

Talbert v C.A.C. Indus., Inc.
2024 NY Slip Op 33498(U)
October 2, 2024
Supreme Court, New York County
Docket Number: Index No. 154468/2017
Judge: Adam Silvera
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART 40

Justice

-----X

LISBETH E. TALBERT,

Plaintiff,

- v -

C.A.C. INDUSTRIES, INC., STEVEN J. FOULDS

Defendant.

-----X

INDEX NO. 154468/2017

MOTION DATE 05/30/2024

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 132, 133, 134, 135, 136, 137, 138, 139, 140, 149, 150, 151, 152, 162, 163, 164, 165

were read on this motion to/for STRIKE PLEADINGS

Upon the foregoing documents, and after oral arguments, it is ordered that defendants C.A.C. Industries, Inc. and Steven J. Foulds' order to show cause to strike plaintiff's Second Supplemental Bill of Particulars (hereinafter referred to as the "Second BP") dated February 22, 2024, to strike plaintiff's expert disclosures for Dr. Mark McMahon and Dr. Ali Guy, to preclude plaintiff from presenting evidence at trial related to the injuries claimed in the Second BP, to vacate the Note of Issue, and to stay the trial is decided below. Plaintiff opposes and cross-moves to preclude defendants' biomechanical expert and to conduct a *Frye* hearing. Defendants reply and oppose plaintiff's cross-motion. Plaintiff replies to the cross-motion.

With regards to defendants' order to show cause, they argue that plaintiff's Second BP must be stricken as it was untimely filed and raises a new category of damages not previously claimed. Moving defendants further argue that both of plaintiff's expert disclosures were exchanged on the eve of trial and would be duplicative of the expert treating doctors.

Plaintiff opposes the instant order to show cause arguing that defendants knew of the

right shoulder surgery which was claimed in the Second BP as a right shoulder injury was claimed in the first Bill of Particulars. Plaintiff further argues that CPLR §3101(d) does not specify a particular time frame for the expert disclosure. According to plaintiff, such statute states that the disclosures must be made with “appropriate notice”, which plaintiff argues was done in this action. Plaintiff argues that the expert disclosures and the reports were sent to defendants expeditiously following the physical examinations done by the two expert doctors. As such, plaintiff contends that there was no willful failure to disclose the experts.

Here, at oral arguments, lengthy discussions were held in an attempt to resolve the instant order to show cause, however, the parties were unable to come to a resolution regarding additional discovery necessary for this action to be trial ready. As a result, the trial date was adjourned and no additional discovery was agreed to, such that no additional discovery has been completed since the filing of the instant Order to Show Cause.

In this action, plaintiff filed the Note of Issue on May 2, 2022. Following the filing of the Note of Issue, which marked this action trial ready, this case was scheduled for three settlement conferences, the last of which was held on December 13, 2023. On such date, a trial date of March 4, 2024 was chosen by the parties. Eleven days before the March 4, 2024 trial date, plaintiff filed the Second BP. Plaintiff’s two expert disclosures were served on February 7, 2024 and February 26, 2024. The Court notes that CPLR §3042(b) explicitly states that the bill of particulars may be amended “once as of course prior to the filing of a note of issue.” It is undisputed that plaintiff failed to obtain leave of court prior to filing the Second BP, which was filed subsequent to the filing of the Note of Issue. The Second BP claims a right shoulder surgery that was not claimed in the first Bill of Particulars dated July 27, 2017. Although plaintiff argues that defendants knew of such surgery, defendants’ knowledge of a surgery does not obviate

plaintiff's obligation to provide sufficient notice of all of her injuries and to claim all such injuries. Notably, while plaintiff contends that defendants had knowledge of the 2018 shoulder surgery, the report of defendants' medical expert, Jeffrey D. Klein, M.D., dated March 30, 2020, specifically states that plaintiff "was...involved in a motor vehicle accident in 2015 in which she injured her right shoulder; she denied a neck or lower back injury related to this accident. ...This information is what was given by the claimant at our evaluation." Notice of Motion, Mot. Seq. No. 005, Exh. D, Dr. Klein's IME Report, dated March 30, 2020, p. 2. Thus, defendants attributed the right shoulder injury and surgery to plaintiff's 2015 motor vehicle accident, rather than to plaintiff's 2016 accident which is the subject of the instant action. Dr. Klein's IME Report further states that "right shoulder arthroscopy in 2015 with revision in 2016 (both prior to current accident)". *Id.* The Court notes that the shoulder surgery at issue herein was performed in June of 2018, over five and a half years prior to the filing of the Second BP, and nearly four years prior to the filing of the Note of Issue. There is no mention of the June 2018 right shoulder surgery in Dr. Klein's IME Report, dated March 30, 2020, with regard to the instant action. Even if this Court considers the Second BP as a "supplemental" bill of particulars, rather than an amended bill of particulars, it is still untimely pursuant to CPLR §3043(b). Such statute states that "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages...without leave of court at any time, but not less than thirty days prior to trial." CPLR §3043(b). The Second BP was filed a mere 11 days prior to the March 4, 2024 trial date. Thus, plaintiff's Second BP was untimely served and filed, and is hereby stricken, and plaintiff is precluded from presenting evidence at trial related to the injuries claimed in the Second BP.

