

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-20-47

KRISTIN ARSENAULT

v.

ORDER

BLUE WATER EMERGENCY PARTNERS
et. al.

The parties requested a conference pursuant to M.R.Civ.P. 26(g) regarding two issues arising from the settlement between the Plaintiff and Defendant Martin's Point Help Care, Inc. ("Martin's Point"). Namely, the two remaining Defendants both seek production of the settlement agreement between Plaintiff and Martin's Point and seek to call Dr. Wei Wei Lee, a primary care provider who the Plaintiff designated to testify against Martin's Point, as a witness at trial. As described below, the court agrees with the Defendants on both issues and orders Plaintiff to produce the settlement agreement pursuant to a confidentiality order and allows Defendants to introduce Dr. Lee's testimony at trial.

FACTS

The facts are laid out in detail in the court's order on the Motion for Partial Summary Judgment filed by Defendant Blue Waters Emergency Partners ("Blue Waters"). In brief and somewhat simplified, on September 13, 2016, Wendell Arsenault went to the emergency room operated by Defendant Blue Waters after an accident. A CT Scan revealed an abnormality in Arsenault's brain. The radiologist informed the Blue Waters emergency physician that an MRI was needed quickly given the risk of a brain abscess. The Blue Waters physician did not order an MRI scan, but told Arsenault to report to his primary care provider at Martin's Point the next day.

The Martin's Point physician did not order the MRI until September 26. On September 17 or 18, the brain abscess began cause focal neurologic deficits resulting in diagnosis of the brain abscess and surgery on September 20. The Plaintiff alleges that the delay significantly reduced Arsenault's chances of recovery and caused his subsequent disability and death. The Plaintiff alleges that both the Blue Waters ER physician and the Martin's Point primary care physician are at fault for failing to secure an earlier MRI.

After mediation on November 19, 2020, the Plaintiff and Martin's Point reached a settlement agreement. Both of these discovery issues arose as a result of the settlement agreement.

A. Settlement Agreement.

The Defendants would like to know the terms of the settlement agreement in order to anticipate the effect of the settlement at trial after the application of 14 M.R.S.A. §§ 156 and 163.¹ The court agrees with the opinions of Magistrate Rich in *Barclay v. Gressit*, 2013 U.S. Dist. LEXIS 103518 (D. Me. July 24, 2013) and Justice Horton in *Laudermilk v. Wellpath, LLC*, 2019 Me. Super. LEXIS 135, *3. It clearly serves the purpose of the statutes governing settlements of fewer than all the parties to allow the remaining parties to know the terms of the settlement to the extent they affect the rights and liabilities of the remaining parties. The Plaintiff provided no good reason why that information should not be disclosed.

The court does agree to protect the settling parties' interests in confidentiality and agrees that the settlement agreement should be produced in accordance with a Confidentiality Order. Subject to a showing by the Defendants that production of copies of the documents themselves is necessary, the court orders production of the agreement pursuant to a Confidentiality Order under the same method of production that Justice Horton ordered in *Laudermilk*.

¹ Whether the existence of the settlement is in any way admissible at trial is an issue for trial.

B. Dr. Lee's trial testimony.

Plaintiff retained and designated Dr. Lee, a primary care provider, to testify regarding the fault of the Martin's Point physician. Not surprisingly, the remaining Defendants believe that testimony will be helpful to them. Dr. Lee was designated by the Plaintiff, but was not designated any of the Defendants. She was deposed and participated in the prelitigation screening panel. When the case went into suit, she was designated by the Plaintiff, but she was not included in any of the Defendants' initial expert designations served before the September, 2020 deadline. Defendant Mid Coast did reserve the right to call expert witnesses designated by the Plaintiff and by codefendants. The parties attended mediation on November 19, where Martin Point and the Plaintiff settled. On November 20, Blue Water supplemented its expert designation to include Dr. Lee.

