

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

JOANN P. WELSH, JAMES F. WELSH,	:	
JOANN WELSH AS EXECUTRIX OF	:	
THE ESTATE OF KEITH B. WELSH,	:	
and KEITH B. WELSH,	:	C.A. No. 98C-06-003(WLW)
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
DELAWARE CLINICAL & LABORATORY	:	
PHYSICIANS, P.A., a Delaware corporation,	:	
THE MEDICAL CENTER OF DELAWARE,	:	
a/k/a Christiana Care Health Services, Inc., a	:	
Delaware corporation, VINCENT DELDUCA,	:	
JR., M.D., NGOC TRAN-VU, M.D.,	:	
MICHAEL W. LANKIEWICZ, M.D., and	:	
KENNETH D. KATZ, M.D.,	:	
	:	
Defendants.	:	

**Submitted: January 10, 2001
Decided: March 19, 2001**

**Upon Plaintiffs' Motion for a New Trial. Denied.
Upon Defendants' Motion for Costs. Denied.**

William D. Fletcher, Jr., Schmittinger & Rodriguez, P.A., Dover, Delaware, attorneys for the Plaintiffs.

John D. Balaguer, White and Williams, LLP, Wilmington, Delaware, attorneys for the Defendants Delaware Clinical & Laboratory Physicians, P.A., Vincent DelDuca, Jr., M.D., and Michael W. Lankiewicz, M.D.

Richard Galperin, Morris, James, Hitchens & Williams, Wilmington, Delaware, attorneys for the Defendants The Medical center of Delaware, Ngoc Tran-Vu, M.D., and Kenneth D. Katz, M.D.

WITHAM, J.

ORDER

Before the Court are two post-trial motions. These motions are presented to the Court following a difficult and emotionally charged medical negligence case tried over three weeks. Joann and James Welsh (“Plaintiffs”) bring a motion for a new trial, and Delaware Clinical & Laboratory, the Medical Center of Delaware and the individual doctors (collectively “Defendants”) bring a motion for costs.

1. Keith Welsh (“Welsh”) was admitted to Christiana Hospital on August 25, 1996, with severe back pain. Welsh, who was 20 years old, had leukemia which by all accounts was in remission; however, he was still receiving chemotherapy treatments at the time. Tests were performed which showed Welsh’s leukemia to still be in remission in August of 1996. To control the back pain, Welsh was given morphine prescribed by hospital staff and his treating physicians from Delaware Clinical and Laboratory Physicians, P.A. During the trial, the medical experts agreed that morphine is a standard drug used to control severe pain such as the back pain Keith Welsh was experiencing. The experts also testified that the appropriate amount of morphine varies from person to person, and it is important to monitor patients on morphine as oversedation can produce unresponsiveness, slowed respirations, decreased oxygenation and thereby reduced oxygen to vital organs which left unchecked can lead to death. On August 26, 1996, at approximately 11:00 a.m., Welsh became over sedated by the morphine and had to be revived with the use of

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Narcan. Welsh's pain returned and the morphine was restarted with a reduced maximum amount allowed. After the morphine was restarted, Welsh became increasingly unresponsive and the treating doctors decided to stop administering the morphine at 7:00 p.m. on August 26. Welsh continued to decline and at 2:00 a.m. on August 27, the doctors administered Narcan. Despite these actions, Keith Welsh died on the morning of August 27, 1996. Welsh's parents filed this civil action alleging that his injuries and wrongful death were the result of the Defendants' medical negligence.

