

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JEFFREY HOBRATH et al)	
)	
Plaintiffs)	
)	
v.)	Civ. No. DKC 12-cv-0226
)	
YOUNGSIK MOON, M.D. (P.A.) et al)	
)	
Defendants)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO
EXCLUDE TESTIMONY OF MARYAM MERATEE, M.D.**

Jeffrey Hobrath, Plaintiff, through counsel, submits the following Memorandum of Law in support of his Motion in Limine to exclude any testimony of Maryam Meratee, M.D., Defendant, that refers to her transactions with or statements by Marion Hobrath, Decedent. The legal basis for the Motion in Limine is the Maryland Dead Man’s Statute, Md. Cts & Jud. Proc. Code Ann., §9-116.

Introduction

The case before this Court is a diversity action involving issues of medical negligence. The Complaint asserts a survival action pursuant to §7-401 of the Maryland Estates & Trusts Code and a wrongful death action pursuant to §3-904 of the Maryland Courts & Judicial Proceedings Code.

On 4/10/2010, Maryam Meratee, M.D., Defendant, ordered a diagnostic chest x-ray for Marion Hobrath, Decedent, upon her admission to St. Mary’s Hospital for treatment of hyponatremia (*i.e.*, low sodium). The x-ray incidentally revealed a small nodule superimposed on a pneumatocele (*i.e.*, a cyst) in the right upper lobe. The

radiologist who interpreted the x-ray recommended in his report that Dr. Meratee obtain a follow up CT scan to evaluate the pneumatocele.

Plaintiff alleges that Dr. Meratee failed to advise Decedent concerning the abnormal x-ray results, and failed to obtain a follow up CT scan. Plaintiff further alleges that Dr. Meratee's failure to communicate the results of the x-ray led to a fourteen (14) month delay in the diagnosis and treatment of Decedent's lung cancer. Plaintiff alleges that the delay is the proximate cause of Decedent's death.

Dr. Meratee's Testimony

Dr. Meratee's undated signature appears on the chest x-ray report. At her deposition, she testified that her signature on the report means that she reviewed the report *and* that she discussed the results with Decedent [Meratee Depo. 35:15 - 18].¹

Dr. Meratee has further testified that she has an independent recollection of her 2010 office visits with Ms. Hobrath. She contends that she discussed the abnormal x-ray results with Ms. Hobrath, instructed her to obtain an immediate CT scan, and wrote an order for this test. Dr. Meratee testified that Decedent failed to comply with her instructions to obtain a follow up CT scan. [Meratee Depo. 38:11 – 43:11].

In her answers to interrogatories, Dr. Meratee provided the following narrative respecting her review of the abnormal chest x-ray and her instructions to Decedent to obtain a follow up CT scan:

... On April 16, 2010, Ms. Hobrath was seen by Dr. Meratee at Hollywood Medical Center for follow up. Dr. Meratee has an independent recollection of this office visit. At this appointment, Dr. Meratee reviewed the radiology report with Mrs. Hobrath, including the risks associated with the pneumatocele and nodule,

¹ Excerpts from Dr. Meratee's deposition transcript cited herein are attached hereto as **Exhibit A**.

and recommended that the patient under go a CT scan of the chest immediately with a follow up CT scan of the chest within approximately three (3) months. Dr. Meratee further advised Mrs. Hobrath the nodule had approximately a 20% chance of being malignant. Dr. Meratee's practice was to provide a St. Mary's Hospital Radiology Order form to her patients who needed follow up chest CT scans. Mrs. Hobrath would have received such a form. Mrs. Hobrath indicated that she was pre-occupied with issues in her personal life and would go for a CT scan soon.

