STATE OF VERMONT
DEPARTMENT OF LABOR

Jasmina Omerovic	Opinion No. 15-18WC
v.	By: Stephen W. Brown Administrative Law Judge
University of Vermont Medical Center	For: Lindsay H. Kurrle Commissioner
	State File No. HH-54558

RULING ON COMMUNITY HEALTH CENTERS OF BURLINGTON, INC.'S MOTION TO QUASH SUBPOENA

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Jennifer Moore, Esq., for Defendant
O. Whitman Smith, Esq., for Community Health Centers of Burlington, Inc.

FACTUAL AND PROCEDURAL BACKGROUND[1]

According to the partiesô pretrial disclosures, Claimant is a survivor of serious childhood injuries from a hand grenade explosion during the Bosnian War in the 1990s. Approximately two decades later, on October 14, 2015, she was working at Defendantôs hospital in Burlington, Vermont, when a dementia patient attacked her and allegedly caused physical and psychological injuries, including post-traumatic stress disorder (ñPTSDò). Defendant accepted Claimantôs physical injuries as compensable, but disputes liability for her psychological injuries. Defendant has asserted that Claimant had pre-existing psychological diagnoses stemming from her childhood war injuries, and that the 2015 attack did not cause her present psychological condition. This case was referred to the formal hearing docket on the question of whether Claimantôs present PTSD arose out of and in the course of her employment with Defendant. Thus, the issue of causation is central to this case.

After her 2015 injury, Claimant received treatment at the Community Health Centers of Burlington, Inc. (ñCHCBò), where Andrea Solomon, P.A. was one of her treating providers. Claimant has identified Ms. Solomon as a witness in her Pretrial Disclosures, indicating that she is expected to testify regarding her treatment of Claimant and Claimantôs psychological condition, including the causation thereof.

[1] The facts as represented by counsel in their pretrial disclosures and during an oral conference are accepted as true for the purposes of this motion only.

Defendant has requested a subpoena compelling Ms. Solomon to testify at a deposition. During an oral conference, counsel for the parties represented that Ms. Solomon diagnosed Claimant with PTSD and expressed opinions concerning the causal relationship between her workplace incident and her present psychological condition. She also wrote letters addressed ñto whom it may concernò regarding her causation opinions and her treatment recommendations. Ms. Solomon is presently Claimantôs only expert witness on the issue of causation.

Claimant does not oppose Defendantôs subpoena request, and has expressed support for the requested subpoena, citing a desire to be able to compel Ms. Solomon to appear at trial if necessary. Counsel for both parties granted oral assurances that they would compensate Ms. Solomon as they would any other expert witness.

Ms. Solomon has not directly expressed any position as to this subpoena. However, her employer, CHCB, moved to quash it, arguing that compelling Ms. Solomon to testify ñdirectly contravenesò V.R.C.P. 45(c), and that case law categorically proscribes ñinvoluntary testimony by an unretained expert witness.ò While CHCBôs counsel does not represent Ms. Solomon individually, he asserted that she does not wish to testify because of her substantial workload and home duties. During the oral conference concerning the instant subpoena request, CHCBôs counsel stated that Ms. Solomon receives many requests to write letters for patients and does not understand that doing so might result in mandatory involvement in a court or administrative proceeding. He also stated that requiring CHCBôs providers to appear for depositions merely because of opinion letters they have provided will make it extremely difficult for them to perform their function in society. Following that conference, CHCB filed its Motion to Quash Subpoena, which this order resolves.

The extended deadline for the parties to respond to the Motion to Quash has passed, and the Department has received no response. However, for the reasons below, I find CHCBôs arguments generally unconvincing. The subpoena will issue, subject to the limitations stated herein concerning the depositionôs duration, scope, and logistics. CHCBôs motion is otherwise denied.

DISCUSSION

I. Ms. Solomonôs Appearance at a Deposition Would Not Subject Her or Her Employer to any ñUndue Burdenò

Rule 45 permits, but does not require, quashal of a subpoena that ñsubjects a person to undue burden.ò *See* V.R.C.P. 45(c)(3)(A)(iv). CHCB contends that because Ms. Solomon works full time and has a large patient load, requiring her to review Claimantôs treatment records and appear for the deposition would impose an undue burden on her and take her away from her important patient care duties.

This contention is not persuasive. Many witnesses work full time and have significant work, personal, and other duties. There is nothing extraordinary about a person with a demanding job having to sit for a deposition. I will not limit the use of compulsory process to witnesses who are unemployed, or who are fortunate enough to enjoy jobs with significant idle time. To mitigate any concern that this deposition may intrude upon her work and other duties, however, I will limit her deposition to three hours.

