IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BRENDA L. LUTZ, Individually and Administrator of the Estate of DAVID W. LUTZ,	:	
Plaintiff	:	**NO. CV-18-384**
vs.	:	
THE WILLIAMSPORT HOSPITAL,	:	**CIVIL ACTION –**
Defendant	:	**Preliminary Objections**

OPINION AND ORDER

Before the Court are several Motions *in Limine* filed by both parties.

I. Factual and Procedural Background

This medical malpractice action was initiated with the filing of a Complaint on March 16, 2018 wherein Plaintiff includes claims for Vicarious Liability, Corporate Negligence, Wrongful Death, and Survival Action. Plaintiff alleges the following:

David Lutz presented to the Williamsport Hospital on March 24, 2016 for a diskectomy and laminectomy due to severe low back and leg pain. *Complaint* ¶¶ *9, 12*. At that time, Mr. Lutz was opioid naïve. *Complaint* ¶ *11.*

During surgery and throughout the rest of the day following surgery, Mr. Lutz was given several doses of opioids including Fentanyl and hydrocodone. *Complaint* ¶¶ *16, 22-34.* Other than a spike in blood pressure initially following surgery, Mr. Lutz's vitals were within normal limits and his pain was low or non-existent. *Complaint* ¶¶ *26-30 and 33-51.*

Late in the night on March 24, 2016, Mr. Lutz was found unresponsive, and recitation efforts began. *Complaint* ¶ *52.* At 12:03 a.m. on March 25, 2016, Mr. Lutz was administered Narcan and a pulse was obtained, but a subsequent head CT was negative. *Complaint* ¶¶ *62 and 66.* For ease of reference, the Court

will refer to the events following the discovery of Mr. Lutz unresponsive as "the code."

Although eventually able to breathe on his own, Mr. Lutz remained unresponsive until his death on April 8, 2016. *Complaint* ¶¶ *80 and 82.* His cause of death is listed as acute respiratory failure, aspiration pneumonia, anoxic brain injury, and cardiac arrest. *Complaint* ¶ *83.*

Plaintiff now alleges that Defendant was negligent in, among other things, allowing Mr. Lutz's physical condition to deteriorate "without appropriate medical intervention for an unreasonable period of time" after he was found unresponsive and in administering "excessive amounts of narcotic pain medication, causing the deterioration of [Mr. Lutz's] physical, respiratory, cardiovascular, and neurological condition, and ultimately causing his death." *Complaint* ¶¶ *87 and 88.*

Following an Order overruling the majority of Defendant's Preliminary Objections, other than Plaintiff's claim for punitive damages, Defendant filed an Answer with New Matter on November 7, 2018. This matter is set to proceed to a jury trial during the Court's August 2022 trial term.

On December 10, 2021, Defendant filed the following four (4) Motions *in Limine*: 1. Regarding Any Claims of Lost Earnings; 2. Regarding Alleged Pain and Suffering Damages; 3. to Exclude Hearsay References in the Notes of Chaplain Marylou Byerly; and 4. Regarding Theories of Liability. At the time of argument, Plaintiff's Counsel indicated that the loss of earnings claim is withdrawn, rendering the first Motion moot. Additionally, Plaintiff's Counsel conceded to Defendant's Motion to preclude pain and suffering damages. The Court will therefore grant that Motion.

On December 13, 2021, Plaintiff filed the following two (2) Motions *in Limine*: 1. to Preclude Cumulative and Redundant Expert Testimony; and 2. to Preclude All References to Alleged Alcohol and Marijuana Use of Decedent.

Argument was held on January 13, 2022. The Motions are now ripe for decision. Each Motion will be addressed in turn below.

