

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ROGER B. CORBITT, JR.,)
) C.A. No. 98C-09-011
Plaintiff,)
)
5.)
)
VIJAY R. TATAGARI, M.D., and)
BAYHEALTH MEDICAL CENTER,)
INC., (previously know as Kent)
General Hospital))
)
Defendants.)

Submitted: February 7, 2001
Decided: May 31, 2001

Stephen A. Hampton, Esq., Dover, Delaware. Attorney for Plaintiff.

Anne L. Naczi, Esq., Georgetown, Delaware. Attorney for Defendant Tatagari.

Mason E. Turner, Jr., Esq., Wilmington, Delaware. Attorney for Defendant Bayhealth.

Upon Consideration of Plaintiff's
Motion For A New Trial

DENIED

VAUGHN, Resident Judge

ORDER

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Upon consideration of the plaintiff's motion for a new trial, the defendants' responses, and the record of the case, it appears that:

1. This is a medical malpractice¹ case in which the jury rendered a verdict in favor of both defendants. The plaintiff contends that: (1) giving the pattern medical malpractice jury instruction was reversible error; and (2) the damages instruction was unclear and invited the jury to find for the defendants unless it found "that Plaintiff had sustained his burden of proof against both defendants on liability and damages."

2. The case involved a failure to diagnose appendicitis. The defendant felt abdominal pains and went to his family doctor, Dr. Tatagari. The doctor initially suspected acute gastritis and prescribed medication. He advised the plaintiff to go to the emergency ward at Bayhealth Medical Center if the pain did not get any better. Later that day the plaintiff did go to Bayhealth where he was examined by an emergency room physician who also suspected a stomach disorder. That physician attempted to give the plaintiff some immediate relief and then discharged him. A few days later the plaintiff returned to Dr. Tatagari who at that point began to suspect pancreatitis. However, shortly after that visit to Dr. Tatagari, the plaintiff's appendix ruptured, necessitating an emergency appendectomy.

3. The plaintiff contends that it was error to give the following portion of the

¹ This is a pre-7/7/98 case.

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pattern medical malpractice jury instruction:

Each physician and healthcare provider is held to the standard of care and knowledge commonly possessed by members of his or her profession and specialty in good standing. It is not the standard of care of the most highly skilled, nor is it necessarily that of average members of this profession, since those who have somewhat less than average skills may still possess the degree of skill and care to treat patients competently. When a physician chooses between appropriate alternative medical treatments, harm resulting from a physician's good-faith choice of one proper alternative over the other is not medical malpractice.

The plaintiff contends that the first sentence of the quoted language improperly modifies and misstates the statutory definition of the standard of care, because it refers to “ ... the standard of care and knowledge commonly possessed by members of [the] profession ...” rather than the statutory language, “ ... that degree of skill and care ordinarily employed ... by members ... of the profession”. He also contends that the use of the word “specialty” is confusing and improper. He further argues that the second sentence shifts the focus of the jury's attention from the degree of skill and care employed by members of the profession to the degree of skill and care of the particular physician involved in the case. He contends that this sentence, when combined with the first, suggests a variable standard of skill and care which would be higher for the most knowledgeable and skilled physicians and lower for physicians who have less than average knowledge and skills. This improper focus, he contends, may have led the jury to believe that the defendants met the standard of care according

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to their particularly skills and knowledge rather a standard of care based upon that “... ordinarily employed by members of the profession in good standing ...”. Finally, he contends that the third sentence should not have been given because the case did not involve any issue of a physician choosing between two alternative appropriate treatments. The presence of this sentence, he contends, may have caused the jury to believe that the diagnosis of gastritis rather than appendicitis was a good-faith choice of one alternative over another.

4. A jury instruction must give a correct statement of the substance of the law²

² *Cabrera v. State*, Del. Supr., 747 A.2d 543 (2000); *Miller v. State*, Del. Supr., 224 A.2d 592 (1966).

