

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ELI SHAHEEN,
administrator of the estate of Val E. Cooper,

Plaintiff,

vs.

THE WILLIAMSPORT HOSPITAL d/b/a
WILLIAMSPORT REGIONAL MEDICAL CENTER,
and UPMC SUSQUEHANNA,

Defendants.

: NO. 18-0188

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: CIVIL ACTION

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: *Motions in Limine*

ORDER

AND NOW, following argument held March 2, 2021, on the parties' various Motions *in Limine*, the Court hereby issues the following ORDER.

The foregoing is a professional liability action brought by Eli Shaheen ("Plaintiff" or "Mr. Shaheen"), Administrator of the Estate of Val E. Cooper ("Ms. Cooper"), against The Williamsport Hospital d/b/a Williamsport Regional Medical Center ("The Williamsport Hospital") and UPMC Susquehanna (collectively "Defendants"). Pursuant to Plaintiff's most recent pleading, the Fourth Amended Complaint, The Williamsport Hospital admitted Ms. Cooper on July 22, 2017, to treat exacerbation of her chronic obstructive pulmonary disease. On July 25, 2017, Ms. Cooper ignited her hospital gown with a cigarette lighter while she was connected to supplemental oxygen, consequently suffering severe injury and eventual death. At the time of this incident, Ms. Cooper was supervised by a video monitor streaming to another room, but had no in-person supervision. Plaintiff alleges that Defendants, through their agents and employees, were negligent in their supervision of Ms. Cooper, and raise claims of Vicarious Negligence and Corporate Negligence, with damages attributable to both Wrongful Death and Survival Actions.

Before the Court are three Motions *in Limine*, all filed on February 19, 2021. The Court will address these Motions *in Limine in seriatim* below.¹

A. Plaintiff's Motion *in Limine* to Preclude Duplicative and Cumulative Expert Testimony

Plaintiff's Motion *in Limine* to Preclude Duplicative and Cumulative Expert Testimony ("Plaintiff's First Motion *in Limine*") seeks to preclude the expert testimony of one of Defendants' experts, either Marc Shalaby, MD ("Dr. Shalaby") or Michael Menen, MD ("Dr. Menen"), on the basis that their expert reports are largely duplicative.² Plaintiff asserts that, "[e]ach expert provides their opinion from the perspective of a clinical physician in a hospital setting, both reviewed the same documents in preparing their reports, and both reports contain nearly identical analysis."³ Plaintiff further contends that the reports overlap as both experts opine on the standard of care in a hospital setting for treating patients who suffer from tobacco and alcohol addiction, discuss appropriate policies for admitting and surveilling patients, discuss Joint Commission standards, and rebut the testimony of Plaintiff's experts.⁴ Finally, each expert comes to an identical conclusion that The Williamsport Hospital and its staff met the applicable standard of care in the treatment of Ms. Cooper.⁵ Plaintiff therefore argues that under the Pennsylvania Rules of Evidence Rule 403, this proffered testimony should be excluded based on the danger of "unfair prejudice. . . undue delay, wasting time, or needlessly presenting cumulative evidence."⁶

Defendants' Response in Opposition to Plaintiff's First Motion *in Limine* denies that Dr. Shalaby and Dr. Menen are providing opinions from the same clinical perspective. Defendants explain that Dr. Shalaby is an internal medicine physician, who also practices and teaches outpatient and inpatient medicine. His perspective is on

¹ The Court notes that Plaintiff's Motion *in Limine* to Preclude Introduction of the Report of Sara C. Egnatz, BSN, RN-BC, also filed on February 19, 2021, has since been resolved by the parties. Defendants' Motion *in Limine* to Preclude Testimony of Daniel D. Lozano, M.D., filed on December 11, 2020, has similarly been resolved.

² Dr. Menen and Dr. Shalaby's expert reports are attached respectively as Exhibits A and B to Plaintiff's Motion *in Limine* to Preclude Duplicative and Cumulative Expert Testimony.

³ Plaintiff's Motion *in Limine* to Preclude Duplicative and Cumulative Expert Testimony ¶ 5 (Feb. 19, 2021) ("Plaintiff's First Motion *in Limine*").

⁴ See Plaintiff's First Motion *in Limine* ¶¶ 6-11.

⁵ See Plaintiff's First Motion *in Limine* ¶ 12.