Plaintiff applies the standard excusable neglect analysis that the court would apply to an untimely expert designation. *Hutz v. Alden*, 2011 ME 27, ¶¶ 19-22, 12 A.3d 1174. When an opposing party is not unfairly surprised, however, a court may allow expert witness testimony even without a finding of excusable neglect. *Estate of O'Brien-Hamel*, 2014 ME 75, ¶23; *Bray v. Grindle*, 2002 ME 130, ¶9.

Because the Plaintiff retained Dr. Lee, this is not the typical case. Here, the Plaintiff prepared and tendered Dr. Lee for a deposition and was thoroughly aware of Dr. Lee's testimony. Dr. Lee's testimony is part of the record in the case. As the Seventh Circuit held in similar circumstances, the party who retained the witness cannot claim surprise. *SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009). Once testimony is part of the case, anyone can use it. One party cannot keep the testimony from the factfinder just because they retained the witness. "The cry of

'privilege' does not stop the Court and jury from hearing the opinion of the expert in the search for the truth." *Rancourt v. Waterville Urban Renewal Authority*, 223 A.2d 303, 305 (Me. 1966).

Here, Blue Water designated Dr. Lee immediately after the mediation, as soon as it was no longer apparent the Plaintiff would not use her testimony. Until then, Blue Water had good reason to believe Dr. Lee would be testifying at trial at the request of the Plaintiff. The November designation was only about two months after the September expert deadline. The Plaintiff cannot be said to have suffered any prejudice.²

The entry is:

Defendants' request for production of the settlement agreement is GRANTED. Plaintiff will produce the agreement subject to a confidentiality order. Although Plaintiff may produce a copy of the agreement to the Defense counsel subject to the confidentiality agreement, the court will not require the Plaintiff to do any more than show the agreement to the Defendants at this time.

Defendants' request to allow them to designate Dr. Lee as an expert witness is GRANTED. Defendant may either call Dr. Lee as a witness or introduce deposition testimony from Dr. Lee as permitted by the Maine Rules of Civil Procedure and the Maine Rules of Evidence.

This Order is incorporated on the docket by reference pursuant to M.R.Civ.P. 79(a).

DATE: 4/22/21



Thomas R. McKeon
Justice, Maine Superior Court

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CLERK OF SUPERIOR COURT
MAINE

² Any objection to any aspect Dr. Lee's testimony based on Rule 403 would be addressed at or before trial.

KRISTEN A. ARSENAULT AS)
PERSONAL REPRESENTATIVE OF)
THE ESTATE OF WENDELL A.)
ARSENAULT,)

Plaintiff,)

v.)

MID COAST HOSPITAL, BLUE)
WATER EMERGENCY PARTNERS,)
LLC, and MARTIN'S POINT)
HEALTH CARE, INC)

Defendants)

ORDER ON AND DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

Before this court is Defendant's, Blue Water Emergency Partners LLC., ("Blue Waters") Motion for Partial Summary Judgment. Although Blue Water vigorously disputes liability, the Motion is limited to whether Defendants' negligence was the proximate of Wendell Arsenault's death. It does not address either liability or other damages. For the reasons described below, Defendant's Motion is denied.

I. Factual Background

Wendell Arsenault was transported to Mid Coast Hospital on Sunday, September 13th, 2015, after he was involved in a vehicle accident. (PSAMF ¶ 1.) Mr. Arsenault did not remember the accident but is alleged to have suffered acute mental status changes that caused him to drive over a curb. (PSAMF ¶ 1). Dr. Charles Markowitz, an employee of the Defendant, evaluated Mr. Arsenault in the emergency room. (PASMf ¶ 3.) Based on Mr. Arsenault's acute mental status changes, Dr. Markowitz ordered a computed tomography scan ("CT scan") of Mr. Arsenault's head. (PSAMF ¶ 3.) The CT scan showed an abnormality that could indicate either a metastatic disease or brain abscess. (DSMF ¶ 3.) A radiologist flagged the abnormality and Dr. Markowitz

recommended that an MRI be completed. (DSMF ¶ 4.) However, Dr. Markowitz did not arrange for an MRI while Mr. Arsenault was at the hospital. (DSMF ¶ 5; PSAMF ¶ 8.) Instead, Dr. Markowitz discharged Mr. Arsenault and instructed him to follow up and arrange an MRI with his primary care physician (“PCP”). (DSMF ¶ 5; PSAMF ¶ 10.)