As to the portion of defendants' motion seeking to strike plaintiff's expert disclosures of Dr. McMahon and Dr. Guy, the Court finds that plaintiff failed to provide "appropriate notice"

pursuant to CPLR §3101(d). Such statute, relied upon by plaintiff, states that “where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert’s testimony at the trial solely on grounds of noncompliance with this paragraph.” CPLR §3101(d)(1)(i). Here, plaintiff has failed to provide any reason for the delay in retaining Dr. McMahon and Dr. Guy, let alone establish good cause for the delay. One such disclosure was a mere seven days prior to the original trial date. As such, plaintiff’s expert disclosures for Dr. Mark McMahon and Dr. Ali Guy are stricken.

As to plaintiff’s cross-motion seeking to exclude defendants’ biomechanical expert, Dr. Ronald J. Fijalkowski, Ph.D., plaintiff argues that such expert must be precluded as his testimony is not based upon generally accepted scientific methods. Alternatively, plaintiff seeks a *Frye* hearing. In opposition, defendants argue that Dr. Fijalkowski’s methods are peer-reviewed and are generally accepted in the field.

It is well settled that expert testimony in New York must meet the *Frye* standard, as articulated by the Court of Appeals in *People v Wesley*. “The long-recognized rule of *Frye v United States*...is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has ‘gained general acceptance’ in its specified field.” *People v Wesley*, 83 NY2d 417, 422 (1994) (citing *Frye v United States*, 293 F. 1013 [D.C. Cir. 1923]). As to methodology, “[t]he burden of proving general acceptance rests upon the party offering the disputed expert testimony”. *Dovberg v Laubach*, 154 A.D. 3d 810, 813 (2nd Dept 2017).

Defendants have offered evidence herein to establish that Dr. Fijalkowski is using a generally accepted methodology and one that has been accepted in many similar cases, as well as

having been peer reviewed. *See* defendants' Affirmation in Opposition dated April 8, 2024, Exh. A, Affidavit of Ronald J. Fijalkowski, Ph.D. in Opposition to Plaintiff's Notice of Cross-Motion and Affirmation in Support, p. 1-6. Contrarily, plaintiff offers no expert opinion to dispute that these methods are not generally scientifically accepted. In the instant action, defendants have provided evidence that Dr. Fijalkowski is using methods that are generally acceptable in the scientific community. Thus, plaintiff's arguments regarding the testimony of Dr. Fijalkowski applies to the weight of the expert's testimony rather than preclusion. As such, plaintiff's cross-motion is denied.

Accordingly, it is

ORDERED that defendants' order to show cause to strike is granted in part to the extent that plaintiff's Second BP dated February 22, 2024 is stricken, plaintiff is precluded from presenting evidence at trial related to the injuries claimed in the Second BP, and plaintiff's expert disclosures for Dr. Mark McMahon and Dr. Ali Guy are stricken; and it is further

ORDERED that plaintiff's cross-motion seeking to preclude defendants' biomechanical expert is denied in its entirety; and it is further

ORDERED that the parties shall appear on November 7, 2024 at 9:30am, in Part 40, 60 Centre Street, New York, NY 10007 for trial; and it is further

ORDERED that within 21 days of entry, defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

10/02/2024
DATE

CHECK ONE:

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☐
☐

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐ DENIED

☒
☒
☐
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐ OTHER

☐ REFERENCE

ADAM SILVERA, J.S.C.

At IAS Part _____ of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York 10007 on the _____ day of _____, 2024.

P R E S E N T:

Hon. _____
JSC

LISBETH E. TALBERT,

X

Index No.: 154468/2017

Plaintiff,

ORDER TO
SHOW CAUSE

-against-

C.A.C. INDUSTRIES, INC. and STEVEN J. FOULDS,

Defendants.

X

Upon the reading and filing of the Affirmation of Sean M. Prendergast, dated February 28, 2024, together with the exhibits annexed, and upon all prior pleadings and proceedings heretofore had herein, and upon the motion of Hannum Feretic Prendergast & Merlino, LLC, attorneys for defendants C.A.C. INDUSTRIES, INC. and STEVEN J. FOULDS.:

LET the plaintiff or her attorney show cause before this Court, in the Supreme Court, County of the New York, at the Courthouse located at 60 Centre Street, New York, New York on the ____ day of _____, 2024 at 9:30 A.M., or as soon thereafter as counsel can be heard, why an Order should not be issued herein: (1) striking plaintiff's Second Supplemental Bill of Particulars, dated February 22, 2024; (2) striking plaintiff's CPLR 3101(d) Notice of Expert Disclosure for Dr. Mark McMahon, dated February 7, 2024; (3) striking plaintiff's CPLR 3101(d) Expert Disclosure for Dr. Ali Guy dated February 23, 2024; (4) precluding plaintiff from

presenting evidence relative to the physical injuries and damages claimed in plaintiff's Second Supplemental Bill of Particulars, dated February 22, 2024 and plaintiff's Notices of Expert Witness, referenced above or in the alternative, (5) vacating the Note of Issue and striking this matter from the Court's trial calendar to allow the defendants a reasonable opportunity to conduct necessary discovery in this matter related to plaintiff's untimely and improper Second Supplemental Bill of Particulars and the damage claims included in the Notice of Expert Witness for Dr. McMahon and Dr. Guy; and, (5) requesting that this matter, including the Trial scheduled for March 4, 2024, be stayed pending the determination of the requests asserted herein, and for such other and further relief as the Court deems just, necessary and proper, and it is further,

