

DOCKET NO.: AAN-CV-12-6010861-S : SUPERIOR COURT  
 CLARENCE MARSALA, ET AL. : JUDICIAL DISTRICT OF ANSONIA/MILFORD  
 VS. : AT MILFORD  
 YALE-NEW HAVEN HOSPITAL, INC. : SEPTEMBER 2017

2017 SEP 18 PM 2:51

J.D. GLEBERK'S OFFICE  
 SUPERIOR COURT  
 MILFORD, CT

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**MEMORANDUM OF DECISION**  
**STATEMENT OF THE CASE**

This action emanates from a decision of the defendant, Yale-New Haven Hospital, Inc., to remove the ventilator that was being used for the medical treatment of Helen Marsala, a patient who was under the hospital's care. Helen died the evening after the removal of the ventilator. The remaining plaintiff is Helen's husband, Clarence Marsala, individually and as administrator of Helen's estate. The second amended complaint (#107) contains four remaining counts. Two counts are brought by Clarence as administrator of the estate under General Statutes § 52-555. These counts assert claims for "wrongful death" (count 21) and for "medical malpractice" (count 26). The last two claims are based on these counts respectively and are asserted by Clarence individually for loss of consortium (counts 22 and 27).<sup>1</sup>

In a disclosure dated April 28, 2017 (#186), the plaintiff disclosed Paul Kurmay, retired Probate Judge, as an expert witness.<sup>2</sup> The defendant objected to this disclosure (#190). This

<sup>1</sup>A detailed summary of the specific allegations of the complaint and the disposition of the claims of the other plaintiffs in this action is provided in the Appellate Court's decision, *Marsala v. Yale-New Haven Hospital, Inc.*, 166 Conn. App. 432, 142 A.3d 316 (2016).

<sup>2</sup>The plaintiff's disclosure of Judge Kurmay as an expert witness includes the following information: "Judge Kurmay will testify as to Defendant's liability; to the jurisdiction of the probate court, legal obligations imposed upon the Defendant, duties owed by the Defendant, breaches thereof by the Defendant, and the likely outcome of a hearing before the probate court. Judge Kurmay will testify that the probate court has jurisdiction to resolve disputes regarding the continuation or discontinuation of life sustaining medical treatment. Judge Kurmay will testify

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objection was sustained in a ruling from the bench. On June 9, 2017, the plaintiff filed a motion to reargue the ruling sustaining this objection (#193). The court granted this motion to reargue (193.20). The defendant also filed a formal motion to preclude the testimony of this proposed expert (#194). The plaintiff filed an objection to this motion to preclude (#196). After further argument and reconsideration, the court, on August 29, 2017, reaffirmed its decision sustaining the defendant's objection to this expert and granted the defendant's motion to preclude. This memorandum articulates that ruling.

## DISCUSSION

### I

The defendant opposes the plaintiff's use of Judge Kurmay as an expert witness on the ground that Judge Kurmay's testimony involves inadmissible opinions about the law of probate

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that Defendant knew or should have known that the proper judicial procedure for determining whether life support should be withdrawn from an incapable patient is to seek the appointment of a conservator by the appropriate probate court, whereby the court would direct the conservator to continue or withdraw such life support. Judge Kurmay will testify that Defendant's actions deprived Plaintiff of her due process rights. Judge Kurmay will testify that had a probate hearing been held, Defendant would not have been permitted to discontinue the care provided to the Plaintiff. Judge Kurmay will testify that Defendant failed to obtain probate court approval to resolve disputes over decedent's wishes prior to removal of Plaintiff's ventilator, CPAP, BIPAP, or other respiratory assistance. Defendant's failure to go to the probate court prior to the removal of Plaintiff's ventilator, CPAP, BIPAP, or other respiratory assistance was unreasonable. Judge Kurmay will testify that Defendant was ethically and legally obligated to provide Plaintiffs with an opportunity to arrange for the transfer of Plaintiff to another facility if Defendant was unwilling to continue to treat Plaintiff. Defendant breached this duty by failing to provide notice to the family "within a reasonable time" before removing life support and failing to provide sufficient time for the family to take legal action. Judge Kurmay will testify that defendant does not possess the authority to unilaterally discontinue life support to a patient in the Plaintiff's condition. Judge Kurmay will testify that Defendant does not possess the authority to unilaterally enter a DNR order and, even if properly entered, the Plaintiff retained the right to revoke the DNR at any and all times. Judge Kurmay will further testify that Defendant had a conflict of interest regarding the continuation or discontinuation of care for the Plaintiff, which the statutory scheme and probate courts were intended to address."

and the medical standard of care.<sup>3</sup> In response, the plaintiff contends that Judge Kurmay's testimony is admissible because it is not based on "the status or requirement of the law," but rather on the jurisdiction and procedures of the probate court. Motion to Reargue, p. 11. According to the plaintiff, Judge Kurmay will testify that based on his experience in the legal system and as a probate judge, the defendant failed to follow proper judicial procedure by not seeking a probate court hearing regarding Helen's care, and that if a hearing had been held, the defendant would not have been permitted to discontinue her care. The plaintiff states that Judge Kurmay will testify on "how the defendant's failure to abide by [the] probate court procedures violates the duty of care and the plaintiffs' due process rights." Id.

