

several days. (3rd Amended Complaint, ¶19). The emergency room physician, Dr. Carol Hart, M.D., ordered an obstruction series¹ and gave Ms. Taylor magnesium citrate, Ducolax and a milk and molasses enema. (Id., ¶21). Ms. Taylor remained in the emergency room until the next day, when on July 1, 2000, she was admitted into Misericordia Hospital under the care of Dr. Walter Wrenn, M.D as her attending physician. (Id., ¶22). At that time she presented with complaints of mild cramps, nausea, vomiting, upper-quadrant pain and a non-tender abdomen. (Id.).

Dr. Wrenn subsequently called in Dr. Edouard Misse, M.D. as a surgical consultant to perform tests and give an evaluation. (N.T. dated 11/18/03, pg. 106). On July 1, 2000, an obstruction series was performed by Dr. Misse, which revealed quite a bit of stool within the colon. (3rd Amended Complaint, ¶24). After a colon cleansing Ms. Taylor had three large bowel movements. (Id., ¶25).

On July 2, 2000, a second obstruction series was performed, which showed internal clearing of the stool from the colon. (Id., ¶26).

On July 2, 2000, Dr. Wrenn discharged Melva Taylor from Misericordia Hospital and gave her a prescription for Motrin and instructed her to follow-up with Dr. Raymond Coleman for a colonoscopy within the next two weeks. (Id., ¶28-30). The discharge diagnosis was noted to be fecal impaction, dilated colon and partial small bowel obstruction. (Id., ¶31). It is alleged by Plaintiff that on July 2, 2000, Drs. Orlando Castillo and Leon Clark failed to review the results of an obstruction series prior to her discharge and that the radiologist, Dr. Helen Leibowitz was negligent in viewing the

¹ An obstruction series is a test consisting of a series of x-ray films performed on the abdomen of patients with suspected bowel obstruction, paralytic ileus, perforated viscus, abdominal abscess, kidney stones, appendicitis, or foreign body ingestion. Mosby's Medical Dictionary (6th Edition), 2002.

radiology films to rule out further obstruction prior to her discharge. (3rd Amended Complaint, ¶29). After discharge, Ms. Taylor's pain worsened.

On July 6, 2000, Ms. Taylor was admitted to Thomas Jefferson University Hospital (hereinafter Jefferson) from the emergency room, under the care and treatment of Dr. Michael Weinstein, and his assistants, Drs. Benjamin Braslow and Susanne Huffnagle. (Id., ¶37). An obstruction series was performed in the emergency room at Jefferson, which was consistent with a large bowel obstruction in the sigmoid colon with a 13 to 14 cecum. (Id., ¶ 38). Ms. Taylor was hydrated with IV fluids and a nasogastric tube was inserted. Ms. Taylor also underwent a gastrographic enema, which revealed an apple-core lesion within the sigmoid colon with a dilated proximal bowel, which was identified within the rectum. (Id., ¶40).

Dr. Weinstein performed endoscopic stenting of the apple-core lesion to allow for decompression, and a mechanical bowel prep was performed prior to a resection of the tumor to prevent the need for a stoma. (Id., ¶41). However, the endoscopic stenting was unsuccessful due to the positioning of the lesion, its movement was unable to be traversed endoscopically for stent placement. Melva Taylor aspirated during the procedure and experienced acute pulmonary failure. (Id., ¶43). Following the performance of the endoscopic stenting on July 6, 2000, Ms. Taylor was stabilized and transferred to the intensive care unit on a ventilator where she was resuscitated over the next several hours, and, as her pulmonary status continued to worsen, she required several hemodynamic suppressors to maintain her blood pressure. (Id., ¶44). Ms. Taylor was then taken to the operating room where she underwent an exploratory laparotomy, fascial closure, and a low transverse colostomy with IV bag. There was no evidence of

perforation or spillage of stool or contamination identified within the abdomen, and, the large and small bowels were globally dilated. (Id. at 47). After the exploratory laparotomy, Ms. Taylor remained in critical condition and was taken to the intensive care unit. Ms. Taylor's condition worsened overnight and on July 7, 2000, she was pronounced dead.

