

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

ANTHONY ALLEN JORDAN,

Plaintiff,

Case Number: 2017-CA-001913

v.

GAUDENCIA HERNANDEZ, TRINITY
SERVICES GROUP, INC. a Florida Profit
Corporation, and RYDER TRUCK RENTAL
LT, a Florida Trust d/b/a RYDER TRUCK
RENTAL, INC., a Florida Profit Corporation,

Defendants.

**PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE OR LIMIT THE TESTIMONY OF
DEFENDANTS' NEUROSURGEON EXPERT JOHN A. JENKINS, M.D.**

Plaintiff, ANTHONY ALLEN JORDAN, moves this Honorable Court for an order in limine to exclude or limit the testimony of Defendants, TRINITY SERVICES GROUP, INC. and GAUDENCIA HERNANDEZ's ("Defendants") neurosurgeon expert, John A. Jenkins, M.D. In support thereof, Plaintiff states as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. This action pertains to injuries suffered by Plaintiff, ANTHONY ALLEN JORDAN ("Mr. Jordan"), as the result of a motor vehicle crash which occurred on October 7, 2015 ("Crash") when the vehicle driven by Defendant, TRINITY SERVICES GROUP, INC.'s ("Trinity"), employee, Defendant GAUDENCIA HERNANDEZ ("Hernandez"), rear-ended Mr. Jordan's vehicle. As a result of the Crash, Mr. Jordan suffered serious injuries.

2. In Defendants' initial Witness and Exhibit List, they named eight specially retained experts, including John A. Jenkins, M.D. ("Dr. Jenkins") a purported expert in neurosurgery, Dr.

Matthew Berlet as an expert neuro-radiologist, and Dr. Alan Segal as neurologist. See Dr. Jenkins's curriculum vitae attached hereto as **Exhibit A**.

3. In response to Plaintiff's expert interrogatories requesting the substance of the facts and the opinions in which Dr. Jenkins is expected to testify and a summary of grounds for each of his opinions, Defendants answered, *in pertinent part*:

John A. Jenkins, M.D. (neurosurgeon – expected to testify on the subject matter of causation and damages within his specialty, including but not limited to the claimed neurological/spine injuries, damages, and/or treatment/surgeries; and rebuttal of Plaintiff's experts addressing these issues).

Dr. Jenkins' opinion is expected to be that there were no orthopedic injuries causally related to the subject accident, and that any disc bulge within the spine was degenerative in nature, appropriate for Mr. Jordan's age (similar to what Dr. Glasser testified to). Further, Dr. Jenkins is expected to testify as to the absence of future treatment and care necessary relating to this accident and, that there was no orthopedic injury from this accident that would prevent Mr. Jordan from employment.

Dr. Jenkins will base his opinions on his education, background, training, knowledge, and experience as well as his review of the Plaintiff's medical records, diagnostic studies, and depositions of fact witnesses and expert witnesses that discuss the Plaintiff's medical condition.

4. Dr. Jenkins prepared an initial report on October 16, 2018, his first addendum to his report on November 16, 2018, and a second addendum to his report on November 28, 2018. In these reports, Dr. Jenkins indicates, *in pertinent part*, as follows:

ASSESSMENT: A 50 year old status post a motor vehicle accident. Some records indicate a loss of consciousness, others do not. He had multiple head CT scans, which showed no abnormalities. He had MRI scans of the brain which show some decreased signal in the T2 images in the posterior lateral ventricular area. This is of uncertain etiology. It is not consistent with trauma. The patient also has pituitary hypofunction, which is not consistent with his history of trauma, as described. He has some mild degenerative change in the neck and the back. He had a four-level discectomy, which would be for degenerative change and not related to the above motor vehicle accident. Any future impairment, restrictions or need for surgery with respect to the neck or

back would be due to degenerative change and not related to the above motor vehicle accident. He had neurocognitive testing. The examiner indicates the results are suspicious as they place him in the 1 percentile. The changes in the neck and the back are mild and degenerative in nature and not related to the above motor vehicle accident.

See Dr. Jenkins' reports and addendums that are attached hereto as Composite **Exhibit B**.

5. Although Dr. Jenkins was hired and identified to only opine regarding Mr. Jordan's spinal injuries, Jenkins' report (and his two subsequent addendums) include a significant medical summary that is riddled with opinions and evaluations of Mr. Jordan's complete medical records that are completely irrelevant to any opinion relative to spinal injuries.

