

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-01117

Daniel Shaffer v. Heartbeat Lifesharing Corporation, et al

ENTRY REGARDING MOTION

Title: Motion to Strike; Motion in Limine Expert Disclosure-Preclude Expert Testimony of Ahmed Nadeem MD; to Exclude Testimony of Matthew Smith, M.D. (Motion: 2; 7)
Filer: Richard J. Windish David M. Pocius; David F. Silver Daniel S. Shaffer
Filed Date: February 23, 2022; October 25, 2022

The motion is GRANTED IN PART and DENIED IN PART.

The present motions in limine concern Defendants' proposed expert witness Dr. Matthew Smith and Plaintiff's proposed rebuttal expert, Dr. Ahmed Nadeem. The motions, although filed separately, are intertwined around the central issue of this case, which concerns how long a young man's testicular cancer, went undetected—and by extension, untreated—by his caregivers until after his death at age 26 in April of 2017.

Background

Due to the circumstances of Jared Shaffer's life, there are a number of factors, which complicate this central issue. Mr. Shaffer had multiple, severe disabilities, including autism, epilepsy, obsessive compulsive disorder, and anxiety. Mr. Shaffer, due to these disabilities had limited ability to express himself in words and lacked the ability to live independently. Mr. Shaffer is reported to have been able to communicate with trusted friends and caregivers, but he was also reported to have a fairly high pain threshold.

For purposes of this motion, the Court understands the following facts to be undisputed. In 2009, when Mr. Shaffer turned 18, he became a resident at Co-Defendant Heartbeat, a Camphill community that focuses on helping disabled individuals by having them live on a communal, working farm where they can work, study, and develop to their highest potential.

Heartbeat does not provide on-going medical care to its residents but does provide caregivers

who help the residents perform both work tasks and personal grooming and care. Medical care service, in this case, were performed by Co-Defendant Northeast Kingdom Human Services (NEKHS), who provided regular medical check-ups and annual physicals.

As part of his program, Mr. Shaffer had his annual physicals and regular health care with Dr. Peter Sher, a physician at the Hardwick Area Health Center, Inc., which was coordinated through NEKHS. A Heartbeet employee always accompanied Mr. Shaffer to these examinations. The record indicates that Dr. Sher saw Mr. Shaffer in 2013 and 2014 and did genital examinations, which he has stated indicated no abnormal masses on either testicle. In 2015 and 2016, Mr. Shaffer refused to allow Dr. Sher to perform the same exam, and Dr. Sher did not perform the exam in either year. In April 2017, Mr. Shaffer, then 26-years old, passed away. The cause of his death was a sudden and acute embolism, but at his autopsy, the Chief Medical Examiner found a cancerous testicular tumor that had metastasized into Mr. Shaffer's liver, lungs, and lymph nodes. Both sides agreed that at his time of death, Mr. Shaffer was suffering from stage III testicular cancer.

Mr. Shaffer's father has brought the present action alleging that Heartbeet and NEKHS were negligent and breached their duty of care to Mr. Shaffer by failing to detect and offer treatment to Mr. Shaffer for his cancer, which Mr. Shaffer alleges caused the embolism and his untimely passing. In support of his claim, Mr. Shaffer has retained Dr. Leslie Lockridge to opine about Mr. Shaffer's cancer, its growth, and why at certain points a reasonable medical examination would have likely prevented Mr. Shaffer's passing and any suffering that he incurred during his stage three cancer. While oversimplifying Dr. Lockridge's opinion, the primary conclusion offered is that Mr. Shaffer had a relatively common and slow-growing form to testicular cancer that in Dr. Lockridge's opinion took three years to develop and metastasize. This conclusion reinforces Plaintiff's theory that but for Defendants failure to follow up on likely symptoms and intervene between 2015 and 2017, Mr. Shaffer could have been treated and might have survived, given the positive treatment outcomes for this kind of cancer.

Co-defendants in this matter have retained Dr. Matthew Smith as an expert witness to rebut Dr. Lockridge's opinion and testimony. Dr. Smith's opinion lodges several criticisms and objections to Dr. Lockridge's testimony, including taking issue with the academic studies he

cites as well as the conclusions and timelines he draws. Dr. Smith suggests given all of the circumstantial evidence that Mr. Shaffer had a more aggressive form of testicular cancer. As support for this theory, Dr. Smith points to the autopsy finding of likely choriocarcinoma cells in a portion of Mr. Shaffer's testicular tumor. From this evidence as well as the various timelines, Dr. Smith opines that Mr. Shaffer's cancer was likely fast-growing and quick to metastasize. Dr. Smith's opinion supports the Co-Defendants' position that the co-defendants could have done very little to help Mr. Shaffer, beyond what they did, given the speed and shortened timeline behind this cancer.

