

DEBORA L. MOSE, and RODNEY MOSE, her husband,
PLAINTIFF vs. STEVEN S. COHEN, M.D., DEFENDANT,
Franklin County Branch, Civil Action - Law No. A.D. 1994-320

MOSE V. COHEN

Medical malpractice claim alleged physician over-prescribed medications which resulted in plaintiff becoming addicted; physician found 70% liable and plaintiffs awarded damages; plaintiffs' motion for new trial denied; contributory negligence; admissibility of evidence; jury charge on future medical expenses denied as speculative.

1. A defendant needs to produce only a minimal amount of evidence of the plaintiff's contributory negligence to trigger a jury charge on that issue; once a defendant produces that evidence, a court's failure to give the charge constitutes reversible error.
2. The charge of contributory negligence was appropriate where the following evidence was produced at trial: the plaintiff became aware during the course of treating with the defendant that she was addicted to the medications he prescribed; she told another doctor that she intended to sue the defendant; she stopped taking some addictive drugs and was weaning herself from others after a hospital detoxification program but nevertheless returned to the defendant's care despite treatment alternatives.
3. A party seeking a new trial on grounds that the court made incorrect evidentiary rulings must show that those rulings constitute reversible error, i.e., that the rulings were harmful in addition to being erroneous; an evidentiary ruling which does not affect the verdict cannot be the basis for granting a new trial; a ruling on the admissibility of evidence on grounds of relevance is a matter within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.
4. In a medical malpractice claim, the plaintiff has the burden of proving either that the physician did not possess and employ the required skill and knowledge, or that he did not exercise the care and judgment of a reasonable man in like circumstances.
5. Once a doctor completes his formal education and achieves a certain minimum level of medical proficiency as revealed through testing and the attainment of a license, the particular medical school he attended becomes irrelevant to his qualifications to practice medicine; what remains relevant is whether he exercises the required standard of care in treating his patients.
6. The court is required to charge the jury only on those issues for which there is support in the record; the question is whether, considering the charge in its totality, the court committed a clear abuse of discretion or error of law in its charge which controlled the outcome of the case.
7. A charge limiting the jury to awarding compensatory damages in a manner which will cause the least burden to the tortfeasor was consistent with the idea of fully and fairly compensating the injured party; this charge was particularly appropriate where the plaintiffs pursued a claim for punitive damages up to the last stages of the trial and it was necessary to remind the jury that their deliberations on damages should be confined to compensation.
8. The mere possibility of future damages is insufficient to recover; a plaintiff must show his injury will continue and must present reasonable specific information about the costs of future medical treatment; while precise figures are not required, future damages cannot be purely speculative or hypothetical.
9. Although the plaintiff's expert testified in a general manner that the plaintiff is susceptible to future addiction as a result of the defendant's actions and may need counseling, the expert

never examined the plaintiff and could not specifically testify about her particular need for future treatment; a jury charge allowing the award of future medical expenses would have been inappropriate where the plaintiff did not present the jury with a method of calculating such damages.

Pamela G. Shuman, Esquire, Counsel for Plaintiffs
Kevin E. Osborne, Esquire, Counsel for Defendant

OPINION AND ORDER

Herman, J., July 29, 1997:

INTRODUCTION

Plaintiffs Debora Mose and her husband filed a medical malpractice action alleging the defendant Steven Cohen, M.D. breached the standard of care in his treatment of Mrs. Mose. In particular Mrs. Mose alleged Dr. Cohen knowingly caused her addiction to various prescription medications. A jury found Dr. Cohen negligent and that his negligence was a substantial factor in causing Mrs. Mose's injuries. The jury also found Mrs. Mose 30% contributorily negligent and that her negligence was a substantial factor in causing her injuries. A verdict in the amount of \$51,185.46 was awarded to the plaintiffs and was composed of the following damages: \$19,150.16 for past medical bills, \$17,035.30 for past wage loss, \$10,000.00 for past, present and future pain and suffering, and \$5,000.00 to Mr. Mose for loss of consortium. The court reduced the award by 30% to reach a total award of \$35,829.82. The plaintiffs filed a post-trial motion for a new trial. Transcripts were prepared and counsel submitted briefs. The matter is ready for decision.

