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NATURE AND STAGE OF PROCEEDINGS

This is Appellant/Cross-Appellee Christiana Care Health Services, Inc.'s ("CCHS") Reply Brief in response to Appellees John and Evelyn Houghton's (the "Houghtons") Answering Brief. CCHS previously responded to the arguments in Appellant/Cross-Appellant Dr. Shapira's cross appeal in its Answering Brief.

SUMMARY OF ARGUMENT¹

1. Denied. CCHS preserved the issue concerning the Superior Court's refusal to reform the verdict sheet on appeal. The trial judge erred when she found that the verdict should not be reformed to reflect the jury's supplemental finding that as to the 35% liability assessed to CCHS, 75% was assessed to Dr. Shapira and 25% to Dr. Castellano would result in the ultimate apportionment of liability of 91.25% to Dr. Shapira and 8.75% to CCHS.

¹ CCHS specifically denies the Houghton's argument with regard to the cross appeal pursuant to Supreme Court Rule 14 (c) (ii). CCHS also denies Dr. Shapira's argument with regard to the cross appeal, however, the reasons are more fully set forth in its Opening and Answering Briefs.

ARGUMENT

- I. **THE TRIAL COURT MADE SEVERAL ERRONEOUS AND PREJUDICIAL EVIDENTIARY RULINGS, THE NET EFFECT OF WHICH WAS THAT DR. SHAPIRA AND CCHS WERE PRECLUDED FROM PRESENTING A CRITICAL DEFENSE TO MR. HOUGHTON'S ALLEGATIONS THAT DR. SHAPIRA'S TREATMENT VIOLATED THE STANDARD OF CARE BECAUSE ALLEGEDLY IT WAS "EXPERIMENTAL."**

CCHS relies upon and adopts the argument set forth in Dr. Shapira's Reply

Brief with respect to this argument.

II. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE INFORMED CONSENT GIVEN BY DR. SHAPIRA WAS REQUIRED TO CONTAIN THE FACT THAT HE SERVED ON THE SPEAKER'S BUREAU OF THE COMPANY THAT MANUFACTURED THE MEDICAL DEVICE THAT HE USED IN TREATING MR. HOUGHTON'S INJURIES.

A. Question Presented

Did the Superior Court err when it found that the informed consent given by Dr. Shapira was required to contain the fact that he served on the Speaker's Bureau of the company that manufactured the medical device that he used in treating Mr. Houghton's injuries? (A-84-92, A-370-408.)

B. Scope of Review

"Questions of statutory interpretation are questions of law that this Court reviews de novo." *Dishmon v. Fucci*, 32 A.3d 338, 341-42 (Del. 2011). This Court must determine whether the Superior Court erred as a matter of law in formulating or applying the legal principles of informed consent under 18 *Del. C.* § 6852 and 18 *Del. C.* § 6801 (6).

C. Merits of Argument

In *Spencer v. Goodill*, this Court noted the following:

[T]o prevail on an informed consent claim, plaintiff must prove that: 1) the health care provider failed to provide information about risks and alternatives customarily given to patients; 2) a reasonable person would have considered the undisclosed information material; and 3) plaintiff was injured by a complication that should have been disclosed.

17 A.3d 552, 554 (Del. 2011)

In *Spencer*, this Court also noted that “One of the basic rules of statutory construction is that, ‘if [a] statute is unambiguous, there is no room for interpretation, and the plain meaning of the words controls’” *Id.* at 555 (*citing Rubick v. Security Instrument Corp.*, 766 A2d 15, 18 (Del. 2000)). Finally, this Court stated:

If there were any doubt about the proper construction of the informed consent statute, that doubt is resolved by reference to the entire chapter in which it is found. The informed consent statute was enacted as part of a chapter designed to manage the then-burgeoning number of medical malpractice claims. Statutes are passed by the General Assembly as a whole and not in parts or sections. Consequently, each part or section should be read in light of every other part or section to produce an harmonious whole.

Spencer, 17 A.3d at 555 (citations and quotations omitted).

The words of the informed consent statute in Delaware² are clear and unambiguous. The words relate solely to medical risks and alternatives. The language of the statute does not contemplate or suggest that any type of financial information is required to be disclosed to a patient. It should be left to the General Assembly to decide whether or not the statute should be amended to include financial information or other types of information other than medical. The disclosure of financial information as part of informed consent is more properly

² 18 Del. C. § 6852.

decided by legislative debate including the nature of the financial information under consideration and the scope of any disclosure.

