

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

ALISA MOORE, :  
 : C.A. No. 02C-09-027WLW  
Plaintiff, :  
 :  
v. :  
 :  
NANCY FAN, M.D. and WOMEN :  
TO WOMEN OB/GYN ASSOCIATES, :  
 :  
Defendants. :

Submitted: June 23, 2004  
Decided: December 3, 2004

**ORDER**

Upon Plaintiff's Motion for a New Trial  
Under Superior Court Civil Rule 59. Denied.

**APPEARANCES**

Mary E. Sherlock, Esquire of Brown Shields Beauregard & Chasanov and A. Richard Barros, Esquire of Barros McNamara Malkiewicz & Taylor, Dover, Delaware; attorneys for the Plaintiff.

Jeffrey M. Austin, Esquire and Diane M. Andrews, Esquire of Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware; attorneys for the Defendants.

WITHAM, J.

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Upon consideration of the Plaintiff's Motion for a New Trial pursuant to Superior Court Civil Rule 59, it appears to the Court:

1. This is a medical negligence case in which Alisa Moore ("Plaintiff") has alleged multiple claims of negligence against Dr. Nancy Fan ("Defendant"). Specifically, Plaintiff contends that the Defendant was negligent either in administering or in ordering the administration of the drug Depo-Provera to her. Plaintiff also contends that the Defendant was medically negligent by failing to obtain her informed consent prior to administering Depo-Provera to her. Upon conclusion of a jury trial that involved expert testimony from eight witnesses, the jury returned a verdict in favor of the Defendant. The jury concluded that the Defendant was medically negligent but that her negligence was not the proximate cause of Plaintiff's injuries.

Plaintiff has filed a timely motion for a new trial pursuant to Superior Court Civil Rule 59. Because the verdict form submitted to the jury failed to separate the two different theories of negligence, Plaintiff asserts that it is impossible to ascertain whether the jury concluded that the Defendant was medically negligent for failing to obtain her informed consent or concluded that the Defendant was medically negligent based upon a theory of ordinary negligence. If the jury found that the Defendant was medically negligent for failing to obtain her informed consent, Plaintiff argues that the jury must have concluded that the Defendant was the proximate cause of her injuries as a matter of law. Accordingly, Plaintiff claims that a new trial is required because the jury's verdict might be erroneous as a matter of

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law.

2. Pursuant to Superior Court Civil Rule 59, a trial court should set aside the jury' s verdict only when it is against the great weight of the evidence or if manifest injustice would result from allowing the verdict to stand.<sup>1</sup> A trial court' s decision whether to grant a new trial is given broad discretion and will not be disturbed unless it is arbitrary or capricious.<sup>2</sup> In this case, although the Plaintiff states in her motion that the jury was presented with “ an extremely strong case” for lack of informed consent, Plaintiff does not allege that the verdict was against the great weight of the evidence; rather, Plaintiff contends that a new trial is required because manifest injustice would result if the verdict was allowed to stand based upon a fallacious jury verdict form. Plaintiff contends that the verdict form submitted to the jury was legally erroneous and undermined the jury' s ability to intelligently perform its duty.

3. Plaintiff' s argument derives from the first two questions presented to the jury on the verdict form:

1) Do you find that Dr. Fan committed medical negligence in connection with the treatment of Alisa Moore?

If your answer is yes, go on to Question #2. If your answer is no, stop and call the Bailiff.

2) Do you find that the medical negligence of Dr. Fan was the

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<sup>1</sup> *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

<sup>2</sup> *Burgos v. Robert Hickok, Jr., M.D.*, 695 A.2d 1141, 1145 (Del. 1997).

proximate cause of injury to Alisa Moore?

The jury answered the first question in the affirmative and the latter question in the negative. In other words, the jury concluded that the Defendant was medically negligent but also found that such negligence was not the proximate cause of the Plaintiff's injuries.

Plaintiff purports that if the jury concluded that the Defendant was medically negligent by failing to obtain her informed consent, then the jury as a matter of law must have found that her medical negligence was the proximate cause of Plaintiff's injuries. In order for the jury to find that the Defendant was medically negligent by failing to obtain her informed consent, Plaintiff maintains that the jury had to conclude:

- (1) that before the injection Defendant failed to tell the Plaintiff about certain risks of Depo-Provera;
- (2) that a reasonable patient would have considered this information to be important in deciding whether to have the injection; and
- (3) that Plaintiff has suffered injury as a *proximate result* of the injection.

Thus, if the jury did find the Defendant medically negligent for failing to obtain her informed consent, then as a matter of law they would have had to answer the second question on the verdict sheet pertaining to proximate cause in the affirmative. Plaintiff contends a new trial is required because it is impossible to determine whether the jury's verdict is erroneous as a matter of law. Plaintiff also

argues that the jury verdict form undermined the jury' s ability to intelligently perform its duty because it required the jury to deliberate the issue of proximate cause twice with respect to informed consent.