CHCB also complains that the subpoena calls for the deposition to take place at 10:00 a.m. on November 15, 2018, but it identifies no reason why this time is problematic. To ameliorate any burden resulting from this particular time, Ms. Solomon shall have the right to choose any reasonable time and place for her deposition, subject to counselôs availability, between todayôs date and December 31, 2018, and within 50 miles of Burlington, Vermont. However, Ms. Solomon will waive the three-hour time limit and the right to select the time and place of the deposition if she or her employer fail to substantially cooperate with the scheduling and/or progress of the deposition.

II. Ms. Solomonôs Status as an ñUnretained Expertò Does Not Categorically Shield Her Opinions from Discovery Under Rule 45

CHCB contends that the requested subpoena impermissibly seeks to compel expert testimony because ñRule 45(c), V.R.C.P., explicitly prohibits this practice.ò *See* CHCBôs Brief at 3. This is incorrect. That rule authorizes, but does not require, quashal or modification of a subpoena for opinion testimony by an unretained expert under certain circumstances.

a. Textual analysis of Rule 45(c)

The relevant portions of Rule 45(c) provide that if a subpoena

> ñrequires disclosure of an unretained expertôs opinion or information ***not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party***,ò

a court

> ñ***may***, to protect a person subject to or affected by the subpoena, quash or modify the subpoena ***or***, if the party in whose behalf the subpoena is issued shows a ***substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated***, the court ***may order appearance*** or production only upon specified conditions.ò

V.R.C.P. 45(c)(3)(B)(ii)ð (iii) (emphasis added).

CHBC is correct that Ms. Solomon is an unretained expert, in that she has expressed opinions in a field requiring specialized knowledge and training but has not been privately retained to testify. Thus, her testimony is subject to V.R.C.P. 45(c)(3)(B)(ii)ð (iii).

Her treatment of Claimant and the opinions she formed in the course of that treatment, particularly with respect to the issue of causation, are ñspecific events or occurrences in dispute.ò *Cf.* V.R.C.P. 45(c)(3)(B)(ii).

To the extent that her treatment of Claimant and formation of opinions in connection with that treatment involved any ñstudy,ò such study was performed at Claimantôs request, because Claimant sought treatment and Ms. Solomon provided it. *Cf.* V.R.C.P. 45(c)(3)(B)(iii). However, I will not require Ms. Solomon to perform any additional study beyond what she has already done, except as necessary to refresh her recollection in advance of her deposition. She shall have no duty to perform any new research or analysis, or to formulate any new opinions. She is only required to testify as to the opinions she formed while treating Claimant or expressed to the parties afterward, and reasons or bases for those opinions.

The parties clearly have a ñsubstantial needò for Ms. Solomonôs testimony since Ms. Solomon has personal knowledge of Claimantôs treatment history and her opinions constitute the Claimantôs only evidence relating to the crucial issue of causation. *Cf. id.* Moreover, there is no obvious evidentiary substitute for the personal knowledge and already-formed opinions that Ms. Solomon developed from treating Claimant. Thus, the partiesô substantial need for Ms. Solomonôs testimony cannot be met elsewhere without ñundue hardship.ò *Cf. id.*

Finally, both claimantôs and defendantôs counsel have orally indicated that they would be willing to compensate Ms. Solomon as they would any other expert witness. I find these assurances satisfactory, but I order the parties to make good on their promises.

Accordingly, the plain text of Rule 45 authorizes me to order Ms. Solomonôs appearance upon specified conditions. *Id.* I find it appropriate to do so under the circumstances of this case. The specified conditions are enumerated at the conclusion of this order.[2]

b. Advisory Committee Notes to the Federal Rule 45

i. The Advisory Committee Notes Do Not Support a Blanket Prohibition

CHCB cites the advisory committeeôs notes to Fed. R. Civ. P. 45, on which the Vermont rule is substantially based, in support of its argument that the rule should be read to prohibit the compulsion of expert testimony. Those advisory committee notes provide that Fed. R. Civ. P. 45(c)(3)(B)(ii) ñprovides appropriate protection for the intellectual property of the non-party witness.ò *See* Fed. R. Civ. P. 45, Advisory Committee Notes to the 1980 amendments.

[2] In addition to its argument that Rule 45 prohibits the discovery sought, CHCB also argues that Ms. Solomon did not waive Rule 45ôs protections by writing letters in support of Claimantôs position. Because Rule 45 allows her deposition subject to the limitations specified herein, I do not consider whether Ms. Solomon waived its protections.