⁶ Plaintiff's First Motion *in Limine* ¶ 14 (quoting Pa.R.E. 403).

the clinical aspect of care.⁷ In contrast, Dr. Menen is a cardiologist who has also served as the medical director of a large healthcare system. He also serves as a clinician who actively treats patients. Therefore, Dr. Menen's perspective is primarily from the corporate liability aspect while touching upon the clinical aspect of care.⁸ Defendants therefore argue that the proposed testimony of Dr. Shalaby and Dr. Menen is not cumulative, but is rather corroborative.

"Cumulative evidence has been defined as, additional evidence of the same character as existing evidence and that supports a fact established by the existing evidence. . . . Evidence that bolsters, or strengthens, existing evidence is not cumulative evidence, but rather is corroborative evidence."⁹ As Defendants note in their response, the Pennsylvania courts recognize that testimony is corroborative, and not cumulative, when multiple expert witnesses ultimately reach the same conclusion but approach the issue from different clinical perspectives.¹⁰ The Superior Court has further affirmed the trial court's admission of expert testimony that is slightly cumulative but primarily supplementary does not result in *per se* prejudice to the opposing party.¹¹

Having reviewed the expert reports and rebuttal reports of Dr. Shalaby and Dr. Menen, along with their CVs, the Court is satisfied that the two experts provide separate perspectives and therefore their reports are corroborative, not cumulative. Dr. Shalaby speaks primarily from the perspective of a clinical physician, addressing hospital practices as applied to Ms. Cooper's treatment history,¹² while Dr. Menen speaks primarily from a corporate administrative perspective, addressing the standard policies

⁷ See Defendants' Response in Opposition to Plaintiff's Motion *in Limine* to Preclude Duplicative and Cumulative Expert Testimony ¶¶ 4-5 (March 2, 2021) ("Defendants' Response to Plaintiff's First Motion *in Limine*").

⁸ See *id.*

⁹ *Andrusis v. MicroVention, Inc.*, No. 1242 WDA 2018, 2019 WL 7187510, at *13 (Pa. Super. Dec. 26, 2019) (quoting *Com. v. G.D.M., Sr.*, 926 A.2d 984, 989 (Pa. Super. 2007)) (internal quotations omitted).

¹⁰ See *id.* (citing *Klein v. Aronchick*, 85 A.3d 487, 501 n.7 (Pa. Super. 2014) (finding that a nephrologist and internist, a medical toxicologist, and a gastroenterologist testifying to similar conclusions, but from different clinical perspectives, is not cumulative)).

¹¹ See *Quivers v. Manzetti*, No. 745 WDA 2018, 2019 WL 7282044, at *3 n.4 (Pa. Super. Dec. 27, 2019) (citing *Whitaker v. Frankford Hosp. of City of Philadelphia*, 984 A.2d 512 (Pa. Super. 2009)).

¹² For example, Dr. Shalaby's expert report provides that while Ms. Cooper had some 30 prior admissions to The Williamsport Hospital, it would not fall within the standard scope of practice or be in any way practicable or necessary for the admitting nurse to review the thousands of pages of prior records upon Ms. Cooper's final admission. See Defendants' Response to Plaintiff's First Motion *in Limine* (Ex. A – Dr. Shalaby's July 2, 2020 Expert Report at pg. 4).

of hospitals across the country.¹³ The reports of the two experts do overlap in many areas, particularly on the issues of whether The Williamsport Hospital had a duty to search Ms. Cooper following admission or had a duty to ensure that Ms. Cooper was subject to in-person supervision. However, these are the central issues of the case and it is only logical that they would be within the purview of each expert; that the experts reach the same conclusions on these central issues may simply speak to the strength of these conclusions. There are also many areas where there is no overlap, such as where Dr. Shalaby opines at length that Ms. Cooper did not suffer from dementia upon her final admission to The Williamsport Hospital as alleged within the pleadings, but was rather experiencing an alcohol induced delirium.¹⁴

Pursuant to the foregoing, Plaintiff's First Motion *in Limine* is DENIED. However, Plaintiff shall not be precluded from objecting at time of trial if, in practice, Defendants on direct examination have Dr. Shalaby and Dr. Menen merely reiterate the same opinions without the same degree of delineation provided within the reports.