II. Discussion

A motion *in limine* is a tool for parties to use prior to trial to obtain a ruling on the admissibility of evidence. *Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc.,* 933 A.2d 664 (Pa.Super. 2007). "It gives the trial judge the opportunity to weigh potentially prejudicial and harmful evidence before the trial occurs, thus preventing the evidence from ever reaching the jury." *Parr v. Ford Motor Co.*, 109 A.3d 682, 690 (Pa.Super. 2014), *citing Com. v. Reese,* 31 A.3d 708, 715 (Pa.Super. 2011) (*en banc*). Questions concerning the admissibility of evidence lie within the sound discretion of the trial court. *Stumpf v. Nye,* 950 A.2d 1032, 1035–1036 (Pa.Super. 2008).

a. Defendant's Motion *in Limine* to Exclude Hearsay References in the Notes of Chaplain Marylou Byerly

It is undisputed that on April 3, 2016, after Mr. Lutz was taken off the ventilator but continued to breathe on his own, the hospital chaplain, Marylou Byerly authored and charted the following note:

> David is breathing on his own on and off the vent. He is still nonresponsive. Staff is reporting stories of an error. Chaplain does not know if family is aware of this, but staff has shared they are angry because someone told them he would die when he was taken off the vent and he did not die. No family was present on Sunday afternoon. Chaplain prayed with his nurse, Theresa.

See Exhibit A of Motion at Page 12, Lines 16-25.

During her deposition, Chaplain Byerly admitted that the "staff" to which she was referring did not report the "error" to her, but were just "talking amongst themselves." *See Exhibit A of Motion at Page 14, Lines 11-14.* Additionally, she does not know whom the "staff" included, other than that they were part of the ICU staff, and does not know specifically what "error" they were talking about. *See Exhibit A of Motion at Page 13, Lines 1-12 and Page 15, Lines 9-10.*

Defendant argues that the note should be excluded from evidence at trial because it is hearsay. Plaintiff does not argue that the aforementioned note is hearsay but rather, that it is admissible under the hearsay exception of a business and/or medical record.

"Hearsay" is a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Pa.R.E. 801(c). It is well settled that, as a general rule, hearsay statements are not admissible in court. Pa.R.E. 802. There are, however, several exceptions to the hearsay rule, including "records of a regularly conducted activity," which is defined as a record if:

> (A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a "business" . . . ;
>
> (C) making the record was a regular practice of that activity;
>
> (D) all these conditions are shown by the testimony of the custodian or another qualified witness . . . ; and

(E) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Pa.R.E. 803(6).

This Court is of the opinion that, based on her testimony, Chaplain Byerly's note does fall within the above hearsay exception. Chaplain Byerly testified that when she does her assessments, she does them "for the next chaplain and so the next chaplain can be aware that people were upset." *See Exhibit A of Motion at Page 14, Line 23 to Page 15, Line 3.* Chaplain Byerly herself can testify that she made the record at or near the time she heard the statements and that she regularly kept these types of records in the course of her job duties.

That said, the Court agrees with Defendant that admission of this note and Chaplain Bylerly's testimony would be more prejudicial to Defendant than it would be probative to Plaintiff. "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Pa.R.E. 403. Chaplain Byerly's note provides no sense of reliability because there are too many questions left unanswered. For example: who made the statement? and what is the error related to? Introduction of the note would cause the jury confusion and would certainly be unfairly prejudicial to the Defendant without answers to these questions. Indeed, Defendant would have no way of even defending the issue due to the speculation surrounding the circumstances of the alleged statement that the note documents.

For these reasons, Defendant's Motion *in Limine* is granted. Plaintiff is precluded from introducing at the trial in this matter Chaplain Bylerly's aforementioned note or any testimony surrounding the content of the note.

b. Defendant's Motion *in Limine* Regarding Theories of Liability

Plaintiff indicates in the narrative portion of her Pre-Trial Memorandum that "[i]n the hours following [Mr. Lutz's] procedure, Mr. Lutz was negligently administered excessive amounts of narcotic pain medication by Williamsport Hospital employees." Defendant argues that none of Plaintiff's three (3) experts opined in their written reports that the pain medication orders issued by Dr. Tuffaha following Mr. Lutz's surgery violated the standard of care or that any of the nurses violated the standard of care in the administration or monitoring of Mr. Lutz following his surgery. Plaintiff argues that all of her experts have sufficiently opined regarding the standard of care on this issue.