On May 14, 2010, Mrs. Hobrath returned to Holywood Medical Center to see Dr. Meratee. Dr. Meratee has an independent recollection of this office visit. Dr. Meratee inquired whether the patient had obtained the follow up chest CT scan. The patient informed Dr. Meratee that the chest CT had not been obtained but would be obtained soon.²

Dr. Meratee has testified that Ms. Hobrath did not comply with her instruction to obtain a follow up CT scan because she was concerned that her husband was "having an affair" [Meratee Depo. 64:19 – 65:11]. According to Dr. Meratee, Ms. Hobrath's marital problems had caused her to experience "overwhelming" anxiety, which was her "major problem" at the time [Meratee Depo. 79:1 - 21].

It is undisputed that there were no witnesses to any of the transactions or statements described by Dr. Meratee in her testimony or answers to interrogatories [Meratee Depo. 39:16-20; 74:14-17].

Argument

The Maryland Dead Man's Statute provides, *inter alia*, that a party to litigation by or against a personal representative may not testify concerning any transaction with or statement by the decedent:

A party to a proceeding by or against a personal representative, heir, devisee, distributee, or legatee as such, in which a judgment or decree may be rendered for or against them, or by or against an incompetent person, may not testify

² At her deposition, Dr. Meratee testified that there was a 30 – 35% probability that the nodule shown on the x-ray was malignant [Meratee Depo. 52:3].

concerning any transaction with or statement made by the dead or incompetent person, personally or through an agent since dead unless called to testify by the opposite party, or unless the testimony of the dead or incompetent person has been given already in evidence in the same proceeding concerning the same transaction or statement.

Md. Cts & Jud. Proc. Code Ann., §9-116.³ The Dead Man’s Statute is an exception to the general rule that every person is competent to testify. *Reddy v. Mody*, 39 Md. App. 675, 388 A.2d 555 (1978).

In a diversity action in federal court, state law governs the determination of witness competence to testify, F.R.Evid. 601. Accordingly, the Dead Man’s Statute is applicable in the diversity action before this Court to the determination of Dr. Meratee’s competence to testify concerning her transactions with and statements made by Marion Hobrath, Decedent. *See Maltas v. Maltas*, 197 F. Supp.2d 409 (D. Md. 2002).

The purpose of the Dead Man’s Statute is “to equalize the position of the parties by imposing silence on the survivor as to transactions with or statements by the decedent.” *Reddy v. Mody, supra* at 679. The rule recognizes the great danger that a surviving party’s testimony is likely to contain “self interested perjury” when her adversary has no ability to present the decedent’s version of the transaction or statement. *Id.* at 681.

In a *survival* action arising out of medical negligence, the Maryland Court of Special Appeals has held that the Dead Man’s Statute precludes a defendant doctor from testifying as to transactions with and statements by his deceased patient. *Reddy v. Mody*,

³ The test for determining whether there has been a transaction within the meaning of the dead man’s statute is “[w]hether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge.” *Schifanelli v. Wallace*, 271 Md. 177, 184, 315 A.2d 513 (1974)(quoting *Ridgley v. Beatty*, 222 Md. 76, 83, 159 A.2d 651 (1960)); *Boyd v. Bowen*, 145 Md. App. 635, 806 A.2d 314 (2002).

supra. The Dead Man’s Statute is inapplicable, though, in a *wrongful death* action, because damages are awarded to wrongful death beneficiaries in their own right, not as heirs, devisees, distributees, or legatees as such. *State, Use of Miles v. Brainin*, 224 Md. 256, 167 A.2d 117 (1960)(medical negligence case); *Robinson v. Lewis*, 20 Md. App. 710, 317 A.2d 854 (1974).

