EXHIBIT O

©Tucker v. John R. Steele and Associates, Inc.
N.D.Ill.,1994.
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United States District Court, N.D. Illinois, Eastern Division.
Robert A. TUCKER and Steven H. Stewart, Plaintiffs,
v.
JOHN R. STEELE AND ASSOCIATES, INC. and Dr. Duane Wilcox, Defendants.
JOHN R. STEELE AND ASSOCIATES, INC., Cross-claimant,
v.
Dr. Duane WILCOX, Cross-defendant.
No. 93 C 1268.

April 12, 1994.

MEMORANDUM OPINION AND ORDER

HART, District Judge.

***1** Plaintiffs, Robert A. Tucker and Steven H. Stewart, are the owners of "Nuclear Siren," a four-year-old pacing horse of some success and the son of "No Nukes." Defendant, Dr. Duane Wilcox, is a veterinarian who was allegedly negligent in Nuclear Siren's care. After Dr. Wilcox's treatment, and Nuclear Siren's subsequent health problems, Nuclear Siren was treated by veterinarians William J. Donawick, D.V.M. and Jill Beech, D.V.M. When Drs. Donawick and Beech were deposed, they testified that Nuclear Siren's condition was not necessarily the result of negligence on the part of Dr. Wilcox. Defendants wish to introduce Dr. Donawick's testimony as expert liability testimony. Plaintiffs move to strike any opinion testimony by Dr. Donawick.[FN1] Also before this court are several other motions in limine by both plaintiffs and defendants. This case presents the issues of whether physician-patient privilege principles apply and whether introduction of adverse opinion testimony by a treating veterinarian would be fundamentally unfair.

According to plaintiffs, in 1991, Nuclear Siren was racing as a three-year-old and had won 16 of 30 races, including a string of 10 straight races at the Meadowlands racetrack in New Jersey. In November 1991, Nuclear Siren was transported to Maywood Park in Illinois to conclude his 1991 racing season by competing in the $300,000 "Windy City Stakes." On November 14, 1991, one day before the Stakes race, Dr. Wilcox administered phenolbutezolidin, commonly known as "Bute," to Nuclear Siren via intravenous injection. Bute is a general analgesic frequently administered to race horses by veterinarians to alleviate routine aches and pains associated with the rigors of racing.

After receiving the Bute, Nuclear Siren began experiencing severe physical problems, including the development of a significant area of thrombophlebitis in his left jugular vein near the site where Dr. Wilcox administered the Bute shot. Plaintiffs' complaint alleges that Dr. Wilcox failed to follow normal and accepted standards of veterinary medicine in that he negligently administered the Bute shot, resulting in the thrombophlebitis.

In an effort to have the thrombophlebitis treated and to determine its pathology, Nuclear Siren was transferred to the New Bolton Center School of Veterinary Medicine at the University of Pennsylvania ("New Bolton"). There, veterinarians Donawick and Beech examined and treated Nuclear Siren during the course of several admissions, spanning a period of more than a year. Nuclear Siren was first admitted on November 19, 1991. On January 24, 1992, Dr. Donawick surgically removed a significant portion of Nuclear Siren's left jugular vein. On December 11, 1992, Dr. Donawick recommended by letter that Nuclear Siren be retired from racing.

Throughout the course of Nuclear Siren's treatment at New Bolton, Tucker made it "crystal clear" to Drs. Beech and Donawick that he suspected Dr. Wilcox's negligent administration of Bute was the cause of Nuclear Siren's thrombophlebitis. Tucker "repeatedly confided to Beech and Donawick about Nuclear Siren's condition, its likely cause and the probability of litigation." Tucker understood that Drs. Beech and Donawick were medical professionals and believed that all communications with them would be held in the strictest confidence.

