IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN MITCHELL, SR. and DONNA MITCHELL,	)	
Plaintiffs,	)	
v.	)	C.A. No. 03C-03-100-PLA
DR. JOYDEEP HALDAR,	)	
Defendant.	)	

Date Submitted: June 15, 2004
Date Decided: August 4, 2004

UPON PLAINTIFFS' MOTION FOR NEW TRIAL.
DENIED.

UPON DEFENDANT'S MOTION FOR JUDGMENT
AS A MATTER OF LAW. **DENIED.**

Kenneth M. Roseman, Esquire, Wilmington, Delaware for the Plaintiffs.

Mason E. Turner, Jr., Esquire, Wilmington, Delaware for the Defendant.

ABLEMAN, JUDGE

This is the Court's decision on a Motion for New Trial filed by plaintiffs in this medical malpractice case stemming from plaintiff, John Mitchell's appendicitis which was not diagnosed until after it had ruptured. After four days of trial, from June 7, 2004 to June 10, 2004, the jury returned a verdict in favor of plaintiffs, and awarded a total of $15,000.00 in damages. Of that amount, $2,000.00 was designated to plaintiff, Donna Mitchell, for loss of consortium. Plaintiffs contend in their motion that the damages award is inadequate because it was substantially less than the medical expenses of $37,997.27. Plaintiffs assert that defendant presented no evidence to support a conclusion that the medical bills were not caused by the defendant's negligence nor any evidence that they were not reasonable or necessary. Plaintiffs further argue that the issue of liability is distinct from the question of damages. Therefore, they submit that any new trial granted by this Court should be limited to the issue of damages.

On June 24, 2004, Defendant filed a Response to Plaintiff's Motion as well as a "Motion for Judgment as a Matter of Law" pursuant to Rule 50(b). The basis for the motion is the alleged "total vacuum of evidence" as to the way in which defendant's negligence caused the harm. Defendant submits that evidence establishing causation is required under 18 Del.C. §6855, and that the plaintiffs' theory of the case "simply assumed that, had the

defendant acted as they contended he should have, perforation and the alleged subsequent consequences would have been avoided".

In response to plaintiff's request for a new trial, defendant points out that plaintiffs' proof of damages was far from compelling. Defendant submits that, regardless of anything done, or not done, by defendant doctor, plaintiff would have had to have undergone abdominal surgery, have been hospitalized, have had an incision, and the like. Defendant also questions the legitimacy of plaintiffs' evidence, connecting his pulmonary embolism and hernia surgery to Dr. Haldar's negligence, reasoning that these problems could have occurred in any case. Defendant further argues that plaintiff's attempt to link his ongoing abdominal problems to the delay in surgery were in large measure refuted by the medical records of his treating surgeon, Dr. Saliba. Defendant submits that plaintiffs' claim of ongoing effects of the pulmonary embolism was also refuted by the records of his treating pulmonologist, Dr. Salvatore, who discharged him from his care in April 2002. The resumption of treatment with Dr. Salvatore in July 2003 resulted from his diagnosis of emphysema, related to plaintiff's long history of cigarette smoking. Because damages and liability were both so "hotly disputed", defendant argues that the verdict must stand, where there is any margin for reasonable difference of opinion as to the proper verdict.

Alternatively, defendant submits that, if the damage award is grossly inadequate, the verdict must be the result of a compromise. If the Court concludes that the verdict was the result of a compromise, defendant contends that a new trial on all issues should be ordered because the issues of liability and damages cannot fairly be severed under these circumstances.

Defendant's Rule 50(b) Motion

Before considering plaintiff's request for relief by way of a new trial, I turn to defendant's Motion for Judgment as a Matter of Law. While the Court is satisfied that there was sufficient evidence for the jury to have found defendant negligent and to have attributed some of the complications to that negligence, the Court need not reach the merits of this claim. Rule 50(b) requires that a Motion for Judgment after trial be filed "no later than 10 days after the entry of judgment". The pleading requesting this relief was filed on June 24, 2004, 14 days after the entry of judgment. The request is therefore untimely. The motion is denied.

Facts

During the afternoon of July 17, 2001 plaintiff, John Mitchell, Sr. began to experience abdominal pain that worsened as the day progressed. Mr. Mitchell left his work as a painter early and returned home, still complaining of pain. Eventually, Mr. Mitchell, accompanied by his wife,

plaintiff Donna Mitchell, sought treatment at Millville Medical Center, a satellite medical treatment facility of the Beebe Hospital in Lewes, Delaware, which is operational in the summer to accommodate the overflow of patients presenting in the emergency room during the busy tourist months.

