SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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February 19, 2014

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RE: *Angeline M. Solway v. Kent Diagnostic Radiology Associates, P.A., Michael Polise, D.O., Martin G. Begley, M.D., Thomas Vaughan, M.D., Raphael Caccese, Jr., M.D., Bayhealth Medical Center, Inc. d/b/a Kent General Hospital, Carlos A. Villalba, M.D. and Inpatient Services of Delaware, P.A.*
C.A. No. S11C-01-022 RFS

Dear Counsel:

Before the Court is the Motion *in Limine* of Plaintiff Angeline M. Solway ("Solway") to Require Defendant Carlos A. Villalba, M.D. (" Dr. Villalba") to Share Costs Incurred by Solway for Expert Witness Fees in Connection with Dr. Villalba's Cross-Designation of Solway's Expert Witnesses. This Motion is **DENIED** as premature.

Facts

This is a medical malpractice case in which Solway alleges that she received negligent care rising to the level of punitive conduct from a host of physicians at Bayhealth Medical Center's ("Bayhealth's") Kent General Hospital ("Kent General") in Kent County, Delaware from Monday, January 26, 2009 to Monday, February 2, 2009. Despite subsequent care she received at Christiana Hospital's ("Christiana") Christiana Care Health Services from February 2, 2009 to Tuesday, February 17, 2009, Solway was rendered a functioning paraplegic.

In its memorandum opinion denying the Motion for Partial Summary Judgment of Defendants Kent Diagnostic Radiology Associates, P.A. ("KDRA"), Thomas Vaughan, M.D. ("Dr. Vaughan"), and Martin Begley, M.D. ("Dr. Begley") (collectively "the Radiology Defendants") on the claims of Solway, the Court extensively laid out the facts of this case.[1] As this litigation deals with one set of factual circumstances, the Court will not repeat those facts.

Solway has identified multiple trial expert witnesses, whose depositions have been or are in the process of being taken. Dr. Villalba's Answer to Solway's Second Amended Complaint asserted cross-claims against his codefendants. Regarding these

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[1] *Solway v. Kent Diagnostic Radiology Assocs., P.A.*, C.A. S11C-01-022 (Del. Super. Feb. 18, 2014) (denying the Radiology Defendants' Motion for Partial Summary Judgment).

cross-claims, Dr. Villalba has not identified his own experts. Rather, Dr. Villalba reserved the right to call at trial any expert whom Solway identified against any codefendant, or to read such expert's deposition testimonies in accordance with this Court's Civil Rule 32, as well as to prove his cross-claims should any codefendant settle with Solway, or should Solway not call her experts to testify at trial.

Analysis

Parties' Contentions

Solway argues that while Dr. Villalba may use the deposition testimony of her experts at trial,[2] he may not force her expert witnesses to appear at trial.[3] Solway asserts that Dr. Villalba's not identifying any experts to prove his cross-claims constitutes a strategic maneuver whereby Dr. Villalba may maintain a unified defense with his codefendants. Additionally, she claims that this maneuver saves Dr. Villalba significant expense. If Dr. Villalba were permitted to use Solway's experts without paying his fair share of the expenses associated with their deposition and trial testimonies, the result would be an injustice for Solway, whose financial condition dwarfs Dr. Villalba's. While Solway acknowledges that Dr. Villalba's strategy is not

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[2] Solway cites, *inter alia*, *Barrow v. Abramowicz*, 931 A.2d 424 (Del. 2007) for this proposition.

[3] Solway cites, *inter alia*, *Starkey v. Hunt-Madani Prof'l Assocs.*, 1988 WL 33561 (Del. Super. Mar. 31 1988) for this proposition.

prohibited, case law supports that it could certainly be labeled "disingenuous."[4] Solway suggests a fifty percent split in the respective fees. Furthermore, she claims that Dr. Villalba's failure to employ his own experts deprives the jury of the most complete evidence possible, as Dr. Villalba's own experts would have provided further proof of his codefendants' liability. Solway also states that she should be able to inform the jury that Dr. Villalba relies on her experts, and that the jury is entitled to infer that Dr. Villalba agrees with her experts regarding his codefendants' liability.

