

[REDACTED]

Plaintiff

v.

[REDACTED]

Defendant

* IN THE
* CIRCUIT COURT
* FOR
* ANNE ARUNDEL COUNTY
* Case No.: C-06-113681 MT

DEFENDANT'S MOTION IN LIMINE

Defendant, [REDACTED] y Council, Baradel, Kosmerl & Nolan, P.A. and Edwin H. Staples, II, his attorneys, moves this Court to enter an order in limine excluding the testimony of Plaintiff's designated medical expert witness, [REDACTED], that relates to any future allegedly surgeries needed by Plaintiff, and in support thereof states:

Summary of Argument

This lawsuit arises from an automobile accident on April 25, 2003. Defendant [REDACTED] has conceded liability in this case. However, Plaintiff still has the burden to prove the amount of her damages. Included in these damages are the necessity for any future medical procedures. Plaintiff must prove, through expert testimony, that, to a reasonable degree of medical certainty, future medical procedures will be necessary as a result of the underlying motor vehicle accident.

Plaintiff's expert, [REDACTED], testified at his deposition on November 15, 2007, that he believes that Plaintiff may be a candidate for future surgeries to her left knee and both shoulders, as well as a diskectomy as a result of this accident. However, [REDACTED] testimony is lacking the requisite factual basis to rise to the level of a reasonable degree of medical certainty. Therefore, Defendant [REDACTED] would be prejudiced if this proposed evidence is presented to the jury. Thus, any testimony regarding the possibility of Plaintiff undergoing future surgeries must not be allowed to be presented to the jury as it does not have the requisite level of medical certainty.

Factual History

Plaintiff began receiving medical treatment from [REDACTED] on August 6, 2003, approximately 3 ½ months post accident. Plaintiff's initial complaints to [REDACTED] were neck pain, headaches, an aching jaw, and bilateral shoulder pain that was worse in the right shoulder, all of which she alleged were caused by the motor vehicle accident. The shoulder pain was allegedly exacerbated by the physical therapy that Plaintiff was undergoing per orders from [REDACTED]. [REDACTED] examined Plaintiff's spine, shoulders, and knees. He found some tenderness in her spine but the x-rays showed no abnormalities. [REDACTED] diagnosed Plaintiff's shoulders with rotator cuff tendonitis. The examination of Plaintiff's knees did not reveal abnormalities. [REDACTED] discussed the possibility of diskectomy surgery if Plaintiff's symptoms persisted.

Plaintiff had follow-up care with [REDACTED] on September 9, 2003 for neck pain and stiffness. [REDACTED] found Plaintiff's overall condition to be improved.

Plaintiff returned to [REDACTED] on November 11, 2003 with complaints of neck pain, bilateral shoulder pain, ankle pain, and left arm pain. However, plaintiff did state that her neck was feeling better. [REDACTED] examination of Plaintiff's neck revealed some tenderness and rendered a diagnosis of cervical spondylosis. [REDACTED] again diagnosed Plaintiff's shoulders with rotator cuff tendonitis. Plaintiff was instructed to restart physical therapy.¹

Plaintiff's next visit for injuries that were alleged to have been caused by this motor vehicle accident was not until April 6, 2004, when she was seen by [REDACTED] s physician's assistant, [REDACTED]. [REDACTED] Plaintiff's complaints were now for left shoulder and cervical spine pain. The examination of the left shoulder revealed tenderness, limited range of motion and moderate pain. The examination of the spine revealed moderate tenderness, some limitation of motion and evidence of

¹ For whatever reason, Plaintiff had not gone to physical therapy from September 15, 2003 until restarting on November 17, 2003.

disc degeneration and bulging. Plaintiff's shoulder was injected with cortisone and she was advised again to go to physical therapy. However, Plaintiff decided to do home exercise instead of physical therapy. [REDACTED] determined that discectomy surgery may be necessary at some point, but at this point the Plaintiff believed the symptoms were tolerable and controllable. Moreover, [REDACTED] cannot opine that Plaintiff is in need of a discectomy as he is not a medical doctor.

Plaintiff was seen again by [REDACTED] on April 20, 2004. At this time Plaintiff's neck was improved but she still had discomfort in her left shoulder. An examination of Plaintiff's spine revealed mild myofascial tenderness with mild pain. An examination of Plaintiff's shoulder revealed tenderness and a limited range of motion.

