

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ROBERT C. CRAFT, Executor of the)
Estate of KATHLEEN M. CRAFT, and) No. 098, 2001
ROBERT C. CRAFT, Individually,)
) Court Below: Superior Court
Plaintiff Below,) of the State of Delaware in
Appellant,) and for New Castle County
)
v.) C.A. No. 95C-12-125
)
GHASSEM VAKILI, M.D.,)
)
Defendant Below,)
Appellee.)

Submitted: November 29, 2001

Decided: December 12, 2001

Before **VEASEY**, Chief Justice, **HOLLAND** and **STEELE**, Justices.

ORDER

This 12th day of December, 2001, it appears to the Court that:

1. On February 28, 2001, the appellant filed a notice of appeal from orders of the Superior Court dated September 8, 2000 and January 31, 2001. Superior Court held a trial beginning on September 5, 2000 continuing through September 8, 2000. The Court entered a verdict in favor of the defendant September 8, 2000. Appellant filed a Motion for a New Trial on September 23, 2000. On January 31, 2001, the Superior Court denied the motion.

2. Appellant, Plaintiff Below, Craft, argues that he is entitled to a new trial because of the nature of the testimony of the Appellee, Defendant Below's

expert. At trial, Craft objected on the ground that the testimony had not been previously disclosed. Specifically, Craft claims prejudicial surprise because the expert testified regarding Macrochantin refills. Craft argues that the evidence presented to the jury was fairly equally balanced and that the testimony of Vakili's expert tipped the scale in favor of Vakili. Because of the possibility that Craft's claim might be time barred, the parties agreed that if the jury found that Vakili did not advise Mrs. Craft to take Macrochantin in 1994, they would not have to resolve any other issues.

3. While the testimony may not have been specifically disclosed before trial, it does not appear that admitting the testimony amounted to prejudicial surprise. Vakili's discovery response specified that: "[i]t is improbable that after regularly documenting such prescription for many years, Dr. Vakili would prescribe the medication in 1992 and 1993 but make no record of it." Craft was aware that Vakili's expert would be testifying that based on his review of Mrs. Craft's record, that Vakili performed in conformity with the standard of care. One should not be surprised by the testimony admitted since none of the documented prescriptions had refills and that standard practice is to not prescribe refills. Also, all the medical witnesses, not just Vakili's expert, testified that Macrochantin is not prescribed with refills and that according to Mrs. Craft's record, Vakili had never prescribed her Macrochantin with refills. It appears that Craft was sufficiently

apprised of the “substance of the facts and opinions to which the expert [was] expected to testify and a summary of the ground of such opinion.”¹

4. In addition, there was sufficient evidence for the jury to find that Vakili did not advise Mrs. Craft to take Macrochantin in 1994, regardless of the expert’s testimony. Vakili and one of his staff members testified regarding office prescription policy and various witnesses discussed Mrs. Craft’s patient record containing documented prescriptions. This evidence squarely contradicted that of Mrs. Craft that Vakili advised her to take Macrochantin in 1994. The jury could reasonably have accepted Vakili’s evidence and rejected Craft’s evidence and concluded that Vakili did not advise Mrs. Craft to take Macrochantin in 1994, without regard to the expert’s testimony concerning refills.

NOW, THEREFORE, IT IS ORDERED, that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Justice

¹ Super. Ct. Civ. R. 26(b)(4)(A)(1).