6. Dr. Jenkin's deposition was taken on December 19, 2018. Although Dr. Jenkins' opines that Mr. Jordan only suffered from a mere muscle sprain, this deposition revealed that Dr. Jenkins does not actually diagnose or treat patients with musculoskeletal strains. He stated "...I don't have recall of that specifically because there's not really any reason for me to. I basically diagnosed patients that have potentially surgical lesions." See Deposition Transcript of John A. Jenkins, attached hereto as **Exhibit C** at p. 79:15-20.

7. Throughout his deposition, Dr. Jenkins stated that he doesn't "...treat patients for musculoskeletal strain. I basically tailor my diagnosis related to what I do, which is surgery...there is not really a situation in which I would need to diagnose that." See **Exhibit C** at p. 82:18-24. In evaluating patients in his practice, Dr. Jenkins' admittedly only makes the determination "does this guy need a neurosurgeon or not." See **Exhibit C** at p. 83:1-3.

8. Dr. Jenkins, who self identifies as only determining whether a patient needs a surgery and is the "top of the food chain," makes the opinion that Mr. Jordan suffered from a muscle sprain, but yet, has never made this diagnosis before. Making Dr. Jenkins' unqualified to even assert such a position.

9. In support of his opinions, Dr. Jenkins discusses at length all the imaging that Mr.

Jordan has obtained and makes his own opinions from his own review of the films.¹ This is precisely the same testimony and purpose of Defendants' expert neuro-radiologist, Dr. Matthew Berlet and Defendants' expert physical medicine doctor, Dr. Ronald Tolchin.

10. Dr. Jenkins' redundant and unnecessary opinion also repeats two of Defendants' experts – neurologist Dr. Alan Segal and Dr. Ronald Tolchin – who both opine that Mr. Jordan's medical injuries are not caused by the October 2015 crash. Dr. Jenkins' testimony offers nothing more than what Dr. Segal and Dr. Tolchin intend to offer.

11. Taking Dr. Jenkins' reports and his deposition testimony together, he does not provide any additional opinion on behalf of Defendants. His testimony is nothing more than cumulative testimony of Defendants' other experts, Dr. Alan Segal, Dr. Ronald Tolchin, and Dr. Matthew Berlet. The redundancy of his testimony is apparent even to Dr. Jenkins who admits that Dr. Segal's opinion "sounds pretty similar to my opinion." See Exhibit C at p. 108:16-19.

ARGUMENT

In addressing the admissibility of expert testimony, presentation of cumulative expert testimony is improper and is grounds for reversal. Dr. Jenkins' opinions should be excluded for the following reasons: (1) his opinion is cumulative and irrelevant; (2) his report is a mere medical summary that creates cumulative evidence; and (3) he is not qualified to make the opinions he offers and is therefore unreliable.

A. Dr. Jenkins' Testimony is Cumulative and Irrelevant

It is patently unfair for a party to call expert witnesses with the same medical specialty to support that party's position as it will unfairly sway a jury to decide in that party's favor. See Vargas v. Gutierrez, 176 So. 3d 315, 322-26 (Fla. 3d DCA 2015). The Third District Court of

¹ Dr. Jenkins reviewed the films of Mr. Jordan's cervical spine and makes his opinion on what those films reflect. See Exhibit C at p. 64:6-18.

Appeals recognized this exact issue and held that “limiting of a number of witnesses for a given side has long been recognized as appropriate” under Florida law. Stager v. Fla. East Coast Ry. Co., 163 So. 2d 15, 17 (Fla. 3d DCA 1964) (“What he would have testified to was proffered in the evidence and its effect was that the plaintiff was unable to continue in the occupation of a railroad engineer. However, this evidence would merely have been cumulative to that testified to by the two treating physicians.”); Carpenter v. Alonso, 587 So. 2d 572, 573 (Fla. 3d DCA 1991) (“We find no error in the trial court limiting expert witnesses in a medical malpractice case to one expert per side.”). “Unfair cumulative expert testimony is prejudicial...and will rarely be considered harmless error[.]”. Vargas, 176 So. 3d at 323. This long standing rule prohibiting cumulative expert witness testimony is derived by the “trial court's inherent authority to control the trial proceedings and presentation of evidence[.]” Id.

