STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: April 4, 2014]

MARIA PRICE, as Administratrix of the Estate of Stacey Spikes, and on behalf of CURTIS SPIKES, a minor	:	
VS.	:	**C.A. No. PC 07-1673**
NICHOLAS CALIFANO, M.D.; DOMINICK TAMMARO, M.D.; RHODE ISLAND HOSPITAL, et al.	:	

DECISION

VOGEL, J. Plaintiff, Maria Price, brings this case as Administratrix of the estate of Stacey Spikes and on behalf of a minor, Curtis Spikes against Defendants, Dr. Dominick Tammaro, an internist, and the Rhode Island Hospital. (The claims against Dr. Jennifer Hur have been dismissed). Defendants have filed a motion to strike Plaintiff's Further Supplemental Answers to Interrogatories and to stay prejudgment interest. The gist of the motion pertains to Plaintiff's supplemental expert disclosure in which she names rebuttal experts. Defendants object to the disclosure as inconsistent with the Court's scheduling order and suggest that the experts named and opinions expressed do not constitute rebuttal experts or opinions. Defendants contend that such experts should have been included in the original disclosure and that Plaintiff's effort to characterize them as rebuttal witnesses constitutes an effort to circumvent the scheduling order requiring staggering disclosure of experts. Plaintiff disputes this contention and maintains that the experts and opinions are disclosed for use in the rebuttal stage of the trial, not in connection with her case in chief.

For the reasons set forth herein, the Court rules as follows:

The motion to strike is denied. Plaintiff's rebuttal disclosure may stand. The Court defers to the trial justice to determine whether the experts and opinions disclosed constitute rebuttal evidence or if the witnesses should be excluded as constituting evidence more properly presented during Plaintiff's case-in-chief.

The Court hereby rules that Plaintiff is precluded from presenting those experts named as rebuttal witnesses at trial during her case-in-chief for her failure to name such experts in her disclosure, as required by scheduling orders issued by this Court.

Within thirty days following the completion of the trial, counsel shall appear before Justice Vogel, in the event that Defendants rest at trial without offering testimony from each of the seven experts named in their supplemental interrogatory answer. In such event, the Court may impose sanctions, including, but not limited to fees and costs to Plaintiff to reimburse her for expenses incurred in deposing any non-testifying expert.

Defendants' motion to stay prejudgment interest is denied.

Factual Allegations

In pertinent part, Plaintiff alleges that Plaintiff's decedent, Stacey Spikes, committed suicide as the result of receiving pain treatment beneath the standard of care from Defendants. She had a history of chronic abdominal pain and pancreatitis for which she received pain treatment and diagnostic testing over a period of years. The diagnostic testing failed to reveal a physiological cause of the pain.

Plaintiff alleges that Ms. Spikes presented to the emergency room at Rhode Island Hospital in 2003 with complaints of severe right quadrant pain. The emergency room physician treated her with IV Dilaudid, IV Reglan, and admitted her. While in the hospital, she developed nausea and vomiting consistent with her previous pain attacks and received IV opioids again

which alleviated the pain. While hospitalized, she saw a gastroenterologist who had treated her previously, and he noted her chronic pain control and indicated that a psychiatric consult was pending. He also reported concerns over anger, depression, sedation and paranoid ideation. He reported that her mother expressed concerns that she could kill herself. She received a psychiatric consult which ruled out paranoia.

She was discharged from that hospitalization a few days after her admission. However, over the next year, with increasing frequency, she had several other admissions/ER visits reporting similar complaints. At each emergency room visit and admission, prior to her final admission, she received the same pain control regime including IV Dilaudid followed by PO pain medication until pain free and able to be discharged.

On March 26, 2004, she was admitted to the hospital floor from the emergency room where she had been treated with IV Dilaudid. On March 27, 2004, the attending physician changed her order from IV to oral medication which allegedly did not alleviate her complaints of pain. This change represented a deviation from her usual course of treatment and constitutes a significant part of the factual basis of Plaintiff's malpractice wrongful death claim.

Plaintiff claims that Ms. Spikes remained in great pain, but without effective pain treatment for several hours and that such treatment plan led to her suicide attempt on March 27, 2004, when she hung herself from an IV pole. Ms. Spikes never recovered and died on April 7, 2004.

