

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MICHELLE CUSICK, Administratrix of the Estate of Thomas J. Cusick, Deceased, Plaintiff	:	CV-19-00058
vs.	:	
CAROL J. ADAMS, CRNA, MICHAEL E. HARF, RRT, CATHY WENRICH, RRT, CRNA MICHELE, JOHN/JANE DOE 1-4, ABC CORPORATION 1-4, ANESTHESIA ASSOCIATES OF WILLIAMSPORT, INC., THE WILLIAMSPORT HOSPITAL, UPMC d/b/a UNIVERSITY OF PITTSBURGH MEDICAL CENTER, UPMC WILLIAMSPORT d/b/a THE WILLIAMSPORT HOSPITAL a/k/a and d/b/a THE WILLIAMSPORT HOSPITAL AND MEDICAL CENTER a/k/a and d/b/a UPMC SUSQUEHANNA WILLIAMSPORT a/k/a and d/b/a UPMC SUSQUEHANNA WILLIAMSPORT REGIONAL, and UPMC SUSQUEHANNA, Defendants	:	<i>Motions in Limine</i>

OPINION AND ORDER

AND NOW, this 30th day of January 2023, the Court hereby issues the following OPINION and ORDER addressing the parties' Motions in Limine.

BACKGROUND

A. Pleadings and Stipulation

Plaintiff filed a Complaint in medical malpractice on February 10, 2020, alleging that Decedent presented to a non-party hospital on the morning of

February 28, 2018 with a myocardial infarction.¹ Due to the nature of Decedent's condition, he was quickly transported to Defendant Williamsport Hospital to receive cardiac care. Plaintiff contends that shortly after Decedent's arrival at Williamsport Hospital, Defendants² negligently performed an intubation resulting in a sustained lack of oxygen and ultimately causing Decedent's death on March 4, 2018.

Defendants filed an Answer on March 26, 2020 denying the averments in the Complaint and raising standard affirmative defenses. However, at a June 13, 2022 pretrial conference, Defendants stipulated that they would admit liability in this matter, conceding both negligence and causation. Therefore, the only issue remaining is damages. A jury trial is scheduled to commence on February 7, 2023.

B. Motions in Limine

In anticipation of trial, Plaintiff has filed five motions in limine which remain pending.³ These are:

1. Plaintiff's Motion *in Limine* to Preclude Defendants from Denying, Directly or Indirectly, Negligence and Causation, including the Testimony of Defense Expert Dr. Sunil Rao

¹ The parties' experts note that a myocardial infarction is commonly referred to as a "heart attack."

² On June 14, 2022, all parties stipulated to the discontinuance of this action with prejudice against Defendant Anesthesia Associates of Williamsport, Inc. All references in this Opinion and Order to "Defendants" refer to the remaining Defendants, each affiliated with UPMC. In particular, references to any admission of liability by "Defendants" apply only to the remaining UPMC-affiliated Defendants and should not be read to suggest any admission of liability by previous Defendant Anesthesia Associates of Williamsport, Inc.

³ Defendants filed two motions in limine, which the parties have since resolved.

2. Plaintiff's Motion *in Limine* to Permit Plaintiff to Introduce Evidence of Decedent's Medical Care including Defendants' Negligent Care
3. Plaintiff's Motion *in Limine* to Preclude Evidence of and/or References to Remarriage of Plaintiff
4. Plaintiff's Motion *in Limine* to Preclude Defendants' Comments, Arguments, and/or Statements Regarding Defendants' Sympathy and/or Remorse for Decedent's Death
5. Plaintiff's Motion *in Limine* to Preclude the Late Produced Defense Expert Report of Dr. Sunil Rao

The Court heard argument on the first four of these motions on January 4, 2023. Plaintiff filed the fifth motion, concerning Dr. Rao's second report, on January 9, 2023.

The first, second, and fifth motion listed above each depend partially or entirely on the parties' expert reports; therefore, this Opinion will first address these three motions together. The Opinion will then address the motions concerning evidence of remarriage and statements of sympathy or remorse.

MOTIONS IN LIMINE INVOLVING EXPERT REPORTS

A. Timeline and Summary of Expert Reports

1. Hayek Report

The first expert report relevant to the issues raised in Plaintiff's Motions in Limine is Plaintiff's January 25, 2022 report of Dr. Emil Hayek (the "Hayek Report"). Dr. Hayek authored this report before Defendants conceded liability, and therefore much of it addresses the negligence and causation elements of Plaintiff's claims.

The first seven pages of the Hayek Report list Dr. Hayek's credentials and discuss Decedent's medical history, beginning with his presentation to the non-party hospital and his transfer to Defendant Williamsport Hospital. Dr. Hayek explained Decedent's course of treatment and various test results. Of relevance here, Dr. Hayek noted that Decedent's EF⁴ improved from 10-15% on February 28, 2018 to 20-25% on March 1, 2018 and 30-35% on March 3, 2018.

