IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JENNELL WILLIAMS-ZAHIR, Individually, and as PERSONAL REPRESENTATIVE of the ESTATE OF ARIF ZAHIR,	)	
Plaintiff,	)	C.A. No. N19C-05-116 CEB
v.	)	
BAYHEALTH MEDICAL CENTER, INC.,	)	
Defendant.	)	

Submitted: September 1, 2023
Decided: December 4, 2023

ORDER

Upon Defendant Bayhealth Medical Center, Inc.'s Motion for New Trial,

DENIED.

Timothy E. Lengkeek, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware. *Attorney For Plaintiff*.

James E. Drnec, Esquire, Phillip M. Casale, Esquire, Wharton, Levin, Wilmington, Delaware. *Attorneys for Defendant*.

BUTLER, R.J.

This will be the Court's ruling on Defendant's first Motion for a New Trial. As an indication of just how hotly this matter has been contested, it is the first of two motions for a new trial, in addition to a separate dispute over costs.

1. As briefly as the Court can describe the case, Arif Zahir was admitted to Bay Health hospital on June 6, 2017, for cardiac bypass surgery. He died two days later, although the cause of death was disputed. As Defendant put it succinctly, "The central issue in the case was whether the decedent Arif Zahir died as a result of an undiagnosed, untreated myocardial infarction as plaintiff alleged, or whether Mr. Zahir died from a chain of events including aspiration as the defendant contended."[1]

2. One of the most unusual features of the dispute was the presence of an autopsy report prepared by an individual located in Kansas who, subsequent to preparing his report, was indicted in both state and federal courts for practicing medicine without a license, fraud, and sundry other counts, ultimately resulting in his incarceration in federal prison, to be followed by more incarceration in state prison.[2] Neither party chose to seek (or at least neither party took, or attempted to take) a deposition of this autopsy performer, but apparently both sides saw something useful in the autopsy report they wanted and so sought to introduce those portions they found useful.

[1] Def.'s Mot. for a New Trial 1.
[2] Def.'s Mot. for a New Trial 2 n.1.

3. All of this was made evident in the pretrial conference, held about one month before commencement of the trial. At that point, the parties directed the Court that they had come to an agreement concerning the autopsy report: both would consent to the admission of the "anatomical findings" found by the hearsay declarant but not any of the declarant's "opinions." The Court accepted this arrangement without further fanfare. A major heading in the report was denoted "Opinions" and that was all redacted out. Under "Anatomical Findings" there were numerous observations, one of which was "acute myocardial infarction." All of this passed through the pretrial conference without discussion since the parties had indicated agreement on the autopsy.

4. The term "acute myocardial infarction" did receive some discussion at the pretrial conference, but it was not in the context of the autopsy report, it was in connection with a Plaintiff's proposed demonstrative exhibit. The demonstrative, prepared by counsel, showed Plaintiff's heart in a deteriorated condition and was labeled "acute myocardial infarction." Defendant objected to the term appearing on the exhibit, arguing that the exhibit demonstrated an opinion about an acute myocardial infarction. With little discussion, Plaintiff's counsel agreed to remove the words from the demonstrative exhibit.

5. So, to be clear, Defendant did not object to the words "acute myocardial infarction" in the anatomical findings of the autopsy protocol. Defendant did object

to those words on the demonstrative. The Plaintiff chose not to further belabor the issue and agreed to remove it from the demonstrative exhibit without further argument.

6. Then, on the morning of jury selection, Defendant offered a new objection to the term "acute myocardial infarction" appearing in the anatomical findings of the autopsy. Defendant had not previously taken the position that "acute myocardial infarction" was a statement of "opinion." The "opinions" in the autopsy were all expressed as "Opinions" on page 8 of the autopsy and all "Opinions" had been redacted as agreed during the pretrial conference. Defendant was thus calling on the Court to redefine the term "opinions" subject to exclusion so as to now include one of the "anatomical findings" in the autopsy report, to which the Defendant had previously reported no objection.

7. When Defendant pressed the objection immediately before trial began, Defendant felt that the "opinion" of "acute myocardial infarction" by the non-testifying/presently jailed autopsy pathologist would unfairly give the Plaintiff yet one more expert witness to opine that the decedent suffered an "acute myocardial infarction."[3]

8. Acute myocardial infarction was listed in the Anatomical Findings, not in the Opinions section of the autopsy report. Whether "acute myocardial infarction" is

[3] Def.'s Reply In Support of First Motion for New Trial 4.

a statement of opinion or a statement of anatomical fact invites one down a linguistic rabbit hole, ill-suited to the few minutes before jury selection in a significant trial. Defendant did not object at the pretrial conference.[4] The Court felt, on balance, that Defendant's argument might have been parsed with more nuance had it been raised at the pretrial conference, but in the Court's view, we had crossed the bridge, the pretrial order had become binding on the parties, and Defendant's argument was not sufficiently persuasive to undo what had already been done.[5]

9. And, as later testimony at trial would prove out, there was little or no disagreement that the decedent suffered injury to his heart – a "myocardial infarction." The defense experts had different explanations for the injury from the Plaintiff's experts, but all agreed his heart had suffered damage.[6]

10. The Court continues to adhere to its belief that Defendant waived its argument concerning the use of the term "acute myocardial infarction" in the anatomical findings of the autopsy report. The Court is also of the view that this reference in the autopsy report was fully obscured by the plethora of more persuasive, testifying expert witnesses, on both sides, who testified that the decedent

[4] Pl.'s Opp. to Def.'s First Mot. for a New Trial 3.
[5] *See e.g.,* Pl.'s Opp. to Def.'s First Mot. for a New Trial 2 (The pre-trial order "is tantamount to a contract" between the parties (*quoting Barrow v. Abramowicz*, 931 A.2d 424, 431 (Del. 2007)).
[6] Pl.'s Opp. to Def.'s First Mot. for a New Trial 2-3.

suffered a myocardial infarction, albeit for different reasons.[7]

Defendant's First Motion for a New Trial is **DENIED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Charles E. Butler, Resident Judge

[7] Pl.'s Opp. to Def.'s First Mot. for a New Trial 5 (Plaintiff uses the "invited error doctrine" to support its position that Defendant cannot now claim it committed reversible error after a trial strategy was unsuccessful (*citing Judkins v. State*, 1990 WL 38263 (Del. 1990)).