SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Gary S. Nitsche, Esquire
Michael B. Galbraith, Esquire
Weik, Nitsche & Dougherty
1300 North Grant Avenue
Suite 101
P.O. Box 2324
Wilmington, Delaware 19899
Attorney for Plaintiff Theresa K. O'Dell

Roger D. Landon, Esquire
Murphy & Landon
1011 Centre Road
Suite 210
Wilmington, Delaware 19805
Attorney for Defendant Louis A. Fiorucci, Jr.

Danielle K. Yearick, Esquire
Tybout, Redfearn, & Pell
750 Shipyard Drive #400
P.O. Box 2092
Wilmington, Delaware 19899
Attorney for Defendant State Farm Mutual Automobile Insurance Company

Re: Theresa K. O'Dell v. Louis A . Fiorucci, Jr. & State Farm Mutual Automobile Insurance Company
C.A. No. N09C-12-070 RRC

Submitted: May 12, 2011
Decided: May 12, 2011

On Defendant State Farm Mutual Automobile Insurance Company's Applications to Admit Certain Exhibits at Trial.
GRANTED.

Dear Counsel:

Defendant State Farm Mutual Automobile Insurance Company ("Defendant") brings the instant application to admit the report of Dr. Stephen Rodgers, prepared at Plaintiff Theresa K. O'Dell's ("Plaintiff") request in

connection with Plaintiff's previous Industrial Accident Board claim; this Industrial Accident Board claim arose from injuries Plaintiff sustained in a work-related automobile accident in August 2006.[1] Defendant seeks to use this report to impeach the expert opinion testimony of Plaintiff's current medical expert, Dr. Steven D. Grossinger, who relied on Dr. Rodgers' report in reaching his expert opinions.[2] On a related note, Defendant seeks to admit any pleadings, petitions, statements, agreements, and receipts relating to the litigation that resulted from the August 2006 accident; Defendant contends that this evidence would be useful for impeaching Plaintiff's present claims that her injuries were caused by the instant accident, because these documents indicate Plaintiff's claim of similar permanent injuries due to the 2006 accident.[3]

Plaintiff objects to the admission of both exhibits. Plaintiff acknowledges that Dr. Rodgers prepared an August 16, 2007 permanency report for Plaintiff's Industrial Accident Board case, but maintains that this report is inadmissible hearsay evidence.[4] With respect to Defendant's application to admit the litigation documents from Plaintiff's 2006 accident, Plaintiff asserts that this would violate the collateral source rule.[5] At oral argument, Plaintiff conceded that these documents do not suggest a collateral recovery for the instant accident, but nonetheless maintained that the collateral source rule analysis should be the same, notwithstanding the fact that any recovery indicated in these documents pertains to the 2006 accident, rather than the instant accident. Defendant has agreed to the redaction of any reference to a monetary sum paid to Plaintiff as a result of the 2006 accident litigation;[6] during oral argument, Defendant's counsel indicated that the agreement to redact this information is based on the prevention of potentially misleading evidence being presented to the jury, pursuant to D.R.E. 403. Trial in this matter is scheduled to commence May 16, 2011.

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[1] Def.'s Memo. on Admissibility and Use of Certain Exhibits at Trial at 1.
[2] *Id.* at 2.
[3] *Id.* at 2-3.
[4] Pltf.'s Memo. in Opp'n. to Admissibility and Use of Certain Exhibits at 1-2. The parties' moving papers also reference an issue with respect to testimony under oath given by Dr. Rodgers, but during oral argument, Defendant's counsel indicated that Defendant is not attempting to utilize any of Dr. Rodgers' prior testimony, thereby mooting this point.
[5] *Id.* at 2.
[6] Def.'s Memo. on Admissibility and Use of Certain Exhibits at Trial at 3.

DISCUSSION

I. Admission of Dr. Rodgers' Report

As a threshold matter, it must be determined if Dr. Rodgers' report constitutes inadmissible hearsay. Pursuant to D.R.E. 801(c), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Rule 703 provides that, "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." At the same time, the bare fact that Plaintiff's current medical expert may properly rely on Dr. Rodgers' report, under Rule 703, does not mean that it would be admissible; to the contrary, "[a] reliability analysis under Rule 703 is not a substitute for a hearsay ruling."[7] Indeed, the Supreme Court of Delaware has noted the difficulty in ruling on the admissibility of evidence relied upon by experts:

> To what extent an expert witness may rely on material facts not directly in evidence but assumed is an issue unresolved under D.R.E. 703. Further, there is a split of authority in the interpretation of Federal Rule of Evidence 703, which is identical to D.R.E 703. A majority of courts facing the issue take the position that while the "inadmissible data" relied upon by the experts in forming their opinion is admissible to explain their reasoning, that information is not admissible as substantive evidence to prove the truth of the matters therein.
>
> While an expert is afforded latitude under Rule 703 to incorporate into the methodology source material normally relied upon in the expert's field, the use of specific contested data poses a particular risk of circumvention of hearsay restrictions.[8]

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[7] *Gannett Co., Inc. v. Kanaga*, 750 A.2d 1174, 1187 (Del. 2000). Thus, inasmuch as Defendant asserts that D.R.E. 703 and 705 independently form the basis of admissibility of this evidence, this is incorrect. Def.'s Memo. on Admissibility and Use of Certain Exhibits at Trial at 2 ("Use of the prior testimony, either as an exhibit or to be shown to the plaintiff or her medical expert at trial may be permitted and admissible under DRE Rule 703 and/or 705. . . .").