Section 90.403, Florida Statutes affirms this position and requires that witness testimony be excluded if it presents a “***needless presentation of cumulative evidence.***” See Fla. Stat. § 90.403. (emphasis added). Meaning if two experts are going to provide the same opinions on the same issue at trial, their testimony is cumulative and should be excluded. Rivers v. State, 425 So. 2d 101, 106 (Fla. 1st DCA 1982) (“No showing has been made that the testimony of Dr. Yates would have been any different in its import and effect than that given by Drs. Miller and Saul. As such, it would have been merely cumulative, and no reversible error has been shown in the exclusion of her testimony.”); Kennedy v. Brago, 544 So. 2d 216 (Fla. 3d DCA 1989) (“[W]e conclude that the proffered testimony-that there was a degeneration in Mrs. Kennedy's condition after the accident-was cumulative and therefore its exclusion was harmless.”); see also Millien v. State, 766 So. 2d 475, 477 (Fla. 4th DCA 2000) (“While a defendant in a criminal case has the right to present his theory of defense ... this right is subject to the reasonable discretion of the trial

judge in controlling the hearing and limiting unnecessary, cumulative, and repetitive testimony.”); Hall v. State, 614 So. 2d 473, 477 (Fla. 1993) (affirming trial court's exclusion of four fact witnesses that would testify to similar matter because “[i]t is within the trial court's discretion to exclude cumulative evidence”); Joseph F. Maimone v. Am. Exp. Travel, 598 So. 2d 272, 272-73 (Fla. 3d DCA 1992) (“[W]e find no error in the exclusion of testimony of two witnesses regarding the origin of one clause in the contract between the parties...it and was properly excluded as irrelevant and cumulative to testimony already received.”).

In Vargas, the plaintiffs called four medical experts to testify at trial, all of whom gave the same opinion testimony. The defendant moved in limine to exclude that testimony as cumulative, but the motion was denied. On appeal, the Third District Court of Appeals reversed holding that the plaintiffs' unfair balance of expert testimony was cumulative evidence. The Third District explained “by limiting each party to one expert per specialty, the case will not be decided by which side has the assets to afford more expert witnesses to sway the jury, but rather, it will be decided on the credibility of the single best expert each side can present on the issue.” Because of the cumulative testimony of those experts, the Third District granted a new trial.

The instant case is exactly like Vargas. Defendants intend to call six medical experts to testify at trial. Of those six medical experts, Dr. Jenkins’ testimony is offering the same opinions as Dr. Segal and Dr. Berlet. Dr. Jenkins and Dr. Segal will give the same opinions on the same issues, i.e., that Mr. Jordan’s injuries are not caused by the subject crash.

Dr. Jenkins and Dr. Berlet will offer the same opinion that Mr. Jordan did not suffer from any impingement on the cervical spine or cervical disc herniation and Mr. Jordan only suffers from “degenerative changes.” See Deposition Transcript of Dr. Matthew Berlet, attached hereto in pertinent part as **Exhibit D** at pp. 45:3-25; 46:1-25; 47:13. Both Dr. Berlet and Dr. Jenkins also

review and provide opinions on Mr. Jordan's thoracic and lumbar spine based on their interpretation of the films. Dr. Tolchin also makes the same opinion regarding Mr. Jordan's cervical spine – that the “anterior cervical discectomy and fusion secondary to degenerative changes and not related to the accident” based upon the MRI films. See Deposition Transcript of Ronald Tolchin, dated February 8, 2019, attached hereto in pertinent parts as **Exhibit E** at pp. 48:24-25; 49:1-2; 66:19-24; 67-69.

As the Third District held in Vargas, allowing Defendants to call Mr. Jenkins on his causation opinion and his read of radiology films will give the exact same opinions at trial as Dr. Segal, Dr. Berlet, and Dr. Tolchin, respectively, and is completely improper and grounds for reversal. Any opinion by Dr. Jenkins' regarding causation of Mr. Jordan's injuries and opinions on radiology films is cumulative and prohibited by the rules and common law governing expert testimony.

B. Dr. Jenkins' Medical Summary is Cumulative

Section 90.956, Florida Statutes, Summaries states in part: “When it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs, ***a party may present them in the form of a chart, summary, or calculation by calling a qualified witness.*** The party intending to use such a summary must give timely written notice of his or her intention to use the summary...” See Fla. Stat. § 90.956. Dr. Jenkins' report, like Tolchin's report, provides a summary of the medical records reviewed. Such summaries may be admissible ***if the witness who created the summary “testified to the accurate summary.”*** See Scott v. Caldwell, 37 So. 2d 85, 88 (Fla. 1948).

