NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LINDA EMERY, AS EXECUTRIX OF THE ESTATE OF DALE EMERY, DECEASED, Appellee v. WILLIAM GROH, M.D., PHILADELPHIA HEART INSTITUTE, CLINICAL PRACTICES OF THE UNIVERSITY OF PENNSYLVANIA, PENN PRESBYTERIAN MEDICAL CENTER OF THE UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, UNIVERSITY OF PENNSYLVANIA HEALTH SYSTEM, THE TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA, Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 858 EDA 2013

Appeal from the Judgment Entered May 14, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): April Term, 2010, No. 3731

BEFORE: BENDER, P.J., LAZARUS, J., and FITZGERALD, J.*

MEMORANDUM BY BENDER, P.J. **FILED FEBRUARY 07, 2014**

Appellants, William Groh, M.D. (Dr. Groh), *et. al*, appeal from the entry of judgment in favor of Appellee, Linda Emery (Mrs. Emery), individually and as executrix of the estate of Dale Emery (Mr. Emery) in this medical malpractice case. The judgment awarded damages to Mrs. Emery in her dual capacity for negligence, failure to obtain informed consent, and loss

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* Former Justice specially assigned to the Superior Court.

of consortium related to the implantation of a cardiac stent in Mr. Emery. Appellants claim that the jury's verdict was inconsistent with the causation testimony offered by Mrs. Emery's medical expert, and that the jury's verdict for Mrs. Emery's loss of consortium claim was against the weight of the evidence. After careful review, we reverse.

A jury trial commenced in this matter on November 13, 2012. On November 15, 2012, the jury returned a verdict in Mrs. Emery's favor on her claims of negligence, failure to obtain informed consent, and loss of consortium. The jury awarded Mrs. Emery, as Executrix of the Estate of Dale Emery,[1] $365,500, and $282,000 to Mrs. Emery individually.

Appellants filed a timely notice of appeal. They now present the following questions for our review:

> A. Whether the trial court erred in failing to enter a judgment notwithstanding the verdict in [Appellants'] favor or, alternatively, in failing to grant a new trial because the jury's verdict was inconsistent with the causation testimony of [Mrs. Emery's] medical expert, Stuart Fischer, M.D.?
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> B. Whether this Court should grant remittitur, or, alternatively, a new trial since the jury's verdict in favor of Mrs. Emery was clearly excessive and against the weight of the evidence presented and/or could only have been the product of prejudice, speculation, sympathy and/or conjecture?

Appellants' Brief at 4.

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[1] Dale Emery died of unrelated causes prior to trial. The exact cause of his death is not contained in the record, but it was undisputed that his death was not caused by the implantation of the stent in question. N.T. Trial Vol. I, 11/13/12, at 206.

In August 2008, Dale Emery was under the care of a cardiologist, who referred him to Dr. Groh for a diagnostic cardiac catheterization. N.T. Trial Volume I, 11/13/12, at 139, 147. Dr. Groh testified that Mr. Emery "indicated to me that he was allergic to nickel." ***Id.*** at 146. According to Dr. Groh, it was not possible to choose an exact course of treatment for Mr. Emery's cardiac disease prior to the procedure, "without knowing the patient's specific anatomy or taking into account his clinical situation." ***Id.*** at 154. Dr. Groh told Mr. Emery that treatment options included stenting, bypass surgery, medical therapy, and balloon angioplasty. ***Id.*** at 153. Dr. Groh also told Mr. Emery that all stents contain nickel. ***Id.*** at 155. Initially, Mr. Emery objected to the implantation of a stent, but after further discussion with Dr. Groh, Mr. Emery signed a form that stated he explicitly consented to all of the above-mentioned procedures (including the implantation of a stent). ***Id.*** at 155, 163. That form did not note that Mr. Emery was allergic to nickel, nor did it note that stents contain nickel. ***Id.*** The instruction for use of the stent at issue stated that it was not indicated for use in patients with a known allergy to stainless steel.[2] ***Id.*** at 155 – 160. This fact was not disclosed to Mr. Emery prior to the catheterization. ***Id.*** at 161.

