

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROLAN ALLEN

Appellant

v.

MICHAEL A. DANIELS, M.D.
ALBERT EINSTEIN HEALTHCARE
NETWORK, GERMANTOWN COMMUNITY
HEALTH SERVICE, ALBERT EINSTEIN
MEDICAL CENTER

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 831 EDA 2012

Appeal from the Judgment Entered February 23, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): May Term 2009 No. 2471

BEFORE: PANELLA, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PANELLA, J.

FILED MAY 20, 2013

Appellant, Rolan Allen, appeals from the judgment entered February 23, 2012, on the defense verdict rendered by a jury in this medical malpractice case. After careful review, we conclude that the trial court erred in confusing the jury by allowing the admission of irrelevant consent forms, and compounded this error by allowing these forms into the jury deliberation room. As a result, we reverse.

The essential facts of this case are largely undisputed. Allen was under the care of Appellee, Michael A. Daniels, M.D., a urologist, for benign

* Retired Senior Judge assigned to the Superior Court.

enlargement of his prostate gland and other, related, medical issues. After years of treatment *via* pharmaceuticals, Dr. Daniels recommended a procedure known as transurethral microwave thermotherapy, or TUMT.

TUMT is a non-surgical, outpatient procedure that is intended to last for 30 minutes. The TUMT procedure involved inserting a treatment catheter into Allen's urethra, which would then selectively heat his prostate tissue to a temperature sufficient to kill a portion of the prostate tissue, thereby reducing the size of the prostate. The purpose of the TUMT procedure was to improve the flow of urine from Allen's bladder and other related symptoms flowing from the enlarged state of his prostate.

The first time Dr. Daniels attempted the TUMT procedure, he discovered a urethral stricture while inserting the treatment catheter. As a result, he cancelled the TUMT procedure and proceeded with an alternative treatment to address the stricture. After Dr. Daniels treated the urethral stricture, Allen was able to void his bladder without any complaints for several months.

When Allen complained that his urinary flow was decreasing, Dr. Daniels again treated Allen's urethral stricture. Following this treatment, Allen was again able to void his bladder without any complaints for several months. When Allen's urinary flow began to decrease again, Dr. Daniels recommended treatment *via* TUMT. On October 5, 2007, Dr. Daniels

performed the TUMT procedure on Allen. According to the medical records, Dr. Daniels performed the TUMT procedure successfully.

However, after Allen left Dr. Daniel's office, he immediately suffered from symptoms of urinary urgency. After these symptoms continued unabated into the night, Allen became distressed and attempted to contact Dr. Daniels. After being unable to speak with Dr. Daniels, Allen presented at Chestnut Hill Hospital. After describing his symptoms to staff at the hospital, a catheter was inserted into his urethra and Allen's symptoms were partially relieved. Despite several more catheterizations, Allen's symptoms did not improve. After treating with another doctor, it was discovered that Allen had suffered permanent injuries leading to incontinence.

At trial, Allen's expert witness testified that these injuries were the result of the TUMT procedure, while Dr. Daniel's expert witness opined that they were more likely the result of procedures performed by other doctors. Over Allen's objection, the trial court allowed counsel for Dr. Daniel to publish pre-TUMT consent forms, signed by Allen, to the jury. While in deliberations, the jury requested the consent forms. Also over Allen's objection, the trial court permitted the consent forms to be sent to the deliberation room. The jury subsequently entered a defense verdict.

The trial court entertained post-trial motions, but ultimately denied them. Judgment was entered on the jury's verdict, and this timely appeal was taken by Allen.

On appeal, Allen presents two issues for our review:

1. Whether the Trial Court abused its discretion and/or committed an error of law by permitting Defendant-Appellee, Michael A. Daniels, M.D., to introduce evidence, documentation, and testimony concerning informed consent in a medical negligence case at the time of trial resulting in an unfair and improper verdict for the Defendant thereby warranting a new trial?
2. Whether the Trial Court abused its discretion and/or committed an error of law by precluding Plaintiff-Appellant, Rolan Allen, from introducing evidence, documentation, and testimony regarding Dr. Daniels' costs for leasing and/or purchase of equipment used to perform the TUMT procedure and Dr. Daniels' Billing Records and Charges for the Office Visits, Procedures and the TUMT procedure resulting in an unfair trial and improper verdict for the Defendant thereby warranting a new trial?