The introduction into evidence of a physician's financial interest will always be unduly prejudicial. A bad outcome will always be attributed to financial incentives in retrospect. Patients who have bad outcomes will allege informed consent violations and then seek discovery of the physician's financial records including income tax returns, contracts with hospitals and other facilities, stock portfolios and any other financial information that might support an informed consent lawsuit.

The pros and cons of such an expansion of the traditional informed consent statutes is not something that should be established by judicial opinion.

III. THE TRIAL COURT ERRED BY AWARDING PLAINTIFFS PREJUDGMENT INTEREST BECAUSE ITS DECISION THAT THE TRIAL BEGAN ON OCTOBER 31, 2012, NOT OCTOBER 24, 2012, WAS CONTRARY TO 6 *DEL. C.* § 2301.

CCHS relies upon and adopts the argument set forth in Dr. Shapira's Reply Brief with respect to this argument.

IV. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE VERDICT SHOULD NOT BE REFORMED TO REFLECT THE JURY'S SUPPLEMENTAL FINDING THAT AS TO THE 35% LIABILITY ASSESSED TO CCHS, 75% WAS ASSESSED TO DR. SHAPIRA AND 25% TO DR. CASTELLANO WOULD RESULT IN THE ULTIMATE APPORTIONMENT OF LIABILITY OF 91.25% TO DR. SHAPIRA AND 8.75% TO CCHS.

A. Question Presented

Did the Superior Court err when it found that the verdict should not be reformed to reflect the jury's supplemental finding as to the liability of CCHS? (A-348-369.)

B. Scope of Review

"When determining the propriety of a jury instruction, the question is whether the instruction 'undermined the jury's ability to intelligently perform its duty in returning a verdict....'" *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993) (*quoting Haas v. United Technologies Corp.*, 450 A.2d 1173, 1179 (Del. 1982)).

C. Merits of Argument

CCHS preserved this issue on appeal by filing a motion to reform the verdict sheet, which was denied by the trial judge in her June 27, 2013 opinion. (*See A-348-369.*)³

The Houghtons, in part, rely on the opinion of Judge Brady to support their position. With all due respect to Judge Brady, there is an undercurrent in the

³ "A" refers to the Appendix to CCHS' Opening Brief.

opinion that counsel for CCHS somehow misled the Court.⁴ For example, the opinion states: “The Court allowed this supplemental question to go forward because it was under the impression, based upon representations from CCHS’s counsel, that there was an issue pertaining to CCHS’s position as an excess insurance carrier.” (A-363.) Additionally, the opinion states:

The Court expressed its dissatisfaction with CCHS’s true purpose in requesting the supplemental instruction:

[I]f I had appreciated at the time that I gave the supplemental instruction that the purpose of that was to see if the jury really meant what the jury said, I would not have given it because I was satisfied that I had done what needed to be done to properly instruct the jury with the initial instructions and interrogatory sheet as to allocate responsibility and the bases upon which define liability. And had I realized at that point in time that the reason you wanted me to give the supplemental instruction was to make sure the jury really meant what they said in the initial verdict sheet, I would not have done it.

(A-365-66.) (footnotes omitted).

Immediately after the jury was polled there was a sidebar conference during which the following, among other things, was stated:

Mr. Ferri: Because I thought there was confusion about the vicarious liability and the independent liability of Christiana, I’m wondering, or I’m requesting, if you could ask the jury whether or not they have found Dr. Castellano was negligent, because I think there could have been confusion about the - - once they found apparent agency, whether or not then they go to - - they still think they have to - -

⁴ The trial Court stated the following at the January 4, 2013 hearing: “I’m not saying you misled [sic] me, but if I had appreciated the real reason you were asking.” (B-9 at 34.)

The Court: they made an independent finding that Christiana Care was negligent, an independent finding, and Dr. Castellano with Christiana Care in another instruction.

Mr. Ferri: Well, I know Your Honor, but I had requested Dr. Castellano be put in the interrogatory answer so it would be clear, and my paralegal just asked me today, on the - - earlier today she said, you know, "Well, if we win on the independent claim, how much will they - - how much do you think they'll apportion to us, if any, on the other?" So, she was confused, and I think the jury could be confused, and I would simply - - I think it's a point that we could clarify right now, and I'd be happy with whatever the answer is, in other words, just clarify things.

(A-583-84.)

