NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

MARY KAREN SICCHITANO, INDIVIDUALLY AND AS EXECTRIX OF THE ESTATE OF MARY JEAN HAVRILCSAK, DECEASED Appellant v. THE PRESBYTERIAN MEDICAL CENTER OF WASHINGTON, PENNSYLVANIA OPERATING UNDER THE FICTITIOUS NAME SOUTHMONT OF PRESBYTERIAN SENIOR CARE Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1737 WDA 2014

Appeal from the Order Entered September 26, 2014
In the Court of Common Pleas of Washington County
Civil Division at No: 2011-2217

BEFORE: BOWES, OLSON, AND STABILE, JJ.

MEMORANDUM BY STABILE, J.: **FILED FEBRUARY 1, 2016**

Mary Karen Sicchitano ("Appellant"), individually and as Executrix of the Estate of her mother, Mary Jean Havrilcsak ("Mrs. Havrilcsak"), appeals from the September 26, 2014 order entered in the Court of Common Pleas of Washington County, denying her motion for judgment notwithstanding the verdict (JNOV) or for a new trial after a jury returned a verdict in favor of Appellee, The Presbyterian Medical Center of Washington, Pennsylvania d/b/a Southmont of Presbyterian Senior Care ("Southmont"). The jury determined that Southmont—either directly or through its employees—was

negligent but that its negligence was not a factual cause in bringing about harm to Mrs. Havrilcsak. Appellant asserts the trial court erred by denying her post-trial motion because the jury's verdict in favor of Southmont was against the weight of the evidence and shocks one's sense of justice. Finding no abuse of discretion on the part of the trial court, we affirm.

The factual background of this case is summarized in the trial court's Rule 1925(a) opinion at pages 2 through 8. Trial Court Opinion ("T.C.O."), 12/19/14, at 2-8. Our review of the trial transcripts confirms that the trial court's summary accurately condenses the three days of testimony presented in the trial. Therefore, we adopt the trial court's Factual Background as our own, as if fully set forth herein. For purposes of this Memorandum, we provide a further condensed version as follows:

Mrs. Havrilcsak was born on February 20, 1928, and lived alone in a seniors' apartment from 1996 until 2010. In the five years prior to her March 2010 death, she was noted to be mentally alert but used a walker because her legs were "bad." She had limited range of motion in her arms and had difficulty breathing at times. In her final years, she fell on numerous occasions.

In late 2009, Mrs. Havrilcsak was hospitalized for dizzy spells and shortness of breath after falling in her apartment. During her hospitalization, she had a pacemaker implanted. She subsequently recuperated in a nursing home for approximately six weeks. While in the

nursing home, she slipped off the edge of her bed, activating a pressure alarm. Upon return to her apartment from the nursing home, she initially had 24-hour care provided by hired caretakers, family and friends. Eventually, Mrs. Havrilcsak was alone in the evenings and overnight. She would get up on her own and walk with the aid of her walker. She often fell, even when someone—including Appellant—was nearby.

In February of 2010, Mrs. Havrilcsak was admitted to Washington Hospital, suffering from shortness of breath and weakness. Tests conducted during her hospitalization did not provide any conclusive diagnosis. She was discharged to the third floor short-term unit of Southmont's skilled nursing facility for a 30-day rehabilitation stay beginning on February 20, 2010, her 82nd birthday. Her son-in-law noted, "She had weakness in her legs and she was in there predominately for rehabilitation, to gain the strength in her legs." Notes of Testimony ("N.T."), Trial, 9/11/14, at 610.

Upon admission to Southmont, Mrs. Havrilcsak underwent an initial assessment and was classified as a high fall risk. Care plans were put into place related to her falls. As with all Southmont patients, for the first 72 hours she was to wear a clip-on alarm that would be removed if she did not fall during that period. Because Southmont is a restraint-free facility, full-

side bed rails were not used for its patients. However, personal alarms and pressure alarms were used on patients' beds and chairs.[1]

On February 23, beyond her initial 72 hours at Southmont, Mrs. Havrilcsak fell. She had not used the call bell on her bed to request help and was not wearing a personal alarm. Her case was discussed at a "fall team" meeting and it was determined she needed alarms.

Mrs. Havrilcsak improved during her stay. She was alert, oriented, and able to make her needs known. She was directed to use her call button for assistance with getting up and moving around. She sometimes used the call button but on occasion would not wait for staff to appear.

