

Franklin County Legal Journal

Volume 21, Issue 51, Pages 241-245

Custer v. Hardsock, et al

TANYA L. CUSTER AND JASON CUSTER, Plaintiffs,  
v. DAVID C. HARDSOCK, JR.,  
AND FAYETTEVILLE CONTRACTORS, INC., Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action — Law, No. 2003-1151

*Expert testimony; Scope; Opinion*

1. A medical expert's testimony at trial will be limited in scope to those matters addressed in his medical expert reports.
2. Whether to admit the opinion evidence of an expert is a matter left to the sound discretion of the trial court.
3. An expert cannot base his opinion upon facts which are not warranted by the record.
4. No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture.
5. Absent some basis in fact, opinion testimony is inadmissible and to admit such evidence would be an abuse of the trial court's discretion.

Appearances:

Edward E. Knauss IV., Esq., *Counsel for Plaintiffs*

W. Darren Powell, Esq., *Counsel for Defendant*

OPINION

Walsh, J., April 8, 2004

This matter is before the court on Defendants' second motion in limine, styled Motion in Limine to Preclude Plaintiffs' Vocational Expert, John Risser, from Testifying at Trial. Defendants' first motion in limine sought to exclude the trial testimony of Plaintiffs' prior vocational expert, Harold Kuhlman. We have reviewed Defendants' Motion, Plaintiffs' Answer thereto, the briefs of both parties and the record. In support of our decision, we note the following:

Findings of Fact

1. Plaintiff Tanya Custer was in a motor vehicle accident on July 31, 2001.

2. There appears to be some evidence that she suffered or may have suffered a brachial plexus injury as a result of it.

3. This matter was certified by Plaintiffs' counsel to be trial ready on January 20, 2004.

4. We note that the parties were to finalize their expert witness lists not later than Friday, March 5, 2004 and, although Plaintiffs have just recently identified John Risser as a vocational expert to be called at trial, Plaintiffs have complied with that deadline, having identified Risser on March 4, 2004 as a testifying expert.

5. Defendant has filed a Motion in Limine to Preclude Plaintiffs' Vocational Expert, John Risser, from Testifying at Trial.

6. We have reviewed all of the medical reports of Plaintiffs' testifying medical expert, Stanton Sollenberger, D.O., that have been made available to us, including [1] those attached to Defendants' Motion; [2] those referred to us by Plaintiff as having been attached to Plaintiffs' Pre-trial conference memorandum; and [3] reports made available within the past week and covered by March 29, 2003 [sic] correspondence from Plaintiffs' counsel. See Plaintiffs' Answer to Defendants' Motion, ¶3 and Plaintiffs' Pre-trial conference memorandum. All of the reports to which we have been referred consist of the following:

a. Sollenberger letter to Bruno dated October 26, 2001 (2 pp.)

b. Electrodiagnostic results of 08-06-02 (3 pp.)

c. Sollenberger letter to Metzger-Wickersham dated December 18, 2002 (1 page)

d. Sollenberger letter to Edward Knauss dated August 8, 2003 (1 page)

e. 3-9-2004 notes of Dr. Sollenberger which he has not read (1 page)

f. Sollenberger letter to Edward Knauss dated March 26, 2004

7. Plaintiffs' counsel asserts that "Dr. Sollenberger has not yet given his trial deposition and has not yet testified to his final opinions regarding Tanya Custer's condition and prognosis. See Plaintiffs' Answer, ¶9. It is well established, however, that Plaintiffs' medical expert's testimony at trial will be limited in scope to those matters addressed in his medical expert reports, identified above. See Pa.R.C.P. 4003.5(c).

8. Other than in his letter to Defense counsel of 10 days ago, there is no evidence in Dr. Sollenberger's reports that the Plaintiff has suffered a permanent injury. In fact, the closest that any portion of his reports comes to any such intimation is found in his August 8, 2003 letter to Defendants' counsel wherein he states, "I do think that Tanya will continue to have off and on pain problems resulting from her brachial plexus injury." See Sollenberger letter of August 8, 2003. Such statement is a far cry from a claim either that the Plaintiff's brachial plexus injury or her "on and off" pain is permanent.

9. The vocational expert report in issue, that of John Risser dated March 28, 2003, makes repeated references to the Plaintiff's disabling condition or to the "permanency" of her condition. See Report of John Risser, attached to Plaintiffs' Motion as Exhibit C. Those references include, but are not believed to be limited to, the following:

a. A 27.31-year-old, **not disabled female** with a high school education has a worklife expectancy of 27.6 years. A 27.31-year-old, **disabled female** (including both **severely** and **not severely disabled** females) with a high school education has a worklife expectancy of only 9.8 years. Therefore, even though Ms. Custer has found she has been able to return to alternate gainful employment, she likely has a reduced worklife expectancy of 17.8 years, as a result of having been injured on 7/31/01. Risser's Report, pg. 10 [emphasis included].

b. Based on a review of the provided information regarding Ms. Custer and the results of my interview with and evaluation of her, it is my opinion that Ms. Custer meets the definition of occupational disability. Risser's Report, pg. 11.

c. There is no question that employers prefer to hire and attempt to maintain the employment of individuals who do not have the likely **permanent deficits** that a person such as Ms. Custer possesses [emphasis supplied]. Risser's Report, pg. 14.

d. A **permanent condition**, such as Ms. Custer possess, results in the loss of opportunities for promotion, and a loss of opportunities to enter the work force (restricted access to the labor market) [emphasis supplied]. Risser's Report, pg. 14.

e. In my opinion, many employers now are fearful of hiring a person, such as Ms. Custer, who possesses a

physical disability, because of questions and uncertainties associated with the "reasonable accommodation" and "essential job functions," as defined in the ADA. Risser Report, pg. 15.

