

IN THE COURT of COMMON PLEAS of PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT of PENNSYLVANIA

CIVIL TRIAL DIVISION

MALCOLM GRAHAM , a minor,	:	
by and through his Parent and	:	
Natural Guardian, Joanne Graham	:	
and	:	
JOANNE GRAHAM , in her own right	:	
Plaintiffs	:	
v.	:	
	:	DECEMBER TERM, 1994
HOWARD M. SNYDER, M.D.	:	
and	:	No. 816
CHILDRENS' SURGICAL ASSOCIATES	:	
Defendants	:	

OPINION of the COURT

OCTOBER 20, 1999

GOODHEART, J.

INTRODUCTION

This medical malpractice action arose from allegedly negligent care rendered to the minor Plaintiff, Malcolm Graham, by Howard M. Snyder, M.D., his urologist, in the summer of 1992.

The minor Plaintiff was born in December of 1983 with a seriously malformed urinary tract, and was diagnosed shortly thereafter as suffering from a condition known as Posterior Urethral Valve Reflux (“**PUV**”), which obstructs the passage of urine out of the body.

Though urine itself is sterile, the continued presence of unvoided urine in the upper urinary tract tends to foster urinary tract infections, which can lead to kidney damage.

After the minor Plaintiff suffered several such infections early in his life, Dr. Snyder prescribed a wide-spectrum antibiotic, Bactrim, to reduce the likelihood of future infections; the

minor Plaintiff continued to take Bactrim until July 6, 1992, when Dr. Snyder decided to discontinue it; three and one-half weeks later, Malcolm was hospitalized with a serious urinary tract infection, which spread to – and destroyed – his kidneys. He has already had one kidney transplant, and will likely require several more – or regular dialysis – in the years to come.

I granted a compulsory non-suit in favor of Childrens' Surgical Associates (“CSA”) before the case went to the jury; the jury deliberated for several hours, and returned a verdict against Dr. Snyder in the amount of \$15,000,000.00.

The Plaintiffs moved for the addition of delay damages, and to remove the compulsory non-suit entered in favor of CSA; Dr. Snyder moved for a *remitter*, or in the alternative, for a New Trial, and to mold the verdict . I granted the Motion for Delay Damages (the correctness of the computation had been conceded), denied all of the other Motions, and entered judgment on the verdict on September 1, 1999. Both parties timely appealed.

Dr. Snyder's brief discusses four alleged bases upon which post-trial relief should have been granted; the Plaintiffs' brief is confined to a request for removal of the non-suit.

Each issue will be discussed here, in turn.

DISCUSSION

I. THE REFERENCE BY PLAINTIFFS' COUNSEL TO A SPECIFIC RANGE OF POSSIBLE JURY VERDICTS, WAS NOT NECESSARILY IMPROPER, AND IN ANY EVENT WAS CURED BY the CAUTIONARY INSTRUCTION GIVEN to the JURY

During his closing argument, the Plaintiffs' counsel wrote “\$498,000.00 to \$13,000,000.00” on an easel visible to the jury, and told the jury :

“just give [the Plaintiff] this, if you think it's too much [indicating]; just give him that. Just take care of him.”

(N.T. 12/4/98; P. 5.51).

Dr. Snyder's counsel timely objected to these remarks, and I then cautioned the jury as follows :

“Before Mr. McGilvery [Dr. Snyder's attorney] speaks, after you left there was an objection to something that occurred. Mr. Rothweiler circled some numbers on the board, indicating what you should give the Plaintiff. Mr. McGilvery could not possibly see what was being circled because he was behind the panel. I couldn't see it. Had I known what he circled, I would have stopped him right then and there. From where I am, I didn't know what numbers he was encircling.

“Under Pennsylvania law, you are not permitted to state how much money you want; except in a situation [such as where] you lend me money, \$1,000.00, and I don't pay you back; you can sue me for \$1,000.00 and tell that to the jury. If I damage your car and cause you \$1,000.00 worth of damage, you can sue me for the \$1,000.00. But in matters involving personal injury, which this claim is, a personal injury claim resulting from what is alleged to be medical carelessness or medical malpractice, you are not permitted to state specifically how much you want. So totally disregard what Mr. Rothweiler did. And don't hold it against his client. He wasn't permitted to do it, so ignore it totally.”
(N.T. 12/4/1998, Pp. 5.53-5.54)

As the Superior Court observed in Harvey v. Hassinger, 315 Pa. Super. 97; 461 A.2d 814 (1983) :

“Whether a lawyer's argument to the jury transgresses the bounds of legitimate advocacy is primarily for the discretion of the trial judge, and an appellate court will not interfere with the exercise of this discretion, unless the record manifests that it was clearly abused. *Abrams v. Philadelphia Suburban Transportation Company*, 438 Pa. 115, 119, 264 A.2d 702, 704 (1970).