B. Plaintiff's Motion *in Limine* to Preclude Deposition Testimony of Amber Noelle Biichle, Formerly Amber Shaheen

Plaintiff's Motion *in Limine* to Preclude Deposition Testimony of Amber Noelle Biichle, Formerly Amber Shaheen ("Plaintiff's Second Motion *in Limine*") seeks to preclude the deposition testimony of Amber Noelle Biichle, Eli Shaheen's ex-wife, on the basis that this testimony lacks probative value and its admission would be unduly prejudicial. Eli Shaheen is the Administrator of the Estate and the son of Ms. Cooper. At deposition, Ms. Biichle stated that she had no direct interaction with Ms. Cooper during her marriage to Mr. Shaheen.¹⁵ When asked by defense counsel whether she viewed Ms. Cooper as a "threat," Ms. Biichle stated yes, explaining that she held this opinion because she had heard Ms. Cooper yelling at Mr. Shaheen on the phone and

¹³ For example, Dr. Menen's rebuttal report discusses how the Avasys video monitoring system utilized by The Williamsport Hospital is the same system used by over 800 hospitals across the United States, elaborating that the system has been deemed effective in several peer reviewed studies. See Defendants' Response to Plaintiff's First Motion *in Limine* (Ex. E – Dr. Menen's January 31, 2021 Expert Report at pg. 3).

¹⁴ See Defendants' Response to Plaintiff's First Motion *in Limine* (Ex. A – Dr. Shalaby's July 2, 2020 Expert Report at pg. 2).

had heard “stories” relating to Mr. Shaheen’s childhood.¹⁶ Ms. Biichle however clarified that Ms. Cooper had never personally threatened her.¹⁷

In Defendants’ Response in Opposition to Plaintiff’s Second Motion *in Limine*, Defendants contend that Ms. Biichle’s deposition testimony is relevant because Mr. Shaheen has asserted a wrongful death claim and alleges a loss of his mother’s tutelage, comfort, guidance, and companionship. Ms. Biichle, who was married to Mr. Shaheen from 2007 to 2014, can therefore attest to her understanding of the relationship between Ms. Cooper and Mr. Shaheen, namely that she perceived the relationship as strained.¹⁸

Plaintiff’s attorney provided at argument on the Motions *in Limine* that Plaintiff has withdrawn his claims for damages based on the loss of Ms. Cooper’s tutelage, comfort, guidance, and companionship. If this is the case, then the Court agrees that Ms. Biichle’s testimony regarding her belief that Ms. Cooper was a “threat,” or otherwise suggesting that Mr. Shaheen and Ms. Cooper had a strained relationship, would be irrelevant to the factfinder.

Therefore, Plaintiff’s Second Motion *in Limine* is GRANTED. The portions of Ms. Biichle’s testimony identified as objectionable within the Second Motion *in Limine*, specifically Ms. Biichle’s statements on pages 13-16 and 33-34 of the deposition transcript, shall be excluded from trial. However, this ruling is contingent on Plaintiff’s withdrawal of the damages claim for the loss of Ms. Cooper’s tutelage, comfort, guidance, and companionship; the ruling shall not remain in effect should Plaintiff attempt to present evidence as to such damages at trial.

C. Defendants’ Motion *in Limine* to Preclude Testimony of Bruce Podrat, MBA, MHA, and References to Joint Commission Accreditation Standards

Defendants’ Motion *in Limine* to Preclude Testimony of Bruce Podrat, MBA, MHA, and References to Joint Commission Accreditation Standards (“Defendants’

¹⁵ Plaintiff’s Motion *in Limine* to Preclude Deposition Testimony of Amber Noelle Biichle, Formerly Amber Shaheen ¶ 4 (Feb. 19, 2021) (“Plaintiff’s Second Motion *in Limine*”) (Ex. A – Deposition testimony of Amber Biichle at pgs. 13-14).

¹⁶ Plaintiff’s Second Motion *in Limine* ¶¶ 5-6 (Ex. A – Deposition testimony of Amber Biichle at pgs. 15-16).

¹⁷ Plaintiff’s Second Motion *in Limine* ¶ 7 (Ex. A – Deposition testimony of Amber Biichle at pgs. 33-34).