4. Parties are entitled to jury instructions that are legally accurate and enable the jury to perform its duty.<sup>3</sup> However, a new trial is not always warranted because of inaccuracies in the jury instructions. A jury' s verdict will only be reversed or vacated when the jury instructions are so deficient as to undermine the jury' s ability to intelligently perform its duty in returning a verdict.<sup>4</sup> Here, Plaintiff does not challenge the legal accuracy of the jury instructions but rather contests the legitimacy of the verdict form submitted to the jury. Plaintiff claims that the jury verdict form was so erroneous that it undermined the jury' s ability to intelligently perform its duty.

5. Plaintiff first contends that her proposed verdict form should have been submitted to the jury because it was set forth in a manner that did not result in a second deliberation by the jury on the issue of proximate cause. However, Plaintiff' s proposed verdict form did not require the jury to specifically deliberate the issue of proximate cause at all. In pertinent part, Plaintiff' s proposed verdict form read:

- 1) On what date was the injection of Depo-Provera given?
- 2) Was Dr. Fan negligent in prescribing Depo-Provera to Alisa Moore?

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<sup>3</sup> *Russell v. K-Mart Corp.*, 761 A.2d 1, 4 (Del. 2000).

<sup>4</sup> *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

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3) Was Dr. Fan negligent in failing to obtain the informed consent of Alisa Moore before she was injected with Depo-Provera of any risks of Depo-Provera that a reasonable patient would have considered to be important in deciding whether to have the injection?

If your answer to either question #2 or #3 was yes, please proceed to #4. If your answer to both questions was no, please call the Bailiff.

4) In what amount do you award Alisa Moore for her injuries?

Plaintiff's proposed verdict form excludes proximate cause entirely. Although it might have been inferred from the jury instructions regarding informed consent, this Court is inclined to use a verdict form that requires the jury to specifically deliberate the issue of proximate cause when proximate cause is the pivotal issue disputed. Accordingly, this Court declined to use Plaintiff's proposed verdict form.<sup>5</sup>

6. Relying upon the decision in *B-H, Inc. v. "Industrial America", Inc.*,<sup>6</sup> the Plaintiff's main contention for a new trial is that the verdict form was so erroneous as to undermine the jury's ability to intelligently perform its duty. In *B-H Inc.*, the plaintiff successfully brought an action against the defendant based upon an implied and quasi-contract theory. The appeal in that case focused on the

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<sup>5</sup> This Court also found that question three on the Plaintiff's proposed verdict form was somewhat incoherent and would have been more confusing than helpful to the jury in their deliberations.

<sup>6</sup> 253 A.2d 209 (Del. 1969).

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interrogatories submitted to the jury. Specifically, the appeal questioned the jury's ability to independently answer Jury Interrogatories Three and Four which dealt with alternative theories of liability. The jury was instructed that an affirmative answer to either question would result in liability for the defendant. More important, the structure of the interrogatories permitted the jury to answer only one of the interrogatories in the affirmative.<sup>7</sup> The jury ultimately concluded that the defendant was liable under the theory pronounced in Interrogatory Four. On appeal, however, the Supreme Court held that the theory of liability articulated in Interrogatory Four was legally incorrect and thus concluded it was an error by the trial judge to instruct the jury that they could find for the Plaintiff based upon the theory set forth in Interrogatory Four.<sup>8</sup> In granting a new trial to determine the sole issue represented by Interrogatory Three, the Court recognized that the jury's answer for Interrogatory Three was probably dependent upon their answer for Interrogatory Four.<sup>9</sup> In essence, because the jury was only allowed to find the defendant liable under one theory, the jury probably chose the theory of liability that they considered more applicable which was presented in Interrogatory Four.<sup>10</sup> In order to answer Interrogatory Four, however, the jury had to answer Interrogatory Three in the

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<sup>7</sup> *Id.* at 212 (The instructions for Interrogatory Three stated "If your answer is yes, skip question 4 and answer question 5").

<sup>8</sup> *Id.* at 214.

<sup>9</sup> *Id.* at 215.

<sup>10</sup> *Id.*

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negative. Accordingly, the Court concluded that the jury' s answer to Interrogatory Three was directly influenced by the jury' s consideration of Interrogatory Four. Thus, because the theory pronounced in Interrogatory Four was legally incorrect and impacted the jury' s response to Interrogatory Three, the Supreme Court concluded that the interrogatories and their related instructions were fatally misleading to the jury.<sup>11</sup>

This Court is not confronted with the same factual scenario as presented to the Court in *B-H, Inc.* In the present case, the verdict form submitted to the jury did not require the jury to choose between two alternative theories of liability. The jury here was empowered to find the Defendant negligent under either one or both theories of negligence. More important, the jury instructions accurately recited the law. Accordingly, this Court finds the decision in *B-H, Inc.* factually incompatible and thus unpersuasive.

7. Relying on *Yarusso v. International Spirit Marketing, Inc.*,<sup>12</sup> the Plaintiff also asserts that a new trial is necessary because there could be inconsistencies in the jury' s verdict. The trial court in *Yarusso* stated “ This court must attempt to reconcile any apparent inconsistencies in a jury' s verdict. The verdict will stand as long as there is one possible method of construing the jury' s

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<sup>11</sup> *Id.*

<sup>12</sup> 1999 Del. Super. LEXIS 231.



