IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GRANT J. MEYERS and KATHY L. MEYERS, Plaintiffs	:	DOCKET NO. 11-01,166
vs.	:	CIVIL ACTION – MEDICAL PROFESSIONAL LIABILITY ACTION
PATRICK J. CAREY, D.O.; PRAFUL K. TILVA, M.D.; WEST BRANCH ORTHOPAEDICS & SPORTS MEDICINE, INC.; SUSQUEHANNA REGIONAL HEALTHCARE ALLIANCE, INC.; SUSQUEHANNA REGIONAL HEALTHCARE ALLIANCE t/d/b/a SUSQUEHANNA HEALTH and DIVINE PROVIDENCE HOSPITAL, Defendants	:	

O P I N I O N AND O R D E R

The matter comes before the Court on a discovery motion, filed by Plaintiffs, requesting the Court to compel deposition testimony of Dr. Carey, a defendant-physician. Generally, the Court notes this matter is a medical malpractice action filed by the Meyers seeking damages for the alleged negligence of Defendants in diagnosing and treating a tumor in Mr. Meyer's lung.

The pertinent facts are as follows. On June 14, 2012, Plaintiffs deposed Dr. Carey; Dr. Carey's counsel was present at the time of the deposition. Prior to starting the deposition, the parties placed on the record a stipulation reserving all objections, other than to the form of the question, for trial. During the deposition, Dr. Carey's counsel objected to a number of questions posed by Plaintiffs. Specifically, Dr. Carey's counsel objected to questions concerning whether Dr. Carey has gone back and reviewed Mr. Meyer's x-rays and if Dr. Carey can now see a tumor on the x-rays. Dep. 44, line 8 – Dep. 45, line 3; Dep. 102, line 7-14.; Dep. 120, 13-19. Similarly, Dr. Carey's counsel objected to questions concerning what Dr. Carey would have done if he would have seen the tumor on Mr. Carey's x-ray. Dep. 111, 24 – Dep. 112, 4; Dep. 113, 22 – Dep. 114, 7. Additionally, Dr. Carey's counsel objected to questions concerning Dr.

Carey's current office procedures and if they are different than those procedures in place at the time of the alleged negligence. Dep. 110, 21 – Dep. 111, 2; Dep. 111, 6-7. Lastly, Dr. Carey's counsel objected to questions regarding how to properly read a radiograph. Dep. 118, 23 – Dep. 120, 19. *See* Dep. 117, 6-19; Dep. 119, 2-6.

The Court believes that these objections may be characterized as objections to two different types of questions: 1. questions regarding past and present office procedures, and 2. questions regarding expert opinions, including new analysis of a radiograph. The Court will address each of these objections in turn.

I. Questions Regarding Past and Present Office Procedures

During Dr. Carey's deposition, Plaintiffs asked him about the office procedures that are currently in place in his office. Dep. 110, 21 – Dep. 111, 2; Dep. 111, 6-7. Dr. Carey's counsel objected to those questions, presumably on the ground that that Pa. R.E. 407 deems subsequent remedial measures inadmissible. The Court OVERRULES the instant objection.

This objection is identical to Dr. Carey's objections to Plaintiffs' request for admissions regarding past and present office procedures. In that instance, the Court ruled that evidence of these office procedures is discoverable, even if the evidence might not be admissible in trial. *See* Pa. R.C.P. 407 and 4003.1. The Court makes a similar ruling in the instant matter.

Yet, the Court notes that Dr. Carey testified to his 2008-2009 procedures regarding radiologist notifications. Dep. 112, 6 – Dep. 113, 11. Also, Dr. Carey testified that orthopedics may go back and review old x-rays, although it is uncommon to do so. Dep. 41, 14 – Dep. 43, 12. However, based upon the Court's prior decision regarding Plaintiffs' request for admissions, the Court OVERRULES the instant objection and DIRECTS Dr. Carey to respond to questions regarding past and present protocols within his office.

