

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRICIA MOSES, : No. 357, 2014
: Court Below: Superior Court of the
Plaintiff below, : State of Delaware, Kent County
Appellant, :
: C.A. No. K13C-04-010 WLW
v. :
: :
AARON DRAKE, :
: :
Defendant below, :
Appellee. :

APPELLANT'S REPLY BRIEF

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RESTATEMENT OF FACTS

Plaintiff Tricia Moses provided a timely identification of a medical expert with his opinion to the Defendant on January 31, 2014. At that time, Plaintiff identified Dr. Stephen P. Ogden, as a medical expert witness. Dr. Ogden's written opinion dated January 15, 2014, was also provided at that time. Dr. Ogden's opinion provided the following:

"My former patient, Tricia Moses was in a motor vehicle accident on 4/6/2011. She subsequently came to my office with complaints of back pain. She was treated with anti-inflammatory medication and Physical Therapy. It is feasible that the complaints she presented with are causally related to her motor vehicle accident and to the best of knowledge were not related to a previous injury or illness. Her injuries were treated with conservative measures and at the time I treated her, no surgery was needed and no permanent impairment was sustained."

Defendant sought no clarification of this opinion by Dr. Ogden. Defendant did not seek to depose Dr. Ogden. Rather, Defendant filed a Motion to Dismiss claiming that this opinion should be interpreted as merely stating a "possible" causal relationship between Ms. Moses' medical condition and the motor vehicle accident of 4/6/2011.

Plaintiff opposed the Motion to Dismiss since Dr. Ogden's report was not based upon mere possibility. Dr. Ogden's report never even used the word "possible" or "possibility". Plaintiff offered a clarifying opinion of Dr. Ogden,

which was filed with the Court prior to the Court considering Defendant's Motion.

This clarifying opinion stated that:

"To clarify my letter of January 15, 2014, since to the best of my knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, it is more likely than not, that these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011."

The Superior Court considered Dr. Ogden's January 15, 2014 opinion and his April 25, 2014 opinion in its Summary Judgment decision. The lower court specifically held that:

"Neither of Dr. Ogden's reports state that the doctor's opinion is based on a reasonable medical probability or certainty. Accordingly, the opinions within Dr. Ogden's reports are inadmissible." (Ex. "A" to Opening Brief at Pg. 9 of Opinion).

On May 20, 2014, Plaintiff timely filed a Motion For Reargument of the Superior Court's decision granting Defendant summary judgment of dismissal. This motion set forth legal authority recognizing that the phrase "more likely than not" is the very essence of the definition of "reasonable medical probability". Further, Plaintiff offered the opinion of Dr. Ogden dated May 14, 2014, which stated the following:

"To further clarify my letter of January 15, 2014, since to the best of my knowledge, Tricia Moses' complaints of back pain were not related to a previous illness or injury, based upon reasonable medical probability, these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011."

Dr. Ogden's clarifications included the definition of "reasonable medical probability" and the use of the words, "reasonable medical probability".

The discovery cutoff date was October 8, 2014. The scheduled trial date was February 9, 2015.

REPLY ARGUMENT I

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT OF DISMISSAL BECAUSE PLAINTIFF'S MEDICAL EXPERT'S OPINIONS WERE LEGALLY SUFFICIENT.

The lower court granted Summary Judgment based upon the record as of May 13, 2014. This Court's review of that record is de novo, *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009). Since the lower court considered Dr. Stephen Ogden's opinions dated January 15, 2014 and April 25, 2014, these opinions should be considered by this Court.

Dr. Stephen P. Ogden's original opinion of January 15, 2014, sufficiently met the "reasonable medical probability" standard. Dr. Ogden opined that the motor vehicle collision was capable or feasible of causing the back condition that Ms. Moses presented to Dr. Ogden. He further stated that neither prior injury or illness was the cause of Ms. Moses' condition. Thus, the doctor identified the motor vehicle accident as an occasion which caused her complaints and he eliminated other potential causes. A fair reading of the doctor's opinion would allow one to infer that it was reasonably probable that the motor vehicle accident caused Ms. Moses' condition for which the doctor treated her. Nowhere in the doctor's opinion does he indicate that the automobile accident was a mere possible cause of her condition. Neither does he state that it would only be speculation to state that the motor vehicle collision caused Ms. Moses' condition. At most, Dr.

Ogden's initial statement was ambiguous or unclear. Defendant did not seek clarification of this opinion by inquiry nor did Defendant depose Dr. Ogden to clarify his opinion. Instead, the Defendant filed a Motion to Dismiss the case claiming the doctor was only offering possibilities because a dictionary definition of the words, "feasible" and "possible" have some overlapping meanings. Defendant did not cite any case law to support his argument that "feasible" cannot be utilized in determining the sufficiency of legal causation.

On Summary Judgment, all reasonable inferences favorable to the non-moving party are to be made by the Court, *Sweetman v. Strescon Indus. Inc.*, 389 A.2d 1319 (Del. Super. Ct. 1978). Thus, since a reasonable inference from the doctor's initial opinion of January 15, 2014, was that it was reasonably probable that the motor vehicle collision caused Ms. Moses' back condition, summary judgment was unwarranted. Further, summary judgment is inappropriate when a record is unclear or ambiguous, *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

Dr. Ogden sought to clarify his initial opinion with a submission of April 25, 2014. It stated the cause of Ms. Moses' back condition was "more likely than not" the motor vehicle collision of April 6, 2011. This statement uses the very essence of the legal definition of "reasonable medical probability and "reasonable medical certainty" found in *Black's Law Dictionary, Tenth Edition* at pg. 1457. Defendant

argues that the Plaintiff never asked the Court to consider Dr. Ogden's April 25, 2014 opinion. Defendant claims the opinion was just submitted (Def. Answering Brief Pg. 12). The record does not support this claim. In opposing Defendant's dispositive motion, Plaintiff stated that Dr. Ogden has now clarified his initial statement and has stated that it is more likely than not that Ms. Moses' back problems were causally related to the motor vehicle collision. Plaintiff further noted that with this clarification there could be no doubt that the doctor's opinions satisfied the requirement of probability. (A-30). The lower court's opinion of May 13, 2014, made numerous references to Dr. Ogden's April 25, 2014 opinion. (Ex. "A" to Opening Brief at pg. 4, 6, 8, and 9). The lower court ruled that:

"Neither of Dr. Ogden's reports state that the doctor's opinion is based on a reasonable medical probability or certainty. Accordingly the, the opinions within Dr. Ogden's reports are inadmissible." (Ex. "A" to Opening Brief at pg. 9).

Since the lower court properly considered Dr. Ogden's clarification opinion of April 25, 2014, and ruled on it, it is part of the record before this Court for de novo review.

Arguing that Dr. Ogden's clarification cannot be considered because of the Case Scheduling Order is misdirected. The Case Scheduling Order set a date for the identification of their experts and opinions. Once a party has complied with this identification and disclosure, the Scheduling Order does not prohibit further supplement or clarification of the initial disclosure. There is nothing in the rule or

practice which prevents additions to a previously identified expert's opinions. Once a party is on notice of an alleged ambiguity or deficiency, the Scheduling Order should not be used to preclude that party from addressing the issue prior to the Court's considering dismissal of the matter. Thus, as indicated by the lower court in its initial opinion, the clarification offered by Dr. Ogden was considered, and unfortunately, erroneously found to be insufficient regarding reasonable probability.

Defendant argues that "reasonable medical probability" requires something greater than a "more likely than not" standard. Defendant fails to cite any supporting legal authority. Defendant fails to explain why this Court should reject the definition of "reasonable medical probability" set forth in *Black's Law Dictionary* and which has been cited by Courts of this State in the past, *see State v. Perkins*, 2005 Del. Super. LEXIS 375 (Nov. 19, 2005). Defendant further asserts that expert testimony should be to "a higher standard than an abstract mathematical calculation greater than fifty percent." (Defendant's Answering Brief pg. 15). Defendant does not explain where the higher standard is set. Such arguments are unpersuasive and should not be accepted by this Court. There is no bona fide reason why an opinion containing the definition of "reasonable medical probability" should be found deficient. If medical experts cannot use the meaning

of "reasonable medical probability" rather than those three specific words, then the law has chosen to place form over substance.

In *Mammarella v. Evantash*, 93 A.3d 629 (Del. 2014), this Court reviewed an extensive record to determine if the medical expert satisfied the standard of "reasonable medical probability". The Court cited extensive testimony of the medical expert, a Doctor Biggs, from his discovery deposition and trial deposition to demonstrate that his opinions could not meet the standard of reasonable medical probability. *Id.* at pgs 632, 634. Said finding, however, was based upon the Court's substantive analysis of the doctor's testimony and not whether the phrase "reasonable medical probability" was used. Though *Mammarella* was decided two days after the lower Court's summary judgment decision in this matter, an analysis of an expert's opinions from a substantive standpoint rather than mere formality, is consistent with *Mammarella* and establishes that the standard for medical causation has been met in the present matter.

REPLY ARGUMENT II

II. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DENIED THE PLAINTIFF'S MOTION FOR REARGUMENT.

