

Clark v Cucinotta
2022 NY Slip Op 35252(U)
April 4, 2022
Supreme Court, Onondage County
Docket Number: Index No. 005516/2018
Judge: Gerard J. Neri
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At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York, on April 1, 2022.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

GERALDINE CLARK and MOSES CLARK,

Plaintiffs,

-against-

**JOHN CUCINOTTA, M.D. and CROUSE
RADIOLOGY ASSOCIATES, L.L.P.,**

Defendants.

DECISION and ORDER

Index No: 005516/2018

By Notice of Motion dated March 17, 2022, Defendants John Cucinotta, M.D.

("Cucinotta") and Crouse Radiology Associates, LLP ("Crouse") seek an order precluding testimony by Plaintiff's experts for whom insufficient disclosure has been served, precluding cumulative expert testimony, precluding certain damages claims by Plaintiff Moses Clark, precluding Plaintiffs from introducing testimony of an economic damages expert, precluding Plaintiff's from introducing evidence of past/pending litigation against Dr. Cucinotta, and precluding references to "root cause" inquiry or analysis by hospital and/or radiology group (*see* Notice of Motion, NYSCEF Doc. No. 210). By Notice of Motion dated March 17, 2022, Plaintiffs Geraldine Clark and Moses Clark seek an order precluding Defendant Cucinotta from offering cumulative opinions that Defendants' retained expert has offered; in the event that Defendant Cucinotta offers any "expert opinions" he shall be subject to full cross-examination as an expert including, but not limited to, the number of times he has been sued and the number of times he has been subject to disciplinary actions; precluding Defendant and/or Defense Counsel

from offering any explanations or excuses for Defendant Cucinotta's failure to be present at trial; precluding Defendants and/or Defense Counsel from offering evidence concerning COVID-19, or the Pandemic's impact on him, his practice or his patients or any other efforts undertaken by Defendant in response to the COVID-19 pandemic; precluding Defendant and/or Defense Counsel from offering evidence or eliciting expert opinions that improperly bolster or inflate Defendant Cucinotta's abilities as a radiologist; and precluding Defendant or Defense Counsel from offering evidence of disparaging remarks about Plaintiffs' pursuit of a medical malpractice action against Defendant (NYSCEF Doc. No. 215).

Motion #8

Defendants assert that Plaintiffs failed to specify the factual basis for radiology and neurology experts' opinions. Defendants proffer that expert disclosure is insufficient where it fails to set forth "in reasonable detail an expert's qualifications, the facts and opinions on which the expert is expected to testify at trial and the grounds therefor" (Chapman v. State, 189 A.D.2d 1075, 1075 [Third Dept. 1993]; *see also* Douglass v. St. Joseph's Hosp., 246 A.D.695, 697 [Third Dept. 1998]). Defendants assert that Plaintiffs' radiology expert fails to state in any detail what should have been seen or what was present on the MRI (*see* Affirmation, NYSCEF Doc. No. 211, ¶5). Similarly, Defendants allege that Plaintiffs' neurology expert fails to detail what symptoms were evident and that Defendants missed (*ibid*, ¶6). Defendants assert they brought these alleged deficiencies to Plaintiffs' counsel's attention, but he responded that the disclosure was adequate (*ibid*, ¶8). Defendants pray the Court grant the requested relief.

Defendants further request an order precluding cumulative testimony of Plaintiffs' experts. It was proffered that Plaintiffs have three experts who will all testify to Defendant Cucinotta's alleged malpractice (*ibid*, ¶10). Defendants assert that when there are multiple

experts, preclusion is proper (*see Horner v. Way*, 257 A.D.2d 819 [Third Dept. 1999]; *see also* *COR Canada Road Co., LLC v. Dunn & Sgromo Engineers, PLLC*, 34 A.D.2d 1364 [Fourth Dept. 2006]). Defendants pray the Court grant the requested relief.

Defendants seek an order precluding Plaintiffs from seeking lost wage damages concerning Plaintiff Moses Clark or introducing expert proof from Dr. McGowan regarding lost wages. Defendants assert a jury may award damages on a derivative claim if it finds the spouse was significantly deprived of the plaintiff's support, companionship, and services or that the spouse was required to provide extensive assistance for a lengthy period of time (*see Teller v. Anzano*, 263 A.D.2d 647, 650 [Third Dept. 1999]). Defendants assert Plaintiffs have offered no expert proof that it was necessary for Moses to voluntarily quit his job to care for his spouse (*see* Affirmation, NYSCEF Doc. No. 211, ¶¶14-15).

