

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

EVELYN WELZ, Administratrix d.b.n. of
the Estate of MARY NEILL, deceased and
ARTHUR R. NEILL

v.

JOHN KANE, D.O., MEGAN C. KANE, D.O.,
and MEGAN C. KANE, D.O., P.C.

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SEPTEMBER TERM, 1999

NO. 0497

Myrna Field, J.

August 8, 2002

OPINION OF THE COURT

Defendants, John T. Kane, D.O. and Megan C. Kane, D.O., appeal from the order of June 14, 2002 granting plaintiffs' request for a new trial. They seek to have the jury verdict in favor of the defendants reinstated. For the following reasons the motion for a new trial was properly granted.

This case arises from the death of 41 year-old Mary Neill, an insulin-dependant diabetic. During the month preceding her death, she made two visits to the defendants' clinic. Notes of Testimony Volume 1 ("N.T. Vol. 1") at 67-69. On the first visit with Dr. Megan Kane, Ms. Neill complained of stomach cramps, fatigue, nausea and vomiting. Notes of Testimony Volume 2 ("N.T. Vol. 2") at 116, 121. She was treated for nausea and was instructed on diet. N.T. Vol. 2 at 122. Dr. Kane also advised the patient to fast and return to the clinic later that afternoon to have her blood sugar tested. Vol. II at 123. Ms. Neill did not return. N.T. Vol. 2 at 125. On the second visit with Dr. John Kane, Ms. Neil complained of fatigue, abdominal pain, nausea,

vomiting and dizziness. N.T. Vol. 1 at 93-94. Concerned about the control of her diabetes, Dr. Kane instructed Ms. Neill to go to the emergency room to get blood tests. N.T. Vol. 1 at 80, 93-94. Ms. Neill never went to the hospital. N.T. Vol. 1 at 82. One week after the second visit, she died as a result of internal bleeding. Dr. Megan Kane was dismissed from the lawsuit after the first day of the trial. After three days of trial, the jury returned a verdict for the defendant, Dr. John Kane, finding him negligent, but holding that his negligence was not a substantial factor in causing the harm to the decedent.

Following the trial, the plaintiff filed a timely post trial motion asserting that a new trial was warranted because the jury charge on the increased risk of harm standard was inadvertently omitted; that this omission prejudiced the plaintiff; and that it was responsible for the verdict.

A trial court has broad discretion to grant or deny a new trial. Harman ex rel. Harman v. Borah, 756 A.2d 1116 (Pa. 2000). Absent an abuse of discretion or an error of law, this decision to grant or deny a new trial should not be disturbed. Id. at 1121. Furthermore, it is within the trial judge's discretion to choose the language he or she would use to charge the jury. Ettinger v. Triangle -Pacific Corp., 799 A.2d 95 (Pa. Super. 2002). A charge to the jury will be found inadequate only if there is an omission which amounts to fundamental error. Von Der Heide v. Cmmw., Dept. Of Transp., 718 A.2d 286 (Pa. 1998). Hence, if a jury instruction is found to be harmful to the complaining party, Gen. Equip. Mfrs. v. Westfield Ins. Co., 635 A.2d 173, 184 (Pa. Super. 1993), a new trial is mandatory. Jones v. Montefiore Hosp., 431 A.2d 920 (Pa. 1981).

In a medical malpractice suit arising out of negligence, four elements must be proved:

(1) that the medical practitioner owed a duty to the patient; (2) that

the practitioner breached that duty; (3) that the breach of duty was the proximate cause of, or substantial factor in, bringing about the harm suffered by the patient; and (4) that the damages suffered by the patient were the direct result of the harm.

Cruz v. Northeastern Hosp., 2002 WL 1302260 __ A.2d __ (Pa. Super. June 14, 2002).

Additionally, it has been recognized by the Pennsylvania courts that there are cases where the causal connection between the “care provided by the physician and the resulting injury is not amenable to proof to a reasonable degree of medical certainty.” Poleri v. Salkind, 683 A.2d 649, 654 (Pa. Super. 1996). Therefore, a plaintiff might “seek to establish that the defendant’s negligence increased the risk of harm” reducing plaintiff’s burden of proof. Id. The jury must determine whether the conduct of the defendant actually increased plaintiff’s risk of harm, and then whether it caused the plaintiff’s injury. Id.

A new trial was correctly granted although neither an abuse of discretion nor an error of law was committed. In this case, the mistake in the jury charge occurred after the court agreed to give a particular charge, but did not do so due to plaintiff’s counsel’s inadvertent omission of the second paragraph of the Pennsylvania Suggested Standard Jury Instruction (“S.S.J.I.”) 10.03B (discussing the increased risk of harm) from the typed jury instructions he submitted to the court. Notes of Testimony Volume 3 (“N.T. Vol. 3”) at 117. The section omitted provides:

A causal connection between the injuries suffered and the **defendant’s failure to exercise reasonable care may be proved by evidence that the risk of incurring those injuries was increased by the defendant’s negligent conduct.**

The law recognizes that it is rarely possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass.

(emphasis added).

Despite the omission by plaintiff's counsel, the court refused to instruct the jury on the increased risk of harm standard after the charge was concluded. N.T. Vol. 3 at 118. This may have affected the verdict because "increased risk of harm" was a major theory of plaintiff's case. The decedent had several pre-existing conditions, but the question remained as to whether the doctor's treatment of her increased the likelihood of her harm. Consequently, because the omission of a portion of S.S.J.I 10.03B may have influenced the outcome of the verdict, and because, absent counsel's omission, the court did intend to use the increased risk of harm standard in its charge to the jury (N.T. Vol 3 at 101, 112), a new trial is warranted.

For the foregoing reasons, the motion for a new trial was properly granted. The order of June 14, 2002, granting the plaintiff's post trial motion, should be affirmed.

BY THE COURT:

Myrna Field, A. J.