COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

GIVA L. GARDNER,	)	Case No. CV 14-822254
	)	
	)	
PLAINTIFF,	)	JUDGE MICHAEL E. JACKSON
	)	
v.	)	
	)	**JOURNAL ENTRY AND OPINION:**
	)	**PLAINTIFF'S FIRST MOTION IN LIMINE.**
DALE A. BAUR, D.D.S., ET AL.	)	
	)	
DEFENDANTS.	)	

Plaintiff Giva L. Gardner's (Gardner) first motion in limine to preclude the testimony from Joseph P. McCain DMD (Dr. McCain) retained by Defendant Dale A. Baur, D.D.S. (Dr. Baur), and Thomas W. Braun DMD (Dr. Braun) retained by University Hospitals Case Medical Center (UH), filed 06/26/2015, is granted and denied in part. The testimony of each of these experts is relevant based upon this Court's review of each expert's report. Gardner's claim to the contrary is not well taken.

That does not mean that each expert will be permitted to testify. The purpose of expert testimony is to aid the jury because the subject matter of their testimony is such that expert opinions are permitted to assist the jury in understanding that the material facts at issue. *State v. Beuke*, 38 Ohio St.3d 29, 44, 526 N.E.2d 274 (1988). Medical-related testimony is a common example when expert testimony is permitted under the rules.

In this case, two experts, one for Dr. Baur and one for UH give the exact same opinion after reviewing the same records. Each has stated to a reasonable degree of dental certainty that Dr. Baur did not breach the standard of care applicable to his treatment of Gardner in this case, and that any injuries she suffered are not the proximate cause of Dr. Baur's conduct. In the briefs

filed by Dr. Baur and UH, each refers to the other's expert in advancing their arguments opposing Gardner's first motion in limine.

The jury does not need the testimony of two experts to provide the same opinion. This is particularly true in this case because Gardner's claim against Dr. Baur is a direct claim against him for his alleged dental malpractice. However, Gardner is not making a direct claim against UH. Rather, Gardner's claim against UH is based on vicarious liability.

In UH's motions for summary judgment and reconsideration of summary judgment, which were both denied by the Court in previous Journal Entries and Opinions, UH advocates that Dr. Baur is not an employee of UH; therefore, UH cannot be vicariously liable for any liability of Dr. Baur regarding his treatment of Gardner. UH relies upon the general rule that "an employer or principal is vicariously liable for the torts of its employees or agents… but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work." *Comer v. Risko*, 106 Ohio St. 3d 185, 188-89 (2005). According to UH, "Dr. Baur is exactly such an 'independent contractor' as described by the Supreme Court of Ohio in *Comer*." The only exception to this rule is when the hospital "holds itself out to the public as the provider of medical services and that the patient looks to the hospital, not a particular doctor, for medical care." *Comer*, at 188 (citing *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio State 3d. 435, 444- 45 (1994)). As to this exception, UH contends that Gardner did not "look to the hospital" as the provider of dental services, but rather she looked to Dr. Baur for that dental care, and as a result, this exception does not apply.

UH summarized its position bluntly by stating, "UH has been an unnecessary, peripheral player in this case from the very beginning … Dr. Baur also has his own counsel and his own

expert." In other words, Dr. Baur's alleged negligence is a matter solely for him to resolve, and UH does not need to be and should not be involved in that issue.

Because the testimony of the two defense experts on dental malpractice is duplicative and needlessly cumulative, only one Defense expert may testify. Evid.R. 403(B). Dr. Baur will have to select between his own expert, Dr. McCain, or UH's expert, Dr. Braun, both of whom are listed on his witness list.

Furthermore, the Court must address the issues raised by Defendants regarding the application of Loc.R. 21.1 Part I. In their briefs in opposition to this motion, both Defendants appeared compelled to explain and justify their respective expert reports. They did so by arguing that each report satisfied Loc.R. 21.1 Part I. "The trial court has discretion in deciding whether a party has complied with the mandates of Loc.R 21.1 Part I and, in the absence of compliance, to exclude expert testimony." *Rivacuk v. Zelitsky*, 1995 Ohio App. LEXIS 2614, *10, 1995 WL 371326 (Ohio Ct. App., Cuyahoga County June 22, 1995); citing *Pang v. Minch* (1990), 53 Ohio St.3d 186, 559 N.E.2d 1313; *Laster v. Light* (Mar. 16, 1995), Cuyahoga App. No. 66747, unreported.