Mr. Mitchell was initially examined and evaluated by Dr. Lavalle, who concluded that he could not make a diagnosis without a CT scan, which was not available at Millville. Since there was the possibility of appendicitis, Dr. Lavalle also called a surgeon, Dr. Spellman, to alert him that he may need to perform emergency surgery. Dr. Lavalle wrote a note and order, transferring Mr. Mitchell to the Beebe Medical Center for a CT scan and evaluation, and specifying in the transferal document the reason for the additional testing as "acute abdominal pain". While there is on the form a specific notation for "appendicitis", Dr. Lavalle did not check or circle that line, presumably leaving it to the emergency physicians at Beebe to make the ultimate diagnosis. By doing so, Dr. Lavalle also did not suggest to the next doctor, whoever that might be, that appendicitis, rather than any other gastrointestinal disorder, was suspected.

When Mr. Mitchell arrived at the Beebe Medical Center, he was first taken to the radiology department in accordance with Dr. Lavalle's orders and standard hospital procedure. There, a CT scan of Mr. Mitchell's

abdomen was performed. The radiologist on call, Dr. Norman Boyer, reviewed the films and determined that the scan was negative. He also found no evidence of appendicitis. Mr. Mitchell was then transferred to an examining room and later examined by defendant, Dr. Haldar. Based upon the report from Dr. Lavalle at Millville Medical Center, the negative CT scan, and Dr. Haldar's physical examination, whereby he found no abdominal tenderness, Dr. Haldar made the decision to release plaintiff rather than admit him. In connection with releasing Mr. Mitchell, Dr. Haldar provided him with elaborate and detailed instructions in the event of any change in the plaintiff's condition, including directions for plaintiff to call his doctor or return to the hospital, as soon as possible, should he experience more severe pain, vomiting, blood in the stole, vomitus, or urine, chills or fever, a distended or swollen abdomen, pain concentrated in one specific area, or, in the event his condition failed to improve. Plaintiff signed the release instructions and, according to Dr. Haldar, both he and Mrs. Mitchell indicated that they understood them.

While the evidence is conflicting regarding whether Dr. Haldar actually physically examined Mr. Mitchell, and whether the discharge instructions were adequately explained to him, the plaintiff's condition did ultimately worsen. At some time during the early morning hours or later the

following day, Mr. Mitchell's appendix did rupture, and he returned to the hospital at approximately 12:00 noon on July 19, 2001. Emergency surgery was performed by Dr. Anis Saliba and plaintiff remained hospitalized for six days.

At trial, plaintiff presented a document that purported to list all of his medical expenses that he proposed were directly related to the failure of Dr. Haldar to diagnose his appendicitis. The majority of the entries on the exhibit pertained to medical treatment, tests, or services performed two or even three years after the initial appendectomy, as plaintiffs contended at trial that a host of complications and ongoing medical problems were directly linked to the delay in the diagnosis of appendicitis. As examples, Mr. Mitchell told the jury that he had continued pain at the site of the incision and that the pulmonary embolism he suffered resulted in permanent injury to his respiratory system. He also maintained that his post-surgical infection required treatment by medication, which in turn, caused diarrhea that lasted for four weeks. Further, he argued that the hernia and adhesions at the sight of the surgical incision, requiring further surgery, were the result of Dr. Haldar's negligence.

Standard of Review

The standard of review on a motion for a new trial is well settled. The jury's verdict is presumed to be correct and just[1] "unless so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice."[2] In fact, traditionally, the Court's power to grant a new trial has been exercised cautiously, with extreme deference to the findings of the jury.[3] A Court will not set aside a jury's verdict unless "the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result," or the Court is convinced that the jury disregarded applicable rules of law, or where the jury's verdict is tainted by legal error committed by the Court during the trial. Furthermore, when a case involves contraverted issues of fact and conflicting evidence, if there is sufficient evidence to support a verdict for either party, "the issue of fact will be left severely to the jury."[4] Simply stated, the Court should yield to the jury's verdict when reviewing a motion for new trial. In the absence of exceptional circumstances, the amount of damages determined by the jury should likewise be presumed to be valid.[5]

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[1] *Mills v. Telenczak*, 345 A.2d 424, 426 (Del. Super. Ct. 1975).
[2] *Porter v. Murphy*, Del. Super., C.A. No. 99C-08-258, Cooch, R.J., (Oct. 2, 2001) (Mem.Op. at 34).
[3] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. Super. Ct. 1997).
[4] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).
[5] *Mikkelborg v. Gonzalez*, Del. Super., C.A. No. 99C-09-275, Toliver, J. (March 14, 2003) (Mem. Op. at 1).