The court treats both the defendant's objection to the plaintiff's disclosure of the expert witness and its motion to preclude the testimony of the expert as motions in limine governed by Practice Book § 15-3. Section 15-3 provides the following: "[t]he judicial authority to whom a case has been assigned for trial may in its discretion entertain a motion in limine made by any party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision thereon until a later time in the proceeding."

## II

The admissibility of expert testimony is addressed by § 7-2 of the Connecticut Code of

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<sup>3</sup>The defendant also objects to Judge Kurmay's testimony on the grounds that an expert may not testify about the ultimate issues of the case under Connecticut Code of Evidence § 7-3, and that his testimony would be unduly prejudicial and confusing to the jury under Connecticut Code of Evidence § 4-3. Because the court rules in favor of the defendant for the reasons discussed herein, the court does not reach these alternative arguments raised by the defendant.

Evidence: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the *trier of fact* in understanding the evidence or in determining a *fact in issue*." (Emphasis added.) The language of § 7-2 contemplates that expert testimony is directed to issues of fact, not issues of law.

As previously stated, the plaintiff insists that Judge Kurmay's testimony is admissible under § 7-2 because his "testimony is not based on the status or requirement of the law, but rather on the jurisdiction and procedure of the probate court. He will testify, based on his experience in the legal system, as to the likely outcome of a hearing before the probate court. . . . Judge Kurmay thus is qualified to testify that, by failing to follow the probate court procedures, the defendant engaged in conduct that violated the law." Motion to Reargue, pp. 11-12. The court is unpersuaded. The use of expert testimony on issues of law was addressed by Judge Sheldon in the following thorough, well-reasoned discussion.

"It has long been the rule at common law that no witness, expert or otherwise, can testify to a legal opinion, either as to the status or requirements of domestic law or as to the way in which the law should be applied to the facts of a given case. . . . The dual rationale for this rule . . . is that such testimony unnecessarily invades both the province of the Court, which alone must decide the law of the case, and the province of the jury, which alone must decide the facts of the case by applying the law, as the Court has instructed on it, to the credible evidence presented at trial.

"The Court presumably knows the law from its own experience, or can learn the law from its own research and the arguments of the lawyers who appear before it. As a result, the

testimony of an expert on the law is typically unnecessary or superfluous.

“Moreover, when the Court decides the law of the case, its decision must be binding on all trial participants, subject only to appellate review. To ensure that jurors honor this obligation, considerable time is typically spent during voir dire to determine that potential jurors are willing and able to follow the Court's instructions on the law. Any demonstrated unwillingness or inability to do so is the surest basis for a successful challenge for cause. Furthermore, once the jurors are selected, every effort is made to insulate them from those parts of the trial where the judge and the lawyers discuss the law, so that they are not confused by what they hear or tempted to make their own decisions on issues of law. Many legal arguments are presented only in writing, most oral arguments on the law are conducted outside the presence of the jury, and the parties are not permitted to engage in running debates with the Court, before the jury or otherwise, about decided points of law.

“Finally, consistent with the taking of these steps to preserve the Court's exclusive power to decide and enforce the law of the case, the jurors are expressly instructed that they must decide the factual issues presented for their decision under the Court's binding instructions on the law, putting out of their minds any personal notions they might have as to what the law provides or should provide, and ignoring whatever any other trial participant may have said about the law that is inconsistent with the Court's instructions. It would be completely inconsistent with these instructions, and with the careful trial procedures implemented to ensure that they are followed, to permit expert witnesses to offer opinion testimony about legal issues.

“The presentation of expert testimony on a point of law would not only suggest to the jury that the matter is in controversy, but would highlight such controversy by inviting

cross-examination on that point, as well as the presentation of conflicting views from opposing expert witnesses. If jurors were exposed to a battle of experts about the proper interpretation of governing law, they might confuse the experts' testimony with the Court's instructions or worse; reject or modify the rules set forth in those instructions based on its own reaction to the more persuasive expert testimony. It is not the jury's job to find the law; instead it must find the facts by applying the law, as the Court has instructed on it, to the credible evidence presented at trial. Excluding expert testimony on points of law significantly reduces the risk that the jurors will step outside their own role as fact finders by finding the law as well.

