

**PLAINTIFF'S MOTION IN LIMINE NO. 3 AND MEMORANDUM OF LAW
TO EXCLUDE MENTION OF CHEST PAIN**

Pursuant to TENN. R. EVID. 403 and 802 Plaintiff respectfully moves, *in limine*, to exclude from trial any testimony, documents or other evidence, argument, reference or mention, directly or indirectly of chest pain allegedly experienced by XXX on XXX, prior to her death. The single allegation of chest pain in the entire record in this case constitutes inadmissible hearsay to which no exception applies. Furthermore, given the unreliable nature of the allegation, any probative value of the evidence is far outweighed by the danger of unfair prejudice to the Plaintiff. Indeed, the most prejudicial aspect of this evidence is that five of Defendants' expert witnesses expressly rely on this single allegation of chest pain as the primary basis for their opinions on causation. Given the lack of trustworthiness of the allegation of chest pain, Plaintiffs also move pursuant to TENN. R. EVID. 702 and 703 to exclude the causation opinions of these defense expert witnesses (Drs. XXX, XXX, XXX, XXX, and XXX).

Background

The only allegation that XXX experienced chest pain immediately prior to her death is in a XXX, medical record of the XXX Emergency Department. That record (attached hereto as Exhibit 1 and Bates stamped numbered XXX 5 01) reads in pertinent part as follows:

"34 yo diabetic c ESRD – c/o L CP to 8 yo son, then lost consciousness – EMS"

XXX's only child, and thus the only "son" to whom this statement could be attributed, is then eight year old son XXX. When deposed, XXX expressly denied making any such statement. (See Deposition of XXX p. 8 line 9 – p. 10 attached as Exhibit 2). Both of the paramedics deposed by Defendants also expressly denied that XXX said anything to them about his mother having chest pain, and the paramedics likewise denied reporting this alleged statement of XXX's to the Emergency Department. (See Deposition of XXX p. 36 and deposition of XXX p. 22, line 21 – p.23, line 8 and p. 24-25 attached as collective Exhibit 3).

Despite Defendants' apparent inability to lay an evidentiary foundation for this statement, five of the Defendants' expert witnesses expressly rely on this single allegation of chest pain as a primary basis for their opinion that XXX may not have died from XXX as opposed to some other theoretical cause of death. As discussed more fully below, the statement and the opinions based thereon should be excluded from evidence.

Argument

The statement at issue in the above cited Emergency Department record regarding chest pain is inadmissible hearsay and, pursuant to TENN. R. EVID. 802, should be excluded from evidence at trial.

Defendants may argue that the statement should be admitted pursuant to TENN. R. EVID. 803(4) which makes an exception for hearsay statements made for the purposes of medical diagnosis and treatment. That exception, however, does not apply because the Defendants cannot lay a proper evidentiary foundation for the statement. While one can perhaps imagine instances

in which a statement regarding someone having had chest pain might be made for purposes of medical diagnosis and treatment, we do not know the circumstances under which this particular statement was made. XXX (the primary alleged declarant) and the two paramedics deposed by Defendants (secondary alleged declarants) deny having made the statement, much less for purposes of diagnosis or treatment. Plaintiffs are not aware of any other witnesses who will testify regarding the circumstances surrounding this alleged statement. Without this necessary evidentiary foundation, the hearsay exception simply does not apply.

Tennessee Rule of Evidence 403 also mandates exclusion of the evidence.

Given the lack of trustworthiness surrounding the statement, both due to the fact that it is denied by those alleged declarants who have been disclosed by the defendants, and the fact that XXX was only eight years old at the time the statement was allegedly made, any probative value of the evidence is far outweighed by the danger of unfair prejudice to the Plaintiff and thus the evidence should also be excluded pursuant to TENN. R. EVID. 403.

The untrustworthiness of this evidence also necessitates exclusion of the opinions of Drs. XXX, XXX, XXX, XXX, and XXX as to the cause of XXX's death pursuant to TENN. R. EVID. 702 and 703.

Rule 703 expressly provides that “[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.” The causation opinions of Drs. XXX, XXX, XXX, XXX, and XXX are so fundamentally premised upon the single allegation that XXX experienced chest pain immediately prior to her death that those opinions must be excluded if this court finds that that single allegation of chest pain in the record does in fact lack trustworthiness.

For ease of reference, excerpts of these experts' opinions on the issue of causation are set forth below:

XXX

“In Dr. XXX's opinion, the facts do not support the opinion that XXX is the cause of XXX's death. The complaint of chest pain as noted in the ER record on the day of her death, is not a common complaint for patients with XXX. Chest pain due to restrictive lung disease, coronary artery disease or heart attack is a more likely scenario, in Dr. XXX's experience.” Dr. XXX's Expert Disclosures p. 10.

XXX

“If called to testify at trial, it is expected that Dr. XXX will offer his opinion that XXX's cause of death cannot be shown to be due to XXX and is more consistent with a cardiopulmonary arrest secondary to her underlying cardiac and respiratory conditions. XXX's complaint of chest pain and sudden collapse are not consistent with a death caused by XXX.” Dr. XXX's Expert Disclosures p. 13.

XXX

“In Dr. XXX's opinion, the facts do not support the opinion that XXX is the cause of XXX's death... In addition, chest pain is not a common complaint for patients with XXX. Chest pain due to

restrictive lung disease, coronary artery disease or heart attack is a more likely scenario, in Dr. XXX's experience." Dr. XXX's Expert Disclosures p. 26.

XXX

"Dr. XXX's opinion is that chest pain in a diabetic patient with end stage renal disease is more consistent with a cardiac event than with death from XXX. Chest pain is not a system of XXX." Dr. XXX's Expert Disclosures p. 29

(Complete copies of Defendants XXX and XXX's expert witness disclosures are attached as Exhibit A and B to Plaintiff's Motion *in Limine* No. 1).

Defendants will argue that these experts should be allowed to give causation opinions even if the evidence itself is excluded because Rule 703 allows experts to rely on inadmissible evidence in forming their opinions if the evidence is of the type regularly relied upon by the expert. Rule 703, however, does not allow any expert opinion where there is a lack of trustworthiness surrounding the underlying facts and data – as with this single statement in a single medical record for which the Defendants cannot lay a proper evidentiary foundation and which is denied by the alleged declarants deposed by defendants. Expert testimony so fundamentally premised on such unreliable evidence simply will not assist the trier of fact as is required by Rule 702.

Conclusion

For the foregoing reasons, Plaintiff respectfully requests that this Court exclude from trial any testimony, documents or other evidence, argument, reference or mention, directly or indirectly of chest pain allegedly experienced by XXX on XXX, prior to her death. Plaintiff also moves this Court for an order excluding the opinions of Drs. XXX, XXX, XXX, XXX, and XXX on the issue of the cause of XXX's death given their reliance on the allegation of chest pain in forming their opinions and the untrustworthiness of that evidence.

NOTICE OF HEARING

THIS MOTION IS EXPECTED TO BE HEARD ON XXX AT XXX A.M. ON THE COURT'S REGULAR MOTION DOCKET. FAILURE TO FILE AND SERVE A TIMELY RESPONSE MAY RESULT IN THE MOTION BEING GRANTED WITHOUT FURTHER HEARING.