Disclosure of Experts

Plaintiff's Expert Disclosure

On May 10, 2013, Plaintiff filed a supplemental answer to interrogatories disclosing a board certified psychiatrist, Phillip Muskin, M.D., as her only expert. He is listed as expecting to testify both as to the standard of care applicable to the treatment rendered to Ms. Spikes and also as to her likely outcome, had she received treatment within the standard of care. His opinion and the facts upon which he based the conclusions were detailed in seven and a half, single-spaced typed pages.

The disclosure includes his opinion that the pain management offered to Ms. Spikes by Defendants fell beneath the standard of care. He notes that from July 2003 to March 27, 2004, she sought treatment at the hospital for abdominal pain with increased frequency. He opines that the Defendants violated standards of pain management care by continuing to treat the pain without determining the root cause of her increased presentations, whether psychiatric or physical.

Dr. Muskin concludes that at the time of her last admission, Ms. Spikes was iatrogenically dependent on pain medication and that she had a reasonable expectation that her pain treatment during that hospitalization would be consistent with the treatment she had been receiving over the previous months. He opines that Defendants breached the standard of care by changing that treatment plan, given her dependence on the medication. Dr. Muskin is prepared to testify that when faced with the withdrawal of medication as previously administered, it was reasonably foreseeable that Ms. Spikes would take actions to call attention to the untreated pain, including harming herself. He connects the suicide attempt to a natural and probable consequence of the abrupt change to her usual pain treatment plan.

Defendants' Disclosure

On August 10, 2013, Defendants filed a supplemental answer to interrogatories disclosing seven experts—three psychiatrists, two hospitalists and two pain management specialists: Daniel D. Dressler, M.D., a hospitalist; Christopher Roy, M.D., a hospitalist; David Gitlin, M.D., a psychiatrist; Jerrold Rosenbaum, M.D., a psychiatrist; Michael Weinberger, M.D., a specialist in pain medicine; Gary Brenner, M.D., Ph.D., an anesthesiologist and specialist in chronic pain; and Colin Harrington, M.D., a psychiatrist.[1]

Their seven opinions appear to follow the same theme, to wit, that the treatment Ms. Spikes received at Rhode Island Hospital was within the standard of care and that it was not reasonably foreseeable that the change in her treatment would result in a suicide attempt. Defendants plan to present experts to testify that those who treated Ms. Spikes worked diligently to identify the cause of her pain and to provide her with appropriate treatment and that it was reasonable to transition her from IV to oral medications. Defendants expect to present testimony that Ms. Spike's previous work-up led to a probable primary diagnosis of Somatoform Disorder, a mental disorder characterized by unexplained physical symptoms. The experts are expected to testify that it was not foreseeable that a change in her treatment regimen from IV to oral medication would result in any severe self-injurious behavior, and that no suicidal ideation was found when she was seen by a psychiatrist two days before her suicide attempt.

[1] The Court previously has recognized and addressed the practice of naming a multitude of experts, possibly to ensure that if one is unavailable or perhaps does not present well at discovery deposition, that he or she has an alternative expert to present. Regardless of the motive for such a practice, "over disclosing" creates an undue burden and expense on adverse parties who must depose the adverse party's expert witnesses. In some cases, it may chill a party's ability to prosecute or defend a case. (See Scheduling Order, May 31, 2013.)

Plaintiff's Rebuttal Disclosure

After the experts disclosed by each of the parties had been deposed, Plaintiff supplemented her interrogatory answers to name two additional experts in rebuttal. In addition to Dr. Muskin, Plaintiff now expects to present testimony from two pain medicine experts, Asokumar Buvanendran, M.D., an anesthesiologist and pain medicine specialist, and Adam Burkey, M.D., a pain medicine specialist.

Dr. Buvanendran is expected to testify that Ms. Spikes was narcotic dependent as a result of her constant exposure to opioid medication, and that she had become tolerant to narcotics. He notes that pain medication was withheld from 5:45 to 7:50 p.m. on March 27, 2004 resulting in severe pain, and that she was unable to receive oral medications. He opines that the standard of care required that any decrease or elimination of her dependence of such drugs should have been done by weaning her gradually off of them, not by withholding pain medication. He concludes that such treatment fell beneath the standard of care.

