

I

Facts

The basic facts of this matter were previously recounted in this Court's Decision of May 23, 2013 regarding Quest's Motions to Compel.¹ The Court will supplement the facts as necessary to decide the instant motion. The underlying litigation was resolved during mediation in February 2011 when Brown settled the case with Pauline Hall (Ms. Hall) for \$6.5 million. Quest has made no payment to Ms. Hall. Brown's cross-claim against Quest seeks contribution. As part of this contribution claim against Quest, Brown seeks to prove the reasonableness of the settlement with Ms. Hall. In this regard, Brown has disclosed Mr. Jones as an expert to testify with respect to the reasonableness of its settlement.

Mr. Jones is a founding partner of the law firm of Jones Kelleher LLP and he possesses over thirty-five years of experience as a trial lawyer, litigating substantial personal injury and medical malpractice actions. (Mem. in Supp. of Quest's Mot. to Strike, Ex. A). He is expected to testify that Ms. Hall's economic and non-economic claims against all of the defendants in the underlying action had a reasonable settlement value range of \$5 to \$7.5 million and that Brown's decision to limit the defendants' exposure by settling all of Ms. Hall's claims in the amount of \$6.5 million was reasonable. *Id.* at 4. In support of this conclusion, Mr. Jones intends to testify that in forming his opinions and conclusions, he took into account Ms. Hall's medical records and course of treatment, the accrual of interest per annum from the date of written notice of the claim, the high competency of Ms. Hall's attorney, the credibility of Ms. Hall's trial experts, Ms. Hall's ability to present as a good witness to the jury, and his experience and knowledge of previous verdicts and settlements in Rhode Island medical malpractice and catastrophic injury

¹ Hall v. Shiff, 2013 WL 2363143, *1 (R.I. Super. May 23, 2013).

cases. Id. at 4-7. Additionally, Mr. Jones is expected to testify that he based his opinions and conclusions, in part, upon an interview he had with Brown’s attorney, Mr. Dailey. During this interview, Mr. Dailey described to Mr. Jones conversations he previously had with Quest’s attorney, Mr. Dolan, in which they discussed the potential value of the case. Id.

In his deposition, Mr. Jones stated that, in his interview, Mr. Dailey,

“described a conversation that he had with [Mr. Dolan] where he described generally what the value of this case might be in Massachusetts and what he was thinking of in terms of the value of it as he was looking at it beginning to prepare for mediation . . . [and] identified a number in the sort of three and a half [million] to four and half [million], five [million] range. And he indicated that [Mr. Dolan] responded by saying that in Rhode Island a case like this would have an aggregate value in the range of \$6 million.” Jones Dep. 28:24-29:12, Oct. 1, 2014.

Later in the deposition, Mr. Jones was asked if the aforementioned conversation was “part of the information upon which [he] relied in the formulation of [his] opinions and conclusions.” Id. at 30:22-30:23. Mr. Jones answered that “[i]t was a piece of the puzzle that supported the opinion that [he] arrived at” and that “it supported opinions and conclusions that [he] had made.” Id. at 31:1-31:2; 31:8-31:9.

II

Standard of Review

The instant motion requests this Court to act as a gatekeeper to bar all or parts of Mr. Jones’ expert testimony. In Rhode Island, the trial court decides whether an expert is permitted to testify, a decision that is afforded much deference. See R.I. R. Evid. 104; Raimbeault v. Takeuchi Mfg. (U.S.), Ltd., 772 A.2d 1056, 1061 (R.I. 2001) (quoting Gallucci v. Humbyrd, 709 A.2d 1059 (R.I. 1998)) (stating that “[t]his Court will not disturb a trial justice’s ruling on the admissibility of expert testimony absent an abuse of discretion”). Before an expert is permitted

to testify, the trial court applies R.I. R. Evid. 702, commonly referred to as the Daubert test, to determine whether the witness is able to clear two evidentiary hurdles: (1) he or she has applicable expert qualifications and (2) he or she will impart reliable and relevant expert testimony that will assist the trier of fact. See Raimbeault, 772 A.2d at 1061 (holding that Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993) applies to scientific testimony in Rhode Island state courts). Such an evaluation is necessary to ensure that the proffered expert testimony is “relevant, appropriate, and of assistance to the jury,” and thus admissible. DiPetrillo v. Dow Chem. Co., 729 A.2d 677, 686 (R.I. 1999). A party must prove by a preponderance of the evidence that its expert can meet these two requirements. Id.

Rule 703, entitled “Bases of opinion testimony by experts,” provides that:

“[a]n expert’s opinion may be based on a hypothetical question, facts or data perceived by the expert at or before the hearing, or facts or data in evidence. If of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject, the underlying facts or data shall be admissible without testimony from the primary source.” Rule 703.