When Dr. Jenkins' testified to his summary, he stated that he would not provide opinions at trial on several of the comments and notations included within the report. Despite that fact,

Defendants will seek to introduce the report. For example, when discussing any potential loss of consciousness that was contained within the summary of Dr. Jenkins' report, he testified at first that he would be making opinions that "some records say there was no loss of consciousness, some records say there was..." Dr. Jenkins then goes on to say "the loss of consciousness has no effect one way or the other on the opinions that [I am] going to provide in this case." **Exhibit C** at p.13:19-22. This fundamentally violates the cumulative evidence rule.

With the inconsistent position of what the summary is actually providing, whether it be Dr. Jenkins' opinions or just his review of the records, the summary is not accurate in that it does not contain all medical records. Although deposed, Dr. Jenkins did not accurately testify to his summary and how it will be used to support his opinions. Nor can the medical summary be validated by Dr. Jenkins and would thus be unreliable evidence at trial. The medical summary contained in Dr. Jenkins' report is also completely cumulative of the medical summary of Dr. Tolchin's report, and Dr. Tolchin actually evaluated Mr. Jordan.

Similarly to cumulative testimony, cumulative evidence is prohibited. See Probkevitz v. Velda Farms, LLC, 22 So. 3d 609, 616 (Fla. 3d DCA 2009) ("It is permissible for the trial court to preclude a party from introducing cumulative evidence."). Dr. Jenkins' cumulative medical summary contained within his report should not be presented at trial as being both unreliable and cumulative of other medical summaries and opinions that Defendants will be introducing at trial.

C. Dr. Jenkins' "Diagnosis" is Unreliable

Dr. Jenkins' purported opinion that Mr. Jordan suffered from a mere strain was admittedly something that Dr. Jenkins had never diagnosed before and even mentioned it was something that would maybe be possible to see upon an MRI. This type of "pure opinion" coming from someone without experience to diagnose this type of injury lacks the foundational principles of medical

probability required for expert testimony. But more importantly, this admission from Dr. Jenkins makes the basis for his opinion unreliable.

CONCLUSION

WHEREFORE, Plaintiff, ANTHONY ALLEN JORDAN, respectfully requests that this Court enter an Order excluding or limiting Defendants, GAUDENCIA HERNANDEZ and TRINITY SERVICES GROUP, INC.'s neurosurgeon expert, John A. Jenkins, M.D., from presenting any testimony on the following topics:

1. Causation of Mr. Jordan's injuries, including but not limited to any spinal, brain, neurocognitive, or psychological injuries or impairments;
2. Reasonableness of Mr. Jordan's medical treatment;
3. Appropriateness of Mr. Jordan's medical treatment;
4. Medical summary contained within his report;
5. Reports or any supplemental reports prepared by Dr. Jenkins;
6. Interpretation, opinions, or comments on any radiological films;
7. Mr. Jordan's spinal injuries; and
8. Mr. Jordan's brain injuries.

Plaintiff requests the above relief, together with such other and further relief as the Court deems appropriate under the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail via the Florida E-filing Portal to: **Michael E. Reed, Esq., Christopher A. Cazin, Esq.**, tpacrtpleadings@wickersmith.com; Wicker Smith O'Hara McCoy & Ford, P.A. (Counsel for the Defendants); **Jeffrey S. Glassman, Esq. and William G.K. Smoak, Esq.**,

courtdocuments@flatrtrialcounsel.com; Smoak, Chistolini & Barnett, PLLC (Co-Counsels for Trinity Service Group, Inc.); **Lisa Ann Kalo, Esq.**, lkalo@kvpalaw.com, (Co-Counsel for Plaintiff), on this **14th** day of **March, 2019**.

/s/Marc Matthews

MARC MATTHEWS, ESQ.

Florida Bar No. 0711098

Email: Marc@mcintyrefirm.com

McIntyre Thanasides Bringgold

Elliott Grimaldi Guito & Matthews, P.A.

500 E. Kennedy Blvd., Suite 200

Tampa, Florida 33602

Telephone: (813) 899-6059

Facsimile: (813) 225-1221

Service of Court Documents:

Marc@mcintyrefirm.com

Eservice-Marc@Mcintyrefirm.com

and

LISHA BOWEN, ESQ.

Florida Bar No. 0169374

Lisha@bowentrials.com

LISHA BOWEN, P.A.

P.O. Box 173442

Tampa Florida 33672

(T :) (813) 995-5580

(F :) (813) 489-4344

Service of Court Documents:

Lisha@bowentrials.com

Attorneys for Plaintiff