

Mickle v Srdanovic
2016 NY Slip Op 32469(U)
June 9, 2016
Supreme Court, Rockland County
Docket Number: 030330/2015
Judge: Margaret Garvey
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X

MICHAEL MICKLE,

Plaintiff,

-against-

ELVIR SRDANOVIC and SENAT SRDANOVIC,

Defendants.

-----X
Margaret Garvey, J.

**DECISION AND ORDER
ON MOTION IN LIMINE**

Index No.: 030330/2015

The following papers, numbered 1 to 2, were considered in connection with Plaintiffs Notice of Motion in Limine seeking an Order precluding Defendants from offering into evidence various entries in the Plaintiff's hospital records that discuss a history of alcohol use on the part of the Plaintiff, and Order precluding Defendant from offering an expert to testify as to the effect of alcohol on a person solely based upon a blood test in a hospital, along with any other relief the Court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF JUSTIN BLASH, ESQ. DATED May 26, 2016 IN SUPPORT	1
OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE OF JAMES HARRIS ESQ. DATED JUNE 7, 2016/EXHIBITS (A-B)	2

Upon a careful and detailed review of the above mentioned papers, the Court now rules as follows:

This matter is scheduled to commence a jury trial before the undersigned on Monday, June 13, 2016. In anticipation of the trial, Plaintiff filed the instant motion in limine, seeking a pre-trial ruling precluding Defendants' counsel from offering into evidence various entries in the Plaintiff's hospital records that discuss a history of alcohol use on the part of the Plaintiff, and Order precluding Defendant from offering an expert to testify as to the effect of

alcohol on a person solely based upon a blood test in a hospital.

Plaintiff argues that evidence of the Plaintiff's prior history of alcohol use is inadmissible, as it would severely prejudice the Plaintiff's ability to have a fair trial. Additionally, Plaintiff avers that Defendant's expert Dr. Lee should be precluded from testifying as to the outward signs and symptoms of the effect of alcohol, or what Plaintiff's behavior might have been at the time of the accident since it would be speculative.

Defendants filed opposition papers. In said opposition, counsel for Defendants notes that he intends on using the medical records of the Plaintiff from Westchester Medical Center to demonstrate the laboratory results on the date of the accident showing Plaintiff's toxicology, i.e. blood alcohol level. Additionally, Defendant argues that he intends to elicit statements from the Plaintiff's Westchester Medical Center medical records that refer to Plaintiff as intoxicated, i.e. "intoxicated ped struck." Further, Defendant argues that those statements are admissible as they related to the hospital staff's ability to provide adequate and appropriate medical treatment for the Plaintiff. In support of this argument Defendant cites Roberto v. Nielson, 262 AD 1035 (2d Dept 1941) for the premise that the hospital must know how an injury occurred in order to treat the patient and therefore information provided about the cause of the accident in that process is admissible. Additionally, Defendant's argues that the Plaintiff's medical records from Westchester Medical Center demonstrate Plaintiff's state and impairment at the time of the accident but fails to inform the Court which documents, records, examinations or statements demonstrate that information is contained within and the specific statements he wishes to elicit. Finally, Defendant also argues that their expert Dr. Lee should be able to testify scientifically about the results of the blood alcohol test and the findings that the results of that test demonstrate.

Turning first to Plaintiff's request to preclude any hospital or medical records regarding alcohol as inadmissible, the Court disagrees. Plaintiff cites a case in which the court found that it was prejudicial to allow information in to the trial regarding prior incidents of

intoxication because the sole purpose of the introduction of those records/information to create an inference that the defendant was intoxicated at the time of the accident. [*Del Toro v. Carroll*, 33 AD2d 160 (1st Dept 1969)]. The instant matter is distinguishable from *Del Toro*. Albeit Defendant's papers are a bit unclear, it seems that Defendant is not seeking to elicit a prior history of alcoholism on the part of the Plaintiff, but rather statements of treating medical professionals regarding their observations or statements Plaintiff made about his possible intoxication. The Court agrees that statements that demonstrate a history of alcoholism or drinking in a previous time unrelated to the instant action are highly prejudicial and invite speculation on the part of a jury as to the Plaintiff's level of intoxication at the time of the accident.

