

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

WINIFRED SAMMONS,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 09C-06-312 CLS
)	
PENINSULA-DELAWARE)	
CONFERENCE OF THE UNITED)	
METHODIST CHURCH, a foreign)	
corporation, et al.,)	

Defendants.

On Plaintiff’s Motion in *Limine* to Preclude the Testimony of Dr. Gordon Ostrum.
DENIED.

On Plaintiff’s Motion in *Limine* to Preclude Speculative Testimony by Defendant
Edwin Kang on Plaintiff’s Sexual History. **GRANTED**

ORDER

Thomas C. Crumplar, Esq., Raeann Warner, Esq. of Jacobs & Crumplar, P.A.,
Wilmington, DE. Attorneys for Plaintiff.

Stephen P. Casarino, Esq. of Casarino, Christman, Shalk, Ransom & Doss, P.A.,
Wilmington, DE. Attorney for Defendant Kang.

Scott, J.

Introduction

Plaintiff's motions in *limine* arise in the context of a sexual abuse case where Plaintiff Winifred Sammons ("Plaintiff") claims that Defendant Edwin Kang ("Defendant") engaged in sexual relations with Plaintiff while she was a minor up to thirty times, starting in September of 1967.¹ Defendant asserts that he only had sex with Plaintiff once. Each party has described one encounter which resulted in Plaintiff's pregnancy and the birth of the parties' son on July 22, 1968, but the parties disagree as to the exact date that this one encounter occurred. Although the parties agree that it happened in the fall, there is a dispute as to whether it occurred before or after Plaintiff's eighteenth birthday, October 23, 1967. For the following reasons, Plaintiff's motion to preclude the testimony of Dr. Gordon Ostrum ("Dr. Ostrom") is **DENIED** and Plaintiff's Motion to preclude speculative testimony by Defendant on Plaintiff's sexual history is **GRANTED**.

Discussion

I. *Plaintiff's Motion in Limine to Preclude the Testimony of Dr. Gordon Ostrum*

Defendant intends to call Dr. Gordon Ostrom to testify as to most likely date of conception of the parties' son. Dr. Ostrom's approximation the date of conception is based only upon the child's birth date, since there are no available medical

¹ The facts of this case are more fully discussed in previous orders.

records in this case concerning Plaintiff's pregnancy² and is based on an assumption that the pregnancy was about 40 weeks. Dr. Ostrom estimates that the likely date of conception was on or after the October 28, 1967. More specifically, Dr. Ostrom opines that the likely date of conception was October 29th. However, Dr. Ostrom also testified that, if the pregnancy was longer, the date of conception would have been earlier.

Plaintiff requests that the Court preclude Dr. Ostrom's testimony pursuant to DRE 702 and DRE 403. To be admissible under DRE 702, expert testimony must assist the trier of fact in understanding the evidence or a fact in issue.³ That is, the testimony must not "embrace[] matters in which 'the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions.'"⁴ Testimony may also be inadmissible if it fails the trial court's balancing test under DRE 403, which provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."⁵

² Pl. Mot., at p. 3.

³ DRE 702.

⁴ *Wheat v. State*, 527 A.2d 269, 272 (Del.1987) (quoting *Lampkins v. United States*, 401 A.2d 966, 969 (D.C.App.1979)).

⁵ DRE 403.

Plaintiff argues that, since the issue is not whether the parties had sex, Dr. Ostrom's testimony will not assist the jury to determine a fact in issue as required by DRE 702. Plaintiff's argument based on DRE 403 is that Dr. Ostrom's testimony would confuse the jury into believing that the suit is a paternity suit and that the precise issue is the date of conception. The Court does not share Plaintiff's concerns that Dr. Ostrom's testimony will confuse and not assist the jury. Instead, the approximate dates of conception and the general explanations of gestation provided by Dr. Ostrom would be helpful to the jury to determine whether, on at least on one occasion, Defendant had sex with Plaintiff while she was a minor. While Plaintiff asserts that the parties agree that they had sex in October 1967, Defendant has shown that neither party knows the exact date of conception and that the parties have provided conflicting dates. Due to this inconsistency, the Court does not consider Dr. Ostrom's testimony to be "a waste of time or cumulative evidence."⁶ The Court also finds no risk that Dr. Ostrom's testimony will present undue prejudice to the Plaintiff.

DRE 702 also requires that an expert base his testimony on sufficient facts or data.⁷ Plaintiff contends that Dr. Ostrom's testimony should be precluded because it is based on an assumption that Plaintiff had a forty week pregnancy and the fact that Dr. Ostrom's assumption was made without any facts relating to the pregnancy

⁶ DRE 403.

⁷ DRE 702; *Perry v. Berkley*, 996 A.2d 1262 (Del. 2010).

since the medical records are non-existing. Considering the fact that there are no existing medical records in this case, the child's birth date serves as sufficient factual basis for Dr. Ostrom's to testify as to the possible dates of conception. However, Plaintiff is free to challenge Dr. Ostrom's knowledge regarding the specific details of Plaintiff's pregnancy on cross examination.⁸

II. Plaintiff's Motion in Limine to Preclude Defendant's Speculative Testimony on Plaintiff's Sexual History

Defendant is prohibited pursuant to D.R.E. 602 from testifying about Plaintiff's sexual history due to his lack of personal knowledge. Defendant Kang testified in a deposition that, after he learned of the pregnancy, he was not sure whether he was the father of the parties' son "because [he] knew she had somebody else at that time."⁹ When asked how he knew that she was involved with someone else, he stated "I just, you know, from my sensing" and that "[he] was sensing that [Plaintiff] dating somebody. She was having relationship with somebody."¹⁰ He explained that he did not know that Plaintiff was actually dating someone else, but that he believed that she had other boyfriends based on conversations that the two had.¹¹ D.R.E. 602 provides that:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the

⁸ See *Perry*, 996 A.2d at 1271.

⁹ Def. Kang Dep., 92:1-3.

¹⁰ *Id.* at 92:4-9.

¹¹ *Id.* at 92:10-22.

matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Defendant has testified that he did not know for a fact that Plaintiff was in a relationship, but that he “sensed” that she was. His only basis for believing so was based on certain conversations and not on personal knowledge. Therefore, Defendant’s testimony about whether he sensed that Plaintiff was in a relationship or had other boyfriends will not be permitted. The Court did not rule on the admissibility of testimony about Plaintiff’s prior sexual activity since it was not raised in Plaintiff’s motion in *limine*.

Conclusion

Based on the foregoing reasons, Plaintiff’s motion to preclude Dr. Ostrom’s testimony is **DENIED** and Plaintiff’s motion to preclude Defendant’s testimony about Plaintiff’s sexual history is **GRANTED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

Date: May 8, 2013