***2** In a March 9, 1992 letter to Tucker, Dr. Donawick wrote:
The most common cause of jugular vein thrombosis

is an inflammation and/or infection, resulting from the intravenous injection of phenylbutazone.... Thrombophlebitis ... have developed in other horses, despite what was perceived at the time to be routine and adequate technique. You have related to me that Nuclear Siren was given an intravenous injection of phenylbutazone before the first signs of inflammation in the left neck were noted. It is reasonable to consider the possibility that the injection and the onset of signs of inflammation in the left neck are associated.

Donawick Tr., Pls.'s Ex. 1. On October 18, 1993, Drs. Beech and Donawick were deposed. When it became clear to plaintiffs' counsel that defense counsel were attempting to elicit expert testimony, plaintiffs' counsel objected. Over objection, Drs. Beech and Donawick testified that a proper injection of Bute can cause the development of a thrombophlebitis such as that experienced by Nuclear Siren. This testimony was directly contrary to plaintiffs' theory of liability and the opinion of plaintiffs' liability expert, Albert Gabel, D.V.M. Defendants have designated Dr. Donawick as their liability expert.

MOTION TO STRIKE DEFENDANTS' EXPERT LIABILITY TESTIMONY

Plaintiffs argue that, as a medical professional, Dr. Donawick owes plaintiffs the same type of fiduciary duty of confidentiality that a physician owes a patient and therefore should be precluded from testifying as defendants' liability expert. Plaintiffs also argue that allowing Dr. Donawick to testify for defendants would be fundamentally unfair.

Under the Federal Rules, at least two bases exist for limiting Dr. Donawick's testimony to facts related to treatment. Rule 501, Fed.R.Civ.P., provides that "in civil actions ... as to which State law supplies the rule of decision," as it does in this case, "the privilege of a witness ... shall be determined in accordance with State law." Alternatively, Rule 403, Fed.R.Civ.P., provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." [FN2] Plaintiffs argue a privilege similar to the physician-patient privilege should apply to bar Dr. Donawick from testifying as an adverse expert. Plaintiffs imply that Pennsylvania law, the state where Dr. Donawick is licensed and practices, should be applied and supports their motion.

Assuming, for a brief moment, that the physician-patient relationship and its attendant privilege have at least some relevance to plaintiffs' relationship with Dr. Donawick, it must be determined what physician-patient privilege would apply. Having determined the vertical choice of law issue, that State law supplies the substantive privilege rules, Fed.R.Civ.P. 501, the next issue is the horizontal choice of law; which state's privilege rules to apply. *See* 23 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5435 (1980 & Supp.1993). Rule 501 is ambiguous as to this issue and its legislative history is of no help. *Id.* The majority of courts follow the general rule that federal courts apply the law of the forum, including conflict of law rules, under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). *Id.* Although Illinois courts have not expressly addressed the issue of which privilege law to apply when the communication was made in a different forum, they have cited with approval the Restatement (Second) Conflict of Laws § 139 (1988 & Supp.1992), which does address this specific issue. *See Consolidated Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 42 N.E.2d 250 (1982). The Restatement (Second) § 139 provides that where communication evidence is not privileged under the law of the local forum but is privileged under the law of the state with the most significant relation to the communication, in this case Pennsylvania, it will be admitted absent a special policy reason.

***3** Unlike the attorney-client privilege, the physician-patient privilege is a "purely statutory innovation." 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 504[01] (1991). In Illinois, the privilege, and its exceptions, are codified in 735 ILCS 5/8-802 (1992). Under Illinois law, assuming there has been no improper *ex parte* contact with the treating physician and that formal discovery rules have been complied with, *see Testin v. Dreyer Medical Clinic*, 238 Ill.App.3d 883, 605 N.E.2d 1070 (2d Dist.1992), the physician-patient privilege is waived where the plaintiff has placed his physical condition in issue, 735 ILCS 5/8-802(4). Although a patient/plaintiff may prevent *ex parte* conferences with treating physicians, there is no proprietary interest in the testimony of a treating physician and plaintiff has no right to prevent a treating physician from testifying as to opinions in a deposition or in court, regardless of whether those opinions run counter to plaintiffs' theory of the case. *Petrillo v. Syntex Labs., Inc.*, 148 Ill.App.3d 581, 499 N.E.2d 952, 965 (1st Dist.1986),

cert. denied, 113 Ill.2d 584, *U.S. cert. denied,* 483 U.S. 1007 (1987).

