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

GEORGE T. ESRY and JOANNA ESRY, his wife,	)	
Plaintiffs,	)	
v.	)	**CA No. 99C-02-209-JEB**
ST. FRANCIS HOSPITAL, INC,	)	
Defendant.	)	

Submitted: August 13, 2001
Decided: April 15, 2002

OPINION

Defendant's Motions for a New Trial or Remittitur.

Motions Denied.

Appearances:

Bartholomew J. Dalton, Esquire, Dalton & Associates, P.A., Wilmington, Delaware.
Attorney for Plaintiffs.

John D. Balaguer, Esquire, White and Williams, LLP, Wilmington, Delaware
Attorney for Defendant.

JOHN E. BABIARZ, JR., JUDGE.

This is a medical malpractice case which resulted in a substantial award in favor of the plaintiffs. Both sides demanded a jury trial. Defendant, disappointed in the result, now seeks a new trial, claiming that the jury verdict was unjust, against the great weight of the evidence, the result of passion prejudice or partiality, manifestly in disregard of the evidence and rules of law and shocking to the Court's conscience and sense of justice. Defendant's rhetoric is not extreme; it is the lexicon employed by parties, plaintiffs and defendants, aggrieved by a jury verdict. One must wonder why an institution so soundly and regularly criticized on motions for new trial is so widely demanded upon initiation of a lawsuit.

Plaintiffs, on the other hand, applaud the verdict as being firmly grounded on reason and common sense and thoroughly supported by the facts of the case. The Court will apply the usual law, giving extreme deference to the jury verdict and vacating it only if it simply doesn't make sense.[1] And sometimes not even then.[2]

The basic facts of this case are easily stated. George Esry was hospitalized at St. Francis Hospital for testing related to rectal bleeding. His physician requested a colonoscopy and, as a prep, he was given a powerful laxative. Because he had experienced some dizziness, a nurse instructed him not to attempt to go to the bathroom alone. However, acting

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[1] *Story v. Camper,* 401 A.2d 458 (Del.1979); *Riegel v. Aastad,* 272 A.2d 715 (Del.1970).

[2] *See Wilmington Country Club v. Cowee* 747 A.2d 1087, 1096-1097 (Del.2000).

under a powerful call of nature, Esry attempted to go it alone and passed out on the way. He suffered a severely fractured jaw and a concussion. The permanent consequence of the jaw injury is that he cannot eat properly because food frequently falls from his mouth. The permanent consequence of the concussion is a brain injury resulting in balance problems, short term memory deficits, frequent daily headaches and, as a result of both injuries, depression.

The jury found St. Francis negligent presumably because it deviated from its own policies regarding the care of patients who were at risk to fall. It found Esry negligent presumably because he disregarded nurses instructions. The jury assessed Esry's contribution to the accident at 18%. It awarded George Esry $1,740,000.00 and his wife Joanna Esry $841,000.00, which sums were reduced by the Court in accordance with the comparative negligence determination.

Defendant first attacks the jury's comparative negligence assessment. It says the 18% attribution to George Esry was too low, reflecting an improper compromise on the part of the jury or a "complete misunderstanding of the facts, the law or both." Undoubtedly the 18% figure was a compromise of some sort. But to vacate a jury verdict because it was a compromise would be to commit some cases to never ending trials. There is no precise logic to justify the exact figure of 18% arrived at by the jury. What that figure represents is a judgment that Esry's negligence was a minor contributing factor to his fall and that judgment

is wholly justified. While Esry should have heeded the nurses instructions, adherence by the hospital to its own procedures would likely have precluded Esry's unwise but urgent walk. Since hospitals often have to deal with unsound decisions by patients, the jury's placing of the lion's share of fault on the hospital is justifiable.

Next, defendant complains that the Court improperly limited its cross examination of plaintiff's nursing expert Ellen Barker by prohibiting inquiry regarding the opinion of another nurse expert retained by plaintiffs, Linda Kopishke.

The Court is not persuaded that it erroneously limited cross examination for two reasons. First, Nurse Barker testified that she did not rely on Nurse Kopeshke's opinion in formulating her own. And second, plaintiff did not call Kopeshke as a witness because defendant objected to the plaintiffhaving two experts testify on the same topic. Having acted to prohibit Kopeshke's testimony, defendant cannot now complain about being unable to utilize it. *Onti, Inc. v. Integra Bank*[3] is inapposite since the issue there was whether the pre-trial deposition of expert witnesses who testified at trial could be submitted by the opposing party for consideration on post-trial briefing.

Finally, the defendant charges that the jury's award of damages was excessive. While high, the Court does not find that the awards were excessive. George Esry was 71 years old and retired at the time of his injury. His brain injury has left him with balance problems,

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[3]No. 14514 WL (Del.Ch.1998)

short term memory deficits and constant headaches. Because of his jaw injury he cannot eat properly. He suffers bouts of depression. As a result, most of the things he enjoyed in retirement are now denied him. He cannot play golf, tennis or jog. He cannot concentrate or read effectively. His ability to travel is greatly diminished. The loss of the ability to enjoy retirement is a significant and substantial loss. The jury did not err by placing a high value on it.

Joanna Esry suffered no physical injury but her loss of consortium, i.e., the loss of the enjoyment of her retirement with her husband, is no less than his loss. The jury's award for that loss does not offend this Court's sense of justice.

Since the Court does not find the jury awards to be excessive, there is no need for the Court to speculate about the impact on the jury of newspaper accounts concerning the outcome of a different medical malpractice case.

Defendant's Motions for a New Trial or Remittitur are ***Denied***.

IT IS SO ORDERED.

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Judge John E. Babiarz, Jr.

JEB,jr/bjw
Original to Prothonotary