Decision

In recognition of the foregoing standard of review, and the enormous deference afforded to the jury's decision, the Court now turns to a consideration of the verdict in this instance.

While the total jury award was less than half of the special damages, the Court's conscience is not shocked by the jury's verdict in this case, and does not find the award inappropriate under the circumstances. Indeed, there are several explanations for why the jury's verdict was less than the medical expenses, any one of which (or a combination of them) would lead the Court to conclude that the verdict should not be disturbed.

In the first place, contrary to plaintiffs' repeated assertions that the medical evidence was "uncontradicted" as to damages, it was not. In fact, plaintiffs' proof of damages was far from convincing. What is undisputed is that, regardless of anything done, or not done, by Dr. Haldar, plaintiff would have had to have undergone abdominal surgery, and been hospitalized, as that course of treatment is absolutely necessary in the case of appendicitis. Experts for both plaintiffs and defendant's testified that surgical intervention would have been required in either case. The jury could have concluded that plaintiff would have endured pain and suffering from the appendicitis no matter when it was diagnosed. And, while there was some testimony that

the surgical procedure may have been less invasive had the diagnosis been made prior to the rupture, there was no evidence as to what would have happened in the interim if plaintiffs' liability theory was correct, or what the consequences would have been.

In this case, plaintiffs' theory of the case simply assumed that, had the defendant acted as plaintiffs contended he should have, the appendix perforation and all the other alleged complications and consequences would have been avoided. Yet, the jury could have (and apparently did) allocate the amount of damages based not on what plaintiff actually claimed, but on an effort to assess the additional damages attributable to the ruptured, as opposed to an unruptured, appendix. Or, the jury may well have believed that none of the medical expenses were compensable, with the resulting award representing the jury's view of the amount necessary to indemnify plaintiffs for pain and suffering only.

Similarly, when plaintiff developed a pulmonary embolism several months after the surgery, plaintiffs' contention was that this complication was related to the delayed diagnosis of appendicitis, allegedly resulting in more extensive surgery and longer immobilization. Evidence was also presented to the jury, however, that in February 2004, plaintiff had minor surgery involving no incision and no inpatient hospitalization. Yet, plaintiff

developed the same problem following that procedure. And, while plaintiff sought to link his February 2004 surgery for an incisional hernia to defendant's negligent delay in diagnosis of the appendicitis,, the jury also learned that the more compelling reason for the plaintiffs' 2004 surgery was his umbilical hernia, unrelated to the appendectomy. What is more, evidence at trial showed that the incisional hernia was a complication that could have occurred in the case of any abdominal incision, regardless of Dr. Haldar's actions or inactions.

Moreover, plaintiff's contention that his ongoing abdominal problems were the result of Dr. Haldar's negligence, was largely refuted by the records of Dr. Saliba, his treating surgeon. These records establish that, as of October 4, 2001, Mr. Mitchell was not experiencing any continuing abdominal distress and his CAT scan was negative. After follow-up appointments with Dr. Saliba on October 25, 2001, November 16, 2001, and December 28, 2001, Mr. Mitchell was "doing well", "much better", "no complaint", "doing very well", and revealed "no indication of other significant problem". Thus, to the extent that plaintiffs alleged permanent disability and inability to work caused by weakness at the sight of the incisional hernia, his own medical records demonstrate that his complaints had resolved by the Fall of 2001.

Another alternative explanation for the jury's verdict is that legitimate questions were raised regarding Mr. Mitchell's credibility, particularly in connection with his claim that his pulmonary condition and the ongoing effects of this condition were directly related to Dr. Haldar's misdiagnosis. In fact, although plaintiffs have repeatedly argued that evidence of the pulmonary complications as a result of Dr. Haldar's negligence was undisputed, the records of Dr. Salvatore, plaintiff's treating pulmonologist, distinctly discount this theory.

In fact, these records demonstrate that, in Dr. Salvatore's opinion, the pulmonary embolism and any effects had been resolved by April 2002, when plaintiff was discharged from his care. When plaintiff returned for treatment over a year later, in July of 2003, he was experiencing symptoms from emphysema, which the jury could have easily concluded were related to his cigarette smoking rather than to his appendicitis.

Mr. Mitchell's own testimony to support this element of his damages was hardly convincing. When questioned on cross-examination, Mr. Mitchell was forced to acknowledge his thirty-year history of cigarette smoking, and even conceded that his treating physician had ordered him to stop smoking "now". Yet, he actually claimed that one of his doctors had specifically advised him to "keep smoking", because of his "nerves". This

comment, in particular, was so inconceivable that it potentially tainted the rest of his testimony and could have raised suspicion about the validity of his other complaints of pain and suffering.