Appellant's Brief, at 5.

Both of Allen's issues on appeal challenge evidentiary rulings by the trial court. We note that our standard of review for evidentiary rulings is a narrow one:

When we review a trial court's ruling on admission of evidence, we must acknowledge that decisions on admissibility are within the sound discretion of the trial court and will not be overturned absent an abuse of discretion or misapplication of law. In addition, for a ruling on evidence to constitute reversible error, it must have been harmful or prejudicial to the complaining party.

Reott v. Asia Trend, Inc., 7 A.3d 830, 839 (Pa. Super. 2010).

In his first issue on appeal, Allen contends that the trial court erred by admitting consent forms into evidence at trial. Specifically, Allen argues that the forms were irrelevant to the medical negligence claims presented in the case. "Evidence that is not relevant is not admissible." Pa.R.E., Rule 402,

42 PA. CONS. STAT. ANN. Relevant evidence is defined as evidence “having any tendency to make the existence of any *fact* that is of consequence to the determination of the action more probable or less probable.” Pa.R.E., Rule 401, 42 Pa.Cons.Stat.Ann. (emphasis added).

It is undisputed that Allen’s cause of action at trial was one of medical malpractice. **See** Appellees’ Brief, at 18. In particular, it is undisputed that Allen’s claims centered on the theory that Dr. Daniels was negligent for recommending the TUMT procedure to Allen. **See id.** There was no claim that Dr. Daniels failed to warn Allen of the risks involved with the TUMT procedure, or that Dr. Daniels failed to gain Allen’s informed consent. Thus, the consent forms were required to be relevant to establishing or negating Allen’s claim that Dr. Daniels committed malpractice by recommending the TUMT procedure.

To establish a cause of action for medical malpractice, a plaintiff must plead and prove the four elements of negligence:

- (1) the physician owed a duty to the patient;
- (2) the physician breached that duty;
- (3) the breach of duty was the proximate cause of, or a substantial factor in, bringing about the harm suffered by the patient;
- and (4) the damages suffered by the patient were a direct result of that harm.

Hatwood v. Hospital of the University of Pennsylvania, 55 A.3d 1229, 1241 (Pa. Super. 2012) (citation omitted). Allen presented the expert testimony of Michael Palese, M.D., to support his claim. Dr. Palese opined

that Dr. Daniels breached his duty of care to Allen by performing the TUMT procedure:

The performance of the TUMT was not indicated at that time. Based on the position that Mr. Allen had symptoms that were not active at that time. He was performing well with the medications. He was on, at least according to the document, he had no complaints that would warrant a TUMT at that time.

...

So the fact that [Allen's] stricture was dilated twice and appeared to also improve the symptoms would also indicate the likelihood the symptoms, if he had any, were likely due to the stricture rather than the BPH at that time. Or the BPH, the symptoms were minimal could be controlled with medications.

N.T., Trial, 10/24/2011, at 148. Dr. Palese also opined that Allen suffered injuries from the TUMT procedure, including but not limited to scarring and "a complete disruption of his sphincter and the area around there." *Id.*, at 149. The damage to Allen's sphincter renders him incontinent. *See id.*, at 149-150.

Thus, Allen's case was premised upon his claim that pursuant to his clinical condition at the time, he was not an appropriate candidate for TUMT therapy. Allen contended that his symptoms were primarily caused by his urinary stricture, and as the TUMT procedure would not address that issue, it was inappropriate to suggest the TUMT procedure. Allen's claim at trial did not concern the manner in which Dr. Daniels performed the procedure or allege that any mistake in the procedure led to his injuries. Rather, he

claimed that since his symptoms were the result of his stricture, TUMT therapy's benefits would be limited to nil, while the risks were significant. It is also significant to note that Allen's claim was not that Dr. Daniels failed to inform him properly of the risks of the procedure; there was no informed consent issue at trial.

