Heresay Statements in Medical Records About how the Accident Happened is Not Admissible

Defendant will likely attempt to make reference to hearsay statements recorded by an Emergency Medical Technician (EMT) shortly following Plaintiff David Hick's injury. Of course, Mr. Hicks was injured when he tripped into a pot hole on his way to a football game. However, one medical personnel's record differs from the overwhelming evidence concerning how Plaintiff's injury occurred. This rogue account should be barred as hearsay without exception for a multitude of legal and practical reasons. (*Exhibit A – Meadowlands Medical Center records*).

First, it is well established under New Jersey law that declarations of a patient as to "his condition, symptoms and feelings made to his physician for the purpose of diagnosis and treatment are admissible in evidence as an exception to the hearsay rule." *Cestero v. Ferrara*, 57 N.J. 497, 501 (1971). The rationale behind permitting declarants' statements regarding symptoms over a hearsay objection is that the law recognizes that such statements are made at a time when the desire for relief provides an incentive for truth telling. *Bobber v. Independent Planting Corp.*, 28 N.J. 160, 170 (1958). However, this exception to the hearsay rule does not include statements relating to the cause, or events that led to the symptoms or condition, "because the same compelling motivation may not be present." *Cestro v. Ferrara*, 57 N.J. at 501. This notion is contemplated in *New Jersey Rule of Evidence* 803(c)(4), which provides:

> Statements made in good faith *for the purposes of medical diagnosis or treatment which describe medical history, or past or present symptoms, pain, or sensations,* or the inception or general character of the cause or external source thereof to the extent that the statements are *reasonably pertinent to diagnosis or treatment*. (emphasis added).

The language of the Rule references the long held notion that while statements which are merely descriptive of pain may be trusted by virtue of the declarant's desire for relief, statements as to the cause of the pain have not been considered as trustworthy. *See generally, Cestro v. Ferrara*, 57 N.J. 497(plaintiff's testimony of when she crossed an intersection was inadmissible as statement necessary for medical treatment or diagnosis*)*; *Dinter v. Sears*, 252 N.J. Super. 84, 92 (App. Div. 1991)(plaintiff's statement to her physician that she slipped on ice inadmissable); *Rose v. Port of New York Authority*, 61 N.J. 129, 138 (1972)(plaintiff's statement in hospital records that she waited for green light before entering intersection inadmissible as statement for purposes of medical diagnosis or treatment).

Statements as to the cause of a patient's symptoms, when impertinent to medical treatment or diagnosis, should be redacted from medical and hospital records which may otherwise qualify for admission under the business records exception. *Pinter v. Parsekian*, 92 N.J. Super. 392, 394-396 (App. Div. 1966)(recognizing that statements as to the cause of the symptoms are generally inadmissible). *Pinter v. Parsekian*, involved an automobile accident in which the plaintiff declarant died before trial. Liability was dependent upon demonstrating that a phantom vehicle caused the accident. However, even when declarant was deceased and thus unavailable, his statement about how the accident happened documented in medical records was

not beyond the hearsay rule because the statement regarding the cause of the accident was not information which could lead to diagnosis or treatment. *Id.* at 395-396. Accordingly, statements regarding the cause of the automobile accident were inadmissable. *Id*.

Likewise, in this instance, EMT's statement that Plaintiff tripped over a "pole" (*Exhibit A – Meadowlands Medical Center records)* is similarly not exempted from the Hearsay Rule, although imbedded within a medical record. What exactly caused Plaintiff to fall and injure his arm is immaterial in regards to how to treat and diagnose the injury of a broken bone. It is simply irrelevant what type of object the Plaintiff tripped over to cause his injury, and therefore is not information pertinent to medical treatment and diagnosis. As such, the portion of EMT's medical report pertaining to what the Plaintiff fell over is not the type of material pertinent to treatment and diagnosis of an injury, and therefore, not the type of information court's seek to exempt from the hearsay rule. Accordingly, EMT's records as to what caused Plaintiff's injury should be treated as inadmissible.