These notes acknowledge CHCBôs stated concern that ñcompulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services.ò *See id.* However, they clarify that the federal rule ñestablishes the right of such persons to withhold their expertise, at least ***unless*** the party seeking it makes the kind of showing required for a conditional denial of a motion to quash as provided in the final sentence of subparagraph (c)(3)(B)[.]ò *Id.* (emphasis added).

As detailed in ¶ II.a, *supra*, the parties meet the requirements of subparagraph (c)(3)(B), and therefore satisfy the ñunlessò clause in the relevant portion of the federal advisory committeeôs notes. Accordingly, the notes on which CHCB relies do not support its legal position.

ii. The Advisory Committee Notesô Multi-Factor Guidance

The advisory committeeôs notes go on to provide guidance for how a federal trial court should exercise its discretion in deciding when to compel an expert witness to testify:

> [T]he district court's discretion in these matters should be informed by the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; and the degree to which the witness is able to show that he has been oppressed by having continually to testify....ò

Id. (cits. & punct. omitted).

These factors strongly favor compelling Ms. Solomon to testify. The parties seek Ms. Solomonôs testimony precisely because of her knowledge of the facts relevant to this case. They also seek her ñpreviously formedò opinions and have not asked for her to form any new ones. Her status as a treating provider who has observed and opined about Claimantôs condition, and the fact that she is the only expert who has provided Claimant an opinion as to causation, make her a ñuniqueò expert, and makes it unlikely that any comparable witness exists. There is no sense in which compelling her appearance at a deposition for market value compensation constitutes ñoppression,ò notwithstanding her substantial and important work duties. *Cf.* Fed. R. Civ. P. 45, Advisory Committee Notes to the 1980 amendments.

III. Case Law Does Not Prohibit the Discovery Sought

CHCB acknowledges that the Vermont Supreme Court has not ruled on the issue presented in its motion. Accordingly, it relies on decisions from other jurisdictions. It contends that the decisions it cites stand for a general prohibition against subpoenaing an expert to provide opinion testimony. While the cases it cites vary in their approaches to compelling experts to testify, none stand for such a strong proposition as CHCB asserts. Each case it cites for this position is considered in turn.

CHCB correctly notes that the Rhode Island Supreme Court has held that ñ[a]bsent extraordinary circumstances[,]ò a ñnon-party expert cannot be compelled to give opinion testimony against his or her will.ò *See Owens v. Silvia*, 838 A.2d 881, 901 (R.I. 2003); *accord Ondis v. Pion*, 497 A.2d 13, 18 (R.I. 1985). However, that Court clarified that ñ[s]uch circumstances might exist, for example, when there are no other experts available who can address the substance of the issues in the case, or when the expert in question is uniquely qualified to do so.ò *Owens*, fn. 13. As discussed *supra*, such circumstances are present here, because Ms. Solomon is the only person who has treated Claimant and rendered an opinion that her psychological injuries were related to her work incident. Her personal knowledge of Claimantôs history and treatment renders her uniquely qualified to render such opinions. Thus, the Rhode Island decisions CHCB cites would not prohibit the discovery sought here.

CHCB quotes *Gilly v. City of New York*, 69 N.Y.2d 509, 508 N.E.2d 901 (1987) for the broad statement that ña person may not be required to give an expert opinion involuntarily.ò While the quoted text appears in that decision, it appears in the context of ***distinguishing*** a prior decision which had used that language. The *Gilly* Court in fact reached the ***opposite conclusion*** with respect to the expert at issue there and reversed the trial courtôs judgment because it failed to compel an expert to testify at trial. The appellate court emphasized that the expert in question was a physician who had examined the plaintiff and had voluntarily involved himself in the litigation. Also, like Ms. Solomon here, he was called ñonly to relate conclusions already formulated and fully disclosed.ò *See id.* Thus, *Gilly* supports the partiesô position in this case rather than CHCBôs.

CHCB also cites *People ex rel. Kraushaar Bros. & Co. v. Thorpe*, 296 N.Y. 223, 225, 72 N.E.2d 165 (1947), which upheld a trial courtôs refusal to compel an appraiser to give his opinion in a tax appeal, stating, ñWe think the better rule is not to compel a witness to give his opinion as an expert against his will.ò *Id.* However, that holding was limited in *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 29, 203 N.E.2d 469, 474ï 75 (1964), which held that a defendant physician in a medical malpractice case could be compelled at trial to provide expert testimony against himself. *McDermott*, in turn, was cited in *Gilly*, *supra*, as support for requiring the physician in that case to testify. Thus, to the extent that *Kraushaar* purports to stand for a broader prohibition than *Gilly*, the New York Court of Appealsô more recent holding in *Gilly* (which supports the partiesô position here) would be controlling.

