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August 30, 2002

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RE: Barbara Plauche v. Doctors for Emergency Services, P.A., et al.
C.A. No. 99C-07-115 WCC

Submitted: June 27, 2002
Decided: August 30, 2002

On Plaintiff's Motion for New Trial. Denied.
On Defendants' Motion for Costs. Granted in part.

Dear Counsel:

The Court has before it a request by the Plaintiff for a new trial as well as a request for costs filed on behalf of the Defendants. This is the Court's decision on those outstanding motions.

This matter was a classic case of the patient, trained as a nurse, knowing too much for her own good and as a result, failing to follow the reasonable directions of the doctors as to her treatment and diagnostic testing. While the Court is sympathetic to the condition that the Plaintiff now finds herself, it cannot find the jury's verdict to be unreasonable or against the great weight of the evidence. As such, the Plaintiff's Motion for New Trial will be denied.

The Plaintiff was injured on October 31, 1998, while attempting to move furniture. She went to the hospital and was diagnosed as having a compressed fracture of her L-1 vertebrae that would heal with bed rest and medication. She was discharged from the hospital with directions to contact her family physician. The following Monday, November 2, 1998, she was seen by Dr. Berlin and he concurred with the diagnosis that had been rendered at the hospital and ordered bed rest and prescribed pain medication.

The next day, November 3, 1998, the Plaintiff returned to Dr. Berlin's office because of continual pain, and while her diagnosis remained the same, he ordered, mainly to satisfy the complaints of the Plaintiff, a CT scan. Unfortunately for the Plaintiff, she failed to keep the CT scan appointment, allegedly due to the amount of pain she was experiencing at the time. She did not notify Dr. Berlin of her inability to keep the appointment, and the calls to the doctor during this period of time centered around pain and medication issues. It also appears that the Plaintiff was not following the doctor's advice about bed rest and subsequently fell.

Dr. Berlin arranged for visiting nurses to go to the Plaintiff's home beginning around November 11, 1998. Between November 11, 1998 and November 18, 1998, the Plaintiff's condition continued to deteriorate, and the Plaintiff began to increase her pain medication. This eventually lead to an overdose condition and hospitalization on November 18, 1998. Because of a prior aneurysm and her confused state, a CT scan of her head was ordered at the hospital which proved to be negative. She was given medication to reverse the overdose condition and was released. On November 19, 1998, Dr. Berlin was advised of the emergency room visit and evaluation and was also misinformed that a CT scan of her back, not her head, had been performed. On November 23, 1998, the Plaintiff was again admitted into the hospital where the burst fracture was discovered and surgery was subsequently performed.

First, it is important to note that there is no claim or evidence to suggest that the initial diagnosis of the compressed fracture on October 31, 1998 was incorrect. As such, it is the Plaintiff's assertion that her deteriorating condition should have caused Dr. Berlin to take additional corrective action, perform additional testing and to refer her to other specialists. Obviously the Plaintiff's failure to obtain the CT scan of her lower back on

November 9th prevented the disclosure of potentially critical information, and her failure to follow the directions of her treating physicians contributed to the subsequent burst fracture. However, the real issue at trial was whether Dr. Berlin's assessment met the applicable standard of care in the diagnosis of the Plaintiff's condition. This issue was clearly presented to the jury by counsel and defined for them in the Court's instructions, and the factual dispute was resolved by the jury in favor of the doctor. There was evidence introduced that was consistent with the jury's conclusion including supporting medical opinions, and there is no basis to reverse that decision. The insertion of the Foley catheter pointed to by the Plaintiff reasonably appeared to the doctor to be a convenience issue for the Plaintiff and was done by her outside of the treatment ordered by Dr. Berlin or any doctor at the emergency room. Her inability to ambulate was a logical extension of the Plaintiff's over medicating herself which subsequently lead to her hospitalization for an overdose. In addition, by November 19, 1998, Dr. Berlin had received confirmation of his initial evaluation by the fact that he was told, although mistakenly, that a CT scan of her back had been performed with negative results. Under these circumstances, it was reasonable to find Dr. Berlin had met the applicable standard of care and there was no requirement for him to order additional evaluations or modify the treatment he had prescribed. If there is any criticism of Dr. Berlin it would only be his perceived impatience with a difficult patient. He obviously was frustrated by her failure to comply with his directions, and at some point, it appears he began to minimize her complaints. This however does not equate to being negligent and to a large degree the Plaintiff has only herself to blame for this occurring. As a result, the Court finds the jury's decision to be supported by the evidence and the Plaintiff's Motion for New Trial is denied.

The Court also has before it Motions filed by Dr. Berlin and Doctors for Emergency Services for costs. While the imposition of costs is routine, there is discretion given to the Court regarding the amount to award.[1] While the Court recognizes the Plaintiff's financial condition places limitations on her ability to pay, this alone does not preclude the imposition of reasonable costs associated with defending a lawsuit which was initiated by the losing party. There are risks involved when one pursues litigation, and the imposition of costs is a reasonable tool to balance the expense associated with defending a lawsuit that is subsequently found to be without merit. The Court has reviewed the submissions of the Defendant's experts and the following costs are ordered to be paid by the Plaintiff. As to Dr. Wehner, the Court finds fees associated with preparation and testimony to be reasonable and thus costs of $1,000.00 are approved. The remaining balance of $600 relates to travel and will not be ordered. As to Dr. Funk, the Court finds the $500 fee associated with preparation to be clearly reasonable and appropriate. It is however concerned about the

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[1] *See Donovan v. Delaware Water & Air Resources Com'n*, 358 A.2d 717, 723 (Del. 1976); Del. Code Ann. Tit. 10, § 8906 (1999).

testimony fee of $2,700.00. While the Court believes that Dr. Funk's representation of 6 3/4 hours of courthouse time is correct, it is also clear that most of this time does not relate to his testimony in the courtroom. It is not reasonable for the Plaintiff to pay for the doctor's time that is more fairly associated with his availability to Defendant's counsel and relates to the timing of the presentation of the Defendant's case. As such, the Court approves a preparation fee of $500.00 and a court fee of $1,200.00 (3 hours at $400 per hour) for a total cost of $1,700.00.

The Court believes this resolves all outstanding motions in this case.

IT IS SO ORDERED.

Sincerely yours,

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Judge William C. Carpenter, Jr.

WCCjr:twp

cc: Prothonotary