Dr. Burkey offers a similar opinion and notes that she was both psychologically and physiologically dependent on opioids due to her previous course of treatment. He notes that she likely experienced withdrawal along with symptoms of pain by 10:00 a.m. on March 27, 2004 but did not receive any pain medication until nearly 8:00 p.m., when she was given the equivalent of one-fifth of her usual IV pain medication. Dr. Burkey concludes that such treatment fell beneath the standard of care for pain management, which would have required slowly tapering her pain medication.

Admissibility of Testimony From Dr. Muskin

The trial justice has the discretion to determine whether Dr. Muskin possesses the requisite credentials, experience and skills to testify as an expert in pain management in the

Plaintiff's case-in-chief. This judge has responsibility for issuing and modifying scheduling orders, conducting scheduling conferences and determining when the case is trial-ready. The trial justice, not the scheduling justice, determines the admissibility of expert opinion.

Rhode Island Rules of Evidence 702 provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion. The Rhode Island General Assembly enacted a statute on the need to present qualified experts to testify in medical malpractice actions. G.L. 1956 § 9-19-41 provides, in pertinent part, that:

> **". . . [**o]nly those persons who by knowledge, skill, experience, training, or education qualify as experts in the field of the alleged malpractice shall be permitted to give expert testimony as to the alleged malpractice."

The trial justice has wide discretion to determine the competency of a witness to testify as an expert. However, that decision is reviewable, and the Supreme Court will reverse the ruling on a finding that the trial court abused its discretion in admitting or refusing to admit testimony from a proffered expert. See Marshall v. Medical Assocs. of Rhode Island, Inc., 677 A.2d 425 (R.I. 1996).

The Rhode Island Supreme Court has not interpreted § 9-19-41 or Rule 702 to require that the witness must practice in the same specialty as the defendant physician in order to meet the requisite qualifications to offer an opinion on standard of care. Debar v. Women and Infants Hosp., 762 A.2d 1182, 1186 (R.I. 2000); Buja v. Morningstar, 688 A.2d 817, 819 (R.I. 1997) (per curiam); Marshall, 677 A.2d at 426. There is no requirement that the witness be board certified in the defendant's specialty. Marshall, 677 A.2d at 426.

The proffered expert must possess adequate knowledge, skill, experience or education in the same field as the alleged malpractice. See Flanagan v. Wesselhoeft, 712 A.2d 365, 369 (R.I. 1998); Sheeley v. Memorial Hosp., 710 A.2d 161, 165 (R.I. 1998). The Court addressed what constitutes "field" of alleged malpractice in Sheeley. The Court noted that the focus should be on the procedure performed or treatment provided and whether it was executed or administered in a reasonable manner, and not on the physician's area of professional specialization or certification. The Court stated that "[A]ny doctor with knowledge of or familiarity with the procedure, acquired through experience, observation, association, or education, is competent to testify concerning the requisite standard of care and whether the care in any given case deviated from that standard." Sheeley, 710 A.2d at 166. If an expert possesses the requisite expertise to offer the opinion, his or her lack of formal certification in a particular field will go to the weight of his or her opinion, not to its admissibility. Marshall, 677 A.2d at 426-27.

Nonetheless, the witness must possess more than a casual familiarity with the defendant physician's specialty. The Court has stated: "The witness must demonstrate a knowledge acquired from experience or study of the standards of the specialty of the defendant physician sufficient to enable him to give an expert opinion as to the conformity of the defendant's conduct to those particular standards, and not to the standards of the witness' particular specialty if it differs from that of the defendant." Debar, 762 A.2d at 1188.

As stated previously, this case is before this justice in her role as scheduling justice for the medical malpractice calendar. Since Plaintiff disclosed Dr. Muskin as her expert within the time frame permitted under the scheduling order as amended, the Court must defer to the trial justice to exercise his or her discretion as to whether Dr. Muskin possesses the requisite expertise to testify in the Plaintiff's case-in-chief on issues of standard of care and proximate cause.