Mr. Arsenault contacted his primary care physician, Dr. David Inger, the following day, September 14th, 2015. (PSAMF ¶¶ 11-12.) Dr. Inger reviewed the CT scan on this date and understood the need to arrange an MRI. (DSMF ¶ 11; PSAMF ¶ 12.) However, the MRI was not ordered on an urgent basis but was instead scheduled for the following week. (DSMF ¶ 12; PSAMF ¶ 13.) Over the next few days, Mr. Arsenault attended physical therapy and showed no signs of cognitive complications. (PSAMF ¶ 14.) On September 17, he began to show signs of focal neurological deficits. **Citation.** September 18, 2015, Mr. Arsenault was again admitted to Mid Coast Hospital. (DSMF ¶ 12; PSAMF ¶¶ 15-16.) Mr. Arsenault underwent a new CT scan which showed that the mass had grown since it was first observed on the September 13th CT scan. (PSAMF ¶¶ 17-18.)

Mr. Arsenault was subsequently transported to Maine Medical Center where he underwent an MRI. (PSAMF ¶¶ 19-20.) The MRI showed that the mass observed on the September 13th CT scan was in fact an abscess stemming from a brain infection. (PSAMF ¶¶ 20-23.) Although Mr. Arsenault underwent various treatments, including surgery on September 20th and 30th, he continued to have fixed neurological deficits, including paralysis on his left side, problems related to speech, swallowing, and cognition, as well as seizures. (PSAMF ¶¶ 22-30.) Mr. Arsenault spent the remainder of his life in skilled care facilities until his death on February 10, 2016. (PSAMF ¶ 33.)

The Plaintiff has now brought this medical negligence case against various defendants. The Plaintiff alleges that Blue Water was negligent by virtue of its employee, Dr. Markowitz. Specifically, the Plaintiff alleges that Dr. Markowitz was negligent when he failed to take appropriate steps to arrange a timely MRI, which could have led to critical intervention in treating Mr. Arsenault's abscess. The Plaintiff further alleges that Dr. Markowitz's negligence led to Mr. Arsenault's development of fixed neurological defects, which in turn led to Mr. Arsenault's death.

The Plaintiff has presented evidence from two expert witnesses to support the argument that Dr. Markowitz's negligence was the cause of Mr. Arsenault's death: Dr. Jonathan Miller; and Dr. Shmuel Shoham. Dr. Miller is Plaintiff's neurosurgery expert and Dr. Shoham is Plaintiff's infectious disease expert.

Dr. Miller testified that 90-95% of patients with a brain abscess survive if the abscess is diagnosed and treated in a timely manner. (PSAMF ¶ 52.) However, a brain abscess becomes more serious the longer it is left untreated, thereby reducing the patient's chance of survival. (PSAMF ¶¶ 53-54.) In Mr. Arsenault's case, Dr. Miller testified that Mr. Arsenault would have more likely than not made a full recovery without permanent neurological deficits if he had been treated prior to September 17th. (PSAMF ¶ 61.) Although that chance of survival had decreased by the time Mr. Arsenault was admitted to the hospital on September 18th, Dr. Miller testified that in his opinion, Mr. Arsenault's chance of survival remained above fifty percent. (PSAMF ¶ 52.) Dr. Miller also stated that, in his opinion, Mr. Arsenault's chance of survival fell below 50% when Mr. Arsenault developed further neurological defects after his surgeries on September 20th and 30th. (PSAMF ¶¶ 64-65.) It is Dr. Miller's opinion that the fixed neurological defects were caused by the delay in diagnosing and treating Mr. Arsenault's brain abscess and that Mr. Arsenault's death was very likely the result of such neurological defects. (PSAMF ¶¶ 66-67.)

