

IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PA

MEGGAN SKRUTSKY, :
Plaintiff : NO: 08-02599
vs. :
CHARLES F. ULMER, JR., : CIVIL ACTION
Defendant :
vs. :
MATTHEW D. AIKEY, :
Additional Defendant :

MATTHEW D. AIKEY, :
Plaintiff : NO: 08-02599
vs. :
CHARLES F. ULMER, :
Defendant : CIVIL ACTION

OPINION

On April 7, 2010 the Defendant, Charles F. Ulmer, Jr. filed three (3) Motions in Limine. On April 7, 2010, the Plaintiff, Meggan Skrutsky filed one (1) Motion in Limine. Following argument, this Court finds as follows:

Defendant Charles Ulmer's Motion in Limine to Preclude Testimony and Evidence Regarding the Death of Plaintiff Aikey's Sister

Defendant's Motion in Limine to Preclude Testimony and Evidence Regarding the Death of Plaintiff Aikey's Sister is hereby GRANTED by agreement of the parties, and the Plaintiffs and their witnesses are hereby precluded from offering

any testimony regarding the death of Plaintiff Aikey's sister and/or otherwise offering testimony regarding Flight 800.

Defendant Charles Ulmer's Motion in Limine to Preclude Introduction of Photographs Depicting Blood at Trial

Defendant's Motion in Limine to Preclude Introduction of Photographs Depicting Blood at Trial is hereby GRANTED in part and DENIED in part. The determination of whether a particular piece of evidence is relevant and therefore admissible, lies in the sound discretion of the trial court. Fisher v. North Hills Passavant Hospital, 781 A.2d 1232, 1234 (Pa.Super. 2001). The admissibility of photographs at trial is largely within the discretion of the trial court. Piso v. Weirton Steel, Co., 345 A.2d 728, 731 (Pa.Super. 1975). In determining whether to admit photographs, the court must weigh the evidentiary value of the photographs to the likelihood of inflaming the minds and passions of the jurors. Id.

The Defendants are seeking to preclude the introduction of any and all photographs at trial that depict blood. The Plaintiffs argue that the photographs are probative on the issue of pain and suffering, and probative to show the nature and extent of the damage to the vehicle and its final resting location in the woods. The Plaintiffs assert that by excluding all photographs that depict blood, no photographs will be presented to the jury which show the entirety of the vehicle as it existed following the accident.

Following a review of the photographs at issue, this Court finds that the up-close photographs which depict the interior of the cab of the vehicle are not admissible at trial as the evidentiary value of these photographs is outweighed by the likelihood of inflaming the passions of the jurors. The remainder of the photographs

at issue, however, are admissible at trial as their probative value outweighs the danger of prejudice. Even if the photographs depict blood, evidence which depicts the Plaintiffs' vehicle as it existed following the accident is relevant and probative to show the force of the impact, the resting position, and the nature and extent of damage to the vehicle.

Defendant Charles Ulmer's Motion in Limine to Preclude Expert Testimony Outside the Scope of Expert Reports and Plaintiff Skrutsky's Motion in Limine

The final two (2) motions relate to the admissibility of medical testimony. The Defendant seeks to preclude the testimony of Dr. Joel Klena regarding injuries sustained by Plaintiff Skrutsky other than an alleged left wrist injury. The Defendant also seeks to preclude the testimony of Plaintiff Matthew Aikey's treating physician, Dr. David Andreychik, regarding the permanency of Plaintiff Aikey's injuries.

Plaintiff Skrutsky has also filed a Motion in Limine seeking a pre-trial ruling on the issue of the admissibility of Dr. Klena's testimony. Specifically, Plaintiff Skrutsky requests a pre-trial ruling on the issue of whether Dr. Klena's testimony concerning the diagnoses set forth in Plaintiff Skrutsky's discharge summary and evidence of Plaintiff's third wrist surgery is admissible at trial. Plaintiff Skrutsky's Motion in Limine is hereby GRANTED and Defendant Charles Ulmer's Motion in Limine to Preclude Expert Testimony Outside the Scope of Expert Reports is GRANTED in part, and DENIED in part.

