

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CALEAH N. FELDER, Administratrix of the :
Estate of Cornel Felder, Deceased :
Plaintiff :

v. :

METHODIST HOSPITAL - THOMAS :
JEFFERSON UNIVERSITY HOSPITAL; :
ANTHONY J. MACHIAVELLI, M.D.; and :
ANDREW H. DeMICHELE, M.D. :
Defendants :

September Term, 2008

No. 1389

Re: ANDREW H. DeMICHELE, M.D. :
APPELLANT :

SUPERIOR COURT
2524 EDA 2011

**OPINION TO THE HONORABLE
SUPERIOR COURT**

MASSIAH-JACKSON, J.

Felder Vs Methodist Hospital Thomas Jefferso-OPFLD



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Date: October 13th, 2011

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On May 16, 2007, Mr. Cornel Felder, underwent a laparoscopic procedure for removal of his gallbladder. On May 17, 2007, Mr. Felder was pronounced dead from massive intraperitoneal bleeding due to post-operative complications.

In September, 2008, the Estate of Cornel Felder commenced this litigation against his surgeon, Andrew H. DeMichele, M.D., and other medical providers. Following a one week trial in January, 2011, the jury returned a verdict in favor of the Plaintiff-Estate in the amount of \$400,000.00. Dr. DeMichele was determined to be 25% causally negligent.

On August 4, 2011, post-trial motions were denied. Judgment was entered in favor of the Plaintiff-Estate. See Court Exhibit "A", attached hereto. Dr. DeMichele filed a Notice of Appeal.

In accordance with Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure, this Court respectfully submits to the Honorable Superior Court, the **Memorandum in Support of Order Denying Dr. DeMichele's Post-Trial Motions**, dated August 4, 2011, Court Exhibit "B", attached hereto, as the reasons for the rulings and Judgment Order.

BY THE COURT:


FREDERICA A. MASSIAH-JACKSON, J.

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CALEAH N. FELDER, Administratrix of the	:	
Estate of Cornel Felder, Deceased	:	
Plaintiff	:	
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v.	:	
	:	No. 1389
METHODIST HOSPITAL - THOMAS	:	
JEFERSON UNIVERSITY HOSPITAL;	:	
ANTHONY J. MACHIAVELLI, M.D.; and	:	
ANDREW H. DeMICHELE, M.D.	:	
Defendants	:	

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AUG - 4 2011
R. POSTELL
DAY FORWARD

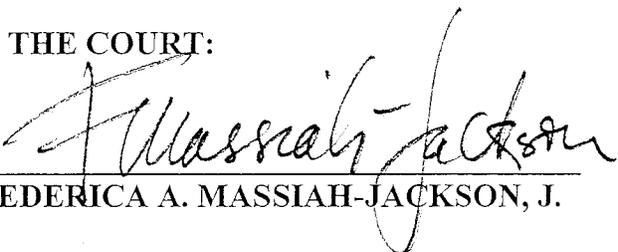
Re: ANDREW H. DeMICHELE, M.D.

JUDGMENT ORDER

And Now, this ^{4th} day of August, 2011, after consideration of the Motion for Post-Trial Relief filed by Andrew H. DeMichele, M.D., and the Plaintiff's Response thereto, and after oral argument held August 2, 2011, and for the reasons set forth in the Memorandum filed this date, it is hereby ORDERED that the Motion for Post-Trial Relief is **DENIED.**

Judgment is entered in favor of Caleah N. Felder, Administratrix of the Estate of Cornel Felder, Deceased in the amount of One Hundred Thousand Dollars (\$100,000.00), and against Defendant Andrew H. DeMichele, M.D. only.

BY THE COURT:


FREDERICA A. MASSIAH-JACKSON, J.

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Re: ANDREW H. DeMICHELE, M.D. :
: :
:

MEMORANDUM IN SUPPORT OF ORDER DENYING
DR. DeMICHELE'S POST-TRIAL MOTIONS

MASSIAH-JACKSON, J.