I. Plaintiff's Motion for a New Trial.

2. The jury trial in this matter took place from November 13, 2000 through November 29, 2000. After approximately nine hours of deliberation the jury wrote a note to the Court stating that "We feel that we cannot reach a decision on Question #1. We are currently at 10-1. We have discussed/argued all details and lines of reasoning that we can think of and it is obvious that this situation will not change." The Court thereafter reminded the jury of the time and effort of the parties, the importance of the issue, the relatively short period of deliberations given the importance of the case, and instructed them to resume their deliberations in an attempt to reach a verdict. On the second day of deliberations, between two and three hours after the Court responded to the note, the jury returned with their verdict. In answering question number one of the special jury interrogatory form, the jury found each of the four doctors negligent in their treatment of Welsh. However, the jury answered special

interrogatory number two in the negative, finding that none of the doctors' negligent actions were the cause of Keith Welsh's death. Plaintiffs bring this motion for a new trial claiming that the verdict is logically and legally inconsistent and likely the result of an improper jury compromise.

3. A jury's verdict is presumed to be correct.¹ Barring exceptional circumstances, the court should not set aside a jury's verdict unless it is against the great weight of the evidence.² A jury verdict may also be set aside when it is clear that the jury disregarded the evidence or the applicable rules of law.³ Delaware Courts have set aside jury verdicts which were logically and/or legally inconsistent or irreconcilable with the facts and law.⁴ A motion for a new trial

¹ *Mills v. Telenczak*, Del. Supr., 345 A.2d 424, 426 (1975).

² *Storey v. Camper*, Del. Supr., 401 A.2d 458, 465 (1979).

³ *Storey v. Castner*, Del. Supr., 314 A.2d 187, 193 (1973).

⁴ *Citisteel USA, Inc. v. Connell Ltd. Partnership*, Del. Supr., No. 312, 1997, Holland, J. (May 18, 1998) (ORDER) (reversing the Superior Court's refusal to grant motion for new trial because jury's answers to interrogatories were inconsistent and irreconcilable under Delaware law as the jury found that "Citisteel breached the oral agreement and is liable in damages for failing to sign the written agreement tendered by Luria," but also found that "Citisteel did not breach the same oral contract with Luria by not paying amounts owed under the oral contract"); *Duphily v. Delaware Electric Cooperative, Inc.*, Del. Supr., 662 A.2d 821, 833-834 (1995) (finding that jury's verdict must have been the result of misunderstanding of the law of proximate cause and intervening, superseding cause; therefore, new trial is mandated); *see also, Phipps v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, Del. Super., C.A. No. 96C-07-105, Cooch, J. (June 9, 1999) (ORDER); *Savignac v. Canteen Corp.*, Del. Super., C.A. No. 96C-02-104, Herlihy, J. (April 6, 1999) (Mem. Op.).

will also be granted when the result appears to be a compromise verdict.⁵ In the immediate case, Plaintiffs find it disconcerting that the jury found the doctors to be negligent but that their negligence was not the cause of Keith Welsh's death.

4. Plaintiffs claim that the jury's findings are inconsistent and thereby evidence of an unlawful compromise. The Welshes argue that the inconsistency of the verdict is shown with respect to Drs. Lankiewicz, Tran and Katz and the discussion they engaged in at 11:00 p.m. on August 26. During this discussion, the doctors decided not to administer Narcan which would have reversed the effect of any morphine oversedation. The testimony at trial was that the only purpose in giving Narcan is to reverse the harmful effects of morphine oversedation which can result in death. According to the Plaintiffs, the only allegation against those three doctors for that time period was their decision not to administer Narcan at 11:00 p.m. Therefore, Plaintiffs argue that the jury must not have understood the law or the medical testimony because they found these three doctors negligent for not giving Narcan at 11:00 p.m. to reverse any morphine oversedation, but also found that the doctors' actions were not the cause of Keith Welsh's death. Plaintiffs find this particularly troubling because the testimony at trial was that the only reason the doctors would have

⁵ See, *Bennett v. Andree*, Del. Supr., 252 A.2d 100, 103 (1969) (affirming trial judge's granting of motion for new trial where judge had strong suspicion that verdict was a compromise by the jury on issue of liability).

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administered Narcan is if they thought Welsh was over sedated by the morphine. Plaintiffs use this sequence as an example of the inconsistency or irreconcilability of the jury's verdict.