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and must be “reasonably informative and not misleading.”³ A defendant does not have a right to a particular instruction in a particular form.⁴ In evaluating the propriety of a jury charge, the instructions must be viewed as a whole.⁵

5. The medical malpractice instruction begins by informing the jury of the exact, statutory definition of medical malpractice. The language doing so appears prior to the above-quoted portion of the charge. The remainder of the instruction, including the portion objected to by the plaintiff, is added to give an informative explanation of the statutory definition. The plaintiff argues that the first two sentences of the quoted language suggest to the jury that the standard of care against which a physician’s conduct is measured is a function of that particular physician’s level of skill, and is therefore variable from case to case. However, a fair reading of the

³ *Baker v. Reid*, Del. Supr., 57 A.2d 103, 109 (1947).

⁴ *Chavin v. Cope*, Del. Supr., 243 A.2d 694 (1968).

⁵ *Culver v. Bennett*, Del. Supr., 588 A.2d. 1094 (1991).

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language leads to the conclusion that the plaintiff's argument is not correct. The language correctly emphasizes to the jury that the standard of care upon which it is to judge the physician's conduct is that degree of care commonly possessed, in other words, ordinarily employed, by members of the profession in good standing. I am satisfied that these two sentences give the jury a helpful, informative and accurate explanation of the standard of care, that the words in these sentences do not conflict with the statutory standard, and are not confusing or improper. The third sentence of the quoted language is an accurate statement of law and, while the case may not have been one, strictly speaking, about choosing between two or more alternative treatment procedures, there was evidence that the two physicians were making choices as they went about attempting to diagnose and treat the plaintiff's condition. I am satisfied that having the sentence in the instruction was not error.

6. The plaintiff's contention that the damages instruction contained error arises from the first sentence of that instruction which reasons as follows: "If you do not find that Mr. Corbitt has sustained his burden of proof, the verdict must be for Dr. Tatagari and Bayhealth Medical Center." The next sentence of the instruction reads "If you do find that Mr. Corbitt is entitled to recover for damages proximately caused by medical malpractice, you should consider the compensation to which he is entitled." The instruction continues with the standard damages instruction language. The plaintiff argues that it is unclear whether the first sentence refers to the burden of proof on liability or the burden of proof on damages. He argues that this language may have made the jury think that it could not give him a damages award unless it concluded

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that the plaintiff had met his burden of proof against both defendants on liability and damages.

7. The plaintiff's argument that the first sentence of the damages instruction may somehow have confused the jury is not persuasive. It overlooks the fact that the jury was specifically instructed that the liability of each defendant must be considered separately. The jury was instructed as follows:

There are two defendants in this case. One may be liable while the other is not. Both defendants are entitled to your fair consideration of their own defenses. If you find against one defendant, that shouldn't affect your consideration of the other defendant. Unless I tell you otherwise, all my instructions apply to both defendants.

The jury was also given an instruction on burden of proof which informed it that the plaintiff had the burden of proving by a preponderance of the evidence that "a defendant committed medical malpractice and that this medical malpractice was a proximate cause of injury to the plaintiff." The jury was also instructed that the instructions should be considered as a whole. They were also instructed to "use your common sense to reach conclusions based on the evidence." Question one of the jury verdict sheet asked "Do you find that Dr. Tatagari committed medical malpractice?" Question three asked "Do you find that Dr. Carter committed medical malpractice?"⁶ To both of these questions, the jury answered "No". The sentence complained of is legally correct and there is no reasonable possibility that this one sentence in the

⁶ Dr. Carter was the Bayhealth emergency room physician.

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damages instruction confused the jury or improperly affected its verdict.

8. The jury instructions were a correct statement of the substance of the law, were reasonably informative, and were not misleading. The plaintiff's motion for a new trial is *denied*.

IT IS SO ORDERED.

Resident Judge

oc: Prothonotary
cc: Order Distribution