As a result of this incident, Plaintiff Dana Taylor, as Administrator of Melva Taylor's estate, brought this lawsuit by filing a Complaint on March 16, 2001. The Third Amended Complaint was filed on September 6, 2001. Plaintiff brought a Survival Action and Wrongful Death action against Misericordia Hospital and its agents and employees (Drs. Wrenn, Coleman, Leibowitz, Castillo, Clark and Misse) alleging negligence in their diagnosis, care and treatment of Melva Taylor. (3rd Amended Complaint). Plaintiff also brought a Survival Action and a Wrongful Death action against Thomas Jefferson University Hospital and its agents and employees ("Jefferson") (Drs. Weinstein, Braslow and Huffnagle) alleging negligence in their diagnosis, care and treatment of Melva Taylor. (3rd Amended Complaint).

After extensive discovery, the case proceeded to trial on November 14, 2003, and after the close of Plaintiff's case a non-suit was entered on November 24, 2004 in favor of Walter Wrenn, M.D., Edouard Misse, M.D. and Misericordia Hospital. (Misericordia's Response to Plaintiff's Motion for Post-Trial Relief, pg.1). The case then proceeded against Jefferson. However, a Mistrial was declared by the Court on November 28, 2003 after the jury could not reach a verdict. (Trial Court Findings & Order dated 5/16/03, pg. 1). A Findings and Order were issued by this Court addressing the Mistrial on December 4, 2003. (See Docket).

Plaintiff subsequently settled out of Court with Jefferson and filed their Notice of Appeal to the non-suit of Drs. Wrenn, Misse and Misericordia on July 28, 2004.

(Misericordia's Response to Plaintiff's Motion for Post-Trial Relief, pg.1).

On August 3, 2004, after this Appeal was filed, Plaintiff filed her Post-Trial Motions. Defendants Wrenn, Misse and Misericordia filed a Motion to Dismiss the Appeal of July 28, 2004, arguing that Plaintiff failed to timely file Post-Trial Motions to the Order of December 4, 2003 pursuant to Pa.R.C.P. 227(c)(1). (Trial Court Findings & Order, pg.1). By Order dated September 5, 2004, our Superior Court dismissed Plaintiff's Appeal without explanation. (Order of Superior Court dated 9/5/04). In light of the Superior Court's Order, this Court entered an Order marking Plaintiff's Motion for Post-Trial relief as moot. (See Superior Court Opinion dated 9/18/06). Judgment was subsequently entered on the verdict pursuant to Pa.R.C.P. 227.4(1)(A) on January 28, 2005. Plaintiff thereafter again filed a Notice of Appeal to the Superior Court and Drs. Wrenn, Misse and Misericordia filed their Motions to Quash the Appeal. (Superior Court Opinion, pg. 4). This Court submitted its Findings and Order dated May 16, 2005 holding that the Plaintiff failed to timely file her Post-Trial Motions and Appeal from the non-suit. By Opinion dated September 18, 2006, the Superior Court reversed this Court's Findings and Order and remanded the matter with instructions for this Court to rule on the Post-Trial Motions. By Order dated April 17, 2007, this Court denied Plaintiff's Post-Trial Motions. Plaintiff thereafter filed her Notice of Appeal to this Order and accordingly issued her 1925(b) Statement of Matters.

The issues to be addressed on appeal are:

1. Whether the trial Court committed an error of law or abused its discretion in precluding the testimony of Dr. Peter Charap, M.D. from testifying as to whether Drs. Wrenn and Misse breached standard of care to plaintiff.
2. Whether the trial Court committed an error of law or abused its discretion in precluding the testimony of Dr. Kenneth Janes, M.D. from testifying as to whether Drs. Wrenn and Misse breached standard of care and caused or increased the risk of harm to plaintiff.
3. Whether the trial Court committed an error of law or abused its discretion in granting a non-suit in favor of Drs. Wrenn, Misse and Misericordia.