5. In this extremely difficult case, the Court agrees that the jury's answers to the first two questions is unsettling at first blush. However, the law draws distinctions between the elements of tortious conduct. The verdict in this case highlights the difference between the duty-breach and proximate cause elements of negligence. The first special interrogatory asked, "Do you find that any of the following Defendants committed any act of medical negligence in the treatment of Keith B. Welsh," with "yes/no" choices by each of the four individual doctor's names. The jurors answered this question "yes" for all four doctors. That is, the jury found that all four doctors breached their duty of care during their treatment of Welsh. The second special interrogatory asked "Do you find that any medical negligence on the part of any of the following Defendants was a proximate cause of the death of Keith B. Welsh," again with "yes/no" choices by each of the doctor's names. The jurors answered this question "no" for all four doctors. That is, the doctors' negligence was not the

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proximate cause of Welsh's death.⁶ The question that remains is, was it possible under the evidence and testimony presented in this case for the doctors to have been negligent and for that negligence not to have been the cause of Keith Welsh's death.

⁶ The jury charge on proximate cause was as follows:

A party's negligence, by itself, is not enough to impose legal responsibility on that party. Something more is needed: the party's negligence must be shown by a preponderance of the evidence to be a proximate cause of the death of Mr. Welsh.

Proximate cause is a cause that directly produces the harm, and but for which the harm would not have occurred. A proximate cause brings about, or helps to bring about, the death, and it must have been necessary to the result.

6. Dr. Singer, Plaintiff's medical expert on standard of care, testified that once Keith Welsh was restarted on the morphine the standard of care would have required careful monitoring, stopping the morphine the minute Welsh showed somnolence and giving him Narcan to reverse the effect of the morphine. Dr. Singer also testified that in his opinion Narcan should have been administered at 7:00 p.m. or 11:00 p.m., and if that had occurred Keith Welsh would not have died the next morning. Drs. Berman and Roberts, Defense medical experts, testified that after the 11:00 a.m. incident, Welsh did not exhibit the classic signs of morphine oversedation and therefore Narcan was not needed or within the standard of care. In addition to disputing the standard of care with respect to the use of morphine and Narcan, the Defendants and their experts argue that the cause of death in this case is fat emboli and not morphine oversedation. Specifically, Defendants argue that fat emboli⁷ was released into Welsh's bloodstream by bone marrow necrosis caused by the chemotherapy drugs which were administered to treat Welsh's leukemia. Plaintiffs argue that the jury improperly combined these "two diametrically opposed views" of Keith Welsh's death. The jury accepted that the doctors were negligent in not

⁷ Embolism is a body in the circulation that obstructs blood flow. Fat embolism is due to the release of small fat globules into the circulation from disrupted bone marrow.

administering Narcan but found that morphine oversedation was not the cause of death.

7. Choosing to accept parts of testimony from different experts is within the discretion of the fact finder.⁸ Pursuant to 18 *Del. C.* § 6853 and *Russell v. Kanaga*, Delaware law requires “direct expert medical testimony to support a jury’s finding of negligence and causation.”⁹ Plaintiffs argue that in choosing to accept different ideas from different experts, the jury was speculating about scientific matters beyond their general knowledge and the evidence presented at trial. The Court disagrees. The statute and *Russell* note that the fact finder must have direct medical evidence for two elements: negligence (duty and breach) and causation. Rather than an improper mixture of the medical testimony, the jury could reasonably choose to accept Plaintiffs’ medical experts’ opinions on standard of care and the Defendants’ medical experts’ opinions about the cause of death.

⁸ *DeBernard v. Reed*, Del. Supr., 277 A.2d 684, 685 (1971).

⁹ *Russell v. Kanaga*, Del. Supr., 571 A.2d 724, 734 (1990).