August 4th, 2011

A. FACTUAL BACKGROUND and PROCEDURAL HISTORY

This medical malpractice action was initiated by the Estate of Cornel Felder against Methodist Hospital (a division of Thomas Jefferson University Hospital), Anthony J. Macchiavelli, M.D. and Andrew H. DeMichele, M.D.

On May 12, 2007, Cornel Felder, age 54, was admitted to Methodist Hospital in Philadelphia. Earlier in the day, he had been drinking alcohol when he experienced abdominal pain and came into the hospital emergency room. He was diagnosed with gallstone induced pancreatitis. On May 16, 2007, at about 2:30 p.m., Dr. DeMichele, a surgeon, removed Mr. Felder's gallbladder in a laparoscopic procedure. Twenty-four hours later Mr. Felder was pronounced dead. Jefferson Hospital performed an autopsy in order to determine the cause of Mr. Felder's unexpected death. The Autopsy Report revealed the cause as "massive intraperitoneal bleeding due to post-operative complications of cholecystectomy [gall bladder removal] . . . estimated 2 liters of partly clotted blood, predominantly occupying the right upper abdominal quadrant".

During a one week trial in January, 2011, the jury heard from fact witnesses and multiple medical experts in the fields of surgery, hematology and cardiology. Defendants Dr. Macchiavelli and Methodist Hospital resolved their litigation prior to trial, however, they were listed on the verdict sheet. On January 11, 2011, the jury returned a verdict in favor of the Estate of Cornel Felder in the amount of \$400,000.00. Dr. DeMichele was determined to be 25% causally negligent.

After trial transcripts were received, a post-trial briefing schedule was set by the Court and counsel. Oral argument was heard on August 2, 2011.

The defendant surgeon, Dr. DeMichele seeks judgment notwithstanding the verdict and/or a new trial and/or remittitur. For the reasons which follow, the Motion for Post-Trial Relief is DENIED.

B. LEGAL DISCUSSION

1. Judgment Notwithstanding The Verdict Is Not Appropriate

Dr. DeMichele asserts that he is entitled to judgment notwithstanding the verdict (JNOV). This Court does not agree.

In Niles v. Fall Creek Hunting Club, Inc., 545 A.2d 926 (Pa. Superior Ct. 1988), the Superior Court commented 928-29:

“The entry of judgment notwithstanding a jury verdict . . . is a drastic remedy. A court cannot lightly ignore the findings of a duly-selected jury. Thus, in considering a motion for judgment n.o.v., the court must view the evidence and all reasonable inferences that arise in a light most favorable to the verdict winner.”

See also, Sundlun v. Shoemaker, 617 A.2d 1333 (Pa. Superior Ct. 1992); Nernberg & Laffey v. Patterson, 601 A.2d 1237 (Pa. Superior Court. 1991); Vernon v. Stash, 532 A.2d 441 (Pa. Superior Ct. 1987). JNOV is appropriate where either the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant, or, the movant is entitled to judgment as a matter of law. Somerset Community Hospital v. Allan B. Mitchell & Assoc., 685 A.2d 141, 146 (Pa. Superior Ct. 1996).

a. *The Expert Testimony Was Articulated With a Reasonable Degree of Medical Certainty.*

In order to establish liability on the part of Dr. DeMichele, the plaintiff was required to prove by competent evidence that the failure to properly investigate and evaluate Mr. Felder's platelet count was negligent and that this failure was a legal cause of the plaintiff's harm. See generally, Mitzelfelt v. Kamrin, 584 A.2d 888 (Pa. 1990); Brannan v. Lankenau Hospital, 417 A.2d 196 (Pa. 1980).

Defendant-DeMichele explained the significance of Mr. Felder's thrombocytopenia, a low blood platelet count, on Jan. 4, 2011, N.T. 158-159:

"It could mean you have an increased risk of bleeding platelets are part of your clotting cascade that allows you to clot. So when you cut yourself, platelets are part of the beginning process to help form a clot so that you don't continue to bleed. Someone with low platelet count, they're not functioning up to par because you don't have as many of them."

