

Clark v Cucinotta
2023 NY Slip Op 35331(U)
May 15, 2023
Supreme Court, Onondaga County
Docket Number: Index No. 005516/2018
Judge: Rory A. McMahon
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

GERALDINE CLARK and MOSES CLARK,

Plaintiffs,

-vs-

DECISION and ORDER
IN LIMINE MOTION
INDEX #005516/2018

JOHN CUCINOTTA, M.D., CROUSE HOSPITAL
EMERGENCY MEDICINE DEPARTMENT, CROUSE
RADIOLOGY ASSOCIATES, L.L.P., CROUSE HEALTH
HOSPITAL, INC., and KRISTA KANDEL, M.D.,

Defendants.

By Notice of Motion dated April 17, 2023, Defendant Krista Kandel, M.D. ("Kandel") made a motion seeking an order (1) precluding plaintiffs Geraldine Clark and Moses Clark (collectively "plaintiffs") from offering testimony from their experts in radiology and neurology that Dr. Kandel deviated from the standard of care; (2) precluding the plaintiffs from offering any testimony or evidence regarding alleged deviations from the standard of care by Dr. Kandel that were not alleged in their Verified Bill of Particulars; (3) precluding the plaintiffs from offering any testimony or evidence from forensic economist Daniel A. McGowan, Ph.D., and from offering any testimony or evidence in support of a claim for plaintiff Moses Clark's lost wages; (4) precluding the plaintiffs from offering any hearsay testimony and (5) precluding the plaintiffs from offering or offering testimony regarding the handwritten notes made by Todd Clark (Notice of Motion, NYSCEF Doc No. 330).

By Notice of Motion dated April 17, 2023, Defendants Crouse Health Hospital, Inc., and Crouse Hospital Emergency Medicine Department made a motion in limine seeking an order on the same grounds, namely: (1) precluding Plaintiffs from offering testimony from their experts in radiology and neurology that Dr. Kandel deviated from the standard of care; (2) precluding Plaintiffs from offering any testimony or evidence regarding alleged deviations from the standard of care by Dr. Kandel that were not alleged in their Verified Bill of Particulars; (3) precluding Plaintiffs from offering any testimony or evidence from forensic economist Daniel A. McGowan, Ph.D., and from offering any testimony or evidence in support of a claim from Mr. Clark's lost wages, to the extent it is even a claim, inasmuch as Plaintiffs already withdrew such claim against Dr. Cucinotta; (4) precluding Plaintiffs from offering any hearsay testimony; (5) precluding Plaintiffs from offering or offering testimony regarding the contents of the handwritten notes made by Todd Clark (Notice of Motion, NYSCEF Doc No. 351). Plaintiffs filed an affidavit in opposition dated April 24, 2023 (Plaintiff's Speaking Affidavit, NYSCEF Doc No. 377).

**EXPERTS IN RADIOLOGY AND NEUROLOGY REGARDING KANDEL'S ALLEGED
DEVIATION FROM THE STANDARD OF CARE**

While the Court acknowledges that a medical expert is not required to be a specialist in a particular field in order to testify regarding accepted practices in that field, “the witness must be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable.” (*DiLorenzo v. Zaso*, 148 AD3d 1111, 1113). Therefore, when a medical expert offers an opinion which is outside of their “area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered.” (*Id.*) The lack of such a foundation proffers an expert opinion which is of no probative value for the trier of fact. (*Id.*)

The proffer of the two experts, with seemingly no significant background in Emergency Room Training to speak of, is not probative of the issue at hand, namely the standard of care for an ER doctor and whether Dr. Kandel fell below that standard of care. *Montanari v. Lorber*, 200 A.D.3d 676, 676 (2nd Dept. 2021).

The Court notes that this issue was addressed in the decision and order dated April 4, 2022 wherein Judge Neri stated “Plaintiff’s experts are precluded from testifying on areas outside their proffered expertise.” (NYSCEF Doc No. 233). While that motion was brought by Defendants Cucinotta and Crouse Radiology, the same premise applies here.

