

2013 WL 5951254 (Utah Dist.Ct.) (Trial Order)
District Court of Utah.
First Judicial District Court
Cache County

Glenna COLLIER and Wendell Collier, Plaintiffs,

v.

Scott W. GROVER, D.O.; Jeffrey S. Job, M.D.; Ali Ben-Jacob, M.D.; Cache Valley Surgical
Consultants, P.C; Cache Valley Specialty Hospital, LLC; and Does I-X, Defendants.

No. 110101663.

July 10, 2013.

Memorandum Decision

[Thomas L. Willmore](#), Judge.

*1 THE ABOVE MATTER is before the Court pursuant to (1) Defendant Dr. Job's Motion in Limine No. 18 to Exclude Evidence or Argument that Plaintiff's are Entitled to Punitive Damages; (2) Defendant Dr. Job's Motion in Limine No. 3 to Preclude Plaintiff's from Asking Members of the Jury to Put Themselves in Plaintiff's Shoes or Other Similar Comments; (3) Defendant Dr. Job's Motion in Limine No. 21 to Exclude Plaintiff's Counsel from Presenting "Golden Rule" Arguments; (4) Defendant Dr. Job's Motion in Limine No. 10 to Exclude Testimony From Dr. Cohen Regarding Causation of the Staph Infection and Subsequent Empyema; (5) Defendant Dr. Job's Motion in Limine No. 14 to Preclude Fact Witness Dr. Goff From Testifying as to Dr. Grover's Standard of Care and Causation; (6) Defendant Dr. Job's Motion in Limine to Preclude Dr. Van-Scoy Mosher From Testifying as to the Effect of Intra-Plueral Administration of Adriamycin and Causation, and (7) Defendant Dr. Job's Motion in Limine Regarding Non-Economic Damage Cap.

In preparation of this decision, the Court has reviewed the respective pleadings, each document submitted before the Court, and the applicable case law and statutory provisions. Oral arguments on the Motions were heard on May 8 and 10, 2013. Having considered the foregoing, the Court issues this Memorandum Decision.

DISCUSSION

(1) Dr. Job's Motion in Limine No. 18 to Exclude Evidence or Argument that Plaintiff's are Entitled to Punitive Damages

Dr. Job argues that Plaintiff's should be precluded from introducing evidence that punitive damages should be awarded and/or that Dr. Job should be punished. Dr. Job also asks that Plaintiff's be precluded from asking the jury to "send a message" or "make an example" out of any aspect of the case. Plaintiff's stipulate that they will not introduce claims of punitive damages. However, Plaintiff's argue they should be allowed to make statements regarding "sending a message" so long as the statements concern liability and accountability rather than damages.

The Court finds that the use of the phrase "send the message" is likely to arouse the jury to reach a verdict based on something other than the evidence presented. Therefore, the Court will preclude Plaintiff's use of such. However, the Court finds that Plaintiff can say a phrase such as the "Doctor should be held accountable" as it concerns liability and accountability and not damages. The Court finds the use of the phrase "accountable" is similar to holding the defendant "liable" and therefore will not be inflammatory or prejudicial.

Accordingly, Defendant Dr. Job's *Motion in Limine No. 18 to Exclude Evidence or Argument that Plaintiffs are Entitled to Punitive Damages* is granted in part and denied in part.

(2) Dr. Job's Motion in Limine No. 3 to Preclude Plaintiff's from Asking Members of the Jury to Put Themselves in Plaintiff's Shoes or Other Similar Comments

Dr. Job argues it would be unfairly prejudicial to allow Plaintiff's to ask the jury to put themselves in Plaintiff's shoes when deciding this case and assessing damages. Dr. Job argues allowing such statements would make it more likely that the jury would improperly base their decisions on sympathy rather than the facts and law. Plaintiff's agree that such statements are improper with respect to damages. However, Plaintiff's argue they should be able to ask the jury to consider what kind of care and treatment they would personally consider to be reasonable when evaluating liability issues.

*2 The Court finds that such "golden rule" arguments on the issue of liability would be improper in this matter. Unlike the case *Green v. Louder*, 2001 UT 62, ¶ 36, 29 P.3d 638, the "reasonable person" standard is based on the care that other qualified doctors would ordinarily use and should not be based on the juror's own experiences. In *Green*, the court found that it was proper to use golden rule arguments on the issue of liability when determining fault in a car accident. In this matter, the standard of care will be presented through expert testimony and the jury should base their decision on this evidence. See *Farrow v. Health Services Corp.*, 604 P.2d 474, 477 (Utah 1979). Although jury instructions have not been prepared, the Court also finds the Model Utah Jury Instructions persuasive in precluding such "golden rule" statements from being presented to the jury. See MUJI 2d CV3.26 ("You may not use a standard based on your own experience or any other standard of your own.").