David Befeler, M.D. gave his opinions, as plaintiff's expert witness in surgery. He stated that Mr. Felder, a patient with thrombocytopenia, should have had his platelets monitored. The standard of care was to know the actual platelet count. Dr. Befeler opined that generalized descriptions of Mr. Felder's platelets such as, "adequate" or "clumped", were not satisfactory under the circumstances here. This patient came into the hospital with low platelet count. The count continued downward throughout the hospitalization. Dr. Befeler testified that the failure to "replace" platelets (transfusion), the failure to investigate

episodes of bleeding and stains on his bandage dressing, meant the hospital and surgeons missed the signs of internal bleeding, and caused Mr. Felder to bleed to death. This was confirmed by the autopsy reports. Befeler Video, N.T. 116-117.

Befeler Video, N.T. 63:

“Repetitive platelet counts need to be performed, such that the platelets can be assessed.

The other thing is, the patient has to be observed, his mucous membranes, so the patient has to be observed to see if there’s evidence of petechiae, which is one of the signs of -- of low platelet count, but again, it requires somebody to look at the mucous membranes, and not one person looked at the mucous membranes in the chart and identified that; that’s including the autopsy.”

Befeler Video, N.T. 77-78:

“. . . the lab should have been instructed to re-draw these in containers that will not cause platelets to clump. That’s easily arranged. . . . Because you want to know what number of the platelets are. You want to know the actual number as I indicated before, many of the events that were taking place, or could take place in the hospital that would have an effect on the platelet count, and that would include surgery, it would include administration of Heparin, it would include giving the patient medication. . . .”

Befeler Video, N.T. 202:

“[Heparin] should not have been given to a patient with thrombocytopenia and a dropping platelet count.”

There was ample evidence for the jury to conclude that the multiple deviations of the standard of care by Defendant-Dr. DeMichele who failed to monitor or evaluate his surgical patient after 2:40 p.m. on May 16, 2007, caused the pain, suffering and eventual death of Plaintiff's Decedent-Cornell Felder on May 17, 2007.

Befeler Video, N.T. 80-81:

“It’s [the platelet count] a significant drop from the initial and the pre-surgical, it is a very significant drop It has to be taken in context with the fact that he became symptomatic in terms of increasing abdominal pain during that period of time, during the morning of the 17th. I think it has to be taken in context with that, that there were significant findings.

He required multiple doses of narcotics, and even that did not control his pain. I think taken in context of the two of them, that’s a very significant fall.”

Befeler Video, N.T. 97:

“Because in general, we either close the sites, sew up the sites, deal with the sites so that they do not leak.

If they’re leaking, it means they are bleeding from a port, which is a significant event. It’s a significant event in a patient who’s not thrombocytopenic.

If, in a patient who is thrombocytopenic, it’s possibly a very significant event, and needs to be evaluated by a surgeon.”

The jury accepted Dr. Befeler’s clear and unequivocal opinion when he described the ultimate result of the failure of the defendant surgeon to monitor his patient.

Befeler Video, N.T. 114-115:

“Massive intra-peritoneal bleeding in a patient status post-cholecystectomy ‘Intra-peritoneal bleeding estimated two liters of partially clotted blood, predominantly occupying

the right upper quadrant.’ Two liters is two Pepsi bottles, good-size Pepsi bottles, or one giant Pepsi bottle, essentially least a third or more of a blood supply, or a total blood count in the abdomen. . . . He bled to death.”

In Vicari v. Spiegel, M.D., 936 A.2d 503, 510-511 (Pa. Superior Ct. 2007), the Superior Court held that an expert’s testimony must be viewed in its entirety. Carrozza v. Greenbaum, M.D., 866 A.2d 369 (Pa. Superior Ct. 2004).

Finally, Defendant-DeMichele asserts in his Post-Trial Brief at page 15, that:

“Plaintiff’s expert, Dr. Befeler, failed to present credible testimony that his opinion was supported either by the facts of record, or by a scientific basis.”

Challenges to the weight and credibility of a witness’ testimony are factual issues for a jury’s consideration. Dr. Befeler was vigorously cross-examined by two very experienced defense counsel. The jury considered the challenges to the facts and data upon which Dr. Befeler’s opinions were based. They had the opportunity to weigh the expert’s opinions with the defense expert testimony in areas of surgery, cardiology and hematology. See, Rules 703 and 705 of the Pennsylvania Rules of Evidence. The jury’s decision is supported by the record.

b. Dr. DeMichele is Liable for the Negligent Actions of His Partner.