Therefore, the motion to preclude experts in radiology and neurology regarding Dr. Kandel’s alleged deviation from the standard of care is granted.

**TESTIMONY OR EVIDENCE REGARDING ALLEGED DEVIATIONS FROM THE
STANDARD OF CARE BY DR. KANDEL THAT WERE NOT ALLEGED IN THE
VERIFIED BILL OF PARTICULARS**

The law of this case, as set forth in the Court’s ruling on the motion of Mr. Borelli, Order dated April 12, 2023, is that the Supplemental Verified Bill of Particulars is stricken. Therefore, plaintiff will not be allowed to advance any theories contained in the December 9, 2022 Supplemental Verified Bill of Particulars. That being said, it appears that the issue of TIA and/or stroke were included in both the complaint and original Verified Bill of Particulars to the extent that plaintiff alleges symptoms of presentment could have been signs of TIA and/or stroke. This is not to say that the TIA is an appropriate theory of liability, as in a failure to diagnose a TIA. Instead, it was posited in a manner that a TIA was not ruled out even in the face of symptoms which could have been a sign of TIA or stroke (See paragraph 18 of the plaintiff’s complaint)—which allegedly was a hemorrhagic stroke.

Therefore, the motion to preclude is granted to the extent it not a separate theory of liability (i.e. that plaintiff suffered a TIA) .

TESTIMONY OR EVIDENCE FROM FORENSIC ECONOMIST DANIEL A. MCGOWAN, PHD. OR EVIDENCE IN SUPPORT OF A CLAIM FOR PLAINTIFF MOSES CLARK'S LOST WAGES

The Court notes that pursuant to Honorable Gerard Neri's Decision and Order dated April 4, 2022, the Court granted the Defendants' motion in limine to preclude Plaintiff from asserting lost wages as Plaintiffs conceded they would not be pursuing same. Further, the Court granted Defendants' motion to preclude economic damages expert, also stating that "Plaintiffs have conceded they would not call same"(NYSCEF Doc No. 233). Again, while that motion was brought by Defendants Cucinotta and Crouse Radiology, the same premise applies here.

Therefore, the motion to preclude is the economic damages expert, Daniel A. McGowan, PhD or any evidence regarding Moses Clark's lost wages is hereby granted.

HEARSAY TESTIMONY

While objections were made by both counsel for Defendant Dr. Kandel and Defendants Crouse Health Hospital, Inc., and Crouse Hospital Emergency Medicine Department, the below references the ruling of the Court with respect to the specific points in Defendant Kandel's motion papers. The points raised by Defendant Kandel, incorporate the issues raised by Defendants Crouse Health Hospital, Inc., and Crouse Hospital Emergency Medicine Department and the rulings noted are the same for all Defendants.

a) Conversations between the plaintiffs and Todd on October 29, 2017 about the plaintiff's symptoms and how she was feeling, taking the plaintiff to the hospital, and which hospital she should be taken to:

Geraldine Clark Depositions: page 41-44, 100-101, 115-117 and Transcript II pages 30-33, With respect Plaintiff, Geraldine Clark and her conversations with Todd regarding how she felt, to the extent she can recall it is acceptable as it is not hearsay. The Court finds these conversations are not offered for the truth of the matter asserted but simply that the conversations took place.

Moses Clark conversations with son: pages 45-48 and page 56-The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

Todd Clark Conversations with plaintiffs in Todd Clark transcript pages 22-24, 28-34, 85-88-The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

b) **Telephone conversations between Moses and Todd Clark while the plaintiff was at Crouse on October 29, 2017 and after Todd Clark and the plaintiff had returned home.**

Moses Clark Transcript pages 48-56, 85-88-The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

Pages 94-95 To address this portion of the objection, we must address the note in question which was labeled as Exhibit 1 to Deposition conducted 3/1/19. The note was not contemporaneously written (see page 94-) and there is a question as to who wrote it (see page 94 "I'm not exactly sure when I wrote it up."—stated by Moses Clark).¹ In addition, to the extent the conversations between Moses and Todd in pages 94-95 address or refer to the note, the discussion is not reliable (a necessary piece of any exception to the hearsay rule). Most importantly, the conversation is not probative in any way and the note was made in anticipation of litigation.

