not allowed to hear Plaintiffs' expert testimony regarding his impressions of the CT scan report and their relationship to the standard of care," Plaintiffs' Motion for Post-Trial Relief, p.2 (March 2006); however, a review of the trial transcript shows otherwise. At trial, Dr. Cooperstein went into detail regarding the basis of his conclusions and his interpretations of the CT scan despite the fact that his report consisted of only conclusory statements and failed to state the basis for his opinions. For example:

DR. COOPERSTEIN:I base that opinion [that the CT scan demonstrates a large abscess] on my review of the CAT Scan that shows abnormalities on it that I think are totally diagnostic of that condition. N.T. 03/07/06, p.30.

...

DR. COOPERSTEIN:. . . All the gas or the air is the black. No straight line. Very wavy, curvy, kind of line. This is not simply water layering beneath air. This is complex solid or semi-solid material that one would never find in the bladder, but that one sees in an abscess and this is how one diagnoses an abscess in this particular case. N.T. 03/07/06, p.39.

. . .

DR. COOPERSTEIN:It's a very important condition [an abscess] in that it's evidence of infection. It's clearly of some importance, and if untreated it will clearly be of harm to the patient. N.T. 03/07/06, p.44.

The Court fails to understand what testimony of Dr. Cooperstein, as related to Defendants Nichols and Lock haven Hospital, the Plaintiffs contend was improperly excluded.

The court in *Jones*, 429 Pa. Super. 73, 631 A.2d 1289 (Pa. Super. Ct. 1993) was faced with a similar issue. In *Jones*, the trial court granted the Plaintiff a new trial for several reasons, one of which involved the fair scope doctrine. The court determined that it erroneously permitted a Defense expert to testify beyond the fair scope of his report. *Jones*, 429 Pa. Super. at 79, 631 A.2d at 1292. The Defense expert's report stated that the Defendant did not negligently cause the Plaintiff's injuries but the report failed to proffer a theory as to why the injuries occurred. At trial, however, the expert did testify as to what he believed caused the Plaintiff's injuries. *Id.* On appeal, the Superior Court of Pennsylvania stated:

While the appellant may think that [Pa.R.C.P.] Rule 4003.5 allows his expert to make a bald assertion of non-negligence in his expert report and then proffer an in-depth theory explaining absence of culpability at trial, we simply disagree.

Id. at 86, 1296.

Although the status of the *Jones* case and the party proffering the report at issue differs from the case *sub judice*, (i.e. the expert report in *Jones* was offered by defendant doctors, not plaintiffs) the Court finds the application of Pa.R.C.P. No. 4003.5 setout in *Jones* persuasive. Dr. Cooperstein's expert report, like the expert in *Jones*, "provided only conclusory statements and general, unsupported opinions." *Jones*, 429 Pa. Super. at 84, 631 A.2d 1295. Such a meager expert report (coupled with vague interrogatory and deposition answers) fails to provide the opposition with the type of notice Pa.R.C.P. 4003.5 envisions.

Accordingly, the Court finds the Plaintiffs' Motion for Post-Trial Relief to be without merit. The Plaintiffs' Motion contends that the Court erroneously limited Dr. Cooperstein's testimony, but fails to cite any such limitation while ignoring the obvious fact that the testimony the Court did allow of Dr. Cooperstein actually went well beyond the scope of his report.

ORDER

AND NOW, this 21st day of August 2006, the Court hereby DENIES the Plaintiff's Post-Trial Motion for a New Trial.

By the Court,

Nancy L. Butts, Judge

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