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[2] We note that stainless steel is a metal alloy frequently containing nickel. Though this fact was not adduced at trial, the fact that all stents contain nickel is contained in the record. N.T. Vol. I, at 155.

Dr. Groh performed the catheterization. ***Id.*** at 166. While in the hospital room, Dr. Groh spoke by telephone with Mr. Emery's physician. ***Id.*** He also spoke with Mr. Emery (who was sedated but conscious) about his observations. ***Id.*** Dr. Groh then proceeded to implant a stent in one of Mr. Emery's coronary arteries. ***Id.*** Once implanted, the stent could not be removed. ***Id.*** at 167.

Mr. Emery experienced itching, pain and rashes following the procedure. ***Id.*** at 186 – 187. These symptoms progressively worsened over the course of the following year. ***Id.*** at 202 – 203. His mood deteriorated as well. ***Id.*** at 204. The combination of his physical symptoms, and the emotional distress resulting from them, put a strain on the Emerys' marriage. ***Id.*** at 202 – 204. Mr. Emery began to travel from the marital home to reside at the homes of his family members for extended periods of time. ***Id.*** at 203. Mrs. Emery continued to reside in the marital home, but would frequently spend time with Mr. Emery at his relatives' homes. ***Id.*** The situation continued until Mr. Emery died of unrelated causes in 2011. ***Id.*** at 206.

At trial, Mrs. Emery offered the expert testimony of Dr. Stuart Fischer, an interventional cardiologist. Dr. Fischer testified that he felt comfortable expressing opinions regarding the standard of care and causation as they related to this case. N.T. Trial Vol. II, 11/14/12, at 15 – 16. He opined that Dr. Groh breached his duty of care when he failed to inform Mr. Emery that,

according to the stent's package instructions, its use was contraindicated in patients with known stainless steel allergies. ***Id.*** at 34.

Dr. Fischer prepared a report prior to trial. In that report, he characterized the facts as follows: Mr. Emery "complained of pruritus [itching] in his chest, felt secondary to the nickel-containing stent." Expert Report of Dr. Stuart Fischer (Report), at 4. Dr. Fischer also reported that "following discharge, [Mr. Emery] continued to have complaints of pruritus, rash, all felt secondary to the nickel-containing stent," and that "Mr. Emery continues to complain of multiple symptoms, including pruritus, and rash, all felt secondary to the nickel-containing stent." ***Id.*** He concluded, "It is my opinion to a reasonable medical probability that had Mr. Emery not received this nickel-containing drug eluding stent, he would not be complaining of the multiple symptoms, documented in his follow-up records." ***Id.*** at 5.

Nowhere in his report did Dr. Fischer opine that the stent was the direct cause of Mr. Emery's symptoms. Instead, Dr. Fischer noted that symptoms were reported by Mr. Emery, and that Mr. Emery felt they were caused by the stent. Dr. Fischer used the term "secondary" without the modifier "felt" elsewhere throughout his report to establish direct causality – *i.e.*, "His sternum was not wired secondary to the nickel containing sutures…." Report at 4. However, when Dr. Fischer discussed the causality associated with the stent, he noted that the symptoms were "felt" by Mr. Emery to be "secondary" to the stent. Moreover, his conclusion did not state that the stent was the cause of the symptoms – rather, he only went so far

as to conclude that Mr. Emery would not be complaining of the symptoms if he had not received the stent. In other words, Dr. Fischer continued to attribute the ultimate conclusions of causality to Mr. Emery, and not to himself.

