SUPERIOR COURT
OF THE
STATE OF DELAWARE

JAMES T. VAUGHN, JR.
PRESIDENT JUDGE

KENT COUNTY COURT HOUSE
38 THE GREEN
DOVER, DELAWARE 19901

April 7, 2010

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Re: Henry v. Fisher, et al.
C.A. No. 03C-07-009

Dear Counsel,

The defendant has moved for summary judgment. As I noted at the motion hearing, I wanted to further consider both the parties' arguments and the deposition of the plaintiff's expert before making my ruling. I have done so, and it is my conclusion that the defendant's motion for summary judgment must be denied.

As this is a medical malpractice case, the plaintiff's allegations must be supported by expert testimony in order to establish negligence and causation.[1] The plaintiff's medical expert must provide direct testimony demonstrating the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injuries.[2] The defendant has moved for summary judgment based upon his contention that the plaintiff has failed to comply with this requirement. The plaintiff disagrees.

The plaintiff has identified Dr. H. Robert Levin, D.M.D. as an expert in this case. In Dr. Levin's expert report, he opined that "the real problem is that when the

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[1] 18 *Del. C.* § 6853(e).

[2] *Rayfield v. Power*, 2003 WL 22873037, at *1 (Del.).

patient called with worsening symptoms, Dr. Fisher refused to prescribe [an antibiotic], displaying not only negligence, but a lack of compassion."[3] In addition, Dr. Levin reported that while the extraction was performed properly, Dr. Fisher "was negligent in recognizing the need for antibiotic supplementation for [the patient], both at the time of the extraction, and, more particularly, on each of the subsequent five days following the extraction, and that this failure to do so directly caused the patient's morbidity, inconvenience, pain and suffering."[4] Dr. Levin's deposition testimony builds upon his report:

> Q: Would you believe that if there was a simple extraction of tooth 17 that occurred on Friday afternoon, if a dentist or oral surgeon received a phone call the next day indicating somebody had [a fever, continuous and increasing pain and swelling on the left side of the face and jaw], what do you believe the standard of care would have required?
>
> A: I think they should have been seen and I think that she probably should have been given an antibiotic at that time.
>
> ***
>
> Q: Do you believe or have an opinion as to whether or not the patient's ultimate course would have differed had she been given an antibiotic immediately?
>
> A: In all probability, yes.
>
> Q: In all probability would her outcome have been more favorable?

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[3] Def. Mot. Summ. J., Exhibit A.

[4] *Id.*

> A: Yes.
>
> Q: Do you hold that opinion even though, in retrospect, Clindamycin might not have been effective against the infectious agent?
>
> A: Yes.[5]

After drawing the appropriate inferences in the plaintiff's favor, I conclude that the expert's report and deposition provide a sufficient basis for a jury to find both negligence and causation. The plaintiff has identified an expert, provided an expert report, and the expert has been deposed regarding the standard of care, the alleged breach of care, and the cause of the plaintiff's injuries. In particular, Dr. Levin identified the standard of care (the plaintiff should have been seen and given an antibiotic on Saturday), the alleged deviation from that standard (the plaintiff was not seen or given an antibiotic on Saturday), and that the breach caused the plaintiff's injuries (the plaintiff's outcome would have been better if she had been given an antibiotic on Saturday).[6] While I pass no judgment on the merits of the expert's opinion, his opinion is sufficient enough to allow the plaintiff's case to survive summary judgment.

At the motion hearing, the defendant raised two other bases for summary judgment. First, the defendant argued that he should not be held liable for any

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[5] Dr. Levin Dep. Tr. at 71-72.

[6] *See Simmons v. Bayhealth Med. Ctr., Inc.*, 2008 WL 2059891, at *3 (Del.) (holding that the minimal evidentiary standards of § 6853 were satisfied when the expert identified the standard of care and opined that the medical center deviated from it). The cases cited by the defendant in his motion are distinguishable from the case *sub judice*. In both cases, the court granted summary judgment when the plaintiff, who was alleging negligence, failed to identify an expert, and therefore did not provide *any* expert testimony.

damages that were caused by the subsequent, and allegedly unnecessary, surgery. I conclude that this argument goes to the issue of proximate causation and should therefore be presented to the jury.[7] Second, the defendant argued that summary judgment is appropriate because the plaintiff did not provide an expert on damages. This issue, to the extent that it is an issue, may be dealt with at trial.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[7] *Manerchia v. Kirkwood Fitness and Racquetball Clubs, Inc.,* 2010 WL 1114927, at *2 (Del.); *See* Del. Super. P.J.I. Civ. § 21.3 (2000) revised (2003); *See also* 22 Am. Jur. 2d Damages § 246.