

**IN THE DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 15-cv-00296-RM-MJW

Laurence Niles,
Plaintiff

vs.

William Rodman, M.D.,
Defendant

**SPECIAL MASTER REPORT NO. 2
REGARDING DEFENDANT’S MOTION TO LIMIT PLAINTIFF TO ONE RETAINED
EXPERT WITNESS IN THE AREA OF TRAUMA SURGERY (DOCKET NO. 98)**

The undersigned was appointed as a Special Master, pursuant to Fed. R. Civ. P. 53 and D.C.COLO.LCivR 30.3(b) and 72.1(b)(10), by Magistrate Judge Michael J. Watanabe. In a Minute Order dated February 22, 2016 (Docket no. 170), Magistrate Judge Watanabe referred Defendant’s Motion to Limit Plaintiff to One Retained Expert Witness in the Area of Trauma Surgery (Docket no. 98) to the Special Master for ruling. The Special Master has completed his review of the Motion, Plaintiff’s Response (Docket no. 116), and Defendant’s Reply (Docket no. 167), and hereby finds and concludes as follows:

I. Background:

Plaintiff, an 80 year old man, filed a medical malpractice suit against Defendants Rodman and Aspen Valley Hospital District. Aspen Valley has been dismissed as a defendant and is not subject to this Order, although its earlier presence in the case relates to the issue at bar.

The Court’s Scheduling Order (Docket no. 30) was issued on May 6, 2015 when Defendant Aspen Valley was still a party to the case. Regarding expert witnesses, Judge Watanabe Ordered: “Each party may endorse 12 experts. *If both Defendants* designate an expert in the same field, then plaintiff will be allowed one more expert for the field” (emphasis added). Both remaining parties have endorsed less than 12 experts, but Defendant argues that two of Plaintiff’s experts—Drs. Lekawa and Rosenberg—are in the same specialty of trauma surgery.

Defendant asserts that Plaintiff’s endorsement of two experts allegedly in the same specialty, may have been appropriate when Aspen Valley was still in the case; however, now that Aspen Valley has been dismissed as a party, Plaintiff should be limited to one expert in the area of trauma surgery to avoid cumulative evidence and added expense deposing two experts.

Plaintiff responds by arguing that the doctors are not truly in the same specialty for purposes of their testimony: Dr. Lekawa is a Level I trauma surgeon and Dr. Rosenberg is a Level III trauma surgeon and their opinions come from different viewpoints, both of which are relevant to the issues in the case (Plaintiff's complaint is that he should have been transferred from Aspen Valley, a Level III unit, to St. Mary's Medical Center in Grand Junction, a Level II unit, and his injuries were caused by the failure to make such a transfer). Further, in addition to standard of care opinions, Plaintiff intends to elicit testimony and opinions from Dr. Lekawa about "the role of the Colorado Department of Health and Education ('CHPHE') in regulating, monitoring and providing accreditation for trauma centers in Colorado," "the failures and deficiencies of the AVH trauma department under Dr. Rodman's leadership [that] date back to at least 2007," and "that the July 2013 on-site review . . . identified a long-standing pattern of problems and deficiencies surrounding admission versus transfer of traumatic brain injured patients (like Larry Niles)." (Plaintiff's Response, docket no. 116, pages 7, 9, and 10)

Plaintiff also argues that Defendant has endorsed three different trauma surgeons (Drs. Biffl, Livengood, and Defendant Rodman) and one neurosurgeon (Dr. Parker), all of whom allegedly will opine cumulatively as to Defendant meeting the applicable standard of care. Plaintiff argues that striking one of Plaintiff's experts would be "absurd and completely inequitable." (Plaintiff's Response, docket no. 116, page 2)

Defendant replies by stating that Drs. Livengood will not opine as to the standard of care; rather, that Dr. Rodman "complied with the Aspen Valley Hospital policies" (Defendant's Reply, docket no. 167, page 3), that Dr. Rodman's endorsement as an expert should not preclude him calling a retained trauma surgeon expert, and that the retained neurosurgeon is of a different specialty and thus is not in violation of the Scheduling Order.

II. Conclusions

First, Defendant's Motion is not absurd. Whether it is equitable really turns on the rules of evidence and Judge Watanabe's Scheduling Order, not equity.