Moreover, the law expressly grants broad discretion [over the grant of a new trial] to the trial judge as he has refereed the courtroom battle and has a familiarity with the proceedings that cannot be achieved by one who peruses the printed page. Harvey, *id.*

The fact that the Plaintiffs' counsel did not ask for a specific amount of damages for pain and suffering – the passage quoted above refers to the minor Plaintiff's estimated future medical

bills, in amounts supported by the evidence of record – also militates against the grant of a new trial.

As Mr. Justice Roberts observed, in his dissenting opinion in Atene v. Lawrence, 456 Pa. 541; 318 A.2d 695 (1974) :

“It is commonplace that counsel may not name a specific dollar figure when asking the jury to return damages for pain and suffering. *Bullock v. Chester & Darby Telford Road Co.*, 270 Pa. 295, 113 A. 379 (1921); *Ruby v. Casello*, 204 Pa. Superior Ct. 9, 201 A.2d 219 (1964). Here, however, counsel did not ask for a particular dollar amount. He simply referred to properly-admitted testimony that defense witnesses had been paid large sums for their pretrial efforts and court appearances¹.” Ibid.

Similarly, in Bullock v. Chester & Darby Telford Road Company, 270 Pa. 295; 113 A. 379 (1921), Mr. Justice Walling acknowledged that counsel “...may properly call the jury's attention to what the evidence shows...”, and in Rider v. York Haven Water & Power Co., 255 Pa. 196, at 200 (1916), found no error in similar remarks of counsel to “...justify setting aside the verdict. He merely called the jury's attention to the amount of damages which the evidence for plaintiff indicated he was entitled to recover, which is entirely different from informing the jury of the amount claimed in the statement.”

Here, Dr. Snyder's counsel made a timely objection, in response to which I promptly instructed the jury to disregard counsel's reference to a particular verdict amount, but even so, a reference in closing argument to facts of record -- even if they tend to suggest that a verdict for a particular amount of special damages would be appropriate -- is not necessarily improper.

¹ Justice Roberts felt that Plaintiff's counsel was entitled to remind the jury of evidence showing that the Defendants had already spent significant sums defending the case, and to thereby suggest that an appropriate verdict for his clients would be measured accordingly.

II. THE REFERENCE BY PLAINTIFFS' COUNSEL, IN CLOSING ARGUMENT, TO the DEFENDANT'S FAILURE to ORDER a VCUG TEST ON THE MINOR PLAINTIFF BEFORE HE DISCONTINUED BACTRIM was SUPPORTED by Dr. LIEBERMAN'S EXPERT TESTIMONY

The Defendant's next assignment of error arises from the following remarks made by Plaintiffs' counsel during closing argument :

“Why didn't he do that test [the VCUG] on July 6, 1992 [the day that he discontinued the minor Plaintiff's Bactrim] ? He could have done the test then. If he was unsure about the reflux, he could have done the test then.... He should have done it on July 6, 1992.” (N.T. 12/4/1998; Pp. 5.31-5.32).

The Defendant contends that these comments were unsupported by the evidence. The Defendant is incorrect.

On December 1, 1998, the Plaintiff's expert, Dr. Lieberman, was asked whether it would be appropriate to discontinue a PUV patient's Bactrim without first testing for reflux (with a VCUG test). His answer was “No. In my view, it would be a very important factor that one would need to know [before] making [that] decision.” (N.T. 12/1/1998, P. 2.73)

No “magic words” are necessary to enable a jury to determine that failure to perform a “very important” test before discontinuing antibiotic therapy is a breach of the applicable standard of care; because counsel's remarks were supported by the testimony of Dr. Lieberman, this assignment of error is meritless.