ORDERED, that all proceedings in this matter, including the jury selection and trial scheduled for March 4, 2024, be stayed pending the hearing and determination of this Order to Show Cause; and it is further;

ORDERED, that service by overnight mail or by filing this Order with the New York State Electronic Filing System of this Order together with the affirmation upon which it is based, upon counsel for all parties on or before the _____ day of _____, 2024, be deemed sufficient service.

DATED: New York, New York
 March _____, 2024

ENTER:

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
LISBETH TALBERT,

Index No.: 154468/2017

Plaintiff,

ORDER WITH
NOTICE OF ENTRY

-against-

C.A.C. INDUSTRIES, INC. and STEVEN J. FOULDS,

Defendants.
-----X

C O U N S E L:

PLEASE TAKE NOTICE, that the annexed is a true copy of an Order signed by the Honorable Adam Silvera, J.S.C. on October 2, 2024 and entered in the Office of the Clerk of the County of New York on October 3, 2024.

Dated: New York, New York
October 4, 2024

LONDON FISCHER LLP



By: _____

Robert D. Martin, Esq.
Attorneys for Defendants
59 Maiden Lane
New York, New York 10038
(212) 972-1000
rmartin@londonfischer.com

TO: Joseph P. Napoli, Esq.
NAPOLI SHKOLNIK, PLLC
Attorneys for Plaintiff
360 Lexington Avenue – 11th Floor
New York, New York 10017
(212) 397-1000
jnapoli@napolilaw.com

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA **PART** **40**

Justice

-----X

LISBETH E. TALBERT,

Plaintiff,

- v -

C.A.C. INDUSTRIES, INC., STEVEN J. FOULDS

Defendant.

-----X

INDEX NO. 154468/2017

MOTION DATE 05/30/2024

MOTION SEQ. NO. 006

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MOTION**

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were read on this motion to/for

STRIKE PLEADINGS

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right shoulder surgery which was claimed in the Second BP as a right shoulder injury was claimed in the first Bill of Particulars. Plaintiff further argues that CPLR §3101(d) does not specify a particular time frame for the expert disclosure. According to plaintiff, such statute states that the disclosures must be made with “appropriate notice”, which plaintiff argues was done in this action. Plaintiff argues that the expert disclosures and the reports were sent to defendants expeditiously following the physical examinations done by the two expert doctors. As such, plaintiff contends that there was no willful failure to disclose the experts.

Here, at oral arguments, lengthy discussions were held in an attempt to resolve the instant order to show cause, however, the parties were unable to come to a resolution regarding additional discovery necessary for this action to be trial ready. As a result, the trial date was adjourned and no additional discovery was agreed to, such that no additional discovery has been completed since the filing of the instant Order to Show Cause.

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plaintiff's obligation to provide sufficient notice of all of her injuries and to claim all such injuries. Notably, while plaintiff contends that defendants had knowledge of the 2018 shoulder surgery, the report of defendants' medical expert, Jeffrey D. Klein, M.D., dated March 30, 2020, specifically states that plaintiff "was...involved in a motor vehicle accident in 2015 in which she injured her right shoulder; she denied a neck or lower back injury related to this accident. ...This information is what was given by the claimant at our evaluation." Notice of Motion, Mot. Seq. No. 005, Exh. D, Dr. Klein's IME Report, dated March 30, 2020, p. 2. Thus, defendants attributed the right shoulder injury and surgery to plaintiff's 2015 motor vehicle accident, rather than to plaintiff's 2016 accident which is the subject of the instant action. Dr. Klein's IME Report further states that "right shoulder arthroscopy in 2015 with revision in 2016 (both prior to current accident)". *Id.* The Court notes that the shoulder surgery at issue herein was performed in June of 2018, over five and a half years prior to the filing of the Second BP, and nearly four years prior to the filing of the Note of Issue. There is no mention of the June 2018 right shoulder surgery in Dr. Klein's IME Report, dated March 30, 2020, with regard to the instant action. Even if this Court considers the Second BP as a "supplemental" bill of particulars, rather than an amended bill of particulars, it is still untimely pursuant to CPLR §3043(b). Such statute states that "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages...without leave of court at any time, but not less than thirty days prior to trial." CPLR §3043(b). The Second BP was filed a mere 11 days prior to the March 4, 2024 trial date. Thus, plaintiff's Second BP was untimely served and filed, and is hereby stricken, and plaintiff is precluded from presenting evidence at trial related to the injuries claimed in the Second BP.

