IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAURA COONEY-KOSS and JEROME KOSS,	)	
Plaintiffs,	)	
v.	)	C.A. No. N10C-10-230 WCC
JENNIFER H. BARLOW, M.D., A. DIANE MCCRACKEN, M.D., and ALL ABOUT WOMEN OF CHRISTIANA CARE, INC.,	)	
Defendants.	)	

Submitted: October 15, 2012
Decided: February 28, 2013

On Defendants' Renewed Motion for Judgment As a Matter of Law or, in the Alternative, Motion for a New Trial - **DENIED**

On Plaintiff's Motion for Costs **- GRANTED IN PART**

MEMORANDUM OPINION

Robert J. Leoni, Esquire. Shelsby & Leoni, P.A., 221 Main Street, Wilmington, DE 19804. Attorney for Plaintiffs Laura Cooney-Koss and Jerome Koss.

Gregory S. McKee, Esquire, and Joshua H. Meyeroff, Esquire. Wharton, Levin, Ehrmantraut & Klein, P.A. 300 Delaware Avenue, Suite 1220, P.O. Box 1155, Wilmington, DE 19899. Attorneys for Defendants Jennifer H. Barlow, M.D., A. Diane McCracken, M.D., and All About Women of Christiana Care, Inc.

CARPENTER, J.

The Court has before it several post-trial motions regarding this medical malpractice case. They are: (1) Defendants' Motion for Judgment as a Matter of Law pursuant to Superior Court Rule 50(b); (2) Defendants' Motion for New Trial; and (3) Plaintiffs' Motion for Costs. The Court will address each motion separately.[1]

(1) Rule 50(b) Motion

Under Rule 50, this Court is required to view the evidence in the light most favorable to the nonmoving party. Utilizing that standard, this Court must determine whether the evidence and all reasonable inferences to be drawn therefrom could justify a jury verdict in favor of Plaintiffs. In order to find for the moving party, this Court must find that there is no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiffs. Thus, the factual findings of a jury will not be disturbed if there is any competent evidence upon which the verdict could reasonably be based.[2]

Defendants assert that since Plaintiffs' expert, Dr. Spellacy, agreed that a hysterectomy would be appropriate if conservative measures to stop Plaintiff's

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[1]Laura Cooney-Koss and Jerome Koss will collectively be referred to as "Plaintiffs" herein when discussing damage awards. However, "Plaintiff" or "Plaintiff's" will be used to refer to Laura Cooney-Koss when discussing medical procedures performed.

[2]*See Mumford v. Paris*, 2003 WL 231611, at *2 (Del. Super. Jan. 31, 2003) (citing *Del. Elec. Coop. Inc. v. Pitts*, 1993 WL 445474, at *1 (Del. Super. Oct. 22, 1993)).

bleeding failed, there was no basis upon which the jury could have found a violation of the standard of care. While it is true that all the experts agree with this general proposition, they disagree whether all the appropriate conservative measures were performed by Dr. McCracken before performing the surgery. Further, Dr. Spellacy believed that the bleeding could have been controlled if Dr. McCracken had exhausted these conservative measures and, therefore, made the hysterectomy unnecessary. Specifically, Dr. Spellacy indicated that Dr. McCracken violated the standard of care by: (a) failing to order and administer additional medication before and during the D&E; (b) failing to massage the Plaintiff's uterus; (c) failing to perform the O'Leary stitch/Uterine Artery Ligation once the open procedure had begun; and (d) failing to perform the B-Lynch procedure.

Clearly, when the Court views the evidence in the light most favorable to Plaintiffs, Dr. Spellacy's testimony provides a basis for the jury to find that Dr. McCracken failed to exhaust all appropriate conservative measures before taking the drastic step of performing the hysterectomy. As such, there was a reasonable basis in the record to support the jury's verdict and it will not be disturbed. As a result, Defendants' Motion for Judgment as a Matter of Law is hereby DENIED.

(2) Rule 59 - Motion for New Trial

Once a jury's verdict has been returned, it should only be set aside for exceptional circumstances. In other words, a new trial should not be granted unless the verdict is manifestly and palpably against the weight of the evidence or where there would be a miscarriage of justice to let the verdict stand.[3] In support of this Motion, Defendants allege six (6) "errors" by the Court that they believe justify a new trial. Before addressing each of these areas, the Court would like to suggest to counsel if one desires to argue that a particular ruling by the Court was incorrect, then one should at least have the courtesy to order the transcript of the particular proceeding in which the alleged error occurred. This would allow for a more thorough and precise argument instead of a general conclusory assertion of error. That said, the Court will now review each claim set forth in the Motion.

(a) First, Defendants argue that the Court should not have allowed the jury to consider whether Dr. McCracken was negligent for failing to review the triage records on the day of the incident. Because no particular testimony is referenced in Defendants' Motion, the Court believes Defendants are arguing that the jury should not have been allowed to consider Dr. Spellacy's testimony that Dr. McCracken, in making the decision leading up to the hysterectomy, should

[3]*See id.* at *3 (citing *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997)).

have reviewed Plaintiff's medical records before making that decision. Dr. Spellacy testified that the triage records would have provided relevant information in making the decision whether to perform the hysterectomy or, instead, continue with a more conservative treatment. This was clearly relevant to the issue of whether Dr. McCracken violated the standard of care, and the testimony was properly allowed. In this claim Defendants also reference the testimony of Jerome Koss concerning his daughter's emotional distress. Since the daughter was only a few weeks old, it would have been difficult for her to communicate such distress to him. What Mr. Koss did say was that he was saddened by the fact that his daughter would not have the benefit of a future sibling. This is relevant to the effect that Dr. McCracken's negligence had on Mr. Koss and, therefore, was appropriate testimony.

