

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANE A. ADAMS, D.O., and)
BAYSIDE HEALTH) No. 119, 2003
ASSOCIATION, CHARTERED,)
) Court Below: Superior Court
Defendants Below,) of the State of Delaware in
Appellants,) and for New Castle County
)
v.) C.A. No. 99C-06-185
)
ALEXANDER LUCIANI and)
CONNIE LUCIANI, individually)
and as next friend of)
ZACHARY G. LUCIANI, a minor,)
)
Plaintiffs Below,)
Appellees.)

Submitted: October 27, 2003
Decided: December 2, 2003

Before **HOLLAND, BERGER, and STEELE**, Justices.

ORDER

This 2nd day of December 2003, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. Plaintiff-Appellee Connie Luciani's physician diagnosed her as an insulin-dependant diabetic during her pregnancy. When she came to full term at 40 weeks, Defendant-Appellant, Diane A. Adams, D.O. and Albert French, M.D. decided to induce labor. Milford Memorial Hospital admitted Luciani on March 1, 1998, for the administration of Cervidil, a device that ripens or thins the cervix.

Dr. Adams left the hospital after administering the Cervidil. Her order sheet provided that Luciani was to be monitored for one hour after the administration of the Cervidil, and then as needed. It also indicated that the Cervidil was to be discontinued if fetal distress or uterine hyperstimulation was detected. Nurse Patricia Brenneman disconnected the fetal heart monitor at 11:00 p.m. At Luciani's request, the monitor was reconnected from 3:20 a.m. to 5:40 a.m. Nurse Brenneman called Dr. Adams at 6:10 a.m. on March 2, to update her on Luciani's status. She notified Dr. Adams that she had discontinued the fetal heart monitor and Dr. Adams indicated her approval. Dr. Adams did not return to the hospital until 8:00 a.m. on March 2. At 8:08 a.m., there was no fetal heartbeat. Dr. Adams examined Luciani at 8:27 a.m. and then ordered a caesarian section. Zachary was born at 8:55 a.m. He suffered from perinatal asphyxia and encephalopathy, resulting in Cerebral Palsy.

2. Luciani filed a complaint against Drs. Adams and French, both employees of Bayside Health Association, Chartered. A second complaint was filed against Bay Health Medical Center, Inc. and Milford Memorial Hospital, Inc. The action against Dr. French was dismissed before trial.

3. During trial, Plaintiffs' expert, Dr. Krane, testified that Luciani was a high-risk patient because of her diabetes. He stated when using Cervidil, continuous fetal monitoring was needed and that a failure to do so violated the

known applicable standard of care. He also testified that Dr. Adams should have been present at the hospital during administration of the Cervidil and that the C-section should have been performed earlier. Dr. Bean, on behalf of the Plaintiffs, testified that there was no brain injury at the time Luciani entered the hospital and that there would have been no injury if Zachary had been delivered before 5:20 a.m. Dr. Bean also concluded that the injury would not have been as severe if Zachary had been delivered before 8:55 a.m. and that Dr. Adams' inaction proximately caused Zachary's injuries.

4. During the course of the trial, Plaintiffs' counsel made statements about the testimony of defense experts such as "that's your opinion;" accused Dr. Adams of "gambling" with Zachary's life; and made specific references to religious convictions held by the Plaintiffs. Dr. Adams' counsel made timely objections to these comments. The trial judge sustained the objections. The trial judge did not give a curative instruction, but did appropriately instruct the jury at the close of the case regarding what evidence they could consider in sufficient detail in an attempt to negate any unfair prejudice caused by Plaintiffs' counsel's improper statements.

5. Before closing arguments, the hospital defendants settled with the Plaintiffs in a sealed agreement. The trial judge instructed the jury to make a determination about whether Dr. Adams, the hospitals, or both were negligent.

The jury found for the Plaintiffs and awarded \$4 million, apportioned 50% each to Dr. Adams and to the hospitals. On December 18, 2001, Dr. Adams filed a Motion for Judgment Notwithstanding the Verdict, or in the alternative, For a New Trial. The trial judge denied the motion on February 6, 2003 (amended February 10, 2003).¹ Dr. Adams appealed.