Plaintiff was next seen by [REDACTED] on May 13, 2004 for a follow-up evaluation on her left shoulder.² An MRI of her shoulder revealed a small tendon tear. [REDACTED] discussed shoulder arthroscopy surgery with the Plaintiff.

[REDACTED] had provided no further medical treatment to Plaintiff at the time he wrote an "opinion" letter to Plaintiff's former attorney on June 22, 2006.³ In this letter, [REDACTED] summarized the treatments done to the Plaintiff's neck, left shoulder, and right knee. [REDACTED] stated that Plaintiff "may well end up needing to have anterior cervical discectomy". [REDACTED] also stated that Plaintiff's knee was getting better, "but if it shows continued clinical worsening with pain that relates back to the motor vehicle accident, she could possibly need at least an arthroscopy surgery and postoperative rehabilitation". [REDACTED] concluded that "[t]o a reasonable degree of medical certainty and probability, the above-noted diagnoses and possible surgical treatments and ongoing non-surgical treatments are casually related to the motor vehicle accident of April 25, 2003."

Plaintiff was reexamined by [REDACTED] office on October 5, 2006, specifically by [REDACTED]

² This was the first time Plaintiff had seen [REDACTED] in six months.

³ This letter came over two years after [REDACTED] last provided treatment.

██████████⁴ On this date, Plaintiff's only complaints were for left knee pain. The examination revealed degenerative arthritis in that knee. There were no complaints of neck or shoulders and no treatment was rendered for those parts of the body. (emphasis added)

On October 30, 2007, Plaintiff was examined by ██████████ physician's assistant for neck pain, bilateral shoulder and arm pain, and numbness and tingling that she alleged had been ongoing since the motor vehicle accident.⁵ The records on that date stated that Plaintiff "has been managing her symptoms conservatively since her last visit in May 2004." An examination of Plaintiff's spine revealed a limited range of motion, tenderness, and some muscle spasms. An examination of her left shoulder revealed a limited range of motion and moderate pain, while the right shoulder exam revealed degenerative changes in her joints. An exam of Plaintiff's spine revealed mild spondylitic and degenerative changes. The treatment recommendation was for anti-inflammatory medication, muscle relaxants, and a follow-up examination.

On November 9, 2007, the last time ██████████ examined the Plaintiff, he took an MRI of the Plaintiff's shoulders. It revealed a tear of the rotator cuff (which would be impossible to attribute to the mechanics of the accident) and degenerative changes in Plaintiff's right shoulder.

Summary of Law

The trial court has the discretion to determine the admissibility of evidence. *White v. State*, 324 Md. 626, 636-37 (1991). Evidence must be relevant and material to be admissible. Therefore, the evidence must help to establish a legally significant theory and it must be sufficiently probative to be admissible. *Paige v. Manuzak*, 57 Md. App. 621, 632 (1984). The trial court also has the discretion to determine if the probative value of the evidence outweighs any unfair prejudice.

⁴ This is now 3 ½ years post accident.

⁵ This examination was performed 3 ½ years after the last time ██████████ or his staff examined the Plaintiff for complaints with these parts of her body and 4 ½ years after the accident. This examination was also approximately two weeks prior to ██████████'s deposition.

Evidence that is more prejudicial than probative should not be admissible at trial. *Farley v. Allstate Insurance Co.*, 355 Md. 34, 42 (1999).

An opinion offered by an expert must have a sufficient factual basis in order to be admitted. Md. Rule 5-702. The mere fact that a witness is qualified as an expert witness in a particular field does not mean that the witness may give an unbridled opinion. *Giant Food, Inc., et. al. v. Booker*, 152 Md. App. 166, 182 (2003). "No matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown." *State Dep't of Health v. Walker*, 238 Md. 512, 520 (1965). An expert's opinion must be based on a "reasonable probability or reasonable certainty", not "mere possibilities." *Ager v. Baltimore Transit Co.*, 213 Md. 414, 421 (1957).

Argument

There is insufficient evidence to support [REDACTED] opinion that Plaintiff will need to undergo future surgeries to her left knee, bilateral shoulders, and back.