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answers as consistent with one another and the general verdict.”<sup>13</sup> Although the Plaintiff maintains that there are several ways to construe the jury’ s answers that would render them inconsistent, the Plaintiff acknowledges that there is another way to construe them so they are consistent with one another and the general verdict. By the Plaintiff’ s own admission the jury could have found that the Defendant was medically negligent based upon ordinary negligence but that her negligence was not the proximate cause of Plaintiff’ s injuries. In accordance with the holding in *Yarusso*, this Court will not disturb the jury’ s verdict so long as there is at least one possible way to construe the jury’ s answers as being consistent. Because the jury’ s answers can be construed as consistent with one another and the general verdict, Plaintiff’ s reliance on *Yarusso* is unpersuasive and does not provide this Court with a meritorious basis for granting a new trial.

8. Plaintiff’ s motion for a new trial is premised on the assertion that the jury had to find that the Defendant’ s negligence was the proximate cause of Plaintiff’ s injuries as a matter of law if the jury found that the Defendant was medically negligent with respect to informed consent.<sup>14</sup> This Court disagrees with

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<sup>13</sup> *Yarusso*, 1999 Del. Super LEXIS 231, \*23 (citing *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. 1993) *aff’d*, 632 A.2d, 63, 72 (1993)).

<sup>14</sup> 18 *Del. C.* §6801(6) defines informed consent as “the consent of a patient to the performance of health care services by a health care provider given after the health care provider has informed the patient, to an extent reasonably comprehensible to general lay understanding, of the nature of the proposed procedure or treatment and of the risks and alternatives to treatment or diagnosis which a reasonable patient would consider material to the decision whether or not to undergo the treatment or diagnosis.”

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Plaintiff's contention. Moreover, the jury was never instructed that they must find Defendant's actions to have been the proximate cause of the Plaintiff's injuries in order to find the Defendant negligent for failing to obtain her informed consent. The jury instructions regarding informed consent, which were submitted by the Plaintiff, read in pertinent part:

To prevail on this claim, Alisa Moore must prove by a preponderance of the evidence:

- (1) that before the injection Nancy Fan failed to tell her about certain risks of Depo-Provera; and
- (2) that a reasonable patient would have considered this information to be important in deciding whether to have the injection; and
- (3) that Alisa Moore has suffered injury as a proximate result of the injection.

This instruction dictates what is necessary in order for the Plaintiff to *prevail* on a claim based upon lack of informed consent. However, contrary to Plaintiff's assertion, all of these enunciated factors are not necessary for the jury to find that the Defendant was simply negligent. In other words, the first two pronounced factors in the Plaintiff's jury instructions for informed consent determine negligence. In order to prevail on her claim, the Plaintiff must still prove that she has suffered injury as a proximate result of the Defendant's negligence. This is represented by the third factor in the Plaintiff's instructions for informed consent. This rationale is made quite clear when the Plaintiff's instructions for informed

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consent are read in conjunction with the rest of the jury instructions. In addition to the jury instructions regarding informed consent, the Plaintiff also submitted the jury instructions for proximate cause which read: “ 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 injury.” This instruction unquestionably indicates to the jury that proximate cause is not a requirement for an initial finding of medical negligence. Instead, proximate cause is necessary in addition to a finding of negligence in order to impose legal liability. This is also depicted in the jury instructions relating to the nature of the case which stated “ as a proximate result of Dr. Fan’ s negligence...” Accordingly, when the jury instructions are read in *pari materia*, they inescapably advise the jury that proximate cause is a separate issue to be determined only after there has been an initial finding of negligence.

Plaintiff acknowledges that the jury instructions submitted by her accurately represent the law. Plaintiff’ s jury instructions undeniably directed the jury to determine whether the Defendant was negligent and if so, whether such negligence was the proximate cause of Plaintiff’ s injuries. This is precisely how the jury verdict form read. Accordingly, even if the jury found that the Defendant was negligent by failing to obtain the Plaintiff’ s informed consent, the jury’ s verdict was not inconsistent or erroneous as a matter of law. The jury could have concluded that the Defendant was medically negligent simply by failing to inform the Plaintiff about certain risks of Depo-Provera that a reasonable person would have considered

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to be important in deciding whether to have the injection. However, in order for the Plaintiff to prevail, the jury would have also had to conclude that the Defendant's negligence was the proximate cause of Plaintiff's injuries. In short, the jury verdict form and the jury's verdict was consistent with both the law and the jury instructions that were submitted by the Plaintiff.

In conclusion, the jury found that the Defendant was medically negligent in her treatment of the Plaintiff. Regardless of the theory of negligence, the jury concluded that the Defendant's negligence was not the proximate cause of Plaintiff's injuries. As discussed above, such a finding is not inconsistent nor erroneous as a matter of law. Moreover, the verdict form submitted to the jury was indicative of the jury instructions that were submitted by the Plaintiff. In addition to being consistent with the jury instructions, this Court also finds that the verdict sheet submitted to the jury was legally accurate and in fact bolstered the jury's ability to intelligently perform its duty in returning a verdict. Accordingly, Plaintiff's motion for a new trial is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

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