"The prohibition against testifying as to the status or requirements of domestic law has long been strictly enforced in Connecticut." (Citations omitted.) *Pepe & Hazard v. Jones*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X02-CV-960151601-S (September 11, 2002, *Sheldon, J.*) (33 Conn. L. Rptr. 72, 73-74); accord *Madison v. Guilford*, 85 Conn. 55, 65-66, 81 A. 1046 (1911) (a question "calling for a legal conclusion" is objectionable); *Sagamore Group, Inc. v. Commissioner of Transportation*, 29 Conn. App. 292, 299, 614 A.2d 1255 (1992) ("a witness is incompetent to offer a legal opinion"); *Orange Street Armory Associates, Inc. v. New Haven*, 17 Conn. App. 166, 173, 551 A.2d 759 (1988) (same).

The plaintiff's contention that Judge Kurmay is not being called to testify about the law or the application of the law to the facts is belied by the expert disclosure itself. In its April 28, 2017 disclosure, the plaintiff explains that "Judge Kurmay will testify as to Defendant's liability, to the jurisdiction of the probate court, legal obligations imposed upon the Defendant, duties owed by the Defendant, breaches thereof by the Defendant, and the likely outcome of a hearing before the probate court." See n. 2. More specifically, Judge Kurmay will testify that the probate

court has "jurisdiction to resolve disputes regarding the continuation or discontinuation of life sustaining medical treatment." He will opine that the defendant "knew or should have known" about these procedures and was "ethically and legally" obligated to follow them. Furthermore, Judge Kurmay will testify that if these procedures had been followed, a probate hearing would have been held, and at this hearing the defendant "would not have been permitted to discontinue the care provided to [Helen]." Judge Kurmay will explain that the defendant breached its duties owed to the plaintiffs as imposed by the statutory scheme of the probate courts and that its actions were "unreasonable" and "deprived [Helen] of her due process rights." Id.

This witness is not being called to provide factual information to jury or to provide expert opinions directed primarily to the factual allegations. Based on the disclosure summarizing Judge Kurmay's expected testimony, there can be no bona fide dispute that this witness is being called as an expert to testify about probate law, the application of this law to the anticipated facts of the case, and how the defendant violated the law in this witness' opinion. The court agrees with the defendant that this proffered testimony is objectionable and should be precluded as a matter of law because the plaintiff impermissibly seeks to provide expert opinions on probate law and on the application of this law to the facts of this case. This testimony is improper and inadmissible because it "unnecessarily invades both the province of the court, which alone must decide the law of the case, and the province of the jury, which alone must decide the facts of the case by applying the law, as the court has instructed it, to the credible evidence presented at trial." *Pepe & Hazard v. Jones*, supra, 33 Conn. L. Rptr. 73. The plaintiff's arguments to the

contrary are rejected.<sup>4</sup>

### III

The court also agrees with the defendant that Judge Kurmay is neither competent nor qualified to provide standard of care testimony as to any medical malpractice claims asserted by the plaintiff. General Statutes § 52-184c addresses the standard of care in a negligence action against a health care provider and the qualifications necessary for an expert to testify about this standard. Under § 52-184c (a), “[t]he prevailing professional standard of care for a given health care provider shall be that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.” An expert witness is qualified to testify about the applicable standard of care when the witness is a “similar health care provider” as defined by the statute or when the witness, “to the satisfaction of the court, possesses sufficient training, experience and knowledge as a result of practice or teaching in a related field of medicine . . . .” General Statutes § 52-184c (d).

According to the plaintiff’s disclosure, Judge Kurmay was admitted to practice law in the state of Connecticut and retired after thirty-five years of service as a probate judge and a practicing attorney. He has never worked as a health care provider and has no formal training or experience in any health care field. There is no dispute that Judge Kurmay is not a health care provider qualified to testify about the prevailing professional standard of care applicable to the defendant hospital. The plaintiff does not seriously argue to the contrary.

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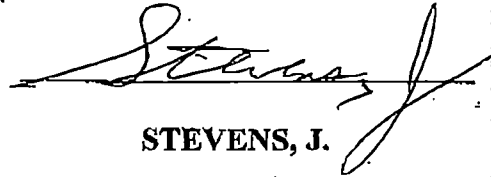
<sup>4</sup>The plaintiff also contends that the court’s rulings in favor of the defendant’s opposition to Judge Kurmay’s testimony constitute improper discovery sanctions under Practice Book § 13-4 (h). As articulated herein, the court’s rulings are unrelated to Practice Book § 13-4 (h).



**CONCLUSION**

Therefore, for these reasons, the defendant's objection to the plaintiff's disclosure of Judge Kurmay as an expert witness is sustained and its motion to preclude the testimony of this witness is granted.

So ordered this 18<sup>th</sup> day of September 2017.

  
**STEVENS, J.**