SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Arnold P. Kemp v. Christiana Care Health Services, Inc., a/k/a Christiana Care Health System, Inc., a Delaware Corporation, Ehyal Shweiki, M.D., and Surgical & Critical Care Associates
C.A. No. 10C-07-012 RRC

Submitted: February 8, 2012
Decided: May 2, 2012

On Plaintiffs' Amended Motion for a New Trial.
DENIED.

Dear Counsel:

I. INTRODUCTION

Plaintiff has moved for a new trial in this medical malpractice action, asserting that the jury's finding of no negligence was "unreasonable" and contrary to the evidence. Defendants contend the verdict was not unreasonable but rather demonstrated the jury's collective determination that Defendants did not breach their standard of care.

This Court concludes that a reasonable jury could find that Defendants did not breach the standard of care owed to Plaintiff. The Court finds that a new trial is not merited. Therefore, Plaintiff's Amended Motion for a New Trial is **DENIED**.

II. FACTUAL HISTORY

Plaintiff asserts that there are "21 undisputed facts" developed at trial that render the jury's finding of no negligence "unreasonable."[1] However, Defendants in response "do not agree that all 21 of these facts are undisputed but, rather than individually reference specific testimony that would indicate that they were disputed, defendants assert that the recitation of these facts does not result in a conclusion that the jury's finding was unreasonable. It is defendants' position that whether these 21 'facts' were believed by the jury or not believed by the jury, a reasonable jury could have concluded that there was no breach of standard of care."[2] The facts Plaintiff asserts as undisputed are set forth verbatim below:

> Arnold Kemp's median nerve was severed when his right arm went through a glass window on July 19, 2008 at 5:30pm in Newark, Delaware. Bleeding from the wound was "spurting" and required placement of a tourniquet at the accident scene. The spurting continued in the Emergency Department. Mr. Kemp was examined in Defendant's Emergency Department at 6:00pm and was evaluated as a "trauma alert" by Defendant's Trauma Team at 6:49pm. The median nerve is part of the neurovascular bundle at the palm side of the wrist. The neurovascular bundle consists of arteries, veins, tendons, and the median nerve. The neurovascular bundle is confined to a very narrow space, the carpal tunnel, which is enclosed by bones and the flexor retinaculum, a ligament. Surgery to repair the "multiple complex right upper extremity lacerations" under anesthesia began at 2:43am on July 20, 2008 and ended at 3:38am. Surgery was performed by Defendant Dr. Shweiki who is a general surgeon not trained as a hand surgeon. The wrist laceration was "deep" into the neurovascular bundle. The flexor retinaculum was "unroofed" by the wrist laceration. There was documented evidence of median nerve injury as of 6:45am on July 20, 2008 by a recovery room nurse. Arnold Kemp was discharged from the hospital at 2:10pm on July 20, 2008. No physician examined or evaluated Arnold Kemp between 6:45am and 2:10pm on July 20, 2008.
>
> Defendant surgeon admitted that he "missed" the injured median nerve preoperatively, intra-operatively, and post-operatively, and doing so "in the context" described by counsel does not meet the standard of care. Defendant CCHS is a Level 1 Trauma Center and, as such, is required to have subspecialty "on call" physicians at all times. Hand surgeons are a subspecialty required to be on "Call" at Level 1 Trauma Centers. Defendant CCHS had a hand surgeon "on

[1] Plaintiff's Amended M for New Trial at 1-3.
[2] Def's Response to P's M for a New Trial at 2.

Call" on July 19-20, 2008. A "suspicion" that the median nerve has been injured requires a Level One Hospital to obtain the consultation of a hand surgeon in order to meet the "Standard of Care." Defendants did not obtain the consultation of a hand surgeon between July 19 and August 4, 2008. Defendants discharged Arnold Kemp from post-operative care on August 4, 2008 without advising or warning him that a severed median nerve can only benefit from a primary repair within a period of one to four weeks. On August 4, 2008 Arnold Kemp was seen and evaluated only by Defendants' nursing staff.

III. PROCEDURAL HISTORY

A trial was held in July 2011 for Plaintiff's medical malpractice claims against all Defendants. Prior to trial, the parties agreed that a question for the jury was whether Defendants were negligent and whether Defendants failed to meet the standard of medical and surgical care regarding Plaintiff's treatment.[3] The jury returned a verdict finding that Defendants were not negligent in the care and treatment provided to Plaintiff. Plaintiff timely filed a Motion for a New Trial and the Court allowed Plaintiff to Amend the Motion to incorporate pertinent parts of the trial transcript.

IV. THE PARTIES' CONTENTIONS

Plaintiff contends that certain "undisputed" facts established negligence but that the jury unreasonably concluded otherwise. Plaintiff asserts that the expert opinion of Defendants' expert Dr. Miller "does not make any sense" and is "implausible." Plaintiff characterizes Dr. Miller's testimony as merely excusing Defendants' failure to notice the nerve damage and yet somehow concluding from Defendants' failure to notice that Defendants fulfilled their standard of care. Plaintiff suggests that Dr. Miller's testimony contravened the medical record, the standard of care, and Dr. Miller's own hospital's protocol. Plaintiff also asserts that the jurors reached an "unreasonable" verdict because of prejudice, a lack of impartiality, and defense counsel's purported attempts to disparage Plaintiff's character by commenting on Plaintiff's alcohol use.