LEGAL ANALYSIS

TESTIMONY OF DR. PETER CHARAP AS TO DR. WRENN

Plaintiff raises the issue that Dr. Peter Charap was improperly precluded from testifying that Dr. Wrenn deviated from the standard of care in diagnosis, treatment and care of Ms. Taylor. Plaintiff initially offered Dr. Charap as an expert in the field of internal medicine and diagnosis of gastroenterological problems. (N.T. 11/18/03, Vol. 2, pg.63). In cross-examination it was discovered that Dr. Charap does not perform colonoscopies, he does not treat colon cancer and he is not a board-certified, credentialed gastroenterologist. (N.T., 11/18/03, Vol.2, pg.64). Upon further inquiry and objection by defense counsel, Plaintiff further clarified the proffer of Dr. Charap:

I suggest that he's [Charap] an expert in internal medicine, and he can diagnose gastroenterological problems. I never said he could treat colon cancer. I never said he could do colonoscopies. He's here to talk about the diagnosis of a gastroenterological problem. (N.T. 11/18/03, Vol.2, pg. 64).

Dr. Charap was permitted to opine on the standard of care of Dr. Wrenn's diagnosis, care and treatment of Ms. Taylor and was not being offered to give any testimony pertaining to causation. (N.T. 11/18/03, Vol.2, pgs. 22, 74-77).

On direct examination of Dr. Charap, Plaintiff's counsel asked:

Mr. McEldrew: Doctor, in Mrs. Taylor's case, had a gastroenterology work-up been done and a barium enema done, as well, and/or sigmoidoscopy, would a lesion have been found. (N.T. 11/18/08, Vol. 2, pg. 77).

Defense counsel objected and moved to have the testimony stricken. *Id.* This testimony was stricken from the record. This Court further explained its reasoning for sustaining the objections, "...The doctor's [Charap's] testimony will be limited to his testimony on the standard of care for failure to diagnose, failure to perform the necessary tests. *Id.* At sidebar, a discussion was held regarding the limitation of Dr. Charap's testimony on this issue:

Mr. McEldrew: On page 2 of Dr. Charap's report it says, 'furthermore, either of these diagnostic tests would have led to a timely diagnosis of colon cancer and allowed for appropriate preparation and successful surgery. Unfortunately, the patient was discharged without diagnosis from Mercy Hospital, and presented soon after to Thomas Jefferson, where she subsequently died after a failed colonic stenting.'

In that place, he [Charap] talks about why the tests were necessary, and what the consequences of not having the test were. (N.T. 11/18/03, Vol.2, pgs. 78-79).

Mr. McEldrew: What I'm saying is that this man – I'm offering his testimony to indicate that the result of not doing the colonoscopy, and the result of not doing the barium enema led to a re-obstruction at a certain point, which is mentioned in the report.

Court: I don't have a problem with that; but that's where it has to end.

Mr. McEldrew: That's all I'm trying to say, that there's a re-obstruction. (N.T. 11/18/03, Vol.2, pg. 80).

Dr. Charap was then permitted to testify to this effect:

Mr. McEldrew: Doctor, if a work-up is not carried out in the hospital, what are the consequences?

Charap: The consequence is the patient can show up at another hospital, obstructed. (N.T. 11/18/03, Vol.2, pg. 82).

The Court permitted Dr. Charap to testify as to the breach in standard of care by Dr. Wrenn and that this breach can cause a subsequent re-obstruction. In light of the testimony, it is clear that this Court did not prohibit Dr. Charap from testifying and therefore Plaintiff's claim of error is factually unsupported.

In the event that Plaintiff's argument is that Dr. Charap was not permitted to testify as to what occurred subsequent to Ms. Taylor's discharge from Misericordia, it would be impermissible to have Dr. Charap testify outside the four-corners of his report into the realm of causation. (Expert Report of Dr. Charap, 1/7/03, Plaintiff's Exhibit 14). This is an area for which Dr. Charap was not offered to testify and therefore any testimony on such an issue should be precluded under the law.

