

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DORIS GRAHAM	:	CIVIL ACTION
	:	
v.	:	
	:	
	:	
GIANCARLO BAROLAT, M.D., <u>et al.</u>	:	No. 03-2029

MEMORANDUM AND ORDER

HUTTON, S.J.

January 12, 2005

I. BACKGROUND

On March 28, 2003, Plaintiff, Doris Graham, initiated this suit against Defendants Giancarlo Barolat, M.D., ("Barolat") and Thomas Jefferson University Hospital ("Hospital"), alleging injuries arising out of a series of surgeries performed on Plaintiff by Dr. Barolat. Plaintiff claims, among other things, that Dr. Barolat negligently failed to remove a Dacron pouch after surgery and this failure caused her to undergo a second surgery to remove the pouch. In preparation for trial, all parties deposed Plaintiff's expert, Dr. Charles Rawlings, on June 7, 2004. Plaintiff plans to introduce Dr. Rawlings' video deposition at trial, in lieu of live testimony, pursuant to Federal Rule of Civil Procedure 32(a). Here, Plaintiff and both Defendants ask the Court to rule on objections made during the video deposition.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 26 requires a party disclose the identity of any expert witnesses they plan to use at trial.

See Fed. R. Civ. P. 26(a)(2). The rule also requires the party to submit a written report containing the "complete statement of all opinions to be expressed, the basis and reasons therefor," and the data considered in forming these opinions. See id. A party must supplement this report if the party learns that the information disclosed is incomplete or incorrect. See Rule 26(e). Specifically, "with respect to testimony of an expert from whom a report is required . . . the duty extends both to information contained in the report and to information provided through a deposition of the expert." Fed. R. Civ. P. 26(e). Failure to supplement can lead to the exclusion of the evidence at trial.

The Third Circuit has stated that district courts should consider the following four factors before excluding testimony for failure to comply with pre-trial requirements: 1) "the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified," 2) "the ability of that party to cure the prejudice," 3) "the extent to which waiver of the rule [at issue] would disrupt the orderly and efficient trial of the case or of other cases in the court," and 4) "bad faith or willfulness in failing to comply with the court's order."

Bowersfield v. Suzuki Motor Corp., 151 F. Supp. 2d 625, 631-32 (E.D. Pa. 2001) (quoting DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978)). Furthermore, this Court

has noted that "'testimony of an expert on matters within the expert's expertise but outside of the expert's report is not only permissible at trial, but the exclusion of such testimony may be reversible error. . . . An expert may testify beyond the scope of his report absent surprise or bad faith.'" Bowersfield, 151 F. Supp. 2d at 631 (quoting Fritz v. Consolidated Rail Corp., 1992 WL 96285, *3 (E.D. Pa. 1992)).

III. DISCUSSION

A. Testimony Regarding a Supplemental Expert Report and Physical Examination

All parties concede that Dr. Rawlings completed an expert report on August 26, 2002. Plaintiff provided copies of this report to Defendants' respective counsels. However, at the video deposition, Dr. Rawlings referred to a second report dated October 21, 2002. Apparently, Dr. Rawlings conducted a physical examination of Plaintiff on October 21, 2002 and amended his initial report to reflect this exam. It is unclear from the record before the Court whether Plaintiff received a copy of the supplemental report before Dr. Rawlings' deposition. Defendants did not receive a copy of the supplemental report, nor did the Defendants learn of the physical exam until Dr. Rawlings' deposition. Defendants now seek to strike all references to the supplemental report and the examination on October 21, 2002.

Defendants allege that this testimony is outside the scope of the original expert report and its probative value is

substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403. Plaintiff argues that Defendants will not be unfairly prejudiced because she will not introduce the supplemental report or any specifics of Dr. Rawlings' examination into evidence at trial. Plaintiff also notes that Dr. Rawlings stated in his deposition that his examination did not alter his original opinion in any way. According to Plaintiff, any error in failing to notify Defendants of Plaintiff's exam is harmless. Because Plaintiff has stated that she will not introduce the second report at trial, the only remaining expert report is the one dated August 26, 2002. The Court must now determine if the testimony regarding the examination, which is outside the scope of the August report, is admissible under the Third Circuit test.

