IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK BAIRD, Plaintiff, v. JEROME E. GOLDSTEIN, M.D., JEFFREY E. CARTER, M.D., PRISON HEALTH SERVICES, INC., THE CITY OF PHILADELPHIA, COSTELLO, COMMISSIONER OF PRISONS, WARDEN, HOLMESBURG PRISON, and AMERICA SERVICE GROUP, INC., Defendants.	Civil Action No. 95-6920

Gawthrop, J. April 30, 1998

M E M O R A N D U M

This case involves medical malpractice claims arising from medical care the plaintiff, Frank Baird, received while he was a pretrial detainee in a Philadelphia prison. At the end of trial, the jury returned a verdict in favor of the defendants. Mr. Baird has filed a motion for a new trial, pursuant to Federal Rule of Civil Procedure 59. Upon the following reasoning, I shall deny his motion for a new trial and sustain the jury's verdict.

I. Background

On January 23, 1995, while a pretrial detainee at Holmesburg Prison, Mr. Baird sustained various facial injuries in

an altercation with another inmate. Shortly after the incident, correctional officers brought Mr. Baird to the prison infirmary where medical personnel examined him and ordered a full skull x-ray series. Jeffrey Carter, M.D., a radiologist, reported the x-rays as negative for fractures. Mr. Baird received further examinations and treatment under the direction of Jerome Goldstein, M.D., medical director for the prison, who also referred him to Episcopal Hospital for consultation with an ear, nose and throat specialist. The specialist believed the plaintiff had a fracture of the left zygoma, a facial bone below the eye, and recommended a CT scan. Mr. Baird was scheduled for a CT scan on February 17, 1995, but instead he was transferred from Holmesburg Prison on that date. On March 3, 1995, Mr. Baird received additional medical treatment at the Sacred Heart Hospital in Allentown which revealed that he had a facial fracture which had healed. Mr. Baird filed this suit claiming that the doctors and staff at Holmesburg Prison failed to provide proper medical treatment which caused the fracture to heal imperfectly and left a depression in the left side of his face. Specifically, he claimed violations of his constitutional rights, pursuant to 42 U.S.C. § 1983, and state tort claims of negligence based on medical malpractice.

II. Standard of Review

Federal Rule of Civil Procedure 59(a) permits the court to order a new trial "for any of the reasons for which new trials

have heretofore been granted in actions at law in the courts of the United States." Although the Rule does not attempt to specify the grounds on which a new trial can be granted, Federal Rule of Civil Procedure 61 states that the court should not order a new trial unless "substantial justice" so requires. The Rule further instructs the court to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Fed. R. Civ. P. 61; see generally 11 Charles A. Wright, et al., Federal Practice and Procedure § 2803 (1995) ("Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial.").

"The decision to grant or deny a new trial is confided almost entirely to the discretion of the district court." Blancha v. Raymark Indus., 972 F.2d 507, 512 (3d Cir. 1992) (citing Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)). Since granting the motion for a new trial acts to overturn a jury verdict, the court will not grant such a motion unless "manifest injustice will result if the verdict is allowed to stand." Emigh v. Consolidated Rail Corp., 710 F. Supp. 608, 609 (W.D. Pa. 1989) (citation omitted). Mr. Baird moves for a

new trial under Rule 59 for several reasons. I will address each one in turn.

III. Discussion

A. Testimony of Dr. Kaufman

The first, and principal, argument of the plaintiff is that the court abused its discretion, see General Elec. Co. v. Joiner, _ U.S. _, 118 S. Ct. 512, 139 L.Ed.2d 508 (1997), in restricting the testimony of one Arthur Kaufman, M.D. Dr. Kaufman was proposed to testify as to why, in his view, the defendants should be held liable to the plaintiff, Mr. Baird. After a hearing pursuant to Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993), this court determined that Dr. Kaufman could testify as an expert.

In assessing when to admit expert testimony, the principal guide can be found in Federal Rule of Evidence 702, which reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

That technical, expert medical testimony in this case would assist the jury to understand the evidence or to determine a fact

in issue is self-evident. I thus turn to the second factor -- the proposed witness's qualifications to give opinion testimony in the specialized area of knowledge pertinent to the case at bar.