Defendants further object to Plaintiffs calling their economic expert as no report for said expert has been provided. In fact, Plaintiffs have stated that if the expert is called, a report will be provided at that time (*ibid*, ¶18). Defendants assert that preclusion is proper where Plaintiffs willfully refuse to provide a copy of the expert's report (*see Sisemore v. Leffler*, 125 A.D.3d 1374, 1375 [Fourth Dept. 2015]). Defendants pray the Court grant the requested relief.

Defendants further seek to preclude Plaintiffs from offering evidence of prior or pending lawsuits against Defendants. "A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a difference, unrelated occasion" (*In re Estate of Brandon*, 55 N.Y.2d 206, 210-211 [1982]). Defendants assert New York State courts typically exclude impeachment evidence involving prior bad acts which do not rise to the level of criminality or do not involve

affirmative dishonesty (*see People v. Grier*, 162 A.D.2d 416, 416 [1990]). Defendants argue that other lawsuits involving Defendants do not rise to this level and preclusion is proper.

Defendants further seek preclusion of any evidence of quality review inquiry or investigation conducted in this matter. Defendants assert that documents generated in connection with the performance of a medical or a quality assurance review function, and reports required to be filed under Public Health Law are not subject to disclosure or use as evidence in a medical malpractice trial (*see Klinger v. Mashioff*, 50 A.D.3d 746 [Second Dept. 2008]). Specifically, Defendants seek preclusion of “RAD peer” internal review process of radiology cases at Crouse Hospital – Dr. D’Ambrosio EBT, pp. 30-31 and Dr. Cucinotta’s testimony about having reviewed radiology cases as an expert for law firms and insurance companies, including MLMIC, in medical malpractice cases – Dr. Cucinotta EBT, p. 19. Defendants pray the Court grant the requested relief.

Plaintiffs oppose the relief sought (*see Affirmation*, NYSCEF Doc. No. 220). Plaintiffs assert their expert disclosure satisfied CPLR §3101(d). Plaintiffs proffer that their radiology expert disclosure provided:

“The expert will opine that the MRI (MRA) that Defendant interpreted that there was no acute ischemic findings, was incorrect, negligent and below the standards of care. The interpretation the following morning by Radiologist Nicholas D’Ambrosio, M.D. found a discrepant finding. Discrepant’s plain meaning is a variance to, disagreeing, indeed the correct diagnosis was an acute cerebral vascular accident in the brainstem, meaning stroke. The expert completely agrees with Dr. D’Ambrosio’s diagnosis and personally reviewed the imaging studies which demonstrate that there is a brainstem stroke that was occurring and is show on the MRI (MRA)” (*see Plaintiff’s Expert Disclosure*, NYSCEF Doc. No. 212, p. 4).

Plaintiff’s Counsel asserts this is adequate, stating: “I am not sure how much more specific one can get!” (*see Affirmation*, NYSCEF Doc. No. 220, ¶5). Plaintiffs note that a party is “obligated

to disclose only a summary of the grounds for the expert's opinion" (*see Barrowman v. Niagara Mohawk Power Corp.*, 252 A.D.2d 946 [Fourth Dept. 1998]). Plaintiffs oppose the relief sought. Plaintiffs further assert that their neurology expert disclosure was satisfactory (*see Affirmation*, NYSCEF Doc. No. 220, ¶7). Plaintiffs assert that the neurology expert opinions are detailed as to the evolving nature of Geraldine Clark's stroke (*ibid*, *see also* Plaintiff's Expert Disclosure, NYSCEF Doc. No. 212, p. 11). Plaintiffs further proffer that Defendants' reliance on Sisemore is misplaced as Defendants have not demonstrated "a willful or intentional failure to disclose" (*see Sisemore supra*). Plaintiffs pray the Court deny the requested relief.

Plaintiffs assert that their experts will not offer cumulative testimony. Plaintiffs' experts will each testify in their own field of expertise (*see Affirmation*, NYSCEF Doc. No. 220, ¶13). Plaintiffs further assert that Dr. D'Ambrosio was a treating radiologist and his testimony is a fact witness and is not being called as an expert witness (*ibid*, ¶14). Plaintiffs pray the Court deny the requested relief.

Plaintiffs state they will not call a forensic expert economist (*ibid*, ¶15). Plaintiff Moses Clark will testify that he retired to take care of Geraldine Clark (*ibid*). Plaintiffs will not elicit a dollar amount nor claim lost wages or costs (*ibid*).

Defendants did not reply.

