

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

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**Re: Crist, et al. v. Connor, et al.
C. A. No. 05C-06-101 RRC**

Submitted: June 28, 2007
Decided: August 31, 2007

On Defendant Christiana Care Health Services, Inc.'s Motion for New Trial.
DENIED.

Dear Counsel:

Before this Court is Defendant Christiana Care Health Services, Inc.'s ("CCHS") Motion for New Trial, which asserts that "the interests of justice" require a new trial based on certain events that occurred during the course of a medical malpractice trial. The issues raised by this motion are (1) whether the allowance of leading questions posed by Plaintiffs' counsel to certain expert witnesses on direct and redirect examination constituted an abuse of the Court's discretion; (2) whether certain allegedly impermissible remarks by counsel for co-defendant Mary Ann Connor, D.O., ("Dr. Connor") during closing arguments were improper in that these remarks vouched for the credibility of certain witnesses, and; (3) whether sufficient evidence was adduced at trial to support Plaintiffs' claim that the breach in the standard of care by hospital nurses was the proximate cause of any injury to Plaintiff/Decedent Matthew Harris.

The motion is denied. This Court acted within its discretionary power when it allowed certain leading questions by Plaintiffs' counsel to Plaintiffs' own expert witness in order to elicit complex medical testimony. Secondly, counsel for Dr. Connor in his closing argument did not improperly vouch for the "truthfulness" of witness testimony so as to warrant a new trial. Finally, sufficient evidence was adduced at trial to establish proximate cause and

lead a reasonable jury to a conclusion that the actions of certain nurses fell below the standard of care and that breach of the standard of care proximately caused the injuries to Plaintiff/Decedent, Matthew Harris. Therefore, Defendant's Motion for New Trial is **DENIED**.

I. DISCUSSION

Matthew Harris died on February 15, 2004 from an acute subdural hematoma which allegedly developed after falling while a patient at Christiana Hospital for hip surgery. Plaintiffs filed a complaint in this Court alleging medical negligence on the part of CCHS, Dr. Connor, and Van Buren Medical Associates (Dr. Connor's employer).

Following a two week jury trial, a verdict was returned against CCHS and Dr. Connor in the amount of \$2,000,000. The jury found CCHS 60% liable and Dr. Connor 40% liable. Following the trial, CCHS submitted this Motion for New Trial asserting the three grounds for relief.

A. The Court acted within its discretion when it allowed Plaintiffs' counsel to ask leading questions to expert witnesses.

CCHS's first ground for relief alleges that the Court abused its discretion by allowing Plaintiffs' counsel to ask some leading questions of

certain of their expert witnesses during the trial.¹ CCHS contends that “numerous” leading questions were “timely objected [to] on multiple occasions[.]”² CCHS relies on D.R.E. 611(c), which states:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be leading questions.

CCHS contends that:

[a]n expert witness called by a party is particularly susceptible to suggestion from the attorney that called him or her. This is because the attorney who initially retained the expert, has previous pretrial communications with the witness for the purpose of providing opinion during discovery and has prepared the witness for trial testimony.”³

Plaintiffs respond by asserting that the objections to leading questions were “the subject of a detailed bench ruling at the trial of this case”⁴ and rely on arguments made during trial on this issue, which set forth Plaintiffs’ position that the questions were “appropriate, with respect to expert

¹ CCHS’s Mot. for New Trial, D.I. 93, at 1.

² *Id.* at 2. For example, Plaintiffs’ counsel asked experts the following questions, to which CCHS objected to as leading: “Now, the way that the symptoms are described during this period from 8:25 to 12:30, which is documented in the chart, were all those symptoms related, in your opinion, to an acute subdural hematoma that was evolving over that time period or to some other cause?” *Id.* at Ex A, 36; “The further opinion you’ve given is, even if Dr. Connor did not give the order that there was still more that the nurse was expected to do?” Trial Tr. June 6, 2007 at 55.

³ *Id.* at 3.