6. Dr. Adams contends that she is entitled to a new trial because the verdict was against the weight of the evidence. Dr. Adams maintains that: (1) the evidence failed to establish a deviation from the known standard of care; (2) she is not liable for the negligence, if any, resulting from the actions or inactions of Milford Hospital before her arrival at the hospital; (3) the trial judge allowed improper expert witness testimony; (4) Plaintiffs' counsel made unfairly prejudicial, improper statements; (5) improper jury conduct warrants a new trial; and, (6) the trial judge committed errors of both fact and law.

7. Where an appeal is grounded on allegations that the trial judge erred as matter of law or abused his discretion in certain evidentiary rulings, we first consider whether the specific rulings at issue were correct.² If we find error or an abuse of discretion, we must then determine if the mistakes constituted prejudice

¹ *Luciani v. Adams*, Del. Super., No. 99C-06-185 (Feb.10, 2003).

² *Barrio Canal v. Gibbs*, 697 A.2d 1169 (Del. 1977).

significant enough to prevent a fair trial.³ The standard of review for an appeal of a trial judge's denial of a motion for a new trial is abuse of discretion.

8. Dr. Adams contends that the evidence failed to establish a deviation from the known, applicable standard of care. The Delaware Medical Malpractice Statute requires that expert medical testimony be presented to allege a deviation from the applicable standard of care.⁴ In this case, a jury could have reasonably concluded that Dr. Adams deviated from the required standard of medical care when she ordered Luciani to be monitored for one hour and then as needed. In addition, there was a "sufficient basis upon which the jury could have reasonably believed that Nurse Brenneman would have adhered to her normal practice of informing the doctor of any irregularities in fetal monitoring strips."⁵ As a result, the jury could have fairly concluded that Dr. Adams acted negligently by returning later to the hospital to care for Luciani than a reasonably prudent doctor would have done after prescribing Cervidil. The Plaintiffs did produce evidence of the applicable standard of care as their experts saw it and on proximate cause. Accordingly, the trial judge did not abuse his discretion when he concluded that the jury had sufficient information to accept either party's expert testimony on the

³ *Eustice v. Rupert*, 460 A.2d 507 (Del. 1983).

⁴ 18 *Del. C.* § 6853: No liability shall be based upon asserted negligence unless expert testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death,...

⁵ *Luciani v. Adams*, Del. Super., No. 99C-06-185 (Feb.10, 2003) p.12.

applicable standard of care and simply chose to accept the plaintiffs' experts' testimony as the better view.

9. Dr. Adams contends that the Plaintiffs did not establish causation between her action, or inaction, and the injury suffered by Zachary. She alleges that the brain damage occurred before her arrival and that irreparable injury would have occurred before Zachary was delivered even if there had been continuous monitoring. In addition, Dr. Adams maintains that before 8:08 a.m. the only information known to her was that Luciani was fine. However, evidence in the record supports the jury verdict. Plaintiffs' expert Dr. Marvin Krane testified that Dr. Adams should have returned to the hospital and delivered the baby after receiving a 6:10 a.m. phone call from Nurse Brenneman informing her of poor variability shown on the heart monitoring strips. Dr. Krane also testified that administering Cervidil to a high-risk patient like Connie Luciani required continuous electronic fetal monitoring. Dr. Adams ordered Luciani monitored only "for an hour, and then as needed." Dr. Charles Bean testified that had Dr. Adams delivered the Luciani baby before 5:20 a.m., no brain injury would have resulted. Further, Dr. Bean testified that delivery before 8:55 a.m. would have resulted in less significant brain injury. Here, the jury's finding of negligence is supported by the evidence because they "apparently chose to accept [expert

testimony] proffered by the Plaintiffs over that presented by the Defendants...”⁶

The trial judge did not abuse his discretion by denying the Motion for a New Trial on that basis.