CHCB also cites *Metro. New York Coordinating Council on Jewish Poverty v. FGP Bush Terminal, Inc.*, 1 A.D.3d 168, 768 N.Y.S.2d 190 (2003). That decision does not provide any context or case history, but conclusorily upheld a trial courtôs decision to quash an expert subpoena. *See id.* Without information concerning the circumstances surrounding that decision, it is not instructive to the analysis of this case.

Additionally, CHCB cites *Stanton v. Rushmore*, 112 N.J.L. 115, 117-18 (1934) for the proposition that an expert may be compelled to give factual testimony but not expert opinion. However, *Stanton* merely affirmed the trial courtôs judgment awarding an expert compensation for services already rendered. The expert physician did not want to be a witness, but the defendant subpoenaed him and orally promised to pay the amount he ñmight receive for a gall bladder or appendicitis operation.ò *Id.* The physician provided expert testimony at trial and sent his bill to the defendant, which went unpaid. The physician sued for payment and won. The Courtôs holding was simply that it was improper to hire an expert witness without compensating the expert. Because the physician had already testified at trial, any statement to the effect that an expert cannot be compelled to testify was *dicta*. Here, the parties have granted reasonable assurances that they will compensate Ms. Solomon as they would any retained expert, and I have ordered them to make good on that assurance. Thus, *Stanton*ôs *dicta* on which CHCB relies is inapposite unless and until Ms. Solomon testifies and the parties thereafter refuse to pay her.[3]

Additionally, in *Blodgett v. United States*, No. 2:06-CV-00565DAK, 2008 WL 1944011, at *5 & fn. 5 (D. Utah May 1, 2008), the Court merely held that a treating physician who expressed a causation opinion but whom the plaintiff had not disclosed before the disclosure deadline could not testify at trial. While the court indicated that the treating physicianôs causation opinion constituted expert testimony, its decision to preclude his testimony was based simply on the plaintiffôs failure to comply with a scheduling order.

In *Friedland v. TIC - The Indus. Co.*, No. CIV-A-04-CV-01263-PSF-MEH, 2006 WL 2583113 (D. Colo. Sept. 5, 2006), the Court limited the scope of a subpoena to a third partyôs expert, a private company who had analyzed the plaintiff's legal fees and costs in other lawsuits. The Court required production of the legal bills and similar documents but did not require production of the expertôs reports and analysis, because the defendants failed to show any undue hardship in obtaining their own expert analysis. I find that an analysis of legal bills is wholly distinct in character from a treating medical providerôs opinions resulting from personal observation. Unlike a treating provider, there was no indication in *Friedland* that the expert had any first-hand knowledge of the plaintiffôs legal strategies or its attorneysô billing practices that might have made its opinions uniquely valuable or difficult to replace. Also, as discussed above, I have found that the parties in this case would endure undue hardship in finding an alternative source of evidence comparable to Ms. Solomonôs testimony. *Friedland* is so distinguishable as to be non-instructive here.

[3] CHCB also cites several cases for the uncontroversial proposition that a party subpoenaing an expert witness must compensate that professional at market rates. Because I am ordering such payment, I do not discuss those cases here.

CHCB cites *Lykins v. Miami Valley Hosp.*, 2004-Ohio-2732, ¶¶ 102-104, 157 Ohio App. 3d 291, 316ï 17 (Ohio App. 2d Dist. 2004) and *Klabunde v. Stanley,* 384 Mich. 276, 181 N.W.2d 918 (1970) for the proposition that ñan expert witness subpoenaed by a party may refuse to answer any question based on his or her professional knowledge or expertise.ò *See* CHCBôs Brief at 4. Neither case stands for this conclusion. In *Lynkins*, the court simply held that the trial court was not *required* to compel a physician to provide expert testimony in a medical malpractice case, where the physician himself stated that he was not qualified to testify as an expert, but he provided lay fact testimony on other subjects. *See id.* Similarly, in *Klabunde*, the Court upheld a trial courtôs exercise of discretion in declining to compel an expert to testify, but specifically declined to make any broad-sweeping rule against compelling expert testimony:

> ***We do not decide whether in a proper case the testimony of an expert may not be compelled in a pretrial discovery order***, under penalty of prohibiting use of his testimony at trial; all we say here is that, under the circumstances of this case, denial of the requested discovery, sought as a matter of right, was not an abuse of the trial court's discretion.