⁴ Pl. Response to CCHS’s Mot. for New Trial, D.I. 98, at 1.

witnesses, to lead the [expert] witness when it deals with things like facts and information they reviewed and pointing out testimony that is ... significantly in dispute and which has been the subject of [expert] witness testimony at trial.”⁵

Both parties agree that the allowance of leading question on direct examination is within the discretion of the Court. CCHS has cited one case, *Straub v. Reading Company*,⁶ which held that a court had abused its discretion in allowing leading questions asked to a medical expert. However, in that case the court stated that “[t]he proof of plaintiff’s claim both as to the accident and injury was put in to an unconscionably large extent by leading questions. Little seems to have been left to a spontaneous explanatory answer. At times the witnesses seemed relatively unnecessary except as sounding boards.”⁷ *Straub* is distinguishable from this case where the Court observed (at the time of CCHS’s objection) “if [Plaintiffs’ counsel’s questions] were leading, they were barely leading...”⁸

Furthermore, D.R.E. 611(c) states that “[l]eading questions should not be used on direct examination except as may be necessary to develop his

⁵ *Id.* at Ex. A, 131.

⁶ 220 F.2d 177 (3d Cir. 1995).

⁷ *Id.* at 179.

⁸ Pl. Response to CCHS’s Mot. for New Trial at Ex. A., 135.

testimony.”⁹ One court has noted that “[b]y the restriction on leading questions the law seeks to encourage honest, narrative answers as opposed to positions put forth by counsel.”¹⁰ However, when an expert witness “clearly [is] communicat[ing] his own thoughts,”¹¹ leading questions have been allowed in the discretion of the court.¹²

The use of leading questions to an expert can be appropriate in a complex medical malpractice case where the expert’s testimony is necessary to establish the accepted standard of care, but which opinion can be complicated to explain to the jury. “A medical malpractice case is ‘one of the classic examples of the necessity of expert opinion testimony as to the ultimate issue.’”¹³ In fact, case law indicates that leading questions to expert witnesses do not generally constitute “reversible” error,¹⁴ and one court has

⁹ D.R.E. 611(c).

¹⁰ *Lambert v. Shearer*, 616 N.E.2d 965, 971 (Ohio Ct. App. 1992) (citing 1 McCormick on Evidence 16 (1992) (affirming the trial court’s allowance of leading questions to a medical expert).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (quoting *Alexander v. Mt. Carmel Med. Ctr.*, 383 N.E.2d 564, 568 (Ohio 1978)).

¹⁴ *Sheets v. Kurth*, 426 S.W.2d 103, 104 (Mo. 1968) (noting, where the plaintiff objected to the defendant posing leading questions to medical experts, that “approval or disapproval of leading questions is largely discretionary with the trial court and will not constitute reversible error unless discretion is abused”); *Randolph v. USF&G Co.*, 626 S.W.2d 418, 422 (Mo. Ct. App. 1981) (stating that “it is not generally considered error to ask leading questions of an expert witness”).

commented that “these highly intelligent [expert medical] witnesses [are] unlikely to be influenced by leading questions suggesting answers.”¹⁵

The Court did not abuse its discretion and correctly noted that D.R.E. 611(c) allows considerable discretion by providing that, “[leading questions] shouldn’t be used, except as may be necessary to develop his testimony.”¹⁶

The Court also noted, from an examination of the questions at issue, that “if they were leading, they were barely leading...”¹⁷ Allowance of leading questions is a discretionary matter, especially when asked of experts. In some situations not present here, it may not be appropriate to allow leading questions to an expert witness. Moreover, the questions in this case were “barely leading” and there has been no showing that the questions affected or compromised the expert’s testimony. Defense counsel had full opportunity to cross-examine Plaintiffs’ expert witnesses to whom leading questions were posed. Therefore, Defendant’s first ground in the Motion for New Trial is **DENIED**.

¹⁵ *Sheets*, 426 S.W.2d at 104.

¹⁶ D.R.E. 611(c).

¹⁷ Pl. Response to CCHS’s Mot. for New Trial at Ex. A., 135.

B. Dr. Connor’s counsel’s comments about “the truth” during closing arguments do not warrant a new trial.

CCHS’s second ground for relief summarily¹⁸ alleges that Dr. Connor’s counsel “argued his personal belief” regarding the credibility and truthfulness of witnesses during closing arguments.¹⁹ Defendant asserts that “Delaware law prohibits this type of argument to the jury[,]” and “[w]hen egregious arguments are made, a trial judge should act *sua sponte* and implement a strong remedial measure.”²⁰ Defendant contends that failure by the Court to remedy the situation warrants a new trial.²¹

In response, both Plaintiffs and Dr. Connor deny that such statements entitle CCHS to a new trial. Plaintiffs adopt the position of Dr. Connor that “there is no merit to [CCHS’s] argument that [counsel’s] comments during closing argument about the ‘truthfulness’ of Dr. Connor’s testimony were improper and warrant a new trial.”²²

Dr. Connor, through counsel, asserts that “[a]t no time did I state which witness I personally believed and which one I did not.”²³ Dr. Connor contends that the fact that CCHS did not “even raise an objection during my

¹⁸ The entirety of this argument in the motion for new trial is three sentences.