Discussion:

"[P]reclusion [of expert testimony] for failure to comply with CPLR §3101(d) is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (Sisemore v. Leffler, 125 A.D.3d 1374, 1375 [Fourth Dept. 2015], *citing* Marchione v. Greenky, 5 A.D.3d 1044, 1045 [Fourth Dept. 2008]). Defendants proffer that their attorney's letter of January 19, 2022 (NYSCEF Doc. No. 213) set forth their

objections to Plaintiffs' expert disclosure and Plaintiffs' failure to address the objections satisfies the "intentional or willful" component. Plaintiffs note that their disclosure is sufficient and point to the findings of treating radiologist D'Ambrosio (*see* Expert Disclosure, NYSCEF Doc. No. 212, p. 4, *et seq.*). CPLR §3101(d) merely requires:

"Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion" (*see* CPLR §3101(d)(1)(i)).

Plaintiffs' expert disclosure satisfied this burden. Plaintiff's radiology expert points to the images themselves and D'Ambrosio's findings as to what Defendant Cucinotta missed and should have seen. Similarly, Plaintiffs' neurology expert walks through Geraldine Clark's medical records and highlights the alleged deviations from the standards of care (*see* Expert Disclosure, NYSCEF Doc. No. 212, p. 7, *et seq.*). Defendants' motion is denied.

Defendants further seek to preclude Plaintiffs from offering cumulative expert testimony. "Whether [testimony] should be excluded as cumulative is a matter that rests within the sound discretion of the trial court" (COR Canada Road at 1365). Subsequent to the Court's decisions on dispositive motions, the remaining Defendants are Dr. Cucinotta and Crouse Radiology Associates, L.L.P. The contention is that Cucinotta failed or deviated from the standard of care in his interpretation and impression diagnosis of Plaintiff's MRI. Plaintiff's neurology expert explicitly states: "While this expert does not claim to be a radiologist, the report later that morning by Nicholas D'Ambrosio, M.D. in reporting a discrepant finding and an acute cerebral vascular accident in the brainstem (stroke) is certainly below the reasonable standards of medical care for a Board Certified Radiologist as an attending physician at a comprehensive stroke center and is responsible for reading and diagnosing strokes" (*see* Expert Disclosure, NYSCEF Doc.

No. 212, p. 11). Plaintiffs' emergency medicine expert also opines that "Defendant Cucinotta missed the brainstem stroke that was evolving when the imaging was taken and reported no acute ischemic findings" (*ibid*, pp. 18-19). These findings mimic exactly what Plaintiffs' radiology expert proffer (*ibid*, p. 4, *et seq.*). Defendant's motion on this point is granted.

Defendants next move to preclude expert economic testimony on lost wages. Plaintiffs concede they will not call expert testimony, therefore the motion is moot in this regard. Defendants further seek to preclude Moses Clark's testimony concerning lost wages for quitting his job to take care of his wife. Similarly, Plaintiffs state they will not claim for lost wages or costs (*see* Affirmation, NYSCEF Doc. No. 220, ¶15). This issue is also now moot. Defendants also seek to preclude Plaintiffs from introducing evidence of prior or pending lawsuits against Defendants. This issue is raised in Plaintiffs' motion and will be addressed in detail.

Defendants seek to preclude evidence of any quality review inquire or investigation conducted in this case. Defendants assert such evidence is not subject to disclosure or use as evidence in a medical malpractice action (*see Klingner supra*). Plaintiffs failed to oppose this portion of the motion. The Court grants insofar as Defendants seek to preclude the referenced "RAD peer" internal review process. However, and as will be detailed below, the Court does not grant such relief at this time concerning Dr. Cucinotta's testimony about having reviewed radiology cases as an expert for law firms and insurance companies, including MLMIC, in medical malpractice cases.

Motion #9

Plaintiffs seek to preclude Defendant Cucinotta from offering cumulative expert testimony. Plaintiffs allege this would unfairly allow Defendants to bolster Cucinotta's

credibility. Plaintiffs concede Cucinotta should be allowed to testify as to what he did or did not do from a factual standpoint. Plaintiffs further ask that any other of Plaintiff Geraldine Clark's treating physicians are called to testify, that they be similarly limited to factual testimony. In the event that Defendant Cucinotta does testify in an expert fashion, Plaintiffs seek the ability to cross-examine him fully as if he were an expert (*see e.g.* Goff v. Paul, 8 A.D.3d 971 [Fourth Dept. 2004]). Plaintiffs further seek an order precluding any evidence or testimony concerning Cucinotta's whereabouts should he not appear during the trial, as such explanation would be prejudicial. Similarly, Plaintiffs seek an order precluding Defendants from offering any testimony or evidence concerning COVID-19 and Defendants' response to the Pandemic as such testimony would be prejudicial.