Admission of expert testimony is a matter within the sound discretion of the trial court and the appellate courts of this Commonwealth will not disturb those rulings unless a clear abuse of discretion is shown. *Hall v. Jackson*, 2001 PA Super 334, 788 A.2d 390, 401 (Pa. Super. 2001). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by

the evidence or the record, discretion is abused." *Paden v. Baker Concrete Constr.*, 540 Pa. 409, 658 A.2d 341, 343 (Pa. 1995).

Pennsylvania Rule of Civil Procedure 4003.5 states, in part:

To the extent that the facts known or opinion held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, his direct testimony at the trial may not be inconsistent with or go beyond the fair scope of his testimony in the discovery proceedings as set forth in his deposition, answer to an interrogatory, separate report, or supplement thereto. Pa.R.C.P. 4003.5(c).

In deciding whether an expert's trial testimony is within the fair scope of his report, the accent is on the word "fair." *Sutherland v. Monongahela Valley Hosp.*, 2004 PA Super 245, 856 A.2d 55, 59 (2004). The question to be answered is whether, under the particular facts and circumstances of the case, the discrepancy between the expert's pre-trial report and his trial testimony is of a nature which would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the response. *Bainhauer v. Lehigh Valley Hosp.*, 2003 PA Super 338, 834 A.2d 1146, 1151 (Pa. Super. 2003).

Dr. Charap's report does not contain any statements about the obstruction being the cause of Ms. Taylor's death from aspiration. Without this information in his report or any indication that Dr. Charap would be testifying as to causation prior to trial, it is clearly outside the fair scope of his report of January 7, 2003. If it was Plaintiff's intention to offer Dr. Charap as a causational expert or have him opine as such, Plaintiff's failure to previously advise Defendants of their intention to present Dr. Charap as an expert in standard of care and causation prejudices Defendants in that they are incapable of preparing a proper defense to Dr. Charap's testimony. Therefore, Dr. Charap would be

precluded from testifying as a causal expert in this case, since he was offered as such without properly serving notice of the same to Defendants.

TESTIMONY OF DR. JANES AS TO DRs. WRENN & MISSE

Plaintiff next challenges the ruling of the Court that found the testimony of Dr. Kenneth Janes to be inadmissible as to establish that the conduct of Drs. Wrenn , Misse and Misericordia deviated from the standard of care caused or increased the risk of injury and death to Ms. Taylor.

In order to establish a prima facie case of malpractice, the Plaintiff must establish (1) a duty owed by the physician to the patient (2) a breach of duty from the physician to the patient (3) that the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient, and (4) damages suffered by the patient that were a direct result of that harm. *Mitzelfelt v. Kamrin*, 526 Pa. 54 , 584 A.2d 888, 891-892 (1990).

A plaintiff must also present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. *Id.*

Dr. Janes was offered by Plaintiff to testify, inter alia, as to the standard of care of Drs. Wrenn and Misse in their treatment of Ms. Taylor while at Misericordia Hospital from June 30, 2000 to July 2, 2000. (N.T. 11/19/07 pg. 53). Specifically, Dr. Janes's testimony was to focus on the second X-ray obstruction series ordered by Dr. Misse on July 2, 2000. Dr. Janes's was prepared to opine that the failure of Misse or Wrenn to review the result of the second obstruction series or perform a sigmoidoscopy procedure

prior to Ms. Taylor's discharge on July 2 was a breach in the standard of care. (Narrative Report of Dr. Janes dated 12/26/02, pg.1).

Dr. Janes offered testimony regarding the breach of standard of care, as well as the complications that the alleged breach would produce. In preparation for his testimony, Dr. Janes authored two narrative reports dated October 31, 2002 and December 26, 2002. However, Dr. Janes' reports never establish a causal link between the care and treatment of Drs. Wrenn and Misse, while at Misericordia to Ms. Taylor's death by aspiration of fecal contents during the Jefferson surgery. Dr. Janes did not proffer any testimony within the four corners, or the fair scope of his report that the care and treatment of Drs. Wrenn, Misse and Misericordia caused or increased the risk of harm to Ms. Taylor. He did offer testimony regarding the complications from the treatment she received from Drs. Wrenn, Misse and Misericordia in the form of a possible perforated colon. (Narrative Report of Dr. Janes dated 10/31/02, pg.3). However, it is uncontested that Ms. Taylor did not die from this complication. She died as a result of the colonic stenting procedure performed at Jefferson Hospital, which caused her to aspirate.