Second, the fact that Dr. Rodman has endorsed himself as an expert does not come into play regarding number of experts. The Special Master agrees with Defendant that "if the Defendant himself counted against the 'one expert, per field, to testify against the other side' Order, then the Defendant in a professional liability case would have to make the decision whether to testify on his own behalf or hire an expert in the same field." (Defendant's Reply, docket no. 167, page 4) A defendant, even if endorsed as an expert, is not considered in the number of experts equation or the 'one expert, one field' restriction.

Third, the endorsement of other experts in other specialties (Dr. Parker—neurosurgery; Dr. Goldstein—neuro-radiologist; Dr. Fisher—hematologist) does not violate Judge Watanabe's Order. After reading the reports, the Special Master concludes that these other specialists, although opining in part about the standard of care, are different specialties than trauma surgery and are not necessarily duplicative or cumulative.

Fourth, considering the issues in this case, the Special Master concludes that Dr. Lekawa and Dr. Rosenberg, although both are trauma surgeons, have different specialties and viewpoints. The primary issue in this case revolves around the differences in Level III and Level II care and the witnesses can each opine on “the interplay between different level trauma centers, how the trauma system is supposed to work and how the system failed under the circumstances of this case” (Plaintiff’s Response, docket no. 116, page 7) from their respective viewpoints as a Level III specialist and as a Level I or II specialist.

Finally, after reviewing and comparing Dr. Lekawa’s report (Docket no. 98-1) and Dr. Rosenberg’s report (Docket no. 98-2), the Special Master does see much overlap and the possible cumulative nature of parts of their testimonies. However, as will be discussed below, that issue, to a large extent, is one for a trial judge to decide at the time the testimony is offered.

One sub-issue is whether to allow a deposition to be taken (even if out of state and at greater expense) when some of the testimony might be cumulative and, perhaps, not admitted. The standard for allowing a discovery deposition is different from the evidentiary issue of whether evidence is unduly cumulative. The Special Master will allow the depositions of both Dr. Lekawa and Dr. Rosenberg to be taken without concern for the possible cumulative nature of their testimonies.

The Special Master also concludes that both Dr. Lekawa and Dr. Rosenberg can be called at trial. However, after reading the experts’ reports, there is the potential for overlap in the opinions. Plaintiff has conceded he will not be introducing cumulative evidence at trial (Plaintiff’s Response, docket no. 116, page 4). So long as the expert qualifies his opinions of the standard of care within that expert’s specialty, the evidence might not be deemed cumulative. Regardless, it is up to the trial judge to determine if testimony is cumulative and, therefore, inadmissible. *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997). The determination of cumulative evidence at trial will apply equally to the Defendant’s experts, not including the Defendant.

Defendant suggests that if both Drs. Lekawa and Rosenberg are allowed to testify, an order similar to Judge James Hiatt’s (Larimer County, Colorado, District Court Judge) order issued in 2004 (Defendant’s Motion, docket no. 98-4) should be ordered in this case. To an extent, the Special Master agrees. The Special Master, subject to review by the trial judge, orders as follows:

Both Dr. Lekawa and Dr. Rosenberg will be permitted to testify for the plaintiff. Each may only give opinions based on the their endorsed difference in their expertise and specialty consistent with this order—Dr. Lekawa can opine as to the standard of care, the quality of care given to Mr. Niles, and other opinions consistent with his report from his vantage point as a Level I or II Trauma Surgeon and Dr. Rosenberg can opine as to the standard of care, the quality of care given to Mr. Niles, and other opinions consistent with his report from his vantage point as a Level III Trauma Surgeon. The second witness of the two cannot duplicate

opinions about which the other already opined or repeat testimony already covered by the other expert, unless the opinion or testimony is differentiated based on the expert's level of trauma care specialty. This restriction against cumulative testimony applies to all experts, other than the Defendant, called as witnesses at trial.

Defendant's Motion to Limit Plaintiff to One Retained Expert Witness in the Area of Trauma Surgery is DENIED, in part. Plaintiff's request for attorneys' fees and costs is DENIED, as Defendant's Motion was not frivolous.

So ORDERED, March 3, 2016.

BY THE SPECIAL MASTER:



Christopher C. Cross