In rebuttal, Plaintiffs have retained Dr. Nadeem to address the choriocarcinoma theory and to suggest several flaws in its application and in Dr. Smith's opinion.

Legal Analysis I. Dr. Smith

Plaintiff's primary objection to Dr. Smith's proposed testimony rests upon what Plaintiff characterizes as Dr. Smith's unscientific and speculative theory that Mr. Shaffer's cancer was either dominated or controlled by the choriocarcinoma cells. Plaintiff's argument is that the evidence of Choriocarcinoma cells found in Mr. Shaffer is scant, conditional, and ultimately insufficient to make the leaps in logic and scientific conclusions that Dr. Smith takes. Plaintiff also takes issue with Dr. Smith's use of two peer-reviewed studies, particularly to support a more collapsed timeline of how Mr. Shaffer's disease progressed.

Defendants respond by noting that Dr. Smith's conclusions are based on Dr. Smith's education and experience treating cancers similar to Mr. Shaffer's and come from his understanding of how different types of cancers develop and from the evidence that there were some choriocarcinoma cells in Mr. Shaffer's testicular tumor. His opinion also derives, from his review of Mr. Shaffer's available medical records and the testimony of Dr. Lockridge, the Chief Medical Examiner, and Dr. Sher. Defendants also defend Dr. Smith's citations to the journals by noting that his opinion is not premised on the journals, but rather the journals are offered as evidence of how Dr. Smith came to form some of his underlying analysis.

The core dilemma for the parties is that there is very little information on which to foot or anchor any opinion about the timeline and development of Mr. Shaffer's disease in this case. All of the medical records associated with Mr. Shaffer's cancer come from his post-mortem

examination. This autopsy appears to have been conducted primarily to establish Mr. Shaffer's cause of death but not with an eye to preserving or providing data on some of the historical origins or development of the cancer in Mr. Shaffer. Both sides note repeatedly that there is an overall lack of evidence and accuse the other of overreaching into speculation and unsupported testimony.

Some of the missing data includes testing of the choriocarcinoma cells or the make-up and composition of the cancer cells in other parts of Mr. Shaffer's body. There is also the problem of what can be gleaned from Mr. Shaffer's final years. Each side has mustered the scant facts—a decrease in appetite here, a complaint of pain there—and attempted to reconstruct what was happening to Mr. Shaffer's body in 2015, 2016, and early 2017. In reviewing the three experts' reports, the Court does not find one expert purposefully ignoring or disregarding the key facts or data available about Mr. Shaffer's life and health. Instead, the reports assemble the shards of Mr. Shaffer's medical and personal history into different shapes. Dr. Smith clusters the facts and gives greater weight to certain facts that support the conclusion of a short, sudden onset. Dr. Lockridge spreads the data along a timeline that would suggest a longer-gestating illness. Dr. Nadeem offers criticism of Dr. Smith's decisions and assumptions arguing that the circumstantial evidence and learned treatises do not support his compressed timeline theory.

While this summary is by necessity reductive of the more nuanced points offered by each of the experts, they are illustrative of the real debate occurring here, which is a series of competing theories about events that cannot be definitively known to either the parties or to the experts. Plaintiff's issues go to the credibility and weight of Dr. Smith's testimony. While Plaintiff emphasizes that the existence of the choriocarcinoma cells appear to be too few in number to support Dr. Smith's theory and were not definitively examined, tested, and confirmed by the medical examiner, the emphasis is misplaced for purposes of a Motion to Strike on *Daubert* grounds. Vermont applies the standard for admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 592-93 (1993), under which the trial courts “act as gatekeepers who screen expert testimony ensuring that it is reliable and helpful to the issue at hand before the jury hears it.” *985 Assocs., Ltd. v. Daewoo Elecs. Am., Inc.*, 2008 VT 14, ¶ 6.

The analysis under *Daubert* and *985 Assocs., Ltd.*, by extension, looks to the three prongs of VRE 702, which allow an expert to testify about their opinion if:

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

V.R.E. 702.