In the particular facts of the case at bar, plaintiff’s expert Dr. Befeler opined that there were significant signs of internal bleeding following the May 16, 2007 laparoscopic surgery. Dr. Befeler testified that in addition to the drop in the platelet count, Mr. Felder’s hemoglobin dropped; he bled through his surgical wound and dressing onto the sheets; later

blood stained his dressings. Additionally, he endured extreme pain and discomfort from 2:00 a.m. and throughout the morning of May 17, 2007 without relief from doses of intravenous narcotics and morphine; with ongoing nausea and vomiting. Mr. Felder's abdomen was distended and swollen on the morning of May 17, 2007. **None** of the defendants evaluated or took any action in response to the continuing drop in platelets and the signs that the thrombocytopenia was worsening as Mr. Felder exhibited signs of internal bleeding.

After Dr. Lawrence came on duty at about 7:00 a.m., May 17, 2007, to cover Dr. DeMichele's patient, a doctor ordered an anti-coagulant medicine, Heparin, to be administered. This was done at 8:00 a.m. Dr. Befeler indicated that rather than "oozing slowly on the inside", Video, N.T. 94, the Heparin caused Mr. Felder to start actively bleeding. Video, N.T. 168-169. Dr. Befeler opined at Video, N.T. 202:

"[Heparin] should not have been given to a patient with thrombocytopenia and dropping platelet count."

Dr. Befeler told the jury at Video, N.T. 207, that by 2:30 p.m. in the afternoon of May 17, 2007,

"[Mr. Felder] bled to death. Clearly, he bled to death and the records absolutely document it."

Defendant-DeMichele argued pre-trial and at trial, that even assuming arguendo the administration of Heparin was a negligent act, he (Dr. DeMichele) can not be held liable for the actions of his "colleague" in the Limited Liability Company (LLC) professional practice.

In the defendant's Post-Trial Brief at page 30, he states:

“Following Dr. Befeler's testimony, Dr. DeMichele moved for a Nonsuit, because Dr. Befeler did not offer testimony causally connecting the care rendered by Dr. DeMichele to the patient's death.

Dr. Befeler testified that the patient did not allegedly begin to bleed until sometime after 0800 on May 17, 2007. According to Dr. Befeler, the trigger for this alleged bleed was the administration of subcutaneous Heparin at 0800 on May 17, 2007, and it was undisputed that Dr. DeMichele was no longer involved in the care of the patient as of May 17, 2007; the patient was being followed by Dr. Lawrence. It was further undisputed that Dr. DeMichele neither ordered, nor administered the Heparin to the patient. It is additionally undisputed that Plaintiff did not file suit against either Dr. Lawrence, or Mid-Atlantic Surgical Practice, L.L.C., the practice group in which both Dr. DeMichele and Dr. Lawrence practice.”

The plaintiff's two-prong response is persuasive. JNOV is denied.

First, Plaintiff-Felder argues that Dr. DeMichele is statutorily liable for the acts of other members of his medical practice. Dr. Lawrence, the surgeon on duty at 8:00 a.m., May 17, 2007, is a professional partner of Dr. DeMichele. In Plaintiff's Post-Trial Response Brief at page 19, it states:

“15 Pa. C.S. §8922. Liability of members.

(a) General rule.-- Except as provided in subsection (e), the members of a limited liability company shall not be liable, solely by reason of being a member, under an order of a court or in any other manner for a debt, obligation or liability of the company of any kind or for the acts of any member, manager, agent or employee of the company.

The above limits liability to the *company* as a whole and does not fall upon a member who was not negligent. However, in medical liability cases, the entity is deemed to be a partnership under another section of the statute:

(f) Medical professional liability.-- A professional company shall be deemed to be a partnership for purposes of section 811 of the act of October 15, 1975 (P.L. 390, No. 111), known as the Health Care Services Malpractice Act.”