Id. (emphasis added).

With respect to compelling testimony of treating physicians, CHCB states, ñSome jurisdictions have carved out an exception to the above case law with respect to treating physicians. But this result oftentimes has arisen in the context of determining whether or not such medical personnel must submit a written expert report.ò *See* CHCBôs Brief at 4-5. As an initial matter, this asserted ñexceptionò rests on the dubious premise that there is a generally-applicable blanket prohibition against compelling expert testimony. The case law cited does not support such a prohibition, but instead demonstrates a variety of approaches courts have taken in balancing the competing interests of parties to litigation and the burdens upon non-parties with potentially discoverable information. Thus, it is not clear that there is any general rule from which to carve such an exception. It is equally unclear why it should matter that any putative exception ñoftentimes has arisenò in the context of an expertôs written report. In any event, CHCB cites *Lamere v. New York State Office for The Aging*, 223 F.R.D. 85 (N.D.N.Y. 2004) for this principle. That case simply held that under the federal rules governing expert disclosures, a treating physician must generally be identified as an expert but does not need to provide a written report unless the anticipated testimony extends beyond those facts and opinions characteristically related to the care and treatment of the patient. *Id.* Because the present dispute is not subject to the federal disclosure rules, and does not involve any expert reporting obligations, *Lamere* is inapposite.

Finally, CHCB cites *Young v. United States*, 181 F.R.D. 344, 346ï 47 (W.D. Tex. 1997) for a broad prohibition against compelling expert witnesses to testify. That case does say that ñ[i]n the absence of a statute to the contrary, a professional witness may not generally be compelled to testify as an expert at the request of a private litigant, as such testimony is a matter of contract or bargain.ò *See id.* However, *Young* goes on to say that ña treating physician generally must be considered an ordinary fact witness,ò and that the treating physicians at issue ñacquired knowledge of this case by direct observation, not later consultation.ò *Id.* Importantly, the Court held that ña treating physician, even though he has not, through additional investigation, qualified himself as an óexpertô for the purposes of litigation, ***may still be asked questions which implicate his expertise***.ò *Id.* (emphasis added). It held that the they could be asked ñabout the degree of injury in the future, or about anything else that was a necessary part of the patient's treatment,ò but could not be asked about ñmedical issues not involved in his diagnosis and treatment.ò *Id.* Thus, *Young* supports the compulsion of Ms. Solomonôs deposition so long as its scope is limited to opinions that Ms. Solomon has already formed in the course of or as a result of her treatment of Claimant.

SUMMARY AND ORDER

As Claimantôs treating provider, Ms. Solomon expressed opinions in connection with her treatment, both in the course of her treatment and afterward. The parties are not trying to conscript her to formulate new opinions or reveal opinions not previously disclosed. They simply seek to depose her treatment, observations, and opinions that she has already formed and disclosed. The parties have satisfied all prerequisites articulated in Rule 45 for taking Ms. Solomonôs deposition, subject to the restrictions stated herein.

Accordingly, CHCBôs Motion is **DENIED**, and Defendantôs request for a subpoena is **GRANTED**, subject to the following modifications and conditions:

1. Ms. Solomonôs deposition will take no more than three hours, unless she or CHCB fails to substantially cooperate with her deposition.

2. Ms. Solomonôs deposition will take place at a reasonable time and place of her choosing, within 50 miles of Burlington, Vermont, and no later than December 31, 2018, unless she or CHCB fails to substantially cooperate with her deposition.

3. Ms. Solomon shall have no duty to perform any new research or analysis, or to formulate any new opinions. She is only required to testify as to the opinions she formed in the course of or as a result of treating Claimant or expressed to the parties afterward, and reasons or bases for those opinions. She must, however, take any actions necessary to refresh her recollection sufficiently to allow her to testify accurately and completely.

4. The parties shall compensate Ms. Solomon for the fair market value of her time, expressed as an hourly rate, including reasonable preparatory time. If the parties cannot agree as to the appropriate rate of her compensation, they shall contact the Department and request a conference on that issue.

Within five business days after the date of this order, Defendant shall submit a new proposed subpoena that conforms to these conditions for the Departmentôs execution.

DATED at Montpelier, Vermont this 13th day of November 2018.

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Lindsay H. Kurrle
Commissioner