This Court ruled that neither of Dr. Janes's reports included an increased risk of harm theory and therefore Dr. Janes could not opine with regard to that theory of liability:

There is nothing in the report that says so. That's a specific theory of liability; and in order for you to prepare a defense on that, that would have had to have been part of his opinion. And it cannot be inferred, and I'm not going to allow a jury to speculate. You're bound by your reports. Okay? (N.T. dated 11/19/03, pg. 12).

Plaintiff's counsel establishes that there are two theories in this case:

...One is that the procedure at Misericordia hospital should have been done. It would have been [sic] completely cured it...

But the second theory in this case, that is in all these reports, is that by allowing her to leave the hospital, and allowing her to re-obstruct, and allowing her, then, to present at another hospital in an emergent situation, that, in addition to being a complete loss, you know, a complete causation argument, there is also the fact that he placed her from a position of a curative procedure to a position where she [Ms. Taylor] was not in an emergent situation, where the chance for that procedure being successful and not leading to complications and/or fatality were significantly increased. (N.T. 11/19/07, pg. 18-19).

He says it in the report, your Honor. Because he says that there's a procedure that would have been done at Misericordia Hospital. And then he does say that the procedure that was done later on, at that particular point in time, when she was completely obstructed, is a more significant and a more dangerous operation; and that was a result of the re-obstruction occurring, which is the basis for why he thought this women should not have left. Id.

The Court: But he doesn't say that. He has two separate theories of liability; one against Mercy [i.e., Misericordia], for not doing the procedure immediately, and two against Jefferson, for doing the incorrect procedure. But he never connects the dots. That's my problem. (N.T. dated 11/19/03 pg. 19).

In applying the test as stated in *Mitzelfelt*, Dr. Janes was required to establish a causal nexus between a breach in the duty of care by Drs. Wrenn and Misse at Misericordia Hospital and the ultimate death of Ms. Taylor. Misericordia argued that there are four theories to establish causation: (1) *res ipsa loquitur*; (2) ostensible agency; (3) factual cause or proximate cause and (4) increased risk of harm. The only two theories at issue in this matter were increased risk of harm and proximate cause. Dr. Janes, who was Plaintiff's only causational expert, did not address increased risk of harm

in his expert reports and therefore was properly precluded from opining with regard to this subject. Dr. Janes also did not opine that Drs. Wrenn's and Misse's care at Misericordia ultimately caused Ms. Taylor's death by aspiration at Jefferson Hospital four days later.

NONSUIT

This Court granted Drs. Wrenn's, Misse's and Misericordia's Motion of Involuntary Non-suit because Plaintiff offered no expert testimony, which would establish a causal link between their care, diagnosis and treatment of Ms. Taylor and her injury and death. Plaintiff argues that sufficient evidence was presented in Dr. Janes testimony to establish a causal link.

When a nonsuit is entered, the lack of evidence to sustain the action must be so clear that it admits no room for fair and reasonable disagreement. *Dion v. Graduate Hospital of Univ. of Pennsylvania*, 360 Pa. Super. 416, 520 A.2d 876 (1987); *Kelly v. Doran*, 312 Pa. Super. 286, 458 A.2d 962 (1983). In order to justify granting a nonsuit, it must appear from the plaintiff's statement that there is a complete absence of evidence legally sufficient to maintain the action. *Dion*, 520 A.2d at 876. The plaintiff must be given the benefit of all favorable evidence along with all reasonable inferences of fact arising from such evidence; any conflict in the evidence must be resolved in the plaintiff's favor. *Gorfti v. Montgomery*, 384 Pa. Super. 256, 558 A.2d 109 (1989).