Furthermore, plaintiff argues that the expert medical testimony was "unrebutted", "proving that the medical expenses were proximately caused by the defendant's negligence". The fact that plaintiff presented an "expert" who opined as such does not mean that the jury was required to accept his testimony as true, especially in a case such as this. The jury was instructed that they could give expert testimony the weight it deserved and that, just like any other witness, an expert's opinion could be disregarded by the jury if they concluded that it was unreasonable or not supported by the evidence.

Indeed, the plaintiffs' choice of Dr. Stephen Rodgers as his expert on causation, to support these alleged complications, and to link them to Dr. Haldar's negligence, could have led the jury to question seriously the validity of these damages. Dr. Rodgers' expertise in offering broad-based causation theories may have been rejected by the jury for several reasons.

First, although plaintiff was treated for his pulmonary condition by a pulmonologist, the only witness who linked his ongoing pulmonary problems to the delayed appendectomy was Dr. Rodgers. Dr. Rodgers saw plaintiff only once and did not treat him but merely evaluated him for

purposes of this trial. His expert testimony – that plaintiff's decreased lung efficiency was the result of Dr. Haldar's failure to diagnose his appendicitis – was therefore somewhat suspect.

Indeed, plaintiff's claim of diminished respiratory capacity caused by the appendectomy could and should have been corroborated by his pulmonologist. The reason for plaintiff's decision not to call him as a witness to support that claim was obvious; plaintiff's smoking history gave ample basis for the jury to discredit both plaintiff and Dr. Rodgers and may have even given plaintiff's claim the appearance of overreaching. The jury's verdict reflects this mistrust.

Secondly, Dr. Rodgers is not a surgeon, gastroenterologist, or pulmonologist. Yet, he was the only physician who testified regarding the cause of plaintiff's conditions and their permanency. The jury could have simply concluded that Dr. Rodgers was not truly qualified to render this far-reaching opinion, which spanned several medical specialties, for which he was not Board certified, and the jury could have, and apparently did, discredit some or all of his causation theories.

The jury's possible distrust of that opinion, coupled with the obvious connection between plaintiff's smoking and his lung disease and

emphysema, provide ample justification for the jury's verdict in an amount that was less than the medical expenses.

The amount of damages attributable to defendant doctor's missed appendicitis diagnosis was also a matter of great conflict in this case. As demonstrated, the evidence provided a clear and rational basis for the jury to discount many elements of claimed damages and to determine not to award them. In a case like this, the fact that the verdict was less than the claimed "outstanding medical bills" does not require a new trial, as plaintiffs contend. The entries on plaintiff's exhibit 10 contain no explanation or itemization, making it difficult to determine exact amounts for each provider, and the exhibits include some medical providers who could easily have been eliminated by the jury consistent with the evidence.

For example, the jury could well have concluded that all expenses after the initial hospitalization in July of 2001 were not the result of defendant's negligence, or that the bulk of the expenses would have been incurred, even in the absence of Dr. Haldar's negligence, or even that certain types of expenses had nothing to do with his appendicitis. The fact that the jury was forced to speculate regarding which portion of the medical expenses were attributable to Dr. Haldar's negligence, in the face of a non-specific, non-itemized, and non-documented exhibit listing those expenses,

should not now be a basis for plaintiffs to claim that "the jury's failure to award those expenses must have been the result of improper speculation and conjecture".[6] Having failed to provide a complete itemization and specific individualized listing of what each physician charged[7], and which expenses were related to each hospitalization, plaintiffs cannot now complain that the jury's verdict was based upon improper speculation and conjecture.

Nor do the cases upon which plaintiffs rely compel a different result. In those cases cited by plaintiffs, the Superior Court determined that the verdicts were grossly out of proportion as there was either no award for pain and suffering or only a token amount. However, the circumstances in those cases were distinguishable from this case in material ways.

To illustrate, in both *Johnson v. Carney's Contracting Co.*[8] and *Fowler v. Raksnis*,[9] the Court was "shocked" by the awards, which either mirrored the special damages "to the penny" or were only $1.00 more than the medical expenses. In each of those cases, the Court was convinced of

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[6] Plaintiff's exhibit 10 was admitted without objection by defendant. The fact that defendant did not oppose the admission of the exhibit containing the written summary of medical expenses does not mean that defendant stipulated or agreed that any of the expenses were compensable under plaintiff's theory of the case.

