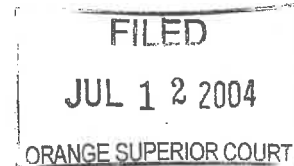


STATE OF VERMONT
ORANGE COUNTY, SS.

ORANGE SUPERIOR COURT
DOCKET NO. 73-4-02 OeCv

PAULA HANNAH and
JOHN HANNAH
Plaintiffs

MARCUS COXON, M.D. and
GIFFORD MEDICAL
CENTER, INC.
Defendant



ORDER RE: MOTION IN LIMINE

Absent a showing of particularized need, defendants are allowed to introduce expert medical testimony from one general surgeon, Dr. Joseph Kiernan or Dr. Frederick P. Loy, and not both. *Entry Regarding Motion, Hannah v. Coxon*, 73-4-02 OeCv (May 17, 2004) (J. Burgess). To the extent that defendants still intend to call Dr. Loy, therefore, Dr. Kiernan's testimony, absent the showing of particularized need, becomes cumulative and this discussion moot. V.R.E. 403.

The fact that Dr. Kiernan himself suffered from the same condition as plaintiff, standing alone, is not such a showing of particularized need. Assuming that Dr. Loy testifies as the general surgeon expert for the defense, Dr. Kiernan's testimony—to the extent that he, as a patient, encountered a similar situation as plaintiff, in both medical condition and difficulty in diagnosis—would be akin to allowing a lay witness to offer their personal experience as a patient into evidence and will not be allowed by this court. Dr. Kiernan's own medical condition or treatment, absent additional foundation, is not the type of evidence which would assist the finder of fact.

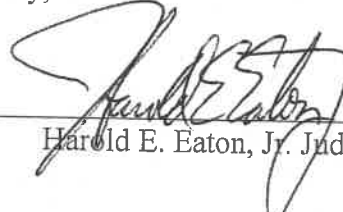
Assuming that Dr. Loy does not testify, Dr. Kiernan may be able to offer an expert opinion regarding the condition and its diagnosis if adequately based on facts or data perceived by or made known to him as a general surgeon. V.R.E. 703. This might include his own experience as a patient or it might not. It is unclear to the court, at this stage, how Dr. Kiernan's own medical condition might form, in part, a basis for his expert opinion, as presumably the diagnosis in his case was made by another physician, who would likely be in the best position to judge the difficulty of diagnosis. A ruling on this testimony must await the offer.

Given proper qualifications, Dr. Kiernan may provide expert testimony without specific reference to his personal medical history. This could include, absent the cumulation issues discussed above, his experiences, as a physician, with the difficulty in making the diagnosis.

However, in the event Dr. Kiernan bases his expert opinion upon not only his education and professional experience as a surgeon but also upon his particular personal experience as a patient, then his medical records must be made available to opposing counsel for examination. V.R.E. 705. Such testimony would be akin to waiving one's medical privilege by putting it in issue. V.R.E. 503(d)(3); see *Castle v. Sherburne Corp.*, 141 Vt. 157, 168 (1982). Dr. Kiernan can not rely upon his own medical history as a basis, in whole or in part, for his expert opinion and at the same time refuse to provide his medical records concerning that medical issue. Such a position would enable the expert to have the benefit of his prior medical treatment to bolster his opinion, while frustrating efforts to cross examine.

Therefore, should Dr. Kiernan testify, and should he attempt to offer, as a basis for his expert testimony, his past experiences as a patient, Dr. Kiernan is to provide to the plaintiff, prior to testifying, his medical records as they pertain to his own experience with the medical condition for which he is offering his expert opinion. If Dr. Kiernan is not relying upon his own medical history as a basis for his expert opinion, his medical records need not be produced. A ruling upon whether Dr. Kiernan's past medical history is appropriate for consideration by the jury, as part of his basis for expert opinion, if so offered, will be made at trial.

Dated at Chelsea, Vermont, this 12 day of July, 2004.


Harold E. Eaton, Jr. Judge

FILED

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ORANGE SUPERIOR COURT