According to Rule 703, the facts that form the basis for an expert’s opinions or inferences need not be admissible in evidence “[i]f of a type reasonably relied upon by experts in the particular field.” United States v. Locascio, 6 F.3d 924, 938 (2d Cir. 1993); see United States v. Corey, 207 F.3d 84, 89 (1st Cir. 2000); United States v. Mejia, 545 F.3d 179, 197 (2d Cir. 2008); Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999); see also Smith v. Johns–Manville Corp., 489 A.2d 336, 339 (R.I. 1985) (“This court has stated previously that where the federal rule and our state rule of procedure are substantially similar, we will look to the federal courts for guidance or interpretation of our own rule.”). However, “Rule 703 does not authorize admitting hearsay on the pretense that it is the basis of expert opinion when, in fact, the expert adds nothing to the out-of-court statements other than transmitting them to the jury.” 29 Federal Practice and

Procedure Evid. § 6273 (1st ed.); see Mejia, 545 F.3d at 197 (citing United States v. Dukagjini, 326 F.3d 45, 54 (2d Cir. 2003)) (“The expert may not . . . simply transmit that hearsay to the jury.”). “Instead, the expert must form his own opinions by ‘applying his extensive experience and a reliable methodology’ to the inadmissible materials.” Mejia, 545 F.3d at 197.

III

Discussion

A

Parties’ Arguments

In support of the motion to strike, Quest makes two arguments: 1) the common interest doctrine operates so as to extend the work-product doctrine to the communications at issue; and 2) that Mr. Jones cannot base his expert opinion upon any part of Mr. Dolan’s purported comments because they were made as part of settlement or compromise negotiations. In response, Brown argues that: 1) Mr. Jones did not base his opinion solely upon the interview in question; 2) the common interest doctrine does not apply; and 3) statements were not made in compromise negotiations and thus are not precluded under Rule 408.

B

Common Interest Privilege²

The common interest privilege is “an extension of the attorney client privilege.” Waller v. Fin. Corp. of America, 828 F.2d 579, 583 n.7 (9th Cir. 1987). “[A]s an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid

² The Common Interest Privilege is also referred to as the ‘joint defense privilege,’ the ‘community of interest’ doctrine, and the ‘allied attorney’ privilege. Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); Maplewood Partners, L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550, 605 (S.D. Fla. 2013).

privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine.” In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990).

The First Circuit has found:

“[t]he [common interest] privilege protects communications between an individual and an attorney for another when the communications are ‘part of an on-going and joint effort to set up a common defense strategy.’ In order to establish the existence of a joint defense privilege, the party asserting the privilege must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989) (citing In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir.1986)).

The privilege has even been extended to parties that are not co-defendants or do not have an explicit joint defense agreement, such as when co-parties may be subject to prospective litigation. In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d at 249. In fact, “[c]ommunications to an attorney to establish a common defense strategy are privileged even though the attorney represents another client with some adverse interests.” Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d at 28 (citing Eisenberg v. Gagnon, 766 F.2d 770, 787–88 (3d Cir. 1985)); see also Maplewood Partners, L.P., 295 F.R.D. at 606 (“Interests of the members of the joint defense group need not be entirely congruent.”). Courts have generally recognized that if the parties share a common interest in litigation, they should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d at 28. “However, if the parties to that agreement are later in opposition with each other, statements which were made by one co-defendant to another defendant’s attorney are not protected by privilege.” Maplewood

Partners, L.P., 295 F.R.D. at 606; see United States v. Almeida, 341 F.3d 1318, 1326 (11th Cir. 2003) (finding the same in the criminal context).

Preliminarily, Brown alleges that the work-product privilege is inapplicable because 1) they are not seeking production of any discovery, and 2) the oral conversation does not fall within the protection of the privilege. This Court, however, need not decide whether the oral communication between Mr. Dolan and Mr. Dailey falls under the purview of the work-product doctrine because, as will be explained below, the common interest doctrine is not applicable and thus does not extend the protection of the work-product doctrine to the instant communications.

Brown and Quest had a common legal interest in defending and otherwise minimizing their exposure to Ms. Hall's medical malpractice suit. The statements at issue were made in regard to the possible value of the case and were made when the interests of Brown and Quest were aligned. Although Brown later brought cross-claims against Quest, such actions do not alter the fact that at the time the communications were made both parties sought to defend against Ms. Hall's suit. See Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d at 28 (holding that communications are privileged even though the attorneys represent clients with some adverse interests). Thus, any statements made between Brown and Quest regarding the possible value of the case would be privileged with respect to third parties, such as Ms. Hall. However, now that the parties are bringing claims against one another, the privilege is no longer applicable in regard to the present suit. See Maplewood Partners, L.P., 295 F.R.D. at 606; Almeida, 341 F.3d at 1326.

Such a result comports with the general purpose of the doctrine, which is to protect privileged information when it is exchanged between parties engaged in a joint or common defense effort. See Almeida, 341 F.3d at 1324. Here, the information exchanged between Quest

and Brown was protected from being disclosed to Ms. Hall; however, now that the parties are adverse, the rationale of protecting such information is no longer applicable. See id. at 1326 (“Although a limitation on confidentiality between a defendant and his own attorney would pose a severe threat to the true attorney-client relationship, making each defendant somewhat more guarded about the disclosures he makes to the joint defense effort does not significantly intrude on the function of joint defense agreements”); Maplewood Partners, L.P., 295 F.R.D. at 608 (“The policy behind the attorney-client privilege (encouraging candid disclosures by clients which improve the ability of an attorney to provide effective representation) gains little by extending the privilege to communications made to attorneys who do not individually represent the client.”). Accordingly, the prior communications regarding the possible value of the case—between Quest and Brown—are not covered under the common interest doctrine, and thus any privilege was waived as between the two parties when Mr. Dolan had a conversation with Mr. Dailey. See Rosati v. Kuzman, 660 A.2d 263, 266 (R.I. 1995) (holding “the attorney-client privilege may be waived through disclosure of a confidential communication to a third party”).