The final four pages of the Hayek Report detail Dr. Hayek's opinion on negligence, causation, and life expectancy as a component of damages. Regarding negligence, Dr. Hayek opined that Defendants violated the relevant standard of care by intubating Decedent's esophagus rather than his trachea and failing to observe or timely act upon signs that the intubation had not been successful. Dr. Hayek stated that these deviations increased the risk of harm to Decedent, causing his brain injury and ultimately his death.

Additionally, Dr. Hayek gave the opinion that "[h]ad it not been for the esophageal intubation, [Decedent] would not have suffered cardiac arrest, would not have died of his acute [myocardial infarction], [and] would not have suffered brain injury." Regarding life expectancy, Dr. Hayek opined that based on Decedent's medical history, Decedent's condition would have continued to resolve, his EF would

⁴ The experts use the terms "ejection fraction" and "left ventricular ejection fraction," and the associated abbreviations "EF" and "LVEF," interchangeably to discuss this clinical measure of the efficiency with which the heart is pumping blood. For clarity, this Opinion will refer to this measure with the abbreviation "EF."

have continued to improve, and with optimal treatment and medication for his underlying conditions Decedent would be expected to live an additional 15 years.

2. 2022 Rao Report

The second relevant report is the first report of Defendants' expert Dr. Sunil Rao (the "2022 Rao Report"); the report is dated June 9, 2022, though the parties agree Defendants produced the report to Plaintiff several weeks later. The 2022 Rao Report consists of two pages and is limited to an "estimate[] [of] the risk of short-term mortality for [Decedent]." The first page of the 2022 Rao Report lists the documents Dr. Rao reviewed in preparing the report and summarizes Dr. Rao's credentials.

The second page details Dr. Rao's opinion concerning Decedent's "in-hospital and longer-term mortality." Dr. Rao first notes that his opinions are based on Decedent suffering an "acute [myocardial infarction] complicated by cardiogenic shock requiring VA ECMO life support," with an EF of 15% immediately after initial treatment that "improved to 30% during the hospitalization." Dr. Rao opined that "[b]ased on [Decedent's] risk factors and the clinical presentation of [myocardial infarction] with cardiogenic shock," Decedent's likelihood of dying during his hospitalization was 16% to 20%. Dr. Rao stated that if Decedent survived to discharge, "the diagnosis of ischemic cardiomyopathy with a left ventricular ejection fraction of 30%" carries a 30% mortality rate within 1 year, a 60% mortality rate within 3 years, and an 80% mortality rate within 10 years. Dr. Rao opined that

Decedent's "ischemic cardiomyopathy was caused by the... myocardial infarction... and cardiogenic shock he suffered."

3. Hayek Rebuttal

The parties have not attached the Hayek Rebuttal as an exhibit to any filing, and therefore it is not part of the record. The parties agree, however, that the Hayek Rebuttal "disputed Dr. Rao's opinion that [Decedent] presented to UPMC in cardiogenic shock."

4. 2023 Rao Report

Dr. Rao's second report, dated January 4, 2023 and produced to Plaintiff the following day, consists of two pages,⁵ again beginning with a list of the documents Dr. Rao reviewed in preparing the report. Dr. Rao notes that the Hayek Rebuttal "outlines [Dr. Hayek's] disagreement with [Dr. Rao's] assessment that [Decedent] arrived... at Williamsport Hospital in cardiogenic shock," with Dr. Hayek suggesting Decedent's blood pressure, oxygen saturation, lack of need for vasopressor support, and state of consciousness each suggested Decedent was not in cardiogenic shock.

Dr. Rao explained that his opinion of cardiogenic shock was based on certain symptoms exhibited by Decedent including "hemodynamic instability," certain elevated laboratory results, and signs of altered mental status. Dr. Rao further opined that although the signs Dr. Hayek noted may have meant Decedent would

⁵ Dr. Rao's signature is the only item of note on the third and final page of the 2023 Rao Report.

not be a good candidate for clinical trials related to cardiogenic shock, they did not preclude a finding that Decedent met the standards for cardiogenic shock formulated by the Society for Cardiovascular Angiography and Interventions, which Dr. Rao described as “the most widely accepted framework for defining shock.”

Dr. Rao further addressed Dr. Hayek’s opinion that “[Decedent’s] LVEF would have improved to 45-50% had he not died due to the anoxic brain injury,” characterizing this opinion as having “no scientific basis.” Dr. Rao stated that “[i]t is well-known in clinical cardiovascular medicine that there is no way to predict which patient’s ejection fraction will improve after a heart attack,” and contended that Dr. Hayek did not cite any sources in support of his prediction that Decedent’s EF would have continued to improve had he not died.