Accordingly, Defendant Dr. Job's *Motion in Limine No. 3 to Preclude Plaintiff's from Asking Members of the Jury to Put Themselves in Plaintiff's Shoes or Other Similar Comments* is hereby granted.

(3) Dr. Job's Motion in Limine No. 21 to Exclude Plaintiff's Counsel from Presenting "Golden Rule" Arguments

Similar to the Motion in Limine No. 3, this Motion seeks to preclude Plaintiff's from presenting "golden rule" arguments. Specifically, Dr. Job argues Plaintiff's should not ask the jury to "do unto him as they would have him do unto them." This would be improper because it encourages the jury to decide the case based on personal interest and bias rather than on the evidence. Further, liability evidence must come from experts and not the jury. Plaintiff's argue that use of the golden rule arguments is proper when they are not concerned with damages, but instead with liability.

As noted above, the Court finds that such "golden rule" arguments on the issue of liability would be improper in this matter as Plaintiff's must establish the standard of care through expert testimony rather than simply a "reasonable person" standard.

Accordingly, Defendant Dr. Job's *Motion in Limine No. 21 to Exclude Plaintiff's Counsel from Presenting "Golden Rule" Arguments* is hereby granted.

(4) Dr. Job's Motion in Limine No. 10 to Exclude Testimony From Dr. Cohen Regarding Causation of the Staph Infection and Subsequent Empyema

Dr. Job moves to exclude, under [Utah Rules of Evidence 702](#) and [703](#), any testimony of Dr. Cohen on the issue of causation of Plaintiff's staph infection and subsequent empyema. Specifically, Dr. Job argues that Dr. Cohen's testimony does not assist the trier of fact in determining whether Dr. Job's interpretation of the chest x-ray caused Plaintiff's subsequent infections. Dr. Job argues Plaintiff's have the burden of proving that the subsequent infection and empyema were caused by Dr. Job's negligence. Plaintiff's argue that Dr. Cohen is able to testify to a reasonable degree of medical certainty that the subsequent infection and empyema would not have occurred except for the misplaced catheter and infusion of chemotherapeutic agents into the pleural space. Plaintiff's agree that none of the experts can pinpoint exactly when the subsequent infection began, but assert that there is

sufficient expert testimony to establish that the infection occurred as a result of the initial catheter misplacement and subsequent chemotherapy infusions or as a result of one of Dr. Goff's procedures that were necessary to treat the misplaced catheter.

As previously held in the Court's decision on Dr. Job's *Motion for Partial Summary Judgment Regarding Causation*, the Court agrees with the Plaintiffs. The Court finds Plaintiff's have presented expert testimony sufficient to establish that the October 2009 pleural effusion and December 2009 empyema were causally linked with Dr. Job's alleged negligence under either of the two theories presented. (Dep. of Dr. Cohen, 234:12-16; Dep. of Dr. Goff, 28:22-29:4, 37:1-19, 56:16-23.) Dr. Cohen's expert testimony is that, but for the infusion of chemotherapy into Plaintiff Glenna Collier's pleural space, she would not have suffered any of the subsequent pleural effusions or empyemas. (*Id.*)

*3 The Court finds the jury must be allowed to look at the sequence of these events and ultimately determine if the subsequent medical problems were caused by Dr. Job's negligence. It will be for the jury to weigh the expert testimony regarding this issue.

Accordingly, Defendant Dr. Job's *Motion in Limine No. 10 to Exclude Testimony From Dr. Cohen Regarding Causation of the Staph Infection and Subsequent Empyema* is hereby denied.

(5) Dr. Job's Motion in Limine No. 14 to Preclude Fact Witness Dr. Goff From Testifying as to Dr. Grover's Standard of Care and Causation

Dr. Job argues that Dr. Goff should be precluded from testifying as to causation because his testimony on that issue is inconclusive. Dr. Job argues that Dr. Goff's opinions on causation are speculative. Plaintiff's have stipulated that they will not be introducing any evidence regarding Dr. Grover's standard of care. Plaintiff's argue that they appropriately designated Dr. Goff and that Dr. Goff will testify that if the course of events had not been started, then his treatment would have been unnecessary.

As noted above and in the Court's decision on Dr. Job's *Motion for Partial Summary Judgment Regarding Causation*, the Court finds the jury must be allowed to look at the sequence of these events and ultimately determine if the subsequent medical problems were caused by Dr. Job's negligence. It will be for the jury to weigh the expert testimony regarding this issue. However, the Court will reserve specific objections to Dr. Goff's testimony concerning cumulative or duplicative causation testimony for trial.

Accordingly, Defendant Dr. Job's *Motion in Limine No. 14 to Preclude Fact Witness Dr. Goff From Testifying as to Dr. Grover's Standard of Care and Causation* is hereby denied.