C

Statements Not Made in Compromise Negotiations

Rule 408 provides, in relevant part, that “statements made in compromise negotiations [are] . . . not admissible” in order to prove liability. Rule 408. However, the “rule also does not require exclusion when the evidence is offered for another purpose” Id.; see Fed. Rules of Evidence Rule 408 (3d ed.) (“[T]he permissible purposes that are listed in the rule are not the only permissible purposes. Any relevant purpose that is not the expressly prohibited purpose is permissible unless Rule 403 or some other rule bars the evidence.”). Here, the statements made between the respective attorneys for Brown and Quest do not qualify as offers to compromise;

rather, the discussions could be more accurately characterized as a strategy session between two co-defendants discussing the potential value of the case. See Maplewood Partners, L.P., 295 F.R.D. at 607 (“[N]o one has ever made a convincing argument that strategy sessions among co-defendants produce a benefit to the legal system that outweighs the cost of the loss of evidence to the courts.”) (quoting Charles Alan Wright and Kenneth W. Graham, Jr., 24 Federal Practice and Procedure § 5493 (1986)).

Furthermore, Brown seeks to use the statements in order to prove that the settlement amount of \$6.5 million was reasonable, not that Quest is liable for contribution. See Urico v. Parnell Oil Co., 708 F.2d 852, 854–55 (1st Cir. 1983) (evidence of settlement negotiations admissible to show interference with efforts to mitigate damages); Carney v. Am. Univ., 151 F.3d 1090, 1095 (D.C. Cir. 1998) (holding that settlement letters are admissible for purposes other than proof of liability or amount, including establishment of independent violation unrelated to underlying claim which was the subject of the correspondence). Thus, assuming arguendo that the relevant conversations were offers to compromise, they would still be admissible to prove that the settlement amount was reasonable.

D

The Proposed Testimony of Mr. Jones

As detailed above, Mr. Jones intends to testify that, in his expert opinion, Brown’s decision to settle with Ms. Hall for \$6.5 million was reasonable. (Mem. in Supp. of Quest’s Mot. to Strike, Ex. A). In forming this opinion, Mr. Jones took into account a variety of factors including Ms. Hall’s medical records and course of treatment, the accrual of interest per annum from the date of written notice of the claim, the high competency of Ms. Hall’s attorney, the credibility of Ms. Hall’s trial experts, Ms. Hall’s ability to present as a good witness to the jury,

and his experience and knowledge of previous verdicts and settlements in Rhode Island medical malpractice and catastrophic injury cases. Id. In addition, Mr. Jones did factor in the purported conversation between Mr. Dailey and Mr. Dolan. However, as Mr. Jones stated in his deposition, such information was merely one factor, considered among many. Specifically, Mr. Jones attested that such information “was a piece of the puzzle that supported the opinion that [he] arrived at.” Jones Dep. 31:1-31:2, Oct. 1, 2014. Mr. Jones’ statements indicate that he had already formed his opinion based upon a litany of other evidence; however, Mr. Dailey’s testimony “supported opinions and conclusions that [he] had made. And in connection with other conversations . . . it explained some things to [him].” Id. at 31:8-31:11.

Here, Rule 703 expressly permits Mr. Jones to rely upon such information, even if it is hearsay, so long as it is “of a type reasonably and customarily relied upon by experts in the particular field in forming opinions upon the subject[.]” Rule 703; see Mejia, 545 F.3d at 197 (“Under Rule 703, experts can testify to opinions based on inadmissible evidence, including hearsay, if ‘experts in the field reasonably rely on such evidence in forming their opinions.’”); Locascio, 6 F.3d at 938. In the present action, a conversation regarding what Quest deemed to be a reasonable settlement amount goes directly to the heart of the issue at hand. Thus, it is reasonable for Mr. Jones to consider—as one factor among many—what Quest may have said regarding the possible value of the case.

IV

Conclusion

After careful consideration of the parties’ arguments, this Court finds that the conversation regarding the value of the case—between Mr. Dailey and Mr. Dolan—was not privileged under Rule 408. Furthermore, now that the parties are adverse, the common interest

doctrine no longer applies. Therefore, Mr. Jones is permitted to use such information in forming his expert opinion. Accordingly, the Court denies Quest's motion to strike Mr. Jones' expert testimony.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Pauline R. Hall v. Rita Schiff, PA-C, et al.

CASE NO: PC 08-2420

COURT: Providence County Superior Court

DATE DECISION FILED: February 17, 2015

JUSTICE/MAGISTRATE: Gibney, P.J.

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