Plaintiff also cites a Second Department case for the premise that certain portions of hospital records probative value is outweighed by the highly prejudicial effect on a jury. [*Grcic v. City of New York*, 139 AD2d 621 (2d Dept 1988)]. A more thorough reading of the *Grcic* case by this Court finds that it supports Defendant's argument for the need for an expert toxicologist to testify in the instant matter. Specifically, in *Grcic* the Court found that regarding the Defendant's defense of comparative negligence it was insufficient to elicit evidence that established that the plaintiff had drunk two to three beer in a five hour period before the accident without testimony regarding the effect the consumption of those beers had or could have had on the Plaintiff's ability to drive a vehicle. 139 AD2d at 625.

In the instant matter statements within the medical records of the Plaintiff which demonstrate a subjective observation of medical personnel would not be admissible either on their own or through the interpretation or testimony of an expert witness proffered by the Defendant. In contrast, raw data, i.e. lab results, results of tests (not the impressions of a technician or doctor) included in properly certified medical records are admissible as they are objective and can be used by an expert witness for them to form their own expert opinion. Therefore, the Court finds that statements in Plaintiff's medical records regarding intoxication determined

subjectively by medical personnel or reference to prior alcohol use are inadmissible and precluded.

As to the admission of the blood alcohol levels, Plaintiff raises the concern that each person with a specific blood alcohol level does not exhibit the same effects and therefore the expert's testimony would be speculative. Plaintiff is free to cross-examine Defendant's expert as to the difference in those effects and those answers would go to the weight given to the expert's testimony rather than its admissibility. Therefore, the raw data, specifically the Plaintiff's blood alcohol level found in the medical records, coupled with testimony of an expert witness of the effect a blood alcohol at the level the Plaintiff had may have on a person is not precluded.

Briefly, the Court has reviewed Plaintiff's argument regarding the dram shop case, *Romano v. Stanley*, 90 NY2d 444 (1997) and finds that the case is distinguishable from the instant action. Specifically, an element of a dram shop case is that the person who served the allegedly intoxicated person had to serve that person knowing they were intoxicated, i.e. visible intoxication. The element of "visible intoxication" cannot be raised through an expert witness who is speculating about the outward signs the allegedly intoxicated person expressed based on blood alcohol tests. "Visible intoxication" in a dram shop case must be elicited by a fact witness. In the instant action, which sounds in negligence, there is no element of visible intoxication required to demonstrate some negligence on the part of the Plaintiff. In direct contrast, Defendant's purpose in having an expert witness testify and interpret the blood alcohol tests is to provide testimony about the types of conduct that may occur when a person's blood alcohol is at the same level as the Plaintiff's was on the night of the accident in the instant action. In *Romano*, the Court specifically stated that the testimony was not based on laboratory tests, but was on the expert's "ultimate conclusions were both speculative and conclusory." 90 NY2d at 451. That is in direct contrast to the instant action. Defendant is seeking to have Dr. Lee testify based on the laboratory tests completed and the results obtained

upon the Plaintiff's admission to Westchester Medical Center.

The Court finds that Dr. Lee may testify as a expert witness for the Defendant interpreting the blood alcohol results, that the levels of alcohol in Plaintiff's blood at the time of the accident was above the legal definition of intoxication when operating a motor vehicle in the State of New York and the types of impairments that are associated with the alcohol content level in a person the size of the Plaintiff.

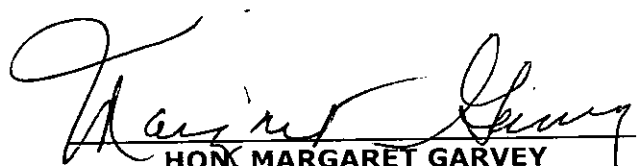
Accordingly, it is hereby

ORDERED that Plaintiffs' Notice of Motion in Limine is granted in part and denied in part consistent with the terms of this Decision and Order; and it is further

ORDERED that counsel for the parties shall appear before the undersigned on **MONDAY, JUNE 13, 2016 at 9:15 a.m.** for a conference prior to jury selection.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
June 9, 2016


HON. MARGARET GARVEY
Justice of the Supreme Court

TO:
e-filed -

JUSTIN BLASH, ESQ.
NEIMARK and NEIMARK
Attorney for Plaintiff

JAMES HARRIS, ESQ.
LAW OFFICE OF JOHN TROP.
Attorney for Defendants