SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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June 13, 2012

(VIA E-FILED)

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RE: *Aneita Patterson v. State Farm Mutual Automobile Ins. Co.*
C.A. No. 10C-07-149 FSS

Upon Plaintiff's Motion to Exclude Dr. Bonner's Testimony – DENIED, in part and GRANTED, in part;
Upon Plaintiff's Motion to Exclude Dr. Cary's Testimony – DENIED;
Upon Defendant's Motion to Bar Evidence of Lost Wages – DENIED.

Dear Counsel:

As we know, this PIP case, filed almost two years ago, will go to trial in a few days. The pretrial conference was held a few days ago, on June 4, 2012. Despite this hotly contested case's age, the run-up to the pretrial conference and the conference, itself, brought out festering disputes. This decides two of them.

I.

On June 6, 2012, Plaintiff filed a motion to preclude Defendant from relying on two doctors' depositions: James Bonner, M.D., and Damon Cary, D.O. The same day, Defendant filed a motion to bar evidence of lost wages. As to the latter, the court agrees with Plaintiff. Defendant has waived the right to rely on estoppel as an affirmative defense. Defendant had knowledge that Plaintiff was claiming medical disability from work, based on Dr. Cary's verification of disability before Defendant filed its answer. At the latest, Defendant knew Plaintiff would rely on Dr. Cary when his opinion was disclosed a year ago, on June 7, 2011. As Plaintiff suggests, Defendant probably knew about the potential issue even sooner. By waiting so long to raise the defense, Defendant violated Superior Court Civil Rule 12 (b)'s spirit and purpose.

Further, the court views Defendant's motion as a backdoor motion for summary judgment.[1] If the motion is granted, the claim for lost wages will not go to trial, much less to the jury. Simply put, the collateral estoppel claim should have been raised, at the latest, as part of Defendant's July 22, 2011 motion for summary judgment. Now is too late. Of course, Defendant may cross-examine Dr. Cary as to how he only found his voice on May 23, 2012, during his deposition.

II.

In contrast to Defendant's motion, Plaintiff's motion *in limine* is procedurally proper. But, as Defendant argues, it is overreaching. As to Dr. Bonner, he has offered his expert opinion here and elsewhere that soft tissue injuries like

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[1] *See Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 499-500 (Del. 2001) ("It will quickly be seen that this is not a motion in limine. [It] is dispositive of a substantive legal issue . . . [and] was in reality a motion for summary judgment. There was no dispute. Therefore the question was an entirely legal one.").

Plaintiff's "generally resolve within a period of one to four months time."[2] The court has held, and Defendant concedes here, that Dr. Bonner's general opinion is inadmissable. So, he will not offer it at trial.

Defendant, however, has established that Dr. Bonner examined Plaintiff, and, based on the examination rather than his general opinion, he specifically opines that Plaintiff's injuries had resolved. Defendant may rely on that specific opinion at trial. In deciding that Dr. Bonner may offer opinion based on an actual examination, the court appreciates that Dr. Bonner's original reports seem to rely on his general opinion about soft tissue injuries rather than an actual physical examination. Plaintiff makes too much of that, however. Plaintiff knew that Dr. Bonner had examined her in March or April 2010.[3] Had the examination not supported the opinion, Defendant would have had to disclose it. Plaintiff cannot benefit now from obliviousness.

As for Dr. Cary, at least in part, his expert opinion relies on Plaintiff's statements about her medical history and subjective complaints. Accordingly, her credibility is at issue and Defendant is entitled to cross-examine her about ways she may have minimized prior incidents and injuries, and ways she may have exaggerated her subjective complaints.

In allowing Defendant cross-examination, the court appreciates that Plaintiff has been in sixteen prior collisions and that fact raises the possibility of unfair prejudice. Nevertheless, some of the sixteen collisions included injury claims, and Plaintiff's not mentioning fourteen of them potentially has a significant bearing on whether Plaintiff is believable and whether Dr. Cary, having formed opinions in reliance on what Plaintiff told him, is also believable.

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[2] *Patterson v. State Farm Mutual Automobile Ins. Co.*, C.A. No. 08C-04-127 JRJ, at *2 (Del. Super. July 1, 2009).

[3] Dr. Bonner's report is dated "March 12, 2010," yet it anachronistically says Plaintiff "was seen today April 12, 2010."

III.

For the foregoing reasons, Plaintiff's motion *in limine* to exclude Dr. Bonner's testimony is **GRANTED** as to general opinion about soft tissue injuries, but **DENIED** as to the rest. Plaintiff's motion *in limine* to scale-back Dr. Cary's cross-examination is **DENIED.** Defendant's motion to preclude testimony about lost wages is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS:mes
oc: Prothonotary (Civil)