

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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November 30, 2016

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RE: *Cheryl DeBussy v. Glenn E. Graybeal, M.D., Glenn E. Graybeal, M.D., P.A.,*
C.A. No. S14C-03-034 RFS

Submitted: November 28, 2016
Decided: November 30, 2016

Upon Defendants' Motion *in Limine* to Preclude Claims of Increased Risk of Injury.
Denied.

Dear Counsel:

Before the Court is the Motion *in Limine* of Defendants Glenn E. Graybeal, M.D. and Glenn E. Graybeal, M.D., P.A. (collectively "Dr. Graybeal") to Preclude Claims of Increased Risk of Injury. This Motion is **DENIED**.

Facts

This is a medical malpractice case in which Cheryl Debussy (“DeBussy” or “Plaintiff”) alleges that she received negligent care when Dr. Graybeal performed a laparoscopic cholecystectomy (gallbladder removal) on her. On April 18, 2012, during the surgery, Dr. Graybeal transected her common bile duct and then attempted to repair the damage by performing a primary end-to-end repair. The proper procedure to repair a transacted common bile duct is a Roux-en-Y hepaticojejunostomy, but this procedure was not performed. As a result, DeBussy has suffered multiple complications from the common bile duct injury and improper repair including a temporary bile drain, multiple stent procedures, and an increased risk of additional future complications.

Now, DeBussy seeks to introduce an expert witness, Dr. I. Michael Leitman (“Dr. Leitman”), who will testify that she “is at risk for additional future complications, including bile duct obstruction, anastomotic stricture, hernia formation, cirrhosis, liver failure, and liver transplant.”¹ At his deposition, Dr. Leitman testified that he could not state to a reasonable degree of medical probability that DeBussy would actually suffer future complications but that she is at risk for future complications because the proper repair procedure was not performed on the day of the surgery.

Parties’ Contentions

Dr. Graybeal argues that Dr. Leitman’s testimony will not establish that DeBussy is at an increased risk of complications to a reasonable degree of medical probability; therefore, any evidence on that issue is irrelevant and should be excluded. Dr. Graybeal recognizes that the

¹ Pl.’s Expert Witness Disclosure.

“increased risk of harm” doctrine exists in Delaware, but claims that the lack of testimony regarding DeBussy’s actual increased risk of complications and causation closes this avenue of recovery. Further, Dr. Graybeal contends that any testimony about increased risks should be excluded as unfairly prejudicial under D.R.E. 403.

Conversely, DeBussy argues that Dr. Leitman will be able to testify to a reasonable degree of medical probability that DeBussy is now at an increased risk for future complications because the correct repair procedure was not performed on the day of the surgery. DeBussy claims that Dr. Leitman’s inability to state a percentage of risk is inconsequential. What is essential is that Dr. Leitman can state to a reasonable degree of medical probability that DeBussy suffers an increased risk for complications as a result of Dr. Graybeal’s negligent repair.

Discussion

The key case on this issue is *United States v. Anderson*. In *Anderson* the Court explained that the injury compensated is the increased risk of harm, not the harm itself.² Therefore, it would not make sense to force the plaintiff to wait until the harm resulted to recover.³ To establish this claim the plaintiff must present testimony showing that, as a result of a serious physical injury, he or she will be predisposed to suffering additional future harm.⁴ The *Anderson* Court cited with approval a Connecticut Supreme Court holding that the plaintiff need not prove the future harm to be more likely than not, only that “a breach of duty was a substantial factor in causing a present injury which has resulted in an increased risk of future harm...”⁵

² *United States v. Anderson*, 669 A.2d 73, 76 (Del. 1995).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 77 (internal citations omitted).

Here, DeBussy will present expert testimony to prove that, as a result of Dr. Graybeal's failure to properly repair her common bile duct, she now suffers an increased risk of complications such as bile duct obstruction, anastomotic stricture, hernia formation, cirrhosis, liver failure, and liver transplant. The Plaintiff will also show that her increased risk of future complications is a direct result of the surgical mistakes made during the surgery. Dr. Leitman's Deposition Testimony is informative:

Q: Am I correct that she's [DeBussy] still a candidate for a Roux-en-Y procedure [proper repair procedure] today?

A: Yes.

Q: If she underwent that today, do you have an opinion as to whether that would alleviate those risks; the cirrhosis, stricture, bile duct obstruction?

A: Partially, but not entirely.

Q: All right, if she had the Roux-en-Y initially would those risks still exist?

A: Yes, but to a lesser extent.

Q: Than today?

A: Than today.

Q: Because of the primary repair?

A: Right.⁶

Considering the risk of additional future complications, DeBussy has suffered an injury which is greater than that which she would have suffered if the common bile duct had not been transected or if after transaction the duct had been properly repaired. Further, given that this testimony is relevant to establishing a claim for increased risk of injury, it is not unfairly prejudicial and should not be excluded under D.R.E. 403. It is probative also of her claim of mental anguish, given her anxiety about the uncertainty of her future well-being. This testimony

⁶ Dr. Leitman Depo. 94:6-21.

is not inflammatory, confusing, or prolonged. It would not induce a verdict on an improper basis.

Based on the foregoing, this Motion is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes, Judge

Cc: Prothonotary
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Francis J. Murphy, Esq.
Joshua H. Meyeroff, Esq.
Richard Galperin, Esq.