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Shives v. Peele

DORIS SHIVES, Plaintiff, v. THERESA PEELE, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Fulton County Branch
Civil Action — Law, No. 148–2000-C

Expert testimony; Previous diagnosis

1. The standard for qualification of an expert witness in Pennsylvania is a liberal one.

2. When determining whether a witness is qualified as an expert, the court is to examine whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation.

3. The court must ascertain whether the proposed witness has sufficient skill, knowledge or experience in the field at issue as to make it appear that the opinion or inference offered will probably aid the trier of fact in the search for truth.

4. In the field of medicine, specialties sometimes overlap and a practitioner may be knowledgeable in more than one field.

5. Some doctors will be more qualified than others to provide evidence about specific medical practices; however, it is for the jury to determine the weight to be given expert testimony in light of the qualifications presented by the witness.

6. If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

7. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing; if 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.

8. Even though one physician makes a diagnosis, another physician may express an opinion based on that diagnosis if the diagnosis is one on which the other physician would normally rely while practicing in his field.

9. When the expert witness has consulted numerous sources, and uses that information together with his own professional knowledge and experience to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise.

10. An expert should not be permitted simply to repeat another's opinion or data without bringing to bear on it his own expertise and judgment; in such a situation, the non-testifying expert is not on the witness stand and truly is unavailable for cross-examination.

Appearances:

Charles E. Ganley, Esq., *Counsel for Plaintiff*

Brian R. Sinnett, Esq., *Counsel for Defendant*

OPINION

Walsh, J., November 25, 2003

Background

We have before us for decision Defendant's Motion in Limine. The basis of this lawsuit is a motor vehicle accident that occurred in Fulton County on August 6, 1998. According to the briefs filed by the parties, Doris Shives ("Plaintiff") and Theresa Peele ("Defendant"), the accident occurred on State Route 655 in Thompson Township, Fulton County, as both parties were driving in a north-bound direction. Plaintiff's vehicle came to a near complete stop on the road as she was waiting for a car to pass so that she could turn left into her driveway. As the Plaintiff was waiting, her vehicle was struck from behind by a vehicle being driven by Defendant.

Defendant has admitted liability in causing the accident. Therefore, the only issues remaining for trial are damages and whether the injuries complained of by Plaintiff were caused by the accident. Defendant filed a Motion in Limine to Exclude Plaintiff's Medical Expert's Testimony Regarding Plaintiff's Claims of Cardiac Contusion and Hypertension and a brief in support thereof. Plaintiff filed a Response to Defendant's Motion in Limine to Exclude Plaintiff's Medical Expert's Testimony Regarding Plaintiff's Claims of Cardiac Contusion and Hypertension and a brief in opposition to Defendant's Motion in Limine.

Defendant's Motion in Limine seeks to exclude testimony by plaintiff's expert, Arthur Horn, M.D. Defendant asserts that he anticipates that Dr. Horn will testify as to Plaintiff's claimed injuries, namely the claims of cardiac contusion and hypertension; or will attempt to elicit such claims from Plaintiff's medical records. Defendant's Motion In Limine, ¶3.

Having fully reviewed the parties' submissions, we note that neither counsel has clearly articulated the legal issues for consideration. 1 Wrapped in a kind of camouflage in the Motion and the Answer are a number of issues, not clearly articulated by Counsel, and we have tried to identify them as follows: (1) may Dr. Horn be qualified as an expert witness proffered to give an opinion as to causation; (2) may Dr. Horn rely on the medical records of the Plaintiff in the forming of his opinion(s); (3) are the medical records of Dr. McLucas admissible evidence; and (4) may Dr. Horn testify as to Dr. McLucas' diagnoses.

Discussion

May Dr. Horn be qualified as an expert witness proffered to give an opinion as to causation?

It is well settled in Pennsylvania that the standard for qualification of an expert witness is a liberal one. Rauch v. Mike-Mayer, 783 A.2d 815 (Pa.Super. 2001). When determining whether a witness is qualified as an expert, the court is to examine whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation. Miller v. Brass Rail Tavern, 541 Pa. 474, 664 A.2d 525 (1995). The court must ascertain whether the proposed witness has sufficient skill, knowledge, or experience in the field at issue as to make it appear that the opinion or inference offered will probably aid the trier of fact in the search for truth. George v. Ellis, D.O. et al., 820 A.2d 815 (Pa.Super. 2003) quoting Bindschursz v. Phillips, 771 A.2d 803 (Pa.Super. 2001). In the field of medicine, specialties sometime overlap and a practitioner may be knowledgeable in more than one field. Id. Some doctors will be more qualified than others to provide evidence about specific medical practices; however, it is for the jury to determine the weight to be given expert testimony in light of the qualifications presented by the witness. Id.

