

**IN THE COURT OF COMMON PLEAS OF
LYCOMING COUNTY, PENNSYLVANIA**

ALDEN J. EVANS, SR.,	: No. CV 20-00879
Plaintiff	:
VS	:
	:
NATHALIE LAVALLEE, M.D.;	: Civil action, Law
TIMOTHY PASTORE, M.D.; KRISTIN	:
ADKINS, CRNA; THE WILLIAMSPORT	:
HOSPITAL; THE WILLIAMSPORT	:
HOSPITAL d/b/a WILLIAMSPORT	:
REGIONAL MEDICAL CENTER;	:
UPMC SUSQUEHANNA f/k/a	:
SUSQUEHANNA HEALTH SYSTEM	:
and ANESTHESIA ASSOCIATES OF	:
WILLIAMSPORT, INC.,	: Motion to in limine
Defendants	:

OPINION

AND NOW, this ___ of **December**, following argument held December 19, 2022 on Plaintiffs’ Motion in Limine to preclude Defendants Timothy Pastore, M.D. and Anesthesia Associates of Williamsport, INC., from offering the expert report and testimony of Dr. Marshall G. Miles, F.A.C.S. at trial, it is hereby Ordered and Directed as follows:

I. Background.

The facts of this matter were thoroughly reviewed by the Honorable Ryan M. Tira in his Opinion filed December 3, 2020. The matter arose out of a surgical procedure which occurred on October 30, 2019. Defendant, Dr. Lavallee, failed to announce that she was about to use Bovie cautery. She also failed to turn off oxygen for at least 60 seconds prior to its use. When she began use of the Bovie cautery, a fire ignited resulting in severe burns and other injuries to the Plaintiff.

On January 19, 2021, Plaintiff filed Preliminary Objections to the New Matter filed by Movants on January 14, 2021. By stipulation filed February 16, 2021, the parties agreed that Defendants Pastore and Anesthesia Associates of Williamsport, Inc. could file an Amended New Matter, through sixty (60) days prior to the close of discovery.

A scheduling Order filed on December 10, 2021, provided a cut-off for completion of discovery of January 10, 2021, and the exchange of expert reports to be concluded by April 31, 2022.

On July 14, 2022 Evans, Levallee, Adkins, The Williamsport Hospital d/b/a Williamsport Regional Medical Center, and UPMC Susquehanna f/k/a Susquehanna Health System (hereinafter “Settled Defendants”), provided the Court with notice of a joint tortfeasor release and settlement. Thus, Dr. Pastore and Anesthesia Associates of Williamsport, INC. (hereinafter Defendants) are the only remaining Defendants.

Long after the deadline for completion of discovery, Defendants Timothy Pastore M.D. and Anesthesia Associates of Williamsport, Inc., filed a Motion (and an Amended Motion) seeking leave of Court to amend their Answer and New Matter, and to assert cross claims against the Settled Defendants. The issue presented to the Court in that Amended Motion was whether the proposed Amended New Matter and the cross claims would cause prejudice to the Plaintiff. After briefing and oral argument, the Court determined that there would be little prejudice to the Plaintiff from permitting the filing of affirmative defenses which were raised long ago, but stricken by stipulation. The Movants’ request to file tardy cross claims was denied. Defendants Timothy Pastore M.D. and Anesthesia Associates of Williamsport, Inc., then filed an Amended New Matter, without cross claims.

Evans has now filed a motion in *limine*, seeking to preclude Defendants from introducing the expert testimony of Dr. Marshall G. Miles, F.A.C.S. (hereinafter “Dr. Miles”), either because his expert report was provided after the deadline for expert reports established by the December 8, 2021, scheduling Order, or because he is plastic surgeon rather than an anesthesiologist, or because his testimony might be cumulative or duplicative with the testimony of Dr. Pastore, or with the testimony of Patrick M. McQuillan, M.D.

II. Issues Presented.

1) Whether Dr. Miles should be precluded from testifying, because his expert report was provided after the deadline for expert reports established by the December 8, 2021, scheduling Order.

2) Whether Dr. Miles should be precluded from testifying under the Medical Care Availability and Reduction of Error (MCARE) Act, because he is a plastic surgeon rather than an anesthesiologist.

3) Whether Dr. Miles should be precluded from testifying because his testimony might become cumulative or duplicative with the testimony of Dr. Pastore, or with the testimony of Patrick M. McQuillan, M.D.

III. Brief Answer

1) Dr. Miles will not be precluded from testifying based upon the fact that his expert report was provided after the deadline for expert reports established by the December 8, 2021, scheduling Order, because the Plaintiff has not established prejudice.