III. THE TESTIMONY of the PLAINTIFFS' WITNESSES WAS PROPER

A. Nurse Patterson's Testimony was not Hearsay

One of the Plaintiffs' expert witnesses, Nurse Margaret Daly, an expert in rehabilitative nursing care, was unavailable to testify at trial due to an unspecified medical condition. The

Plaintiffs instead called her colleague, Nurse Terri Sue Patterson as an expert in that field.

The Defendant objected, not to the substitution *per se*, but on the basis that testimony from Nurse Patterson – who had not signed the expert report – would be hearsay.

After reviewing Nurse Patterson’s testimony – including that on her qualifications, in which she specifically testified to familiarity with the report and its methodology, and her direct involvement in updating the file for trial -- I am convinced that Nurse Patterson was sufficiently qualified to testify on the subject in her own right.

The mere fact that Nurse Patterson relied upon Nurse Daly’s report as a partial basis for her testimony does not render Nurse Patterson’s testimony hearsay; indeed, given Nurse Patterson’s testimony that “nothing leaves the office” without her approval, it is clear that Nurse Patterson was doing more than simply mouthing the words that Nurse Daly had written. Under the circumstances, the admission of her testimony was not error.

B. Joanne Graham

Most of the questions asked of Ms. Graham sought her first-hand observations of changes in her son at various times during his course of treatment. The few questions that grossly overstepped the bounds of lay testimony were timely objected to, and the objections made were sustained. The remaining questions cited in the Defendant’s brief, while perhaps borderline-objectionable, produced inconsequential answers.

There is thus no issue with regard to this witness’ testimony.

C. Justin Taylor and Afiya Watkins

No objection was made at trial to the testimony of Justin Taylor, the minor Plaintiff’s “best

friend”, nor to the testimony of the minor Plaintiff’s half-sister, Afiya Watkins. Accordingly, any assignments of error based upon the admission of their testimony are waived. Bell v. City of Philadelphia, 341 Pa. Super. 534; 491 A.2d. 1386 (1985). Even so, Mr. Taylor’s and Ms. Watkins’ testimony was appropriately based upon their first-hand observation of the minor Plaintiff, and even if not particularly weighty under the circumstances, was surely admissible.

IV. THE AMOUNT of the VERDICT was not INAPPROPRIATE

It cannot be said that the amount of the verdict in this case was excessive. The high end of the range of projected medical expenses, \$13,000,000.00, is not particularly out-of-line with the \$15,000,000.00 verdict, nor – if this jury believed that Dr. Snyder was fully responsible for Malcolm Graham’s medical condition (as it was certainly entitled to do based upon the evidence presented at trial) – is a multi-million dollar verdict inconsistent with the pain and suffering that Malcolm has experienced since July of 1992, and that he will continue to live with for the remainder of his life.

Remittiturs are quite rare in Pennsylvania’s courts. When a jury verdict is excessive, the correct remedy is usually a new trial on damages. Here, however, the amount of the verdict does not shock my conscience, and I will therefore not disturb the jury’s decision.

V. ENTRY of a COMPULSORY NON-SUIT as AGAINST CSA was PROPER

CSA was made a defendant in this action on a theory of *respondeat superior*. However, Dr. Snyder’s testimony made it perfectly clear that CSA was not itself engaged in the practice of medicine, and that it neither controlled nor directed Dr. Snyder’s professional efforts :

“Q. You had mentioned that CSA performs a billing function ?

A. Yes.

Q. And it's a not-for profit corporation ?

A. Yes

Q. It's not a partnership; is that correct ?

A. No, not in the true sense of a partnership.

Q. And that corporation that performs that billing function, does it tell you how to practice medicine ?

A. No.

Q. Does it direct how you practice medicine ?

A. No.

Q. Does it control you in the practice of medicine ?

A. No."

(N.T. 12/3/98 [Snyder volume], Pp. 136-137)

Given the above, the Plaintiffs could not – and did not – show that Dr. Snyder was acting as the agent of CSA; without such a showing, CSA could not be held liable to the Plaintiffs, and the entry of a compulsory nonsuit was both appropriate and mandated by the evidence.

CONCLUSION:

Dr. Snyder has not shown the existence of error at trial to justify disturbing the jury's verdict; the Plaintiffs established no basis upon which the compulsory non-suit entered as against Defendant CSA should be removed. The judgment in this case should therefore be affirmed.

BY THE COURT:

GOODHEART, J.