10. Dr. Adams contends that she was prejudiced by the fact that Plaintiff’s brother, Dr. Gerald Luciani, an obstetrician and Captain in the United States Air Force, was permitted to testify while wearing his uniform. Specifically, she maintains that the uniform enhanced Captain Luciani’s credibility based upon “respect for the military.” Captain Luciani testified only as a fact witness about a March 2, 1998 conversation with his brother regarding the propriety of the C-section. The trial judge did not allow him to testify on the issue of negligence. The trial judge properly allowed him to testify in uniform because Captain Luciani was on active duty and the uniform of the day was his work attire. Dr. Adams’ concern that the mere presence of the uniform would cause the jury to be biased favorably toward the Plaintiffs is no more than unsupported speculation.

11. Dr. Adams contends that Plaintiffs’ counsel made improper comments regarding the testimony of numerous witnesses and that the trial judge improperly failed to cure these statements in general instructions given at the close of the case. Dr. Adams relies on *Hughes v. State*⁷, where we adopted a test to gauge the effect of improper comments made by counsel. There, we said that the trial judge must

⁶ *Id.* at 17.

⁷ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

consider: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.⁸ This test, although applied in a criminal proceeding in *Hughes*, is applicable in the civil cases.⁹ In *Hughes*, the State's case was based on circumstantial evidence and little tangible evidence connected Hughes to the murder. There, prosecutors clearly misstated evidence during the summation because the record failed to show proof of "blood on [Hughes'] hands through his own mouth."¹⁰ The State also made statements to the jury that Hughes lied on twelve occasions. This Court found that Hughes had been denied a fair trial because the case was close, the central issue of credibility was affected by the prosecutors' misstatements, and the trial judge's general statements on the duty of the jury did not sufficiently mitigate the errors. In *DeAngelis v. Harrison*, a civil case, the defense referred to the personal injury action as a "lottery ticket."¹¹ We concluded that comments of defendants' counsel in closing arguments were clearly improper and the trial judge erred when he refused to give a curative instruction.¹² There we held that the statements were improper because they distracted the jury's focus from the instructions to be given in the case.¹³

⁸ *Id.* at 571, citing *Dyson v. United States*, D.C. App., 418 A.2d 127, 132 (1980).

⁹ *DeAngelis v. Harrison*, 628 A.2d 77, 81 (Del. 1993).

¹⁰ *Hughes* at 569.

¹¹ 628 A.2d at 81.

¹² *DeAngelis* at 78.

¹³ *Id.* at 80-81.

12. In the case *sub judice*, the trial judge found that the comments of Plaintiffs' counsel were not beyond the bounds of professional reasonableness and did not rise to the level of those in *Hughes* or *DeAngelis*. The improper comments were neither inaccurate nor misleading to the jury. They were objected to when made during cross-examination and the objections were sustained. The trial judge addressed the comments outside the presence of the jury and then generally instructed the jury on the issues they were to consider. Trial judges are in the best position to observe the impact of improper statements at the time they are made, to determine the extent to which they may have affected the jury or the parties, and to remedy any ill effects. Sustaining timely objections followed by clear closing instructions even in a hotly contested and emotionally charged "close" case, sufficiently cures any potentially lingering effects of Plaintiffs' counsel's ill advised hyperbole. Under the circumstances, Dr. Adams' could not have been unfairly prejudiced by the comments or their alleged cumulative effect.

13. Dr. Adams contends that the conflict between two jurors requires them to be deposed to determine if the dispute was connected to their verdict.¹⁴ In general, a juror may not impeach her own verdict once the jury has been

¹⁴ An incident occurred on December 3, and involved what was reported to the trial judge as a verbal confrontation between two female jurors during the course of the deliberations. Other members of the jury intervened, order was restored and the deliberations proceeded without further incident. The trial judge was notified and in turn notified counsel. Neither participant nor any member of the jury complained or asked the trial judge to take any action. There was no indication that the incident was the result of any outside influence or improper conduct by anyone associated with the trial or outside of the trial. The trial judge decided to take no action.

