#### SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD F. STOKES

JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 TELEPHONE (302) 856-5264

# February 20, 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 Defendants Kent Diagnostic Radiology Associates, P.A. ("KDRA"), Thomas Vaughan, M.D. ("Dr. Vaughan"), Martin Begley, M.D. ("Dr. Begley"), and Raphael Caccese, M.D. ("Dr. Caccese")<sup>1</sup> (collectively "the Radiology Defendants") to Preclude Cumulative Expert Testimony

<sup>&</sup>lt;sup>1</sup> On February 17, 2014, on the Radiology Defendants' Motion to Continue Trial, the Court ruled that if Solway dismissed her claims against Dr. Caccese, the pending trial in this matter will proceed as scheduled.

of Plaintiff Angeline M. Solway ("Solway"). This Motion is **DENIED**.

### **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 the Radiology Defendants<sup>2</sup> on the claims of Solway, the Court extensively laid out the facts of this case.<sup>3</sup> As this litigation deals with one set of factual circumstances, the Court will not repeat those facts.

In support of her case, Solway has disclosed multiple experts. Those subject to this Motion are four radiologists and four neurosurgeons, including her treating neurosurgeon at Christiana. The Radiology Defendants have identified experts in

<sup>&</sup>lt;sup>2</sup> Dr. Caccese was not a party to the Radiology Defendants' Motion for Partial Summary Judgment.

<sup>&</sup>lt;sup>3</sup> 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).

radiology and neurosurgery as well, including Dr. Begley and Dr. Vaughan themselves.

# **Analysis**

# **Parties' Contentions**

The Radiology Defendants assert that Solway's radiological experts all proffer the same opinion; e.g., that the Radiology Defendants misread diagnostic imaging studies. They also assert that her neurological experts all proffer the same opinion as well; e.g., that the failure to diagnose and treat Solway earlier caused her to lose the functioning of her legs. The Radiology Defendants argue that because Solway advances the opinions of multiple experts with identical expertise, who hold identical opinions, the Court should exclude any cumulative testimony under Delaware Rule of Evidence 403 ("Rule 403"). Also, they claim that these redundant opinions do not assist the trier of fact, as required by Delaware Rule of Evidence 702. Furthermore, to the extent that Solway accuses the Radiology Defendants of trying to obfuscate the truth by limiting the amount of her experts, the Radiology Defendants counter that Solway herself, through the use of her string of repetitive experts, is trying to unfairly sway the trier of fact and prejudice them.

Solway repels any tactic that would limit her to one radiological expert and one neurological expert. She notes that from the beginning, she was obligated to put forth

her experts first. In a case against four defendant-radiologists, Solway argues that she appropriately put forth four radiological experts.

Solway reminds the Court that exclusion of relevant evidence under Rule 403, particularly exclusion *in limine*, is an extraordinary remedy. She suggests the better approach for the Court is to determine at trial whether a particular expert's testimony should be excluded as needlessly cumulative.<sup>4</sup> Solway also chastises this Motion as an attempt to deter the truth-seeking function of a trial, thereby denying her the right to fairly prove her case.<sup>5</sup> She claims that it would be unfair to limit the number of her experts while allowing all of the Radiology Defendants' experts to proffer opinions.<sup>6</sup> Furthermore, Solway argues that her experts' testimonies are not needlessly cumulative. Rather, all of her experts, radiological and neurological alike,<sup>7</sup> have

<sup>&</sup>lt;sup>4</sup> Solway cites *Argenyi v. Creighton Univ.*, 2013 WL 4499012, at \*5 (D. Neb. Aug. 19, 2013).

<sup>&</sup>lt;sup>5</sup> Solway cites, *inter alia*, Delaware Rule of Evidence 102 for this proposition. *See* D.R.E. 102 ("These Rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

<sup>&</sup>lt;sup>6</sup> At a basic level, Solway claims that because there are four Radiology Defendants in this case, she is entitled to present a separate expert as to each.

The Radiology Defendants state that they too have employed a host of experts, but they assert that unlike Solway's experts, their experts truly do offer focused, non-cumulative testimony.

<sup>&</sup>lt;sup>7</sup> Solway specifically notes the weaknesses in the Radiology Defendants' neurological experts' opinions, which will be combated by her neurologist experts' opinions.

unique qualifications and contribute independently to her quest to present the truth.

### **Discussion**

Under Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Regarding cumulative evidence specifically, the Court does not take excluding evidence on such grounds lightly. As the Delaware Supreme Court has stated, "[w]hile a trial judge may limit a party's presentation of evidence on the ground that it is cumulative, such authority should be exercised sparingly so as not to deprive a litigant of the right to manage the presentation of her evidence."

The Court denies the present Motion as a cautionary measure. At this pre-trial stage, the Court cannot conclude, on balance, that the testimonies of Solway's multiple experts justify exclusion. Rather, the Court will wait until trial. If, at that point, it determines that any of her experts are so similar in credentials and approach

<sup>&</sup>lt;sup>8</sup> D.R.E. 403.

<sup>&</sup>lt;sup>9</sup> Green v. A.I. duPont Institute of the Nemours Foundation, 759 A.2d 1060, 1065 (Del. 2000); see also 75 Am. Jur. 2d Trial Expert Testimony § 260 (2014) ("[B]ecause a medical malpractice case is always necessarily a battle of expert witnesses, within only very broad limits, there is authority that all qualified opinion testimony should be allowed, notwithstanding it is cumulative to other evidence[;] and there is no limit on how many experts a plaintiff may produce on issues other than the standard of care." (footnote omitted) (citations omitted)).

to the issues as to labeled cumulative, the Court will make the appropriate ruling.<sup>10</sup>

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

### IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes
Richard F. Stokes

cc: Dennis D. Ferri, Esq.

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<sup>&</sup>lt;sup>10</sup> See 75 Am. Jur. 2d Trial Expert Testimony § 267 (2014) ("A court may preclude expert testimony that is cumulative or redundant, where it is not clear that the additional expert would have provided any different information that could not have been presented through the experts who did testify. In determining whether expert testimony is cumulative, a court should compare the testimony of the two experts, and their testimony will not be considered cumulative if the experts are not so similar in their credentials and approach to the issues." (footnotes omitted) (citations omitted)).