Admissibility of Experts Named by Plaintiff to Testify in Rebuttal

Defendants contend that the experts and expert opinions disclosed by Plaintiff as rebuttal evidence constitute evidence that should have been disclosed in support of her case-in-chief. The rules do not contemplate allowing a plaintiff to delay presenting a significant part of his or her case until a defendant rests and then offer the evidence in rebuttal, thereby getting an unfair advantage. A plaintiff cannot hold back evidence in her case-in-chief and introduce it in rebuttal to counter the opposing party's evidence merely because a defendant's evidence proved to be more extensive or effective than expected. However, a plaintiff clearly may present evidence in rebuttal to new evidence offered by a defendant which he or she did not have the opportunity to address in her case-in-chief (or in this case, in her expert disclosures). Plaintiff contends that the opinions her rebuttal experts have disclosed constitute appropriate rebuttal evidence, while Defendants argue that the rebuttal witnesses and anticipated opinions reflect a holding back of evidence and Plaintiff's calculated plan to present her most compelling case in rebuttal.

The Court finds this issue most interesting. However, it is not an issue to be decided by the scheduling judge. The trial justice, not the scheduling justice, determines the admissibility of rebuttal evidence. This justice, as scheduling judge, has the discretion to set timelines for disclosures and to issue sanctions if parties violate those timelines. However, the trial justice has the sole discretion to determine whether the proffered expert witnesses and the opinions they have disclosed constitute an appropriate subject matter for rebuttal evidence.

The trial justice has the discretion to determine whether the evidence offered in rebuttal counters new evidence offered by a defendant in the way of a defense. McGonagle v. Souliere, 113 R.I. 683, 689, 324 A.2d 667, 670 (1974); Souza v. United Elec. Railways Co., 49 R.I. 430, 432–33, 143 A. 780, 782 (1928). Whether to admit evidence on rebuttal is a matter within the

sound discretion of the trial justice. Id.; Michon v. Williams, 97 R.I. 74, 82, 195 A.2d 751, 755 (1963); State v. Falcone, 41 R.I. 399, 402, 103 A. 961, 962 (1918).

The Rhode Island Supreme Court has stated that "'the proper function and purpose of rebuttal testimony is to explain' or to discredit the adverse party." Ruffel v. Ruffel, 900 A.2d 1178, 1190 (R.I. 2006) (quoting State v. Kholi, 672 A.2d 429, 433 (R.I. 1996)) (internal citation omitted). Accordingly, a plaintiff is allowed to "meet and discredit" evidence in rebuttal that a defendant introduced as a "new and relevant part of his defense[.]" McGonagle, 113 R.I. at 689, 324 A.2d at 670. While "a plaintiff is not bound to anticipate a defense[,]" Ruffel, 900 A.2d at 1190, he or she "is strictly entitled to give *only* such evidence as tends to answer *new matter* introduced by [a] defendant." Id. at 1191. (alteration in original) (citation and internal quotation marks omitted). Conversely, "a plaintiff who has the burden of proof on an issue cannot hold back his evidence but must give all of his evidence supporting the affirmative of the issue when presenting his case-in-chief." Labree v. Major, 111 R.I. 657, 306 A.2d 808, 819 (R.I. 1973). When a plaintiff holds back part of his case and attempts to introduce it in rebuttal, it is within the sound discretion of the trial justice to refuse to permit him or her to do so. Michon, 97 R.I. at 82, 195 A.2d at 755; See Ruffel, 900 A.2d at 1190.

A plaintiff cannot introduce expert testimony in rebuttal solely because the defendant contests an aspect of the plaintiff's case-in-chief more extensively or more effectively than expected. See Michon, 97 R.I. at 82, 195 A.2d at 755. In Michon, the Court noted that "[t]he plaintiff in his declaration charged the defendant with negligence resulting inter alia in spondylolisthesis, and it was clearly his obligation to adduce all of the evidence tending to prove that allegation during the presentation of his case in chief." Id.

Additionally, it is not an abuse of a trial justice's discretion to exclude rebuttal evidence where the evidence is of such a nature that plaintiff should have included it in an interrogatory answer. For instance, in Ruffel, the Rhode Island Supreme Court held that it was a "sustainable exercise of [a general magistrate's] abundant discretion in evidentiary matters" to exclude a wife's rebuttal testimony of the defendant's emotional abuse in a divorce proceeding because the facts were of a type that should have been revealed in an interrogatory answer. Ruffel, 900 A.2d at 1191.