discharged.¹⁵ We have decided that the policy reasons behind this rule are to discourage harassment of jurors by defeated parties who want the verdict set aside; to encourage free and open discussion among jurors; to reduce incentives for jury tampering; to promote verdict finality; and to maintain the viability of the jury.¹⁶ However, extrinsic influences upon a jury verdict permit a juror to testify post-verdict.¹⁷ In *McLain v. General Motors Corporation*, the Superior Court found that alleged harassment and intimidation of a juror by other jurors during deliberations was an intrinsic influence, therefore, the juror could not impeach her verdict.¹⁸ There is no suggestion here that the juror was threatened with physical harm, that the juror voiced a complaint of undue intimidation to the court, or that she wished her verdict re-examined or impeached. Here, similar to the incident in *McLain*, the juror conduct in issue did not prompt any request for action by the trial judge. Further, there is no indication that other jurors complained to the trial judge at the time of the incident. Accordingly, the trial judge properly decided, consistent with well established precedent, that no further action was necessary.

14. Dr. Adams alleges six instances of factual error appearing in the trial judge's post-trial Opinion and Order: (1) Luciani was not admitted while in labor;

¹⁵ *McLain v. General Motors Corporation*, 586 A.2d 647 (Del. Super. 1988), citing *Stein v. New York*, 346 U.S. 156, 178 (1953).

¹⁶ *McLain* at 651, citing *Sheeran v. State*, 526 A.2d 886 (Del. Super. 1987).

¹⁷ *Id.* at 651; *See Government of Virgin Islands v. Gereau*, 523 F.2d 140, 150 (3rd Cir. 1975), cert. den. 424 U.S. 917 (1976).

¹⁸ 586 A.2d 647 (Del. Super. 1988).

(2) the fetal monitor was for checking the impact of the Cervidil, not to trace the progression of labor; (3) the fetal monitor was removed at Luciani's request at 5:40 a.m. and Dr. Adams was not notified about it by Nurse Brenneman until 6:10 a.m.; (4) Dr. Adams was not the primary physician treating Luciani; (5) the testimony of Plaintiffs' expert witnesses was conflicting as to the time of injury; and, (6) the trial judge incorrectly concluded there was fetal distress at 5:40 a.m.

15. In this case, the jury verdict should not be invalidated based on factual errors made by the trial judge in his Opinion and Order. These noted discrepancies were not the basis for the trial judge's decision to deny Dr. Adams' motion. The jury did not need to accept these statements as true to find for the Plaintiffs. The trial judge found sufficient evidence in the record for a reasonable jury to have decided for the Plaintiffs. The record supports his conclusion. We, therefore, must agree with the trial judge and uphold his decision to deny Dr. Adams' post-trial motions.

16. Finally, Dr. Adams contends that the trial judge misinterpreted the Delaware Constitutional mandate that a finding by a jury, if supported by the evidence, is conclusive.¹⁹ She suggests that the trial judge failed to differentiate between the substantial quantity of testimonial evidence and probative evidence as required by statute.

¹⁹ Del. Constitution, art. IV, § 11.

17. Here, the trial judge's view of the conflicting evidence was reasonable. There was sufficient evidence in the record for the jury to reach a verdict for either side. The trial judge found that the jury verdict was not against the great weight of the evidence. This is the correct test at this stage of the proceedings.²⁰ The record supports the trial judge's conclusion and, therefore, it must be affirmed.

For the foregoing reasons, the trial judge did not abuse his discretion by failing to grant Defendants' Motion for Judgment Notwithstanding the Verdict or Motion for a New Trial.

NOW, THEREFORE, IT IS ORDERED that the decision of the Superior Court be, and hereby is AFFIRMED.

/s/ Myron T. Steele
Justice

²⁰ *Storey v. Camper*, 401 A.2d 458 (Del. 1979) (Holding that a trial judge should not set aside a jury verdict unless the evidence preponderates so heavily against the verdict as to make it unreasonable or capricious); *Szewczyk v. Doubet*, 354 A.2d 874 (Del. Super. 1998).