As to the portion of defendants' motion seeking to strike plaintiff's expert disclosures of Dr. McMahon and Dr. Guy, the Court finds that plaintiff failed to provide "appropriate notice"

pursuant to CPLR §3101(d). Such statute, relied upon by plaintiff, states that “where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert’s testimony at the trial solely on grounds of noncompliance with this paragraph.” CPLR §3101(d)(1)(i). Here, plaintiff has failed to provide any reason for the delay in retaining Dr. McMahon and Dr. Guy, let alone establish good cause for the delay. One such disclosure was a mere seven days prior to the original trial date. As such, plaintiff’s expert disclosures for Dr. Mark McMahon and Dr. Ali Guy are stricken.

As to plaintiff’s cross-motion seeking to exclude defendants’ biomechanical expert, Dr. Ronald J. Fijalkowski, Ph.D., plaintiff argues that such expert must be precluded as his testimony is not based upon generally accepted scientific methods. Alternatively, plaintiff seeks a *Frye* hearing. In opposition, defendants argue that Dr. Fijalkowski’s methods are peer-reviewed and are generally accepted in the field.

It is well settled that expert testimony in New York must meet the *Frye* standard, as articulated by the Court of Appeals in *People v Wesley*. “The long-recognized rule of *Frye v United States*...is that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has ‘gained general acceptance’ in its specified field.” *People v Wesley*, 83 NY2d 417, 422 (1994) (citing *Frye v United States*, 293 F. 1013 [D.C. Cir. 1923]). As to methodology, “[t]he burden of proving general acceptance rests upon the party offering the disputed expert testimony”. *Dovberg v Laubach*, 154 A.D. 3d 810, 813 (2nd Dept 2017).

Defendants have offered evidence herein to establish that Dr. Fijalkowski is using a generally accepted methodology and one that has been accepted in many similar cases, as well as

having been peer reviewed. *See* defendants' Affirmation in Opposition dated April 8, 2024, Exh. A, Affidavit of Ronald J. Fijalkowski, Ph.D. in Opposition to Plaintiff's Notice of Cross-Motion and Affirmation in Support, p. 1-6. Contrarily, plaintiff offers no expert opinion to dispute that these methods are not generally scientifically accepted. In the instant action, defendants have provided evidence that Dr. Fijalkowski is using methods that are generally acceptable in the scientific community. Thus, plaintiff's arguments regarding the testimony of Dr. Fijalkowski applies to the weight of the expert's testimony rather than preclusion. As such, plaintiff's cross-motion is denied.

Accordingly, it is

ORDERED that defendants' order to show cause to strike is granted in part to the extent that plaintiff's Second BP dated February 22, 2024 is stricken, plaintiff is precluded from presenting evidence at trial related to the injuries claimed in the Second BP, and plaintiff's expert disclosures for Dr. Mark McMahon and Dr. Ali Guy are stricken; and it is further

ORDERED that plaintiff's cross-motion seeking to preclude defendants' biomechanical expert is denied in its entirety; and it is further

ORDERED that the parties shall appear on November 7, 2024 at 9:30am, in Part 40, 60 Centre Street, New York, NY 10007 for trial; and it is further

ORDERED that within 21 days of entry, defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

10/02/2024

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE


ADAM SILVERA, J.S.C.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

BRENNA SANABRIA, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age, and resides in Brooklyn, New York.

That on the 4th day of October, 2024, deponent served the within ORDER WITH NOTICE OF ENTRY upon:

Joseph P. Napoli, Esq.
 NAPOLI SHKOLNIK, PLLC
Attorneys for Plaintiff
 360 Lexington Avenue – 11th Floor
 New York, New York 10017
 (212) 397-1000
jnapoli@napolilaw.com

at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.


 BRENNASANABRIA

Sworn to before me this
 4th day of October 2024.


 Notary Public

INGRID QUAMINA
 Notary Public, State of New York
 No. 01QU6126260
 Qualified in Kings County
 Commission Expires May 2, 2025

Index No. 154468/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LISBETH E. TALBERT,

Plaintiff,

-against-

C.A.C. INDUSTRIES, INC. and STEVEN J. FOULDS,


Defendants.

ORDER WITH NOTICE OF ENTRY

LONDON FISCHER LLP
Attorneys for Defendants
59 Maiden Lane
New York, New York 10038

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney duly admitted to practice law before the Court of State of New York, certifies that, upon information and belief and reasonable inquiry, the contention contained in an annexed hereto document are not frivolous.

Dated: 10/04/2024

Signature:  _____

Name: Robert D. Martin, Esq.