In *Reddy v. Mody, supra*, the jury returned a defense verdict in both the wrongful death and survival actions. On appeal, plaintiff raised the issue whether the trial court erred by allowing the testimony of the defendant doctor concerning transactions with and statements by the deceased patient. The appellate court held that the Dead Man’s Statute applied to the survival action, and that it was reversible error for the trial court to have allowed the defendant doctor’s testimony in that action. Citing *Brainin*, the court further held that it was not error for the trial court to have allowed the defendant’s testimony as to the wrongful death action. Accordingly, the court in *Reddy* ordered a retrial of the survival action, but affirmed the judgment in the wrongful death action. In a case in which survival and wrongful death actions are joined at trial, as in the case *sub judice*, *Reddy* does not address the question how procedurally the trial court can, when applying the Dead Man’s Statute, simultaneously allow defendant’s testimony in the wrongful death action and disallow the same testimony in the survival action.⁴

Because Dr. Meratee is a party to the survival action, it is clear that the Dead Man’s Statute precludes her testimony in the survival action respecting her transactions

⁴ In *Robinson v. Lewis, supra*, a personal injury case in which wrongful death and survival actions were joined at trial, the court declined to address the “interesting question” whether the testimony of a wrongful death beneficiary should be excluded under the dead man’s statute when that party is also the personal representative of the estate.

with and statements made by Decedent. Defendant's inadmissible testimony concerning her transactions with Decedent includes the following:

Dr. Meratee's undated signature on the chest x-ray report means that she discussed the x-ray results with Decedent;

After reviewing the chest x-ray results with Decedent, Dr. Meratee recommended that Decedent get an immediate CT scan and another follow up CT scan in three months;

Dr. Meratee advised Decedent concerning the probability that the nodule shown on the chest x-ray was malignant;

Dr. Meratee gave Decedent a written order to obtain a follow up CT scan; and

After giving Decedent a written order to obtain a follow up CT scan, Dr. Meratee inquired at Decedent's next office visit whether she had complied with instructions.

Defendant's inadmissible testimony concerning statements made by Decedent includes the following:

Decedent was concerned that her husband was having an affair with another woman;

As the result of her husband's supposed affair, Decedent had experienced overwhelming anxiety which was her major problem at the time; and

Decedent failed to comply with instructions to obtain a follow up CT scan because she was preoccupied with issues in her personal life, including her husband's supposed affair.

This Court may exclude otherwise relevant testimony pursuant to F.R.Civ.P. 403 if its probative value is substantially outweighed by, *inter alia*, the danger of unfair prejudice or confusing the issues. For the following reasons, the dangers of prejudice and confusion far outweigh the probative value of Dr. Meratee's testimonial recollections concerning her transactions with and statements by Decedent. Such testimony should therefore be excluded in both the survival and wrongful death actions.

In order to exclude Dr. Meratee's inadmissible testimony in the survival action, as required by *Reddy*, and at the same time allow the identical testimony in the wrongful death action, this Court would necessarily have to fashion a limiting instruction pursuant to F.R.Evid.105. Such an instruction would advise the jury that it may only consider Dr. Meratee's testimony when it decides the wrongful death action, but that it must disregard her testimony when it decides the survival action. Such an instruction, though perhaps technically permissible, would be baffling and incomprehensible to a lay jury. This is because the basis of Defendant's liability in both actions is identical (*i.e.*, Defendant negligently failed to obtain a follow up CT scan), and Dr. Meratee's defense in both actions is identical (*i.e.*, Defendant advised Ms. Hobrath to obtain a follow up CT scan, but she failed to comply). No matter how conscientious the jury, it can not reasonably be expected to simultaneously consider and disregard Defendant's testimony when it evaluates the asserted negligence claims and defenses thereto. Once it has received Defendant's testimony, the jury will inevitably consider it in both the survival and wrongful death actions. For this reason, a limiting instruction under F.R.Evid. 105 would be ineffective. Allowing Dr. Meratee's testimony in the wrongful death action will therefore unfairly prejudice Plaintiff, because there is a great likelihood that the jury, no matter how carefully this Court instructs it on the proper application of the Dead Man's Statute, will consider Defendant's testimony in the survival action, in violation of the legislative intent which underlies the Dead Man's Statute, *i.e.*, the protection of decedents' estates from spurious claims and defenses.⁵