The trial court summarized the events of March 17, 2010 as follows:

> On March 17, 2010, around 10:30 p.m., Mrs. Havrilcsak fell a second time. At the time of the fall, the nurses were changing shifts and having a meeting to exchange information for the day. A staff member heard a thump in Mrs. Havrilcsak's room and found her on the floor. She had been walking from her bed to the bathroom, unassisted, fell and hit her head. She had not pressed the call button. The staff determined that the call button was working because a [Certified Nursing Assistant] pulled the emergency alarm upon arriving at her room. The call bell system, in general, was functioning because the emergency

---

[1] A personal or "clip-on" alarm was a device attached to a resident's clothing on one end and to the resident's chair or bed on the other end. In the event the resident would get up from the chair or bed, the device would emit an alarm sound. A pressure alarm was a mat placed on a resident's bed and would emit an alarm sound if the resident would get out of bed or even simply move around in bed so that sufficient pressure was not maintained on the mat.

> light was activated and sounded. Therefore, the call bell system was functioning. . . .

T.C.O., 12/19/14, at 3-4 (quotations and references to Notes of Testimony omitted).

Mrs. Havrilcsak was taken to Washington Hospital and then life-flighted to Presbyterian Hospital in Pittsburgh. On the following day, she was unresponsive and underwent surgery to relieve pressure of a cerebral hematoma. She survived the surgery but did not improve. On Friday, March 26, she was removed from her ventilator. On March 28, Mrs. Havrilcsak died from a "subdural hematoma due to or as a consequence of trauma of the head." N.T., Trial, 9/11/14, at 626 (quoting Stipulation of the Parties, 8/27/12, at ¶ 2).

In her Complaint, Appellant alleged negligence on the part of Southmont and its employees for, *inter alia*, failing to protect Mrs. Havrilcsak from harm; failing to apply her personal alarm on March 17, 2010; failing to implement appropriate measures to prevent her from falling; and failing to hire and appropriately train its staff. Complaint, 4/12/11, at ¶ 52(a)-(c)(c). In addition, Appellant alleged Southmont was negligent for, *inter alia*, failing to comply with various regulations relating to nursing services and maintenance of clinical records. ***Id.*** at ¶ 56(a)-(u).

At trial, Appellant argued that Southmont should have ensured that Mrs. Havrilcsak was wearing a personal alarm or that she should have had a pressure alarm on her bed on the evening of her fall. Appellant and her

husband testified that they visited Mrs. Havrilcsak daily during her stay at Southmont and that they never observed a personal alarm on her.

Southmont's defense included testimony that Mrs. Havrilcsak was non-compliant with wearing an alarm and that her non-compliance was a factor in her fall. The facility's records did not reflect that her alarms were ever discontinued. Various employees testified that Mrs. Havrilcsak was not using her personal alarm and was taking it off, although instances of her removal of the alarm were not regularly documented.

Both parties offered expert testimony. Appellant offered testimony of a nurse expert. Southmont offered a nurse expert and an internal medicine expert. The trial court surmised, "The jury as fact-finder chose to believe defense experts and determine credibility on factual cause in favor of [Southmont]." T.C.O., 12/19/14, at 7.

On September 12, at the conclusion of testimony and after closing arguments and the delivery of jury instructions, the jury was charged with completing a verdict slip that included six interrogatories. In the first question, the jury was asked, "Was [Southmont], directly and/or through its employees, negligent?" The jury responded, "Yes." Proceeding as directed to the second question, the jury was asked, "Was the negligence of [Southmont] a factual cause in bringing about any harm to [Mrs.] Havrilcsak?" The jury answered, "No." The verdict slip indicated that answering the second interrogatory in the negative meant that Appellant

could not recover and the jurors should return to the courtroom without answering any additional questions.

Appellant filed a motion for post-trial relief requesting JNOV or, in the alternative, a new trial, contending the jury's finding of "no causation" for any harm to Mrs. Havrilcsak shocks one's sense of justice and was against the weight of the evidence. Motion for Post-Trial Relief, 9/22/14, at ¶¶ 6, 18. By order entered September 26, 2014, the trial court denied Appellant's motion.

