IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ELIZABETH I. HARTMAN,	:	
	:	**C.A. No: K14C-01-027 RBY**
Plaintiff,	:	
	:	
v.	:	
	:	
ORTHOPAEDIC ASSOCIATES OF SOUTHERN DELAWARE, P.A., a Delaware corporation, and WILLIAM L. PFAFF, M.D., Individually,	:	
	:	
Defendants.	:	

Submitted: February 24, 2015
Decided: February 27, 2015

Upon Consideration of Plaintiff's
Motion in Limine
GRANTED

Upon Consideration of Defendants'
Motions in Limine
GRANTED IN PART and DENIED IN PART

ORDER

Douglas B. Catts, Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiff.

John A. Elzufon, Esquire, Elzufon Austin Tarlov & Mondell, P.A., Wilmington, Delaware for Defendants.

Young, J.

DECISION

The various matters, presented to the Court as Motions in Limine, will be addressed separately, but all in this single Order, so as to provide timely responses to counsel in preparation for trial commencing on April 13, 2015.

I. Motion to Declare that a Surgeon who makes a Decision which is Supported by Peer Reviewed Literature has Acted within the Required Standard of Care as a Matter of Law

The granting of this Motion, as configured by counsel, would be tantamount to a summary judgment in favor of the Defendants in this case. That is, Defendants argue that, since Defendant Orthopaedic Associates has only vicarious liability from Defendant Pfaff's treatment, and since Dr. Pfaff must, as a matter of law, be found not to be negligent, judgment for Defendants must be rendered.

The reason propounded, to support the demand that Defendant cannot be found negligent, is that certain peer reviewed literature could be read to indicate that processes – essentially followed by Defendant – are appropriate in the performance of the surgical procedure undertaken by Defendant. That being the case, Defendants say, judgment in their favor is appropriate, citing to *Riggins vs. Mauriello*, (Del. Supr. 1992) 603 A.2d 827 at 830-831.

The *Riggins* case involved the language of a jury instruction. Ultimately, it reversed a jury finding on behalf of the physician. The case held that "there is sufficient evidence upon this record to support Dr. Mauriello's defense," sending the case back for a new trial. Far from finding that medical testimony of experts (let alone excerpts from treatises) in favor of the physician will preclude going to

trial, *Riggins* merely recognizes that both sides have legitimate arguments.

So, in this case, with expert testimony present on each side of the argument, the case will not be terminated on a finding as a matter of law.

Defendant's Motion on this issue is **DENIED**.

II., III. & IV. Motion to Preclude Punitive Damages, to Prevent their being Submitted to the Jury, and to the Admission of "Expert" Testimony Regarding them

The matter of the submission of a claim to the trier of fact is originally, a matter for the decision of the Court. That is, if, upon review of the evidence, the circumstances do not justify submission of a question of punitive damages, then the issue is foreclosed as a matter of law.[1]

In response to Defendants' Motions, Plaintiff has relied upon certain pieces of testimony from her experts, Dr. Fedder and Dr. Zuccaro. They, respectively, have said:

> (1) "... once you have evidence...that it's abnormal...you are obligated to take it out. If you don't, then this concept that you're willful or reckless, I think, does hold true. It violates the standard of care..."
>
> (2) "What I was referring to as far as his recklessness in the case is that he basically had missed opportunities where he could have prevented an injury...He chose not to remove it. Therefore, I think he was reckless in that case and breached the standard of care."

[1] *Stein v. Diamond State Telephone Co.*, Del. Super., 146 A. 737 (1929); *Jardel Co., Inc. vs. Hughes*, Del. Supr., 523 A.2d 518 (1987).

It must be recognized as axiomatic that physicians are not trained in the nuances of legal language distinction. Hence, the mere use by physician of the words "you're wilful or reckless" and "recklessness" is of small consequence. The issue is as described at length in the *Jardel* case, which reversed an award of punitive damages, indicating that the punitive issue should not have been submitted to the jury. So, we look here to see if the actions of Defendant, viewed in a light most favorable to Plaintiff, could present a case where a reasonable jury could find punitive damages appropriate.

There is evidence that Defendant Pfaff, in completing a surgical procedure to Plaintiff's back, utilized a surgical screw at the L-5 area to stabilize the resultant process. Plaintiff alleges that the screw was misplaced, was belatedly recognized as such, and was left without repair for an improper length of time. The experts for Plaintiff have opined (not without contradiction by Defendants' experts) that that treatment breached the standard of care to which Defendant should be held; and that, as noted, the conduct was "reckless", or in one reference "wilful."

