

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

SHERRI LANO, and )  
STEPHEN LANO, )  
Plaintiffs, )  
v. ) C.A. No. N11C-01-277 PLA  
RHONDA FRANCO, )  
Defendant. )

Submitted: September 4, 2012

Decided: December 3, 2012

UPON DEFENDANT’S MOTION *IN LIMINE* TO PRECLUDE  
THE EXPERT TESTIMONY OF DR. FRANK FALCO  
**DENIED**

On this 3rd day of December, 2012, it appears to the Court that:

1. Plaintiff Sherri Lano filed this personal injury action following a car crash on February 22, 2010 with Defendant Rhonda Franco. In her complaint, Plaintiff states that the accident has caused her to suffer from “personal injuries, mental anguish and special damages.” Defendant filed this Motion *in limine*, seeking to exclude Plaintiff’s expert’s testimony for two reasons: (1) he changed his diagnosis opinion after the due date for Plaintiff’s expert report; and (2) his causation opinion does not meet the minimum criteria for admissibility under Delaware Rule of Evidence 702.

2. Plaintiffs' medical expert, Dr. Frank Falco, provided his expert report on October 16, 2011, well before the Court-imposed deadline of May 14, 2012. In that report, he opined that Plaintiff suffers from Reflex Sympathetic Disorder ("RSD") as a result of the accident. Shortly thereafter, Defendant subpoenaed "ALL records" from Dr. Falco relating to the Plaintiff. Dr. Falco provided seven pages of treatment notes that summarized three office visits by the Plaintiff. Plaintiff thereafter continued to seek treatment from Dr. Falco for her allegedly accident-caused injuries.

3. Defendant retained Dr. Stephen Gollump as her medical expert. Dr. Gollump examined Plaintiff on May 16, 2012 and provided his expert report to Plaintiffs before the Defendant's expert report deadline. The parties' experts' opinions differed, and the Defendant elected to depose Dr. Falco to obtain information about the basis of his opinion. At that deposition, which occurred on June 29, 2012, Defendant was informed for the first time that Dr. Falco had changed his diagnosis from RSD to fibromyalgia. Dr. Falco's new diagnosis opinion was based on approximately two hundred pages of treatment history, most of which had not been previously provided to Defendant. Dr. Falco stated that he modified his diagnosis opinion during an examination of Plaintiff on June

21, 2012, and he did not inform counsel of this change until the discovery deposition on June 29, 2011.

4. Defendant now moves *in limine* to exclude the testimony of Dr. Falco for two reasons. First, Defendant asserts that Dr. Falco changed his diagnosis opinion after the deadline for Plaintiff to provide an expert report, and did not immediately notify her. Secondly, she claims that his causation opinion is unreliable because it is based on an incomplete medical history of the Plaintiff and relies exclusively on the temporal proximity between the accident and the onset of fibromyalgia symptoms. Plaintiff opposes Defendant's Motion because the Defendant was made aware of Dr. Falco's changed opinion at the earliest possible time, and also because his opinion is supported by several factors other than just the temporal proximity between the accident and onset of symptoms.

5. Pretrial discovery is intended "to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial."<sup>1</sup> This process is based on the rationale that "a trial decision should result from a disinterested search for truth from all the available evidence[.]"<sup>2</sup> The Court issues scheduling orders to ensure cases progress in a timely fashion so that all parties are prepared for trial on the scheduled date. When an expert

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<sup>1</sup> *Levy v. Stem*, 687 A.2d 573, 1996 WL 742818, at \*2 (Del. Dec. 20, 1996) (TABLE).

<sup>2</sup> *Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. 1969).

changes his opinion after the expert report deadline, it potentially causes prejudice to the opposing party, who may be deprived of sufficient time to confront the expert and respond to the expert's views. The Court has several sanctions available to address an untimely disclosure of an expert opinion. Imposition of sanctions is intended to discourage litigants from violating the Court's scheduling orders and to ameliorate the impact on the culpable litigant's adversary.

6. Exclusion of an expert's testimony is one of the most severe sanctions because it can effectively result in dismissal of the claims that depend upon that testimony. The "sanction of dismissal [or exclusion of an essential expert] is severe and courts are and have been reluctant to apply it except as a last resort."<sup>3</sup> In determining the appropriate sanction, the Court must consider several factors, including: (i) the party's personal responsibility; (ii) the prejudice to the party seeking exclusion or dismissal; (iii) history of dilatoriness; (iv) whether the conduct was willful or in bad faith; (v) the effectiveness of other, less severe sanctions; and (vi) the meritoriousness of the claim or defense.<sup>4</sup> According to the Delaware Supreme Court, monetary penalties are "likely to be the most effective

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<sup>3</sup> *Drejka v. Hitchens Tire Service Inc.*, 15 A.3d 1221, 1224 (Del. 2010) (quoting *Hoag v. Amex Assurance Co.*, 953 A.2d 713, 717 (Del. 2008)).

<sup>4</sup> *Id.*

sanction” to prod cases forward. Dismissal should occur only after monetary penalties have been imposed several times and prove to be ineffective.<sup>5</sup>

7. Exclusion of evidence that is essential to a case should occur only when the Court finds that its duty to enforce the standards of fairness and Rules of Court outweigh its duty to admit all relevant and material evidence.<sup>6</sup> Stated another way, the Court must weigh the prejudice to the party seeking exclusion of evidence against the prejudice to the proponent of the evidence if it is excluded. In its analysis, the Court must always consider Delaware’s well known public policy that favors permitting a litigant to resolve her case on the merits.<sup>7</sup>

8. Dr. Falco communicated his amended diagnosis on June 29, 2012, over a month after the deadline for Plaintiff to produce an expert report. Defendant seeks to exclude that diagnosis opinion because it was disclosed late. Plaintiff does not argue the timeliness of the diagnosis opinion, but instead states that it was disclosed as soon as possible with ample time remaining before trial. The Court recognizes that excluding Dr.