As previously stated, the question of whether those experts disclosed as rebuttal witnesses can testify and offer the opinions they have disclosed in rebuttal is left to the trial justice. I defer to the trial justice to determine the admissibility of such evidence in rebuttal.

Medical Malpractice Scheduling Program

In 2010, the Presiding Justice established a medical malpractice scheduling program to address a problem that had developed with reference to the preparation of medical malpractice cases and the assignment of those cases for trial. Those attorneys representing plaintiffs and defendants in medical malpractice cases engage in extensive and expensive discovery. That discovery often involves deposing defendant medical professionals and non-party treating physicians, all of whom have busy work schedules and are not readily available to appear for questioning. It also involves engaging the services of one or more experts to opine on issues of standard of care, proximate cause and damages, and producing those witnesses for discovery depositions. Often those depositions require counsel to travel out-of-state.

Because the trial of a medical malpractice case requires testimony from physicians, both parties and party-retained experts, the Court must give date certain trial assignments and schedule the trials weeks and even months in advance. In light of the complexities in handling

such a case, the medical malpractice trial bar is rather small, and many of the cases take a few weeks to try. Plaintiffs often sue numerous defendants who are represented by different attorneys. As a result, the same attorneys appear on multiple malpractice cases that are pending in the Superior Court awaiting completion of discovery and trial. For these reasons, it is important to control the date certain trial calendar so that trials are staggered appropriately, keeping in mind the trial schedules of attorneys who handle them.

Prior to the creation of the medical malpractice scheduling program, counsel attempted to estimate when their cases would be ready for trial and sought and received date certain trial assignments consistent with their predictions. Statistics demonstrate that over 85% of the cases were not ready for trial when their assignment date approached. In light of the busy trial schedules of the attorneys involved in the cases, parties had to wait many months for a new trial date that would not interfere with competing obligations of counsel.

The practice of assigning and then reassigning medical malpractice cases for trial led to multiple problems, including incivility among counsel. Each blamed the other for the delay. One side might blame the other for delaying expert disclosure or for continuing an expert deposition once scheduled. Plaintiff's counsel might attribute the delay to the unavailability of the defendant physician for deposition, etc. Sometimes, the attorneys postured to appear before a judge they viewed as less likely or more likely to grant a continuance.

Additionally, a date certain assignment is an appointment. The trial calendar judge must make certain that a judge remains available to try the case and cannot reach other matters for trial that will conflict with the block of time designated for the medical malpractice trial.

To address these problems, the Presiding Justice established a scheduling calendar and assigned one judge to handle it statewide. In accordance with that program, counsel attend regular scheduling conferences and receive a series of scheduling orders.

After considering the issue at length and hearing from attorneys on both sides of the issue, the Court decided that most scheduling orders would require a plaintiff to disclose experts at least thirty days before a defendant was required to disclose. (Some members of the plaintiffs' bar had argued in favor of simultaneous disclosure while members of the defense bar sought staggered disclosure.) The Court's ruling on this issue recognizes that plaintiffs have the burden of proof and of going forward with the evidence. The Court further decided that depositions of experts could proceed in any order, and that the deposition of a plaintiff's expert need not be taken until after the defendant disclosed experts.

Once all discovery has been completed, counsel sign a certificate indicating that the case is ready for trial and that all discovery including expert disclosures and depositions are complete. The cases are then given date certain trial assignments, and the trials generally go forward as scheduled. Because the certification eliminates premature trial assignments, the attorneys' trial calendars do not include blocks of time when they are committed to try cases that will be continued as the trial date approaches. The Court can assign trial dates closer in time to the certification date.

Scheduling Orders Issued in Price vs. Rhode Island Hospital and Tammaro

The Court conducted many conferences on this case and issued several scheduling orders. The Court granted multiple requests to extend the period of time in which the parties could disclose their experts. However, at some point, in light of the age of the case and in response to

various concerns raised by opposing counsel, the Court included strict provisions concerning expert disclosure.