Even assuming Pennsylvania law would recognize a privilege protecting a patient from treating physicians' adverse opinion testimony, *see Alexander v. Knight,* 177 A.2d 142 (Pa.Super.Ct.1962) (excluding treating physician's adverse opinion testimony), this court would follow Illinois law, which allows such testimony. There is no special reason why, in this case, the policy favoring admission of relevant evidence should not be given effect. *See* Restatement (Second) § 139 Notes. *But see Miles v. Farrell,* 549 F.Supp. 82 (N.D.Ill.1982) (fiduciary nature of physician-patient relationship prevented treating physician from testifying as defense expert); *Piller v. Kovarsky,* 194 N.J.Super. 392, 476 A.2d 1279 (Law Div.1984) (same).

More to the point, the physician-patient privilege is designed to encourage patients to seek necessary medical attention and provide full disclosure of all medical facts without fear of embarrassment and invasion of personal privacy. *See People v. Herbert,* 108 Ill.App.3d 143, 149, 438 N.E.2d 1255, 1259 (1st Dist.1982). The purpose behind the physician-patient privilege simply does not apply in the context of the veterinarian-client relationship because the reasons for seeking veterinary care and the medical condition of an animal are of an entirely different nature from the personal privacy of one's own health.

Plaintiffs also argue it would be fundamentally unfair to allow defendants to use a treating veterinarian as an expert witness. Plaintiffs argue the unfairness is clear in that defendants will be able to argue "even plaintiffs' own treating veterinarians do not believe there was malpractice", placing excess weight on this testimony because plaintiffs will have already vouched for his credibility in presenting Donawick as a fact witness. *See Miles v. Farrell,* 549 F.Supp. 82 (N.D.Ill.1982); *Piller v. Kovarsky,* 194 N.J.Super. 392, 476 A.2d 1279 (Law Div.1984).

***4** Plaintiffs' argument falls within Rule 403's discretionary exclusion of overly prejudicial evidence. Although Rule 403 is a federal rule, the fact that Illinois courts allow adverse opinion testimony by treating physicians, *see Petrillo,* 499 N.E.2d at 965; *Galindo v. Riddell, Inc.,* 107 Ill.App.3d 139, 437 N.E.2d 376 (3d Dist.1982) (allowing adverse treating physician opinion testimony); *see also Atkins v. Thapedi,* 166 Ill.App.3d 471, 519 N.E.2d 1073 (1st Dist.1988) (defendant elicited adverse expert testimony from treating physician), strongly suggests that any prejudice flowing from such opinion testimony is not substantially outweighed by its probative value [FN3] and that its introduction would not be fundamentally unfair.[FN4] Therefore, plaintiffs' motion to strike Dr. Donawick's expert liability testimony will be denied.

PLAINTIFFS' MOTION TO BAR REFERENCE TO NUCLEAR SIREN'S RIGHT-SIDE THROMBOSIS

According to plaintiffs, in or about September 1992, Nuclear Siren developed a right-side thrombosis. The thrombosis allegedly caused by Dr. Wilcox's injection was on Nuclear Siren's left side. The right-side thrombosis resolved itself without surgical intervention. Plaintiffs seek to bar any reference to Nuclear Siren's right-side thrombosis as irrelevant to the case because, plaintiffs argue, defendants' own experts concede that Nuclear Siren demonstrated no proclivity towards development of thrombosis. Plaintiffs are willing to stipulate that their plan was to retire Nuclear Siren after his four-year-old racing season and that this coincided with the date of the right-side thrombosis. However, plaintiffs contend, since there is no evidence of Nuclear Siren's proclivity toward thrombosis, reference to the right-side thrombosis could only be used for this improper inference.