Motion *in Limine*") seeks to exclude Mr. Podrat's testimony on the basis that he improperly relies on accreditation standards set by the Joint Commission for the Accreditation of Healthcare Organizations ("JCAHO") to establish a hospital's medical standard of care.¹⁹ Defendants provide that the JCAHO is a nonprofit and that seeking accreditation from the JCAHO is voluntary on the part of a hospital.²⁰ Defendants note that even the JCAHO's mission statement identifies its accreditation standards as aspirational.²¹ Defendants further contend that the accreditation standards that Mr. Podrat identifies The Williamsport Hospital as having violated in his report are general provisions that do not address the medical standards of care regarding the issues of smoking, monitoring patients, or searching patients' belongings.²² Defendants further emphasize that Mr. Podrat relies solely on these standards to establish the applicable standard of care.²³ Defendants next argue that admission of the JCAHO's standards would be of limited relevance and their probative value would be substantially outweighed by their prejudicial value.²⁴ Defendants finally argue that invocation of the JCAHO standards to support an expert opinion would be akin to an expert using a learned treatise or other third-party source as the basis of his or her opinion, which has been disallowed by the Pennsylvania courts.²⁵

Plaintiff in his Response and Memorandum of Law in Opposition to Defendants' Motion *in Limine* first argues that the Pennsylvania courts have generally allowed evidence of industry standards and regulations at trial when relevant and admissible.²⁶ Plaintiff further asserts that while Defendants have cited several cases where Pennsylvania Courts have held that JCAHO accreditation standards were inadmissible

¹⁸ See Defendants' Response in Opposition to Plaintiff's Motion *in Limine* to Preclude the Deposition Testimony of Amber Biichle, R.N. ¶¶ 4-5 (March 2, 2021).

¹⁹ Mr. Podrat's Expert Report and CV are attached as Exhibits A and B respectively to Plaintiff's Response in Opposition to Defendants' Motion *in Limine* to Preclude the Testimony of Bruce Podrat.

²⁰ See Defendants' Motion *in Limine* to Preclude Testimony of Bruce Podrat, MBA, MHA, and References to Joint Commission Accreditation Standards ¶¶ 18-20 (Feb. 19, 2021) ("Defendants' Motion *in Limine*").

²¹ See Defendants' Motion *in Limine* ¶ 21.

²² See Defendants' Motion *in Limine* ¶ 24.

²³ See Defendants' Motion *in Limine* ¶ 25.

²⁴ See Defendants' Motion *in Limine* ¶ 31 (citing Pa.R.E. 403).

²⁵ See Defendants' Motion *in Limine* ¶ 34 (citing *Aldrich v. Edmonds*, 750 A.2d 292 (Pa. 2000)).

²⁶ See Plaintiff's Memorandum of Law in Support of Plaintiff's Response in Opposition to Defendants' Motion *in Limine* to Preclude the Testimony of Bruce Podrat at pg. 3 ("Plaintiff's Memorandum of Law") (citing *Birt v. Firstenergy Corp.*, 891 A.2d 1281, 1290 (Pa. Super. 2006)).

because the hospitals at issue were not JCAHO members,²⁷ those cases are non-applicable because The Williamsport Hospital is in fact a JCAHO member. Plaintiff instead cites the Lehigh County Court of Common Pleas' decision in *Unger v. Allen* for the proposition that when a hospital is a member of JCAHO then, "evidence of JCAHO standards may be relevant in determining the appropriate standard of care. . . just as the hospital's internal policies are relevant. By affiliating with JCAHO, [the hospital] may have voluntarily assumed an obligation to comply with JCAHO standards for the quality of services provided to patients."²⁸ Plaintiff therefore concludes that there would not be undue prejudice in introducing the JCAHO standards because The Williamsport Hospital has voluntarily agreed to adopt the standards by joining the JCAHO, and because industry standards and regulations are generally relevant and admissible to the issue of negligence.²⁹ Plaintiff additionally asserts that the JCAHO standards are not the sole or primary basis of Mr. Podrat's report; rather his experience and expertise in field hospital administration primarily underset his expert opinion.³⁰ Plaintiff finally argues that, "judicious use of learned treatises may be made on direct examination of an expert witness in appropriate circumstances for the limited purpose of explaining the basis for the opinion."³¹

Upon consideration, the Court holds that JCAHO accreditation standards may not form a valid basis for an expert report. The Court agrees with Defendants' assertion that these accreditation standards are aspirational, with the JCAHO's own Mission and Vision statement proclaiming that the standards are for "evaluating health care organizations and inspiring them to excel."³² The Court also credits the representation of Defendants' counsel at argument that JCAHO accreditation is a requirement that hospitals must meet in order to receive Medicare and Medicaid reimbursement, but membership has little significance to accredited hospitals' daily practices. The Court

²⁷ See Defendants' Motion *in Limine* ¶ 28 (citing *Wey v. Evangelical Cmty. Hosp.*, 833 F. Supp. 453 (M.D. Pa. 1993); *Houdershielt v. St. Luke's Hosp.*, No. 2005-C-3318, 2006 WL 8096561 (Lehigh Cty. Dec. 08, 2006)).