Additionally, Dr. Carey's counsel objected to questions concerning what Dr. Carey would have done if he would have seen Mr. Meyer's tumor on an x-ray. Dep. 111, 24 – Dep. 112, 4; Dep. 113, 22 – Dep. 114, 7. The Court believes that if Dr. Carey responds to Plaintiffs' questions regarding past and present office procedures, this hypothetical question will be adequately addressed. Therefore, the Court SUSTAINS Dr. Carey's objection to the hypothetical question posed by Plaintiffs.

II. Questions Requesting Expert Opinions

During Dr. Carey's deposition, Plaintiffs questioned him about one of Mr. Meyer's old x-rays. In particular, Plaintiffs asked Dr. Carey if he had gone back and reviewed this x-ray and, if so, what Dr. Carey now sees on it. Dep. 44, line 8 – Dep. 45, line 3; Dep. 102, line 7-14.; Dep. 120, 13-19. Therefore, Plaintiffs are requesting Dr. Carey to perform a present day analysis of this radiograph; the Court believes this analysis is akin to an expert opinion. Additionally, Plaintiffs asked Dr. Carey how to properly read a radiograph; again, the Court believes this question relates to expert opinion testimony. Dr. Carey objected to these questions because he does not expect to testify as an expert in his own defense. Dep. 118, 23 – Dep. 120, 19. *See* Dep. 117, 6-19; Dep. 119, 2-6. The Court SUSTAINS Dr. Carey's objections.

In considering these objections, the Court must analyze two rules of civil procedure, Pa. R.C.P. 4003.1 and 4003.5. Initially, Pa. R.C.P. 4003.1 governs the general scope of discovery. That rule provides that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Pa. R.C.P. 4003.1(a). That rule provides that "it is not ground for objection that the information sought involves *an opinion* or contention that relates to a fact or the application of law to fact." Pa. R.C.P. 4003.1(c) (emphasis added). The 1989 comment to that rule provides that opinions are discoverable under the rules,

but that there "has been no express general provision authorizing the discovery of opinions." Pa. R.C.P. 4003.1, comment. Additionally, Pa. R.C.P. 4003.5 governs the discovery of expert testimony. That rule provides that opinions held by experts that are "acquired or developed in anticipation of litigation or for trial" are discoverable. Pa. R.C.P. 4003.5.

Our Superior Court has held that Rule 4003.5 does not apply to a defendant physician's expert testimony. *Katz v. St. Mary Hosp.*, 816 A.2d 1125, 1127-28 (Pa. Super. Ct. 2003); *Neal v. Lu*, 530 A.2d 103, 106 (Pa. Super. Ct. 1987). *See also* Pa. R.C.P. 4003.5, comment 5.[1] In those cases, the Superior Court held that the rule did not apply to defendant physicians because they do not acquire or develop their opinions "in anticipation of litigation or for trial" as required by the rule. Pa. R.C.P. 4003.5(a). *See Katz*, 816 A.2d at 1127-28. Despite Pa. R.C.P. 4003.5 not applying to defendant physicians, comment 5 to the rule provides that if a defendant doctor is examined by oral deposition, he "cannot assert that his opinion may not be discovered without his consent." *See* Pa. R.C.P. 4003.5, comment 5. However, the appellate cases cited by the parties and found by the Court fall contrary to this comment.

First, the Court will address the general rule that defendant expert testimony falls outside of the purview of Pa. R.C.P. 4003.5. In *Neal*, our Superior Court held that defendant doctors need not abide by Rule 4003.5. 530 A.2d at 106.[2] In *Neal*, a defendant physician was the sole witness to testify in his defense. *Id*. at 105. On appeal, plaintiffs questioned whether the defendant physician could testify as an expert witness without providing them with an expert report, pursuant to Pa. R.C.P. 4005.3. *Id*. at 106. Answering the question in the affirmative, our

---

[1] Comment 5 of Pa.R.C.P. 4003.5 provides:

> It should be emphasized that Rule 4003.5 is not applicable to discovery and depositions procedure where a defendant is himself an expert, such as a physician… and the alleged improper exercise of his professional skills is involved in the action. Such a defendant can be examined by written interrogatories under Rule 4005 or by oral depositions under Rule 4007.1. If so examined, a defendant cannot assert that his opinion may not be discovered without his consent.

