IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LINDA HEIM, Plaintiff vs.	:	NO. 15 – 00,371
	:	CIVIL ACTION
HOPE ENTERPRISES FOUNDATION INCORPORATE and/or HOPE ENTERPRISE, INC. and/or HOPE CORPORATION and/or RYAN BENIS, Defendants	:	Motion in Limine

OPINION AND ORDER

Before the Court is a motion in limine filed by the Hope Defendants on April 16, 2018, in which Defendants seek to exclude certain portions of the testimony of Plaintiff's expert, Harry Kamerow, M.D. Argument on the motion was heard May 17, 2018.

In her Complaint, Plaintiff seeks to recover damages for the death of her son, Nathan McHenry, who died as a result of choking on food while a resident of a group home owned and operated by the Hope Defendants, bringing claims of negligence and corporate negligence. Plaintiff has offered the testimony of Harry Kamerow, M.D., who opines that Nathan's caretaker, Ryan Benis, was negligent in his rescue efforts,[1] actually causing more harm than good, and that Hope Enterprises was negligent in failing to properly train Mr. Benis. In the instant motion in limine, the Hope Defendants assert generally that certain statements made in Dr. Kamerow's report in support of these opinions should be excluded as either hearsay, prejudicial, speculative or beyond the scope of his expertise.

[1] Mr. Benis testified at his deposition that upon discovering Nathan choking, he performed the Heimlich maneuver and then administered rescue breaths and CPR until emergency personnel arrived.

Seven passages are at issue. Each will be addressed in turn.

1. "This is important to my opinion in that we do not know the specific amount of time McHenry would have had his airway blocked/partially blocked before it was noticed he was in need of help."

The Court assumes Defendants object to this statement on the basis it is speculative. In the preceding sentences, however, Dr. Kamerow explains that he gleaned from the records that Nathan "had no significant applicable complaints prior to aspiration on the bread" and that "he was not being observed by one of the staff members … at the time he was initially found aspirating on a piece of bread". This explains why the amount of time is unknown, and Mr. Benis may testify to his actions and observations to provide that amount of time for the jury. Dr. Kamerow actually does *not* speculate about the amount of time and the Court finds nothing objectionable in this sentence.

2. "On January 26, 2011, 4 days after McHenry's choking incident and 2 days before he died, another Hope Enterprises Employee states that on that date about 5:00 pm, '*Nathan was still breathing on his own and [the Physicians] placed him on a morphine drip for pain and discomfort*.' According to the listing of medications, McHenry was ordered and administered morphine throughout his stay at the hospital and medical facilities. This same employee of Hope Enterprises stated that on January 28, 2011, Nathan was still breathing on his own but also stated that '*Dr. Nesbit did express that he felt Nathan would pass within the next day due to his breathing*.'"

Both of the statements which relate what an unidentified Hope Enterprises employee stated are clearly hearsay (and even hearsay within hearsay as the employee is stating what the physician or other medical personnel stated), and Dr. Kamerow will not be permitted to testify to these statements. Reference to the

medical records to conclude that Nathan was administered morphine is proper, however, under the business records exception. Pa.R.E. 803(6).

3. "When McHenry began to choke the first sensation he would feel is being frightened because initially no one was around him to help. Based on a review of the documents and McHenry's level of functioning, this sensation would be only heightened and he would feel similar effects despite his disabilities. The fact of dying alone while choking is terrifying as anyone could imagine."

The first two statements are speculative because Dr. Kamerow has no basis to state how Nathan himself would have felt, since Dr. Kamerow was not there to observe Nathan's reactions or emotional state. While Dr. Kamerow may testify regarding the mechanisms, signs, symptoms and complications of choking with respect to persons generally, he may not testify to how Nathan McHenry would have himself reacted or felt. *See* Commonwealth v. Johnson, 690 A.2d 274 (Pa. Super. 1997)(expert may testify to objective medical facts but not to speculative explanations for patterns of behavior).

Moreover, the emotional effects of choking are well-imagined by the average layperson and therefore not the proper subject of expert testimony. See Pa.R.E. 702 (A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if … the expert's scientific, technical, or other specialized knowledge *is beyond that possessed by the average layperson*; … .)(emphasis added). Thus, the first two statements, as well as the third statement, are inadmissible on this basis as well. As Dr. Kamerow himself notes, "*anyone could imagine*" that "dying alone while choking is terrifying".

4. "Well before this point McHenry would have begun to panic. So the steps in a logical medical order would be McHenry would have initially not believed he was choking but rather tried to swallow harder since no one was there to assist this medically fragile and intellectually challenged adult. During this time his body actually started reacting to the fact that something is wrong and that's when he started to panic; instinctively the mind tells the body to grab at the source of the problem, which is the throat. Medically this would not in any way help dislodge the bread for McHenry but clutching his hands around his throat is the universal sign for choking in almost every country. Therefore, if someone was present with McHenry, this sign would have alerted them to his emergency and saved his life before the bolus went too far down and was further lodged."

For the reasons stated in Paragraph 3, above, this testimony is not admissible. Again, Dr. Kamerow may testify only with respect to the mechanisms, signs, symptoms and complications of choking with respect to persons generally.

5. "Eventually, McHenry began to lose his ability to see and hear. At this point even if he survived, Nathan, as the doctors advised "there is not going to be a happy ending" and the Nathan that was known before would be no more."

The first statement must be couched in general terms, as part of the signs, symptoms and complications which occur when a person experiences choking.[2] The second statement is inadmissible because it is clearly meant to inflame the jury and is thus unduly prejudicial.

6. "Benis not continuing to perform the Heimlich when he relayed it was working and bringing food out, but rather blowing breaths into McHenry's airway, was negligent and reckless. Hope Enterprises who trained Benis is also negligent and reckless."

[2] Although, if the medical records reflect that Nathan did in fact lose his ability to see and hear, Dr. Kamerow may testify to such facts.

While Dr. Kamerow may testify that Mr. Benis did not perform the Heimlich maneuver correctly, or that the rescue efforts he made were insufficient or incorrect under the circumstances, and that his training was insufficient or incorrect, he may not testify that Benis and Hope Enterprises were negligent or reckless. While experts may give opinions on an ultimate issue, Pa.R.E. 704, an opinion that the defendant was negligent would impermissibly invade the province of the jury. *See* Seamans v. Tremontana, 2014 WL 4384256 (M.D. Pa., September 3, 2014).

7. "Further, Nathan McHenry experienced numerous feelings to include pain and suffering, panic and terror, which in his mind felt like an eternity. This pain and other correlating senses lasted a significant period of time. He obviously experienced all of the above and died as a direct result of this choking event."

For the reasons stated in Paragraph 3, above, all of this testimony, except for the statement that he "died as a direct result of this choking event", is not admissible.

ORDER

AND NOW, this day of May 2018, for the foregoing reasons, the Hope Defendants' Motion in Limine to preclude the testimony of Dr. Harry Kamerow is hereby GRANTED in part and DENIED in part. Dr. Kamerow's testimony shall be limited as directed above.

BY THE COURT,

Eric R. Linhardt, Judge

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