¹⁹ CCHS’s Reply Brief at Ex. E., 45, 74, 75. For example, Dr. Connor’s counsel told the jury: “The truth is that Dr. Connor gave that verbal order...”; “Dr. Connor chose to tell the truth.”; “And that’s the truth.”

²⁰ CCHS’s Mot. for New Trial, at 3-4.

²¹ *Id.*

²² Pl. Response to CCHS’s Mot. for New Trial, at 1.

²³ Dr. Connor’s Response to CCHS’s Mot. for New Trial, D.I. 94 at 1.

closing argument, or any time before Your Honor charged the jury is ‘proof positive’ that counsel for [CCHS] did not think my remarks were inappropriate.”²⁴ Dr. Connor also contends that the jury verdict, finding Dr. Connor liable, demonstrates that the jury did not accept his version of “the truth.”²⁵

It has been stated that “[i]n the context of criminal trials, this Court has repeatedly cautioned against attempts by both prosecutors and defense counsel to direct the jury from its task of individualized and unbiased determination of guilt or innocence. In the civil arena, counsel are similarly restricted.”²⁶ Even without an objection, the Court may *sua sponte* intervene if counsel improperly comments on the credibility of witnesses.²⁷

In the context of Dr. Connor’s counsel’s entire and comprehensive closing argument, it cannot be said that the complained-of brief statements did, in fact, vouch for the credibility of witnesses. Moreover, the Court notes that CCHS did not object to the argument, or otherwise seek an instruction from the Court regarding the statements. Furthermore, even though CCHS argues that Dr. Connor’s closing argument was improper, a

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *DeAnglis v. Harrison*, 628 A.2d 77, 80 (Del. 1993).

²⁷ *See, e.g., Bradford v. State Farm*, 2004 WL 2830936 (Del. Super.) (where the court *sua sponte* advised the jury to ignore counsel’s remarks after he implied that the defendant had bought the testimony of a witness).

review of the entire closing argument shows that Dr. Connor’s counsel correctly told the jury its role when counsel for Dr. Connor said, “[y]ou are the judges of the witnesses and their credibility, you, and you alone.”²⁸ Counsel went on to say, “[n]ow, you may disagree with me, and you have the right to do that...I have to respect that right.”²⁹

In addition, the jury instructions given after the closing arguments informed the jury that “[w]hat an attorney says is not evidence...[w]hat an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any person opinion or belief offered by an attorney concerning testimony or evidence.” Therefore, even though Defendant argues the Court should have acted *sua sponte* in remedying the situation, there is no indication whatsoever that the jury instruction was an insufficient remedy.

Lastly, the Court agrees with Dr. Connor’s argument that the statements appeared to have no effect on the jury as they returned a verdict against Dr. Connor. The unobjected-to statements made by co-Defendant were hardly so “egregious” as to warrant *sua sponte* intervention by the Court. Because the final verdict indicates that the jury was not influenced by Dr. Connor’s counsel’s closing statements, and the jury instructions were

²⁸ Trial Tr. June 14, 2007 at 44.

²⁹ *Id.* 53.

provided so as to guide the jury in their deliberations, Defendant's Motion for New Trial on ground two is **DENIED**.

C. There was valid causation testimony advanced by Plaintiffs that a breach in the standard of care occurred that proximately caused injury.