The trial court held that the forms were relevant and necessary for "the jury's full understanding of the care rendered and for its determination of whether [Appellees were] in fact negligent in suggesting, prescribing, and performing the TUMT procedure... [.]" Trial Court Opinion, 6/27/2012, at 10. Initially, we note that there does not appear to be any significant dispute as to the care Dr. Daniels rendered to Allen. Our review of Allen's and Dr. Daniels's testimony at trial reveals that there are, at best, minor disagreements over how Dr. Daniels treated Allen. In any event, the best evidence of the care rendered by Dr. Daniels came from the parties themselves.

Allen testified that Dr. Daniels had discussed the TUMT procedure with him "on a number of occasions." N.T., Trial, 10/25/2011, at 23. Allen felt that Dr. Daniels minimized the risks, and repeatedly told him that he "was an ideal candidate for [TUMT]." *Id.*, at 23-24. Allen conceded that Dr. Daniels informed him that one of the benefits of TUMT therapy would be to reduce or eliminate the pharmaceutical regimen Allen was using to treat his symptoms prior to the procedure. *See id.*, at 80.

Dr. Daniels testified that he explained the TUMT procedure and its proposed benefits. **See id.**, at 125. “The positives of the procedure are balanced out against the risks of the procedure.” **Id.** He then discussed several risks with Allen, including infection, urinary leakage, and damage to the treated organs and tissues. **See id.**

Reviewing the consent form reveals that it provides a brief summary of the TUMT procedure. At the end of the description of the procedure, the form states “[m]y physician has discussed contraindications and precautions with me concerning this procedure.” The form then lists the anticipated benefit of the procedure as relieving Allen’s “bladder outflow obstruction and associated symptoms.” Under risks, the form indicates that infections, leakage, and “injury to the urethra” are possible. The form proceeds to discuss alternatives to the procedure, once again ending the discussion with “[m]y physician has discussed the alternatives with me and answered any questions I have about these alternative treatments.”

Clearly, the consent form was not a record of the treatment or care provided by Dr. Daniels. It is, at most, a written summary of Dr. Daniels’s discussion of the TUMT procedure, its expected benefits, and possible risks with Allen. It does not address risk probabilities or expected success rates. Nor does it purport to include the entirety of the discussion, in several places referencing other oral communications between Dr. Daniels and Allen. It therefore could not be used to establish whether Dr. Daniels utilized

appropriate care in recommending the TUMT procedure to Allen in the first place.

Furthermore, in terms of chronology, it comes after the time that is the pivot of Allen's claim. By the time the consent form was signed, Dr. Daniels had already recommended the TUMT procedure, and from the wording of the form, discussed it in detail with Allen orally. The consent form provides no information capable of establishing what factors Dr. Daniels relied upon in utilizing his professional judgment to recommend the TUMT procedure to Allen. For example, Dr. Daniels conceded that the TUMT procedure is subject to a 30 percent failure rate. **See** N.T., Trial, 10/25/2011, at 153, 196. This information is not present on the consent form, but it is implied that Dr. Daniels considered this information in utilizing his professional judgment to recommend the TUMT therapy to Allen.

In sum, the consent form did not provide any light to the issue of whether Dr. Daniels breached his duty of care by recommending TUMT therapy to Allen. On its face, it does not purport to be a record of the care provided, even if that were at issue in this case. The form, at best, is a written summary of discussions that occurred after the time when Allen claims Dr. Daniels breached the standard of care. Accordingly, the evidence was utterly irrelevant to the case.