2) Dr. Miles, F.A.C.S.' will not be precluded from testifying based upon the fact that he is not an anesthesiologist, because he is likely qualified to testify under the test established by the MCARE ACT, and because the standard of care required of both a plastic surgeon and an anesthesiologist is relevant in this matter.

3) Dr. Miles will not be precluded from testifying, but the scope of his expert testimony may be limited at trial, to the extent necessary to avoid cumulative or duplicative testimony.

IV. Discussion

It is important to note that the resolution of Plaintiff's Motion in Limine may not be the "last word" on the admissibility of the proposed testimony of Dr. Miles. Only in the context of the trial itself can the Court finally conclude whether he is qualified to offer the proposed expert opinion, whether his opinion is relevant, and whether his opinion is cumulative or duplicative. In advance of trial, the Court can only determine whether, based upon the existing record, the testimony *might* become admissible.

An in limine motion is a motion or petition submitted to the court in a pending matter either pretrial or during trial whereby exclusion is sought of anticipated prejudicial evidence, keeping extraneous issues out of the underlying proceeding, precluding reference to prejudicial matters, or preventing encumbering the record with immaterial matter. A trial court may or may not in its discretion, entertain such in limine motions and the denial thereof cannot in and of itself constitute reversible error since those matters seeking to be precluded have not been presented to the factfinder and may never reach the factfinder.

Com. v. Pikur Enterprises, Inc., 127, 596 A.2d 1253, 1259 (Pa. Cmwlth. Ct. 1991).

Dr. Miles will not be precluded from testifying, based solely upon the fact that his expert report was untimely.

The Court is obligated to “liberally construe” the Rules of Civil Procedure “to secure the just, speedy and inexpensive determination of every action,” and “may disregard any error or defect of procedure which does not affect the substantial rights of the parties,” to that end. Pa.R.C.P. 126. A party may serve additional and supplemental expert reports without leave of court until a deadline set by the court for the production of expert reports has passed. Pa.R.C.P. 1042.32. An expert witness whose identity is not disclosed shall not be permitted to testify unless the court grants a continuance or other relief as a result of extenuating circumstances. Pa.R.C.P. 4003.5(b).

The admission of expert testimony is committed to the discretion of the trial court. *Nobles v. Staples, Inc.*, 150 A.3d 110, 113 (Pa. Super. 2016). “[T]o preclude expert testimony, in the circumstance of late disclosure of information about him to the adverse party, is a drastic sanction, and unless necessary under the facts of the case, may be the basis for finding an abuse of discretion by the trial judge.” *Kemp v. Qualls*, 473 A.2d 1369, 1374 (Pa. Super. 1984). “In order for a party to obtain a sanction as a result of another party's failure seasonably to disclose the identity of an expert witness and the substance of the expert's report, prejudice to the complaining party must be shown.” *Royster v. McGowen Ford, Inc.*, 439 A.2d 799, 804 (Pa. Super. 1982). “Assuming that a party has not acted in bad faith and has not misrepresented the existence of an expert expected to be called at trial, no sanction should be imposed unless the complaining party shows that he has been prejudiced from properly preparing his case for

trial as the result of a dilatory disclosure.” *Royster v. McGowen Ford, Inc.*, 439 A.2d 799, 804 (Pa. Super. 1982).

The Court’s December 8, 2021, scheduling order set the cut-off dates for providing expert reports as February 7 2022, for the plaintiff, March 21, 2022 for the defendant, and April 31, 2022 for rebuttal reports. Evans argues that because Dr. Pastore provided Dr. Miles’ expert report on August 17, 2022, and because Dr. Pastore did not seek an extension of deadlines or leave of Court to submit his report, he should be precluded from offering Dr. Miles’ report and testimony.

Evans’ brief relies upon the fact that Dr. Pastore provided Dr. Miles’ expert report five (5) months after the Court Ordered deadline, but does not establish prejudice. Although unquestionably late, the report was served approximately five (5) months in advance of trial. It appears to the Court that the greater prejudice might result to Defendants from precluding the testimony. The jury will unquestionably find that Evan’s surgery did not proceed according to plan. Settled Defendants will not be Defendants at trial. Defendants may reasonably conclude that the jury will require expert testimony from a plastic surgeon, qualified to opine that the Evans’ injuries were proximately caused by factors outside of Dr. Pastore’s control, particularly by the Settled Defendants.

Dr. Miles, F.A.C.S.’ will not be precluded from testifying solely based upon the fact that he is not an anesthesiologist

The MCARE Act regulates the qualifications necessary for an expert medical opinion in a medical professional liability action against a physician.

