Dissenting Opinion on Denial of En Banc Rehearing; Opinion Filed July 24, 2019

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00719-CV

CAMERON MCPHERSON, Appellant
V.
BRIAN DAVID RUDMAN, M.D., Appellee

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-05858

DISSENTING OPINION ON DENIAL OF REHEARING EN BANC

Before the En Banc Court
Opinion by Justice Partida-Kipness

I respectfully dissent from the Court's denial of appellant's motion for rehearing en banc. The pivotal question in this medical malpractice case is the admissibility at trial of expert opinion testimony from a treating physician on causation. In his motion for rehearing en banc, Cameron McPherson contends this Court wrongly concluded the trial court did not reversibly err by allowing his treating neurologist, Norma Melamed, to testify that his injuries were not caused by anesthesiologist Brian Rudman's insertion of a needle into McPherson's sciatic nerve during the installation of a pain pump after foot surgery.

I agree with McPherson that Melamed's testimony was outside the scope of either party's designation of Melamed and was a surprise to McPherson. McPherson designated Melamed as a treating physician to testify "in accordance with her medical records and reasonable inferences

therefrom." Rudman likewise designated Melamed as a treating physician who would testify that "there are several possibilities as to the cause of [McPherson's] alleged injury and that it is difficult to say which cause is probable, if any." In a supplemental discovery response, Rudman also generally designated treating physicians like Melamed as experts testifying "in accordance with their medical records and reasonable inferences therefrom" and regarding "the applicable standard of care, and the cause of the conditions for which they treated Plaintiff."

It is undisputed that Melamed's records revealed she identified three possible causes of McPherson's injury: (1) placement of the tourniquet, (2) compression injury from a cast that was too tight, and (3) injection of the anesthetic into the nerve. Melamed was not deposed before trial and did not prepare a written report to any party regarding her opinions on the standard of care or causation. At trial, however, Melamed contradicted her own records that there were three possible causes for the injury and instead testified that, to a reasonable medical probability, McPherson's nerve injury was not caused by the injection of pain medication into the nerve, but was a pressure injury, leaving only the tourniquet and cast as possibilities for the injury.

Melamed admitted that she never told McPherson her opinion that his injury was not caused by the injection into the nerve. She also admitted to meeting with defense counsel a few weeks before trial and indicated she asked for and received from defense counsel information about the specific tourniquet pressure. She further stated that she was testifying "to discuss the facts of the case and offer an opinion as a neurology expert exactly what the cause, in my opinion, was based on objective data." Although not specifically stated by Melamed, it is clear she made defense counsel aware of her new causation opinions.[1] Nevertheless, Rudman did not amend or supplement his discovery responses to include Melamed's new opinions on what caused or did not

[1] Rudman does not contend he was unaware that Melamed had eliminated the injection of pain medication as a cause prior to trial.

cause McPherson's nerve injury. However, on the last day of testimony, and as his final witness, Rudman called Melamed to testify that the needle insertion into the nerve was not the cause of McPherson's injury—thereby undercutting McPherson's principal liability theory and contradicting Melamed's prior opinion.

"A party must not be allowed to present a material alteration of an expert's opinion that would constitute a surprise attack." *Beinar v. Deegan*, 432 S.W.3d 398, 407 (Tex. App.—Dallas 2014, no pet.). The very purpose of the discovery rules is to facilitate full disclosure of the issues and facts before trial so that parties may accurately assess their respective positions in order to promote settlements and prevent such a trial by ambush. *See Lopez v. La Madeleine of Tex., Inc.*, 200 S.W.3d 854, 860 (Tex. App.—Dallas 2006, no pet.). Because Melamed's opinions on causation offered at trial materially differed from the statements contained in her treatment records, Rudman should have supplemented his discovery responses to disclose the new opinions. *See* TEX. R. CIV. P. 193.5. Because Rudman failed to do so, these opinions should have been excluded under rule 193.6(a) unless there was good cause for the failure to timely amend or the failure to amend would not unfairly surprise or unfairly prejudice the other parties. *See* TEX. R. CIV. P. 193.6(a).[2] The rule's sanction of automatic exclusion of undisclosed evidence, subject to its exceptions, is well-established. *See Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992).

The fact that Melamed did not sign a September 2013 letter from McPherson's counsel indicating her agreement that McPherson's injuries most likely resulted from the tourniquet and pain pump does not refute McPherson's assertion of unfair surprise. Melamed's refusal to sign

[2] McPherson preserved his complaint by objecting to Melamed's testimony as an expert (rather than a treating physician). After Melamed's testimony concluded on Friday afternoon, McPherson filed a motion to strike her testimony at midnight the following Monday to which Rudman responded by 8:00 a.m. The motion was heard and ruled on before any other matter was taken up in the case.

the letter is consistent with her records where she indicates there were *three* possible causes for the injury and nothing in her records indicates that she had excluded the injection of anesthetic into the nerve as a cause of McPherson's injury. Like the expert's opinion in *Beinar*, I conclude Melamed's trial testimony on causation was not merely a refinement of her opinion stated in the medical records, but in direct conflict with it. *See Beinar*, 432 S.W.3d at 406.

I would grant rehearing en banc. Because the Court does not, I respectfully dissent.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

Molberg, Osborne, Reichek, Nowell, and Carlyle, J.J., join in this dissent

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