Dr. Fischer's testimony at trial was consistent with the hesitation expressed in his report. On direct examination, in response to the question, "is it your opinion that the breach of the standard of care that you spoke about in terms of the placement of the stent and the informed consent caused the harm, including the itching and the rash and the things you spoke about?" Dr. Fischer answered, "Yes, it is." N.T. II at 62. Dr. Fischer also stated:

> And I believe the fact that a stent containing stainless steel was implanted in this gentleman, from the next day he started having complaints of itching, pruritus, nausea. He had multiple somatic complaints that persisted throughout once the stent was implanted, so I believe it did do harm.

Id. at 44. As in his report, Dr. Fischer merely offered a correlation in time between the symptoms reported by Mr. Emery, and the implantation of the stent. He also failed to state any level of certainty in this correlation. Dr. Fischer offered no other testimony regarding causation on direct examination.

When questioned on cross-examination, "Who felt it was secondary to the nickel containing stent?" Dr. Fischer stated, "I believe Mr. Emery did." ***Id.*** at 76. He subsequently strengthened his disclaimer of these conclusions: "When I say that, felt secondary to the nickel containing stent, I believe this

was the strong beliefs of Mr. Emery and I'm relating to that." ***Id.*** at 77. Dr. Fischer also noted "I believe that later on he was seen by an allergist who believed a lot of his symptoms may have been caused by the nickel containing stent." ***Id.*** at 76 – 77.

Dr. Fischer testified that Mr. Emery had symptoms, these symptoms presented after the stent was implanted, Mr. Emery believed the stent caused the symptoms, and another physician thought that the "possibility" that the symptoms were caused by the stent was "high." ***Id.*** at 84, 86, 98. As far as his own opinion, Dr. Fischer was asked: "[Y]ou're not sitting here as a cardiologist giving an opinion that this is in fact the cause?" ***Id.*** He avoided making any conclusion as to causality: "[W]hat I'm sitting here as a cardiologist saying is with this gentleman's history I would never have placed a drug eluding stent in him." ***Id.*** Dr. Fischer was immediately pressed further: "[A]nd you're also not saying that his symptoms were in fact based on a reasonable degree of medical certainty, you are not saying that the symptoms were caused by the nickel stent?" ***Id.*** Dr. Fischer conceded, "I can't say that for sure, I agree with you." ***Id.*** To the extent Dr. Fischer ever expressed his own professional opinion as to whether the symptoms were caused by the stent, he testified, "as the physician reading this from another physician, I'm seeing the word possibility of systemic symptoms is high, and I'm thinking, gee, there's a good possibility that his symptoms are caused by the nickel, and that's how I would interpret it as a physician." ***Id.*** at 96.

In order to state a *prima facie* claim of medical malpractice, a patient must prove the doctor's conduct was the proximate cause of the harm suffered by the patient. ***Carrozza v. Greenbaum***, 866 A.2d 369, 379 (Pa. Super. 2004), *affirmed on other grounds*, 916 A.2d 553 (Pa. 2007). Likewise, to state a *prima facie* case of lack of informed consent, a plaintiff is required to prove a "causal connection between the lack of informed consent and the suffering of the injury." ***Maliszewski v. Rendon***, 542 A.2d 170, 172 (Pa. Super. 1988). In cases involving medical impairment,

> expert medical testimony is necessary to establish the causal nexus of the injury to the tortious conduct in those cases where the connection is not obvious. This is due to the complicated nature of the medical field which is beyond the knowledge of the average juror.

Id. at 172. This Court has addressed what an expert testimony must establish in order to prove such a causal nexus:

> When a party must prove causation through expert testimony the expert must testify with "reasonable certainty" that "in his 'professional opinion, the result in question did come from the cause alleged.'" …
>
> The issue is not merely one of semantics. There is a logical reason for the rule. The opinion of a[n] … expert is evidence. If the fact finder chooses to believe it, he can find as fact what the expert gave as an opinion. For a fact finder to award damages for a particular condition to a plaintiff it must find as a fact that the condition was legally caused by the defendant's conduct …. [I]t is the intent of our law that if the plaintiff's … expert cannot form an opinion with sufficient certainty so as to make a [professional] judgment, there is nothing on the record with which a [factfinder] can make a decision with sufficient certainty so as to make a legal judgment.