1. On December 3, 2010, the Court issued a scheduling order requiring Plaintiff to disclose experts by May 23, 2011; requiring Defendants to disclose experts by June 23, 2011; and, permitting Plaintiff to disclose a rebuttal expert by July 23, 2011;
2. On March 25, 2011, the Court granted Plaintiff's motion to extend discovery deadlines and ordered expert disclosure on dates requested by Plaintiff. Expert disclosure was extended as follows: Plaintiff by August 23, 2011; Defendant by September 23, 2011; and Plaintiff's rebuttal experts by October 23, 2011.
3. On May 20, 2011, the Court extended the disclosure dates as follows: Plaintiff by September 23, 2011; Defendant by October 23, 2011; and Plaintiff's rebuttal experts by November 23, 2011.
4. On March 25, 2011, the Court granted Plaintiff's motion to extend discovery deadlines and ordered expert disclosure on dates requested by Plaintiff. Expert disclosure was extended as follows: Plaintiff by August 23, 2011; Defendant by September 23, 2011; and Plaintiff's rebuttal experts by October 23, 2011.
5. On July 29, 2011, the Court granted Plaintiff's motion to extend discovery deadlines and ordered expert disclosure on dates requested by Plaintiff. Expert disclosure was extended as follows: Plaintiff by December 15, 2011; Defendant by January 15, 2012; and Plaintiff's rebuttal experts by February 15, 2011.

6. On December 16, 2011, the Court extended the disclosure dates as follows: Plaintiff by May 30, 2012; Defendant by July 30, 2012; and Plaintiff's rebuttal experts by August 30, 2012.

7. On July 13, 2012, the Court extended the disclosure dates as follows: Plaintiff by October 1, 2012; Defendant by December 1, 2012; and Plaintiff's rebuttal experts by January 1, 2013.

8. On November 16, 2012, the Court extended the disclosure dates as follows: Plaintiff by February 1, 2013; Defendants by April 1, 2013; and Plaintiff's rebuttal experts by May 1, 2013. (The Court order noted: *"In light of the age of the case, the parties shall not modify the timeframes set forth in this order without filing a motion, with notice and after hearing thereon, which motion shall be filed before the dates expire . . . "*)

9. On April 19, 2013, the Court issued still another order extending the time in which the parties could disclose experts. Plaintiff's disclosure date was extended to May 10, 2013; Defendants' disclosure date was extended to July 10, 2013; Plaintiff's rebuttal experts' disclosure date was extended to August 10, 2013.

   The Court order noted: *"In light of the age of the case and in light of the provision set forth in the previous scheduling order regarding timelines, the Court rules as follows: If Plaintiff fails to disclose experts by May 10, 2013 . . . Plaintiff will be precluded from presenting experts at trial.")*

10. Defense counsel indicated that his clients anticipated naming multiple experts in their disclosure. On May 31, 2013, the Court issued an order to protect Plaintiff from unnecessary expense by having them depose Defendants' named experts, unless Defendants intended to call them as witnesses at trial. The Court included a provision in

the order noting defense counsel's representation that he planned to call all of the experts named as witnesses at trial.

11. On September 13, 2013, the Court issued an order extending Defendants' disclosure date to August 10, 2013 and Plaintiff's rebuttal expert disclosure date to October 10, 2013. The Court included the following provision concerning Plaintiff's plan to name rebuttal experts:

"a. In light of the age of the case, the history of scheduling orders and the Court's rule concerning staggering of expert disclosure, it is understood that rebuttal shall be rebuttal and not experts to be presented in Plaintiff's case in chief.

b. The Court hereby rules and orders that Plaintiff cannot circumvent the rule by which disclosures are staggered (with Plaintiff disclosing thirty days before Defendants) by disclosing experts after Defendants disclose theirs and labeling them as rebuttal experts.

c. To permit Plaintiff to hold back experts and label them as rebuttal experts would invite the Defendants to name new experts or supplement opinions and further delay a 2007 case."

Experts Named as Rebuttal Witnesses cannot be presented in Plaintiff's Case-in-Chief

Whereas the trial justice has the sole discretion to determine the admissibility of the experts disclosed by the parties, this justice has the sole discretion to require compliance with the orders issued on the scheduling calendar. The Court has the obligation to ensure compliance with those orders and to vindicate the authority of the medical malpractice scheduling program when necessary.