(b) Without reference to specific testimony or a specific ruling, it is difficult to know exactly what error Defendants assert the Court committed in the second claim. Certainly, the medical treatment provided to Plaintiff before and after the hysterectomy is relevant. This would include what blood products were provided, what records were reviewed, and the interaction between the doctor and the patient during this event. There was no evidence to suggest that Dr.

McCracken was simply a "bad" doctor and nothing said by the Court, counsel or any witness, including Plaintiff, left that impression.

(c) The alleged error in this third complaint relates to the Court's rulings that prohibited the discussion of an alleged blood disorder. Despite years of discovery, Defendants waited until the eve of trial to raise the issue of whether Plaintiff suffered from a blood disorder that exacerbated this event and led to the hysterectomy. It is the Court's recollection that even at the pretrial conference, the issue had not been fully developed nor had an expert report been prepared. However, a report was eventually obtained, which claimed Plaintiff suffered from an "unknown" blood disorder. Interestingly, Defendants had ordered a hemoglobin consult and laboratory work after the hysterectomy to determine whether there was a blood disorder and none was discovered. It was only after an unrelated incident in which Plaintiff also had a bleeding issue that the matter was more fully explored by counsel. Not only was the new opinion rendered approximately a week before trial too late in the game, the opinion was so conclusory without any well-founded basis that the Court simply found it to be unreliable. The Court also believes it provided counsel an opportunity to seek a continuance of the trial to allow this issue to be more fully explored, and Defendants chose not to avail themselves of this opportunity. What is surprising

to the Court is that from the very beginning of this litigation Plaintiff's unexpected bleeding was a key issue but no expert opinion in this area was given until just before trial. In fairness to the Defendants the subsequent bleeding event was significant to the expert in rendering the new opinion. But while the event perhaps provided an opportunity to try to open a door that had been shut years before by the testing done at the request of Dr. McCracken, neither the opinion or the timing justified it being used at trial. The opinion was rendered too late and would have caused the trial to be continued to allow rebuttal by Plaintiff, and experienced counsel decided to proceed to trial. As a result, the Court's decision here was not only correct but fair.

(d) Fourth, Defendants claim the Court erred by not allowing Dr. Lui, the treating anesthesiologist, to testify. Dr. Lui had no recollection of the patient, the event, or, frankly, anything about this case. Therefore, allowing him to testify would be speculative at best and inappropriate. Defendants also raised an objection regarding the Court's decision to allow Alphonsine Sahou, the nurse anesthetist, to testify. Unlike Dr. Lui, Ms. Sahou was permitted to testify because she was the nurse who actually wrote the anesthetist notes during the medical procedure and, therefore, could provide information as to how the notes were created and what was represented in those records. Ms. Sahou's testimony was

relevant to the issues and the opinions subsequently rendered by the experts and properly admitted.

(e) The Court ordered counsel for Defendants to produce, at a reasonable time before trial, material that they would be using to question expert witnesses. Defendants' counsel did not produce the material they say the Court erred in disallowing and as such, having failed to comply with the Court's ruling now complain. If Defendants' counsel had provided that material ahead of time, then they would have been permitted to use it. They didn't, and the material was appropriately excluded. The Court also notes that this was not the only material used by counsel in examining experts, so any limitation caused by the Court's ruling had little, if any, bearing on counsel's ability to question the witness.

(f) Lastly, the Court does not recall the "send a message" statement allegedly made by Plaintiffs' counsel to the jury. However, even if it did occur, the Court's notes do not reflect that an objection was made by counsel nor was there any request for a curative instruction. Assuming in the alternative that the statement did occur, it is not one which was so outrageous that it would cause the Court to declare a mistrial.

In conclusion, the Court finds the six (6) alleged errors claimed by Defendants are without merit and provide no basis to grant a new trial. As such, Defendants' Motion is hereby DENIED.

(3) Motion for Costs

As the prevailing party, Plaintiff is entitled to court costs pursuant to Rule 54 of the Superior Court Civil Rules. The Court first finds that the $985.50 of costs associated with their litigation of this matter are reasonable, and Plaintiff has filed sufficient supporting documentation relating to this claim. As such, the amount will be awarded as appropriate costs.

Plaintiff is also entitled to recover reasonable fees associated with the testimony of their experts. Unfortunately, Dr. Spellacy simply submitted a bill for $4,000 without breaking down what was represented by that figure. As such, the Court will use the hourly rate listed for his deposition testimony of $500 an hour and allow for three (3) hours of testimony time. This would be sufficient to cover the several hours of testimony in Court and any wait time that occurred that day. In addition, the request from Dr. Spellacy for $384.60 for travel expenses is reasonable and will be allowed. As such, the Court awards the following related to Dr. Spellacy.

(A) $1500 ($500 x 3 hours) for court testimony

(B) $ 384.60 for reasonable transportation expenses

Total - $1884.60

Using the same analysis for Dr. Cartagena the Court awards the following related to his testimony:

(A) $1125 ($375 x 3 hours) for court testimony

(B) $ 215 for reasonable transportation expenses

Total - $1340.00

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.