[2] The Court notes that the Superior Court decided *Neal* after the 1978 Explanatory Comments to Pa. R.C.P. 4003.5.

Superior Court held that Pa. R.C.P. 4003.5 applies to non-party expert witnesses because party witnesses' opinions pre-date litigation and form the basis of the underlying action. *Id*. at 106-08.

Similarly, in *Katz*, the Court provided, in a footnote, that plaintiffs can explore a defendant doctor's opinions through written interrogatories or oral depositions. 816 A.2d at 1128 n.2. In that case, a defendant medical doctor testified in his own defense to his expert opinion. *Id*. at 1127. On appeal, plaintiffs questioned the defendant doctor's ability to testify as an expert without providing them an expert report. *Id*. Again, our Superior Court held that defendant physicians need not abide by Rule 4003.5 because their opinions were not generated in anticipation of litigation; however, the Court provided that when defendant doctors are testifying as experts, plaintiffs may explore the doctor's expert testimony through the use of written interrogatories and depositions. *Id*.

Therefore, *Neal* and *Katz* stand for the proposition that plaintiffs may request defendant doctors' opinions through discovery, if the doctor testifies in his own defense. Yet, the issues in *Katz* and *Neal* arose in post-trial appeals when the defendant doctors "surprised" plaintiffs by testifying as experts in their own defense.

However, the issue before this Court differs from the issue presented in those cases; the current issue is whether Plaintiffs may request Dr. Carey's expert opinion during his deposition. In this case, Plaintiffs are requesting Dr. Carey's expert opinions, and Dr. Carey is refusing to provide them. The Court believes that *Dolan v. Fissell*, 973 A.2d 1009 (Pa. Super. Ct. 2009), and *Jistarri v. Nappi*, 549 A.2d 210 (Pa. Super. Ct. 1998), are instructive to the issue at hand.

In *Jistarri*, our Superior Court provided that a co-defendant physician cannot be compelled to provide expert testimony, against his other co-defendants, against his will. 549 A.2d at 218. In that case, the trial court excluded a co-defendant physician's deposition

testimony against other co-defendants, relying in part on *Evans v. Otis Elevator Co*., 168 A.2d 573 (Pa. 1961) (holding that expert witnesses cannot be compelled to testify for a party who did not retain them). *Id*. at 217. On appeal, plaintiffs argued that *Evans* holding applied only to non-party witnesses. *Id*. at 218. Our Superior Court did not agree. *Id*. In particular, the Superior Court provided that *Evans* applies to party and non-party expert witnesses, stating:

> [g]iven our Supreme Court's holding in *Evans v. Otis Elevator Co.*, however, appellant was not free to require [co-defendant doctor] to give expert testimony, against his will, against other defendants. "The private litigant has no more right to compel a citizen to give up the product of his brain, than he has to compel the giving up of material things."

Id. (citing *Pennsylvania Co. v. Philadelphia*, 105 A. 630, 630 (Pa. 1918)). Therefore, no abuse of discretion occurred when the trial court excluded deposition testimony of the doctor against his co-defendants. *Id*.

In *Dolan*, the Superior Court upheld a similar result. In that case, the trial court permitted a doctor who performed an independent medical examination for the defendant to testify for the plaintiff. 973 A.2d at 1013-14. On appeal, the defense argued that the IME doctor could not testify for plaintiff because defendant initially retained the physician. *Id*. at 1013. The Court did not agree. *Id*. That Court held that a physician owns his opinions, and, therefore, it is the physician can decide who he will testify for, even if it is not the party who initially retained him. *Id*. Citing *Jistarri*, that Court held "[t]he idea that an expert cannot be compelled to give up the product of his or her brain has been sustained throughout the years, in a variety of circumstances." *Id*. In that instance, the IME doctor chose to testify for the party who did not initially retain him, and our Superior Court upheld the doctor's choice. *Id*.

