



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NADIV SHAPIRA, M.D. and	:	
NADIV SHAPIRA, M.D., LLC,	:	
	:	No.: 392, 2013
Defendants Below,	:	
Cross Appellants,	:	On Appeal from the
	:	Superior Court of the State
v.	:	of Delaware, in and for
	:	New Castle County,
CHRISTIANA CARE HEALTH	:	C.A. No. N11C-06-092 MJB
SERVICES, INC.,	:	
	:	
Defendant Below,	:	
Appellant / Cross Appellee.	:	
	:	
and	:	
	:	
JOHN HOUGHTON and	:	
EVELYN HOUGHTON, his wife,	:	
	:	
Plaintiffs Below,	:	
Appellees,	:	

**CROSS APPELLANTS NADIV SHAPIRA, M.D. and
NADIV SHAPIRA, M.D., LLC’S REPLY BRIEF AS TO
CROSS APPELLEE, CHRISTIANA CARE HEALTH SERVICES, INC.**

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Dated: December 16, 2013

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ARGUMENT IN REPLY

- I. CCHS' ARGUMENTS IN ANSWER ARE NON-RESPONSIVE TO DR. SHAPIRA'S POSITION THAT THE "SUPPLEMENTAL" VERDICT (AND ALL THAT FOLLOWED) SHOULD BE STRICKEN IN FAVOR OF THE "ORIGINAL" VERDICT.

From the first page of its Argument, it is apparent that CCHS misunderstands Dr. Shapira's appeal on this issue. On page four of its Answering Brief, CCHS' Scope of Review focuses on the propriety of the jury instruction. This is not the proper standard of review. Dr. Shapira does not dispute this issue on the basis of the legal accuracy of either the "original" stipulated Instructions or the "supplemental" instructions given by the trial court. Dr. Shapira simply contends that the supplemental jury instruction should not have been given *at all* and everything that followed was improper.

At pages five and six of its Answering Brief on Cross Appeal, CCHS tries to circumvent the trial judge's conclusion that had she known the real reason for CCHS' request for a supplemental verdict at trial, "I would not have done it,"¹ by arguing that most of the sidebar focused on potential jury confusion. This does not address the trial court's conclusion – which must stand. Since the trial judge agrees that she should not have given the

¹ D.I. 261 at pp. 18-19. (A365-366).

supplemental instruction at all, everything that follows must be stricken as tainted by the “original” error of sending the matter back to the jury.

On page seven of its Answering Brief, CCHS argues that since the trial judge’s colleagues “concurred that the supplemental verdict should be submitted to the jury,” the trial judge was correct to do so. The problem that the judge faced at trial was that she was forced to make a quick decision based upon an unexpected and surprising request by CCHS; up until that point in time CCHS had not objected to the jury instructions or interrogatories. Faced with this unusual request, the trial judge prudently consulted her colleagues as to how to proceed. What the trial judge subsequently noted, and is curiously missing from CCHS’ argument, is that none of her colleagues had ever done this before, but agreed that it was ‘now or never’ and the result could be reconsidered later without the jury (which is exactly what we are doing here) but not *vice versa*.²

It is obvious, from its Brief, that the crux of the CCHS position is that jury confusion required the supplemental verdict. As for any confusion on the part of the jury, aside from the comments of CCHS counsel suggesting it,

² 11/14/12 Tr 23:22-24:5. (A599-600).

there is no evidence whatsoever that the jury was confused. Moreover, the trial court specifically rejected the notion of jury confusion.³

CCHS further asserts, at page seven of its Answering Brief, that because the supplemental verdict was not returned 100% to Dr. Castellano, the jury must have misunderstood the original verdict sheet. This argument rests upon pure speculation as CCHS attempts to delve into the minds of the jurors. Given the fact that the jury was sent back, it is equally plausible the jurors thought they originally “got it wrong;” an argument that is as speculative as that made by CCHS. Regardless, the burden to demonstrate jury confusion rests squarely upon CCHS, a burden that it cannot meet except through speculation.

In spite of CCHS’ arguments to the contrary, at page eight of its Brief, the instructions given actually did refer to Dr. Castellano -- by name⁴ -- as an employee of CCHS, and that any finding against Dr. Castellano applied to CCHS and “*vice versa*.”⁵

CCHS argues, at page eight of its Answering Brief, that Dr. Shapira’s reliance upon *Lavin v. Silver*⁶ is misplaced because it *did* object to the wording of the verdict sheet. Dr. Shapira takes exception to that argument,

³ 11/14/12 Tr 20:11 – 13. (A596).

⁴ 11/13/12 Tr 146:21 – 147:2. (A575-576).

⁵ 11/13/12 Tr 147:7 – 10. (A576).

⁶ 2003 WL 21481006 (Del. Super. June 10, 2003).

and in reply adopts, by reference, the arguments on pages 52 - 53 of the Houghtons' Answering Brief.

Finally, on the issue of waiver, Dr. Shapira takes note of and adopts the "waiver" argument set forth by the Houghtons in their Answering Brief at page 48 *et seq.*

CONCLUSION

For the foregoing reasons, this matter should be remanded with instructions that the trial court strike the supplemental verdict sheet and adopt the “original” verdict as the final verdict in this matter.

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