Subpart (B) of this rule lays out the requirements for expert reports and states that the "report of a non-party expert must reflect his opinions as to each issue on which the expert will testify. A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report." In addition, both Defendants argue, as stated in UH's Brief in Opposition that "it is necessary and expected for defense expert reports to be less detailed than plaintiff's expert report, precisely because plaintiff bears the burden of proof on all issues, not defendants." UH Brief in Opposition, p. 2. Both defendants also believe that the rule is "*not* specific in regards

to what information must be included in an expert's report." UH elaborated by stating that this rule:

> "parallels Federal rule 26 (a) (2) (B). However, the Federal Rule is far more stringent in requiring an expert's report to contain a complete statement of all opinions the witness will express and the basis and reasons for them. The Local Rule, in contrast, requires only opinions on the issue of the expert will testify about. Accordingly, the standard in the local rule is easier to meet, and clearly contemplates that discovery depositions will be taken after expert reports are exchanged. "

UH Brief in Opposition, p. 5, fn. 2.

Dr. Baur and UH do not apply Local Rule 21.1 (B) correctly. This rule "was written to provide the parties with the basic facts and issues of the case to the fullest practicable extent" concerning the reports that experts prepare for the requesting party, and provide to the opposing party so that each party will understand the opinions to be offered by that expert. *Rivacuk supra*. Just because this Local Rule acknowledges that a deposition of an expert can be taken, does not mean an expert report need not express all of that expert's opinions on the issues in a case. Certainly, this Local Rule does not relieve or excuse an expert from expressing an opinion. Rather, it states very clearly, with emphasis added, that an expert "*must* reflect his opinions as to each issue on which the expert will testify." To emphasize the importance of stating all of that expert's opinions, the rule states what occurs when that does not happen: "[a] non-party expert will not be permitted to testify or provide opinions on issues not raised in his report." Nevertheless, Dr. Baur and UH interpret this rule to relieve an expert for a defendant from stating all of that expert's opinions in his report. That interpretation is not justified by the plain terms of this rule; there is no meaningful difference regarding the application of an expert in complying with Loc.R. 21.1 Part I(B) and the Federal Rule of Civil Procedure stated above. While it may be "customary and expected for defense expert reports to be less detailed" that practice does not meet the requirements of this rule.

Further, another purpose of this rule is to avoid "surprise" regarding expert opinions. One of the fundamental values of having an expert report that complies with the rule – meaning that all opinions are expressed in that report – is having a report that states all of that expert's opinions provides the opposing party a reasonable opportunity to prepare for a follow-up deposition, and to ask meaningful questions about opinions already expressed in that expert's report. An opposing party is significantly inhibited from preparing for and conducting a meaningful deposition if some or all of the expert's material opinions of the conduct at issue are omitted from that report. It is a "surprise" when opposing counsel learns of such opinions while in a deposition when there is no time to properly research and ask follow-up questions regarding those opinions. Attempting to provide only the bare minimum opinions in an expert report, and expecting opposing counsel to depose that expert without knowing what opinions that expert has withheld circumvents the very purpose of Loc.R. 21.1 Part I. While this is a different form of "surprise," albeit very sophisticated one, it is a "surprise" nonetheless.

Finally, Dr. Baur and UH criticize Gardner for not taking the depositions of Defendants' experts. In their view, Gardner had the opportunity to discover and find out all of the opinions that these experts are expected to testify to at trial, and as a result, she cannot complain or argue "surprise" at trial. This argument raises two points. First, Gardner has no obligation to take the deposition of these experts. That is a trial strategy decision that Gardner's counsel must make, and it is not unreasonable that she would rely on the opinions stated in the expert's report and the clear terms of Local Rule 21.1 Part I in making that decision[1]. Second, Dr. Baur and UH state or infer by their arguments that all of the opinions of these experts have not been revealed in their

[1] Defense counsel frequently make the same decision concerning a plaintiff's economic expert regarding lost wages or other economic damages in personal injury cases.

respective reports. As such, this admission or acknowledgment is a basis to determine that Defendants have not satisfied the clear terms of Loc.R. 21.1 Part I.

Accordingly, for the reasons stated above, UH cannot offer expert testimony regarding the alleged dental malpractice of Dr. Baur because it is duplicative of the same expert testimony to be offered by Dr. Baur, and because UH is subject only to vicarious liability. Evid.R. 403(B). Whichever expert Dr. Baur selects from his witness list, he will be limited to offering the opinions stated in his report. He cannot offer any other opinions not stated in his report, including any supporting opinions that led to the opinions stated in either expert's report.

IT IS SO ORDERED.

DATED: _____ **JUDGE MICHAEL E. JACKSON**

THE CLERK OF COURT SHALL SERVE A COPY OF THE FOREGOING JOURNAL ENTRY AND OPINION ON ALL COUNSEL OF RECORD AT THE ADDRESS LISTED ON THE COURT DOCKET.