(6) Dr. Job's Motion in Limine to Preclude Dr. Van-Scoy Mosher From Testifying as to the Effect of Intra-Plueral Administration of Adriamycin and Causation

Dr. Job argues that Plaintiffs' oncology expert, Dr. Michael B. Van Scoy-Mosher, cannot medically explain the expected effects of an administration of Adriamycin to the pleural space and had to resort to speculation to support his opinion that Plaintiff was injured by the inadvertent dosages. Dr. Job argues this speculative testimony fails to meet the admissibility standards contained in [Rule 702 of the Utah Rules of Evidence](#).

Plaintiff's argue that Dr. Mosher did not testify that he lacks sufficient evidence or experience as to the effects of Adriamycin being administered in the pleural space. Instead, Plaintiff's argue Dr. Mosher testified that nobody knows what is "common" or "typical" because nobody intentionally puts Adriamycin into a pleural space. Thus, Plaintiff's argue Dr. Mosher has similar knowledge and experience regarding the immediate symptoms following an inadvertent intrapleural therapeutic dose of Adriamycin in the pleural space as Dr. Job's expert does.

Plaintiff's also argue that Dr. Mosher's primary causation testimony is that Plaintiff suffered a pleural effusion which led to an infection and this was a result of the chemotherapy being administered in the pleural space. Dr. Mosher has sufficient knowledge and experience to know that such an intrapleural infusion can cause pleural effusion and therefore is not required to know the immediate effects of such an infusion.

*4 The Court finds that a 702 hearing is necessary to determine whether Dr. Mosher's opinions are based upon sufficient facts or data. [Utah R. Evid. 702\(b\)](#) (2013). Dr. Mosher's testimony regarding the effects of administering Adriamycin into the pleural space has not been clearly established as being based on reliable scientific principles. The Court understands there is limited information regarding Adriamycin being administered in the pleural space because it is not commonly done. However, Dr. Mosher should be able to explain the basis for his opinion that the infusion of Adriamycin into the pleural space is what caused the pleural effusion and subsequent infection.

Accordingly, Defendant Dr. Job's *Motion in Limine to Preclude Dr. Van-Scoy Mosher From Testifying as to the Effect of Intra-Plueral Administration of Adriamycin and Causation* shall be reserved until a 702 hearing is conducted. Plaintiff's may conduct a short 702 hearing before Dr. Mosher's testimony at trial or may schedule a separate hearing before trial.

(7) Dr. Job's Motion in Limine Regarding Non-Economic Damage Cap

The Court notes that the parties did not address this Motion during oral arguments, likely because Plaintiff's acknowledge that Section 78B-3-410(2) of the Utah Health Care Malpractice Act permits Dr. Job to seek a post-trial reduction in non-economic damages. However, Plaintiff's rightly point out that such a reduction (and motion) is premature at this point. The Court agrees.

Accordingly, Defendant Dr. Job's *Motion in Limine Regarding Non-Economic Damage Cap* shall be reserved until after trial.

CONCLUSION

(1) Defendant Dr. Job's Motion in Limine No. 18 to Exclude Evidence or Argument that Plaintiff's are Entitled to Punitive Damages is hereby granted in part and denied in part. Plaintiff's may not use the phrase "send the message" but may say a phrase such as the "Doctor should be held accountable" as it concerns liability. **(2) Defendant Dr. Job's Motion in Limine No. 3 to Preclude Plaintiff's from Asking Members of the Jury to Put Themselves in Plaintiff's Shoes or Other Similar Comments is hereby granted.** **(3) Defendant Dr. Job's Motion in Limine No. 21 to Exclude Plaintiff's Counsel from Presenting "Golden Rule" Arguments is hereby granted.** **(4) Defendant Dr. Job's Motion in Limine No. 10 to Exclude Testimony From Dr. Cohen Regarding Causation of the Staph Infection and Subsequent Empyema is hereby denied.** **(5) Defendant Dr. Job's Motion in Limine No. 14 to Preclude Fact Witness Dr. Goff From Testifying as to Dr. Grover's Standard of Care and Causation** is hereby denied. However, the Court will reserve specific objections to Dr. Goff's testimony concerning cumulative or duplicative causation **testimony for trial.** **(6) Defendant Dr. Job's Motion in Limine to Preclude Dr. Van-Scoy Mosher From Testifying as to the Effect of Intra-Plueral Administration of Adriamycin and Causation** is hereby reserved until a 702 hearing is conducted. Plaintiff's may conduct a short 702 hearing before Dr. Mosher's testimony at trial or may schedule a separate hearing before trial. And **finally, (7) Defendant Dr. Job's Motion in Limine Regarding Non-Economic Damage Cap is hereby reserved until after trial.**

This final decision should resolve all pending motions that were previously submitted to the Court during the May 8 and 10, 2013 oral arguments. The parties shall immediately provide the Court notice of any remaining motion(s) that might have been overlooked. Counsel for Plaintiff's is directed to prepare an order in conformance herewith.

Dated this 10th day of July, 2013.

BY THE COURT:

<<signature>>

Thomas L. Willmore

DISTRICT COURT JUDGE

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