The plaintiff comments the MCARE Act, at 40 Pa. C.S. §1301.101 et seq., did not render subsection (f) of §8922 moot, nor was it expressly repealed.

Next, and most significantly, due to the conduct and particular circumstances of this case, specifically the misrepresentations made by Defendant-DeMichele to plaintiff and counsel, it has been the plaintiff’s position that Dr. DeMichele is bound by the negligent acts of Dr. Lawrence, per the Revised Uniform Partnership Act, 15 Pa. C.S. §8328(a) and (b), Partnership By Estoppel. See generally, Post-Trial Hearing Transcript, dated August 2, 2011.

In Plaintiff’s Post-Trial Brief at pages 19-22, the argument is made that Dr. DeMichele **at all times prior to the run-date of the statute of limitations affirmatively misrepresented his professional relationship with Dr. Lawrence.**

- When Defendant-DeMichele saw his name was incorrectly certified on hospital records as the medical caregiver for Mr. Felder on May 17, 2007, Dr. DeMichele failed to promptly and timely advise the Plaintiff-Estate or counsel of the mistake. See Rule 4007.4(2) of the Pennsylvania Rules of Civil Procedure.

- Plaintiff's position, which is compelling, is that Dr. DeMichele deliberately concealed his true professional relationship with Dr. Lawrence, Pages 19-22:

“They practice together, view themselves as ‘partners’ in an ‘attending group’, interchanging patients as a matter of conference, and hold themselves out as such -- thereby, misleading patient and their attorneys into believing they are closely-related, agents acting for each other and for a common benefit -- the classic fact pattern constituting a partnership by estoppel.”

See also, Jan. 5, 2011, N.T. 150-155; Murphy and Slota v. Burke, 311 A.2d 904 (Pa. 1973).

- In his answers to interrogatories, Dr. DeMichele provided misleading responses indicating that he was personally involved in Mr. Felders' care on **May 16 and 17, 2007**.

- When Dr. DeMichele learned of the autopsy findings in May, 2007, he shielded his professional practice and his partners by going so far as to **not** name them on his curriculum vitae which he forwarded to Plaintiff-Estate and counsel.

Plaintiff-Estate and counsel reasonably and justifiably relied on these falsehoods and misrepresentations. Discovery responses were incomplete, misleading and not supplemented. Defendant-DeMichele did know and intended for Plaintiff-Estate to rely on the answers to interrogatories and certified medical records and other pre-trial discovery which were presented.

When Defendant-DeMichele's deposition was taken in March, 2010, he continued to mislead by repeatedly describing Dr. Lawrence as his “partner”. It was in March, 2010, for the first time, that Dr. DeMichele admitted that the certified hospital records were not

correct. After the statute of limitations had run, Dr. DeMichele asserted that he can not be found causally liable due to Dr. Lawrence's actions as they related to Mr. Felder's death. Plaintiff-Estate's reliance on the false records and misleading discovery responses and the material omission on the curriculum vitae caused irreparable damage to the plaintiff.

Dr. DeMichele stated that he was surprised when he read the Final Cause of Death in the Thomas Jefferson University Hospital Autopsy Report. Jan. 4, 2011, N.T. 204-216. Dr. DeMichele testified that he knew of the increased risk of bleeding in a patient such as Mr. Felder. He told the jury that he did not remember if he told the surgical residents to be vigilant about Mr. Felder because of the possibility of post-operative bleeding. Jan. 4, 2011, N.T. 185. Dr. DeMichele testified that he does not remember if he told Dr. Lawrence to be aware of Mr. Felder's risk of bleeding. Jan. 4, 2011, N.T. 188. Dr. DeMichele denied that he was told by hospital staff about Mr. Felder's extreme pain or bleeding on the sheets during the evening of May 16, 2007. This defendant also disputes the hospital chart and notes. Although the hospital chart indicates "surgery was aware", Dr. DeMichele told the jury he was not aware. Jan. 4, 2011, N.T. 192, 195.

It has become apparent that Dr. DeMichele's lapses in professional care and his failure to evaluate and manage the care for his patient after the May 16, 2007 operation, misled not only Dr. Lawrence but also misled the family of the decedent and their counsel, to the detriment of Cornel Felder.