The overwhelming majority of the sidebar discussion focused upon CCHS' concern that the jury may have been confused by the multiple legal issues involved in this case including joint and several liability, apparent agency, and the imputation of an agents negligence to the principal. (A-583-596.)

The issue related to further litigation in the future was raised by counsel for Dr. Shapira. (A-590.) This was candidly admitted by counsel for Dr. Shapira during the January 4, 2013 hearing before Judge Brady. (B-9 at 35-36.)

Again, with all due respect to the trial judge, it is difficult to understand how the trial judge did not appreciate the reasons for the requested clarification. Admittedly, the sidebar conference included a discussion of future litigation; however, the majority of the argument pertained to jury confusion and a request for clarification.

The trial judge did not rush into a decision about submitting to the jury supplemental instructions with a supplemental verdict sheet. In fact, the trial judge declared a recess for the purpose of discussing the matter with colleagues. (A-596.) The record reflects that the trial judge did discuss it with colleagues who concurred that the supplemental verdict should be submitted to the jury. (A-599-600.)

The supplemental instructions given by the trial judge were clear and concise. The initial remarks by the trial judge to the jury were as follows:

The Court: Ladies and gentlemen of the jury, you have been good and true soldiers in this process. I wanted to ask one more thing of you. This probably should have been on the verdict sheet, the attorneys concede at this point, but was not, and there is one supplemental question. It's very clear.

(AA-471.)⁵

The Court included potential examples of how the supplemental question could be answered including the example of assigning "a hundred [percent] to one party and zero to the other." (AA-472.)

If the jury had understood the original jury instructions correctly, it would have had to answer the supplemental verdict sheet by assigning 100% to Dr. Castellano and 0% to Dr. Shapira. By answering the supplemental verdict sheet by

⁵ "AA" refers to the Appendix to Dr. Shapira's Opening Brief.

assigning 75% to Dr. Shapira and 25% to Dr. Castellano, proves that the jury did not understand that jury questions 4 and 5 applied only to Dr. Castellano.

CCHS had clearly requested that jury questions 4 and 5 specifically mention Dr. Castellano's name which would have avoided the confusion on the part of the jury as evidenced by the supplemental verdict.

CCHS clearly requested that Dr. Castellano's name be inserted in questions 4 and 5 to the jury. This was acknowledged by Judge Brady. (B-7 at 28;⁶ A-566-67.) CCHS objected to the wording of the verdict sheet prior to its submission to the jury. The objection went to the very heart of the issue of liability and apportionment of liability. This is not a situation where the Court has to speculate about whether or not the jury intended one result as opposed to another. The issue was actually submitted to the jury with proper instructions, and the jury returned a supplemental verdict clearly stating the result of its deliberations. The Court should not simply ignore this verdict. It did happen, and it reflects the collective judgment of the jury sitting on this case and should be enforced.

⁶ "B" refers to the Appendix to CCHS' Answering Brief.

V. THE TRIAL JUDGE INCORRECTLY INSTRUCTED THE JURY CONCERNING PROXIMATE CAUSE.

A. Question Presented

Did the Superior Court improperly instruct the jury concerning proximate cause? (A-127, 182-202, 581.)

B. Scope of Review

“When an instruction to a jury is challenged on appeal, this Court must determine ‘not ... whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.’” *Russell v. K-Mart Corp.*, 761 A.2d 1, 4 (Del. 2000) (quoting *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000)).

C. Merits of the argument

The Houghtons cite numerous cases in their Answering Brief for the proposition that the pattern jury instruction on proximate cause has been approved by this Court, including *Jones v. Crawford*, 1 A.3d 299 (Del. 2010), *Ireland v. Gem Craft Homes, Inc.*, 29 A.3d 246 (Del. 2011) (TABLE), and several other cases.⁷

However, none of the above decisions have focused on the inclusion of the words “or helps to bring about” that appears in the pattern jury instruction that was

⁷ *Pesta v. Warren*, 888 A.2d 232 (Del. 2011) (TABLE); *Baker v. East Coast Prop., Inc.*, 2011 WL5622443 (Del. Super. Nov. 15, 2011); *Hammon v. Colt Indus. Operating Corp.*, 565 A.2d 558 (Del. Super. 1989); and *Hedrick v. Webb*, 2004 WL 2735517 (Del. Super. Nov. 22, 2004).

provided to this jury. In *Spicer v. Osunkoya*, Justice Berger defined proximate cause and remote cause based upon Delaware law. 32 A.3d 347 (Del. 2011). This Court in *Spicer* relied upon *Duphily v. Delaware Electric Co-op., Inc.*, 662 A.2d 821 (Del. 1995) for the definition of proximate cause and upon *McKeon v. Goldstein*, 164 A.2d 260 (Del. 1960) for the definition of remote cause. See *Spicer*, 32 A.3d at 351. In *Duphily*, this Court traced the origin of the traditional “but for” definition of proximate causation.