Dr. Shoham also testified that it is important to treat a brain abscess before a patient develops any neurological defects, and that a person is less likely to survive if treatment begins after the defects have begun. (PSAMF ¶ 68.) According to Dr. Shoham, the rate at which a brain abscess progresses is unpredictable, and “you don’t know when you’re hitting that cliff until you hit that cliff.” (Shoham Dep. at 82:24-83:7.) Dr. Shoham also stated that, in his opinion, Mr. Arsenault’s abscess could have been treated with antibiotics if it had been discovered by September 14th. (PSAMF ¶ 72.) Dr. Shoman testified that this antibiotic treatment could have either reduced the nature of Mr. Arsenault’s surgeries, or avoided surgical intervention altogether. (PSAMF ¶ 72.) Dr. Shoham also stated that Mr. Arsenault would have more likely than not made a full recovery if his abscess had been diagnosed and treated by September 14th, but that he had suffered permanent and irreversible neurological damage by the time he was admitted to the hospital on September 18th. (PSAMF ¶¶ 73, 74, 75, 77.) Ultimately, Dr. Shoham concluded that Mr. Arsenault more likely than not died as a result of the neurological deficits he experienced as a result of the delay in timely diagnosing and treating his brain abscess. (PSAMF ¶ 80.)

II. Summary Judgment Standard

A party is entitled to summary judgment when review of the parties’ statements of material facts and the record to which the statements refer, demonstrates that there is no genuine issue as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. *Dyer v. Dep’t of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821; M.R. Civ. P. 56(c). A contested fact is “material” if it could potentially affect the outcome of the case. *Id.* A “genuine issue” of material

¹ Although the Defendant does not dispute that Dr. Miller and Dr. Shoham have so testified, the Defendant has qualified Dr. Miller’s statements, arguing both that: the impact earlier treatment may have had on Mr. Arsenault’s survival is unknowable; and Mr. Arsenault’s abscess showed to be resistant to treatment on September 18th, indicating that earlier treatment would have not changed the outcome of Mr. Arsenault’s condition. Both will be considered a disputed issue of fact for the purposes of this Motion.

fact exists if the claimed fact would require a factfinder to “choose between competing versions of the truth.” *Id.* (quotations omitted). Once a properly supported motion is filed, the party opposing summary judgment must show that a factual dispute exists sufficient to establish a prima facie case for each element of the defense raised in order to avoid summary judgment. *Watt v. Unifirst Corp.*, 2009 ME 47, ¶ 21, 969 A.2d 897. A party who moves for summary judgment is entitled to judgment only if the party opposed to the motion, in response, fails to establish a prima facie case for each element of the defense raised. *Lougee Conservancy v. Citi Mortgage, Inc.*, 2012 ME 103, ¶ 12, 48 A.3d 774.

III. Discussion

“To establish liability in a medical malpractice case, the plaintiff must show that the defendant’s departure from a recognized standard of care was the proximate cause of the injury.” *Phillips v. Eastern Maine Med. Ctr.*, 565 A.2d 306, 307 (Me. 1989). Here, the Defendant argues that it is entitled to judgment on Plaintiff’s negligence claim as it relates to Mr. Arsenault’s death because there is insufficient evidence to show that Dr. Markowitz’s alleged negligence was the proximate cause of death.

1. Proximate Cause

Generally, proximate cause is a question of fact for the jury and is “that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.” *Webb v. Haas*, 1999 ME 74, ¶ 20, 728 A.2d 1261 (quotations omitted). “Evidence is sufficient to support a finding of proximate cause in the medical malpractice context if the evidence and inferences that may reasonably be drawn from it indicate that (1) the defendant’s negligent conduct played a substantial part in causing the

injury, and (2) the injury was either a direct result or reasonably foreseeable consequence of that conduct.” *Holmes v. E. Me. Med. Ctr.*, 2019 ME 84, ¶ 17, 208 A.3d 792.