Furthermore, it cannot be rationally argued that the forms did not prejudice Allen. Dr. Daniels's counsel, in opening statements, noted that the

decision to go forward with the TUMT procedure was “the decision of the patient.” N.T., Trial, 10/24/2011, at 68. Dr. Daniels’s counsel repeatedly published the form to the jury, and spent significant time questioning Allen and Dr. Daniels about the contents of the form. **See** N.T., Trial, 10/25/2011, at 79-80; 124-125; 140; 152-158. Specifically, each was asked if Allen had signed the consent forms. **See id.**, at 79; 157-158.

During closing arguments, Dr. Daniels’s counsel began his discussion of the case by stating “[n]ow there is a decision to sue for a surgery that he [Allen] consented to.” N.T., Trial, 10/26/2011, at 79. Shortly thereafter, defense counsel returned to the consent form issue, highlighted that Allen had signed them, and described the decision to pursue TUMT therapy as a collaborative process. **See id.**, at 81-82. Not content, defense counsel revisited the consent forms in his summation of the tests run by Dr. Daniels. **See id.**, at 95-97.

Finally, the jury requested to review the consent forms during deliberations. **See** N.T., Trial, 10/27/2011, at 3. Allen’s counsel objected to allowing the consent forms in the deliberation room, noting that “the fact that the jury is requesting these consent forms is clear evidence that the jury has permitted the injection of the issue of consent to confuse their thought process in these deliberations...” **Id.**, at 4.

We agree with Allen’s counsel. This irrelevant evidence was repeatedly published to the jury, ostensibly to provide a fuller understanding

of the care provided. As we observed above, it provided no such evidence. In fact, it provided no evidence, other than the fact of Allen's consent, that was not already available through the testimony of the witnesses. The fact that the jury was focused on an issue with what the consent forms contained indicates that they were distracted from the real issue at trial: whether Dr. Daniels should have recommended the TUMT therapy in the first place.

The trial court opines that its ruling was consonant with the prior trial court decision ***Lomax v. Thomas Jefferson University Hospital***, 1992 WL 1071397, 24 Phila.Co.Rptr. 224 (Pa.Com.Pl. 1992), ***aff'd*** 627 A.2d 208 (Pa. Super. 1993) (Unpublished memorandum) (Table). Initially, we note that trial court opinions and unpublished memorandums of this Court hold no precedential weight upon this panel. In any event, we find ***Lomax*** distinguishable. In ***Lomax***, one of the primary issues in contest at trial was whether the plaintiff's injuries were due to mistakes made during surgery. The trial court ruled the consent form was admissible to prove that the injuries suffered by the plaintiff were possible even in the absence of a breach of the standard of care. In contrast, as noted previously, Allen's claims are entirely independent from Dr. Daniels's actions during the TUMT procedure; there was no claim that Dr. Daniels made a mistake during the procedure. Rather, Allen's claim was that the procedure should never have been recommended in the first place. The consent form had no relevance to

this issue. Accordingly, we reverse the judgment and remand for a new trial.

While this technically moots Allen's second issue on appeal, in the interest of judicial economy we will address the issue to avoid having the same issue arise after the re-trial. In his second issue, Allen contends that the trial court erred in excluding evidence regarding Dr. Daniels's costs for leasing the TUMT machinery and other assorted billing records. Allen desired to use this evidence to establish that Dr. Daniels recommended the TUMT therapy primarily to help recoup his sunk costs in leasing the machinery.

The trial court ruled that such evidence was not relevant to a cause of action for negligence. We agree. As noted by the trial court, evidence of this motive would be relevant to establishing the existence of an intentional tort. However, Allen's pleadings and claim at trial did not include an intentional tort. As such, the evidence would have no probative value. Furthermore, as the trial court notes, even assuming the presence of *de minimus* probative value, the improper prejudicial effect of such evidence, without more evidence of a link, would outweigh any such small probative value. **See** Pa.R.E. 403. Accordingly, we conclude that Allen's second issue on appeal would merit no relief.

Judgment reversed. Case remanded for further proceedings consistent with this memorandum. Jurisdiction relinquished.

J-A06015-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 5/20/2013