

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

DANIEL EZERO, Individually and as Administrator of the :	:	DOCKET NO. 10-01023
Estate of Abby Ezero, M.D., Deceased,	:	CIVIL ACTION – LAW
Plaintiff	:	
	:	
vs.	:	JURY TRIAL DEMANDED
	:	
THE WILLIAMSPORT HOSPITAL AND MEDICAL	:	ORDER RE: MOTION <i>IN</i>
CENTER; SUSQUEHANNA HEALTH SYSTEM;	:	<i>LIMINE</i> – PAIN AND
SUSQUEHANNA HEALTH; JOEL OLIVER D’HUE,	:	SUFFERING DAMAGES
M.D.; SUSQUEHANNA HEALTH MEDICAL GROUP;	:	
HARRY DEAN MINTZER, D.O., and ANESTHESIA	:	
ASSOCIATES OF WILLIAMSPORT,	:	
Defendants	:	

OPINION AND ORDER

AND NOW, this ___ day of July, 2012, following oral argument on the Motion *in Limine* of Defendants The Williamsport Hospital and Medical Center, The Williamsport Hospital Foundation, Susquehanna Health System, Susquehanna Health, Susquehanna Health Systems, Inc., Susquehanna Health Foundation, Joel Oliver D’Hue, M.D., and Susquehanna Health Medical Group Regarding Alleged Pain and Suffering Damages and the Motion *in Limine* of Defendants Harry Dean Mintzer, D.O., and Anesthesia Associates of Williamsport Regarding Alleged Pain and Suffering Damages, it is hereby ORDERED and DIRECTED that Defendants’ motions are GRANTED to the extent that no expert testimony has been identified on the topic of Abby Ezero’s pain and suffering.

The Pennsylvania Rules of Evidence provide that 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. The admission and exclusion of evidence

is within the sound discretion of the trial court. *Jacobs v. Chatwani*, 922 A.2d 950, 960 (Pa. Super. Ct. 2007).

Additionally, the trial court has the discretion to entertain motions *in limine*. *Commonwealth v. Pikur Enterprises, Inc.*, 596 A.2d 1253, 1259 (Pa. Cmwlth. Ct. 1991). Motions *in limine* are pre-trial rulings regarding the admissibility of evidence. *Yacoub v. Lehigh Valley Med. Associates, P.C.*, 805 A.2d 579, 588 (Pa. Super.2002). Motions *in limine* exclude from the trial anticipated prejudicial evidence, keep extraneous issues out of the underlying proceeding, preclude references to prejudicial matters, and prevent encumbering the record with immaterial evidence. *Id.*

In this matter, Defendants filed *in limine* motions to preclude the introduction of evidence regarding Abby Ezero's alleged pain and suffering. In *Cominsky v. Donovan*, 846 A.2d 1256 (Pa. Super. Ct. 2004), our Superior Court held that "in order to make a case for pain and suffering damages on behalf of a person in a persistent vegetative state, the plaintiff must present competent opinion testimony that the person could in fact experience such pain." *Id.* at 1261. In *Cominsky*, plaintiff alleged that defendants' negligence during post-operative care caused the decedent's resulting brain injury and death. *Id.* at 1257. In that matter, plaintiff presented evidence that its decedent experienced pain, anguish and fear while she was in a persistent vegetative state for the nineteen days prior to her death. *Id.* In that matter, the jury awarded plaintiff pain and suffering damages.

On appeal, appellants alleged that the jury's pain and suffering award was based upon inadmissible evidence, i.e. lay witness testimony regarding the decedent's pain, anguish, and fear, while in the vegetative state. *Id.* Our Superior Court agreed. The Superior Court ruled that appellee should have presented expert evidence supporting the claim that the decedent could

experience pain despite her vegetative state because “[w]here the decedent is unconscious for the entire period between the time of injury and the time of death, there can be no recovery for pain and suffering in a survival action.” *Id.* at 1260 (citing *Nye v. Commonwealth*, 480 A.2d 318, 321 (Pa. Super. Ct. 1984)). Additionally, the Court noted that although the hospital records indicate notes that the respondent was responsive to stimuli and exhibited posturing, those notes could not be interpreted without expert medical testimony. *Id.* at 1260.

In the above-captioned matter, Defendants want to preclude any evidence regarding Abby Ezero’s pain and suffering because Plaintiff has not identified an expert that will so testify. In this matter, the evidence does not irrefutably establish that Abby was unaware of her surroundings. *See Wagner v. York Hospital*, 608 A.2d 496 (Pa. Super. Ct. 1992) (distinguished by *Cominsky*). Abby’s medical records that indicate that she was not in a coma on October 24, that she was pulling at tubes on October 25, that she moved to pain on October 28, and that she received a certain amount of medication. However, the Court needs expert testimony to be submitted that explains what this documentation means. *Cominsky*, 846 A.2d at 1260. After an examination of the expert reports submitted by Plaintiff, no expert addresses the issue of the pain that Abby experienced from October 23, 2009, to November 2, 2009; Plaintiff’s response to Defendants’ motions contain no citations to an expert or an expert report that addresses the pain and suffering issue. Therefore, Defendants’ above-mentioned motions are GRANTED to the extent that no expert testimony has been identified on the topic of Abby Ezero’s pain and suffering because the Court requires expert testimony to establish what pain, suffering, anguish, and/or fear Abby Ezero experienced from October 23, 2009, to November 2, 2009.

BY THE COURT,

Richard A. Gray, J.

RAG/abn

cc: Thomas Kline, Esquire/Amy Guth, Esquire
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