

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

STACIE SWANK,	:	NO. 19 - 1830
Plaintiff	:	
vs.	:	
	:	CIVIL ACTION
CAMILLE A. GREENAWAY, a/k/a	:	
CAMILLE A. DONAHUE,	:	
Defendant	:	<i>Motion in Limine</i>

ORDER

AND NOW, following argument held March 15, 2021 on Defendant Camille A. Greenaway, a/k/a Camille A. Donahue’s Omnibus Motion *in Limine*, the Court hereby issues the following ORDER.

The foregoing is a personal injury action. Within the Complaint, Plaintiff Stacie Swank (“Plaintiff”) avers that on March 3, 2019, Defendant Camille A. Greenaway, a/k/a Camille A. Donahue (“Defendant”) operated a vehicle that collided into a vehicle in which Plaintiff was a passenger. Defendant does not contest liability for the accident, and so the only issue for trial is that of damages.

On March 2, 2021, Defendant filed an “Omnibus Motion *in Limine*” consisting of two separate Motions *in Limine*, along with supportive briefs. These Motions will be addressed below.

A. Motion *in Limine* to Preclude Plaintiff’s Designated Experts, Tamar Fleischer, R.N. and Nadene R. Taniguchi, R.N., from Testifying at Trial Based on Insufficient Methodology and Data as Inherently Unreliable

Defendant’s Motion *in Limine* to Preclude Plaintiff’s Designated Experts, Tamar Fleischer, R.N. and Nadene R. Taniguchi, R.N., from Testifying at Trial Based on Insufficient Methodology and Data as Inherently Unreliable (“Defendant’s First Motion *in Limine*”) seeks to preclude certain testimony regarding the estimated costs of future care contained in a Life Care Plan authored by Ms. Fleischer and Ms. Taniguchi.¹ Defendant specifically objects that the projected costs for Injections, Discectomy –

Lumbar Spine (3 levels), and Lumbar Fusions (4 levels) are based purely on “fairhealth.org” pricing data. Defendant argues that this pricing data lacks sufficient foundation to constitute admissible evidence at trial, and should therefore be omitted as insufficient, unreliable, and not properly qualified.

“FAIR Health is an independent nonprofit that collects data for and manages the nation’s largest database of privately billed health insurance claims[.]”² Defendant acknowledges that the Pennsylvania courts have not yet addressed the admissibility of “fairhealth.org” data as the basis of an expert opinion on future medical costs. However, Defendant cites a recent Illinois Appellate Court decision, *Verci v. High* as persuasive authority. The *Verci* Court determined that projected medical costs reliant exclusively on data from “fairhealth.org” would be subject to exclusion. The *Verci* Court reasoned that the “fairhealth.org” database could not provide the reasonable value of services charged by area providers because: “(1) the data comes from an unknown number of insurance companies, not health care providers, (2) the database is used to determine reimbursement rates, not the reasonableness of provider charges, and (3) the data contained in the database is incomplete.”³ Defendant further cites FAIR Health’s own licensing agreement for the proposition that the “fairhealth.org” databases and other data products “are not fee schedules and should not be used as a substitute for Licensee’s own judgment. . . . The Data do not constitute stated or implied ‘reasonable and customary’ charges’ nor report actual allowed amounts associated with any payout or plan. . . . FAIR Health is not responsible for developing or establishing any fee schedule[.]”⁴

Plaintiff in her Response in Opposition to Defendant’s First Motion *in Limine* asserts that Ms. Fleischer and Ms. Taniguchi are properly qualified experts who rely upon not only the “fairhealth.org” database information, but also their own professional

¹ This Life Care Plan is attached as Exhibit A to Defendant’s Omnibus Motion *in Limine*.

² *About Us*, FAIR HEALTH, <https://www.fairhealth.org/about-us> (last visited March 16, 2021).