The fact that EMT is not a physician, but still within a class of medical personnel does not remove her from the same rules guiding physician hearsay exemptions. Significantly, although *New Jersey Rule of Evidence* 803(c)(4) which is based off of *Fed.R.Evid. 803(4)* omits a key element that statements made to a "physician" for purposes of medical treatment and diagnosis are exempt as hearsay, it retains the requirement that only statements given "for the purposes of medical diagnosis or treatment" are exempted from the Rule. *Id*. Although the group of medical personnel able to testify under a hearsay exemption is thereby broadened by this omission, showing the Rule to include medical personnel such as EMT's, *New Jersey Rule of Evidence* 803(c)(4) does not remove the requirement that their testimony is limited only to facts pertinent to "medical diagnosis or treatment" as well. *Id.* Therefore, although the EMT in Mr. Hick's case would be permitted to testify under New Jersey law as to the extent and severity of Plaintiff's injuries, she would, as would a physician, not, be able to testify as to the cause of Plaintiff's broken arm, since it is insignificant to the diagnosis and treatment of this unfortunate injury. Thus, EMT's records and testimony as to what she believed Plaintiff told her caused him to fall should not be exempted under the Hearsay Rule, and therefore deemed inadmissible.

Further case law supports the notion that although testimony as to the general cause of an injury may be admitted under the medical records exemption, a specific identification of the actor, or logically, the object, that causes one's injury, is not information intended to be exempted from *New Jersey Rule of Evidence* 803(c)(4). *See generally*, *R.S. v. Knighton*, 125 N.J. 79 (Super.1991). The *Knighton* case involved the issue of whether statements children made identifying their molester to a psychologist were admissible as exempted under the Hearsay Rule. The court ruled that these statements identifying the children's assailant were not exempted. Specifically, the court notes:

> Despite the admission of some [medical] statements regarding the cause of injury when relevant to treatment and diagnosis, no New Jersey case has admitted into evidence . . . a statement identifying an assailant. In *State v. McBride,* 213 *N.J.Super.* 255, 517 *A.*2d 152 (App.Div.1986), the court held that although the patient's statement to her physician that she had been struck by an assailant's fists was relevant to diagnosis and treatment and therefore admissible . . . the portion

> of the statement identifying the perpetrator was inadmissible. *Id.* at 273, 517 *A.*2d 152. Similarly, in *State v. Bowens,* 219 *N.J.Super.* 290, 530 *A.*2d 338 (App.Div.1987), the court held that the trial court properly had excluded testimony by a physician regarding a child's out-of-court identification of the defendant, an alleged child abuser. In so holding, the court implied that . . . the identification evidence was not relevant to the treatment of the child. *Id.* at 300, 530 *A.*2d 338; *see also State v. D.R., supra,* 214 *N.J.Super.* at 288-89 n. 4, 518 *A.*2d 1122 (indicating that identity of child abuser did not fall within "general character of the cause or external source of symptoms"). R.S. v. Knighton, 125 N.J. 79, 88-89 (Super.1991)

This logic is persuasive in the case at hand as well. Applied to the facts in Mr. Hick's case, what is crucial to the treatment and diagnosis of Plaintiff's injuries is only the fact that he fell. The object that caused his fall is as irrelevant, if not even more so, than the specific causes of harm in the aforementioned cases. As shown above, what is admissible under a hearsay exemption is not who struck the plaintiff, but that she was struck. What matters to the court in granting exemptions to the hearsay rule is not who molested the children, only that the children were molested. *See generally*, *State v. McBride,* 213 *N.J.Super.* 255, 517 *A.*2d 152 (App.Div.1986); *State v. Bowens,* 219 *N.J.Super.* 290, 530 *A.*2d 338 (App.Div.1987). Thus, it proceeds logically that testimony as to what object actually caused Plaintiff to fall should be deemed as inadmissible as testimony as to who injured the Plaintiffs in the abovementioned cases. As a result, EMT's testimony concerning what object led to Plaintiff's fall should be barred.

