

Jenkins v Erie County Pub. Adm'r
2022 NY Slip Op 30742(U)
March 14, 2022
Supreme Court, Erie County
Docket Number: Index No. 2017/813786
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DAKIELA JENKINS,

Plaintiff,

- against -

DECISION AND ORDER

Index No.: 2017/813786

ERIE COUNTY PUBLIC ADMINISTRATOR,
JENNIFER G. FLANNERY, ESQ.,
As Administrator of the Estate of
JOHN MCFARLAND,

Defendant.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **DOLCE PANEPINTO, P.C.**
Rene Juarez, Esq., Of Counsel
Attorneys for Plaintiff

BURGIO, CURVIN & BANKER
Hillary C. Banker, Esq., Of Counsel
Stephanie R. Messina, Esq., Of Counsel
Attorneys for Defendant

WALKER, J.

Defendant has applied for an order precluding certain of Plaintiff's expert witnesses from testifying at the jury trial scheduled to commence on March 28, 2022 (Motion 3; Doc. 37).

Plaintiff has cross-applied for an order precluding certain of Defendant's expert witnesses from testifying at trial (Motion 4; Doc. 50).

BACKGROUND

This action arises out of a motor vehicle accident that occurred on January 27, 2016, at

approximately 9:30 a.m., in the City of Buffalo, New York (the “Incident”).

On January 15, 2020, this court issued a Decision and Order granting Plaintiff’s motion for partial summary judgment and holding that “the jury shall be instructed that Defendant’s negligence was the sole proximate cause for having caused the Incident [and] the sole issues to be determined at trial are whether Defendant’s negligence in causing the Incident proximately caused Plaintiff’s injuries; whether such injuries constitute ‘serious injuries’ under the no-fault provisions; and, if so, damages” (Doc. 19, p. 3).

DISCUSSION

Defendant’s Application

Preclusion of testimony of Zair Fishkin, M.D.

Zair Fishkin, M.D., is a medical doctor and board-certified orthopedic surgeon licensed to practice medicine in the State of New York (Doc. 39, ¶1). Plaintiff’s Expert Disclosure reflects that Dr. Fishkin is expected to testify, in relevant part,

by applying engineering principles to medicine and human anatomy for the purpose of arriving at his conditions that Ms. Jenkins was injured in this collision. It is further anticipated he will testify that the injuries sustained by Ms. Jenkins are consistent with the forces and momentum generated by the collision and the trauma that would be experienced by Ms. Jenkins as the driver of her vehicle. Dr. Fishkin is expected to testify about the manner in which the human body responds to the forces (including but not limited to the vectors, acceleration, deceleration, momentum) experienced in collisions such as the one in this lawsuit, and specifically how Ms. Jenkins was injured in this collision. Dr. Fishkin is expected to rely on fundamental biomedical engineering principles to help the jury understand how the collision resulted in Ms. Jenkins sustaining an injury. It is expected he will testify to mechanical loading experienced during car crashes and how it contributes to injuries to the human body including the structural injuries and deficits in human physiological function in general and

specifically Ms. Jenkins

(*Id.*, at ¶6).

Defendant seeks to preclude Dr. Fishkin from “providing any testimony in connection with any ‘biomechanical evaluation’ ” (Doc. 37, p.1).

While no doubt there is a body of law associated with whether, and under what circumstances, medical doctors, such as Dr. Fishkin, should be permitted to provide a biomechanical evaluation at trial, Defendant failed to submit a memorandum of law in support of her application or otherwise provide the court with the controlling law on this topic.

Instead, on March 9, 2022, Defendant submitted a memorandum of law “in further support” of her application. However, the court did not consider it, because it was submitted in *reply* to Plaintiff’s opposition to the application.

Dr. Fishkin is not only a medical doctor. His educational background includes a B.S. in Biomechanical Engineering from Johns Hopkins University, as well as a PhD in Mechanical Engineering from the University at Buffalo (Doc. 58, at ex. A, pp. 6-8). This expert, the scope of his education and experience, as well as the nature and grounds for his testimony were disclosed to defense counsel in 2020, prior to the original date set for trial. No applications were made to expand upon the disclosure or to limit Dr. Fishkin’s testimony. Despite her contention that Defendant was unable to retain a “rebuttal expert,” Defendant has retained, and intends to produce at trial such an expert - Ron Fijalkowski, Ph.D (Doc. 58, at Ex. B).

This aspect of the motion is denied. However, the extent of Dr. Fishkin’s expertise in the area of biomechanics will no doubt be the subject of cross-examination going to the weight, if any, to be given to his testimony on this topic.

Preclusion of Michael C. Cardamone, D.C.

Defendant seeks to preclude Dr. Cardamone from testifying at trial and the introduction of his medical records, because Defendant contends they are illegible. The court has reviewed such records (consisting of sixty-nine pages) and agrees that they are largely, but not entirely, illegible. Thus, Dr. Cardamone shall be precluded from testifying about anything related to those of his records which are illegible, and Plaintiff shall be precluded from introducing such records at trial.

Preclusion of Plaintiff's Other Experts

Defendant also seeks to preclude Darlene M. Carruthers, Ronald Reiber, and A. Marc Tetro from testifying at trial.

Defendant has failed to meet her burden on this aspect of her application, and it is also denied.

Motion to Compel

Defendant seeks an order compelling Plaintiff to produce various documents, including, *inter alia*, medical records, medical authorizations, and tax returns.

The Scheduling Order On Consent, dated April 18, 2019, **ORDERED**, in relevant part, “that all discovery shall be completed by September 1, 2019: and “that all dates are made on a **date certain basis** . . . (Doc. 6, p. 2) (emphasis in original).