"Because the negligence of a physician encompasses matters not within the ordinary knowledge and experience of laypersons[,] a medical malpractice plaintiff must present expert testimony **to establish the applicable standard of care, the deviation from that standard,** causation and the extent of the injury." *Grossman v. Barke*, 868 A.2d 561, 566 (Pa.Super. 2005) (emphasis added). Plaintiff must show that the medical professional whose conduct is in question departed from the requisite standard of care when he or she treated the patient. *Strain v. Ferroni*, 592 A.2d 698, 701-702, FN1 (Pa.Super. 1991) (internal citations omitted) (holding that plaintiff's expert failed to "set forth the appropriate standard of care recognized by the medical profession in the community

applicable to [plaintiff's] circumstances, let alone posit that [defendant] provided treatment in a manner inconsistent with that standard or in an incompetent fashion.").

A recognized exception to this rule is the *res ipsa loquitur* doctrine, which essentially provides that "where the matter is so simple or the lack of skill or care so obvious as to be within the range of experience and comprehension of even non-professional persons," expert testimony is unnecessary. *Toogood v. Owen J. Rogal, D.D.S., P.C.*, 824 A.2d 1140, 1145 (Pa. 2003) (internal citations omitted). In the context of medical malpractice actions, *res ipsa loquitur* is generally applied in "sponge left in the patient" cases. *Id.* at 1147.

Such is not the case here. Plaintiff is claiming that Defendant's employees and agents prescribed and subsequently administered excessive amounts of narcotic medication to Mr. Lutz. An average person would not know the effect of such medications let alone the appropriate dosages under certain circumstances. Therefore, Plaintiff is required to produce an expert opinion on the standard of care and alleged deviation on this issue.

The Pennsylvania Rules of Civil Procedure are clear that "the direct testimony of [an] expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the . . . separate report, or supplement thereto." Pa.R.C.P. 4003.5(c). A review of Plaintiff's expert's reports reveal that they fail to state a standard of care as it relates to the narcotics administered to Mr. Lutz.

Plaintiff's first expert, PhD McDonald, a paramedic, opines that if Defendant had followed the acceptable 2015 American Heart Association

Advanced Cardiac Life Support standards regarding the administration of epinephrine earlier in the code, the outcome of the code would have been different. Plaintiff is correct that PhD McDonald establishes the 2015 American Heart Association Advanced Cardiac Life Support guidelines as the standard of care. Specifically, he opines that failure to give Mr. Lutz epinephrine until 15 minutes after CPR was started was a deviation of those standards. However, the entirety of his report discusses only events occurring during the code and nothing of the alleged narcotic administration prior to the code.

Similarly, Plaintiff's second expert, Dr. Decter, opines that epinephrine should have been given to Mr. Lutz every 3-5 minutes once a non-shockable rhythm was determined, rather than a onetime dose 15 minutes after the code started. Again, while it is true that Dr. Decter provides this opinion, he does so in the context of the proper procedures during the code. He does not provide an opinion on the administration of narcotics prior to the code.

Finally, Plaintiff's third expert, Dr. Coyer, was tasked with reviewing the medications administered to Mr. Lutz during the medical procedure and render an opinion on Mr. Lutz's cause of death. Dr. Coyer ultimately concludes that Mr. Lutz's death was in fact caused by the administration of numerous and concomitant opioid narcotics. While Dr. Coyer provides ample information on the science of opioids, his report is nevertheless entirely devoid of any opinions identifying a standard of care in the prescription and administration of narcotics as, for example, PhD McDonald identified the American Heart Association standards as it related to the code. Not once does Dr. Coyer explain what Defendant's employees and agents should have done differently and why.