The motor vehicle accident that gave rise to this litigation happened on April 25, 2003. Plaintiff immediately received treatment at the Emergency Room and later began to receive treatment from [REDACTED] on August 6, 2003. Plaintiff also received treatment for her left knee from [REDACTED] on September 23, 2003. [REDACTED] injected the knee with corticosteroid, commonly used as an anti-inflammatory, and diagnosed her left knee problem as arthritis which was present prior to the accident.

At his deposition on November 15, 2007, [REDACTED] testified that Plaintiff was in need of left knee surgery, bilateral shoulder surgery, and a discectomy as a result of the injuries allegedly suffered in the underlying motor vehicle accident. [REDACTED] opined that Plaintiff's injuries are related to the motor vehicle accident because the trauma that she suffered in the accident aggravated her pre-existing conditions, including arthritis and degenerative changes. The specific trauma that

█████ spoke of was the presumed trauma Plaintiff suffered from bracing herself at impact by placing her hands on the dashboard.

█████ also testified that arthritis in a knee can be caused by trauma and is frequently seen in dashboard knee injuries. However, █████ has no personal knowledge of whether Plaintiff's knee suffered a trauma by hitting the dashboard or whether Plaintiff braced herself by placing her hands on the dashboard. Plaintiff never told █████ that either of these events happened. █████ conclusion that these events happened is nothing but mere speculation. Expert testimony based on speculation has no probative force and should not be admitted. *State Dep't of Health*, 238 Md. at 520.

There is absolutely no support to █████'s conclusion that Plaintiff needs future surgeries because of this motor vehicle accident. █████ did not begin treating Plaintiff until August 6, 2003, over three months after the accident occurred. █████ stopped treating the Plaintiff on May 13, 2004, at which time Plaintiff's only complaints were for her left shoulder. During the entire time that Plaintiff was treated by █████ only the *possibility* of future diskectomy surgery was mentioned if Plaintiff's symptoms became intolerable. █████ made no mention of knee surgery during the nine months that Plaintiff was under his care. While █████ did recommend arthroscopic shoulder surgery on May 13, 2004, this was nine months after he began treatment and was for a tendon tear that was not present during his previous evaluations of the Plaintiff. Moreover, Plaintiff has not had nor has she scheduled any of these surgeries.⁶

On June 22, 2006, without having evaluated Plaintiff for over two years, █████ provided a letter to Plaintiff's former attorney that suggested that Plaintiff needed knee surgery and a diskectomy. At his deposition, █████ testified that it was his opinion, to a reasonable degree of medical certainty, that at the time of writing the letter, Plaintiff was in need of these surgeries. █████

⁶ Please recall that the accident occurred on April 25, 2003, almost five years ago.

██████████ then testified that Plaintiff is still in need of these surgeries and that it is his opinion that any knee surgery Plaintiff has within the next three years (up to 2010) would be related to the motor vehicle accident. What this amounts to is mere speculation.

In *Farley v. Allstate Insurance Company*, 355 Md. 34 (1998), the Court of Appeals was faced with the issue of determining the sufficiency of evidence to prove the need of future medical treatment. In *Farley*, the testimony of Plaintiff's doctor was as follows:

[Farleys' Counsel:] Doctor, do you believe that [Mr. Farley] will require any future medical care for that injury [to his left hip]?

[Reischer:] Yes. Yes, I think he will occasionally require an injection, may require some physical therapy.

[Farleys' Counsel:] *Is there any particular time frame in which, frequency in which, this may occur?*

[Reischer:] *Not really.* I suspect that [if] he's going to get very, very active, I may happen, this will probably, this may be kind of, like, a weak link of his and I think that's probable.

[Farleys' Counsel:] And that would be, then, the similar injection to which you just described and maybe physical therapy?

[Reischer:] I would reexamine him, obviously, and have to make a determination at that time. But certainly, if it's the identical thing and that's something that helps as a result of it, then I would inject that area, or perhaps a different area as well as probably put him on a therapy program.