(a) General rule.--No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.

...

(c) Standard of care.--In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following qualifications:

(1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.

(2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).

(3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).

...

(e) Otherwise adequate training, experience and knowledge.--A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

40 P.S. § 1303.512.

On its face, the MCARE Act prefers that expert testimony in professional medical malpractice cases come from witnesses with expertise in the defendant's particular subspecialty. *Herbert v. Parkview Hosp.*, 854 A.2d 1285, 1294 (Pa. Super. 2004). Pennsylvania courts, however, have consistently held that medical specialties may overlap and an expert can qualify to testify under the MCARE Act upon demonstrating a familiarity with the specific standard of care at issue. *Frey v. Potorski*, 145 A.3d 1171, 1178 (Pa. Super. 2016)(citing *Vicari II*, 989 A.2d at 1281–84; *Hycza v. West Penn Allegheny Health Sys., Inc.*, 978 A.2d 961, 973–74 (Pa. Super. 2009); *Smith v. Paoli Memorial Hosp.*, 885 A.2d 1012, 1016–18 (Pa. Super. 2005).

Evans here argues that Dr. Miles is not qualified under MCARE to testify as to the standard of care of an anesthesiologist. Evans cites to *Wexler v. Hecht* in support of his assertion, asserting that MCARE “sets forth that a physician may only provide expert testimony regarding the standard of care where he ‘practice[s] in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue.’” Br. Supp. Pl. Mot. Lim. 12, Nov 10, 2022 (hereinafter Pl. Br.)(citing *Wexler v. Hecht*, 847 A.2d 95 (Pa. Super. 2004), *aff’d*, 928 A.2d 973 (Pa. 2007).

Wexler is not dispositive of the question presented. The court in *Wexler* decided the case primarily on the fact that the expert in controversy was not a physician, but rather a podiatrist, whose education is limited by statute. *Wexler* 847 A.2d at 100; 928 A.2d 973 (“Of particular relevance to our decision here, with regard to Section 512(b)(1)'s requirement of an unrestricted physician's license to practice medicine, the common pleas court observed that

Dr. Lazar never attended a medical school proper, but rather, received his degree from a Pennsylvania school of podiatric medicine, the curriculum of which is limited by statute.”). Indeed, the Court has consistently held that the test as to whether a physician is competent to provide expert testimony is not whether that physician is licensed under the same specialty as the medical professional whose standard of care is in controversy, but whether the physician is familiar with the specific standard of care at issue.

Here, Dr. Miles has familiarity with the standard of care at issue. In his expert report, Dr. Miles submits that he has a very active practice and has done many high-risk surgeries. Pl. Mot. Lim. Dr. Miles, Ex. 1, 3, Nov. 10, 2022 (hereinafter Miles report). Dr. Miles submits his opinion as to who has responsibility to prevent fires in the operating theater. *Id.* The issue in controversy is whether Dr. Pastore has liability for failure to prevent a fire in the operating theater. Therefore, Dr. Miles does have familiarity with the standard of care at issue.

Dr. Pastore has made clear his intention to claim that the injury here was proximately caused by Dr. Levallee or other outside factors, which may vitiate Dr. Pastore’s liability. Dr. Levallee was the operating surgeon. Dr. Miles is an experienced plastic surgeon, familiar with the standard of care required of an operating surgeon. At the very least, Dr. Miles is competent under MCARE to testify as to the standard of care of an operating surgeon.

Dr. Miles may not be precluded from testifying, but the scope of his expert testimony may be limited to the extent necessary to avoid duplication with the testimony of Dr. Pastore, or with the testimony of Patrick M. McQuillan, M.D.

A court may exclude evidence if its probative value is outweighed by the danger of unfair prejudice...wasting time, or needlessly presenting cumulative evidence. Pa.R.E. 403. The trial court has the “discretion to limit a party's presentation in an effort to achieve a just result while avoiding duplication or waste of time.” *Rettger v. UPMC Shadyside*, 991 A.2d 915, 925 (Pa. Super. 2010). “‘Prejudice,’ for purposes of rule 403, does not mean detrimental to a party's case, but rather, an undue tendency to suggest a decision on an improper basis.” *Sprague v. Walter*, 40, 656 A.2d 890, 909 (Pa. Super. 1995).

