

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

SHEILA HIMES, Administratrix of )  
the Estate of Christopher Himes, )  
Deceased, and SHEILA HIMES, )  
individually, )  
 )  
Plaintiffs, ) C.A. No. 06C-01-294 MMJ  
 )  
v. )  
 )  
TAC C. LIU, M.D., TIMOTEO R. )  
GABRIEL, JR., M.D., CHRISTIANA )  
CARE HOSPITAL and JOHN DOE, )  
 )  
Defendants.

Submitted: June 11, 2008  
Decided: August 26, 2008

**ORDER**

*Upon Plaintiffs' Motion for Judgment Notwithstanding the Verdict  
or, alternatively, Motion for a New Trial*

**DENIED.**

Paul Cottrell, Esquire, Melissa Rhoads, Esquire, Tighe & Cottrell, P.A.,  
Wilmington, Delaware, Attorneys for Plaintiff

Richard Galperin, Esquire, Morris James LLP, Wilmington, Delaware, Attorneys  
for Defendant Timoteo R. Gabriel, Jr., M.D.

**JOHNSTON, J.**

1. This is a medical negligence action. At the time of trial, the only defendant remaining in the case was Timoteo R. Gabriel, Jr., M.D. The jury returned a verdict in favor of Dr. Gabriel.

2. Plaintiffs filed a Motion for Judgment Notwithstanding the Verdict or, alternatively, Motion for a New Trial. Plaintiffs argue that:

Based on the testimony presented at trial with respect to Defendant's failure to discuss the alternative method of performing the procedures in stages versus bundled, and Defendant's failure to advise of specific risks and increased risks above normal risks for Decedent Christopher Himes, Plaintiff is entitled to judgment as a matter of law on the issue of informed consent.

Plaintiffs' medical expert testified that Dr. Gabriel breached the standard of care by failing to inform Mr. Himes of the option of staging five procedures, instead of performing all five at once, as was done.

3. Defendant responds that the evidence at trial demonstrated that Dr. Gabriel identified the appropriate risks and complications to Mr. Himes before surgery, that Dr. Gabriel discussed the risks and reasonable surgical alternatives with Mr. Himes, and that Mr. Himes gave his informed consent. Dr. Gabriel testified that he may not have told Mr. Himes about the staging option because he did not feel that it was a reasonable alternative at the time for this patient.

Defendant's medical expert testified that staging would not have been a reasonable

alternative for Mr. Himes. Thus, Dr. Gabriel did not breach the standard of care by not informing Mr. Himes of the staging option.

4. Among the questions of fact is the significance of Dr. Gabriel's testimony that he did not specifically recall his conversations with Mr. Himes. Rather, Dr. Gabriel testified as to his customary practice in supplying information to patients and that, to the best of his knowledge, he did not deviate from that practice.

5. Both plaintiffs and defendant provided the Court with detailed record support for their arguments.

6. A jury verdict will be set aside when, in the judgment of the trial judge, the verdict "is at least against the great weight of the evidence. In other words, barring exceptional circumstances, a trial judge should not set aside a jury verdict on such ground unless, on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."<sup>1</sup> The Court should be reluctant to draw a conclusion different from the jury on a disputed question of fact when the subject matter is

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<sup>1</sup>*Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

within the normal comprehension of a jury and the evidence in the case is not particularly complex.<sup>2</sup>

7. The issues raised in plaintiffs' motion are typical of those properly resolved by a jury. As the finders of fact, and judges of credibility and the weight to be given to the admitted evidence, it is the jurors' province to determine which expert's opinion was more persuasive. The jury also heard Dr. Gabriel's testimony, and the vigorous cross-examination, and obviously found his statements concerning what he believes he discussed with Mr. Himes to be credible and within the standard of care.

8. The Court finds that the jury's verdict was consistent with the weight of the evidence. Additionally, the case was not especially complicated and was within the normal comprehension of a jury. The issues decided by the jury are questions of fact. The jury's verdict is not inconsistent with the evidence. The Court finds that a reasonable jury could have found that plaintiffs failed to prove by a preponderance of the evidence that Dr. Gabriel "did not supply information regarding [Mr. Himes'] treatment, procedure or surgery to the extent customarily given to patients, or other persons authorized to give consent for patients by other

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<sup>2</sup>*See id.* at 466-67.

licensed health care providers in the same or similar field of medicine as the defendant.”<sup>3</sup>

**THEREFORE**, Plaintiffs’ Motion for Judgment Notwithstanding the Verdict or, alternatively, Motion for a New Trial Motion is hereby **DENIED**.

**IT IS SO ORDERED.**

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The Honorable Mary M. Johnston

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<sup>3</sup>18 *Del. C.* §6852(a)(2).