Further, Pa.R.E. 702 provides as follows:

If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Accordingly, where the information sought to be elicited from the expert witness is **beyond the ken** of a lay

person and where it will **assist the jury** in understanding the evidence or to determine a fact in issue, then an expert may offer testimony in the form of an opinion or otherwise. Just as with any other witness, such expert will be subject to cross-examination, and his or her testimony may be accorded whatever weight the jury thinks proper in the context in which it is offered.

In this case, Defendant specifically objects to Dr. Horn being permitted to testify as to the cardiac contusion and hypertension diagnosis because Dr. Horn did not make the diagnoses, and according to Defendant, is not qualified to make such a diagnosis. Defendant's Motion in Limine, ¶5.

Plaintiff argues that Dr. Horn has been one of her treating physicians and therefore that Dr. Horn has had the opportunity to review Plaintiff's medical records and has had the opportunity to formulate a treatment plan for the Plaintiff based in part on his review of her records, and in part on his own findings as to the Plaintiff's medical conditions. It is noteworthy that the doctor that made the original diagnosis of Plaintiff, Dr. McLucas, passed away prior to the taking of his deposition.

Because the threshold for admitting expert testimony is low and because Dr. Horn is one of Plaintiff's treating physicians, he is likely to be qualified, subject to evidence to be adduced at trial, as a medical expert. Any opinion on causation, however, will necessarily be subject to an antecedent foundation to be laid for the rendering of such an opinion; and it cannot be said at this juncture that Dr. Horn may not provide opinion evidence as to causation.

As to the first issue, judgment is reserved until the development of Dr. Horn' s testimony at trial.

May Dr. Horn rely on the medical records of the plaintiff in the forming of his opinions?

Pennsylvania Rule of Evidence 703 provides guidance on this issue: "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If 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." Accordingly, even though one physician makes a diagnosis, another physician may express an opinion based on that diagnosis if the diagnosis is one on which the other physician would normally rely while practicing in his field. Thus, the orthopedic surgeon will choose to apply a cast to a broken arm in reasonable reliance on the diagnosis of the radiologist who determines, on reading an x-ray, that the arm is broken. Where Dr. Horn has relied for his treatment of the Plaintiff upon information contained in Dr. McLucas' records; and to the extent that that information or those records would reasonably be relied upon by Dr. Horn in treating his patient, Dr. Horn may render an opinion based upon them, even if Dr. McLucas' records themselves are not admissible in evidence.

Plaintiff claims that Dr. McLucas's medical records may be admitted into evidence under an exception to the hearsay rule that applies when a declarant is unavailable, and cites Pa.R.E. 804(a). It is clear that a dead witness is an unavailable witness. Pa.R.E. 804(a)(4). Nevertheless, Plaintiff's reliance on Pa.R.E. 804(a) is misplaced. The following statements are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; (4) statement of personal or family history; (5) forfeiture by wrongdoing. Pa.R.E. 804 (b). Clearly, the rule does not provide for an exception to the rule against hearsay for the medical records of a physician whose unavailability is because of his death.

Accordingly, Dr. Horn is not barred from considering the medical records of Dr. McLucas in forming his opinions if the facts or data contained in Dr. McLucas' records were reasonably relied upon Dr. Horn in forming his opinion. That conclusion does not, however, justify the admissibility of hearsay contained in Dr. McLucas' medical records.

Are the medical records of Dr. McLucas admissible evidence?

According to the Pre-Trial Conference Order entered by this Court on August 26, 2003, the parties eliminated an issue as to the authenticity of Dr. McLucas' medical records by stipulating that: [m]edical records of the Plaintiff exchanged by the parties are deemed to be authentic and there shall be no requirement to call the custodian of any such records to testify as their authenticity. Pre-Trial Conference Order, ¶ 5(c). The parties have no such stipulation as to the content of those medical records. Some portions of Dr. McLucas' medical records may be admissible. See, for example, Pa.R.E. 803(4).

May Dr. Horn testify as to Dr. McLucas' diagnosis?