In our case, Plaintiffs are requesting Dr. Carey to look at old x-rays and interpret what he now sees in these x-rays. Plaintiffs are not asking Dr. Carey to look at just any x-rays; Plaintiffs are requesting that Dr. Carey look at old x-rays of Mr. Meyers, i.e. the x-rays at issue in the

instant matter; after looking at these x-rays, Plaintiffs are asking Dr. Carey to interpret what he sees in those x-rays *today*. Plaintiffs already asked Dr. Carey the opinion that he formed about the x-rays while he was caring for Mr. Meyers. Dep. 102, 7-11 (regarding Dep. Exhibit 5.1). *See also Kurian v. Anisman*, 851 A.2d 152 (Pa. Super Ct. 2004) (providing that a doctor cannot come to a conclusion regarding an echocardiography that the doctor has never seen).

The Court believes the opinion Dr. Carey generated while caring for Mr. Meyers is discoverable under Pa. R.C.P. 4003.5, *Katz*, and *Neal*. Yet, the Court believes that Plaintiffs are pushing the boundaries of these cases by asking Dr. Carey to provide new opinions. Cognizant of Plaintiffs' discovery rights and the Superior Court's decisions in *Katz* and *Neal*, the Court believes that requiring a stipulation as to whether Dr. Carey is going to be an expert in his own defense will resolve a lot of the issues presented by the parties. *See Belan v. Ward*, No. GD02-10738, 67 Pa. D. & C.4th 529 (Allegheny County Aug. 3, 2004) (holding that a treating physician should answer questions relating to whether treatment met a standard of care unless the physician stipulates that he will not be providing expert testimony on the issue); *Caldwell v. Branton*, No. 08-00,805 (Lycoming County Sept. 4, 2009) (holding that a present-day interpretation of a CT scan by a non-party physician, but whose actions are the basis of a claim of vicarious liability, is irrelevant because the non-party physician stipulated that he will not be providing expert testimony). Dr. Carey testified during his deposition that he did not intend to be testifying as an expert in his own defense; his counsel reiterated this statement. Dep. 117, 6-9; Dep. 119, 2-6. The Court believes that this statement needs to be stipulated to by Dr. Carey. However, to the extent Plaintiffs are requesting expert opinions from Dr. Carey, the Court DENIES Plaintiffs' motion to compel. *See generally McLane v. Valley Med. Facilities, Inc.*, No. GD 08-005616 (Allegheny Co. Mar. 3, 2009) (holding that a defendant cytotechnologist may be

questioned about decisions made while furnishing medical services, but she cannot be asked to furnish an after-the-fact evaluation of her work unless she is going to testify as an expert at trial).

The Court enters the following Order.

O R D E R

AND NOW, this 22nd day of October, 2012, following oral argument on Plaintiffs' motion to compel, it is hereby ORDERED and DIRECTED as follows:

1. Dr. Carey's objections to questions pertaining to the past and present office procedures are OVERRULED, and Plaintiffs' motion is GRANTED. Plaintiffs counsel may depose Dr. Carey for a second time to address the office procedure issue. This deposition shall be performed within thirty (30) days.
2. Dr. Carey's objection to the hypothetical question posed by Plaintiffs is SUSTAINED.
3. Dr. Carey's objections to questions requesting an analysis of Mr. Meyer's x-ray and expert testimony are SUSTAINED. Dr. Carey shall file a stipulation within twenty (20) days stating that he will not be testifying as an expert in his own defense.

BY THE COURT,

_____ _____

Date Richard A. Gray, J.

RAG/abn

cc: Clifford A. Rieders, Esquire
C. Edward S. Mitchell, Esquire
Richard F. Schluter, Esquire
James A. Doherty, Esquire – 321 Spruce Street, 10th Floor, Scranton, PA 18503
Gary L. Weber, Esquire