Kravinsky v. Glover, 396 A.2d 1349, 1356 (Pa. Super. 1979) (internal citations omitted).

The record here established that Mr. Emery had considerable medical problems, including the cardiac disease that the stent was intended to treat. Mr. Emery's heart disease was so serious that he required additional, highly invasive, cardiac surgery after the stent placement. N.T. Vol. I, at 209. Moreover, Mrs. Emery testified that her husband's allergies were so pervasive that he suffered itching and rashes from contact with doorknobs, wheelchairs, wire, metal currency, belt buckles, brass, rivets in jeans, fences, and bicycles. ***Id.*** at 176 – 177, 211. The symptoms reported by Mr. Emery could presumably have been caused by contact with a panoply of objects, or another underlying medical condition. In the absence of expert medical testimony, a causal link between the stent and Mr. Emery's symptoms is not obvious.

Throughout trial and his report, Dr. Fischer proffered the opinion of Mr. Emery, not his own, regarding causality. Even assuming Dr. Fischer's testimony can be construed as his own opinion, his assertion that there was a "high possibility" the symptoms were caused by the stent fails to establish causation. An expert's testimony fails to qualify as competent evidence where he testifies "that the alleged cause 'possibly,' or 'could have' led to the result, that it 'could very properly account' for the result, or even that it was 'very highly probable' that it caused the result." ***Kravinsky,*** 396 A.2d at 1356. Dr. Fischer's opinion is professedly based on nothing more than

the mere possibility of a causal nexus. "An opinion based on mere possibilities is not competent evidence…. [E]xpert testimony cannot be based solely upon conjecture or surmise." ***Gillingham v. Consol Energy, Inc.***, 51 A.3d 841, 849 (Pa. Super. 2012).

We are not persuaded by the mere fact that Dr. Fischer offered an affirmative response regarding causality to a complex question offered in summary by Mrs. Emery's counsel, as his testimony must be examined as a whole. "[E]xpert testimony should be reviewed in its entirely to assess whether it expresses the requisite degree of medical certainty." ***Hoffman v. Brandywine Hospital***, 661 A.2d 397, 402 (Pa. Super. 1995) (superseded by statute on other grounds). In fact, when asked directly if he could state with a reasonable degree of medical certainty whether the stent caused the symptoms, Dr. Fischer admitted he could not. Having considered the entirety of Dr. Fischer's testimony, we conclude that he did not offer an opinion, within a reasonable degree of medical certainty, that the stent caused Mr. Emery's symptoms.

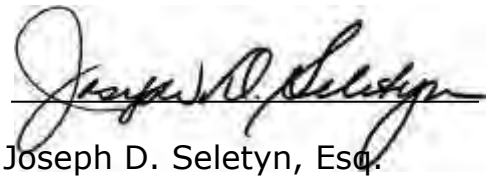
Accordingly, we conclude that the trial court erred when it denied Dr. Groh's post-trial motion requesting judgment notwithstanding the verdict, as the evidence was insufficient as a matter of law to support the jury's verdict in favor of Mrs. Emery. ***See Farnese v. Southeastern Pennsylvania Transportation Authority***, 487 A.2d 887, 889 – 890 (Pa. Super. 1985) ("Where there is no evidence of or the evidence is insufficient to justify an

inference of negligence and causation, the court will direct a verdict in favor or the party against whom liability is sought.")

Appellant also challenges the jury's verdict in favor of Mrs. Emery on her loss of consortium claim, arguing that the award is excessive. We need not reach this assertion, as loss of consortium is a derivate claim. ***Scattergia v. Shin Shen Wu***, 495 A.2d 552 (Pa. Super. 1985). Accordingly, our decision reversing the jury's verdict with regard to Mrs. Emery's negligence and informed consent claims concomitantly reverses the verdict with regard to her loss of consortium claim.

Judgment ***reversed***.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/7/2014