Furthermore, policy reasons guiding the omission of testimony as to who struck a woman, or molested a child are two of the most compelling scenarios in which courts would be tempted to extend the hearsay exemption to include particular causes of injury, yet they refuse to do so. *See, Knighton,* 125 N.J. 88 (Super.1991) (stating that New Jersey has never admitted into evidence an assailant's identity although embedded in medical records). As a result, to allow medical personnel to testify as to what they believe to be the specific cause of Mr. Hick's broken arm would be a direct affront to the New Jersey Supreme Court's logic preceding this case, and a far less noble and compelling reason to break from previous courts treatment of the Rule. In sum, identifying the specific cause of an injury is not the goal courts wish to accomplish by allowing certain aspects of medical records to be admitted into court; accordingly, an exception to this well established rule is unwarranted in the present case as well.

Finally, EMT's testimony and a portion of her medical report should not be admitted since they fail to achieve the preponderance of the evidence threshold required to introduce evidence in a civil case. The preponderance of the evidence standard is described to the jury as proving that the given allegation is more likely true than not true. *Model Jury Charge*, 1.12. To sustain the burden under the preponderance of the evidence standard, the evidence supporting the claim must weigh heavier or be more persuasive than the contrary evident. *Model Jury Charge,* 1.12. It is often analogized that the scales of justice have to be balanced ever so slightly in favor of the allegation; i.e., greater than 50%. Although the hurdle for admitting evidence is set as low as 50.1% *See e.g.*, *Davidson v. Fornicola*, 38 N.J. Super. 365 (App. Div.1956); *Sharpe v. Bestop,*

Inc., 314 N.J. Super. 54, 69-70 (App. Div. 1998)(noting that preponderance of the evidence is sustained when the proof is at least 50.1%), that threshold is not met in this case.

EMT's report that Plaintiff Mr. Hicks tripped over a "pole" is the only account stating as such. (*Exhibit A – Meadowlands Medical Center records*). Significantly, it is also the most hastily recorded, unlikely, and unreliable account of the incident that led to Plaintiff's injury. Anyone who has ever sat in an ambulance, or suffered a severe injury knows the head spinning and surreal process of being rushed to a hospital for treatment. During the ordeal, EMT's focus was surely the degree of pain Plaintiff was in, which was a horrific 10 out of 10, and not the recording of a fact meaningless to the treatment of Plaintiff's injury, such as what he tripped over. (*Exhibit A – Meadowlands Medical Center records*). Likewise, Plaintiff's main concerns were undoubtedly directed more towards the bone sticking out of his arm and his unbearable pain, rather than slowly and eloquently stating the object that caused his horrific injury. The most likely scenario, far more plausible than Plaintiff saying he tripped over a "pole" is that Plaintiff actually said (as he has said consistently since the onset of his injury) that he tripped over "a pot hole" and in the frantic haste of the situation, bouncing around in the back of an ambulance, EMT misheard pot, and hole, as a single word, and hastily scribbled down: "pole."

Importantly, the existence of a "pole" lying in the middle of the parking lot going unnoticed by anyone else is a preposterous and illogical notion. Significantly, it does little to alter Defendant's liability: a pole acting as a trip wire in the middle of a parking lot is equally, if not more of a dangerous condition than a pot hole. As a result, Plaintiff had absolutely zero incentive to misrepresent what he tripped over to EMT.

The far more likely scenario is the formerly stated: EMT misheard plaintiff in the chaos of the situation, and recorded a detail that to her was essentially meaningless, but to the Defense, has become paramount. Consequently, Defendant's ridiculous notion that Mr. Hick's, after telling EMT he tripped over a pole, changed his story to one where he tripped over a pot hole is ludicrous, and little more than an attempt to tarnish Plaintiff's credibility. As such, because EMT's statement as to what Plaintiff actually said fails to meet the 50.1% threshold required for evidence to be admitted into court, being far less conceivable than the evidence to the contrary, her testimony and medical report as to the object Plaintiff stated he tripped over should be barred.