Defendants argue, despite plaintiffs' offered stipulations, that the right-side thrombosis is relevant and no effort to show proclivity will be made. Specifically, defendants argue the right-side thrombosis impacted Nuclear Siren's four-year-old racing season and his stud value. The parties' concerns that the jury will improperly consider the issue of proclivity can be effectively dealt with by stipulation at trial. The right-side thrombosis may be relevant to the issue of damages and plaintiffs' motion to bar defendants' reference to right-side thrombosis [49] will be denied without prejudice.

DEFENDANTS' MOTION IN LIMINE TO INSTRUCT PLAINTIFFS AS TO DAMAGES

Defendants move this court to instruct plaintiffs as to particular points of law regarding damages. Defendants argue damage to personal property is measured by the difference between the fair market value of the property before and after the injury.

Although future lost earning potential may be relevant to current market value, defendants argue, it is not direct evidence thereof. Also, defendants argue that estimates of what Nuclear Siren's breading production would have been is too speculative and not based upon a reasonable degree of certainty. Defendants argue, finally, that Illinois does not allow damages for unborn animals. Citing *Pagel v. Yates*, 128 Ill.App.3d 897, 471 N.E.2d 946, 952 (4th Dist.1984); *Schleicher v. Gentry*, 554 S.W.2d 884 (Ky.App.1977).

***5** Plaintiffs' expert, John Bradley, reports that expected future earnings, winnings and stud fees, inform his determination of Nuclear Siren's value at the date the horse was injured. *See e.g., Restrepo v. State of New York*, 550 N.Y.S.2d 536, 542 (Ct.Cl.1989) (using projected winnings to estimate current value). It is for the jury to determine whether or not Bradley's assumptions are reasonable or too speculative. *See J.F. Equipment, Inc. v. Owatonna Mfg.*, 143 Ill.App.3d 208, 217, 494 N.E.2d 516, 522 (2d Dist.1986). Allowing the jury to consider Nuclear Siren's stud value does not double count his value, *see Pagel*, 471 N.E.2d at 953. Therefore, defendants' motion to instruct plaintiffs on damages [52], which this court treats as a motion to bar, Fed.R.Civ.P. 12(f), will be denied.

DEFENDANTS' MOTION IN LIMINE TO PREVENT PLAINTIFFS' MENTION OF A "DIMLY LIT BARN"

Defendants move for an order instructing plaintiffs, their representatives or witnesses not to make reference to the Bute shot being administered in "a dimly lit barn without the assistance of the horse's trainer or caretaker (groom)." Defendants argue there is no evidence that the area where Dr. Wilcox administered the shot was dimly lit and that plaintiffs' expert has testified that it is not a deviation from the standards of veterinary care to administer Bute shots without an assistant or caretaker. The court reserves ruling on this motion [53] for trial.

DEFENDANTS' MOTION IN LIMINE TO DIRECT PLAINTIFFS TO REFRAIN FROM MAKING STATEMENTS

Defendants move for an order directing plaintiffs not to mention at trial: (1) that Dr. Wilcox administered veterinary care to Nuclear Siren, (2) that Nuclear Siren placed last in the Windy City Stakes, (3) that plaintiffs' expert had no opinion as why Nuclear Siren finished last in that race, (4) that plaintiffs will not be able to sustain their burden of proof regarding any causal connections and (5) that Dr. Wilcox's care was in any way related to Nuclear Siren's performance in the Windy City Stakes. Defendants' motion [54] is denied.

DEFENDANTS' MOTION IN LIMINE TO INSTRUCT PLAINTIFFS AS TO SET-OFF OF DAMAGES

Defendants move this court to instruct plaintiffs to set-off the amount received from the November 1992 sale of Nuclear Siren. Plaintiffs concede a setoff of sales proceeds is appropriate. Defendants' motion [55] is denied.