Delaware recognizes the traditional “but for” definition of proximate causation. *Laws v. Webb*, Del.Supr., 658 A.2d 1000 (1995); *Moffitt v. Carroll*, Del.Supr., 640 A.2d 169, 174 (1994); *Culver v. Bennett*, 588 A.2d 1094 (1991). “[O]ur time-honored definition of proximate cause ... is that direct cause without which [an] accident would not have occurred.” *Chudnofsky v. Edwards*, Del.Supr., 208 A.2d 516, 518 (1965) (quoted in *Laws*, 658 A.2d at 1007; *Moffitt*, 640 A.2d at 174; *Culver*, 588 A.2d at 1094). In other words, a proximate cause is one “which in natural and continuous sequence, *unbroken by any efficient intervening cause*, produces the injury and without which the result would not have occurred.” *Culver*, 588 A.2d at 1094 (quoting *James*, 75 A.2d at 241) (emphasis added).

Duphily, 662 A.2d at 828-829. None of the cases in the above quotation include in the definition of proximate cause the words in controversy here: “or helps to bring about.” Those words were introduced during the creation of the pattern jury instruction. In fact, the pattern jury instruction does not include much of the language used by this Court for the definition of proximate cause in the earlier cases mentioned above.

As applied to the facts in this case, the instruction given by the trial judge for proximate cause, and the one given for prior or remote cause, are in conflict. It is confusing to use the words “or helps to bring about.”

The Merriam Webster Dictionary defines “help” as follows: “to do something that makes it easier for someone to do a job, to deal with a problem, etc.: to aid or assist someone.” As a verb, it is defined as follows: “to give assistance or support to.” See <http://www.merriam-webster.com/dictionary/help>.

One would expect a jury to give the word “help” its common meaning. In this case, the negligence of CCHS consisted of not ascertaining from Dr. Shapira whether or not he had a conflict of interest on his application to publish his findings from the rib fracture database. (B-364-365).

The prejudice is compounded in this case because the trial judge further omitted a portion of CCHS’s requested instruction with regard to “prior and remote cause.” The words omitted from that portion of the charge were “even though such injury would not have happened but for such condition or occasion.” Thus, there can be a factual situation where a prior and remote cause can exist (relieving CCHS of liability) even if Mr. Houghton’s injury would not have happened but for such condition or occasion.

CCHS clearly requested that the proximate and remote cause jury instructions be based upon *Russell v. K-Mart Corporation*, 761 A.2d 1 (Del. 2000)

and *Spicer v. Osunkoya*, 32 A.3d 347 (Del. 2011). (A-182-202). Argument was presented to the trial judge along with the proposed jury instructions. (A-182-202, A-565-66, A-581).

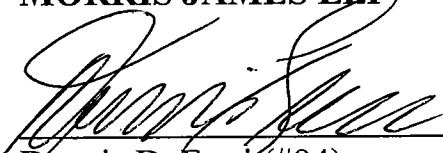
The words “or helps to bring about” waters down and dilutes the “but for” proximate cause test. A jury is forced to conclude that any help at all by another party also results in that party being a proximate cause of injury. It is inconsistent with Delaware case law defining the “but for” rule as a “direct cause without which [an] accident [or injury] would not have occurred.” *Chudnofsky*, 208 A.2d at 518.

After the jury instructions were read to the jury, the trial judge agreed that any previous objections would not have to be restated as long as they were in the record with a series of emails that had been created with regard to proposed jury instructions from all parties. (A-581). CCHS did not receive the benefit of jury instructions on the issue of proximate cause and remote cause consistent with Delaware law. The jury could not properly perform its duty in deciding whether or not CCHS’ role in the case was one that involved being a proximate cause or a remote cause without complete and accurate instructions on both principles of law. CCHS submits that this is reversible error requiring a new trial.

CONCLUSION

For the above reasons and the reasons set forth in CCHS' Opening and Answering Briefs, the Superior Court's decision should be reversed, and a new trial should be granted.

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A handwritten signature in cursive script, appearing to read "Dennis D. Ferri", is written over a horizontal line.

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Dated: December 17, 2013