DISCUSSION

Issue I: Mrs. Mose's contributory negligence

The plaintiffs argue the court erred in charging the jury on contributory negligence. It is well-established that a defendant needs to produce only a minimal amount of evidence of contributory negligence to trigger that charge. *Levine v. Rosen*, 394 Pa. Super. 178, 575 A.2d 579 (1990), *affirmed*, 532 Pa. 512, 616 A.2d 623 (1992). Once a defendant produces that evidence, a court's failure to give the charge constitutes reversible error. *Karchner v. Flaim*, ___ Pa., Commw. ___, 661 A.2d 928 (1995);

Levine, supra. A review of the record indicates there was sufficient evidence presented at trial to warrant the charge of contributory negligence.

Mrs. Mose first went to see Dr. Cohen in the fall of 1991. She gave Dr. Cohen a general history of her physical and psychological health including occasional headaches of varying degrees of severity. In January of 1992 she complained specifically of a sinus headache but a CT scan indicated her sinuses were normal. Dr. Cohen began prescribing a series of potent drugs presumably to treat her increasingly severe headaches. The visits to Dr. Cohen were typically only three or four minutes, just long enough to write a prescription. Her headaches increased in frequency and intensity and Dr. Cohen continued to prescribe a large number of different types of medications at high dosages which resulted in Mrs. Mose eventually becoming addicted.

In September of 1992 Mrs. Mose went to the Chambersburg Hospital emergency room where she was examined by Dr. Wilwerth. He told her not to take any more Demerol or Xanax, two highly addictive medications which Dr. Cohen had prescribed. Her family, friends and co-workers expressed concern to her about her behavior and health and by the end of 1992 she suspected she was addicted to those medications. Around that time Dr. Cohen began giving her injections of highly addictive drugs including morphine. In February of 1993 her pharmacist refused to fill any more of her prescriptions because he was worried about the number of different medications she was taking as well as the dosages. He recommended she see a doctor other than Dr. Cohen. She told Dr. Cohen about the pharmacist's concerns but he assured her the drugs were in her best interests and she trusted his judgment.

Mrs. Mose began treatment for depression and drug dependence with Dr. George who was concerned about the quantity and types of medications she was taking. She treated with Dr. George for six weeks beginning in March of 1993. As part of her treatment she admitted herself to Chambersburg Hospital for detoxification. In April of 1993 she went to Dr. Cohen's office to retrieve her medical records and told him she

was depressed and was going to the Hospital for treatment. In May of 1993 she was discharged from Chambersburg Hospital after a stay of approximately 10 days. She was no longer taking Demerol and Restoril, was weaning herself from Xanax and was not treating with Dr. Cohen. After leaving the Hospital she continued treating with Dr. George during which time she completely stopped taking any prescription drugs. She also treated with Dr. Leaman whom she told in June that she was planning to sue Dr. Cohen for prescribing excessive medications.

However, she returned to Dr. Cohen in July of 1993. She testified Dr. George was not available when she called complaining of bad headache. She testified that, despite her husband's urgings not to return to Dr. Cohen, she was compelled to treat with him because she felt out of control and believed she had no other recourse. She conceded she did not check to see if Drs. Shapiro, Sollenberger or Leaman were available on that occasion, not did she go to the Hospital emergency room as an alternative to returning to Dr. Cohen's care. She remained under Dr. Cohen's care until April of 1994 when she entered a drug detoxification program.

Mrs. Mose argues the evidence clearly showed she was addicted to the various medications prescribed for her by Dr. Cohen and that she lost control and judgment regarding these medications. She became compelled to take the drugs and therefore she could not be contributorily negligent for returning to Dr. Cohen. She argues there was no causal link between her actions and her addiction because she was being controlled totally by her dependence which Dr. Cohen caused. In support she cites to the testimony of her expert witness Dr. Alan K. David who testified about the effects of addiction. He testified that an addicted person has an impaired sense of judgment and control and that once a person has become dependent on drugs he or she is susceptible to becoming addicted again either to the same substance or different substances. This susceptibility can continue for the rest of that person's life. The residue of the addiction is a diminished sense of self-worth and inability to trust others. It also requires much counseling and support from family and the community. (N.T. April 1, 1997, pp. 94; 123). Dr. David also testified about the biochemical effects of addiction but only in general terms. (N.T. April 1, 1997, p.p. 86-94.

We find there was an evidentiary basis for the jury to find that Mrs. Mose's return to Dr. Cohen's care after having treated at the Hospital and being under the care of two other doctors constituted contributory negligence. She returned to Dr. Cohen without consulting other doctors who may have been available. She also chose not to avail herself of further hospital treatment which had been successful in the past. The jury could reasonably have concluded that her failure to pursue those alternatives played a causal role in some of her suffering after the summer of 1993.