B. Contents of Plaintiff’s Motions in Limine involving Expert Reports; Arguments

1. Motion to Preclude Defendants from Denying Negligence or Causation, Including via Dr. Rao

Plaintiff’s first motion in limine seeks to “preclude Defendants from denying, directly or indirectly, negligence and causation, including the testimony of defense expert Dr. Sunil Rao. Plaintiff notes that although many Defendants denied wrongdoing in their depositions, Defendants have since admitted liability; thus, Plaintiff argues, “any evidence to rebut, contradict, or otherwise call into question whether the Defendants were negligent and their negligence was a causal factor in

the harm” is irrelevant and inadmissible. Plaintiff contends that such evidence would also confuse the jury.

As part of this Motion, Plaintiff asserts that Defendants’ expert Dr. Rao “should be precluded from testifying as his opinions ignore the admitted negligence, i.e. esophageal intubation, and [are] therefore misleading, confusing, and not supported by the record.” Essentially, Plaintiff characterizes the 2022 Rao Report as stating that Decedent had a poor prognosis due to his medical situation, but ignoring the fact that his prognosis would not have been as poor had Defendants not been negligent. Plaintiff notes that the 2022 Rao Report does not mention the esophageal intubation or “include how the [attendant] deprivation of oxygen impacted [Decedent’s] cardiac function.” Additionally, Plaintiff contends that Dr. Rao’s statement that Decedent was placed on life support due to cardiogenic shock is simply factually false and unsupported by the record; rather, Plaintiff contends, life support “was utilized because [Decedent] had an undetected esophageal intubation,” which deprived him of oxygen and caused his cardiac function to deteriorate. Ultimately, Plaintiff contends that allowing Dr. Rao to testify would confuse and mislead the jury, as his opinions are “not supported by the record and [do] not include the most important fact in this case, esophageal intubation.”⁶

⁶ Plaintiff acknowledges that issues with the factual underpinnings of expert reports are usually addressed through cross-examination at trial, but contends that Dr. Rao’s report is so deficient as to render it inadmissible under Pennsylvania Rule of Evidence 403.

Defendants respond by first noting that, facially, the majority of Plaintiff's motion is moot, as there is no reason Defendants would attempt to admit evidence concerning negligence and causation given the parties' agreement that these elements are not at issue. With respect to the 2022 Rao Report, Defendants argue that the report appropriately addresses Decedent's life expectancy, which is a major factor in the determination of Plaintiff's damages. Characterizing Dr. Rao's ultimate opinion as a belief that Decedent "had a less-than-statistically-average life expectancy for a person of his gender, race, and age at the time of death," Defendants contend that "the proper measure of life expectancy for damages in a negligence action is the decedent's life expectancy as it was before the alleged negligence occurred."⁷ Thus, Defendants argue, it is not merely appropriate but required that Dr. Rao limit his opinion to the moment before the esophageal intubation. Defendants further argue that factual disputes concerning expert reports do not justify the exclusion of such reports, as disputes of fact are to be resolved by the factfinder.

2. **Motion to Permit Plaintiff to Introduce Evidence of Decedent's Medical Care, including Defendants' Negligent Care**

Plaintiff's second motion seeks permission to "introduce evidence of the underlying facts of [Decedent's] care, including Defendants' negligent care." Plaintiff

⁷ Emphasis in original.

contends “such evidence is pertinent background evidence for the jury, relevant to causation and life expectancy, relevant as evidence to rebut Defendants’ expert opinions on causation and prognosis, is not prejudicial to Defendants, and prevents confusion of the issues and misleading of the jury[.]”

Plaintiff elaborates that her experts “necessarily require a factual predicate,” which “cannot be insulated from the jury....” Plaintiff argues that her experts must therefore “be permitted to introduce the circumstances surrounding the medical care in this case,” including “evidence and opinions regarding what care constitutes a deviation from the standard of care.” This testimony and evidence, Plaintiff asserts, “are the basis for the expert opinions that the jury must hear when determining prognosis, life expectancy, and causally related damages.” Plaintiff provides excerpts from the report of her expert, Dr. Emil Hayek, which she contends cannot be conveyed coherently to the jury without some explanation of the facts establishing Defendants’ negligence.

Defendants respond that their stipulation to negligence and causation renders the specifics of their medical care irrelevant, arguing that evidence concerning Defendants’ negligence does not “make [any] fact... of consequence in determining the action... more or less probable than it would be without the evidence....”⁸ Defendants again assert that the proper point at which life expectancy is to be

⁸ Pa. R.E. 401.

assessed is immediately prior to the negligent care resulting in Decedent's death, and argue that Dr. Hayek can easily present his opinions concerning Decedent's life expectancy to the jury without discussing the esophageal intubation. Defendants further dispute Plaintiff's assertion that these facts are needed to provide "context" to the jury, asserting that they do not help illuminate any uncertainties concerning damages, the sole issue before the jury. Because the facts are irrelevant to the determination of damages, Defendants argue, their sole conceivable use at trial would be to inflame the jury's passions against Defendants.