Defendants, C.A.C. INDUSTRIES, INC. and STEVEN J. FOULDS,

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LISBETH TALBERT,

Plaintiff,

-against-

C.A.C. INDUSTRIES, INC., and STEVEN J.
FOULDS,

Index No.: 154468/2017

**RESPONSE TO DEMAND
FOR EXPERT WITNESS
DISCLOSURE PURSUANT
TO CPLR §3101(d)**

PLAINTIFF, LISBETH TALBERT by her attorneys, NAPOLI SHKOLNIK, PLLC, supplements her Response to Defendants' Demand for Expert Witness Disclosure Pursuant to CPLR §3101(d) dated February 7, 2024, as follows:

1. At the time of trial Plaintiff expects to call Ali E. Guy, M.D., a Diplomate of the American Board of Physical Medicine and Rehabilitation. The expert is licensed to practice medicine in the State of New York with an office located 7 Gramercy Park South – Suite 1-a, New York, New York 10003

2. It is anticipated that Dr. Guy will offer testimony at the trial of this action concerning his independent findings and opinions with regards to the plaintiff's physical status with particular emphasis on the effect of her condition upon her quality of life.

3. Dr. Guy's testimony shall be based upon his examination of the plaintiff, as well as his education, training, experience and review of all relevant material named in Dr. Guy's annexed report as supplied by counsel's office.

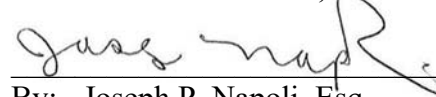
4. For the sum and substance and the facts and opinions upon which plaintiff's expert is expected to testify, please see Dr. Guy's report annexed herewith as Exhibit "A".

5. A copy of Dr. Guy's *Curriculum Vitae* is annexed herewith as Exhibit "B".

Dated: New York, New York
February 23, 2024

Yours, etc.,

NAPOLI SHKOLNIK, PLLC



By: Joseph P. Napoli, Esq.
Attorneys for Plaintiff
360 Lexington Avenue – 11th Floor
New York, New York 10017-6502
(212) 397-1000

To: **HANNUM FERETIC PRENDERGAST & MERLINO, LLC.**
Attorneys for Defendants
C.A.C. INDUSTRIES, INC. and STEVEN J. FOULDS
55 Broadway, Suite 202
New York, New York 10006

CURRICULUM VITAE

ALI E. GUY, M. D.

DIPLOMATE OF THE

AMERICAN BOARD OF PHYSICAL MEDICINE AND REHABILITATION

POSTGRADUATE TRAINING

PHYSICAL MEDICINE AND REHABILITATION

Mount Sinai School of Medicine, Mount Sinai Medical Center
New York, N.Y.

January 1, 1985
to December 31, 1987

INTERNAL MEDICINE

Mount Sinai School of Medicine
Veterans Administration Medical Center
Bronx, NY

July 1, 1984
to December 31, 1984

SURGERY

Cabrini Medical Center
New York Medical College
New York, N.Y.

July 1, 1983
to June 30, 1984

INTERNAL MEDICINE

Mount Sinai School of Medicine
Veterans Administration Medical Center
Bronx, N.Y.

July 1, 1982
to June 30, 1983

EDUCATION

UNIVERSIDAD NORDESTANA

DOMINICAN REPUBLIC

AWARDED DEGREE OF DOCTOR OF MEDICINE

April 1979 to July 1981

UNIVERSIDAD CENTRAL DEL ESTE

DOMINICAN REPUBLIC

January 1978 to April 1979

QUEENS COLLEGE

FLUSHING, NEW YORK

January 1974 to October 1977

MEDICAL LICENSES AND CERTIFICATIONS

NEW YORK STATE LICENSE 163001-1

PENNSYLVANIA STATE LICENSE MD-0336440E

DIPLOMATE OF the American Board of Physical Medicine and Rehabilitation
(May 30, 1989)

WORKMENS' COMPENSATION RATING: CPMR

CURRICULUM VITAE (page 2)

ALI E. GUY, M. D.
DIPLOMATE OF THE AMERICAN BOARD OF
PHYSICAL MEDICINE AND REHABILITATION

HOSPITAL AFFILIATIONS

NEW YORK UNIVERSITY SCHOOL OF MEDICINE
N.Y.U. Medical Center
Clinical Instructor 1/06- Present

MAIMONIDES MEDICAL CENTER, BROOKLYN, NY (1997-2002)
DIRECTOR, DEPARTMENT OF Rehabilitation Medicine
Duties: Teaching, administrative, patient care.

NEW YORK UNIVERSITY MEDICAL CENTER/N.Y.U. HOSPITAL FOR JOINT DISEASE
Duties: CLINICAL INSTRUCTOR OF Physical Medicine and
Rehabilitation.
Former Director of Neuromuscular Equipment Clinic (1990-2005).

CABRINI MEDICAL CENTER, NEW YORK, N.Y.
STAFF PHYSICIAN, DEPARTMENT OF Physical Medicine and
Rehabilitation; a Major Affiliate of N.Y.U. Medical Center

MED-ALLIANCE, Bronx, N.Y.
Article-28 Medical Facility.
DIRECTOR OF PAIN MANAGEMENT.

SPECIAL MEMBERSHIP

NEW YORK STATE MEDICAL SOCIETY
NEW YORK COUNTY MEDICAL SOCIETY

GRAMERCY PARK PHYSICAL MEDICINE & REHABILITATION, P.C.

ALI E. GUY, M.D.