Id. at 50. The trial court found the doctor's testimony to be speculative and held that "the doctor was not ... sufficiently clear to permit the jury [to] engage in rank speculation [as to this issue]." *Id.*

at 51. The Court of Appeals upheld the trial court's decision that the doctor's opinion "was based on mere possibility and not probability." *Id.*

There is absolutely no support for ██████████ conclusion that Plaintiff will be required to undergo knee surgery, bilateral shoulder surgery, and a diskectomy. ██████████ never recommended that Plaintiff undergo knee or the diskectomy while Plaintiff was under his care. ██████████ testimony at his deposition on November 15, 2007 regarding Plaintiff's shoulders is as follows:

Q. And at that point, Doctor, this is the first time, May 13th of 2004 you talked to her about shoulder surgery, correct?

- A. Yes.
- Q. Now, we are 3 ½ years later. Has she ever had that surgery?
- A. No, she hasn't.
- Q. Okay. As you sit here today, Doctor, has her shoulder gotten better, gotten worse or stayed the same?
- A. As of October 30th of 2007, there is continued evidence of significant dysfunction of both shoulders.
- Q. Okay. But you would agree with me and your note reveals that when you saw her just two weeks ago, you had not seen her at all since May of 2004, correct?
- A. That's correct.
- Q. Okay.
- A. Well, no, I saw her on October 5th of 2006.
- Q. Actually, I don't mean to be unkind. You didn't. [REDACTED] did.
- A. Oh, no, no. That's correct. That's correct.
- Q. So you haven't seen her for 3 ½ years?
- A. Correct.
- Q. She hasn't had any shoulder surgery, right?
- A. Correct.
- Q. But your opinion is still the same today, November whatever we are, 15th of '07 --
- A. Yes.
- Q. -- that she needs shoulder surgery and it is as a result of the accident?
- A. She is a candidate for shoulder surgery because of continued significant dysfunction and tears in the shoulder that have continued to be to some degree sometimes worse, sometimes relatively better since the motor vehicle accident.
- Q. Is there any plan, a specific plan for her to have this surgery? I know you said she's a candidate. I might be a candidate for a lot of things, too, but is there any plan on the books for her to have this surgery?
- A. She is not currently scheduled for surgery.

See Deposition Transcript pages 55:7-57:11, Attached as Exhibit A.

As a result of [REDACTED] testimony at his deposition, his opinion with regard to surgery is completely speculative and should not be permitted to be heard by the jury.

Regarding Plaintiff's knee, [REDACTED] testified that "[a]t the current time, as of 2007 ... there is no current need for her to have surgery for her knee." See Deposition Transcript page 61:2-6, Attached as Exhibit B. [REDACTED] also testified that Plaintiff is a "candidate" for diskectomy surgery. See Deposition Transcript pages 66:18-67:3, Attached as Exhibit C. However, he never


recommended these surgeries while Plaintiff was under his care and Plaintiff is not currently scheduled for any of these surgeries.

The Court of Appeals has “consistently held that an expert witness must base his or her opinion on ‘reasonable probability or reasonable certainty’ and not on ‘mere possibilities.’” *Ager v. Baltimore Transit Co.*, 213 Md. 414, 421 (1957). [REDACTED]’s testimony regarding Plaintiff’s need for future surgeries is eerily similar to the testimony of the doctor in *Farley*. The doctor in *Farley* testified that future treatment *may* and *probably* will be necessary, while [REDACTED] testified that Plaintiff is a *candidate* for surgeries. [REDACTED]’s testimony does not rise to the level of a reasonable degree of medical certainty and is nothing more than “rank speculation”. Allowing [REDACTED]’s testimony to be heard by a jury would be highly prejudicial to the Defendant. Therefore, [REDACTED] should not be permitted to testify regarding any future surgeries needed for Plaintiff’s shoulders and knee or a diskectomy surgery.

Conclusion

The conclusions of a medical expert must be made to a reasonable degree of medical certainty. These conclusions must also have a sufficient factual basis to be reliable. A conclusion based on mere speculation or assumptions is not sufficient to allow an expert’s conclusion to be considered by the jury. [REDACTED]’s conclusion regarding Plaintiff’s alleged need for future knee and bilateral shoulder surgery, as well as the diskectomy is based only on mere speculation. These conclusions clearly do not have a sufficient factual basis for them to be considered by the jury. Therefore, the Defendant would be extremely prejudiced if the jury is allowed to consider this testimony. Thus, all evidence regarding Plaintiff’s alleged need for future surgeries must be excluded.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2008, a copy of the foregoing Motion in Limine was mailed, postage prepaid to:

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