On January 9, 2023, Plaintiff submitted a supplemental brief, raising an additional argument in support of their request to present evidence of Defendants' negligence to the jury. Plaintiff notes that Decedent's survivors will "offer testimony regarding the emotional and psychological loss they have suffered as a result of their spouse and son being killed through medical negligence." As part of that testimony, Plaintiff states that Michelle Cusick "will testify about the emotional response she had when learning her husband was intubated into his 'stomach'... [and] how it continues to haunt her knowing how this grave error changed her and [her family's] life forever." Plaintiff asserts that precluding Michelle Cusick from discussing the mechanism by which Defendants caused Decedent's death would "deny [her] from testifying to her legally recognized compensable damages... [and] force[] [her] to sanitize her emotional grief [and] the specific causes of the same." Ultimately, Plaintiff argues that "[t]he very nature of the medical error in this case

contributes a significant role in [Plaintiff's] continuing emotional and psychological harm.”

3. Motion to Preclude Late Produced Report of Dr. Sunil Rao

Plaintiff's final motion in limine seeks to preclude the 2023 Rao Report. Plaintiff contends that the 2023 Rao Report is more detailed than the 2022 Rao Report, including facts not addressed in the earlier report. Plaintiff argues that the 2023 Rao Report does not directly respond to the Hayek Rebuttal; however, Plaintiff asserts that even if the Court characterizes the 2023 Rao Report as a direct response to the Hayek Rebuttal there is no excuse for producing it so long after the Hayek Rebuttal and so soon before trial.

Defendants do not explicitly assert that the 2023 Rao Report is a response to the Hayek Rebuttal, but primarily respond that the 2023 Rao Report is permissible as a supplemental report that does not express any new opinions or theories but “merely amplifie[s] or explain[s] the basis for [Dr. Rao's] previously-expressed life expectancy opinions.” Defendants acknowledge that the lateness of the report will require the Court to perform a balancing test, weighing Plaintiff's harm should the report be admitted against Defendants' harm should the report be excluded. Defendants argue that such a test weighs heavily in favor of admission, as Plaintiff was already aware of Dr. Rao's opinions and has not explained how she would be prejudiced by admission of the 2023 Rao Report.

B. Applicable Law

Pennsylvania Rule of Evidence 702 allows witnesses “qualified as an expert by knowledge, skill, experience, training, or education” to testify in the form of an opinion if three conditions are satisfied:

- “the expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson”;
- “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 issues”; and
- “the expert’s methodology is generally accepted in the relevant field.”⁹

It is well established that “[t]he admission of evidence, including expert scientific testimony, is within the purview of the trial court’s discretion.”¹⁰ Rule of Evidence 403 allows a court to exclude any relevant testimony,¹¹ including expert testimony, if its probative value is outweighed by its potential to cause confusion or mislead.¹² An expert who states an opinion must also “state the facts or data on which the opinion is based.”¹³

⁹ Pa. R.Evid. 702.

¹⁰ *A.J.B. v. M.P.B.*, 945 A.2d 744, 749 (Pa. Super. 2008).

¹¹ Relevant evidence is evidence that “has any tendency to make a fact more or less probably than it would be without the evidence; and the fact is of consequence in determining the action.” Pa. R.Evid. 401. Irrelevant evidence is always inadmissible; relevant evidence is presumptively admissible unless some provision of law requires its exclusion. Pa. R.Evid. 402.

¹² *Green v. Pennsylvania Hosp.*, 123 A.3d 310, 325 (Pa. 2015).

¹³ Pa. R.Evid. 705.

It is generally true that a party need not accept an opposing party's admission, but "may insist on proving the fact" to which the opposing party offers to stipulate.¹⁴ When a stipulation or admission has been accepted, however, "collateral facts" that address only the stipulated element may become irrelevant to the issues remaining before the jury.¹⁵

Pennsylvania Rule of Civil Procedure 4003.5 governs discovery of expert testimony and related trial preparation material. A trial court has broad discretion to exclude expert witness testimony if an expert's identity or the substance of the expert's opinions are not disclosed in accordance with rules of discovery.¹⁶ The preclusion of expert testimony, however, "is a drastic sanction which should not be applied unless the facts of a case make it absolutely necessary to do so."¹⁷ Generally, in the absence of bad faith, a party seeking sanctions for the late

¹⁴ *Parr v. United States*, 255 F.2d 86 (5th Cir. 1958) (*approved of by Old Chief v. U.S.*, 519 U.S. 172, 187 (1997)). In *Old Chief*, cited by Plaintiff, the Supreme Court of the United States stated that the principle articulated in *Parr* is "unquestionably true as a general matter." *Old Chief*, however, addressed the application of this principle to criminal prosecutors and defendants only. Ultimately, the Supreme Court held that when a federal criminal defendant stipulates they are a felon when that prior conviction is an element of the crime, the government *must* accept that stipulation and may not present evidence of the specific nature of the crime, which is rendered more prejudicial than probative by the stipulation.