There is nuance between evidence that is cumulative, and evidence that is corroborative. *Hassel v. Franzi*, 207 A.3d 939, 953 (Pa. Super. 2019). “In the most general sense, corroborative evidence is ‘[e]vidence that differs from but strengthens or confirms what other evidence shows,’ while cumulative evidence is ‘[a]dditional evidence that supports a

fact established by the existing evidence.” *Id.* (citing *Commonwealth v. Small*, 189 A.3d 961 (Pa. 2018)); *Klein v. Aronchick*, 2014 PA Super 3, 85 A.3d 487 (Pa. Super. 2014). An expert may not repeat another's opinion or data without exercising their own expertise or judgment. *Alleghany energy Supply Co. v. County of Greene*, 788 A.2d 1085, 1096 (Pa. Cmwlth Ct. 2001).

The question of whether expert testimony is corroborative or cumulative is necessarily case specific. In *Hassel* the plaintiff alleged that the defendant physician failed to prescribe the appropriate medication. Defendant physician offered expert testimony from multiple corroborating experts, a cardiovascular specialist, an internist, a hematologist, and an orthopedic surgeon, asserting that aspirin was the correct treatment. *Hassel* 207 A.3d at 943. The physician prevailed at trial. On appeal, the court concluded that “Each of the experts [defendant physician] presented, offered opinions from different specialties and approached the standard of care issue from different clinical perspectives.” *Id.* at 953.

Klein was similar to *Hassel* in that the corroborating expert testimony was made to prove that the plaintiff’s injuries were caused by a specific medication. *Klein v. Aronchick*, 85 A.3d 487, 501 n.7 (Pa.Super. 2014).

While all three of defendants' experts ultimately reached the same conclusion, i.e., that Visicol did not cause Klein's chronic kidney disease, they approached the issue from different clinical perspectives. Jesse Goldman, M.D., was a nephrologist and internist; James R. Roberts, M.D., was a medical toxicologist; and David Kastenber, M.D., testified as a gastroenterologist. Therefore, while their testimony may have been corroborative, it was not needlessly cumulative.

The common thread in *Klein* and *Hassel* is that multiple experts were providing expert testimony, but from different fields of expertise, and thus offering varied perspectives on an issue that calls for such varied perspectives. The long term effects of a drug on a body calls for varied perspectives because those varied perspectives provide the factfinder with distinct information. A hematologist may have an understanding of the effects of a medication on the blood, while a cardiologist may have an understanding on its effects on the heart.

It appears to the Court that Dr. Pastore intends to offer the testimony of Dr. Miles that: 1) Dr. Pastore is not the proximate cause of Evans’ injuries because the operating surgeon has the primary responsibility to prevent fires. Miles Report at 3. 2) Dr. Pastore acted consistent with the standard of care of an anesthesiologist. *Id.* at 6. With respect to Dr. Pastore’s

proximate cause argument, Dr. Miles is Dr. Pastore's only surgeon expert witness. Thus, there is no danger of duplicative evidence as to the standard of care of the operating room surgeon.

With respect to testimony as to the standard of care of an anesthesiologist, the question is less clear. Dr. Pastore intends to offer his own expert testimony, and that of Patrick M. McQuillan, M.D. Unlike the situation in *Klien* and in *Hassel*, varied perspectives are not needed to analyze the standard of care of care of an anesthesiologist during a surgery. Here, Defendant proposes to introduce the testimony of both Dr. Pastore and Dr. Patrick M. McQuillan as to the standard of care of an anesthesiologist, and the testimony of Dr. Miles as to the standard of care of a plastic surgeon. While that course appears appropriate to the Court, the Court is puzzled about the need to secure from Dr. Miles a third expert opinion on the standard of care of an anesthesiologist. For that reason, the Court is likely to sustain a trial objection to that proposed testimony as cumulative of the same testimony from Dr. Pastore and Patrick M. McQuillan, M.D.

ORDER

And now, this __ day of December, 2022, Plaintiff's Motion in Limine is granted in part and denied in part. At the trial of this matter, in the event that the testimony of Dr. Marshall G. Miles, F.A.C.S., establishes that he is competent, under 40 P.S. § 1303.512, to offer expert testimony on the subject of the operating room duty of care of a plastic surgeon, he will be permitted to testify on that subject, and on the subject of whether the plastic surgeon who participated in the surgery which is the subject of this matter departed from that standard of care, and on the subject of whether Evans' injuries were proximately caused by the operating room surgeon's departure from that standard of care. Unless Defendants establishes a need at trial for testimony from Dr. Miles on the separate subject of the operating room standard of care of an anesthesiologist, his testimony on that subject will be excluded as cumulative of the same testimony from Dr. Pastore and Patrick M. McQuillan, M.D.

By The Court,

Hon. William P. Carlucci, Judge

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