CCHS's final ground for relief asserts that "[t]here was no valid causation testimony offered by any expert that the negligence of any nurse with regard to the *stat*³⁰ CT Scan that was allegedly ordered by Dr. Connor."³¹ CCHS asserts that:

[t]he testimony by plaintiff's expert, Dr. Polin, related to the need for the performance and interpretation of the CT Scan between 10:00 a.m. and 11:30 a.m. Dr. Connor testified that she gave Nurse Godek the verbal order sometime after she examined Mr. Harris the second time and after she had a discussion with the family at 11:05 to 11:15. Kim Karcher (x-ray tech) testified that it would take anywhere from 20 minutes to 1 hour to have the CT performed and have the film interpreted by radiologist. Dr. Polin and Dr. Wilks testified that 30 minutes would be the general time frame within which to have a stat CT Scan performed and read. In this case, the stat CT Scan would not have been performed and interpreted within the outside range (11:30) testified to by plaintiff's expert, Dr. Polin. Thus, any action or inaction by Nurses Godek or Sammak made no difference to Mr. Harris' outcome since the 2 hours or more needed for the surgery to effectively have taken place would put the time beyond 1:10 to 1:30 when all agreed it was too late to make a difference.³²

³⁰ "Stat" is an abbreviation for the Latin word *statim*, meaning at once or immediately.

³¹ CCHS's Mot. for New Trial at 4.

³² *Id.*

CCHS also asserts that “Plaintiffs’ counsel in his rebuttal argument to the jury admitted that Nurse Godek did not neglect Mr. Harris between 9:30 a.m. and 11:00 a.m.”³³

In response, Plaintiffs assert that “CCHS is mistaken when it argues the ‘there was no valid causation testimony offered by any expert that the negligence of any nurse with regard to the CT scan’ harmed Mr. Harris.”³⁴ Plaintiffs contend that “[t]he testimony of Nurse Barker was that Nurse Godek deviated from the standard of care because she did not independently take the necessary steps to facilitate a hospital physician’s bedside evaluation of Mr. Harris.”³⁵ Plaintiffs assert that “the jury could reasonably conclude from the testimony of plaintiffs’ nursing expert and Nurse Godek that Nurse Godek was negligent....”³⁶ Furthermore, Plaintiffs assert that:

Dr. Polin and Dr. Wilks testified that it would have taken 30 minutes to have performed and interpreted a stat CT scan. Therefore, the jury could find that the negligence of Nurse Godek resulted in Mr. Harris’ acute subdural hematoma not being diagnosed by 11:30 a.m., at which time an urgent neurosurgical evaluation would have been conducted and presurgical therapeutic interventions initiated which would have prevented Mr. Harris’ ultimate deterioration to the point where he was between 1:10-1:30 p.m. when it was too late to save him.³⁷

Plaintiffs also contend that:

³³ *Id.*

³⁴ Pl. Response to CCHS’s Mot. for New Trial at 1-2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

An allocation of fault assessment of greater than 50% against CCHS, strongly suggests that the jury found that CCHS was also negligent because Nurse Baffone administered 10 mg. of Ambien to Mr. Harris when he had no request or clinical need for the medication and at a time when it should not have been given to him. The expert testimony was substantial on the Ambien being the cause of Mr. Harris' fall which resulted in the acute subdural hematoma that eventually caused Mr. Harris' death.³⁸

This Court agrees with Plaintiffs that valid causation testimony was presented by both experts and other witnesses that could have led a reasonable jury to conclude that the negligence of the nursing staff proximately caused injury to Mr. Harris. Plaintiffs elicited testimony that a bedside evaluation of Mr. Harris should have been performed sooner than it was. Plaintiffs also presented expert testimony that a nurse unnecessarily administered Ambien, a prescription sleeping medication. Because the jury found Defendant sixty percent liable, it is impossible to know which testimony the jury found credible and which it did not. Regardless, Plaintiffs presented the necessary evidence justify the jury's conclusion that Defendant was, at least in part, negligent.

Although Defendant points out that Plaintiffs' rebuttal during closing arguments suggests Nurse Godek "did not neglect Mr. Harris between 9:30 a.m. and 11:00 a.m.,"³⁹ this statement is additionally unpersuasive because

³⁸ *Id.*

³⁹ CCHS's Reply Brief, at 3.

Plaintiffs' rebuttal argument is not evidence, and the jury was so instructed. What Plaintiffs' counsel believed was the exact time Nurse Godek was negligent is irrelevant because it is the duty of the jury to evaluate the facts and draw conclusions based on the facts. Plaintiffs' counsel met the burden of demonstrating how the behavior of the nurse might have proximately caused injury to Mr. Harris. Because the jury was presented with sufficient evidence and used that evidence to find against Defendant, Defendant's third ground in the Motion for New Trial is **DENIED**.

II. CONCLUSION

For the reasons stated above, Defendant's Motion for New Trial is **DENIED**.

cc: Prothonotary