¹⁵ Defendants cite *Smith v. Barker*, 534 A.2d 533 (Pa. Super. 1987); *Knowles v. Levan*, 15 A.3d 504 (Pa. Super. 2011); *Warburton v. Eister*, 37 Pa. D. & C.3d. 385 (Northumberland Cnty. 1985) (cited with approval in *Knowles*); and *Jones v. Corna*, 2015 WL 7573039 (Pa. Super. 2015) (unpublished memorandum). These cases are discussed in detail below.

¹⁶ *Green Const. Co. v. Department of Transp.*, 643 A.2d 1129, 1139 (Pa. Cmwlth. 1994).

¹⁷ *Id.*

disclosure of expert reports must demonstrate “prejudice[] from properly preparing its case for trial as a result of a dilatory disclosure.”¹⁸

C. **Analysis**

1. **Motion to Preclude Defendants from Denying Negligence or Causation, Including via Dr. Rao**¹⁹

As noted above, Defendants have agreed that they will not introduce testimony or evidence that contradicts their admission of liability; therefore, a significant portion of this motion is moot. Plaintiff maintains, however, that allowing Dr. Rao to testify in accordance with the 2022 Rao Report would necessarily downplay Defendants’ negligence or causation.

Plaintiff’s argument proceeds, essentially, as follows: 1) Dr. Rao fails to acknowledge the esophageal intubation; 2) Dr. Rao opines that Decedent had a diminished cardiac capacity, but fails to state that it was Defendants’ negligence that caused that diminished capacity; 3) Dr. Rao misleadingly states that Decedent was in cardiogenic shock and required life support due to his myocardial infarction, but these conditions were actually due to Defendants’ negligence; and 4) therefore, Dr.

¹⁸ *Id.*

¹⁹ Plaintiff suggests in her January 9, 2023 Motion in Limine concerning the 2023 Rao Report that Defendants withheld the 2023 Rao Report and submitted it late in an attempt to cure issues with the 2022 Rao Report but prevent Plaintiff from addressing the attempted cure. Thus, the Court has analyzed the admissibility of the 2022 Rao Report and Dr. Rao’s opinions contained therein entirely on their own merits, without reference to the 2023 Rao Report.

Rao's opinion will mislead the jury by painting a bleak picture of Decedent's health without acknowledging that Defendants were the cause of the bleak outcome.

By its own terms, however, the life expectancy opinion in the 2022 Rao Report is based on Decedent's risk factors and his medical condition when he arrived at Defendant hospital and prior to Defendants' negligence. Plaintiff and her expert assert – strenuously – that Decedent did not exhibit cardiogenic shock or need life support until *after* Defendants negligently intubated Decedent. Plaintiff's argument that Dr. Rao's opinions would mislead the jury, though, assumes that Dr. Rao's opinions are factually incorrect. Likewise, Defendants and Dr. Rao clearly believe that Dr. Hayek's opinions are factually incorrect. In other words, whether Decedent's cardiogenic shock and need for life support were caused by his myocardial infarction or by Defendants' negligence is a disputed issue of fact for the jury to decide after hearing the evidence and opinions of both experts.

Ultimately, the Court finds that the 2022 Rao Opinion does not misrepresent admitted facts, as Plaintiff contends, but rather reaches proper opinions based on a review of the evidence. Plaintiff is free to attack Dr. Rao's conclusions at trial. For this reason, the Court will deny the motion to the extent it seeks to preclude Dr. Rao's testimony in accordance with the 2022 Rao Opinion.

2. **Motion to Permit Plaintiff to Introduce Evidence of Decedent's Medical Care, including Defendants' Negligent Care**

Plaintiff's second motion seeks to permit Plaintiff to introduce to the jury facts related to Defendant's negligent care. Plaintiff asserts four justifications for doing so: 1) "such evidence is pertinent background evidence for the jury"; 2) "such evidence is... relevant to causation and life expectancy"; 3) "such evidence is... relevant as evidence to rebut Defendants' expert opinions on causation and prognosis"; and 4) such evidence is relevant to Plaintiff's damages, specifically as it affects her continuing emotional and psychological harm.

Plaintiff makes her assertion that it is necessary to present the jury with "a truncated version" of Defendants' negligent care largely in the context of the need to provide the jury with the facts underlying her expert's opinions. Plaintiff does not suggest that it would be appropriate to provide the jury with otherwise irrelevant information simply because it provides context for what occurred, and does not argue that the jury's lack of such information would prevent the jury from fully accepting the Court's instruction that Defendants have admitted they were negligent and that negligence caused Decedent's death.

With regard to Plaintiff's argument that the circumstances of Decedent's death underlie Dr. Hayek's opinions with regard to "causation and life expectancy," it is unclear how the fact that an esophageal intubation (and not some other mechanism) caused Decedent's death is relevant to causation. Defendants have

admitted that they caused Decedent's death, and the Court will instruct the jury concerning this admission.

