

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MARY BREWER and MARK BREWER,	:	NO. 19 - 0505
Plaintiffs,	:	
	:	
vs.	:	
	:	
RONALD A. CAMPBELL, M.D.;	:	
DIVINE PROVIDENCE HOSPITAL	:	CIVIL ACTION - MEDICAL
OF THE SISTERS OF CHRISTIAN	:	PROFESSIONAL LIABILITY
CHARITY a/k/a DIVINE PROVIDENCE	:	ACTION
HOSPITAL d/b/a WILLIAMSPORT	:	
REGIONAL MEDICAL CENTER; and	:	
UPMC SUSQUEHANNA f/k/a	:	
SUSQUEHANNA HEALTH SYSTEM,	:	
Defendants.	:	<i>Motion in Limine</i>

ORDER

AND NOW, following argument held July 16, 2021 on *Plaintiffs’ Motion in Limine Regarding Defendants Offering Expert Testimony as to Standard of Care and/or Evidence, Testimony or Argument of Risks and Complications* (“Plaintiffs’ Motion *in Limine*” or “Motion”), the Court hereby issues the following Order.¹

The foregoing is a medical malpractice action. By Complaint filed May 6, 2021, Plaintiffs, Mary Brewer and Mark Brewer (collectively “Plaintiffs”), allege that on March 28, 2017, Defendant, Dr. Ronald Campbell, M.D. (“Dr. Campbell”), performed a surgery to repair Defendant, Mary Brewer’s (“Ms. Brewer”), torn rotator cuff. In performing the surgery, Dr. Campbell negligently lacerated the brachial artery and brachial plexus, sutured over the median nerve, and clamped the ulnar nerve. This purported negligence required Ms. Brewer to undergo additional surgeries on March 28, 2017, February 12, 2019, and October 8, 2019.

Following the close of discovery, and in accordance with the Court’s established filing deadlines, on July 6, 2021, Plaintiffs filed their Motion *in Limine*,

¹ Argument had also been set on this date on *Defendant’s First Motion in Limine to Preclude Evidence, Testimony, and/or Argument Regarding Alleged Future Medical Care and/or Medical Expenses* and *Defendant’s Second Motion in Limine to Preclude Evidence, Testimony, and/or Argument Regarding*

accompanied by a supportive brief. The above-captioned Defendants collectively filed a Response in Opposition to Plaintiffs' Motion *in Limine* on July 16, 2021, the date of argument.

Within their Motion, Plaintiffs seek to preclude Defendants from offering any expert testimony as to the applicable standard of care. In support, Plaintiffs explain that within their First Set of Interrogatories filed upon Defendants, Interrogatory No. 22 inquired whether Dr. Campbell intended to testify as an expert witness at trial. Dr. Campbell provided in his Response to Interrogatories that he was “[u]ndecided at this time.”² Later, when Plaintiffs' counsel asked Dr. Campbell at deposition whether he would testify as an expert at trial, Dr. Campbell responded that a decision had not yet been made. Upon further inquiry, Dr. Campbell elaborated that he had never before testified as an expert in a medical malpractice action.³ In light of these responses, Plaintiffs' counsel chose not to question Dr. Campbell at deposition as to his opinion on the applicable standard of care. Dr. Campbell did not thereafter supplement his discovery responses or provide an expert report. Plaintiffs therefore contend he must be precluded from testifying as an expert witness at trial as to the applicable standard of care.⁴ Defendants have not otherwise identified any expert or produced any expert report as to standard of care.⁵

Under Pennsylvania Rule of Civil Procedure 4003.5 , “if a party fails to identify as requested [in interrogatories] any of those experts which he or she expects to call at trial, the court must exclude the testimony of the undisclosed experts, absent some

Alleged Lost Wages and/or Loss of Earning Capacity. Counsel communicated to the Court at time of argument that the parties had reached a stipulation as to these two Motions.

² Plaintiffs' Motion *in Limine* Regarding Defendants Offering Expert Testimony as to Standard of Care and/or Evidence, Testimony or Argument of Risks and Complications (“Plaintiffs' Motion *in Limine*”) ¶ 15 (July 6, 2021). The Responses of Dr. DiSimone to Plaintiffs' First Set of Interrogatories is attached as Ex. 2 to Plaintiffs' Motion *in Limine*.