Appellant filed a timely notice of appeal and timely complied with the trial court's directive to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), raising the same two issues she has rephrased for this Court as follows:

> I. Did the [t]rial [c]ourt err by denying [Appellant's] Motion for Judgment Notwithstanding the Verdict (JNOV) on the issue of causation when the causation verdict was against the clear and substantial weight of the evidence, particularly in light of the fact that witnesses for both [Appellant] and [Southmont] agreed that: 1) the fall caused Mrs. Havrilcsak's death; and, 2) [Southmont's] failure to implement certain fall prevention interventions would have increased the risk of harm to Mrs. Havrilcsak?
>
> II. Did the [t]rial [c]ourt err in denying [Appellant's] Motion for a New Trial on the issue of causation when the causation verdict was against the clear and substantial weight of the evidence, particularly in light of the fact that witnesses for both [Appellant] and [Southmont] agreed that: 1) the fall caused Mrs. Havrilcsak's death; and, 2) [Southmont's] failure to implement certain fall prevention interventions would have increased the risk of harm to Mrs. Havrilcsak?

Appellant's Brief at 5.

In ***Grossi v. Travelers Personal Insurance Co.***, 79 A.3d 1141 (Pa. Super. 2013), this Court addressed the applicable standard and scope of review from denial of JNOV or a new trial, stating:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the [jury] could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.
>
> Our review of the trial court's denial of a new trial is limited to determining whether the trial court acted capriciously, abused its discretion, or committed an error of law that controlled the outcome of the case. In making this determination, we must consider whether, viewing the evidence in the light most favorable to the verdict winner, a new trial would produce a different verdict. Consequently, if there is any support in the record for the trial court's decision to deny a new trial, that decision must be affirmed.

Id. at 1147-48 (citations omitted). Further, "[a]ppellate review of a weight claim is a review of the trial court's exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence." ***Haan v. Wells***, 103 A.3d 60, 70 (Pa. Super. 2014) (quoting ***In***

re Estate of Smaling, 80 A.3d 485, 490 (Pa. Super. 2013) (additional citations and brackets omitted)). Moreover:

> The trial court may award a judgment notwithstanding the verdict or a new trial only when the jury's verdict is so contrary to the evidence as to shock one's sense of justice. In determining whether this standard has been met, appellate review is limited to whether the trial judge's discretion was properly exercised, and relief will only be granted where the facts and inferences of record disclose a palpable abuse of discretion.

Id. (citations and internal quotations omitted).

With respect to the role of the finder of fact—in this case, the jury, "[t]he factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." ***Id.*** (quoting ***Samuel–Bassett v. Kia Motors Am., Inc.***, 613 Pa. 371, 34 A.3d 1, 39 (2011)).

In its analysis, the trial court properly recognized that a motion for JNOV or for a new trial is "addressed to the discretion of the trial court." T.C.O., 12/19/14, at 11 (quoting ***Samuel-Bassett***, 34 A.3d at 39). Further, "[w]itness credibility is an issue 'solely for the jury to determine.'" ***Id.*** (additional citation omitted). With those standards in mind, the trial court determined:

> [Appellant's] counsel attempted to impeach [Southmont employee April] Garnett's credibility regarding her testimony that Mrs. Havrilcsak removed her alarms, but apparently the jury chose to believe that Mrs. Havrilcsak refused to leave on her personal alarm and that Ms. Garnett did not intentionally falsify

> the incident report.[2] Same could have been a factor in the jury's finding that Southmont had been negligent. She had no reason to falsify the report at the time she completed it.
>
> The record is clear that Mrs. Havrilcsak had a history of falling and that not all of her falls were preventable. Even at home when surrounded by family she still fell. Southmont may have breached its duty to document treatment history, but employees recalled reports that Mrs. Havrilcsak had either refused or removed her alarms. Thus, the causation element was not met. The jury being the fact-finder found that [Southmont expert witness] Nurse Maron credibly testified that even if refusals or removals had been documented, [] Southmont had no other options to help prevent Mrs. Havrilcsak's fall other than her use of the call bell. The jury's verdict in this matter did not shock this [c]ourt's sense of justice and therefore did not warrant judgment notwithstanding the verdict (JNOV) or a new trial.

T.C.O., 12/19/14, at 11-12 (references to Notes of Testimony omitted).

Appellant looks to the stipulations entered into by the parties and asserts that the stipulations represent an agreement that Southmont's negligence was the cause of Mrs. Havrilcsak's death.[3] Appellant's conclusion is flawed. Clearly, the parties stipulated that Mrs. Havrilcsak's fall caused

---

[2] Ms. Garnett was one of six current or former Southmont employees called to testify as on cross-examination by Appellant's counsel. She testified that when she entered Mrs. Havrilcsak's room immediately after the fall, Mrs. Havrilcsak told her that she got up to go to the bathroom and fell, and that she was "fine." N.T., 9/9/14, at 182-83. Ms. Garnett completed the hand-written incident report for the fall and was challenged by Appellant's counsel for falsifying information she included in the report. ***Id.*** at 184-92.

