

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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December 2, 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: December 2, 2016

Upon Defendants' Motion *in Limine* to Exclude Heasay.
Granted in part and denied in part.

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 Exclude Hearsay. This Motion is **GRANTED** in part and **DENIED** in part.

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. Allegedly, the proper procedure to repair a transected 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 alleged improper repair including a temporary bile drain, multiple stent procedures, and an increased risk of additional future complications.

DeBussy and her family members have testified that after the surgery Dr. Graybeal said was “having a bad week” because his mother-in-law had died earlier in the week. Dr. Graybeal also explained that he had to leave immediately after the surgery to go to Pennsylvania for the funeral the following day. Additionally, DeBussy and her family members testified that various unidentified members of the hospital administration and staff made statements about Dr. Graybeal’s possible mishandling of the surgery and the staff’s overall lack of knowledge about DeBussy’s situation. Further, DeBussy testified that during various conversations certain hospital administrators indicated that Dr. Graybeal might be at fault. Finally, DeBussy testified about conversations she had with Dr. Graybeal’s staff about post-surgical care.

Parties’ Contentions

In the instant motion, Dr. Graybeal claims that the above testimony given by DeBussy and her family members contains inadmissible hearsay. According to Dr. Graybeal, those out of court statements are being offered to prove the truth of the matter asserted, making them inadmissible hearsay.¹ Further, Dr. Graybeal claims that no hearsay exceptions apply. Thus, he asserts that all

¹ Dr. Graybeal does seem to concede that his statements about “having a bad week” would be allowable under Delaware Rule of Evidence 801(d)(2), but counters by saying those statements are inadmissible under Delaware Rule of Evidence 403 as irrelevant and unduly prejudicial.

such testimony should be excluded. In the alternative, Dr. Graybeal argues that any statements found to be admissible hearsay should nonetheless be excluded under D.R.E. 403 for lacking probative value, insufficient demonstrations of accuracy, or as unduly prejudicial.

Conversely, DeBussy argues that the statements about Dr. Graybeal having a bad week are admissible to show Defendant's state of mind. She further cites D.R.E. 801(d)(2) to claim that a party defendant's own statement is not hearsay. Therefore, DeBussy seeks to have all statements regarding Dr. Graybeal's "bad week," and thus his state of mind, admitted. DeBussy does not oppose Dr. Graybeal's efforts to exclude statements made by unidentified hospital personnel. Finally, DeBussy argues that all conversations she had with hospital administration and staff as well as Dr. Graybeal's staff about post-surgical care should be admitted to explain why she did not continue care with Dr. Graybeal. DeBussy contends that her testimony about what she did and who she called after the surgery is not hearsay. She further argues that any statements made by other people about post-surgical care are not being offered for the truth of the matter asserted, but to show why she switched doctors. As a result, those statements are not hearsay either.

Discussion

According to D.R.E. 801(c), "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."² Hearsay evidence is inadmissible at trial. However, certain statements are not excluded by This rule. D.R.E. 803 provides that "a statement of the declarant's then existing state of mind, emotion, sensation or physical condition..." will not be excluded as hearsay.³ The Court in *Jones v. State* explained the application of Rule 803(3):

² Del. R. Evid. 801(c).

³ Del. R. Evid. 803(3).

D.R.E. 803(3) provides an exception to the hearsay rule, regardless of whether the declarant is available to testify, for a then existing mental, emotional, or physical condition...Accordingly, the hearsay statement must (1) be relevant and material, (2) relate to an existing state of mind when made, (3) be made in a natural manner, (4) be made under circumstances dispelling suspicion, and (5) contain no suggestion of sinister motives for making the statement.⁴

Here, the Court finds that the statements made by Dr. Graybeal about “having a bad week” would meet all of the above requirements. Therefore, any references to his state of mind during the surgery, i.e., his difficult week, will be admissible.

In the alternative, any statements made by Dr. Graybeal would be allowed into evidence under Rule 801(d)(2). Rule 801(d)(2) states, “A statement is not hearsay if...the statement is offered against a party and is his own statement.”⁵ As a result, any statements made by Dr. Graybeal may be used against him at trial.⁶

The parties have agreed that any statements made by unidentified hospital personnel will not be introduced at trial because these statements “lack some theoretical basis making it inherently trustworthy,” which is required for admissibility.⁷ Even if these statements were to fall under one of the hearsay exceptions, the absence of trustworthiness (due to the unidentified nature of the declarant) would render is inadmissible.⁸

The remainder of the statements that DeBussy seeks to admit concern her post-surgical care. This Court has granted the Defendant’s Motion *in Limine* to Preclude Criticisms of Post-Surgical Care; therefore, any statements falling into that category will be inadmissible at trial.

⁴ *Jones v. State*, 798 A.2d 1013, 1016 (Del. 2002).

⁵ Del. R. Evid. 801(d)(2).

⁶ *Flonnery v. State*, 893 A.2d 507, 516 (Del. 2006)(“Under D.R.E. 801(2)(A) an admission by a party-opponent is not hearsay.”).

⁷ *Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994).

⁸ *Id.*

For the foregoing reasons, the Defendants' Motion is **GRANTED** in part and **DENIED** in part.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes
Richard F. Stokes, Judge

Cc: Prothonotary
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