10. Even assuming, *arguendo*, that Plaintiffs' expert, John Risser, believed the medical records of Dr. Sollenberger, then available to him, to support a claim of permanency, the Sollenberger reports of August 8, 2003 and March 26, 2004 did not exist at the time of Risser's March 23, 2003 report in which he **based his economic projections on claims of permanency**. Accordingly, Risser's opinion is based on conjecture; i.e., that Plaintiff has suffered a permanent injury.

11. Were we to allow Plaintiffs' most recently identified vocational expert to testify on the basis of a solicited physician's opinion, offered more than a year after Plaintiffs' vocational expert first rendered his opinion on the basis of facts not then available to him; and were we to allow the Plaintiffs — or any party, for that matter — to continue to develop facts not yet developed when that party had already certified the matter to be trial ready, we would be working substantial prejudice to the opposing party. Discovery would simply continue to the eve of trial, long after the matter was certified to be trial ready. A matter is either ready to be tried or it is not. An assertion of readiness, i.e., listing the matter for trial, is an assertion that discovery is complete; that witnesses, including expert witnesses, are known; and that the objects of discovery, including the discovery of expert testimony, is a mission already accomplished. Plaintiffs' claims that Dr. Sollenberger has not yet "given his trial deposition" misses the point. All that is lacking at this juncture, with the matter now trial ready, is for Dr. Sollenberger to testify. Whether he does that live and in person at trial or whether he is deposed in advance of trial for the purpose of preserving his trial testimony, the bounds of that testimony have already been set by the reports disclosed during discovery. We are unwilling to allow Plaintiffs to claim that the matter is ready for trial and thereafter continue to build their case by accretion of medical opinions which first appear at the eleventh hour; and we are most unwilling to do so in the context of an overt effort to make credible and admissible the opinion of a vocational expert which is facially flawed for want of a factual foundation.

#### Legal Conclusions

12. Whether to admit the opinion evidence of an expert is a matter left to the sound discretion of the trial court. *Hussey v. May Department Stores, Inc.*, 238 Pa. Super. 431, 357 A.2d 635 (1976).

13. Finally, as to Mr. Risser's testimony, an expert cannot base his opinion upon facts which are not warranted by the record. No matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968). Moreover, absent some basis in fact, opinion testimony is inadmissible and to admit such evidence would be an abuse of the trial court's discretion. *Rose v. Hoover*, 231 Pa. Super. 251, 331 A.2d 878 (1974).

#### Conclusion

Because Mr. Risser's expert opinions with regard to the Plaintiff's shortened economic horizons have as underpinnings facts which simply were not warranted by the record, those opinions are conjectural and are inadmissible. An appropriate order will be entered.

#### ORDER OF COURT

April 8, 2004, upon consideration of Defendants' Motion in Limine to Preclude Plaintiffs' Vocational Expert, John Risser, from Testifying, as well as the Plaintiffs' Answer thereto, the briefs, arguments and authority cited by the parties, the record of these proceedings and the law, it is ordered that Defendants' Motion is granted, and that Plaintiffs' vocational expert, John Risser, is precluded from testifying at trial.

This interesting letter, apparently signed by Dr. Sollenberger and addressed to Defendants' counsel reads, in its essence, entirely as follows:

I have spoken with you on the phone regarding a statement you needed for the upcoming deposition on Tanya Carter.

Dr. Sollenberger states that he has been seeing Tanya Carter for a brachial plexus problem and she will have these problems on and off on a permanent basis.

The underscoring in the foregoing text was supplied by this writer. This letter of March 26, 2004 discloses the first appearance of the word "permanent" in the medical reports/records of Dr. Sollenberger. It was prepared only after discussion with counsel of a "statement . . . needed for a deposition." Further, Dr. Sollenberger speaks of himself in the third person in the second paragraph, a fact which permits us to infer that it was not Dr. Sollenberger who authored the letter of only ten (10) days ago. That he ratified, confirmed or authorized the letter is suspect because his "signature" appears to be a rubber stamp signature.

Plaintiffs certified this matter as trial ready as of January 20, 2004. Accordingly, Plaintiffs' counsel as of that date was not anticipating that Dr. Sollenberger would be issuing further medical reports; and, by implication, was at that time prepared to stand on the reports of his medical expert as they then existed. Moreover, the letter authored most recently, ostensibly by Dr. Sollenberger, is a last minute addition to a case in which the defects in Plaintiffs' proffered expert's opinions have been well-aired and scrutinized at an oral argument on Defendants' prior *Motion in Limine* to exclude the testimony at trial of Plaintiffs' first vocational expert, Harold Kuhlman. Having determined that Mr. Kuhlman may not testify for similar reasons, Plaintiffs appear to be scrambling in order to get a second vocational expert qualified to render an economic opinion on the basis of permanency, a feat that is difficult to accomplish in the absence of medical evidence of that underpinning to Mr. Risser's March 23, 2003 report. In that context, it is quite apparent that Plaintiffs are struggling to place the word "permanent" into the mouth and on the lips of Dr. Sollenberger, and are doing it at the last minute. Such efforts—now—cannot undo the fact that Mr. Risser has expressed a firm opinion in his March 23, 2003 report that is unsupported by at least one critical fact supporting his expressed opinions.