[3] The stipulations provided that Mrs. Havrilcsak's death certificate was complete, accurate and admissible at trial and that "The 'CAUSE OF DEATH' listed as 'Subdural Hematoma Due To (or as a consequence of) Trauma of Head' will not be disputed at trial." Stipulation of Counsel, 8/27/12.

her death. However, that does not equate to an acknowledgement by Southmont that any negligence on its part caused harm to Mrs. Havrilcsak. The cross-examination of one of Southmont's two expert witnesses illustrates this fact. Counsel for Appellant was questioning Southmont's nurse expert, Irene Warner Maron, R.N.,[4] about the breach of the standard of care with regard to documentation when the following exchange took place:

> Appellant's Counsel: So the standard of care would require [documentation of non-compliance with federal regulations]?
>
> Nurse Warner Maron: Yes.
>
> Appellant's Counsel: That did not occur in this case?
>
> Nurse Warner Maron: That's right.
>
> Appellant's Counsel: And that would be a breach of the standard of care in this case?
>
> Nurse Warner Maron: It would be a breach of the standard of care if there was harm, and I don't see any harm.

---

[4] Nurse Warner Maron testified that she received a diploma in nursing in 1980 and became licensed as a registered nurse in Pennsylvania in 1981. She is currently licensed in Pennsylvania, New Jersey, Delaware, Virginia, New York and Florida. She is also licensed as a nursing home administrator in Pennsylvania. She has earned master's degrees in gerontology, in health administration and in law and social policy, and was awarded a doctorate in health policy. She is certified in gerontological nursing, in wound care as a pressure sore expert, and as an administrator of assisted living facilities. She is currently a professor at St. Joseph's University and is one of 40 or 50 non-physicians who are fellows in the College of Physicians in Philadelphia. In addition, she has been published and makes presentations concerning geriatric issues. N.T., Trial, 9/11/14, at 637-41.

Appellant's Counsel: Well, breach of the standard of care doesn't necessarily go to harm; does it?

Nurse Warner Maron: No, but there - -

Appellant's Counsel: So my question is, it would be a breach of the standard of care?

Nurse Warner Maron: A breach of the standard of care without harm, yes.

Appellant's Counsel: Wouldn't you agree with me that failure to document repeated non-compliance does put the patient at an increased risk for harm, because, in this case, there are 12 to 15 apparent circles that might document non-compliance, but nothing was done? Wouldn't that put Mrs. Havrilcsak at an increased risk of harm?

Nurse Warner Maron: No. If you are using [an alarm] and she doesn't want to use it or she won't use it or takes it off, and she is 21 days without any harm, then I really don't see the harm that this documentation would have caused.

Appellant's Counsel: You said the standard of care requires an assessment as to why it occurred and also considering interventions, right?

Nurse Warner Maron: Right. . . . So what would be the interventions? I would simply have discontinued the alarm, taking it off the aides' documentation, because she is not using it and she is still safe. So the documentation would have been simply to stop using a device that's not being used anyway.

Appellant's Counsel: She ended up not safe, right, she ended up dead; right?

Nurse Warner Maron: She ended up dead from an accident that may not have been prevented from the use of the device. And she was doing really well. She was improving in her therapy. She was walking without help. She was transferring without help. She was going up and down stairs.

> Appellant's Counsel: And you can't say that, if this alarm was in place, you do not know if anyone from Southmont would have been able to prevent this fall?
>
> Nurse Warner Maron: I don't know that this alarm . . . would have made any difference at all.
>
> Appellant's Counsel: But it might have?
>
> Nurse Warner Maron: You know, in the perfect world, everyone would have been right there, been able to hear it and intervene. I don't know that Mrs. Havrilcsak would have liked that alarm any more than she would have liked the other alarms.
>
> This is not someone that I would have used this alarm on. I think it's a terrible tragedy that she fell and she died, but, again, there is just so much that you would do for somebody who is alert and oriented and who is doing really well, who is going to go home and who is not going to have any alarms at all.

N.T., Trial, 9/11/14, 686-89.

As for the use of alarms themselves, Southmont's internal medicine expert, Adam Sohnen, M.D., testified, "There is no literature that shows that alarms actually prevent falls," ***Id.*** at 712. "There is really no good single intervention that can prevent falls." ***Id.*** at 713-14.