³ Plaintiffs' Motion *in Limine* ¶ 16. Excerpts from the transcript of Dr. DiSimone's deposition testimony is attached as Ex. 3 to Plaintiffs' Motion *in Limine*.

⁴ Plaintiffs' Motion *in Limine* ¶ 17. Plaintiff's identified Dr. Campbell as an expert witness in their Supplemental Pretrial Memorandum, filed on July 12, 2021.

⁵ Plaintiffs' Motion *in Limine* ¶ 18.

extenuating circumstance.”⁶ However, Defendants, in their Response in Opposition to Plaintiffs’ Motion *in Limine*, cite to the Superior Court’s decision in *Neal by Neal v. Lu* for the proposition that Rule 4003.5 does not apply when the defendant him or herself is an expert, such as a physician.⁷ The distinction applies because a physician defendant who qualifies as an expert “can be examined by written interrogatories under Rule 4005 or by oral deposition under Rule 4007.1[.]”⁸ thus providing a plaintiff other means to obtain pertinent information. Therefore, a defendant physician may testify as an expert at trial even if not identified as an expert witness in response to interrogatories, or absent the physician defendant submitting an expert report.

At argument, Plaintiffs’ counsel, Corey Mowrey, Esquire, acknowledged this rule, but explained that he chose not to question Dr. Campbell at deposition as to the standard of care because he anticipated Defendants’ counsel, Richard Schluter, Esquire, would object to the line of questioning and direct Dr. Campbell not to answer. Attorney Mowrey elaborated that he believed this Court upon review would sustain such objections pursuant to its prior decision in *Meyers v. Carey*. In *Meyers*, this Court, with Judge Richard A. Gray presiding, held that if the physician defendant signed a stipulation that he would not appear as an expert witness in his own defense, then the plaintiffs could not compel the physician defendant to participate in a supplementary deposition where he would be asked to interpret x-rays allegedly revealing a tumor.⁹

The Court finds *Meyers* inapposite for multiple reasons. First, in *Meyers*, the request of plaintiffs’ counsel at the initial deposition that the physician defendant interpret x-rays and offer an expert opinion as to their contents, was subject to

⁶ *Neal by Neal v. Lu*, 530 A.2d 103, 106 (Pa. Super. 1987) (citing Pa.R.C.P. 4003.5(b); *Kaminski v. Employers Mut. Cas. Co.*, 487 A.2d 1340 (Pa. Super. 1985)).

⁷ Defendants’ Response in Opposition to Plaintiffs’ Motion *in Limine* Regarding Expert Testimony as to Standard of Care (“Defendants’ Response in Opposition”) ¶ 8 (July 16, 2021); see also *Katz v. St. Mary Hosp.*, 816 A.2d 1125, 1128 (Pa. Super. 2003) (“Presently, appellee, a medical doctor, did not ‘acquire or develop’ his medical opinions on the treatment of appellant’s conditions in preparation for trial; appellee’s medical opinions and knowledge were acquired long before this action commenced. As such, appellee’s opinions proffered at trial fall outside the scope of Rule 4003.5.”).

⁸ *Neal by Neal*, 530 A.2d at 107 (citations omitted).

⁹ See *Meyers v. Carey*, No. 11-01,166, 2012 WL 5362614 (Lyco. Cty. June 14, 2012).

objection by defendants' counsel who directed his client not to answer. In this case, Attorney Mowrey did not inquire as to Dr. Campbell's expert opinion on the standard of care because he anticipated Attorney Schluter's objection (Attorney Schluter, for his part, stated at argument that he would not have objected to this line of questioning). Further, Judge Gray's decision that the physician defendant would not be required to offer his expert opinion in a supplemental deposition was predicated on the defendant filing a stipulation that he would not testify in his own defense at trial. There are no analogous facts in this case; rather, Dr. Campbell communicated the possibility he would testify at trial. Consequently, there should have been no prejudice or surprise to Plaintiffs when Defendants ultimately identified Dr. Campbell as an expert witness. Further, the Court cannot find Plaintiffs were deprived of a full or fair opportunity to explore Dr. Campbell's expert opinions through discovery when they did not attempt to solicit such opinions through interrogatories or at deposition. Attorney Mowrey's belief that such efforts would be futile in light of this Court's opinion in *Meyers* was misplaced, as *Meyers* applies to scenarios where physician defendants stipulate that they will not appear as an expert on their own behalf at trial. The Court therefore finds Dr. Campbell competent to testify as to standard of care.