²⁸ *Unger v. Allen*, 3 Pa. D. & C. 5th 191, 219 (Lehigh Cty. Sept. 26, 2006).

²⁹ See Plaintiff's Memorandum of Law at pgs. 4-5.

³⁰ See Plaintiff's Memorandum of Law at pg. 5.

³¹ *Id.* (quoting *Hyrca v. W. Penn. Allegheny Health Sys., Inc.*, 978 A.2d 961, 976 (Pa. Super. 2009)).

³² Defendants' Motion *in Limine* (Ex. L – JCAHO Mission and Vision Statement).

further finds that the accreditation standards cited by Mr. Podrat in his report are broadly general and not probative to the matter at hand.

Mr. Podrat cites JCAHO Standards PC.02.01.01, requiring “the delineation of responsibility within and between departments, as well as the requirement to establish lines of communication between the parties providing services for those being treated[,]” and PC.02.01.05, requiring every hospital “to provide patient care, treatment and services in an interdisciplinary and collaborative manner[,]” to support his opinion that The Williamsport Hospital fell below the standard of care by not providing proper coordination of care and services.³³ Mr. Podrat similarly relies upon JCAHO Standard LD.04.01.07, requiring that “[h]ospitals fulfil these responsibilities through development of clearly defined and effectively implemented policies and procedures that guide and support patient care, treatment and services[,]” to support his opinion that The Williamsport Hospital fell below the standard of care in failing to develop and follow institutional protocols related to maintaining a smoke-free environment.³⁴ Finally, Mr. Podrat cites JCAHO Standard RC.01.01.01, which requires hospitals to maintain complete and accurate medical records, to opine that The Williamsport Hospital was negligent for failing to provide Ms. Cooper’s treating nurses relevant information regarding Ms. Cooper’s presentation of symptoms, or the care she received during prior admissions.³⁵

These broad and general standards are clearly aspirational and none of the cited JCAHO accreditation standards address issues specific to this case, such as whether The Williamsport Hospital was negligent for failing to search Ms. Cooper’s belongings or for failing to have an in-person sitter with her at the time of the incident. Mr. Podrat’s report also includes unsubstantiated claims, asserting, for example, that The Williamsport Hospital failed to take any safety or precautionary measures during Ms. Cooper’s final admission on July 22, 2017, in order to enforce the JCAHO smoke-free hospital mandate that has been in effect since 1993.³⁶ This clearly discounts that Hospital staff confiscated a pack of cigarettes from Ms. Cooper upon her admission,

³³ See Plaintiff’s Response in Opposition to Defendants’ Motion *in Limine* to Preclude the Testimony of Bruce Podrat (“Plaintiff’s Response in Opposition”) (Ex. A – Mr. Podrat’s March 2020 Report at pg. 5).

³⁴ *Id.*

³⁵ See Plaintiff’s Response in Opposition (Ex. A – Mr. Podrat’s March 2020 Report at pg. 8).

and monitored Ms. Cooper by video. Further, while Mr. Podrat has had thirty-five years of experience working with hospitals, his report fails to identify with any specificity the common practices of the hospitals he has worked with and the manner in which The Williamsport Hospital diverged from these practices in this case. The Court therefore finds it fair to say that Mr. Podrat relies solely upon the JCAHO accreditation standards to support his opinion.

Pursuant to the foregoing, Defendants' Motion *in Limine* is GRANTED. Mr. Podrat shall be precluded from testifying as an expert witness at trial. Further, all other expert witnesses shall be precluded from discussing JCAHO accreditation standards.

IT IS SO ORDERED this 12th day of March 2021.

BY THE COURT:

Eric R. Linhardt, Judge

cc: Charles S. Cooper, Esq. / Seth A. Britten, Esq.
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Richard F. Schluter, Esq. / Morgan M. Madden, Esq.
Gary Weber, Esq. / Lycoming Reporter

³⁶ See Plaintiff's Response in Opposition (Ex. A – Mr. Podrat's March 2020 Report at pg. 8).