8. In addition to challenging the medical basis of the jury verdict, the Plaintiffs challenge the consistency of the verdict. When the consistency of a jury verdict is challenged the “Court must determine whether there is any rational basis on which to maintain the jury’s verdict.”¹⁰ In *Citisteel USA, Inc. v. Connell Ltd. Partnership*, the Court went on to state that, “A verdict will not be stricken as internally inconsistent so long as there is any possible interpretation or explanation which avoids the inconsistency.”¹¹ In the immediate case there is a rational way to reconcile the jury’s verdict. The jury accepted Dr. Singer’s opinion that whether or not Keith Welsh was over sedated with morphine it was within the standard of care for the doctors to administer Narcan at the first signs of somnolence. However, the jury did not accept that morphine was the cause of death but rather chose to accept the Defendants’ explanation of fat emboli as the cause of death. More simply put, the jury thought that the doctors should have administered the Narcan under the circumstances that were presented, but the fat emboli’s blockage of blood vessels in Welsh’s brain and lungs actually caused his death. Therefore, Plaintiffs’ Motion for a New Trial is DENIED.

II. Defendant’s Motion for Costs.

9. Defendants claim that they should be awarded costs for their expert witness fees pursuant to *Superior Court Civil Rule 54* and *10 Del. C. § 8906*.

¹⁰ *Citisteel* at 9-10.

¹¹ *Id.*

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Superior Court Civil Rule 54(d) states that

Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.

Defendants motion is for the costs involved with the expert witnesses they called based on § 8906.¹² Rule 54(d) must be read in conjunction with 10 *Del. C.* § 5101 which states that “[g]enerally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court.”

10. Determining when costs should be awarded under § 5101 and Rule 54(d) is a matter of judicial discretion.¹³ In *Donovan v. Delaware Water & Air Resources Comm’n*, the Court found that costs is a matter of judicial discretion under § 5101 because the statute uses the word “generally” which means “for the most part” or “usually.”¹⁴ In light of the language of the statute, the Court found

¹² 10 *Del. C.* § 8906. The fees for witnesses testifying as experts or in the capacity of professionals in cases in the Superior Court, the Court of Common Pleas and the Court of Chancery, within this State, shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are not collected and paid. 10 *Del. C.* § 8906.

¹³ *Donovan v. Delaware Water & Air Resources Comm’n*, Del. Supr., 358 A.2d 717, 722-723 (1976).

¹⁴ *Id.*

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that final judgment does not automatically lead to costs being awarded to the prevailing party.¹⁵ *Donovan* also found that the judicial discretion found in § 5101 is consistent with Rule 54(d) which awards costs to the prevailing party “unless the court otherwise directs.”¹⁶ The Court has in certain situations found that “it is right and just and fair for the defendant to bear the defense cost burden of the successful defense.”¹⁷

11. The case *sub judice* is such a case. Keith Welsh, whose leukemia was in remission but for which he was still undergoing chemotherapy, was admitted to the Christiana hospital with severe back pain. The medical staff treated the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Moore v. Garcia*, Del. Super., C.A. No. 93C-08-26, Quillen, J. (July 10, 1995) (Letter Op.); *Mosley v. Milner*, Del. Super., C.A. No. 95C-06-093, Quillen, J. (April 8, 1999) (Letter Op.).

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pain with morphine. After one bad reaction to the morphine, the doctors revived Welsh with Narcan but placed him back on morphine at a lower dosage because his severe back pain returned. The next morning Keith Welsh passed away. The jury reached its verdict after hearing almost three weeks of hotly contested medical testimony from well-respected doctors. These doctors, who are leading experts in their field, testified to complex, modern theories of medicine. Under these uncertain circumstances and in light of the fact that the jury found the Defendants to have been negligent, although not the proximate cause of Welsh's death, the Defendants should bear the burden of their successful defense. Therefore, Defendants' Motion for Costs is DENIED.

IT IS SO ORDERED.

Judge

dmh

oc: Prothonotary
xc: Order Distribution
File