Plaintiffs also seek to preclude any testimony which may bolster Defendant Cucinotta's abilities as a radiologist. Plaintiffs request an order precluding Defendants from offering disparaging remarks about Plaintiffs' pursuit of a medical malpractice action against the Defendants.

In opposition to Plaintiffs' motion and in light of Plaintiffs' recitation of facts, Defendants amended their notice of motion to include a request that the Court preclude any allegations that the remaining Defendants bared any responsibility for the discharge of Plaintiff Geraldine Clark (*see* Affirmation, NYSCEF Doc. No. 219, ¶3). Defendants assert that Defendant Cucinotta should be able to offer his expert opinion in his own defense. Defendants further proffer that it would be prejudicial to allow cross-examination of Cucinotta on other lawsuits.

Defendants state that an order regarding COVID-19 is unnecessary as the events of this action occurred prior to COVID-19. Further, Defendants state that it would be an "unnecessary

restriction” to preclude Defendants from offering background information which may include comments on COVID-19. Defendants assert that Defendant Cucinotta will be present at trial so an order on this point is unnecessary. Defendants also assert that the Plaintiffs’ motion regarding disparaging remarks and bolstering Cucinotta are vague, but to the extent that they understand it, the motion should be denied as unnecessary and premature. Defendants only ask that such a grant of Plaintiffs’ motion on these points be reciprocal.

Plaintiffs replied and reiterated their arguments (*see* Reply, NYSCEF Doc. No. 224).

Discussion:

Plaintiffs seek to preclude Defendant Cucinotta from providing expert testimony in his defense. “In addition to testifying to his or her own observations, a treating physician may give expert opinion testimony” (*Krinsky v. Rachleff*, 276 A.D2d 748 [Second Dept. 2000]).

However, should Cucinotta deviate from factual testimony and stray into expert testimony, the Court shall permit a full cross-examination of Cucinotta as if he were an ordinary expert witness.

As noted by Defendants, Defendant Cucinotta intends to attend the trial. The motion on this point is denied without prejudice. Should Cucinotta be absent, the Court will revisit this question upon Plaintiffs’ motion.

Plaintiffs further seek an order precluding references to COVID-19. Defendants concede that the issues of this case occurred prior to the COVID-19 Pandemic. The Court agrees that COVID-19 is irrelevant to the instant matter (*see* Affirmation, NYSCEF Doc. No. 219, ¶12). As COVID-19 is irrelevant to the instant matter, the Plaintiffs’ motion is granted on this point. Plaintiffs’ request to preclude testimony regarding the bolstering of Cucinotta’s abilities or disparaging remarks about the filing of the instant medical malpractice lawsuit are vague and premature, therefore the relief sought at this time is denied without prejudice.

NOW, THEREFORE, upon reading and filing the papers with respect to the Motion, and due deliberation having been had thereon, it is hereby

ORDERED, that Defendants' motion to preclude expert testimony for failing to comply with CPLR §3101 is DENIED; and it is further

ORDERED, that Defendants' motion to preclude cumulative testimony is GRANTED and Plaintiffs' experts are precluded from testifying on areas outside their proffered expertise; and it is further

ORDERED, that Defendants' motion in limine precluding Plaintiffs from calling an economic damages expert is GRANTED as Plaintiffs have conceded they will not call same; and it is further

ORDERED, that Defendants' motion in limine to preclude Plaintiffs from asserting a lost wages claim is GRANTED as Plaintiffs have conceded they are not pursuing same; and it is further

ORDERED, that Defendants' motion in limine to preclude Plaintiffs from eliciting testimony or other evidence concerning a "RAD peer" internal review process is GRANTED; and it is further

ORDERED, that Defendants' motion in limine is DENIED in all respects not granted hereinabove; and it is further

ORDERED, that Plaintiffs' motion in limine which seeks permission to cross-examine Defendant Cucinotta as an expert in the event that Cucinotta proffers expert testimony is GRANTED; and it is further

ORDERED, that Plaintiff's motion in limine which seeks to preclude Defendants from offering testimony or commentary on Defendant Cucinotta's absence during trial is DENIED as Defendants have represented that he will be in attendance at trial; and it is further

ORDERED, that Plaintiffs' motion to preclude testimony regarding COVID-19 is GRANTED; and it is further

ORDERED, that Plaintiffs' motion to preclude testimony of a "bolstering" nature or precluding Defendants from making "disparaging remarks" concerning the filing of a medical malpractice action are DENIED WITHOUT PREJUDICE; and it is further

ORDERED, that Plaintiff's motion not specifically granted hereinabove is DENIED WITHOUT PREJUDICE.

Dated: April 4, 2022


HON. GERARD J. NERI, J.S.C.

ENTER.