Citing *Dornon v. Johnston*, 421 Pa. 58, 218 A.2d 808 (1966), Mrs. Mose argues Dr. Cohen was required to produce expert testimony in order to establish her contributory negligence. *Dornon* held that an expert is required to establish causation in medical malpractice cases. In the case at bar malpractice is not the basis of Dr. Cohen's claim of contributory negligence. His claim is based on Mrs. Mose's failure to follow the advice of other doctors who were medical experts. There is no authority for the proposition that Dr. Cohen was required to present expert testimony to prove Mrs. Mose did not behave as a reasonable person in regard to her medical treatment.

ISSUE II: The preclusion of portions of Dr. David's testimony

The plaintiffs contend we erred in precluding the testimony of Dr. David regarding the quality of Dr. Cohen's medical education. A plaintiff has the burden of proving either "(1) that the physician or surgeon did not possess and employ the required skill and knowledge, or (2) that he did not exercise the care and judgment of a reasonable man in like circumstances..." *Incollingo v. Ewing* 444 Pa. 263, 275, 282 A.2d 206, 214 (1971) (emphasis in original).

The evidence showed Dr. Cohen was unable to gain admission to any medical school in the United States and instead attended school in Valencia, Spain for five years and attended St. Lucia Health Sciences Center in the British West Indies in 1983. Plaintiffs' counsel asked Dr. David for his opinion regarding the quality of medical education which such foreign schools provide based on his twenty years' experience as a doctor and medical teacher. We sustained the objection raised by counsel for Dr.

Cohen on the grounds of relevance: "We believe that the evidence does not bear upon the issue of whether the doctor exercised the required standard of care in carrying out his treatment of the plaintiff." (N.T. April 1, 1997, pp. 95-97). A prospective physician must attend medical school. To be licensed to practice medicine, he must undergo further training and achieve a certain minimum level of medical proficiency as revealed through testing. Once he passes the tests and is licensed, the particular medical school he attended becomes irrelevant to his qualifications to practice medicine. What remains relevant is whether he exercises the required standard of care in treating his patients.

The plaintiff also argues we erred in not allowing Dr. David to testify that the ECFMG test and the Flex test are identical for the purpose of impeaching Dr. Cohen's earlier testimony in which he stated they were two separate tests. We sustained Dr. Cohen's objection because Dr. Cohen had already been cross-examined on the inconsistencies in his testimony and the issue of his credibility was properly before the jury. The requested testimony from Dr. David would have exceeded the scope of his expertise and invaded the province of the jury. (N.T. April 1, 1997, pp. 97-98).

The plaintiff also contends we erred in precluding Dr. David from testifying about Dr. Cohen's treatment of other patients which was consistent with his treatment of her. She argues Dr. Cohen's practices with regard to those patients showed his treatment of her did not meet the required standard of care and was relevant to her claim for punitive damages. We ruled that such testimony was irrelevant and in any event its probative value was outweighed by its highly prejudicial effect. (NT April 2, 1997, pp. 99-100). Furthermore, the admissibility of this testimony was addressed at the pre-trial conference and the ensuing Order. "Counsel for the plaintiff will provide the defendant with an updated report from plaintiffs' expert witness Dr. Alan K. David. The report will focus on plaintiff Debora Mose, and any reference to other patients of Dr. Cohen will be eliminated from the report." (Order of Court dated January 24, 1997). Counsel for the plaintiffs accepted this aspect of the pre-trial Order and counsel was properly precluded from eliciting this testimony from Dr. David at trial.

A party seeking a new trial on grounds that the trial court made incorrect evidentiary rulings must show those rulings constitute reversible error, i.e., that the rulings were harmful in addition to being erroneous. An evidentiary ruling which does not affect the verdict cannot be the basis for granting a new trial. *Dougherty v. Edward J. Meloney, Inc.*, 443 Pa. Super. 201, 661 A.2d 375 (1995). A ruling on the admissibility of evidence on grounds of relevance is a matter within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Henery v. Shadle*, 443 Pa. Super. 331, 661 A.2d 439 (1995).

The key issue at trial was whether Dr. Cohen's treatment of Mrs. Mose fell below the required standard of care. The jury weighed the witnesses' credibility, found Dr. Cohen liable and returned a substantial verdict in favor of the plaintiffs. Consequently, even if the court were in error as to any of the foregoing evidentiary issues, which we do not concede, the plaintiffs were not prejudiced by our rulings. The admission of Dr. David's testimony would not have altered the outcome of the case.