⁵ Courts in other jurisdictions which have grappled with this issue have held that the survivor's testimony should be excluded when wrongful death and survival actions are joined in one proceeding. *See National State Bank of Boulder v. Brayman*, 497 P.2d 710

Furthermore, Dr. Meratee’s testimony has little or no probative value under the circumstances of this case. As the court points out in *Reddy*, the temptation of a surviving party to fabricate a claim or defense is “obvious” in cases in which her adversary has no ability to present the decedent’s version of the transaction or statement, 39 Md App. at 681. Thus, the legislative purpose which underlies the Dead Man’s Statute is to prevent “self interested perjury”, *id.* at 679. Merely because Dr. Meratee’s testimonial recollections are admissible in the wrongful death action does not diminish the recognized danger that her testimony is fabricated. The danger of fabrication greatly diminishes the probative value of Dr. Meratee’s testimony.

The exclusion of Dr. Meratee’s *testimony* concerning her transactions with and statements by Ms. Hobrath does not prevent Defendant from introducing other evidence in support of her contention that she advised Decedent to obtain a follow up CT scan, and that Decedent failed to comply with medical advice. Such other evidence includes Decedent’s medical records, which document Defendant’s contemporaneous assessment of Decedent’s medical needs, as well as Decedent’s treatment plan and significant events during the course of treatment.

Because Ms. Hobrath was a Medicare beneficiary, Dr. Meratee was obligated to comply with Medicare policy guidelines which required her to clearly document in

(Colo. App. 1972)(where negligence was basis of both survival and wrongful death actions tried to same jury, court rejected defendant’s position that testimony could be admitted for purposes of wrongful death claim and at same time excluded for purposes of survival action); *Groce v. South Chicago Community Hospital*, 669 N.E.2d 596 (Ill. App. 1996)(defendant doctor prohibited from testifying on his own behalf as to referrals of decedent to oncologist and her refusal to submit to treatment). *But see Gibbs v. Herman*, 714 A.2d 432 (Pa. Super. 1998)(court allowed defendant’s testimony because “to tell jury to listen to defendant in one claim and close its ear in other might possibly be technically correct but practically senseless”).

Decedent's medical records, *inter alia*, all orders for diagnostic testing, including CT scans. [Ex. B, Medicare Benefit Policy Manual, §80.6.1, CMS Documentation Guidelines for Evaluation and Management Services]. Moreover, Dr. Meratee has testified that it was her regular practice to document her medical advice and instructions in the patient's medical record.

Q. Let me ask you generally, Doctor. When you give a patient medical advice or instructions, do you customarily document this in the patient's chart?

A. I try to do as much as I can.

Q. Okay. Is there any other place or method that you use to document advice or instructions you give to a patient other than in the patient's chart?

A. No.

* * * * *

Q. Are there any exceptions to your general rule of documenting in the patient's chart the medical advice and instructions?

A. No.

[Meratee Depo. 20:11 – 21:21].

Because Dr. Meratee had an obligation to document her medical advice and instructions respecting diagnostic testing, and inasmuch as it was her regular practice to do so, Decedent's contemporaneous medical records contain the most probative evidence of the actions, if any, taken by Dr. Meratee to follow up on Decedent's abnormal chest x-ray. Compared to the contemporaneous medical records, Defendant's testimonial recollections - developed for the purpose of litigation and suspected of containing "self interested perjury" - have slight probative value. Under the circumstances, the probative

value of Defendant's testimony concerning her transactions with and statements by Decedent is outweighed by the dangers of confusing the issues and unfair prejudice.⁶

For all of these reasons, Plaintiff respectfully requests that this Court exclude any and all of Defendant's testimony concerning her transactions with and statements by Decedent.

Date: 2/22/13

/s/ James P Koch
1101 St. Paul St.
Suite 404
Baltimore, MD 21202
410 539 7816
Attorney for Plaintiffs

⁶ Section 14-404(a) of the Maryland Health Occupations Code subjects a physician to discipline for failure "to keep adequate medical records as determined by appropriate peer review".