SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: ***McFarlane v. Atlantic Budget Inn Millsboro, Inc.***
C.A. No. S10C-09-031 RFS

Defendant's Motion in Limine. Granted.
Defendant's Motion for Summary Judgment. Granted.

Submitted: November 21, 2012
Decided: December 5, 2012

Dear Counsel:

In this personal injury case, Plaintiff Mary McFarlane slipped and fell in the laundry room at a hotel owned by Defendant Atlantic Budget Inn, Millsboro, Inc. ("Defendant"). The record shows that the opinion of Plaintiff's medical expert was not based on sufficient facts or data,[1] or on an understanding of the fundamental facts of the case, and is thus excluded.[2] The result is that Plaintiff has no medical expert for trial, and summary judgment is granted to Defendant.

Facts. The slip and fall accident occurred September 28, 2008. Plaintiff identified Balepur S. Venkataramana, M.D., a neurosurgeon, as her expert for trial. She first sought treatment from him August 5, 2010 for low back pain, which she attributed to the 2008 fall. Her self reported medical

[1]DRE 702(1).

[2]*Perry v. Berkley*, 996 A.2d 1262 (Del. 2010).

history consisted of a prior shoulder injury and low back pain starting after the 2008 accident and worsening since then. She stated that she had not been free of back pain since she fell in 2008.

Dr. Venkataramana operated on Plaintiff's back January 12, 2011 and June 28, 2011. He testified that both surgeries were related to the 2008 fall.

He also stated that prior to the operations he looked at a November 2009 MRI but nothing else. He had not seen any medical records pre-dating the September 2008 fall, nor did he review MRI's taken in July 2007 and January 2008. He did not review notes from consultations with other neurosurgeons who treated Plaintiffs at various times. He was unaware that Plaintiff had been injured at work in October 2009.

Plaintiff testified that she has a long history of low back pain radiating to her left leg. She described multiple slip and falls that occurred at home as well as at work and in public. She stated that she experienced chronic low back pain since the September 2008 fall.

The defense expert, Lawrence Piccioni, M.D., reviewed Plaintiff's extensive treatment history for low back pain. He stated in his report that Plaintiff's treatment for this problem started in April 2001. He stated that Plaintiff met with multiple doctors at different locations and underwent diagnostic testing on the following dates: April 2005; March 2006; February 2007; May 2007; June 2007; July 2007; and January 2008.

Further, the report showed that Plaintiff was admitted to Christiana Hospital for intractable back pain from March 5, 2008 through March 14, 2008. Her neurosurgeon at that time, Matthew Eppley, M.D., did not find a need for surgery because Plaintiff's subjective symptoms did not match the objective test results.

Dr. Venkataramana maintained that the surgeries he performed were related to the September 2008 slip and fall. He conceded that he operated on Plaintiff without knowledge of her relevant medical history. He remained unaware of her history at the time of his deposition, although the record shows that Plaintiff's attorney provided him with a complete set of the medical records on two occasions.

Exclusion of expert testimony. Defendant argues that Dr. Venkataramana's opinions are not based on "sufficient facts or data," as required for admissibility of expert testimony pursuant to DRE 702(1). Further, Defendant argues that under *Perry v. Berkley*, exclusion is warranted because Dr. Venkataramana did not understand the "fundamental facts" of the case and therefore can provide no assistance to the jury.[3] Plaintiff argues that this case should be governed by *Wright v. Clark*,[4] where the plaintiff's physician operated on him without knowing his relevant medical history and

[3] *Id.* at 1271.

[4] 2010 WL 2861383 (Del.Super.).

this Court did not apply the *Perry* ruling.

Wright is distinguishable from the case at bar because in *Wright* the parties' medical experts agreed that the plaintiff's injuries resulted from the accident and that he needed the treatment provided by his physician. In this case, there is no agreement between the medical experts.

In *Bell v. Fisher*,[5] this Court excluded medical expert testimony about the causation of cervical neck injuries. The defendant, a dentist, allegedly injured the plaintiff's neck while extracting his wisdom teeth. The causation opinion was made without an accurate understanding of the plaintiff's prior history of neck pain. The Court's decision was based on DRE 702(1) and *Perry*.

In this case, the fundamental facts of Plaintiff's medical history were not understood by Dr. Venkataramana prior to the surgeries, as required for admission under *Perry*. He stated that he was aware only of Plaintiff's self reported shoulder injury. Further, Dr. Venkataramana's opinions were not based on sufficient facts or data under DRE 702(1). That is, his opinion is based on an incomplete and inaccurate knowledge of Plaintiff's prior relevant medical treatment. A party proffering an expert's opinion must make a threshold showing establishing admissibility by a preponderance of the evidence.[6] Plaintiff cannot satisfy this requirement. Consequently, Dr. Venkataramana's opinion and testimony would not be helpful to the jury and will be excluded.

Summary judgment. Defendant argues that, assuming that Dr. Venkataramana's testimony is excluded, summary judgment in its favor is warranted. Summary judgment is appropriate where the record presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[7] If the moving party meets this burden, the burden shifts to the non-moving party to set forth specific facts showing the existence of a question of fact beyond the allegations made in the complaint.[8] The evidence must viewed in the light most favorable to the non-moving party.[9] If this burden is not met, the moving party is entitled to summary judgment.[10]

Plaintiff seeks additional time in order for Dr. Venkataramana to have another opportunity to review Plaintiff's medical records and determine whether they change his opinion in any way.

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[5]2010 WL 3447694 (Del.Super.).

[6]*Wilson v. James*, 2010 WL 1107787, at *2 (Del.Super.).

[7]Super.Ct.Civ.R. 56 (c).

[8]*Manucci v. The Stop 'n' Shop Companies, Inc.*, 1989 WL 48587 (Del.Super.).

[9]*Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del.1992).

[10]*Manucci, supra.*

The record shows that Plaintiff's counsel provided Dr. Venkataramana with Plaintiff's medical records as early as March 2011 and again in August 2012 in preparation for the deposition. Just prior to the deposition, Dr. Venkataramana told Plaintiff's counsel he threw out the records because he assumed the case was over.

The record shows that Plaintiff's counsel was aware of the problem no later than August 2, 2012, the day of the deposition. Counsel could have sought to reschedule the deposition. In any event, counsel had sufficient time to resolve it prior to the November 1, 2012 filing date of Defendant's motion in limine and motion for summary judgment. Good cause to amend the scheduling order at this late date cannot be shown on these facts. Plaintiff's informal request for an extension of time is denied for the reasons stated.

A personal injury plaintiff cannot survive summary judgment if the plaintiff provides no evidence in the form of expert opinion or otherwise of a defendant's negligence.[11] In this case, Plaintiff's proffered expert medical testimony is excluded and without such testimony Plaintiff cannot make a *prima facie* case of negligence. Judgment will be entered for Defendant.

Conclusion. Defendant's motion to exclude the expert opinion and testimony of Plaintiff's proffered expert, Dr. Venkataramana, is **GRANTED.** Defendant's related motion for summary judgment is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary

[11] *Talmo v. Union Park Automotive*, 2011 WL 5335391 (Del.Super.).