In a consideration of this, we must look first to 18 *Del. Code* § 6855, the statute specifically addressing punitive damages in medical malpractice cases, which this is, of course. That statute permits a submission of a punitive damage claim to a jury only "if it is found that the injury complained of was maliciously intended or was the result of wilful or wanton misconduct."

To an extent, it could be argued, that language begs the very question being addressed. It does, however, at the very least, make clear that, in medical malpractice actions, in order to present a punitive claim, very high levels of

inappropriate actions are required to warrant such a submission. Pursuant to this statute, a failure to show that a doctor acted with deliberate indifference to the patient's health precludes jury consideration of punitive damages.[2] Notably, in this case, the requirement is not an intentional or deliberate decision not to remove a screw. It requires an intentional or deliberate indifference to Plaintiff's health. Those are very distinct issues.

The "wilful" nature was attributed to Defendant's deciding not to remove the screw immediately. That is, because Defendant knew the screw was where it was and he deliberately elected not to remove it immediately, his action was "wilful." In context, the comment certainly appears to be that his action was deliberate, and there seems to be little controversy on that point. On that same basis, the comments that the action was reckless are made.

Even without reference to the position of Defendant, supported by treatises, that those very actions were not negligent, it is difficult to imagine any theory under which they could be considered subject to punitive claims. As *Jardel* delineates, "the imposition of punitive damages has been sanctioned only in situations where the defendant's conduct has been *particularly reprehensible*;" which is, in the Court's view, the definition of reckless. Nothing in the testimony of Plaintiff's experts suggests that either viewed this Defendant's conduct as "particularly reprehensible." The *Jardel* case goes on to describe the necessity of an act "accompanied by malice," requiring punishment for "outrageous conduct." "Mere inadvertence," *Jardel* holds citing the Restatement of Torts (§ 908,

[2] *Pattanayak vs. Kahn*, Del. Super., LEXIS 358 (2005).

comment b), is insufficient. Emphasizing the point, the Court held that it "is not enough that a decision be wrong. It must *result from* a conscious indifference to the decision's foreseeable effect." For punitive damages to be considered, the conduct must support a finding of the described reprehensible activity. It is particular conduct, which is not some form or degree of negligence.

Nothing in the review of the salient facts in this case can support the submission of this case to the jury for the consideration of punitive damages.

Accordingly, Defendants' Motion to preclude punitive from being submitted to the jury is **GRANTED**.

For the reasons above stated, Defendants' other Motions regarding reference to or argument on or testimony about punitive claims are **GRANTED**.

Additionally, for the reasons above stated, no consideration of the statutorily required "separate finding" is necessary.

V. Motion to Preclude Reference to Defendant's Credit Reports, etc.

Defendant Pfaff asserts that any reference to his credit reports or to collection efforts instigated against him are irrelevant, and, therefore, barred by D.R.E. 401.

Plaintiff responds that they are admissible relative "for purposes of Defendant's credibility and punitive damages."

Since, as indicated above, any aspect of punitive damages has been removed from this case by this Order, the latter is of no consequence.

As to the former issue of credibility, the Court finds no relevance to such financially associated evidence. Accordingly, pursuant to D.R.E. 402, no such

reference can be admissible. Even if any thread of relevance might be hypothesized, it would be significantly outweighed by the prejudice attached to such reference. Hence, it would be inadmissible pursuant to D.R.E. 403, as well.

Accordingly, Defendants' Motion to exclude any reference to Defendant's credit reports or collection situations is **GRANTED**.

VI. Motion to Prohibit Plaintiff from Arguing that Plaintiff "is not a Bad Doctor"

Assuming that any such suggestion would be in the context of Counsel for Plaintiff including in his Opening or Closing a comment along the lines of: "We're not saying Dr. Pfaff is a bad doctor, it's just that, in his treatment of Ms. Hartman in this situation, he was negligent," Plaintiff will not be foreclosed from such comment. Such a passing reference does not express an opinion, irrespective of the intent. If anything, it would be something of an attempt to curry favor with the jury. In any event, such a motive, in this sort of presentation is not objectionable.

If some other use or context of such a comment is breached, objection would be anticipated.

Thus, Defendants' Motion here is **DENIED** under the circumstances as they are understood.