DEFENDANTS' MOTION IN LIMINE TO INSTRUCT PLAINTIFFS THAT DAMAGES WILL BE REDUCED BY 85%

Defendants argue that because plaintiffs currently own only 15% of Nuclear Siren, that any damages awarded must be reduced by 85%. Nuclear Siren's alleged injury occurred in 1991, prior to the sale. Defendants' motion [56] will be denied.

DEFENDANTS' MOTION TO BAR PLAINTIFFS' EXPERT

Defendants move to bar plaintiffs' liability expert's testimony at trial because, although he expresses an opinion as to the value of Nuclear Siren prior to injury, he does not express an opinion regarding Nuclear Siren's post-injury value. That plaintiffs' expert's opinion does not include a value after injury does not preclude defendants from offering such evidence. Defendants' motion will be denied.

***6** IT IS THEREFORE ORDERED that plaintiffs' motion to strike defendants' proposed expert liability testimony [42] is denied. Plaintiffs' motion to bar reference to right-side thrombosis [49] is denied without prejudice. Defendants' motions in limine to instruct plaintiffs [52, 55, 56] are denied. Defendants' motion in limine for an order directing plaintiffs to refrain from mentioning the dimly lit barn and lack of attendants at trial [53] is reserved. Defendants' motion in limine for an order directing plaintiffs to refrain from mentioning the Windy City Stakes [54]

is denied. Defendants' motion, filed April 8, 1994, to bar plaintiffs' expert testimony is denied.

FN1. Defendants have indicated they do not intend to present any opinion testimony from Dr. Beech.

FN2. It could also be argued, though less persuasively, that Fed.R.Civ.P. 611(a) is an additional basis for barring Dr. Donawick's testimony.

FN3. District courts also have the inherent power to disqualify expert testimony, if necessary, to protect privileges which would be breached if an expert were to switch sides, and to preserve public confidence in the fairness and integrity of judicial proceedings. *See Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 278 (S.D.Ohio 1988) (widely cited on disqualification of expert with prior adverse relationship); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F.Supp. 334 (N.D.Ill.1990). Courts generally apply a two-part test to determine whether such an expert should be disqualified: (1) whether the attorney or client acted reasonably in assuming that a confidential or fiduciary relationship developed, and (2) whether confidential information was exchanged justifying disqualification of the expert. *Great Lakes*, 734 F.Supp. at 335-39. Of course, there must be a reason to protect the relationship. Therefore, if no privileged or confidential communication was passed to the expert during the previous relationship, disqualification is not appropriate. *See Wang Labs., Inc. v. Toshiba Corp.*, 762 F.Supp. 1246 (E.D.Va.1991). Because Tucker claims Dr. Donawick was employed to, *inter alia,* determine the pathology of the thrombophlebitis, it could be argued he should be disqualified as an expert under the *Paul* line of cases. However, there is no evidence that any privileged or confidential information was received during the relationship. Tucker's allegation that he "repeatedly confided to Beech and Donawick about Nuclear Siren's condition, its likely cause and the probability of litigation" does not constitute information privileged in this case. Nuclear Siren's condition is in issue in this case and merely confiding an intent to sue Dr. Wilcox and a belief that Dr. Wilcox was negligent does not suffice. Additionally, Dr. Donawick was not clearly hired by plaintiff as an expert witness with respect to this litigation. Even as an expert with a prior relationship with plaintiffs, there is no basis to disqualify Dr. Donawick as defendants' liability expert.

FN4. Although state courts are divided over the issue of whether or not the adverse opinions of a treating physician should be excluded to preserve the fiduciary nature of the physician-patient relationship, the better argument appears to be that such evidence should be admitted. *See e.g., Carson v. Fine*, 123 Wash.2d 206, 867 P.2d 610 (Wash.1994) (en banc) (comprehensive discussion of this issue).

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Not Reported in F.Supp., 1994 WL 127246 (N.D.Ill.)

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