[7] Some of the entries on plaintiff's exhibit 10 "medical bills" list names of physicians who were never even mentioned at trial. To exclude damages based on those unknown expenses, the basis for which would have been a complete mystery to the jury, is understandable. As an example, Dr. Vinod K. Parasher is listed as treating Mr. Mitchell on 6/6/03 and 5/21/03. Yet, there was no evidence presented in the testimony at trial, or in any of the exhibits, to identify who Dr. Parasher is, the type of treatment he provided, what his specialty is, or the specific care he gave to plaintiff. Under the circumstances, the jury had no choice but to discount the amount of the special medical expenses.

[8] Del. Super., C.A. No. 95C-12-027, Ridgely, P.J. (July 28, 1998).

[9] Del. Super., C.A. No. 95C-04-007, Terry, J. (Oct. 9, 1997).

the inadequacy of the amount of damages for pain and suffering. In *Johnson*, the Court determined that the plaintiff had "severe head injury, various fractures, and brain damage", the award which was the exact amount of stipulated medical expenses "to the penny" was manifestly unjust. Likewise, in *Fowler*, the Court considered a nominal award of $1.00 "for what were significant injuries" was "grossly inadequate to compensate for the largely undisputed injuries…"

Similarly, in *Chorman v. Kelly*,[10] the Court determined that the damage award was "grossly out of proportion". While the Court had no problem with the jury's rejection of any loss of future earnings, it felt that no award to plaintiff for general damages was "troublesome given the award for medical expenses".

The jury verdict in the case at bar was not equal to the outstanding medical bills, nor can it be concluded that the jury disregarded applicable rules of law, or that the amount was grossly out of proportion. Those cases upon which plaintiffs rely do not stand for the principle that <u>any</u> verdict that is less than the medical expenses cannot stand. Rather, they reflect the fact that the trial judge had a discernible discomfort with a verdict that he or she

[10]Del. Super., C.A. No. 95C-11-212, Quillen, J. (July 18, 1997).

believed was against the great weight of the evidence and grossly inadequate to compensate the plaintiff.

Each of these cases are distinguishable because they are based upon their own unique set of facts and circumstances; as such, the verdict in one cannot logically be compared with another, simply because the verdicts were not greater than the claimed medical expenses. Ultimately, the decision on a motion for new trial requires a judicial assessment based upon the distinct evidence and individual circumstances of each particular case.

Whether or not the plaintiffs met their burden of establishing by a preponderance of the evidence that Mr. Mitchell's medical expenses were reasonable, necessary, and the result of Dr. Haldar's negligence, was a jury question. It does not follow from plaintiffs' apparent failure to meet their burden, as to any or all of the expenses, that the jury did not adequately consider the evidence. Rather, the evidence was such as to allow the jury to have some doubt about whether Dr. Haldar was the cause of all of plaintiff's claimed injuries and losses, as well as the claimed expenses associated with them.

Finally, it is difficult to avoid repeated comments made by other judges in this Court regarding the jury system and the deference to be given to jury verdicts. As an example, in a case where plaintiff requested a new

trial or additur based on her claim that the verdict was inadequate, Judge Slights observed:

> While certainly not dispositive of the issue, the strict standard of review by which a motion for new trial is measured no doubt recognizes that it is the parties themselves who elect to present their claims to a jury of their peers and, by so doing, it is the parties who activate the machinery which is our jury trial system. When the parties activate the jury trial system, they activate the risk inherent in the system. And, of course, trials by jury implicate the most risky element of dispute resolution – uncertainty.
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> [Plaintiff's] complaint demanded a trial by jury. She got one, and a fair one at that. Now, unhappy with the result, she asks the Court to supplant the jury or, at least, to ignore the product of its deliberative efforts. The Court will not do so in this, or any other case where the trial was fair and the resulting verdict is not "shocking."
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> "[T]hose of us involved in the judicial system cannot [and should not] make litigation risk free."[11]

In the final analysis, the relief that plaintiff requests requires the Court to discount the jury's considered view of the facts in this case, its credibility assessments, and its opinions as to the weight to be given to the testimony of the witnesses. In essence, plaintiffs ask the Court to deem the verdict so inadequate that a new trial is warranted. But for the Court to do so, it must

[11] *Dunkle v. Prettyman*, Del. Super., C.A. No. 99C-10-265, Slights, J. (May 1, 2002)(Mem.Op. at 3)(citation omitted); See also, *Esry v. St. Francis Hospital, Inc.*, Del. Super., C.A. No. 99C-02-209, Babiarz, J. (April 15, 2002) (Mem.Op. at 2).

conclude that the jury returned a verdict which is contrary to the weight of the evidence and that that verdict shocks the conscience of the Court. This one does not. The Motion for New Trial is therefore denied.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

cc: Kenneth M. Roseman, Esquire
Mason E. Turner, Jr., Esquire
Prothonotary