Defendants allege that news of the examination was not only a surprise, but also prejudiced them in two ways. They allege that they would have prepared questions for Dr. Rawlings regarding his examination of Plaintiff for the deposition. Defendants also argue that they chose not to have liability experts examine Plaintiff because Dr. Rawlings did not examine Plaintiff. While the Court is not persuaded by the second argument, it does find weight in the first regarding preparation for the deposition. This deposition is to serve as Defendants' cross examination at trial. Defendants were prejudiced by not

having the information regarding the examination. Regarding the possibility to cure, Plaintiff argues Defendants could have questioned Dr. Rawlings about the examination on cross or requested to depose him again. While this may be true, Plaintiff offers no explanation why she failed to deliver copies of the supplemental report to Defendants before the deposition. Although the Court finds no bad faith or willfulness on the part of Plaintiff, and the introduction of this evidence is not likely to disrupt the proceedings, the possible prejudice to Defendants in admitting this evidence is high. Additionally, given the limited nature of the testimony regarding the examination, and the fact Plaintiff admits that Dr. Rawlings examination did not alter his opinion, the Court finds the probative value of this testimony quite low. Accordingly, Defendants' motions to strike all references to a second report and the examination on October 21, 2002 are granted.

B. Testimony Regarding Alleged Harm Caused by Surgery to Remove the Dacron Pouch

Defendants also object to Dr. Rawlings' testimony on the alleged harm caused by the surgery to remove the Dacron pouch. Defendants specifically object to portions of both the direct and re-direct examination. Regarding the direct examination, they allege that Dr. Rawlings' testimony is speculative and in response to a leading question. During the direct examination, Plaintiff's counsel asked Dr. Rawlings if it was "possible that

the surgery that Dr. DeGrood did may have in fact caused Ms. Graham to experience further pain in the area of her chest and clavicle?" Dep. Tr. at 44. This question is a permissible leading question asked to develop previous testimony regarding the timing of the removal of the device. See Dep. Tr. at 43. Defendants also argue that this question and answer should be stricken as speculative because it does not meet the standard to prove causation in a medical malpractice case through expert testimony. This Court has noted that "'expert testimony is admissible when, taken in its entirety, it expresses with reasonable certainty' that the malpractice 'was a substantial factor' in causing the injury". Lillis v. Lehigh Valley Hosp., 1999 WL 718231, *7 (E.D. Pa. 1999) (quoting Kravinsky v. Glover, 396 A.2d 1349, 1356 (Pa. Super. 1979)). Therefore, it is necessary for the Court to consider both the testimony on direct and re-direct to determine if the testimony as a whole meets the required standard.

On re-direct, Plaintiff's counsel asked if Dr. Rawlings had an opinion "to a reasonable degree of medical certainty" on the cause of Plaintiff's current pain. See Dep. Tr. at 70. Dr. Rawlings clearly stated it was "the fact that the Dacron pouch was left in and then required a second surgery to remove it." Id. at 71. Therefore, taken as a whole, the testimony is not speculative as it meets the standard for admissible expert

testimony. Defendants also allege that the testimony on re-direct is beyond the scope of the cross examination. The Court notes that the testimony on re-direct fits well within the scope of the cross examination. Defendant Barolat's counsel asked several questions regarding the possible ease or difficulty of removal, what circumstances might make removal more painful, and possible injuries that could result from removal during the cross examination. See Dep. Tr. at 59, 60, 63. In doing so, Defendants opened the door to further questioning on pain from removal on re-direct. Therefore, Defendants' motions to strike are denied.

C. Testimony Regarding Possible Harm From Removing Dacron Pouch at Earlier Date

Plaintiff requests a ruling on Defendant Hospital's objection to Dr. Rawlings' testimony regarding whether removal of the pouch by Dr. Barolat would have harmed Ms. Graham. See Dep. Tr. at 46. The testimony follows directly from statements Dr. Rawlings made in his expert report. Additionally, neither Defendant filed an objection to this testimony. Accordingly, Plaintiff's motion to admit this testimony is granted.