For these reasons, Defendant's Motion *in Limine* is granted. Plaintiff is precluded from introducing any testimony or evidence, including expert testimony, at the trial of this matter regarding any theory of negligence other than the alleged negligence related to the resuscitation efforts.

c. Plaintiff's Motion *in Limine* to Preclude Cumulative and Redundant Expert Testimony

Defendant has submitted the following four (4) expert reports in support of its defenses and has identified each author as an expert witness in its Pre-Trial Memorandum: Michael Tulloch, M.D., FACP, in the field of Internal Medicine; David Mitchell, M.D., PhD, also in the field of Internal Medicine; Robert Barkin, PharmD, FCP, in the field of Pharmacology; and Jeffrey Ciccone, M.D., in the field of Pain Management.

Plaintiff asks this Court to preclude Defendant from "eliciting identical and duplicative testimony from multiple experts opinion on causation and the standard of care of the Defendant." *See Motion* in Limine *at* ¶ *11.* Defendant argues that, although each of its experts come to similar conclusions, their opinions are made independently of one another and therefore, they are corroborative rather than cumulative.

Specifically, Defendant asserts that: Dr. Ciccone, an anesthesiologist/pain management doctor, will testify about the dosing, post-operative medications, and opioid naivety; Dr. Barkin, a pharmacologist, will testify about the kinetic effects of the medications and what led to Mr. Lutz's cardiac arrest; and Dr. Mitchell and Dr. Tulloch, both internal medicine hospitalists, will testify about the code itself. However, Defendant argues that Dr. Mitchell's and Dr. Tulloch's

reports approach the issue from two different perspectives. Dr. Mitchell is, as Defendant's Counsel describes, the "white collar" internist who discusses the issues from an academic point of view and Dr. Tulloch is the "blue collar" internist who discusses the issue from a practical point of view. Neither report refers to the other and both doctors wrote their opinions independently of one another.

The Pennsylvania Rules of Evidence provide that, generally, all relevant evidence is admissible. Pa.R.E. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 401. However, relevant evidence may be excluded if its probative value is outweighed by a danger of needlessly presenting cumulative evidence, among other things. Pa.R.E. 403. The Pennsylvania Supreme Court has noted that "there is a subtle difference between evidence that is 'corroborative' and evidence that is 'cumulative.' 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.' *Com. v. Small*, 189 A.3d 961, 972 (Pa. 2018), *citing* Black's Law Dictionary. 674, 675 (10th ed. 2014). *See also Hassel v. Franzi*, 207 A.3d 939, 953 (Pa.Super. 2019) (applying *Small* in the context of "needlessly cumulative" expert testimony).

In *Klein v. Aronchick*, the plaintiff argued that the trial court erred in allowing three defense expert witnesses to testify on causation because the testimony was cumulative. 85 A.3d 487, 501 (Pa.Super. 2014). The Superior Court held that although all three experts reached the same conclusion regarding

causation, 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 Kastenberg, M.D., testified as a gastroenterologist. Therefore, while their testimony may have been corroborative, it was not needlessly cumulative. *Id. See also Com. v. Flamer*, 3 A.3d 82, 88 n. 6 (Pa.Super. 2012) ("Evidence that strengthens or bolsters existing evidence is corroborative evidence.").

In *Hassel*, the plaintiff argued that the trial court erred in allowing Defendant to introduce testimony regarding standard of care from a general clinical cardiovascular specialist because another expert, an internist, also testified regarding the standard of care and therefore, the testimony was excessively cumulative. 207 A.3d at 953. The Superior Court upheld the trial court's conclusion that the testimony was corroborative rather than cumulative. *Id.* Specifically, the trial court found that "[e]ach of the experts [Defendant] presented, offered opinions from different specialties, and approached the standard of care issue from different clinical perspectives. Each of the experts reached the same conclusion . . . and their testimony is consistent with what the Superior Court determined in Klein v. Aronchick to be corroborative testimony, not cumulative testimony." *Id.*

Here, Defendant has four (4) experts from three (3) different specialties: pain management, pharmacology, and internal medicine. Because Dr. Barkin and Dr. Ciccone offer their opinions from different specialties and clinical perspectives from one another and from Drs. Mitchell and Tulloch, their testimony is corroborative rather than cumulative. The issue is whether Dr.