With regard to life expectancy, Plaintiff reproduces a number of portions of the Hayek Report that she contends depend upon the circumstances of Defendants' negligence. These opinions generally consist of assertions that due to a lack of oxygen caused by the esophageal intubation, Decedent had to be placed on life support, and Decedent would not have suffered a lack of oxygenation or brain injury but for the esophageal intubation.

It is unclear how these opinions relate specifically to the relevant question of Decedent's life expectancy prior to Defendants' negligence. To the contrary, Dr. Hayek expresses an opinion regarding Decedent's life expectancy based on his background medical state, the measured improvement of his EF from February 28, 2018 through March 3, 2018, and the characteristics of Decedent's presentation. Plaintiff asserts that "Dr. Hayek can't provide his life expectancy opinions without an understanding of... the cause of [Decedent's] untimely demise," but the portions of the Hayek Report that go to life expectancy, as opposed to negligence or causation, belie this assertion.

Similarly, testimony concerning the specific mechanism of Decedent's death is not necessary to rebut Dr. Rao's opinions, which are limited to the point in time directly before Decedent's death. As Defendants note, the ultimate issue for the jury

is what Decedent's life expectancy was based on his overall health and medical condition on February 28, 2018, *prior to* Defendants' negligent intubation.²⁰

Although the parties have not located medical malpractice cases addressing the admissibility of the mechanism of defendant health care providers' negligence, it is clear in other negligence cases that once the parties have stipulated to liability,²¹ evidence tending to prove only negligence or causation becomes irrelevant to the issue before the jury and thus inadmissible.²² For example, in automobile accident cases, a defendant's admission of liability renders "collateral facts" – such as leaving the scene of the accident, consumption of drugs or alcohol prior to the collision, or running a red light – inadmissible, as that evidence does not make any fact of consequence *to the issue of damages* more or less likely.

Here, Plaintiff does argue that the specific mechanism of Decedent's death is directly relevant to one portion of damages: Plaintiff's "emotional and psychological harm."

²⁰ As Decedent notes, Pennsylvania Suggested Standard Civil Jury Instruction §7.210B includes the direction that the jury "must first decide the number of years [Decedent] would have lived had [he] not died as a result of this accident."

²¹ As noted above, Plaintiff cites *Old Chief v. United States* for the proposition that a "defendant may not stipulate or admit his way out of the full evidentiary force of the case...." That proposition means, however, that an opposing party generally need not *accept* a stipulation in the first instance. Once the stipulation is agreed to, however, a party may not hold the opposing party to the stipulation, while simultaneously offering evidence that the stipulation renders irrelevant. Here, Plaintiff has clearly accepted Defendants' admission of negligence and liability, acknowledging in her motion in limine that there is no need for Plaintiff "to fully relitigate liability...."

²² See *n.15, supra*.

As Suggested Standard Civil Jury Instruction §14.170 informs the jury, a plaintiff in wrongful death and survival actions under the MCARE Act is entitled to recover money damages for “losing [Decedent’s] companionship, cooperation, affection, services, [and] assistance,” with “services’ includ[ing] the emotional and psychological loss suffered as a result of the death of [Decedent].” This instruction is based on the Superior Court’s pronouncement in *Rettger v. UPMC Shadyside* that the “services” to which a decedent’s family members are entitled include “more than the value of household chores,” and appropriately “extend[] to the profound emotional and psychological loss suffered upon the death of a parent or a child where the evidence establishes the negligence of another as its cause.”²³

Plaintiff is of course entitled to full compensation for the emotional and psychological harm caused by Decedent’s death. However, given that Defendants have acknowledged their negligence, and that they wrongfully caused Decedent’s death, the mechanism of Decedent’s death does not alter the fact of his death, or the character of his absence. Plaintiff’s argument is that she is entitled not just to compensation for the harm caused by *the loss of Decedent*, but for the harm caused by *Plaintiff’s knowledge or observation* of the particular mechanism by which he died.²⁴ Plaintiff cites no legal support for the proposition that this sort of damage is compensable in wrongful death or survival cases.

²³ *Rettger v. UPMC Shadyside*, 991 A.2d 915, 933 (Pa. Super. 2010).

²⁴ To the extent that Plaintiff’s argument is that esophageal intubation is a particularly gruesome manner of negligent death, and that she endured more psychological and

For the foregoing reasons, the Court holds that Decedent's specific manner of death and the surrounding circumstances are not relevant to the issue before the jury, which is damages. Therefore, the Court will deny Plaintiff's motion to admit testimony and evidence concerning Defendants' negligence care.