III: The court precluded cross-examination of Dr. Cohen regarding his pre-trial allegations that plaintiffs' counsel had threatened and terrorized him

In his deposition Dr. Cohen stated plaintiffs' counsel had threatened him and his family by burning a cross on his property and accused counsel of being in the Ku Klux Klan. At trial plaintiffs' counsel asked "Now, doctor, did you ever under oath accuse me of terroristic threats?" to which Dr. Cohen replied "From another one of your clients. I don't think I accused you." (N.T. April 1, 1997, pp. 113-114). Dr. Cohen's counsel objected and we sustained the objection. The probative value of such testimony was outweighed by its prejudicial effect and there was already ample evidence before the jury to impeach Dr. Cohen's credibility. The jury resolved the issue of credibility against Dr. Cohen and found him liable for the plaintiffs' damages.

IV. The court erred in not charging the jury as plaintiffs requested on points for charge #1,8,9,10,11,14 and 19 and in giving defendant's point for charge #23

The court is required to charge the jury only on those issues for which there is support in the record. The charge should be reviewed in its totality. *Clayton v. Sabeh*, 406 Pa. Super. 335, 594 A.2d 365 (1991). The question is whether the court committed a clear abuse of discretion or error of law in its charge that controlled the outcome of the case. *Trude v. Martin*, 442 Pa. Super. 614, 660 A.2d 626 (1995).

Plaintiffs' points #1,8,10,14 and 19 pertain to causation and Dr. Cohen's negligence. Points #9 and 11 pertained to contributory negligence. As previously noted, the necessary amount of evidence was presented at trial to support that charge. We cannot agree that by charging on contributory negligence, we permitted the jury to find that a patient is required to anticipate her doctor's negligence. As defendant points out, Mrs. Mose's negligence was not based on her failure to anticipate Dr. Cohen's negligence, but rather upon her failure to pursue courses of action which may have ended her suffering and addiction. There was evidence presented at trial that Mrs. Mose realized she was being over-medicated and expressed an intent to sue Dr. Cohen. The jury could have concluded she failed to act prudently under the circumstances by returning to Dr. Cohen's care in July of 1993 and continuing treatment with him thereafter.

Defendant's point for charge #23 limited the jury to awarding compensatory damages in a manner which will cause the least burden to the tortfeasor and which is consistent with the idea of fully and fairly compensating the injured party. *Incollingo v. Ewing*, 444 Pa. 307, 282 A.2d 206 (1971). The plaintiffs contend this charge was appropriate in the context of the particular facts of *Incollingo* but should not be applied generally nor to the facts of the case at bar. We disagree. First, the charge has been widely applied in various types of cases. *Walker v. Grand Central Sanitation, Inc.*, 430 Pa. Super. 236, 634 A.2d 237 (1993); *Crisman v. Stidd*, 396 Pa. Super. 335, 578 A.2d 542 (1990). Second, the plaintiffs pursued a claim for punitive damages up to the last stages of the trial and therefore the charge was needed to remind the jury that their deliberations on damages should be confined to compensation. Third, when reviewed in context and in its entirety, the charge repeatedly emphasized the

need to fully and fairly compensate the plaintiffs for their injuries. The specific language which the plaintiff finds objectionable, "... with the least burden to the wrongdoer" merely amplifies the idea of fair compensation. (N.T. April 3, 1997, pp. 85-90). Under this analysis, giving point for charge #23 was not an error.

V. The jury misconstrued or misapplied the court's instructions by not awarding \$6,821.00 of Mrs. Mose's past medical bills

Mrs. Mose claimed \$25,971.16 worth of medical expenses. Her counsel expressly stated to the jury in closing argument that "if you find some of these bills are only questionably related to defendant Cohen's care, then delete them." (N.T. April 3, 1997, p. 60). The plaintiffs had the burden of establishing that all those bills were incurred as a result of Dr. Cohen's treatment and the jury evidently did not find they met that burden. The jury awarded \$19,150.16 for past medical bills which is 73% of the \$25,971.16 plaintiffs sought. The plaintiff speculates that the jury did not follow the court's instructions and reduced the medical expenses by the percentage they found the plaintiff contributorily negligent.

The plaintiffs prepared a summary of past medical bill which the jury took with them during deliberations. The plaintiffs did not prove that all the bills were causally related to Dr. Cohen's substandard care. For example, the evidence showed Mrs. Mose suffered from headaches and received injections of certain non-narcotic drugs. The jury could have found that aside from Dr. Cohen's practice of over-prescribing various drugs, some of the injections were in fact needed to treat her headaches. She did not present evidence to show that the injections made her headaches worse and the jury could have concluded her headaches might have been worse without his treatment. In addition, the summary included bills for cough syrup, antibiotics and Mrs. Mose's treatment for pneumonia. The jury could have found these bills were unrelated to Dr. Cohen's negligent treatment. Finally, question #6 on the verdict slip states:

What is the amount you award to Plaintiff Debora L. Mose for the injuries which you have decided were caused by the negligence of the Defendant? *Do not reduce this amount by any degree of contributory*

negligence you may have found on the part of the plaintiff. The Court will reduce the amount of damages you have found in proportion to the amount of contributory negligence which you have attributed to the plaintiff.