Mitchell and Dr. Tulloch's testimony is also corroborative, given that they come from the same specialty – internal medicine. This requires a comparison of their reports.

Both experts address the code itself, including but not limited to, the timing of events leading up to and during the code, the ventilation procedure, the timing and dosages of the administration of epinephrine and Narcan, the estimation of times recorded, and the recognition and tracking of Mr. Lutz's rhythm. They both discuss the Plaintiff's expert reports and pick apart portions they are feel are inaccurate. While Mr. Mitchell's report is much more detailed and includes educational material about PEA, epinephrine, Narcan, and ACLS, both doctors ultimately tackle the code from the exact same specialty and perspective.

For these reasons, Plaintiff's Motion *in Limine* is granted. Defendant may call either Dr. Mitchell or Dr. Tulloch as witnesses during trial, but not both, as their testimony together is cumulative.

d. Plaintiff's Motion *in Limine* to Preclude All References to Alleged Alcohol and Marijuana[1] Use of Decedent

Plaintiff argues that any evidence of Mr. Lutz's alcohol use is irrelevant and, even if it is relevant, is more prejudicial to Plaintiff than probative to Defendant and therefore, should be precluded. Defendant argues that evidence of Mr. Lutz's prior alcohol use is relevant to refute claims that Mr. Lutz was opioid naïve and was overdosed on opioid medications by Defendant's employees and agents.

[1] Defendant conceded that it will not attempt to introduce evidence about Mr. Lutz's alleged marijuana use.

Plaintiff's Motion is granted as moot because the evidence is no longer relevant to Defendant's case. This Court has already determined that Plaintiff is precluded from introducing any testimony or evidence regarding any theory of negligence related to the alleged excessive prescription and administration of narcotic medications. *See Section II.b., supra.* The rationale provided by Defendant as to why evidence of Mr. Lutz's alcohol use is needed is no longer relevant, because Plaintiff is precluded from arguing it. Therefore, Defendant is precluded from introducing any evidence of Mr. Lutz's past alcohol and marijuana use.

III. Conclusion

For the reasons set forth above, all Motions *in Limine* are granted.

ORDER

AND NOW, this **15th** day of **February, 2022**, upon consideration of the aforementioned Motions *in Limine* filed by both Plaintiff and Defendant, the Court hereby enters the following Order:

1. Defendant's Motion *in Limine* Regarding Any Claims of Lost Earnings is **GRANTED**, as Plaintiff has withdrawn her claim for lost earnings. Plaintiff precluded from introducing any evidence at trial of Mr. Lutz's alleged lost earnings or lost earning capacity.

2. Defendant's Motion *in Limine* Regarding Alleged Pain and Suffering Damages is **GRANTED** pursuant to Plaintiff's concession. Plaintiff precluded from introducing any evidence at trial of Mr. Lutz's alleged pain and suffering.

3. Defendant's Motion *in Limine* to Exclude Hearsay References in the Notes of Chaplain Marylou Byerly is **GRANTED**. Plaintiff is precluded from introducing at the trial in this matter Chaplain Bylerly's aforementioned note or any testimony surrounding the content of the note.

4. Defendant's Motion *in Limine* Regarding Theories of Liability is **GRANTED**. Plaintiff is precluded from introducing any testimony or evidence, including expert testimony, at the trial of this matter regarding any theory of negligence other than the alleged negligence related to the resuscitation efforts.

5. Plaintiff's Motion *in Limine* to Preclude Cumulative and Redundant Expert Testimony is **GRANTED**. Defendant may call either Dr. Mitchell or Dr. Tulloch as witnesses during trial, but not both.

6. Plaintiff's Motion *in Limine* to Preclude All References to Alleged Alcohol and Marijuana Use of Decedent is **GRANTED** as moot. Defendant is

precluded from introducing any evidence of David Lutz's past alcohol and/or marijuana use.

BY THE COURT,

_____
Hon. Ryan M. Tira, Judge

RMT/ads

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