VII. and VIII. Motions Regarding Impact on Defendant's License

One job frequently confronting a trial lawyer is, in one case, to argue a legal position, and than, in the next, to argue the opposition position. There is nothing revolutionary in that. Here, counsel take that responsibility to the next level: arguing dramatically opposed positions in but one case -- in fact, in

simultaneously filed motions.

Hence, evidence or argument of any perceived or potential future effect of any jury verdict on the license to practice medicine by Defendant Pfaff is not relevant to the question of whether or not his actions in this case were negligent, and will not be admitted.

Accordingly, Defendants' Motion to preclude Plaintiff from presenting evidence concerning, or arguing, that a jury verdict would have no impact on Defendant's license is **GRANTED**. Defendants' Motion to allow Defendant to present evidence concerning, or to argue that a jury verdict will or may have an impact on Defendant's license is **DENIED**.

IX. Motion to Preclude Plaintiff's Expert Zuccaro from Offering any Standard of Care Testimony

Defendants have moved to have the Court bar Plaintiff's expert, Dr. Zuccaro, from testifying as to the standard of care to be applied tp Defendant Pfaff's conduct in this case. The basis of that position is that, while Dr. Pfaff is an orthopedic surgeon, Dr. Zuccaro is not, his being a chiropractor certified as a neurophysiologist, who does not have a medical school degree.

First, we turn to 18 *Del. Code* § 6853. The "original statute" was revised in 2003. However, the revisions all concern the "affidavit of merit" requirements. The "original" was incorporated verbatim in § 6853(e).

While the requirements of a qualifying affiant include his being licensed to practice medicine and engaged and Board Certified in the same or similar field as the defendant physician (§ 6853(c)), no such language of qualification exists in

either the "original" §6853 or the present § 6853(e).

In order to be permitted to provide expert testimony on a given standard of care, the proffered witness is required only to present expert medical testimony.

As described by Plaintiff, Dr. Zuccaro has the background in medicine, pursuant to 18 *Del. Code* § 6854, to give expert medical testimony regarding an applicable standard of care. That is so, because he has demonstrated familiarity with the degree of skill ordinarily employed by orthopedic surgeon in the use of, and handling of information from, the NVM-5 equipment, even though it may be a "surgeon-driven" machine.

Certainly, Defendants will be permitted to *voir dire* Dr. Zuccaro prior to his giving testimony, and to cross-examine him following his direct testimony.

Subject to revelations emanating from any *voir dire* requiring a different analysis, Dr. Zuccaro's testimony regarding an applicable standard of care will not be excluded.

Thus, Defendants' Motion to exclude such testimony is **DENIED**.

X. Motion Regarding Sutherland Opinion

Plaintiff has moved to have Dr. Sutherland's record with regard to an opinion about the proximate cause of injury redacted from the records; to preclude Defendants from introducing portions of Dr. Sutherland's record containing his opinion, and from referring to, intimating, introducing evidence on, or otherwise asking Plaintiff or any other witness about this information.

This Motion is not opposed by Defendants.

Accordingly, Plaintiff's Motion is **GRANTED**.

CONCLUSION

For the foregoing reasons this Court:

1) **DENIES** Defendants' Motion in Limine Stating that a Surgeon who makes a Decision which is Supported by Peer Reviewed Literature Acts within the Standard of Care.

2) **GRANTS** Defendants' Motion in Limine to Preclude Punitive Damages.

3) **GRANTS** Defendants' Motion in Limine to Preclude Punitive Damages from being Submitted to the Jury.

4) **GRANTS** Defendants' Motion in Limine to Preclude Plaintiff's Experts from Testifying Regarding Punitive Damages.

5) **GRANTS** Defendants' Motion in Limine to Preclude any Reference to Dr. Pfaff's Bad Credit Reports and Debt Collection Litigation Against Him.

6) **DENIES** Defendants' Motion in Limine to Prohibit Plaintiff from Arguing Dr. Pfaff is not a Bad Doctor.

7) **GRANTS** Defendants' Motion in Limine to Prohibit Plaintiff from Arguing that the Jury's Verdict does not have an Impact on Dr. Pfaff's License.

8) **DENIES** Defendants' Motion in Limine to Allow Defendants to Argue that the Jury's Verdict may have an Impact on Dr. Pfaff's License.

9) **DENIES** Defendants' Motion in Limine to Exclude Standard of Care Testimony of Dr. Zuccaro.

10) **GRANTS** Plaintiff's Motion in Limine.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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