In the Argument section of her brief, Appellant relies largely on automobile negligence cases in support of her contention that the jury's verdict cannot stand and that JNOV or a new trial is warranted. Appellant argues that ***Andrews v. Jackson***, 800 A.2d 959 (Pa. Super. 2002), is "most instructive." Appellant's Brief at 18-19. In that case, medical experts for both parties agreed that some of the plaintiff's injuries were caused by the accident. The jury found the defendant negligent but determined that the

defendant's negligence was not a substantial factor in bringing about harm to the plaintiff. On appeal, this Court reversed, stating:

> Where there is no dispute that the defendant is negligent and both parties' medical experts agree the accident caused **some** injury to the plaintiff, the jury may not find the defendant's negligence was not a substantial factor in bringing about at least **some** of plaintiff's injuries. ***See Neison v. Hines***, 539 Pa. 516, 521, 653 A.2d 634, 637 (1995); ***Mano*** [***v. Madden***, 738 A.2d 493 (Pa. Super. 1999) (*en banc*)]. . . . Such a verdict is contrary to the weight of the evidence adduced at trial. ***See Neison, supra; Mano, supra***. In other words, "a jury is entitled to reject any and all evidence up until the point at which the verdict is so disproportionate to the uncontested evidence as to defy common sense and logic." ***Neison, supra*** at 521, 653 A.2d at 637.

Id. at 962 (emphasis in original) (some citations omitted). Appellant claims further support in another passage from ***Andrews***, in which this Court discusses another automobile negligence case, ***Majczyk v. Oesch***, 789 A.2d 717 (Pa. Super. 2001) (*en banc*), stating:

> Our reading of ***Majczyk***, however, does not lead us to conclude that a jury may disregard uncontroverted expert witness testimony that the accident at issue did not **cause** some injury. Rather, we conclude the jury must find the accident was a substantial cause of at least some injury, where both parties' medical experts agree the accident caused some injury. While the jury may then find the injuries caused by the accident were incidental or non-compensable and deny damages on that basis, the jury may not simply find the accident did not "cause" an injury, where both parties' medical experts have testified to the contrary.

Id. at 964 (emphasis in original).

Appellant's reliance on ***Andrews***, ***Majczyk*** and other cases in which a jury found negligence but no causation is misplaced. Whereas experts for

both parties in those cases found injury caused by an accident, *i.e.*, harm caused by the defendant's negligence, there was no such agreement among the parties' experts in the case before us. As the excerpt from Nurse Warner Maron's testimony clearly illustrates, while she was willing to acknowledge there were shortfalls in documentation, she was adamant that the actions or inactions by Southmont did not cause harm to Mrs. Havrilcsak.

As this Court explained in ***Grossi***, in the course of our review of the trial court's denial of JNOV, we must "consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict." ***Grossi***, 79 A.3d at 1147. Further, we must view the evidence "in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference." ***Id.*** at 1147-48. We keep in mind that "[t]he factfinder is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." ***Haan***, 103 A.3d at 70 (quoting ***Samuel–Bassett***, 34 A.3d at 39). "If any basis exists upon which the [jury] could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. ***Grossi***, 79 A.3d at 1148.

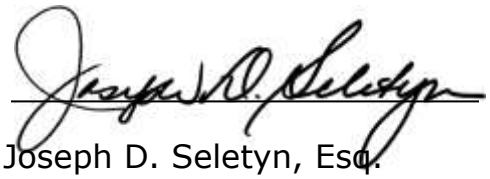
Reviewing the evidence in the light most favorable to Southmont, we conclude there was a basis upon which the jury could properly have made its award. Therefore, we must affirm the denial of the motion for JNOV.

With regard to the motion for a new trial, we again view the evidence in the light most favorable to the verdict winner and our review "is limited to whether the trial court acted capriciously, abused its discretion, or committed an error of law that controlled the outcome of the case." ***Id.*** "[I]f there is any support in the record for the trial court's decision to deny a new trial, the decision must be affirmed." ***Id.***

We do not find that the trial court acted capriciously, abused its discretion, or committed error of law controlling the outcome of the case. Further, we find support in the record for the trial court's decision to deny a new trial. Therefore, the trial court's decision must be affirmed.

Order affirmed. In the event of further proceedings, the parties shall attach a copy of the trial court's 1925(a) opinion to their filings.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/1/2016