With respect to the question commencing on page 94 line 17 regarding the conversation between Moses and his son October 29, 2017 that is allowed as non hearsay up to page 95, line 8 where the deponent indicates and refers to the exhibit 1 notes. Those portions are not to be discussed as they reference the exhibit.

Todd Clark Transcript: pages 44-45 and 66-67: The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

c) **The conversation the plaintiff had with someone at Crouse on October 29, 2017 about leaving the hospital.**

The plaintiff could only identify this person as a "girl," and testified that she did not know whether she was a doctor or a nurse. Todd Clark testified that it was a younger "oriental" lady that he assumed was the doctor, and that he does not know who Dr. Kandel is.

Geraldine Clark Transcript 1 pages 48-49 Pages 101-02 Pages 118-21 Geraldine Clark Transcript 2 pages 34-37: The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

Todd Clark Transcript pages 47-50 and 56: The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

Pages 60-63: The Court finds these discussions were out of court statements, not

¹ Although Todd Clark indicates he wrote the note in his deposition testimony, the deposition testimony of his father, Moses Clark, is not clear as to whether it was Moses or Todd who actually wrote the note.

offered for the truth of the matter asserted, but simply for the fact that they took place. The reference to note is precluded as the note was made in anticipation of litigation, not contemporaneous with the events and is not probative.

Pages 93: There is no reference to conversation on this page of the deposition.

d) Any conversation the plaintiff has with the person from Crouse who called on the morning of October 30, and her conversation with Todd about returning to the hospital.

G. Clark 1 49-50, G. Clark 2 41-42 T. Clark 68-71: The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

e) Moses Clark's phone conversations with Todd on October 30 about returning to Crouse, and after they had arrived at Crouse.

Moses Clark Transcript Pages 55-59 The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

f) Any conversations Todd Clark and or the plaintiff's daughter had with doctors at Crouse.

G. Clark Transcript 1, Pages 54-55. It doesn't appear that there is any specific discussion or reiteration of any portion of a discussion between the plaintiff's daughter and doctors. This portion does not contain discussions which are in any admissible form.

g) Any conversations Moses Clark had with doctors at Crouse about length of time the plaintiff was in the emergency department, why she was sent home and whether she could have been given medication.

Moses Clark Transcript pages 64-66 The Court finds these discussions were out of court statements, not offered for the truth of the matter asserted, but simply for the fact that they took place.

THE HANDWRITTEN NOTES, MADE BY TODD CLARK

Again Defendants Kandel and Defendants Crouse Health Hospital, Inc., and Crouse Hospital Emergency Medicine Department take issue with Todd Clark Transcript pages 11, 57-63. Specifically, the notes allegedly made by Todd Clark (Deposition Exhibit 1, 3/1/19). The court finds that based upon the deposition testimony, it is clear that the note was not contemporaneously written (see page 94- of Moses Clark Transcript). In addition, there is a question as to who wrote it (see page 94 of Moses Clark Transcript). Moses Clark states "I'm not exactly sure when I wrote it up." *emphasis added*. In addition, to the extent the conversations between Moses Clark

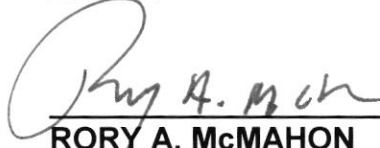
and Todd Clark, pages 94-95 (Moses Clark Transcript) address or refer to the note, the discussion is not reliable. A necessary piece of any exception to the hearsay rule is reliability. (*Nucci v. Proper*, 95 N.Y.2d 597(2001)). Most importantly, the conversation is not probative in any way, especially since the testimony by Todd Clark was that the notes were prepared in anticipation of trial, months after the events in question.

The motion to preclude is hereby granted.

This constitutes the decision and order of the Court.

Dated: May 15, 2023
Syracuse, New York

ENTER

A handwritten signature in cursive script, appearing to read "Rory A. McMahon", is written over a horizontal line.

RORY A. McMAHON
SUPREME COURT JUSTICE