³ See *Verci v. High*, 161 N.E.3d 249, ¶ 29 (Ill. App. Ct. Jan. 23, 2020), attached as Exhibit B to Defendant’s Omnibus Motion *in Limine*.

⁴ See FAIR Health Licensing Agreement ¶ 3.2, attached as Exhibit C to Defendant’s Omnibus Motion *in Limine*.

experience. Plaintiff further argues that expert medical testimony is not “required to predict with certainty the exact result expected[.]”⁵ and asserts “[m]oreover, a qualified expert may opine as to future medical expenses, and the jury is well within its authority to accept or reject such testimony.”⁶

The Court is in accord with the position taken by Defendant, namely that “fairhealth.org” pricing data may not form the sole basis for an expert opinion on prospective medical costs. The reasonable value of medical expenses is not equivalent to the average payout rate from an insurance provider, which is what FAIR Health tracks.⁷ Additionally, while the estimates provided by “fairhealth.org” can be narrowed to a certain geographic region, the database does not identify which insurers have provided information to FAIR Health. Further, there is a lack of transparency as to how FAIR Health reaches its final calculations. Finally, although Plaintiff argues that Ms. Fleischer and Ms. Taniguchi rely upon multiple sources to reach their cost estimates, for the categories identified by Defendant the only cited source is “fairhealth.org.” The Court will find such testimony subject to exclusion based on insufficient methodology.⁸

Pursuant to the foregoing, the Court hereby GRANTS Defendant’s First Motion *in Limine*. Ms. Fleischer and Ms. Taniguchi shall be precluded from testifying as to the

⁵ Plaintiff Stacie Swank’s Response in Opposition to the Defendant’s Motion *in Limine* to Preclude Plaintiff’s Designated Experts, Tamar Fleischer, R.N. and Nadene R. Taniguchi at pg. 2 (quoting *Baccare v. Mennella*, 369 A.2d 806, 807 (Pa. Super. 1976)).

⁶ *Id.* (citing *Mulholland v. Hoffer*, No. CIV.A.04-5981, 2007 WL 1276915 (E.D. Pa. May 1, 2007)).

⁷ *Cf. Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 793 n.3 (Pa. 2001) (Nigro J., dissenting), abrogated by *Northbrook Life Ins. Co. v. Com.*, 949 A.2d 333 (Pa. 2008) (“[T]he underlying bases for tort recovery of medical expenses and the payment of an insured’s medical benefits are distinct. The basis for the former is liability—an injured party is entitled to receive compensation, including the reasonable value of medical services, from a culpable tortfeasor. The basis for the latter is contractual—health insurers are contractually obligated to pay medical benefits to, or on behalf of, their insureds. . . . Likewise, medical providers are sometimes contractually obligated to accept as payment in full reimbursement from health insurers which is less than the reasonable value of the services actually provided to the insured.”).

⁸ 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: (a) The expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson; (b) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (c) The expert’s methodology is generally accepted in the relevant field.”) (emphasis added).

following: Plaintiff's prospective Injections costs, calculated at \$18,295; Plaintiff's prospective surgery costs for Discectomy – Lumbar Spine (3 Levels), calculated at \$46,510; and Plaintiff's prospective surgery costs for Lumbar Fusion (4 Levels), calculated at \$145,933.

B. Motion *in Limine* to Preclude Plaintiff from Introducing Evidence of Non-Economic Damages Based upon Limited Tort

Defendant's Motion *in Limine* to Preclude Plaintiff from Introducing Evidence of Non-Economic Damages Based upon Limited Tort ("Defendant's Second Motion *in Limine*"), asserts that because at the time of the accident Plaintiff had selected the limited tort option of her insurance policy, she should be precluded from introducing evidence of non-economic damages. Under section 1705 of the Motor Vehicle Financial Responsibility Law ("MVFRL"), individuals who have elected limited tort insurance coverage may seek recovery for medical and out-of-pocket expenses, but cannot collect for pain and suffering or other nonmonetary damages except for those injuries falling within the definition of a "serious injury."⁹ The MVFRL defines a "serious injury" as "[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement."¹⁰ The only factor that might apply to this case is a serious impairment of a body function.