[8] *Kanaga*, 750 A.2d at 1187 (citations omitted).

Thus, the admissibility of Dr. Rodgers' report turns on whether it is admissible as non-hearsay or, if it is hearsay, if it qualifies for one of the hearsay exceptions.

This case can be distinguished from the concerns expressed in *Kanaga*, *supra*, because Defendant seeks to introduce Dr. Rodgers' report for purposes of impeaching Dr. Grossinger's testimony on cross-examination. Given that Dr. Grossinger relied on Dr. Rodgers' report in formulating his opinions, Defendant is no doubt entitled to test the consistency of Dr. Grossinger's conclusions against those opinions expressed in Dr. Rodgers' report as part of Defendant's right to impeach Dr. Grossinger's expert testimony. Defendant is not seeking to admit Dr. Rodgers' report as substantive evidence to prove the truth of the matters therein.[9] By its terms, the definition on hearsay evidence contained in Rule 801(c) does not apply to the admission of Dr. Rodgers' report to impeach Dr. Grossinger's testimony; the rule prohibits only out-of-court statements that are "offered in evidence to prove the truth of the matter asserted." Therefore, with the qualification that Dr. Rodgers' report is admissible only to impeach Dr. Grossinger's opinion testimony, Defendant's application is **GRANTED**.[10]

II. Admission of Prior Litigation Documents

The documents pertaining to Plaintiff's 2006 accident litigation do not implicate the collateral source rule. The collateral source rule "prohibits the admission of evidence of an injured party receiving compensation or payments for tort-related injuries from a source other than the tortfeasor."[11] However, the purpose of the rule is to prevent the jury from offsetting its award for to Plaintiff based on a perception that the plaintiff will receive a "double" recovery for the injury in dispute;[12] consequently, the rule

[9] D.R.E. 801(c).

[10] At oral argument, Defendant's counsel alternatively contended that Dr. Rodgers' report is admissible pursuant to the "Public Records" exception to the hearsay rule, codified in D.R.E. 803(8). Having found that the use of Dr. Rodgers' report for impeachment purposes does not constitute hearsay, this Court need not reach the potential applicability of any hearsay exceptions.

[11] *James v. Glazer*, 570 A.2d 1150, 1155 (Del. 1990)

[12] *See, e.g.*, *Estate of Farrell v. Gordon*, 770 A.2d 517, 520 (Del. 2001) ("Double recovery by a plaintiff is acceptable so long as the source of such payment is unconnected to the tortfeasor.") (citation omitted).

prohibits the introduction of evidence that Plaintiff received compensation for the injuries sustained due to the defendant's negligent conduct.[13]

Plaintiff's reliance on *Miller v. State Farm Mutual Automobile Insurance Company* is misplaced.[14] Although at oral argument Plaintiff contended that *Miller* stands for the proposition that the collateral source rule analysis applies, by analogy, to the instant case, the holding in *Miller* is significantly more discrete. In *Miller*, the Supreme Court held that the collateral source rule applies in underinsured motorist cases, an issue of first impression in Delaware.[15] The *Miller* opinion did not purport to fundamentally alter the parameters of the collateral source rule; under Plaintiff's suggested view of the collateral source rule, a defendant could not introduce evidence of a plaintiff's prior claims predicated on similar injuries and permanency. This does not comport with the rationale of the collateral source rule. As stated, the purpose of the collateral source rule is to prevent the jury from inferring that the plaintiff will receive a "double" recovery for the disputed injury. Put simply, the collateral source rule does not impair a defendant's ability to introduce evidence of a prior, unrelated injury as part of its defense on the issue of causation.

In this case, the documentary evidence proffered by Defendant pertains to a 2006 accident injury sustained by Plaintiff, an entirely separate accident for which Defendant bears no responsibility to Plaintiff. This evidence is relevant to Defendant's causation defense; it will provide the jury with an indication of Plaintiff's baseline condition vis-à-vis the similar injuries claimed in this case, thereby enabling Defendant to argue that the damages must be apportioned to include only the aggravation or exacerbation of Plaintiff's similar, pre-existing physical injuries. Further, to

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[13] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 73 (Del. 1989) ("The rationale for the collateral source rule appears to emphasize the deterrent and quasi-punitive functions of tort law. It is considered better that the innocent plaintiff receive a windfall than that the wrongdoing defendant bear less than the full **cost of his negligent conduct**.") (emphasis added); *Guy J. Johnson Transp. Co. v. Dunkle*, 541 A.2d 551, 553 (Del. 1988) (describing the collateral source rule as providing that "a person deemed legally responsible to another cannot claim the benefit of the ability of the injured party to recovery from a third party expenses **related to that injury**.") (emphasis added) (citation omitted).

[14] 993 A.2d 1049 (Del. 2010).

[15] *Id.* at 1053 ("The issue before us-whether the collateral source rule applies in the underinsured motorist context-is of first impression. We conclude that that issue must be answered in the affirmative.").

avoid misleading or prejudicing the jury, Defendant has stipulated to redact any indication of monetary sums received by Plaintiff due to the prior litigation. Thus, this evidence is admissible.

Accordingly, for the reasons stated above, Defendant's Applications to Admit Certain Evidence at Trial is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

RRC/rjc
oc: Prothonotary