Dr. Villalba denies that his strategy is inappropriate. He claims that no action on his part caused Solway any financial change. Solway identified her experts; and Dr. Villalba has merely reserved his right to call these experts at trial or read in their depositions. Dr. Villalba states that he disclosed his intentions in order to give Solway adequate notice, thereby avoiding an accusation of late notice or sandbagging.[5] Dr. Villalba claims that a blanket award of costs or an imposition of a cost-sharing agreement is unwarranted. Additionally, he argues that the question of Solway's entitlement to expert witness fees needs to await trial in order to determine whether Dr. Villalba indeed called any of Solway's experts or read in their

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[4] Solway references Dr. Villalba's citation to *Malcolm v. Greenspan*, 2009 WL 5928201, at *6 (Del. Super. Feb. 13, 2009).

[5] Similar accusations were made in *Malcolm.* Dr. Villalba cites that case in order to show that such accusations are not warranted in this case.

depositions.[6]

Discussion

In designating experts against a co-defendant, a party may designate the experts of his opposing party. In *Malcolm v. Greenspan*, the defendant-physician maintained a cross-claim against his codefendant-physician, with whom the plaintiffs settled. As in this case, the defendant-physician had no expert of his own for his cross-claim. Rather, after reserving his rights regarding the plaintiffs' experts, he sought to use portions of the testimony of one of the plaintiffs' experts whom the plaintiffs did not wish to call as a witness. Although describing the defendant-physician's strategy as "disingenuous," this Court denied, *inter alia*, the plaintiffs' motion to preclude the defendant-physician's reading of the expert's deposition.[7] The Court stated that "a witness who is so important to material issues in the case should be allowed to testify."[8] Thus, in this case, because Dr. Villalba has no cross-claims against his codefendants without Solway's expert witnesses, those witnesses certainly are

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[6] Solway counters that saving this question for trial is unjustly advantageous to Dr. Villalba because of the expense he has saved. She claims that Dr. Villalba procured experts by simply designating cross-claims.

[7] *Malcolm*, 2009 WL 5928201, at *6.

[8] *Id.* at *4 (citing *Green v. A.I. duPont Institute of the Nemours Foundation*, 759 A.2d 1060 (Del. 2000)). The Court deemed this to be so even though the "plaintiffs were somewhat sandbagged." *Id.*

crucial; and therefore, Dr. Villalba must be entitled to call them.[9]

In the context of sharing the costs of utilizing the experts of an opposing litigant, this Court has held that "the cost sharing principle should apply only if the other party seeks to develop facts for his own case or to ascertain facts which go beyond those which the party who has retained the expert is relying on."[10] As stated, Dr. Villalba's cross-claims against his codefendants rest solely on Solway's experts. Thus, because Dr. Villalba is "develop[ing] facts for his own case," cost-sharing in this case is warranted.[11] The Court denies this Motion, however, because at this pretrial stage, it would be premature. Rather, the Court will wait until trial to determine Dr. Villalba's responsibility.

Additionally, if Dr. Villalba indeed uses Solway's experts at trial, via their depositions or live testimony, Solway may be able to inform the jury that her experts were not Dr. Villalba's, but her own.[12] The Court would have to weigh the probabtive value against the danger of unfair prejudice at the time of trial under Delaware Rule of Evidence 403.

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[9] *See id.* (describing the precedent as "overwhelming" that the defendant-physician could call the plaintiffs' expert) (citations omitted)).

[10] *Stearrett v. Newcomb*, 521 A.2d 636, 637–38 (Del. Super. 1986).

[11] *Id.*

[12] *Malcolm*, 2009 WL 5928201, at *4 ("It would be proper to allow plaintiffs to make known to the jury that [the expert] was not [the defendant-physician's] expert but theirs.").

Based on the foregoing, this Motion is **DENIED** at this time. Solway may renew it after trial if the facts warrant an award for cost sharing.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes
Richard F. Stokes

cc: **Bradley J. Goewert, Esq.**
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