IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

James R. Wright, Jr.	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	09C-03-201-JOH
	)	
v.	)	
	)	
Chad K. Clark and Debra Clark	)	
	)	
Defendants	)	

Submitted: June 25, 2010
Decided: July 14, 2010

MEMORANDUM OPINION

Upon Motion of the Defendant to
Preclude the Testimony of Gary Moskovitz, M.D.- ***DENIED***

Appearances:

Roger D. Landon, Esquire, of Murphy & Landon, Wilmington, Delaware, and Samuel S. Mehring, Jr., Esquire, of the Law Offices of Samuel S. Mehring, Tampa, Florida, Attorneys for the Plaintiff

Sarah B. Cole, Esquire, of Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, Attorney for the Defendant

HERLIHY, Judge

Plaintiff James Wright was asleep in a van when he claims defendant Chad Clark's vehicle struck the van, allegedly propelling his body around inside. Shortly after the incident, on October 14, 2008, Wright moved to Florida. He saw an orthopaedic spin surgeon, Dr. Gary Moskowitz, for the first and only time on December 10, 2008.

Dr. Moskowitz has opined that Wright suffered a C6-7 disc herniation for which he recommended a discectomy and fusion; a smaller disc herniation at C4-5; lumbrosacral sprain; and multi-level thoracic disc herniations. For the latter three conditions, he recommended conservative care to treat the symptoms. But Wright neither informed Dr. Moskowitz of his prior medical history, nor did Wright or anyone provide him with any prior medical records. That prior history includes three shoulder surgeries in 2001 and 2002. His medical records also covered prior neck and back strains, and left shoulder pain. His medical history pre-dating the October 2008 accident covers a period from 1999-2004.

The Clarks, relying upon the very recent Delaware Supreme Court case of *Perry v. Berkeley*[1] has moved to bar Dr. Moskowitz's testimony. Briefly in *Perry*, the Supreme Court affirmed this Court's ruling barring the plaintiff's doctor from testifying because he was unaware of significant medical history and its potential role in his causation opinion. Based on D.R.E. 702(1), which requires an opinion to be based on sufficient facts or data, the Supreme Court held plaintiff's doctor's opinion was not admissible.

[1] --- A.2d ----, 2010 WL 2163874 (Del.).

Here, the issue is not as clear cut. There are several reasons why. First, the Clarks have offered no competent evidence that there is sufficient, or any, relationship between Wright's pre-accident medical problems and the type of injuries about which Dr. Moskowitz has opined. Second, Perry was being more or less simultaneously treated by two doctors for virtually identical medical problems. But the doctor treating Perry in connection with the auto accident was unaware of the other doctor's treatment. That is not the situation here. There is no apparent overlapping of medical conditions or areas of the body. Third, Dr. Otto Medinilla performed a DME in this case. He opined that Wright suffered; (1) multiple contusions, (2) L-1 anterior compression deformity, and (3) atypical cervical radiculopathy probably caused mostly by the right C6-7 osteophytic disc complex. He attributes the accident at issue as the cause.

The Clarks are not calling him as a witness.

Dr. Medinilla's exhaustive report is eighteen pages long and it lists Wright's extensive pre-accident medical history. It appears this prior medical history is that which the Clarks claim Dr. Moskowitz lacked in formulating his causation opinions. Yet taking into account this history, Dr. Medinilla agrees with Dr. Moskowitz about the injuries that Wright suffered as a result of the accident. In addition, Dr. Medinilla endorses the treatment Kenneth Clark received and Dr. Moskowitz's opinion that he needs the discectomy.

Perry, therefore, is inapposite.

The Clarks opposed Wright's motion to preclude because it was filed about four weeks after the deadline established in this Court's trial scheduling order. This Court has the authority to enforce that deadline and not consider the motion.[2] It is tempting to do so, if anything, to slow the *Daubert*-motion-cottage-industry-train.

This Court notes, however that the motion to preclude in *Perry* was offered at trial. The trial in this case is scheduled to start July 19th and Wright's motion was filed June 25th, albeit four weeks late. Since the Court is denying the motion, it is overlooking in a sense, in this rare instance, the violation of its deadline.

Finally, however, *Perry* and this case should act as a wake-up call to too many plaintiffs' counsel who do not; (1) ensure their clients tell their doctors of prior medical issues, and, (2) most importantly, provide those prior records to their doctor witnesses and make sure their opinions factor in prior medical history, as appropriate. Failure to do so in the past may explain some low awards or defense verdicts; but, in the future, it will prompt more of these motions. Plaintiff credibility issues in this situation are patent. With *Perry*, the chances that these type of motions will be granted are great unless old, bad, habits and practices are changed. Of course, the Clarks' motion in this case has a tinge of being disengenuine since his DME confirmed the same, significant, accident related injuries.

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[2] *Hercules, Inc. v. AIU, Ins.*, 784 A.2d 481, 499-501 (Del. 2001).

Conclusion

For the reasons stated herein, defendants Chad Kenneth and Debra Clark's motion in limine to preclude the testimony of Dr. Gary Moskowitz is **DENIED**.

IT IS SO ORDERED.

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J.