Dr. Smith's theory as stated in his expert opinion and further explored and refined in his deposition uses the existence of the choriocarcinoma cells as both a starting point and as an organizing principle. Yet, it is not the only fact on which his opinion hangs, ipse dixit. As noted by Defendants, Dr. Smith's opinion incorporates and synthesizes several facts including that Mr. Shaffer's cancer was a non-seminoma cancer, which is a more aggressive and rapid spreading cancer than non-seminoma cancer. The opinion also relies on the facts that Mr. Shaffer had a seminomatous tumor and incurred a sudden death with evidence of extensive metastatic disease. Dr. Smith also finds support for his conclusion in the small size of the testicular tumor in relation to the larger tumors found in other parts of Mr. Shaffer's body.

Each of these facts together appear in Dr. Smith's testimony to support the overall thrust of Dr. Smith's opinion and working theory, which is effectively, that Mr. Shaffer had a rare, rapidly spreading cancer that likely narrowed the window during which the Defendants could have identified or intervened and that this version is more consistent with the circumstantial facts of Mr. Shaffer's last years, than Dr. Lockridge's version. As presented by Dr. Smith, these facts in conjunction with his analysis form a conclusion and methodology, which while not immune from attack and counter-point are coherent within its organization and process. *Estate of George v. Vermont League of Cities & Towns*, 2010 VT 1, ¶ 15. ("in fulfilling its gatekeeper role, the trial court must "examine the expert's conclusions in order to determine whether they could reliably flow from the facts known to the expert and the methodology used.") (quoting *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F.Supp.2d 584, 595 (D.N.J.2002)).

Plaintiff, in his motion, makes a number of counter-arguments, which raise legitimate doubts about Dr. Smith's conclusions. These arguments, despite being packaged as challenges to the methodology appeal not to scientific certainty but to logic and reason. As such, they are the

purview of the fact-finder. *Estate of George*, 2010 VT at ¶16 (noting that the Rule 702 examination should not serve as “a preliminary inquiry into the merits of the case”). As long, as there is a sound factual and methodological basis, and the opinion is relevant to the issues at hand, the expert opinion should pass to the jury or fact-finder for its decision. *Id.*

For these reasons, Plaintiff’s motion in limine is **denied** at this time. The Court finds ample basis to allow Dr. Smith’s testimony and to allow the objections and issues raised by the Plaintiff go to the fact finder in this case. *In re Prempro Prods. Liability Litigation*, 2012 WL 13034062, at *3 (E.D. Ark. April 9, 2012) (“No doubt, there is much scientific debate on this issue . . . this is the classic battle of the experts, and goes to the weight, not the admissibility of the evidence . . . Defendants should be able to reveal the weaknesses of the experts’ assessments of the studies and conclusions through vigorous cross-examination [and] presentation of contrary evidence”) (citations and quotations omitted).

Legal Analysis II: Dr. Nadeem

In this case, Plaintiff has offered Dr. Lockridge as his initial witness. Plaintiff has also disclosed Dr. Nadeem as Plaintiff’s surrebuttal witness. In cases such as this, where one party wishes to preclude the other party’s surrebuttal witness, the Court has discretion to determine whether the witness may testify. *State v. Bessette*, 148 Vt. 17, 19 (1987) (“The trial court has wide discretion in matters of trial conduct and evidentiary rulings, including the admission of rebuttal testimony.”) (internal citations omitted). The Court may use this discretion to either allow or deny the entrance of surrebuttal witness testimony. *State v. Noyes*, 198 Vt. 360, 367 (2015).

The Court may decide to not allow the witness to testify if the witness presents information that is cumulative or repetitive. V.R.E. 403 allows the Court to exclude evidence because of “needless presentation of cumulative evidence.” If a witness offers the same evidence as a prior witness, the Court may exclude the witness from testifying. *Hutchins v. Fletcher Allen Health Care, Inc.*, 172 Vt. 580, 582, (2001) (“The court was similarly within its discretion when it denied pretrial plaintiffs’ . . . rebuttal witness. To the extent that [the rebuttal witness] was going to offer the same testimony on rebuttal as plaintiffs had proffered for their case-in-chief, the same reasons warranted the exclusion.”) See also *Nelson v. Percy*, 149 Vt. 168, 170 (1987) (“The court ruled that the evidence was repetitive and the issue had already been covered in the plaintiff’s testimony and in [plaintiff’s witness’s] testimony.”).

The Court may also decide to allow the witness to testify. When the duplicative nature of the witness's testimony is in question, the party offering the surrebuttal witness has the burden of proving the testimony is new. *Bessette*, 148 Vt. at 20 (“The party offering surrebuttal evidence must demonstrate that new, and not merely cumulative, evidence is being offered.”) See also *State v. Richards*, 144 Vt. 16, 20 (1983) (“Under these circumstances, and the lack of any offer of new evidence by the defendant, the trial court exercised sound discretion and denied the proffered surrebuttal.”) In this case, Plaintiff must show how the testimony of the surrebuttal witness differs from the testimony of the original witness. *Bessette*, 148 Vt. at 20. If the Plaintiff sufficiently proves the fact is new, the Court should allow the surrebuttal witness to testify. *Noyes*, 198 Vt. at 367 (“The trial court similarly did not abuse its discretion in allowing the State to revisit the basis for the fight on rebuttal.”).