There is a presumption that a jury has followed the court's instructions. That presumption has not been overcome in this case.

VI: The court erred in refusing to allow the jury to award Mrs. Mose future medical expenses

The plaintiff has the burden of proving future damages. The mere possibility of future damages is insufficient to recover. Where several events would have to occur before a person's claim could become viable, the fact of damages remains merely conjectural. *Carroll v. Philadelphia Housing Authority*, 168 Pa. Commw. 275, 650 A.2d 1097 (1994); *Pashak v. Barish*, 303 Pa. Super. 559, 450 A.2d 67 (1982). A Plaintiff must show his injury will continue and must present specific information about the costs of future medical treatment. *Pratt v. Stein*, 298 Pa. Super. 92, 444 A.2d 674 (1982). Although a plaintiff need not show the precise monetary amount he will need to spend for future treatment, future damages cannot be purely speculative or hypothetical. *Id.*

Dr. David testified Mrs. Mose is susceptible to future addiction as a result of Dr. Cohen's actions and may need counseling. However, Dr. David did not examine Mrs. Mose and could not specifically testify about her particular need for future treatment. Even if the jury could accept Dr. David's generalized statements and find there was some evidence of costs, such would not constitute a prognosis as to the frequency of future treatment. To allow the jury to award future medical expenses without a method of calculating such damages would have been improper. The charge was correctly refused.

The plaintiffs' motion for a new trial is denied. An appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 29th day of July, 1997, having considered briefs and arguments of counsel and having reviewed the record, the Court hereby DENIES the plaintiffs' motion for a new trial.

evidence to his attorney nor informed him that he would not appear to raise mitigating factors himself.

7. When no reasonable basis for an appeal exists and a defendant has not informed his attorney of his wish to appeal, an attorney will not be found ineffective for not bringing an appeal on his fugitive client's behalf.

8. A signed plea colloquy will render meritless a defendant's claim that he was unlawfully induced to plead guilty.

9. When a defendant fails to appear for sentencing, the court is not required to read into the record the appeal rights of the defendant and the reasons for the sentence imposed as this would serve no purpose in light of the defendant's absence.

10. A defendant's claim that there was insufficient evidence to convict him had he gone to trial is irrelevant when the defendant pleads guilty to that charge.

11. A defendant's right to be present at all stages of adjudication may be deemed waived by the defendant's words or actions.

12. Sentencing in *absentia* is proper where the defendant waives his right to be present by failing to appear without satisfactory explanation.

COMMONWEALTH OF PENNSYLVANIA, VS. ERIC W. GRAY, Franklin County Branch, Criminal Action - Nos. 652, 653, 793 and 851 - 1994

28

PUBLIC OFFICIAL AND EMPLOYEE ETHICS ACT, 65 P.S. SECTIONS 401-413 (ALSO PENNSYLVANIA ELECTION CODE, 25 P.S. SECTION 2913)

Objection to nomination petition of prospective candidate for township supervisor; need to timely file a Statement of Financial Interests; Public Official and Employee Ethics Act, 65 P.S. sections 401-413; Pennsylvania Election Code, 25 P.S. section 2913.

1. A prospective candidate for public office must comply with the Public Official and Employee Ethics Act which requires him to timely file a Statement of Financial Interests.

2. The purpose of the Ethics Code requirement of full financial disclosure by prospective office holders is to avoid conflicts of interest and reaffirm confidence in the integrity of public officials.

3. Failure to timely file the Statement of Financial Interests is fatal to a candidate's nomination petition; evidence of circumstances surrounding the failure to timely file cannot be used to cure even a technical error.

4. A prospective candidate's nomination petition must be set aside where he did not file his Statement of Financial Interests until one day after the filing deadline despite having received a packet of written instructions from the County Board of Elections which clearly set forth the deadline in three separate sections.

5. A prospective candidate cannot reasonably rely on any alleged oral instructions by a Board of Elections employee as to when he should file his Statement of Financial Interests where he conceded he obtained the packet of written instructions pertaining to his nomination petition the day before the deadline but did not review the section pertaining to the need to timely file the Statement of Financial Interests.