Diplomate of the American Board of
PHYSICAL MEDICINE & REHABILITATION

7 Gramercy Park, Suite 1-A
New York, NY 10003
Phone (212) 254-7588
Fax: (212) 677-0447

400 Post Avenue, Suite 212
Westbury, NY 11590
Phone: (516) 338-5182
Fax: (516) 338-5184

45-64 Francis Lewis Blvd
Bayside, NY 11361
Phone: (929) 258 7720
Fax: (929) 258 7722

Jose A. Icasas, P.T.

February 7, 2024

RE: Lisbeth Talbert
D/A: 09/12/2016

I had the opportunity to evaluate the above patient for the first time on consultation on February 7, 2024 in my New York City office.

I reviewed the following medical records: I reviewed the operative report of Dr. Cordiale from the New York Presbyterian – Lower Manhattan Hospital. Surgery was performed on August 11, 2021 due to L4 through S1 disc herniations with radiculopathy, instability and neurological deficit with intractable pain. The patient underwent L4 through S1 segmental pedicle fixation with posterolateral fusion and lumbar laminectomy, discectomy, and hemilaminectomy from L3 with partial bilateral facetectomies at L3-L4.

I reviewed the operative report of May 26, 2017 where the surgeon was Daveed Frazier, M.D. Surgery was performed at the Mount Sinai West Hospital. The patient's postoperative diagnosis was cervical radiculopathy with cervical stenosis. The patient underwent C3 through C6 anterior cervical decompression and fusion with allograft and titanium plates and screws extending from C3 to C7.

I reviewed records from physiatrist, Gerard Varlotta, D.O. The patient underwent therapeutic facet joint injection under fluoroscopic needle guidance on October 28, 2015.

I reviewed the MRI report of the lumbar spine taken on September 19, 2016, which revealed T1-T2 disc bulge, T2-T3 disc herniation, T3-T4 disc herniation, T4-T5 disc herniation, T5-T6 disc herniation, T6-T7 disc herniation, T8-T9 disc bulge, T9-T10 disc bulge, T10-T11 disc herniation and T11-T12 disc bulge.

I reviewed the MRI report of the cervical spine taken on September 19, 2016, which showed C2-C3 disc herniation, C3-C4 disc herniation, C4-C5 disc herniation, C5-C6 disc herniation with impingement, C6-C7 disc bulge, C7-T1 disc bulge, and T3-T4 disc protrusion.

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I reviewed the MRI report of the lumbar spine taken on September 3, 2020, which showed disc herniations at L5-S1 with impingement, disc bulges and herniations at L4-L5, disc bulge at L3-L4 level.

I reviewed the thoracic spine MRI taken on September 2, 2020 from Lenox Hill Radiology, which shows multiple level disc herniations and a large 3.9 x 4.6 adrenal lesion, which needs workup.

I reviewed the EMG report of Dr. Gerard Varlotta, which was performed on September 24, 2020, which revealed electrical evidence of a right C5-C6 and a bilateral L5-S1 radiculopathy with distal denervation and also evidence of a left median sensory neuropathy at the wrist consistent with a mild-to-moderate carpal tunnel syndrome.

I reviewed the EMG studies performed by Dr. Varlotta on March 22, 2017, which revealed electrical evidence of a bilateral L5 radiculopathy with distal denervation.

I reviewed nerve conduction studies performed by Dr. Varlotta on October 11, 2017 and EMG, which showed a right C6 cervical radiculopathy.

I reviewed the MRI report of the lumbar spine from NS Radiology, PLLC, which showed multiple bulging discs in the lumbar region with facet hypertrophy.

I reviewed the intraoperative neurophysiological monitoring report from Mount Sinai West Hospital. Procedure was performed on May 26, 2017.

I reviewed various records from the Mount Sinai West Hospital Medical Center.

I reviewed physical therapy records from Recovery Physical Therapy, P.C.

I reviewed records from Dr. Daveed Frazier.

I reviewed records from New York City Spine Surgery, records of Dr. Daveed Frazier.

I reviewed the list of medications from confidential drug utilization report. The patient was taking various medications including Percocet 7.5-325 mg, zolpidem 10 mg at night time, alprazolam 2 mg tablets.

History: History obtained by me is that the patient is 53 years of age, female, right-handed, the patient states that she was well until September 12, 2016 when while driving an Audi, she got rear ended by heavy construction truck. She injured her neck, back, right shoulder. She was taken to Harlem Hospital by ambulance, where she was treated and released. She then saw many different doctors. She had ACDF surgery, lumbar fusion back surgery, and right shoulder surgery. At the day of the accident, the patient was not working since she had had right shoulder surgery on or about December 2015. At the present time today, the patient complains of neck pain, which radiates down the right upper extremity, complains of lower back pain, which radiates into the bilateral

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buttock area. She states that after the surgery, the numbness and tingling got better, but the pain persists. She still has right shoulder pain. She still has numbness and tingling in the right hand. She takes gabapentin, which helps a little bit.

PAST MEDICAL HISTORY: History of a prior right shoulder surgery in December 2015. The patient denies any other significant past medical problems, accidents, or injuries that she recalls.