D. Testimony Regarding Why Dr. Barolat Did Not Tell Plaintiff He Left the Dacron Pouch in Her Body

Defendants next ask the Court to strike the portion of the re-direct where Dr. Rawlings stated that he could think of no reason why Dr. Barolat did not tell Ms. Graham that he left the

pouch in her body. See Dep. Tr. at 71. Defendants object to this testimony on the grounds that it is beyond the scope of the expert report and beyond the scope of the cross examination. A review of the cross examination reveals that it is well within the scope of the cross. During the cross examination, Defendant Barolat's counsel asked Dr. Rawlings questions regarding Dr. Barolat's operative notes and the absence of a notation regarding removal of the Dacron pouch. See Dep. Tr. at 53-55. Defendant's counsel also questioned Dr. Rawlings on additional ways Dr. DeGrood¹ could have determined the cause of the mass in Plaintiff's body. See id. The Court finds that this line of questioning opened the door for Plaintiff's counsel to ask on re-direct whether Dr. Rawlings could think of a possible reason why Dr. Barolat did not tell Ms. Graham that he left the pouch in her body. Since the testimony at issue was in direct response to a line of questioning on cross, the Court need not determine whether it was within the scope of the expert report. Defendants opened the door to this line of questioning; therefore, Defendants' motions to strike are denied.

D. Testimony Regarding the Standard for Informing a Patient that Something was Left in Her Body

Finally, Defendants move to strike the portion of Dr. Rawlings testimony regarding the standard for informing a patient

¹ Dr. DeGrood removed the Dacron pouch pouch from Plaintiff's body in a surgical procedure on March 30, 2001.

that something was left in her body. See Dep. Tr. at 32-34. They object on the grounds that the testimony is irrelevant and beyond the scope of the expert report. Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the outcome of the action more probable or less probable than it would be without the evidence. See Fed. R. Evid. 401. Here, if it is true that Dr. Barolat was negligent in failing to tell Plaintiff that the pouch was in her body, it is more probable that he was negligent in failing to remove the pouch. Therefore, the testimony at issue is relevant.

Although the evidence is relevant, the Court notes that this testimony is outside the scope of Dr. Rawlings' expert report. Nowhere does the report discuss Dr. Barolat's communication with Ms. Graham or the standard of care involving communication with a patient. However, in applying the Third Circuit's four part test, Defendants fail to make a convincing argument that they were legitimately surprised or prejudiced by this line of questioning. They should have expected this testimony given the fact that Dr. Rawlings' report mentioned the absence of any notes regarding removal of the Dacron pouch. Defendants also attempted to cure any surprise on cross examination by asking if Plaintiff and Dr. DeGrood could have called Dr. Barolat to inquire about the cause of the mass in her chest. See Dep. Tr. at 54; see also supra Part C. Additionally, waiver of the rule would not disrupt

the proceedings and there is no bad faith by the Plaintiff. Therefore, Defendants' motions to strike are denied.

IV. CONCLUSION

For the reasons stated above, Defendants' motions are granted in part and denied in part. Plaintiff's motion is granted.

An appropriate Order follows.

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O R D E R

AND NOW, this 12th day of January, 2005, upon consideration of Plaintiff's Motion for Rulings on Video Deposition Objections (Docket No. 48), Defendant Thomas Jefferson University Hospital's response thereto (Docket No. 50), Defendant Thomas Jefferson University Hospital's Motion in Limine to Preclude and/or Strike Portions of the Videotaped Trial Deposition of Charles Rawlings, M.D. (Docket No. 49), Defendant Giancarlo Barolat's Answer to Plaintiff's Motion for Rulings on Video Deposition Objections and Cross-Motion in Limine to Strike Portions of the Videotaped Trial Deposition of Charles Rawlings, M.D. (Docket No. 51), and Plaintiff's response thereto (Docket No. 54), IT IS HEREBY ORDERED that:

(1) Defendants' motions to strike pages 13 (lines 3-25), 14 (lines 1-6), 44 (lines 20-25), and 45 (lines 1-22) are **GRANTED**;

(2) Defendants' motions to strike pages 44 (lines 2-13), 70 (lines 4-25), and 71 (lines 1-7) are **DENIED**;

(3) Plaintiff's motion to admit pages 45 (lines 23-25) and 46 (lines 1-8) is **GRANTED**;

(4) Defendants' motions to strike page 71 (lines 8-22) are **DENIED**;

(5) Defendants' motions to strike pages 32 (lines 6-25), 33 (lines 1-25), and 34 (lines 1-5) are **DENIED**.

BY THE COURT:

s/ _____

HERBERT J. HUTTON, S.J.