We have already noted that medical experts are permitted to express opinions which are based, in part, upon reports which are not in evidence, but which are customarily relied upon by experts in the practice of the profession. Primavera v. Celotex Corporation, 415 Pa.Super. 41, 608 A.2d 515 (1992). "[W]hen the expert witness has consulted numerous sources, and uses that information, together with his own

professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." Id. quoting United States v. Williams, 447 F.2d 1285 (5th Cir. 1971), cert. denied 405 U.S. 954, 92 S.Ct. 1168, 31 L.Ed.2d 231 (1972), rehearing denied 405 U.S. 1048, 92 S.Ct. 1308, 31 L.Ed.2d 591 (1972).

But the Primavera Court went on to clarify: "[a]n expert should not be permitted simply to repeat another's opinion or data without bringing to bear on it his own expertise and judgment. Obviously, in such a situation, the non-testifying expert is not on the witness stand and truly is unavailable for cross-examination." Primavera at 52, A.2d at 521. Therefore, Dr. Horn is permitted to testify as to any diagnosis he independently made regarding Plaintiff. If in reaching that diagnosis, Dr. Horn relied on notes, records, and/or opinions by Dr. McLucas, that reliance may be testified to. Dr. Horn will not be permitted to just repeat in court Dr. McLucas' diagnoses of Plaintiff.

On the other hand, if Dr. Horn made independent diagnoses either of Plaintiff's hypertension or her cardiac contusion, clearly, with proper foundation, he may testify as to those diagnoses. As to whether Dr. Horn has made such independent diagnoses, we are confused because of what appears to be Dr. Horn's equivocation. In his letter report of June 29, 2000, he makes two statements which may fairly be summarized as follows: (1) "I have been able to confirm the diagnosis of hypertension directly as a result of cardiac contusion..." and (2) "Please note that I did not make this diagnosis" [referring to the diagnosis of hypertension from chest trauma]. It is our impression, though we could be wrong, that a "direct confirmation of a diagnosis of hypertension" is tantamount to having made that same diagnosis independently; but Dr. Horn's second statement disavowing any notion that he made such diagnosis and attributing that diagnosis to "her treating physician" (presumably Dr. McLucas) strongly suggests that he did not independently make the diagnosis of hypertension from chest trauma.

Our conclusion remains the same. Dr. Horn may not merely repeat to the jury another physician's diagnoses of the Plaintiff.

Conclusion

Because Dr. Horn possesses a specialized knowledge beyond that of a lay person that would assist the jury in understanding the evidence to be presented, subject to his tender as an expert at trial, it is likely that he will be permitted to testify as an expert.

To the extent that Dr. Horn reasonably relied on facts and data contained in the medical records of Dr. McLucas, Dr. Horn may render an opinion based upon that reliance.

There is no bar as to the authenticity of the medical records of Dr. McLucas based upon the parties' stipulation; but hearsay contained in those records will not be admissible absent a hearsay exception.

Unless Dr. Horn made independent diagnoses of the Plaintiff, he may not testify as to the diagnoses of Dr. McLucas if those diagnoses are not already in evidence.

ORDER OF COURT

Now this 25th day of November 2003, the Court having reviewed Defendant's Motion in Limine to Exclude Plaintiff's Medical Expert's Testimony Regarding Plaintiff's Claims of Cardiac Contusion and Hypertension and a brief in support thereof and Plaintiff's Response to Defendant's Motion in Limine to Exclude Plaintiff's Medical Expert's Testimony Regarding Plaintiff's Claims of Cardiac Contusion and Hypertension and a brief in opposition to Defendant's Motion in Limine and the applicable law, it is hereby ordered that:

1. Dr. Horn may qualify as an expert to give an opinion as to causation, subject to his qualifications adduced during his direct testimony.

2. Dr. Horn may rely on other health care providers' medical records of the Plaintiff in forming his opinion(s).

3. The medical records of Dr. McLucas may not be barred on grounds of authenticity, but the contents of them may be excluded based on hearsay challenges unless the proffered portions are subject to a hearsay exception.

4. Dr. Horn may not testify as to Dr. McLucas' diagnoses unless he made the same diagnoses independently.

1 Defendant's motion seeks an order simply providing that the Motion is granted and that "Defendant's trial objection is sustained." In her motion, Defendant asserts that Dr. Horn is not a cardiologist and not qualified to make a diagnosis of cardiac contusion and hypertension. In addition, she suggests that Dr. Horn is simply unqualified to testify. Plaintiff's proffered order, in the event Plaintiff should prevail on the

Motion, asks us to deny exclusion of "portions of the expert testimony of Dr. Arthur H. Horn, M.D." and allow the Plaintiff "to present such expert testimony to the jury at trial." We are assuming for purposes of deciding this Motion that Plaintiff is calling Dr. Horn to offer, among other things, an opinion on causation.