3. Motion to Preclude Late Produced Report of Dr. Sunil Rao

Plaintiff's January 9, 2023 motion in limine seeks to preclude the 2023 Rao Report on the grounds of untimeliness. Plaintiff notes that Defendants produced the 2023 Rao Report more than three months after the Hayek Rebuttal, and just over one month before trial. In essence, Plaintiff argues that the 2023 Rao Report shows that Dr. Rao was provided with additional records and impermissibly expands on his prior report.²⁵ Plaintiff ultimately asserts that "there is simply no justification for waiting this long to serve the rebuttal especially in light of a pending Motion in Limine to Preclude this same expert." Plaintiff contends she "is prejudiced in attempting to again rebut an untimely produced expert report with just four weeks

emotional loss than had Decedent's manner of negligent death been somehow less offensive, this may be so as a matter of fact. It does not follow, however, that this difference entitles Decedent to greater compensation under a wrongful death or survival action (as opposed to, for instance, a punitive damages or negligent infliction of emotional distress claim).

²⁵ In particular, Plaintiff notes that the 2023 Rao Report makes reference to the esophageal intubation, and suggests that Defendants directed Dr. Rao to address the esophageal intubation to cure any issue caused by his failure to discuss the esophageal intubation in his 2022 Report. As discussed above, however, the 2022 Rao Report's omission of the esophageal intubation does not render it inadmissible, and the circumstances of Decedent's esophageal intubation are irrelevant to the issue of damages before the jury.

until trial commences with an already busy schedule,” including an unrelated trial in mid-January.

The Court has reviewed the 2023 Rao Report, and concludes that it does not raise any new or novel theories beyond those contained in the 2022 Rao Report. It responds to some of Dr. Hayek’s rebuttals of opinions in the 2022 Rao Report, and elaborates on the reasons Dr. Rao asserts those opinions. Although the Court urges parties to endeavor to file responsive expert reports more than one month prior to trial, here the contents of the report do not raise new issues beyond those already in dispute. As noted above, preclusion of expert testimony is a drastic remedy that should not be applied unless absolutely necessary. Here, the report is not so late, and its contents not so disruptive, as to require that harsh remedy. For this reason, the Court will deny Plaintiff’s Motion in Limine to preclude the 2023 Rao Report.

REMAINING MOTIONS IN LIMINE

A. Motion to Preclude Evidence of and References to Remarriage of Plaintiff

Plaintiff’s third motion in limine seeks to preclude Defendants from mentioning Plaintiff’s remarriage. Damages available to Plaintiff include compensation for “the amount of money [Decedent] would have spent to support [Plaintiff] from the date of [Decedent’s] death until the end of his life expectancy” and “the amount of money that fairly and adequately compensates [Plaintiff] for losing

[Decedent's] companionship, cooperation, affection, services, and assistance had the injury and wrongful death not occurred."²⁶ Plaintiff highlights that although a plaintiff's remarriage is ostensibly relevant to those calculations, the Supreme Court of Pennsylvania has long "affirmed the preclusion of evidence of a spouse's remarriage in wrongful death actions."²⁷

In response, Defendants agree that Pennsylvania law has long held that evidence of remarriage is inadmissible in wrongful death cases, but contend that the 2010 case *Rettger v. UPMC Shadyside*²⁸ effected a "sea change in recoverable wrongful death damages," thus undermining the legal reasoning behind the preclusion of remarriage evidence. Specifically, Defendants note that *Rettger* "diverged from the prior case law that held that death damages are generally fixed at the time of death, and allowed wrongful death damages for, *inter alia*, the 'profound emotional and psychological loss suffered upon the death' of a spouse." Defendants argue that this decision expanded available wrongful death compensation into the realms of ongoing psychological loss, loneliness, and grief, thus rendering remarriage far more relevant than it had been under prior law.

²⁶ Pa. SSJI (Civ), § 14.170 (2020).

²⁷ Plaintiff notes that the Supreme Court of Pennsylvania first expressed this position in the 19th century case *Philpot v. Pennsylvania R. Co.*, 175 Pa. 570 (1896), and that Pennsylvania Courts have continued to endorse the position in more modern times. See *Evans v. Reading Co.*, 363 A.2d 1234 (Pa. Super. 1976).

²⁸ *Rettger*, 991 A.2d 915.

As discussed above, after *Retzger*, Pennsylvania law clearly recognizes that the “services” to which a decedent’s family members are entitled include “more than the value of household chores,” and appropriately “extend[] to the profound emotional and psychological loss suffered upon the death of a parent or a child where the evidence establishes the negligence of another as its cause.”²⁹ Defendants acknowledge that no Court since *Retzger* has found a plaintiff’s remarriage relevant to the appropriate compensation for this emotional and psychological loss, but suggest that the time is right for Pennsylvania law to acknowledge the relevance of remarriage to damages calculations in wrongful death cases.