Defendants contend that the facts Plaintiff characterizes as "undisputed" are not entirely undisputed and that a reasonable jury could differ regarding whether these facts were convincing or whether they constituted a breach of the standard of

[3] *Kemp v. Christiana Care Health Svcs., et al*., Pretrial Order, N10C-07-012-RRC D.I. 3795576 (June 2, 2011).

care. Defendants contend that both defense expert testimony and the deference given to a jury's right to weigh evidence support a finding that no new trial is merited. Defendants contend that any comments made by defense counsel occurred after Plaintiff's counsel "opened the door" by discussing Plaintiff's alcohol use.

V. STANDARD OF REVIEW

Superior Court Civil Rule 59 (a) states that "[a] new trial may be granted as to all or any of the parties and on all or part of the issues in an action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court."[4] The Superior Court has ample power to grant a new trial to prevent injustice.[5] The Court must determine whether the verdict is against the great weight of the evidence.[6] If the evidence preponderates so heavily against the verdict that a reasonable jury could not have reached that result, a new trial is required.[7] However, "[t]raditionally the court's power to grant a new trial has been exercised cautiously with extreme deference to the findings of the jury."[8] A jury's verdict is presumed correct.[9] The court will not set aside a verdict unless it clearly resulted from passion, prejudice, partiality, corruption, or it is clear the jury disregarded the evidence.[10]

VI. DISCUSSION

The parties disagree about whether all the facts that Plaintiff asserts as undisputed are in fact undisputed. Furthermore, they differ whether it was rational and reasonable for the jury to reach their verdict in light of the proffered evidence. The determination of standard of care based upon expert testimony is solely within the jury's function.[11] A "jury is free to accept or reject in whole or in part testimony offered before it and to fix its verdict upon the testimony it accepts."[12]

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[4] Super. Ct. Civ. R. 59(a).
[5] *McCloskey v. McKelvey*, 174 A.2d 691, 693 (Del. Super. 1961).
[6] *Story v. Camper*, 401 A.2d 458, 465 (Del. 1976).
[7] *Willey v. McCormick*, 2003 WL 22803925 *1 (Del. Super. Nov. 13, 2003).
[8] *Hardy v. Adam McMillan Const., LLC*, 2011 WL 2163598 *2 (Del. Super. May 31, 2011).
[9] *Dunn v. Riley*, 864 A.2d 905, 906 (Del. 2004).
[10] *James v. Glazer*, 570 A. 2d 1150, 1156-57 (Del. 1990); *Riegel v. Aastad*, 272 A.2d 715, 717-18 (Del. 1970).
[11] *Rezac v. Zurkow*, 1993 WL 389321 *2 (Del. Super. Aug. 26, 1993).
[12] *Id. See also Mumford v. Paris*, 2003 WL 231611 * 4 (Del. Super. Jan. 31, 2003).

At trial, each party called expert witnesses who testified regarding whether Defendants fulfilled the requisite standard of care. Defendants presented defense expert Dr. Richard Miller, chairperson of the Trauma Department at Vanderbilt University Medical Center. Dr. Miller's credentials include experience as a trauma surgeon, professor, lecturer, and author. Dr. Miller testified that there were no breaches of standard of care at any time and that Dr. Shweiki and his nurse practitioner, Mr. Mendell, at all relevant times acted within acceptable standards. Furthermore, Defendants adduced the testimony of Defendant Dr. Shweiki and Mr. Mendell who supported their decision making and gave testimony that was consistent with Dr. Miller's. Plaintiff adduced his own expert testimony at trial including Dr. Osterman, Dr. Adams, and Dr. Young who each testified to their opinions that Defendants had not fulfilled the standard of care.

The jury found that Defendants did not violate their standard of care and that such a conclusion was a reasonable interpretation of the evidence. The jury retains ultimate authority over determining the credibility and reliability of testimony and is free to use such determinations in reaching a verdict.[13] Furthermore, testimony regarding Plaintiff's alcohol use does not alter this finding. The evidence was effectively proffered and the jury retained discretion to consider the evidence when reaching their verdict. There is no indication that testimony regarding Plaintiff's alcohol use diverted the jury from reaching the liability issues.

Plaintiff's suggestion that the jury was distracted from their task of determining liability by extraneous issues is unfounded. It is equally possible that the jury weighed the evidence presented and after sufficient consideration determined Defendants did not violate the standard of care. Notably, in his Reply, Plaintiff offered no further argument regarding the alcohol issue. Finally, the jury was given full instructions regarding the appropriate weight to place upon expert testimony in determining whether a standard of care was violated and the jury was

[13] At oral argument, when the Court pointed out that the jury heard competing standard of care expert opinions, Plaintiff's counsel stated, "I suggest that it's up to the Court to evaluate the credibility of what [the jury] heard." Oral Argument Tr. at 3. In response, defense counsel stated that "[Plaintiff's counsel] suggests it's up to the Judge to weigh the credibility of witnesses. That is not what the Court's to do in a motion for a new trial. [Plaintiff's counsel] is to be commended in his sense of what a better verdict would be. I understand that, but that doesn't change the fact that this jury heard testimony from two experts. It was in some ways a battle of the experts and what we do is, we let [the jury] weigh these. We had credible experts, there was no challenge to credibility. Dr. Miller's position was laid out and subject to cross-examination and [Plaintiff's experts] was the same, and the jury chose." Oral Argument Tr. at 7.

instructed to return a verdict without prejudice or sympathy. There is no indication that the jury acted unreasonably or irrationally. [14]

Plaintiff's Motion for a New Trial is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary

[14] Plaintiff concedes that, hypothetically, a verdict finding that Defendants did not proximately cause Plaintiff's injuries would not constitute grounds for a new trial, but the jury never had to reach the causation issue on the verdict sheet.