While the Defendant has raised issues that may allow it to prevail on this issue at trial, the court finds, after accepting all inferences favorable to the Plaintiff, that the Plaintiff has presented competent expert testimony sufficient to avoid summary judgment. The court assumes, at it must when deciding summary judgment, that Dr. Markowitz should have done more to make certain Arsenault received an MRI on September 13 or 14.

Dr. Shoham testified that Arsenault would have made a full recovery had his abscess been diagnosed and treated by September 14. Both of the Plaintiff's experts testified that as a brain abscess lingers goes undiagnosed, the patient's chance of survival is reduced. As a result of the delay, by September 17 or 18, Arsenault was suffering from fixed, permanent and irreversible neurological defects. Both doctors testified that those defects were the cause of Arsenault's death in February.

These opinions are not an open ended view that earlier diagnosis reduces the chance of death. Instead, Plaintiff points to a specific event, the onset of focal neurological deficits, that would have been prevented, had Arsenault been promptly diagnosed and treated. The Plaintiff has presented sufficient testimony to avoid summary judgment that those neurological deficits were a substantial factor in Arsenault's death.

Defendant points out that Dr. Inger of Martin's Point assumed Arsenault's care on September 14. Although Dr. Inger is also alleged to have committed similar acts of negligence after Dr. Markowitz, the court is not going to weigh the degree of negligence of both the two physicians at the summary judgment stage. For the purposes of summary judgment and reading all inferences in favor of the Plaintiff, had Dr. Markowitz gotten Arsenault to an MRI, the proper

diagnosis and treatment would have occurred before Arsenault began to suffer from the neurological deficits which manifested themselves on September 17 and 18. Again, accepting Plaintiff's expert's testimony, there is an unbroken train of events to Arsenault's death. The neurological deficits were substantial a factor in his death.

The Defendants argues that Dr. Markowitz cannot be held to have caused Mr. Arsenault's death because his negligent acts did not reduce Mr. Arsenault's chance of survival below 50% by September 18, by which time others assumed care of Mr. Arsenault. The Defendant argues that this case presents a related "but distinctly different issue which . . . no Maine court has ever addressed: can a physician be said to have 'caused' a patient's death where it is alleged that his negligence increased the risk that the patient would die, but even after the negligence the patient's chance of survival was greater than 50%?" (Def's. Reply to Pl's. Opp. to Pl's. Mot. for Sum. Judg. pg 1).

If Arsenault was still alive and the expert testimony was that a failure to diagnose had reduced his chance of survival to something over 50%, then possibly, it would be mere speculation whether he was going to die in the future as a result of a misdiagnosis. *See Fabio v. Bellomo*, 489 N.W.2d 241 (Minn. 1992). Here, however, Arsenault has passed away. That does not require speculation. Just because there was a moment in time, in theory, when his chance of survival was over fifty percent, that does not mean there was no causation as a matter of law. The Defendant does not cite other authority that persuades the court on this argument.

Based on the forgoing, a reasonable fact finder could determine that Dr. Markowitz's alleged negligence was a substantial factor in causing Mr. Arsenault's fatal cognitive deficits and that those fatal deficits were a reasonably foreseeable result of that negligence. Accordingly, there is a disputed issue of material fact regarding whether Dr. Markowitz's alleged negligence was the

proximate cause of Mr. Arsenault's death and summary judgment is inappropriate on such grounds.

V. Conclusion

The Plaintiff has presented a prima facie case showing that Dr. Markowitz's negligence was the proximate cause of Mr. Arsenault's death. The affect other contributing negligence or factors had on causing Mr. Arsenault's death should be submitted to the finder of fact.

The entry is:

Defendant's Motion for Summary Judgment is DENIED.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: Apr 22, 2021



Thomas McKeon
Justice, Superior Court

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