Plaintiff Skrutsky was hospitalized at Geisinger Hospital following the accident for treatment of her alleged injuries. Plaintiff Skrutsky's medical expert, Joel C. Klena, MD authored a report on behalf of Plaintiff Skrutsky. On March 31,

2010 a video trial deposition was taken of Dr. Klena. During his deposition, Dr. Klena read portions of Geisinger's discharge summary into the record. This testimony was as follows:

Q: Doctor, first of all, could you tell us during what period of time Ms. Skrutsky was in Geisinger as an inpatient?

A: Again, in reference to the document, the admission date was 5/12/2007, and discharge 5/17/2007.

Q: What were her diagnoses?

A: As stated here, the principle diagnosis was a pregnancy with motor vehicle accident, secondary diagnosis of liver contusion, pulmonary contusion, acute pancreatitis, heart contusion, left wrist fracture, and nasal fracture, and nonreactive stress test.

(Klena Dep. 3/31/10, p. 10).

Dr. Klena additionally testified:

Q: This discharge summary, is this a standard document that's prepared on patients discharged from Geisinger?

A: Yes, I believe it's required by law.

Q: Was it prepared by you?

A: No, sir.

Q: Was it prepared by another physician at Geisinger?

A: Yes.

Q: Is this discharge summary the kind of report that you would rely on in coming to conclusions concerning a patient's hospital course and injuries that she incurred?

A: Yes.

(Id. at 8).

When specifically questioned regarding whether he relied on the discharge summary when authoring his report, Dr. Klena testified that he did not. Id. at 10. The

Defendant accordingly asserts that the testimony is inadmissible at trial.

Dr. Klena, however, clearly adopted the opinion that all of Plaintiff's diagnoses, with the exception of pancreatitis, as set forth in the discharge summary were related to the motor vehicle accident. This testimony was as follows:

Q: In your opinion, were the other diagnoses that are listed in the discharge summary, caused by the accident, the motor vehicle accident of May 11, 2007?

* * * * *

A: With the diagnoses as outlined in the discharge summary, these would also be consistent in liver contusion, pulmonary contusion, heart contusion, wrist fracture, and nose fracture with the trauma. I would not want to speculate on pancreatitis, the source of that being a little bit out of my medical realm.

Id. at 25-26.

Pa.R.E. 703 provides as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As a medical expert is permitted to provide opinions on facts or data of a type reasonably relied upon by experts, and made known to him at the time of trial, this Court finds that Dr. Klena's opinions are admissible and appropriate pursuant to Pa.R.E. 703.

The Defendant also asserts, however, that the evidence should be excluded because it goes beyond the scope of Dr. Klena's expert report. Pursuant to Pa.R.C.P. 4003.5(a)(1)(b), "a party may, during discovery, require his adversary to state the

substance of the facts and opinions to which his or her expert is expected to testify and a summary of the grounds for each opinion.” Feden v. Consolidated Rail Corporation, 746 A.2d 1158, 1161 (Pa.Super. 2000).

Pa.R.C.P. 4003.5(c) specifically 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 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.

The purpose of this provision is “to avoid unfair surprise by enabling the adversary to prepare a response to the expert testimony.” Feden, supra. When considering whether direct expert testimony goes beyond the scope of what is disclosed during discovery, the question is whether the discrepancy between the expert’s pre-trial report or records and his trial testimony is of a nature that would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the appropriate response. Daddona v. Thind, 891 A.2d 786, 805 (Pa.Comm.w. 2006). Testimony should not be excluded if it is to be reasonably anticipated from the content of the expert’s report or records. Id. at 806. In this case, questions regarding the discharge summary should have been expected and should have come as no surprise to Defendant Ulmer. Although Dr. Klerna’s report does not mention the diagnoses contained within the discharge summary, it is undisputed that the discharge summary was provided to Defendant’s counsel months prior to the doctor’s deposition. Moreover, contusions and fractures are obvious accident injuries. Accordingly, this Court finds that it is not unfair to permit Dr.