In order to set forth a prima facie case of medical malpractice, a plaintiff must establish the previously mentioned four elements as stated in *Mitzelfelt*. In order to meet this burden, the plaintiff is required to provide expert testimony to establish, to a reasonable degree of medical certainty, that the acts of the physician deviated from

acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. *Id.*; see also *Chandler v. Cook*, 438 Pa. 447, 265 A.2d 794 (1970) (in malpractice cases, a jury will not be permitted to find negligence without expert testimony establishing variance from accepted medical practice); *Strain v. Ferroni*, 405 Pa. Super. 349, 592 A.2d 698 (1991) (same). An exception to the expert testimony requirement applies only where the physician's departure from the norm is so simple and obvious, it is within the comprehension of ordinary laypersons. *Chandler*, 265 A.2d at 794.

In light of the limitation of Dr. Janes's testimony to the fair scope of his report, Plaintiff failed to establish the causal aspect of a medical malpractice claim against Drs. Wrenn, Misse and Misericordia.

Defendants' argument summarizes the positions of this Court:

Mr. Mintzer: ...[T]his record is devoid of the evidence of direct link causation testimony by Dr. Janes vis-à-vis Dr. Wrenn or Misse that said, their acts or inactions at Mercy [misericordia] hospital led directly to Mrs. Taylor's death three and a half to four days later at a surgery that they could not have foreseen would be done, at a surgery that had a complication that occurred to it. That [sic] that line of causation is absent in Dr. Janes' testimony.

And that, to me, is the absolute critical aspect. And that there's nothing on the record that allows this jury to deliberate to say that there is a direct causation chain, a direct factual cause, a substantial factor, legal causation, proximate causation to the – directly to the death of Mrs. Taylor three and a half, four days later, on an unrelated surgery, and that to allow the jury to speculate would go outside their ability. They have no pretension, no specialized pretension to medical knowledge. They can't do that...

So basically, what we have here is a failure to have expert testimony linking the care and treatment at Mercy

with the actual death of Mrs. Taylor four days later. (N.T. dated 11/24/03, pgs. 24-26).

Mr. Fitzpatrick: ...Plaintiff's case is clear that this lady was going to have, after her presentation to a hospital with her bowel problems, at least two procedures...

There's no testimony anywhere in this record that says that there is an increased risk of aspiration...

With respect to that, Judge, the case, therefore, is, what did doctors Wren [sic] and Misse [sic] do? The testimony attempts to say there's a violation of the standard of care, deviation from the standard of care. And while that is suspect in itself, the testimony about what was the direct cause of that or what was the result of that is solely by the plaintiff in this case; that she was going to have some pain for three days before she went back to the hospital to have the procedures done, that she was going to have to have done, anyway. That's what they testified to.

Well, if you remember Dr. Janes' testimony, Dr. Janes specifically said that in a case like this, it was his testimony that Mrs. Taylor would have had, even if she stayed at the hospital, a colonoscopy done. That would take a day to get ready. And then she would have a biopsy, that would take up to three days to get the results of for the resection, or whatever other surgery that was going to be done.

The time period with respect to mercy is clear. There's no injury as to this. There's no cause of any problem. They decided to do the procedures outpatient as opposed to inpatient. That's all that happened here. That's what this case comes down to.

Dr. Janes is arguing they should have kept her in; and the result of that was she had pain, and Drs. Wrenn and Misse saying, "We were going to do these procedures outpatient." Three and a half days later, she's back in the hospital, anyway, and has the procedure. There's no increased risk testimony at all. Dr. Charap didn't testify at all about cause; and Dr. Janes' testimony wasn't allowed to....

Without any expert testimony to establish that Drs. Wrenn, Misse and Misericordia caused injury and the death of Ms. Taylor, Plaintiff has failed to establish a prima facie case of medical malpractice as set forth in *Mitzelfelt*.

CONCLUSION

Based on the foregoing analysis, this Court respectfully requests that the preclusion of Drs. Charap and Janes and the granting of compulsory nonsuit on behalf of Drs. Wrenn, Misse and Misericordia be upheld by the Superior Court.

BY THE COURT:

February 27, 2008

Date

ALLAN L. TERESHKO, J.

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