The Court declines to take up this invitation. Without mandatory guidance from statute or a higher court, this Court cannot agree that the appropriate degree of compensation for a surviving spouse’s emotional and psychological loss is lessened by a remarriage. Human emotions are complex, and happiness, sadness, love and loss are not so easily framed as a zero-sum calculation. On the contrary, it is quite understandable for the law to acknowledge that a surviving spouse’s loss is unique and immutable, carried forever without diminution regardless of what the rest of the survivor’s life has in store. For this reason, the Court will grant Plaintiff’s Motion in Limine to preclude any reference to Plaintiff’s remarriage.

²⁹ *Id.* at 933.

B. Motion to Preclude Defendants' Comments, Arguments, or Statement Regarding Defendants' Sympathy or Remorse for Decedent's Death

Plaintiff's fourth motion in limine seeks to preclude Defendants from making statements expressing sympathy or remorse concerning Decedent's death. Noting that Pennsylvania has passed a law rendering statements of apology or remorse inadmissible to prove liability in medical malpractice cases, Plaintiff argues that any such statements Defendant may offer at trial are similarly inadmissible and irrelevant to any issue before the jury. The only purpose of such statements, Plaintiff contends, would be to sway the jury to devalue Plaintiff's claim by casting Defendants in a more sympathetic light.

In response, Defendants acknowledge that a jury certainly may not return a verdict based on sympathy or bias, and affirm that they will not attempt to influence the jury into doing so. Rather, Defendants oppose the motion only on the following limited basis:

"[I]t is customary in a medical negligence action for the defense, typically in the opening statement and/or closing argument, to offer a brief explanation to the jury about why the case has reached trial and will be decided by a jury. This is particularly true in a case involving conceded liability. For example, defendants should be permitted to express to the jury that simply because the case will go to trial and the jury will be asked to assess and award damages does not mean that the defendants do not care, or are not sympathetic to the plaintiff's loss, which involves the death of plaintiff's husband. The defendants should be allowed to acknowledge that this case involves the loss of a loved one coupled with a statement of the law that such sympathy must not become part of the calculus for damages."

The Court agrees that although Defendants are not permitted to seek sympathy or bias, be it through the presentation of testimony or evidence or statement of counsel, the law does not require Defendants to present themselves to the jury as blind to the tragedy of Decedent's death, which Defendants acknowledge they caused and are thus liable for. The Court holds that the expression suggested above – an acknowledgment during the opening statement and/or closing argument “that simply because the case will go to trial and the jury will be asked to assess and award damages does not mean that the defendants do not care, or are not sympathetic to the plaintiff's loss, which involves the death of plaintiff's husband” – is appropriate and does not risk the jury devaluing Plaintiff's claim because they are sympathetic to Defendants.³⁰

ORDER

For the foregoing reasons, the Court hereby ORDERS as follows:

- Plaintiff's Motion in Limine to Preclude Defendants from Denying Negligence or Causation, including via Dr. Rao, is DENIED to the extent it seeks the exclusion of Dr. Rao's testimony and opinions. In all other respects, the Motion is MOOT, as Defendants have admitted negligence and causation and have asserted that they will not present testimony or evidence to undermine these admissions.

- Plaintiff's Motion to Permit Plaintiff to Introduce Evidence of Decedent's Medical Care, including Defendants' Negligent Care, is DENIED.

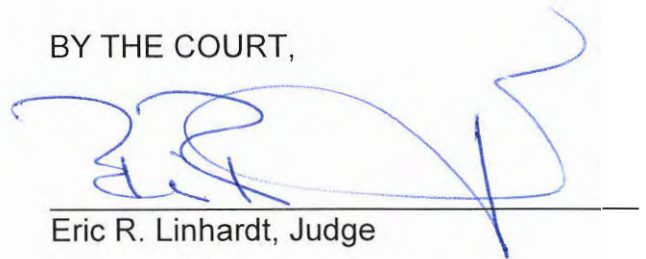
³⁰ The Court will give the jury standard instructions concerning the permissible bases for their verdict.

- Plaintiff's Motion to Preclude Late Produced Report of Dr. Sunil Rao is DENIED.
- Plaintiff's Motion to Preclude Evidence of and References to Remarriage of Plaintiff is GRANTED.
- Plaintiff's Motion to Preclude Defendants' Comments, Arguments, or Statement Regarding Defendants' Sympathy or Remorse for Decedent's Death is DENIED IN PART. Defendants may include the sum and substance of the statement they suggested in their responsive brief as part of their opening statement or closing argument.

Jury selection in this matter will commence on February 6, 2023 at 9:00 a.m. in Courtroom 2 of the Lycoming County Courthouse. Trial will take place from February 7 through February 10, 2023, from 9:00 a.m. to 5:00 p.m., in Courtroom 2 of the Lycoming County Courthouse.

IT IS SO ORDERED this 30th day of January 2023.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

cc: Thomas R. Kline, Esq.; Colin Burke, Esq.; and Garabet M. Zakeosian, Esq.
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Brian J. Bluth, Esq.; Marc F. Lovecchio, Esq.; and William E. Baney, Esq.
Gary Weber, Esq. (Lycoming Reporter)