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<sup>5</sup> *Id.*

<sup>6</sup> *IQ Holdings, Inc. v. Am. Commercial Lines Inc.*, 2012 WL 3877790, at \*2 (Del. Ch. Aug. 30, 2012).

<sup>7</sup> *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011).

Falco's testimony now would be extremely prejudicial to Plaintiff because her claims require his testimony.

9. The Court has thoroughly reviewed the record provided by the parties and concludes that Dr. Falco changed his diagnosis opinion on June 21, 2012.<sup>8</sup> The Defendant was informed of his changed diagnosis eight days later with almost seven months remaining before the scheduled trial date. Defendant's Motion does not identify any prejudice or additional expense resulting from the late change in opinion and the Court cannot assume that the Defendant has been severely burdened since there was ample time remaining before trial. Under these circumstances, the most severe sanction -- exclusion of Dr. Falco's diagnosis opinion -- and the less severe sanction of a monetary penalty are both unwarranted.

10. Defendant's motion also accuses Dr. Falco of failing to provide Defense Counsel with treatment records regarding the Plaintiff. Apparently Dr. Falco brought two hundred or so pages of treatment history, upon which he had relied to form his opinions, to the discovery deposition. The Court cannot find any discovery violation based on the record before it because it is not clear whether these additional records were ever requested by

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<sup>8</sup> Defendant submits that Dr. Falco changed his diagnosis on May 11, 2012 based on a note in Plaintiff's treatment history indicating that her symptoms were consistent with fibromyalgia. Dr. Falco testified that his opinion changed on June 21, 2012. The Court finds Dr. Falco's testimony on this issue controlling.

Defendant. Defendant issued her subpoena on October 21, 2011 for “ANY AND ALL records” relating to Dr. Falco’s treatment of Plaintiff. Dr. Falco produced some records at that time. He subsequently continued to provide treatment to Plaintiff for her injuries. It is almost certain that this additional treatment, after the discovery request, resulted in additional treatment records. Defendant does not specify whether the additional records obtained from Dr. Falco related to treatment before or after October 2011, when Dr. Falco responded to Defendant’s subpoena. The Court therefore finds no prejudice to the Defendant from Dr. Falco’s failure to produce the additional treatment records prior to the discovery deposition.

11. Defendant’s second argument in support of her Motion to exclude Dr. Falco’s testimony is that his opinion is scientifically unreliable because it is based solely on the temporal proximity between the accident and onset of fibromyalgia symptoms. In support of this argument, she cites two prior decisions excluding expert testimony regarding causation of fibromyalgia.<sup>9</sup> In the first case, *Minner v. American Mortgage & Guaranty Co.*, the court excluded an expert’s fibromyalgia causation opinion that was “based solely on a temporal relationship” because it was not scientifically

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<sup>9</sup> *Warren v. Topolski*, 2009 WL 1231099 (Del. Super. Apr. 30, 2009) (citing *Minner v. American Mortgage & Guar. Co.*, 791 A.2d 826 (Del. Super. 2000)).

reliable as it did not exclude other possible causes.<sup>10</sup> In the second case, *Warren v. Topolski*, the court disallowed the testimony of an expert because he could not conclude that the plaintiff's fibromyalgia was caused by the accident at issue. Defendant cites a portion of Dr. Falco's deposition transcript where he agreed with Defense counsel that his opinion is "based exclusively on temporal circumstances conveyed [by Plaintiff]." Plaintiff responded to this argument by identifying eight additional factors upon which Dr. Falco relied before forming his causation opinion.

12. After reviewing the limited portions of Dr. Falco's discovery deposition transcript provided in the Motion and response, the Court concludes that Dr. Falco relied upon more than just the temporal proximity between the accident and onset of fibromyalgia symptoms. Even though he agreed that his opinion was based "exclusively" on the temporal relationship between the accident and onset of symptoms, he also provided testimony of additional factors supporting his opinion. Specifically, Dr. Falco relied upon his examination of Plaintiff, a review of her medical history, a review of her symptoms and complaints of pain, a review of relevant medical literature, a review of medical records from before and after the accident, and a

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<sup>10</sup> 791 A.2d 826, 854-55 (Speculative testimony that environmental material in a building was a causal factor in the plaintiffs' development of fibromyalgia, without exclusion of other causative factors, is precisely the type of testimony that should be kept from the jury under the principles of *Daubert*.)



consideration of the degree of trauma caused by the accident. He also relied upon his prior experience in treating and diagnosing over two thousand other patients injured in a traumatic event. Dr. Falco's expert opinion differs in a material respect from the opinions excluded in the cases cited by Defendant because: (1) it is based on more than just the temporal relationship between the accident and onset of symptoms; and (2) he testified that his causation opinion was "expressed to a reasonable degree of medical probability." The arguments raised by Defendant in her Motion are not sufficient to exclude Dr. Falco's testimony as unreliable. They are, of course, the proper subject of a potentially effective cross-examination.

13. For all the foregoing reasons, Defendants Motion *in limine* to preclude the expert testimony of Dr. Falco is DENIED.

**IT IS SO ORDERED.**

*/s/ Peggy L. Ableman*

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**PEGGY L. ABLEMAN, JUDGE**

Original to Prothonotary  
cc: Counsel via File & Serve