In addition, on April 18, 2021, Plaintiff filed the Trial Note of Issue and Certificate of Readiness for Trial (Doc. 5), and Defendant never sought to strike it.

Accordingly, the motion to compel is denied, because the deadline to seek discovery expired on September 1, 2019, according to the Scheduling Order (*Santiago v. Spinuzza*, 59

AD3d 939 [4th Dept 2009] [in the absence of extraordinary circumstances, the court is without discretion to order discovery once a trial note of issue has been properly filed]).

The parties are reminded that scheduling “orders” are just that - they are neither invitations, nor suggestions. They are orders (*Andrea v. Arnone, Hedin, Casker Kennedy & Drake Architects & Landscape Architects, P.C.* (5 NY3d 514, 521 [2005] [“Litigation cannot be conducted efficiently if deadlines are not taken seriously, and . . . disregard of deadlines should not and will not be tolerated”])).

Plaintiff’s Cross-Application

Preclusion of Ron Fijalkowski, Ph. D.

Defendant’s Expert Disclosure reflects that Dr. Fijalkowski is a biomechanical expert employed by ARCAA, and that he is “expected to testify regarding causation and the mechanism of alleged injury suffered by the Plaintiff in this case” (Doc. 52, ¶¶1-2).

Dr. Fijalkowski is expected to testify about mathematical computations concerning acceleration and crush forces concerning the Incident. He is not expected to testify (nor would the court permit him to testify) about the nature and extent of Plaintiff’s injuries. Rather, his testimony will be limited to a biomechanical analysis and evaluation of the Incident.

It is well settled that biomechanical testimony serves as an admissible form of expert evidence (*Cardin v. Christie*, 283 AD2d 978 [4th Dept 2001]; *Vargas v. Sabri*, 115 AD3d 505 1st Dept 2014]).

Moreover, this court previously denied an application seeking to preclude Dr. Fijalkowski from testifying, holding, as follows:

[P]laintiff’s Motion to Preclude Ronald J. Dr. Fijalkowski, Ph.D., from testifying at trial in the above action, or in the alternative, compelling defendant to produce the proposed predicate for the expert opinions including published treatises, articles, studies and

other items, and further for a *Frye* Hearing of Ronald J. Dr. Fijalkowski, Ph.D., is denied.

Barnett v. Rowland (Index No. I2007/003639, Sup Ct, Erie Co, NY, October 25, 2010, Walker, J.)

Accordingly, the court disagrees with Plaintiff's contentions that Dr. Fijalkowski's testimony would be unreliable and without foundation. Nor is a hearing, pursuant to *Frye v. United States*, 293 F 1013 [DC Cir 1923]), required (*Amodio v. Bianco*, 15 AD3d 979 [4th Dept 2005] [*Frye* hearing not required where expert's testimony does not involve novel scientific evidence]).

Preclusion of Kenneth Pearson, M.D.

Kenneth Pearson, M.D., is a radiologist, and is expected to testify at trial that "there is no definite imaging evidence for a posttraumatic injury to the cervical spine that could be attributed to the 01/27/2016 motor vehicle accident . . . [and] that there is no definite evidence for a posttraumatic injury to the left shoulder that could be attributed to the 01/27/2016 motor vehicle accident" (Doc. 53).

Plaintiff seeks to preclude Dr. Pearson from testifying at trial because he never physically examined her. This is not a valid basis to object to Dr. Pearson, because radiologists rarely physically examine patients. The medical norm is for radiologists to review imaging films without physically examining patients.

Whether Dr. Pearson's testimony may be cumulative (as Plaintiff asserts) is a determination reserved for the time of trial.

Preclusion of Douglas Moreland, M.D. and Paul Mason, M.D.

Douglas Moreland, M.D., is a neurosurgeon (Doc. 55), and is expected to testify with

respect to his physical examination of Plaintiff. As such, he shall be permitted to testify, to a reasonable degree of neurological certainty, that the Incident was not the proximate cause of Plaintiff's injuries. He shall be precluded, however, from testifying about the biomechanics and physics of the Incident, because he is a medical doctor not trained in mechanical engineering or related fields (*Russell v. Pulga-Nappi*, 94 AD3d 1283 [3d Dept 2012] [physician not qualified to offer an opinion regarding the biomechanics or physics of motor vehicle collision]).

Paul Mason, M.D., is an orthopedic surgeon (Doc. 54) and is also expected to testify, to a reasonable degree of orthopaedic certainty, that the Incident was not the proximate cause of Plaintiff's injuries. Like, Dr. Moreland, he shall be permitted to do so, but shall be precluded from testifying about the biomechanics and physics of the Incident, because he is a medical doctor not trained in mechanical engineering or related fields (*Russell, supra*).

Plaintiff's Credibility and Character

Dr. Moreland shall be provided some leeway with respect to testifying about the extent to which he observed Plaintiff allegedly exaggerate her pain and other subjective complaints during his physical examination of her. Over the course of his career, Dr. Moreland has conducted thousands of physical examinations, and he is in a unique position to opine as to whether a patient's claims are overly subjective. Indeed, such issues are part and parcel of his examination and ultimate opinion.

In light of the foregoing, it is hereby

ORDERED, that Defendant's application to preclude Michael C. Cardamone, D.C., from testifying at trial about anything related to those of his records which are illegible is granted, and he shall be precluded from introducing such records at trial. The balance of Defendant's application is denied; and it is further

ORDERED, that Plaintiff's cross-application to preclude Dr. Mason and Dr. Moreland from testifying about the biomechanics and physics of the Incident is granted, but they shall be permitted to testify, to a reasonable degree of medical certainty in their respective fields, that the Incident was not the proximate cause of Plaintiff's injuries. The balance of the cross-application is denied.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: March 14, 2022
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice