

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JENNY TRACZ, Individually, as)
Representative of the ESTATE OF JOHN)
TRACZ, and as Next Friend of JULIANA) C.A. No. N18C-06-052 DCS
TRACZ, a minor, JOSEPH TRACZ,)
JAMIE TRACZ, and JESSICA TRACZ,)
)
Plaintiffs,)
)
v.)
)
CHRISTIANA CARE HEALTH)
SERVICES, INC.,)
)
Defendant.)

ORDER

Submitted: March 4, 2020

Decided: April 27, 2020

Upon Consideration of Plaintiffs' Motion In Limine,

GRANTED

This 27th day of April, 2020, upon consideration of Plaintiffs' Motion *in Limine* Regarding Three Other Patients who were Treated at CCHS on September 28, 2016, Defendant's Response, oral argument, supplemental submissions, and the record of this case, Plaintiffs' Motion is GRANTED.

It appears that:

1. Plaintiffs have alleged that John Tracz (the decedent) had a heart condition, had been a patient at Defendant's facility, needed a TAVR procedure,¹ the procedure was scheduled for October 12, 2016, and he died on October 10, 2016 (two days before the October 12, 2016 scheduled procedure).

2. Plaintiffs further allege that Defendant committed medical negligence because Defendant, pursuant to a hospital committee decision made on September 23, 2016, did not schedule the TAVR procedure for an earlier TAVR procedure date (September 28, 2016).²

3. On February 7, 2020, Plaintiffs submitted a *Motion in Limine* Regarding Other Patients Treated at CCHS. Plaintiffs requested that any testimony or argument about other patients³ who underwent TAVR on September 28, 2016 be excluded. Plaintiffs also asked the Court to exclude any testimony about a spreadsheet created by Defendant's employee (Ms. Erica Henry) concerning a committee decision to give three other patients priority over Mr. Tracz (the other three were scheduled for

¹ A transcatheter aortic valve replacement is a procedure to replace a narrowed aortic valve.

² The Parties have agreed that contributory negligence is not an issue. Pretrial Conference Transcript, at 3-4, 10; Plaintiffs' Omnibus Motion *in Limine*, at 1; Defendant's Response to Plaintiffs' Omnibus Motion *in Limine*, at para. 1; Defendant's Motion for Reargument, at para. 1. *See also*, Court's Order of March 26, 2020, denying Defendant's Motion for Reargument.

³ Three other people underwent TAVR procedures on September 28, 2016.

September 28, 2016 but Mr. Tracz was not scheduled until October 12, 2016). Plaintiffs argued that the spreadsheet does not provide “a complete clinical picture of each of the [other] patients’ health.”⁴ Plaintiffs asserted that they requested the medical charts of the three other patients but Defendant denied the request.⁵ Alternatively, Plaintiffs requested that Defendant produce the redacted medical records of the three other patients prior to trial.

4. On February 7, 2020, Defendant filed its Response. Defendant contended that Plaintiffs’ motion should be denied because Plaintiffs failed to cite any authority supporting either of Plaintiffs’ requests. Defendant also argued that it should be allowed to introduce evidence concerning the other patients because it would explain the process used to triage potential TAVR procedure patients; triage requires the balancing of multiple patients and issues; Plaintiffs’ experts opened the door about the other patients by stating that Mr. Tracz should have been given higher priority than the other patients;⁶ the evidence is directly relevant to Defendant’s defense; and it is admissible to rebut Plaintiffs’ theory of the case. Defendant also pointed out

⁴ Plaintiffs’ *Motion in Limine*, at para. 3.

⁵ Plaintiffs did not provide the date of their request.

⁶ Upon questioning by the Defense, Dr. Brian Swirsky stated, “I’m absolutely predicting that Mr. Tracz had the worst aortic stenosis of all of the patients waiting for TAVR, I’m absolutely sure of that, simply because very few patients have that degree of aortic stenosis.” Dr. Swirsky’s Deposition, at 54-55. Similarly, Defendant asked Dr. Anthony Lemaire whether he “had enough information to say whether or not this patient [unidentified] should have undergone TAVR before Mr. Tracz?” Dr. Lemaire’s Deposition, at 138-39. Dr. Lemaire responded, “A fair amount of – yes, yes.” Id. Dr. Lemaire then offered many reasons why Mr. Tracz should have gone first.

that Plaintiffs did not request the three other patients' medical charts until after discovery closed. Defendant did not cite any cases about triage, a triage defense, or the minimum requirements to establish a triage defense.

5. On February 27, 2020, the Parties presented oral argument at the Pretrial Conference. Plaintiffs maintained that the spreadsheet and any testimony about the three other patients should be excluded unless Defendant produces those patients' medical charts.⁷ Plaintiffs also argued that "we shouldn't have a trial about all these other patients" because there is no evidence that the other patients' conditions were worse than Mr. Tracz's condition.⁸

6. Defendant argued that the spreadsheet is relevant to the decision to schedule other patients on September 28, 2016 (and to delay Mr. Tracz's procedure until the next TAVR date – October 12, 2016). The Court ordered the Parties to submit Supplemental Briefs on the issue.

7. On March 4, 2020, Defendant filed its Supplemental Brief. Defendant alleges that "[i]n moving to exclude [the evidence on the three other patients], Plaintiffs seek to mislead the jury into thinking that the September 28, 2016 [TAVR]

⁷ In response to Defendant's argument that Plaintiffs failed to ask for the medical charts during discovery, Plaintiffs asserted that they sent a letter to Defendant requesting the other patients' medical charts if Defendant planned to use the spreadsheet. However, Plaintiffs did not state whether they sent the letter before or after the discovery cutoff date. *See* Pretrial Conference Transcript, at 33.

⁸ Pretrial Conference Transcript, at 45.

slot was Mr. Tracz's slot alone to lose."⁹ Instead, Defendant argues, the evidence about the three other patients will show that Defendant was "triaging patients constantly, assessing their respective risks, and in this case, evaluating the three other patients with Mr. Tracz *and all other TAVR patients*."¹⁰ Defendant asserts that the spreadsheet is "of consequence because [it] support[s] the decisionmaking of [Defendant] to triage those patients over Mr. Tracz on that TAVR date."¹¹ As such, Defendant contends that the spreadsheet should be permitted "because it goes to the heart" of Defendant's defense.¹²

8. Defendant also argues that it is admissible for impeachment of Plaintiffs' expert (Dr. Brian Swirsky) who testified at deposition that he was "absolutely sure" that Mr. Tracz's condition was worse than the other TAVR patients' conditions.¹³ Additionally, Defendant asserts that there is no danger of unfair prejudice, confusion of issues, or undue delay because the spreadsheet is directly related to Defendant's "triaging decision on September 28, 2016, and [Defendant's] fact and expert

⁹ Defendant's Supplemental Brief, at 15.

¹⁰ *Id.* (emphasis added). Defendant's submission suggests that Defendant wants to raise the issue of the *medical conditions* of the three September 28, 2016 patients and possibly additional patients.

¹¹ *Id.* at 17.

¹² *Id.* at 15. Defendant explains that the "spreadsheet demonstrates that these three other patients were sick, like Mr. Tracz, and that they needed TAVR." *Id.* at 17.

¹³ *Id.* at 19.

witnesses will explain why it was reasonable to choose another patient over Mr. Tracz.”¹⁴

9. On March 9, 2020, Plaintiffs filed their Supplemental Brief. Plaintiffs object to the admission of the spreadsheet because it does not provide enough information regarding the medical conditions of the three other patients. Plaintiffs write that it is willing to withdraw its objection to the spreadsheet if Defendant produces the redacted medical charts of the three other patients. Otherwise, Plaintiffs request that any reference to the spreadsheet or the health of the three other patients be precluded.¹⁵

Standard of Review

10. Delaware law clearly states that:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.¹⁶

Discussion

11. Defendant has argued that triage evidence is relevant and that the defense should be allowed to present the background and basis for its scheduling decision

¹⁴ *Id.* at 21-22.

¹⁵ Plaintiffs appear to use the words “excluded” and “precluded” interchangeably.

¹⁶ Delaware Rules of Evidence, Rule 403.

(giving three other patients priority over Mr. Tracz for the September list of TAVR procedures and scheduling Mr. Tracz in October instead of September). Defendant wants to present evidence and argument about the medical conditions of other patients¹⁷ but has not explained how it intends to introduce evidence of the (potentially complex) medical conditions of the other patients without specific experts or based solely on a spreadsheet created by someone who was not a physician who apparently was present during a doctors' committee meeting.

12. It appears to the Court that any evidence on the conditions and triaging of (at least) three other patients (which may involve comorbidities) would lead to several mini trials (and possibly additional witnesses on both sides) concerning individual treatments, doctors' evaluations, and the particularities and peculiarities of the types of illnesses of those other patient. It would also include the severity of each of their illnesses, their overall conditions, their conditions on the date of the committee decision, and the standard of care in relation to each of those patients. Indeed, Defendant's expert, Dr. Saif Anwaruddin, testified that triaging patients involves the consideration and clinical assessment of "a lot of factors," including "anatomical considerations ... the entire picture of the patient and what's needed for

¹⁷ At the Pretrial Conference, Defendant suggested that Mr. Tracz was given lower priority because prior to September 23, 2016 (the date of the committee decision) he had worsened his condition when he checked out of the hospital (although his discharge was not against medical advice), delayed a consultation, and stopped taking LASIX. This argument appears to blame Mr. Tracz and, arguably, suggests that Defendant took umbrage with Mr. Tracz's decisions.

that patient to get a good outcome.”¹⁸ As such, there is a danger that evidence concerning the many factors that must be considered when triaging several patients in relation to each other and Mr. Tracz could confuse the issues in this case or mislead the jury concerning the standard of care as it relates to Mr. Tracz’s treatment.¹⁹

13. Pursuant to Rule 403, Delaware courts have excluded evidence that would lead to mini trials where the probative value of that evidence is substantially outweighed by the danger that it would confuse the issues, mislead the jury, or prolong the trial.²⁰ Here, evidence about the medical conditions of other patients

¹⁸ Dr. Anwaruddin’s Deposition, at 26-7. Dr. Anwaruddin explained that the factors to be considered include gradient classification, age, strength of heart function, medical comorbidities, and timing of how long it will take to do the workup. *Id.* at 25.

¹⁹ Although Defendant appears to suggest that text messages between Dr. Neil Wimmer and Erica Henry (the person who physically created the spreadsheet) are probative as to the conditions of the three other patients and would support placing Mr. Tracz after the other patients, the text messages do not discuss the other patients’ conditions other than to state that “Tracz should probably be first. He’s much more symptomatic.” Defendant’s Supplemental Brief, at Ex. A-2. This would further confuse the jury.

²⁰ *Bryant v. State*, 1999 WL 507300, at *2 (Del. June 2, 1999) (“[C]onfusion of issues, implicates, in part, the ... concerns addressed under D.R.E. 403 - the danger of a mini-trial.”); *Tilghman v. Delaware State University*, 2014 WL 703869, at *2 (Del. Super. Feb. 10, 2014) (“As the State Defendants correctly argue, presentation of these reports would likely lead to mini-trials about each incident...Presentation of these incidents would just needlessly prolong the trial, have very little probative value, and thus the... reports should also be excluded pursuant to D.R.E. 403.”); *Laugelle v. Bell Helicopter Textron, Inc.*, 2014 WL 5038142, at *12 (Del. Super. Oct. 6, 2014) (“[T]he evidence ... invites the danger of a mini-trial on that issue, thus misleading and confusing the jury.”); *State v. Ellerbe*, 2016 WL 4119863, at *4, n. 36 (Del. Super. Aug. 2, 2016) (excluding evidence under Rule 403 because it would confuse the issues and result in a mini trial). *See also State v. Long*, 1992 WL 207258, at *7 (Del. Super. July 23, 1992) (“The unfair prejudice contemplated by D.R.E. 403 means an undue tendency to suggest a decision should be made on an improper basis such as an emotional one, one characterized to shift the jury’s focus away from the incident in issue or to create risk of a mini-trial thereby unnecessarily wasting time.”).

would require additional testimony about those other patients (currently unidentified), their treating physicians, and possibly rebuttal experts - thereby prolonging the trial. It could also focus the jury on emotional issues, which would be improper. The Court finds that the dangers of issue confusion, misleading the jury, time consumption, and potentially involving jurors in an emotional balance of several patients, substantially outweigh the probative value of comparing the medical conditions of the other patients in relation to Mr. Tracz and in relation to each other.²¹

14. Plaintiffs also assert that the spreadsheet, without more, would not allow Plaintiffs to compare Mr. Tracz's condition to the conditions of the other patients who had the TAVR procedure in September.²² This is corroborated by Dr. Tom Nguyen, Defendant's expert. Dr. Nguyen testified that the spreadsheet did not provide sufficient information to compare the other patients to Mr. Tracz.²³

²¹ After a review of the record, it appears that the spreadsheet is the only evidence concerning the condition of the three other patients produced by Defendant. Furthermore, Defendant has not pointed out, nor could the Court find, that its identified experts testified specifically on the conditions of the three other patients outside of the context of the spreadsheet.

²² Plaintiffs have explained that the spreadsheet "does not provide enough information regarding the medical conditions of the [three other patients]" and argument as to which patient should have been scheduled first "cannot be done ..., to a reasonable degree of medical probability, without the complete medical charts of the [three other patients]." Plaintiffs' Supplemental Briefs, at 2.

²³ At his deposition, Dr. Nguyen was asked to compare Mr. Tracz to the three other patients who underwent TAVR on September 28, 2016 based on the spreadsheets. Dr. Nguyen stated, "to offer a clinical opinion, ideally it would be helpful to have a more complete picture of the patient." Dr. Nguyen's Deposition, at 59. He stated, "it's hard to say, but one of the patients... seemed like, a high-risk patient." *Id.* However, he explained that "it's hard for me to say ... based off this

Furthermore, the probative value of the spreadsheet, *per se*, is questionable. Ms. Henry, the creator of the spreadsheet, testified, at her deposition, that it is “just [her] personal notes ... [and that] it’s not used to define acuity.”²⁴ Therefore, based on the record before the Court, it appears that introduction of the spreadsheet would be improper because it is unsupported and lacks probative value as to the TAVR scheduling or the triaging process.

15. Additionally, Defendant’s contention that the spreadsheet would rebut Plaintiffs’ experts who “opened the door” lacks merit. Defendant, not Plaintiffs, inquired as to the prioritization. Moreover, Plaintiffs have stated that they will not compare Mr. Tracz’s condition to the other patients’ conditions without access to those patients’ medical charts.²⁵

16. Accordingly, Defendant is not permitted to present evidence or argument as to the medical conditions of other patients or the spreadsheet created by Defendant’s non-physician employee.

information [the spreadsheet] whether or not Mr. Tracz should have gone before or after this particular patient. *Id.* at 60. Concerning the other two patients, Dr. Nguyen stated, “it’s hard to come to a conclusion without more information.” *Id.* at 62.

²⁴ Erica Henry’s Deposition, at 51. She also testified that Mr. Tracz appeared to be “more symptomatic” than the others. *See* Footnote 18.

²⁵ Plaintiffs’ Supplemental Briefs, at 2; Pretrial Conference Transcripts, at 21-22, 27, 28-29, 34. *See also*, Footnote 5.

Conclusion

For the foregoing reasons, Plaintiffs' *Motion in Limine* is **GRANTED**.

IT IS SO ORDERED.

/s/ Diane Clarke Streett

Diane Clarke Streett, Judge

Original to Prothonotary

cc: Timothy E. Lengkeek, Esquire
Richard Galperin, Esquire
Joshua H. Meyeroff, Esquire