In their response, Plaintiff asserts that Dr. Nadeem's report includes material not covered by Dr. Lockridge. Specifically, Plaintiff states that “Dr. Nadeem was tasked with addressing ‘the reliability of Dr. Smith's conclusion that Jared Shaffer's testicular cancer was an unusually aggressive one due to the presence of choriocarcinoma foci in the tumor cells, as set forth in the pathology report.’” Plaintiff further explains that “Dr. Nadeem's report focuses on Dr. Smith's testimony and the characteristics of choriocarcinoma. As noted above, Dr. Lockridge's opinion and testimony, which was prepared before Dr. Smith's opinion focuses on causation and how mixed-germ cells develop and spread, as well as the type of treatment and/or intervention that may have prevented Jared's death. Dr. Smith in his critique of Dr. Lockridge introduced the idea of an accelerated timeline based on the presence of choriocarcinoma cells. Dr. Lockridge, by his own admission is not versed in the literature of choriocarcinoma and how the presence of such cells may or may not impact the speed with which testicular cancer can develop.

Given these circumstances, the Court concludes that it is reasonable to allow Dr. Nadeem to testify. Notwithstanding this permission, the Court does find it necessary to put some limits on the use of Dr. Nadeem. First, Dr. Nadeem may only be called to the extent Plaintiff requires a rebuttal witness concerning the defense's presentation of the choriocarcinoma theory. Dr. Nadeem may only testify to the extent that Dr. Lockridge lacks the grounding or training to opine on the nature of choriocarcinoma. In other words, Dr. Nadeem cannot be introduced to repeat testimony from Dr. Lockridge to “tip the scale” in a “battle of the experts.” See *Mejia v.*

Quest Diagnostics, Inc., 2019 WL 1012532, *5 (NJ Super. Mar. 4, 2019) (“Medical malpractice

claims often come down to a “pitched battle of experts,” where any artificial advantage may “tip the scales” such as to affect the ultimate outcome.”). This would include portions of Dr. Nadeem’s report where he draws conclusions about what would have occurred if Mr. Shaffer had been tested in 2016 or 2015, the nature of Mr. Shaffer’s cancer, or the likelihood of treatment outcomes. Those areas are covered by Dr. Lockridge’s testimony, and it is reasonable not to allow a second “surrebuttal witness” to tip the scales.

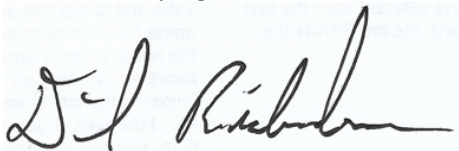
The direction of the Court is that Plaintiff must bifurcate, and to the extent that Dr. Nadeem is sought to be offered, it must be to present new testimony on a limited issue. Given the centrality of the choriocarcinoma issue to Defendant’s theory, it is only fair that Plaintiff be allowed to present a response to this particular theory to the extent that their original witness cannot. Any portion of Dr. Nadeem’s proposed testimony beyond this narrow scope, however, is impermissible and repetitive testimony. As such, it is not allowed.

Based on this, the Court **grants** Defendants’ motion **in part** and **strikes** Dr. Nadeem’s proposed testimony to the extent that he offers an opinion above and apart from responding to Dr. Smith’s opinion on the choriocarcinoma cells alleged to be found in Mr. Shaffer’s body and to the extent that this issue is beyond the ability of Dr. Lockridge to testify.

ORDER

The Court **denies** Plaintiff’s motion to exclude the testimony of Dr. Matthew Smith. The Court **grants in part** Defendants’ motion to exclude and strike Dr. Ahmed Nadeem’s rebuttal testimony consistent with this order to exclude portions of Dr. Nadeem’s report and testimony that overlaps with Dr. Lockridge’s testimony, but it **denies in part** Defendants’ motion to the extent that Dr. Nadeem offers new testimony to respond to Dr. Smith’s testimony and report on the presence and effect of choriocarcinoma cells in Mr. Shaffer’s body.

Electronically signed on 12/19/2022 9:10 PM pursuant to V.R.E.F. 9(d)



Daniel Richardson
Superior Court Judge