Plaintiffs additionally assert Dr. Campbell should be precluded from testifying as to known risks and complications of surgery, as Plaintiffs are not pursuing an informed consent claim, which would involve questions of whether the known risks and complications of a procedure were properly communicated to the patient. Plaintiffs elaborate that evidence or testimony of known risks and complications is irrelevant regarding whether Dr. Campbell conformed to the applicable standard of care and was non-negligent.¹⁰ Plaintiffs alternately argue, even assuming the risks of surgery would have "some marginal relevance," the likelihood of prejudice would be severe, as such testimony could mislead the jury by suggesting that if an injury is a "known risk" then

¹⁰ Plaintiffs' Motion *in Limine* ¶ 19; see also Plaintiffs' Brief in Support of Motion *in Limine* Regarding Expert Testimony as to Standard of Care and/or Evidence, Testimony or Argument of Risks and Complications at pg. 3 (July 6, 2021) (quoting *Brady v. Urbas*, 111 A.3d 1155, 1162 (Pa. 2015)).

the surgeon could not have been negligent in causing such an injury.¹¹ Within their Response in Opposition, Defendants acknowledge that while Plaintiffs are not pursuing an informed consent claim, pursuant to the Pennsylvania Supreme Court's decision in *Mitchell v. Shikora*, "known risks and complications can be relevant evidence regarding compliance with, or violations of, the standard of care and the cause of the alleged harm."¹²

In *Shikora*, the defendants' expert testified at trial, over objection, that in a laparoscopic hysterectomy, the first incision is undertaken blind, and thus a bowel injury occurring during the initial incision is a recognized risk of the procedure. Therefore, the expert opined, such an injury may occur even when the surgeon has complied with the applicable standard of care.¹³ On appeal, the Superior Court held that this evidence of a known risk was irrelevant as to whether the surgeon met the applicable standard of care, and thus held the trial court erred in admitting expert testimony relating to known risks and complications. The case was then certified to the Pennsylvania Supreme Court. The Supreme Court first clarified that pursuant to its prior decision in *Brady v. Urbas*, "evidence of the risks and complications of a surgical procedure, in the form of either testimony or a list of such risks as they appear on an informed-consent sheet could be relevant in establishing the standard of care."¹⁴ The Supreme Court found upon its review that the trial court had been correct in determining that the expert's discussion of risks and complications, and specifically that a perforation of the colon was a known risk that could occur absent negligence, was relevant and admissible as to the applicable standard of care.

The Court will not bar Dr. Campbell from testifying as to known risks and complications without knowing the content of his intended testimony. If such testimony is relevant to defining the standard of care, it will be admissible. As discussed *supra*, the Court will not construe to the detriment of Defendants, Plaintiffs' failure to interrogate Dr. Campbell as to his expert opinions in discovery.

¹¹ Plaintiffs' Motion *in Limine* ¶ 23.

¹² Defendants' Response in Opposition ¶ 20 (citing *Mitchell v. Shikora*, 209 A.3d 307, 311 (Pa. 2019)).

¹³ *Shikora*, 209 A.3d at 312.

Pursuant to the forgoing, *Plaintiffs' Motion in Limine Regarding Defendants Offering Expert Testimony as to Standard of Care and/or Evidence, Testimony or Argument of Risks and Complications* is hereby DENIED.

IT IS SO ORDERED this 6th day of August 2021.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

cc: Corey Mowrey, Esq. / Cliff Rieders, Esq.
Richard F. Schluter, Esq.
Gary Weber, Esq. / Lycoming Reporter

¹⁴ *Id.* (quoting *Brady*, A.3d at 1162 (internal quotation marks omitted)).