Defendant contends that the Plaintiff "did not even argue that the Court overlooked any law or facts" in her Motion for Reargument. (Def. Answering Brief Pg. 18, 20). The record does not support Defendant's assertion. Plaintiff's Motion for Reargument dealt mainly and extensively with the lower court's failure to find Dr. Ogden's clarification opinion of April 25, 2014 legally sufficient to meet the reasonable medical probability standard. At the beginning of the Motion, Dr. Ogden's April 25, 2014, clarification is stated. Plaintiff then argues that the Court has misapprehended the law and has overlooked controlling legal precedent regarding the Plaintiff's opposition to Defendant's Motion to Dismiss. Thereafter, the legal definition of "reasonable medical probability" is cited noting that the standard relates to a "more likely than not" evaluation. Thereafter, prior cases dealing with the term "more likely than not" and opinions holding a doctor's opinion must be evaluated substantively and not merely on form with supporting authority were cited. (A-72-75). It is only after a thorough presentation of the legal sufficiency of Dr. Ogden's "more likely than not" opinion that Plaintiff submitted an opinion of Dr. Ogden dated May 16, 2014, which causally related Ms. Moses' back condition to the motor vehicle collision utilizing the phrase "reasonable medical probability". Thus, Plaintiff's Motion for

Reargument was properly presented upon the criteria utilized by Superior Court Civil Rule 59. Further, an abuse of discretion in failing to grant Plaintiff's Motion for Reargument occurred since the lower court in its summary judgment decision did consider Dr. Ogden's "more likely than not" opinion and found it wanting, yet ruled on Plaintiff's Motion for Reargument that it could not consider this opinion because it was submitted beyond the Scheduling Order expert witness deadline.

As identified in the Plaintiff's Opening Brief, this argument, including Dr. Ogden's "reasonable medical probability" opinion of May 14, 2014 need only be considered if this Court were to determine that Plaintiff was not entitled to a reversal of the Superior Court Summary Judgment decision.

REPLY ARGUMENT III

III. THE SUPPLEMENTAL OPINIONS OF DR. OGDEN WERE PRESENTED TO THE LOWER COURT AND RULED UPON BY THE LOWER COURT IN COMPLIANCE WITH SUPREME COURT RULE 8.

Defendant argues that this Court should not consider Dr Ogden's supplemental reports of April 25, 2014, and May 16, 2014, because these reports were not presented for the lower court's consideration as required by Supreme Court Rule 8. Again, the record does not support Defendant's claim. There is no Supreme Court Rule 8 violation regarding Dr. Ogden's supplemental reports. In the Superior Court, Plaintiff's Response In Opposition to Defendant's Motion to Dismiss (A-27 - A-71) included as an exhibit, Dr. Ogden's report of April 25, 2014 (A-71). In Plaintiff's Response, Plaintiff addressed this supplemental report and noted that it clarified the doctor's opinion as being based upon a "more likely than not" standard. (A-30). In the lower court's Order of May 13, 2014 (Opening Brief Ex. "A"), the Court considered the April 25, 2014 opinion and determined that it failed to meet the standard of "reasonable medical probability". The lower court noted that a supplemental report of Dr. Ogden dated April 25, 2014, had been submitted (Ex. "A" p. 4). The lower court noted that this opinion stated that it was "more likely than not" that Plaintiff's complaints were causally related to the accident. At page 6 of the opinion, the Court notes that this supplemental report was offered to clarify the expert's opinion. The April 25, 2014 report is further

noted at pages 8 and 9 of the Court's opinion. The Court noted that nowhere in Dr. Ogden's original report or his supplemental report does he use the term "reasonable medical probability". Thereafter, the Court rules that:

"Neither of Dr. Ogden's reports state that the Dr.'s opinion is based on a reasonable medical probability or certainty. Accordingly, the opinions within Dr. Ogden's reports are inadmissible." Id. at pg. 9.

There is no basis for the Defendant to claim that the lower court did not consider Dr. Ogden's supplemental report of April 25, 2014. In its original opinion, the lower court specifically considered the supplemental report and ruled that it was legally insufficient. The report was presented to the lower court and the lower court considered it in its decision.

In seeking re-argument, Plaintiff cited to Dr. Ogden's April 25, 2014 report specifically at A-72, A-73, A-74. Further, Dr. Ogden's report dated May 14, 2014, was submitted as part of Plaintiff's Motion for Re-argument (A-75, A-97). The lower court addressed both of these opinions in its Order of June 10, 2014 (See Ex. "B" to Plaintiff's Opening Brief). At pgs. 4, 5, and 9 of this opinion, Dr. Ogden's April 25, 2014 report is considered. At pgs. 5 and 9, the Court addresses Dr. Ogden's May 16, 2014 report. The lower court ruled that it would not consider Dr. Ogden's April 25, 2014 and May 14, 2014 supplemental reports at page 10 of its decision.


Therefore, this record demonstrates that these reports were presented to the lower court for its consideration in a fair manner. The decisions of the Superior Court indicate that these reports were presented to the Court, were considered by the Court, and were ruled on by the Court. There is no basis for Defendant to claim that this Court cannot consider these reports in determining this appeal on the basis that they were not fairly presented to the lower court for its consideration.

CONCLUSION

For these reasons and those set out in Plaintiff's Opening Brief, Plaintiff respectfully seeks the reversal of Summary Judgment granted Defendant with a remand of this matter to Superior Court for trial by jury. Alternatively, this Court should order the Superior Court to grant Plaintiff's Motion for Reargument and consider the legal sufficiency of Dr. Ogden's April 25, 2014 and May 16, 2014 opinions.

Respectfully submitted,

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