Klena's opinions regarding Plaintiff Skrutsky's diagnoses as set forth in the discharge summary and as such, Dr. Klena's opinions regarding the discharge summary are admissible at trial.¹

Plaintiff Aikey's Expert Testimony

Plaintiff Aikey intends to call Dr. David Andreychik, MD as an expert at trial. No expert report was produced by Dr. Andreychik during discovery, instead, Plaintiff Aikey is relying on treatment records from Geisinger Hospital regarding treatment provided by Dr. Andreychik. On April 6, 2010, Dr. Andreychik was deposed.

During his deposition, Dr. Andreychik testified as follows:

Q: Doctor, assuming that Mr. Aikey will testify that he continues to suffer from – from the neck pain presently at this date, similar to what he described to you that he was experiencing back in May of 2008, do you have an opinion as to whether or not that's permanent?

A: I – I have an opinion, I – it's probably –he's probably going to have some degree of discomfort, if after two years he's still having pain.

(Andreychik Dep. 4/6/10, p. 25).

Defendant Ulmer asserts that the treatment records produced during discovery fail to discuss the prognosis and/or permanency of Plaintiff Aikey's injuries and relate only to treatment rendered. Accordingly, Defendant Ulmer asserts that Dr. Andreychik should be precluded from offering Dr. Andreychik's opinion regarding the permanency of Plaintiff Aikey's alleged injuries. This Court agrees. Expert testimony regarding the permanency of Plaintiff Aikey's injuries clearly goes beyond the fair scope of the records disclosed during discovery. Moreover, permitting the

¹ Plaintiff Skrutsky's Motion in Limine also seeks a determination by this Court that evidence regarding Plaintiff Skrutsky's surgery of January 2010 is admissible at trial. This portion of Plaintiff Skrutsky's Motion in Limine is GRANTED by agreement of the parties during argument.

introduction of testimony regarding permanency would constitute unfair surprise to Defendant Ulmer, and accordingly, will not be permitted.

ORDER

AND NOW, this 22nd day of April, 2010, the Defendant Charles Ulmer's Motion in Limine to Preclude Testimony and Evidence Regarding the Death of Plaintiff Aikey's Sister is GRANTED and the Plaintiffs and their witnesses are hereby precluded from offering any testimony regarding the death of Plaintiff Aikey's sister and/or otherwise offering testimony regarding Flight 800.

Defendant Charles Ulmer's Motion in Limine to Preclude Introduction of Photographs Depicting Blood at Trial is GRANTED in part, and DENIED in part. The close-up photographs which depict the interior of the cab of the vehicle are not admissible, but the remainder of the photographs are admissible at trial.²

Plaintiff Skrutsky's Motion in Limine is hereby GRANTED and Dr. Klena's opinions regarding the discharge summary are admissible at trial, along with Dr. Klena's testimony regarding Plaintiff Skrutsky's January 2010 surgery.

Defendant Charles Ulmer's Motion in Limine to Preclude Expert Testimony Outside the Scope of Expert Reports is DENIED to the extent that Dr. Klena's opinions regarding Geisinger's discharge summary are admissible. With regard to Defendant Ulmer's Motion to preclude Dr. Andreychik from offering his opinion regarding the permanency of Plaintiff Aikey's alleged injuries, Defendant Ulmer's

² This Court has not viewed every picture. It is suggested that if there is doubt, the picture should be shown to the Court prior to use.

Motion in Limine to Preclude Expert Testimony Outside the Scope of Expert Reports
is GRANTED.

BY THE COURT,

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