

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ANNA DIEFFENBACH and DONALD DIEFFENBACH, :	:	DOCKET NO: 10-00016
Plaintiffs :	:	CIVIL ACTION – LAW
vs. :	:	
PETER B. TREVOULEDES, M.D., :	:	JURY TRIAL DEMANDED
Defendant :	:	

**O P I N I O N A N D O R D E R**

AND NOW, this 6<sup>th</sup> day of January, 2012, following oral argument on Defendant’s Motion in Limine to Preclude Expert Radiologist Dr. Barry Daly, it is hereby ORDERED and DIRECTED that Defendant’s motion is DENIED. Defendant argued that Dr. Daly should be precluded from testifying as an expert in this case for two reasons: 1) Dr. Daly’s conclusions within his expert report are based on pure speculation, and 2) Dr. Daly failed to express his opinions with the requisite degree of medical certainty. Motion, 2.<sup>1</sup> This Court believes that these two issues are one in the same and will address them as such.

The admission or exclusion of evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Jacobs v. Chatwani*, 922 A.2d 950, 960 (Pa. Super. Ct. 2007). All relevant evidence is generally admissible. Pa. R.E. 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pa. R.E. 401.

Prior to trial, a party may file an *in limine* motion to obtain a ruling from the trial court on the admissibility of evidence before the evidence is offered in trial. *Yacoub v. Lehigh Valley*

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<sup>1</sup> Supplemental issues were raised by the parties during oral argument concerning Dr. Daly’s qualifications and his ability to testify as an expert witness. This Court will not address those issues in this opinion because these supplemental issues were not properly before the Court at the time of the oral argument held on January 4, 2012.

*Med. Associates, P.C.*, 805 A.2d 579, 588 (Pa. Super.2002). The purposes behind an *in limine* motion are excluding “anticipated prejudicial evidence, keeping extraneous issues out of the underlying proceeding, precluding reference to prejudicial matters, or preventing encumbering the record with immaterial matter.” *Commonwealth v. Pikur Enterprises, Inc.*, 596 A.2d 1253, 1259 (Pa. Cmwlt. Ct. 1991). The trial court has the discretion to entertain these motions. *Id.*

In *Vicari v. Spiegel*, 936 A.2d 503 (Pa. Super. Ct. 2007), *appeal granted in part and denied in part*, 973 A.2d 408 (Pa. 2009) (allocator granted on the limited issue of “[w]hether respondent’s medical oncology expert was qualified to render standard of care opinions against an otolaryngologist and radiation oncologist under Section 512 of the Medical Care Availability and Reduction of Error Act, 40 P.S. § 1303.512”), our Superior Court clarified the standard that courts must use in determining whether an expert’s opinion is rendered to requisite degree of medical certainty. In particular, the Superior Court held that:

we must examine the expert’s testimony in its entirety. That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty. Nevertheless, an expert fails this standard of certainty if he testifies that the alleged cause possibly, or could have led to that result, that it could very properly account for the result, or even that it was very highly probable that it caused the result.

*Id.* at 510-11 (citations omitted) (quotations omitted). Therefore, this Court must examine Dr. Daly’s report in its entirety to determine whether his opinions were given with a reasonable degree of medical certainty.

In the instant case, it is clear that, in Dr. Daly’s opinion, “[t]he appropriate imaging test for her [Ms. Dieffenbach’s] symptoms and signs on 2/23/08 was a CT scan of the abdomen and pelvis.” Def. Ex. A, 2. Also, it is clear that in Dr. Daly’s opinion that an oral contrast administered during the CT scan “would have substantially increased the likelihood of demonstrating the exact source of the perforation....” *Id.* at 3. Although Dr. Daly wrote words

such as “very likely” and “would have shown” within his report, the report, taken in its entirety, illustrates that the opinions are based upon a reasonable degree of medical certainty. Therefore, because this Court believes that Dr. Daly’s opinions were expressed to a reasonable degree of medical certainty, the Court will not exclude Dr. Daly’s testimony on the reasons articulated in Defendant’s present motion before the Court.

As a result of supplemental issues raised during oral argument, Plaintiffs shall submit Dr. Daly’s resume and certifications to this Court and Attorney Mitchell, in addition to an affidavit concerning Dr. Daly’s qualifications to testify concerning the standard of care in this case. These documents shall be submitted not later than January 17, 2012. Both parties shall submit memorandums of law on Dr. Daly’s standard of care testimony not later than January 24, 2012.

BY THE COURT,

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Date

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Richard A. Gray, J.

RAG/abn

cc: Clifford A. Rieders, Esquire  
C. Edward S. Mitchell, Esquire  
Gary L. Weber, Esquire, Lycoming County Reporter