SOCIAL HISTORY: The patient is single, has one child. She does smoke cigarettes occasionally and does not drink alcohol.

PHYSICAL EXAMINATION:

All range of motion was performed in the passive range of motion with the use of a goniometer. Pain level is 8/10.

Right Shoulder: Diffusely tender. There are five arthroscopic surgical scars, (three are old, and two are new and causally related to this current accident).

Neck: Shows diffuse tenderness, diffuse moderate spasm, and multiple trigger points present. ROM: Lateral flexion: 30 degrees/45 degrees, lateral rotation: 60 degrees/80 degrees, flexion/extension: 40 degrees/60 degrees. Positive Spurling's maneuver. The ACDF surgical scar is barely visible.

Back: Shows diffuse tenderness, diffuse moderate spasm, and multiple trigger points present. ROM: Extension: 15 degrees/30 degrees, flexion: 60 degrees/90 degrees, bilateral lateral flexion/lateral rotation: 20 degrees/30 degrees.

SLR is 60 degrees/90 degrees with bilateral lower back pain. There is a 6-cm surgical scar, which is about 3.5 inches.

Active range of motion is normal for all four extremities except for the right shoulder flexion, which is 170 degrees/180 degrees, internal rotation and external rotation is 80 degrees/90 degrees. Positive Hawkins, positive Neer sign, positive O'Brien's, positive empty can test.

Muscle power testing is normal for all four extremities except for the right shoulder, which is 4+/5.

Sensation is diminished to pinprick and touch in the right biceps and right medial calf.

DTRs are 1-2+ and symmetrical bilateral.

Gait is slow and antalgic.

Diagnoses:

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1. L4 through S1 disc herniations with radiculopathy and instability with neurological deficits.
2. Status post L4 through S1 lumbar laminectomy, discectomy, foraminotomy with posterolateral fusion from L4 through S1 with segmental pedicle fixation L4 through S1 with hemilaminectomy at L3-L4 (surgery was performed by Andrew Cordiale, D.O., on August 11, 2021 at the New York Presbyterian Lower Manhattan Hospital).
3. C3 through C6 disc herniations with radiculopathy, status post C3 through C6 anterior cervical discectomy with decompression and fusion with titanium plate and screws.
4. Permanent scarring to the lumbar spine and scarring to the cervical spine, which is hard to be seen, but still present.
5. Status post right shoulder intra-articular injection with arthrogram.
6. T2 through T7 disc herniations.
7. T8 through T10 bulges.
8. T10-T11 disc herniations.
9. T11-T12 disc bulges.
10. C2 through C6 disc herniations with C6 through T1 disc bulges with C7-T1 disc herniation.
11. Right C5-C6, bilateral L5-S1 radiculopathy with a left carpal tunnel syndrome (as per EMG studies of September 24, 2020 performed by Dr. Varlotta).
12. Persistent cervical and lumbar radiculopathy.

Opinion: Based upon the history obtained, clinical examination findings, review of the medical records, and response to many different types of treatment including surgery, it is my professional opinion that all of the above diagnoses are permanent and progressive and causally related to the accident of September 12, 2016. The patient had a prior pre-existing surgery to the right shoulder, which was made worse by this accident and necessitated surgery.

Since these injuries are permanent, progressive, and causally related to this accident and the patient had sustained a permanent total disability causally related to this accident, the patient will need the following medical services for the rest of her life based upon proper medical indications and they are as follows:

1. The patient needs and should be seen by an orthopedic surgeon at least six times per year to monitor the orthopedic injuries. The cost for each visit is \$200.
2. The patient needs and should be seen by a neurologist at least six times per year to monitor the neurological injuries. The cost for each visit is \$200.
3. The patient needs and should be seen by a physiatrist at least 10 times per year to monitor the patient's overall musculoskeletal injuries to assess the need for physical therapy, pain medications, diagnostic studies, referral to other medical specialists and other physiatric treatments. The cost for each visit is \$200.
4. The patient needs periodic MRIs of the cervical spine, lumbar spine, and right shoulder every 2-3 years to assess the extent of ongoing pathology. The cost for each MRI is \$1500.