That having been said, Plaintiff has never suggested that she intends to offer those witnesses and opinions she disclosed in rebuttal in the presentation of her case-in-chief. Counsel

for Plaintiff argues that the witnesses were contacted and engaged to serve solely as rebuttal witnesses. At the request of the Court, she submitted affidavits from the physicians consistent with that representation. The Court accepts the physicians' affidavits that they were first contacted after both sides had disclosed their experts and expert opinions.

Nonetheless, the Court finds it appropriate to enter an order deferring to the trial justice issues as to the admissibility of Dr. Muskin's opinions consistent with his disclosure and as to the admissibility of rebuttal evidence. In addition, the Court orders that consistent with the scheduling orders setting forth the order of expert disclosure and the dates for such disclosure, the Plaintiff is precluded from presenting any experts at trial in her case-in-chief that were not disclosed before Defendants disclosed their experts.

The timeline for disclosing experts in this case was established when the scheduling justice issued an order, which she extended eight times at the request of counsel, until she finally ruled that "*[I]n light of the age of the case and in light of the provision set forth in the previous scheduling order regarding timelines, the Court rules as follows: If Plaintiff fails to disclose experts by May 10, 2013 . . . Plaintiff will be precluded from presenting experts at trial.")* Scheduling Order, Apr. 19, 2013.

The Court intentionally staggered the disclosure dates in the initial order and in all subsequent orders so that Plaintiff would be required to disclose experts before Defendants were required to disclose their experts. In anticipation of the possibility that Plaintiff's counsel might be naming experts for her case-in-chief out of time and in violation of the staggering provision contained in each scheduling order, the Court issued a further order addressing that issue. On September 13, 2013, the Court included the following provision concerning Plaintiff's plan to name rebuttal experts:

"a. In light of the age of the case, the history of scheduling orders and the Court's rule concerning staggering of expert disclosure, it is understood that rebuttal shall be rebuttal and not experts to be presented in Plaintiff's case-in-chief.

b. The Court hereby rules and orders that Plaintiff cannot circumvent the rule by which disclosures are staggered (with Plaintiff disclosing thirty days before Defendant) by disclosing experts after Defendants disclose theirs and labeling them as rebuttal experts.

c. To permit Plaintiff to hold back experts and label them as rebuttal experts would invite the Defendants to name new experts or supplement opinions and further delay a 2007 case." Scheduling Order, Sept. 13, 2013.

The Court finds that any effort by Plaintiff to present the rebuttal witnesses in her case-in-chief would violate the scheduling orders issued by the Superior Court. This ruling is consistent with the Rhode Island Supreme Court decision in Malinou v. Miriam Hosp., 24 A.3d 497 (R.I. 2011). In that case, the Court addressed this very issue and held that parties were bound to comply with scheduling orders issued by the Superior Court addressing the sequence and timing for discovery. Under R.I. Super. Ct. R. Civ. P. Rule 37(b)(2)(B), if a party or a witness designated to testify on behalf of a party "fails or refuses to obey an order to provide or permit discovery," the court, in its discretion, may issue sanctions, including "[a]n order * * * prohibiting the disobedient party from introducing designated matters in evidence." Rule 37(b)(2) of the Superior Court Rules of Civil Procedure "provides the court with a variety of sanctions that may be imposed on a party who has failed to comply with an order to provide discovery." Malinou, 24 A.3d at 506 (quoting Flanagan v. Blair, 882 A.2d 569, 572–73 (R.I. 2005)). "The decision to impose a particular sanction is within the sound discretion of the trial court." Malinou, 24 A.3d at 506 (quoting from International Depository, Inc. v. State, 603 A.2d

1119, 1124 (R.I. 1992)). "The trial justice selects the sanction he or she believes is '[the] most appropriate [one] for the situation in question.'" Malinou, 24 A.3d at 506 (quoting Margadonna v. Otis Elevator Co., 542 A.2d 232, 233 (R.I. 1988)). One of the sanctions that are available to the court in appropriate circumstances is the preclusion of a party's expert witness from testifying at trial. See Super. R. Civ. P. Rule 37(b)(2)(B). Based upon all of the aforementioned facts and circumstances, the Court orders that Plaintiff may not present those experts named as rebuttal witnesses in her case-in-chief.