Defendant notes that the issue of whether an injury constitutes a "serious injury" under the MVFRL is generally a question for the factfinder, and the trial court will make a threshold decision upon whether a serious injury has been sustained in only the clearest of cases.¹¹ However, the trial court may determine as a matter of law that no serious impairment of a body function has occurred due to a lack of sufficient evidence.¹² Defendant summarizes Plaintiff's deposition testimony, where she attested to experiencing pain from a herniated disc and intermittent shoulder pain. She testified that her injuries affect her daily chores, her hobbies, her relationship with

⁹ 75 Pa.C.S. § 1705(a)(1)(A).

¹⁰ 75 Pa.C.S. § 1702.

¹¹ Motion *in Limine* to Preclude Plaintiff from Introducing Evidence of Non-Economic Damages Based upon Limited Tort ¶ 3 (March 2, 2021) (citing *Washington v. Baxter*, 719 A.2d 733 (Pa. 1998)).

her fiancée, her self-care, and “possibly” her work life, although she has retained employment.¹³ Plaintiff, in her Response in Opposition to Defendant’s Second Motion *in Limine*, cites various cases in which analogous injuries were found sufficient to qualify as “serious” under the MVFRL.

The Court notes that this issue should have been raised at the summary judgment stage, as Defendant challenges the sufficiency of Plaintiff’s non-economic damages claim and not the quality of the evidence that Plaintiff has introduced in support of that claim.¹⁴ It is significant that the cases cited by both Plaintiff and Defendant in their supportive briefs uniformly address scope of the limited tort clause arguments on summary judgment, on post-trial motions, or on post-verdict appeals. Notwithstanding, the Court is satisfied that Plaintiff’s deposition testimony, as summarized within Defendant’s Second Motion *in Limine*, is sufficient to create a question of fact upon which reasonable minds could differ as to whether Plaintiff has suffered a “serious injury” for purposes of the MVFRL.¹⁵ Pursuant to the foregoing, Defendant’s Second Motion *in Limine* is DENIED.

IT IS SO ORDERED this 17th day of March 2021.

BY THE COURT,

Eric R. Linhardt, Judge

cc: Marc I. Simon, Esq. / 1818 Market St., Ste. 2000, Philadelphia, PA 19103
Patrick J. Murphy, Esq. / 201 Lackawanna Ave., Ste. 300C, Scranton, PA 18503
Gary Weber, Esq. / Lycoming Reporter

¹² *Id.* at ¶ 2 (citing *Murray v. McCann*, 658 A.2d 404 (Pa. Super. 1995)).

¹³ See *id.* at paragraph 4. Plaintiff Stacie Swank’s deposition testimony of October 6, 2020 is attached as Exhibit D to the Omnibus Motion *in Limine*.

¹⁴ See *Com. v. Noll*, 662 A.2d 1123, 1125 (Pa. Super. 1995) (“The purpose of a motion *in limine* is two fold: 1) to provide the trial court with a pre-trial opportunity to weigh carefully and consider potentially prejudicial and harmful evidence; and 2) to preclude evidence from ever reaching a jury that may prove to be so prejudicial that no instruction could cure the harm to the defendant, thus reducing the possibility that prejudicial error could occur at trial which would force the trial court to either declare a mistrial in the middle of the case or grant a new trial at its conclusion.”).

¹⁵ See e.g., *Hellings v. Bowman*, 744 A.2d 274 (Pa. Super. 2000) (finding evidence that plaintiff suffered from a herniated disc, degenerative disc disease, and facet arthrosis, conditions that prevented him from engaging in various physical activities, was sufficient to create a question for the jury as to whether plaintiff suffered from a serious injury under the MVFRL).