2. A New Trial Is Not Appropriate

Defendant-DeMichele contends that he is entitled to a new trial because he was prejudiced by a demonstration presented by plaintiff's counsel during closing argument. Even assuming arguendo that plaintiff's closing demonstration was somehow inappropriate or mis-leading, the Trial Court provided curative instructions to the jury which were accepted by the defense. Defense counsel specifically objected to a suggestion that the color of the two liters of fluid found in Mr. Felder's abdomen during the autopsy was the same color as the fluid in the two liters bottle of Pepsi. Jan. 10, 2011, N.T. 121. The Trial Court stated at N.T. 122:

“I can tell the jury I don't want them to think the color of blood is the same color as Coca Cola.”

Defense counsel agreed, stating at N.T. 122, “I accept that your Honor.” The cautionary instruction, as accepted by defendant, was provide to the jury at N.T. 129.

There is no issue preserved for post-trial review. Harman v. Borah, 756 A.2d 1116 (Pa. 2000).

3. The Verdict Award Does Not Shock This Court's Conscience

Defendant-DeMichele contends that the verdict award is excessive and should be reduced by the Court and/or vacated as against the weight of the evidence. The record does not support these contentions.

The parties agreed that damages could be recoverable under the Survival Act, and the jury was charged per the Pennsylvania Suggested Standard Civil Jury Instruction 6.19, at Jan. 10, 2011, N.T. 148:

“Next, under the Survival Act, the damages recoverable are as follows: The plaintiff is entitled to be awarded an amount you believe will fairly and adequately compensate for physical pain, discomfort and distress that Cornel Felder endured from the time you find that he suffered due to any medical negligence of the defendants to the moment of his death.”

The test for remittitur is well established. See generally, Harding v. Consolidated Rail Corporation, 620 A.2d 1185 (Pa. Superior Ct. 1993); Kemp v. Philadelphia Transportation Co., 361 A.2d 362 (Pa. Superior Ct. 1976).

Here, the jury awarded the Plaintiff-Estate \$400,000.00. Dr. DeMichele was determined to be 25% causally liable. The jury’s decision reflects ample evidence of the pain, suffering and discomfort of Cornel Felder’s post-operative course . . . that is, bleeding on the sheets, severe pain which was not responsive to morphine or intravenous narcotics, weakness, guarding and rebound. The also jury heard how Mr. Felder spoke on the telephone to his daughter on the morning of May 17th. Jan. 6, 2011, N.T. 44-47, 57-60.

In Stoughton v. Kinzey, 445 A.2d 1240, 1242 (Pa. Superior Ct. 1982), the Superior Court held that when a plaintiff’s verdict is supported by the evidence, an order of the court modifying it is an abuse of discretion:

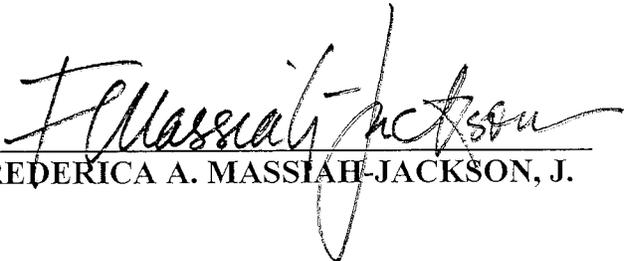
“The issue of the amount of damages that a person is to be awarded for pain and suffering, both past and future is primarily a jury question.”

There are many tangible and intangible items of damages properly considered by the jurors under the Survival Act. The jury recognized that this Defendant was not solely responsible for Mr. Felder's death. This Court concludes that the jury's verdict was fair, thoughtful and reasonable.

C. CONCLUSION

For all of the reasons set forth above, the Motion for Post-Trial Relief filed by Andrew H. DeMichele, M.D. is **DENIED**. Judgment will be entered in favor of plaintiff Caleah N. Felder, Administratrix of the Estate of Cornel Felder, Deceased in the amount of \$100,000.00.

BY THE COURT:


FREDERICA A. MASSIAH-JACKSON, J.