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5. The patient needs EMGs of the upper and lower extremities now and every 1-2 years to assess the extent of radiculopathy and/or neuropathy. The cost for each EMG is about \$2000-\$2500 per study.
6. In addition to a full EMG, the patient needs nerve conduction studies of the hands every three months to assess the extent of median neuropathy. The cost for that would be about \$1000.
7. The patient needs and should have at least one physical therapy session per week to diminish pain and spasm, improve range of motion, restore motor deficits and make the patient as pain free as possible. The cost for each physical therapy session is \$150-\$200 depending on the number of modalities performed. Since this patient has multiple injuries, I recommended comprehensive physical therapy session with four modalities. The cost would be about \$200 per visit.
8. The patient will need periodic medications for pain, spasm, and inflammation. The approximate annual cost would be anywhere from \$3000 to \$10,000 per year depending on medication, dosage and frequency as this will change from time to time and also I recommended topical compounding cream medications, which have the least amount of side effects. The cost for that would be about \$800-\$900 per month.
9. The patient will need periodic CBC, basic chemistry profile, liver function test, and urinalysis every four months to monitor the potential side effects of the medications. The cost would be about \$400 for each lab test.
10. For the next five years, the patient will need the following medical interventional pain management procedures. While the patient is getting interventional pain management procedures to the cervical and lumbar spine, the patient will need annual MRIs of the cervical and lumbar spine.
11. The patient will need three cervical epidural injections per year, three lumbar epidural injections per year. The cost for each epidural is \$2000 and the outpatient surgical facility fee for each is \$3000.
12. The patient will need three cervical/medial branch block injection sets per year and the same for the lumbar spine. The cost for each is \$3000 and the outpatient surgical facility fee for each is \$3000.
13. The patient will need two cervical radiofrequency ablation procedures per year one to each side and the same for the lumbar spine. The cost for each radiofrequency procedure is about \$5000 and the outpatient surgical facility fee for each is \$4000.
14. The patient will also need 12 sets of trigger point injections per year for the next five years for the muscle pain. The cost is \$400 per set.
15. As time goes on and adjacent segmental pathology and traumatic arthritis will set in, this patient will need more cervical and lumbar surgeries as such procedures typically last seven years plus or minus two years.
16. The cost for each future surgery to the neck and the back is as follows: Surgeon's fee would be about \$100,000. Surgical assistant fee for each surgery would be \$10,000. A one- to two-day hospital stay for each surgery would be about \$150,000-\$200,000. This will include the prosthetic disc replacements and other miscellaneous expenses. The patient will need anesthesia. The cost would be \$4000 for each surgery.

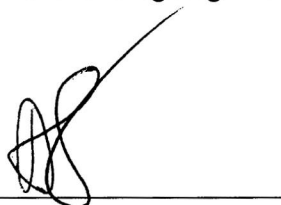
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17. The patient will need neuromonitoring studies performed for each surgery to monitor the spine during surgery. The cost would be \$3000 for each surgery. After each surgery, the patient would need postsurgical bracing, which will cost about \$1000 and afterwards the patient will need physical therapy sessions three times a week for 4-6 months. The patient's overall prognosis must therefore remain guarded.

I, Ali E. Guy, M.D. being a physician duly licensed to practice medicine in the State of New York, under the penalties of perjury pursuant to CPLR 2106, do hereby affirm the contents of the foregoing to be true and accurate.



Ali E. Guy, M.D.
Clinical Assistant Professor of Physical Medicine & Rehabilitation
NYU School of Medicine
NYU Medical Center

AGI/gisl/law/dka/022224/AGI02210410-1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LISBETH E. TALBERT,

Plaintiff,

-against-

C.A.C. INDUSTRIES, INC., and STEVEN J.
FOULDS,

Defendants.

Index No.: 512937/2021

AFFIRMATION
OF SERVICE

JOSEPH P. NAPOLI, an attorney duly licensed to practice before the Courts of the State of New York hereby affirms, under penalty of perjury,

1. That I am over the age of eighteen years, am not a party to this action and reside in New York County;

2. That on February 26, 2024, I served the within: **RESPONSE TO DEMAND FOR EXPERT WITNESS DISCLOSURE PURSUANT TO CPLR §3101(d)** to be served on the undersigned, counsel for the parties hereto, at the addresses below, supplied by those counsel as their mailing addresses for service of papers, by causing same to be enclosed in a post-paid envelope and deposited in a depository box maintained under the exclusive control of the US Postal in the City and State of New York. The following offices were served:

HANNUM FERETIC PRENDERGAST & MERLINO, LLC.

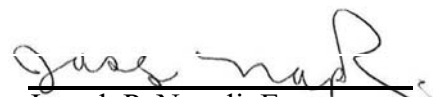
Attorneys for Defendants

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(212) 530-3900


Joseph P. Napoli, Esq.

Index No.: 154468/2017

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK

LISBETH E. TALBERT,

Plaintiff,

-against-

C.A.C. INDUSTRIES, INC., and STEVEN J. FOULDS

Defendants.

3101 (D)

NAPOLI SHKOLNIK, PLLC

Attorneys for Plaintiff(s)

360 Lexington Avenue – 11th Floor

New York, New York 10017-6502


(212) 397-1000

CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. §130-1.1a

JOSEPH P. NAPOLI, ESQ., hereby certifies that, pursuant to 22 N.Y.C.R.R. §130-1.1a, the foregoing is not frivolous as nor frivolously presented.

Dated: New York, New York

February 26, 2024


Joseph P. Napoli, Esq.

To

Attorney(s) for Plaintiff

Service of a copy of the within _____ is hereby admitted.

Dated:

Attorney(s) for Plaintiff

☐ Please take notice that the within is a (certified) true copy of a _____
duly entered in the Office of the Clerk of the within named Court on _____, 20__

☐ Please take Please take notice that an Order of _____
which the within is a true copy will be presented for settlement to the Hon. _____
one of the Judges of the within named Court, at _____ on _____, 20__
at ____:____ ☐ a.m./ ☐ p.m.