The Court previously has expressed concern that Defendants have over-disclosed, naming experts in overlapping fields of specialty with the intention of calling some, but not all, of those experts at trial. When a witness is named, in order to properly prepare his or her case for trial, the opposing party is required to depose the expert. Often, the experts reside out-of-state. They charge expert witness fees to appear at the depositions, and the party taking the deposition is required to expend several hours preparing for the examination. Recognizing the enormous cost of litigating a medical malpractice action, the Court has an interest in making sure that one party is not forcing the opposing party to incur unreasonable expenses. In previous cases, the Court has required counsel to identify the experts he or she intends to call as witnesses and those who he or she has disclosed, just in case the planned expert becomes unavailable or unfavorable. The Court then orders that in the event that a party seeks to switch experts from the disclosed list of witnesses, counsel must request permission to do so for good cause shown.

Counsel for Defendants assured the Court that he intended to present all seven witnesses at trial. (Scheduling Order, May 31, 2013). If, contrary to that representation, the trial proceeds to a point where Defendants rest, and Defendants have not presented all of the named witnesses, the Court orders as follows: Within thirty days of the completion of the trial, regardless of the

outcome, counsel shall appear before this justice. At that time, the Court may impose sanctions against Defendants, which may include, but not be limited to requiring Defendants to reimburse Plaintiff for all costs and fees incurred in connection with the deposition of a non-testifying witness.

Prejudgment Interest

Defendants seek a stay of the running of prejudgment interest in this case. Plaintiff objects to this motion. The imposition of prejudgment interest in a civil action is mandated by statute. Sec. 9-21-10 provides:

> *"(a) In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued, which shall be included in the judgment entered therein. Post-judgment interest shall be calculated at the rate of twelve percent (12%) per annum and accrue on both the principal amount of the judgment and the prejudgment interest entered therein. This section shall not apply until entry of judgment or to any contractual obligation where interest is already provided.*
>
> *"(b) Subsection (a) shall not apply in any action filed on or after January 1, 1987, for personal injury or wrongful death filed against a licensed physician, hospital, clinic, health maintenance organization, professional service corporation providing health care services, dentist, or dental hygienist based on professional negligence. In all such medical malpractice actions in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date of written notice of the claim by the claimant or his or her representative to the malpractice liability insurer, or to the medical or dental health care provider or the filing of the civil action, whichever first occurs.*" G.L. 1956, § 9-21-10.

The General Assembly mandates the imposition of prejudgment interest to be added by the clerk. The Court does not have the discretion to stay the running of interest over the objection of the Plaintiff. Accordingly, Defendants' motion to stay interest is denied.

Conclusion

Defendants' motion to strike the experts and opinions of those experts named by Plaintiff as rebuttal witnesses is denied. The Court defers to the trial justice the decision as to whether such experts may offer rebuttal testimony or whether such evidence should have been presented, if at all, as part of her case-in-chief.

The Court further rules that those experts named as rebuttal witnesses in Plaintiff's expert disclosure are precluded from testifying at trial during Plaintiff's case-in-chief.

Defendants' motion to stay interest is denied.

In the event that Defendants rest at trial without presenting each of the seven experts they have disclosed as witnesses at trial, counsel are ordered to appear before this justice within thirty days of the completion of the trial. The Court will then consider whether to impose sanctions against Defendants, which may include, but not be limited to the award of fees and costs to the Plaintiff in connection with expenses incurred in deposing non-testifying experts. This order is not dependent on the outcome of the case, so long as the trial progresses to a point where Defendants rest.

Counsel shall submit an appropriate order consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Maria Price, et al. v. Nicholas Califano, M.D.; Dominick Tammaro, M.D.; and Rhode Island Hospital
CASE NO:	C.A. No. PC 07-1673
COURT:	Providence County Superior Court
DATE DECISION FILED:	April 4, 2014
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
For Plaintiff:	Amato A. DeLuca, Esq.; Miriam Weizenbaum, Esq.
For Defendant:	Francis A. Connor III, Esq.; Mark P. Dolan, Esq.