As may be gleaned from his nine-page curriculum vitae, Dr. Kaufman's experience is vast. After receiving his M.D. degree from State University of New York, Downstate Medical Center, he went on to intern for one year, 1964, at Petersburg General Hospital, Petersburg, Virginia. After that, he entered solo family practice in Norfolk, Virginia for two years, and in 1966 served as a Medical Officer in the U.S. Navy. In 1968, he returned to family practice, this time in Greenbelt, Maryland, where he practiced medicine until 1974, at which point his career seems to have taken a turn. From that point on, he principally devoted his energies to hospital direction and management. He was Vice President of Prince George's General Hospital and Medical Center from 1974 through 1985. In that capacity, he directed and managed all medical staff functions related to quality assurance, risk management, liability control, utilization review, and containment. He chaired the Utilization Review and Quality Assurance Committees. Thereafter, from 1986 to 1989, he served as Vice President of the Forensic Medical Advisory Service, convening monthly meetings of a 50-member physician peer-review panel to review quality of care in 167 military treatment facilities. Since then, he seems principally

to have worked as a consultant to hospitals and the Department of Veterans Affairs, focusing on quality assurance and peer review. He is board certified in quality assurance in utilization review.

It is also significant what his expertise and experience are not. He is not a plastic surgeon, nor an orthopedist - specialties relevant to this lawsuit and his proposed expert testimonial opinions. (Tr., 4/24/97 at 104.) He was being called to testify as to alleged radiological malpractice, but he is not a radiologist. Id. When asked "When's the last time you read a patient's x-rays, a treating patient you were treating?", he replied, "that is not part of what my job designation is". Id. In fact, he had not treated patients since 1980. Id. Had this case been one of assessing cost effectiveness for an entire medical system, Dr. Kaufman's background might have proved helpful to the fact finder, but those were not the issues the jury was being called upon to decide.

Going beyond his inapposite credentials in the discrete area of expertise for what he was being offered, his review and grasp of the salient facts of the case left much to be desired. For example, he never saw the x-ray about which he was proposing to opine as to the radiologist's having misread it. (Tr., 4/24/97 at 105.) Rule 702 teaches that it is important, in order for an expert to be able "to assist the trier of fact to

understand the evidence," that the expert be familiar with the evidence. Fed. R. Evid. 702. Otherwise, the expert would be reduced to spewing medical hypotheses in the factual dark, a situation not inclined to enlighten the fact-finder. Here, for example, to permit this gentleman to opine upon the reading -- or alleged misreading -- of an x-ray would affront common sense and fair play - not to mention the rule.

Moreover, this court imposed no restrictions upon Dr. Kaufman's testimony concerning matters within his report. Federal Rule of Civil Procedure 26 governs expert reports and provides that the report shall contain a "complete statement of all opinions to be expressed." The rule also requires the report to state the facts and the basis of the opinion. The expert report in question did not contain any opinion as to the harm caused or the preferred medical treatment. In addition, it did not state how any defendant breached the standard of care except in the most general terms. Accordingly, the court limited his testimony as to such matters, but freely permitted Dr. Kaufman to render opinions within the scope of his report.

Federal Rule of Civil Procedure 61 states that the improper exclusion of evidence is not ground for a new trial, "unless refusal to take such action appears to the court inconsistent with substantial justice." Even were I swayed, which I am not, that the limitation of this testimony was

improper, I cannot conclude that this exclusion was inconsistent with substantial justice. It does not constitute ground for a new trial.

B. Informed Consent

The plaintiff next argues that refusal to include a jury charge on informed consent was an error justifying a new trial. In his complaint, the plaintiff did not plead lack of informed consent in his medical care by the defendants. Nor did the plaintiff's allegations warrant an informed-consent charge. Under Pennsylvania law, the doctrine of informed consent arises under traditional battery theory and applies where the treatment in question did not involve a surgical or operative procedure of an invasive nature. See Morgan v. MacPhail, 704 A.2d 617, 620 (Pa. 1997) ("It is the invasive nature of the surgical or operative procedure involving a surgical cut and the use of surgical instruments that gives rise to the need to inform the patient of risks prior to surgery."); see also Marino v. Ballestras, 749 F.2d 162 (3d Cir. 1984) (holding that absent informed consent, an operation is an assault under Pennsylvania law). Here, the plaintiff does not claim that defendant Dr. Goldstein performed any surgery or procedure without consent. Instead, he avers that Dr. Goldstein failed to advise on surgical alternatives and to provide early surgical intervention. Thus, the claim here is based upon negligence, not battery, making

informed consent inapplicable, and the refusal to include such a charge, proper.

C. Testimony of Dr. Reiter

Mr. Baird continues to object to testimony from a defense expert witness, Dr. David Reiter, regarding the separation, or displacement, of the fractured bones. At the trial, Dr. Reiter testified for the defense that the greatest displacement he could find measured one to two millimeters. He further testified that the one centimeter displacement included in the hospital operative record was a dictation or transcription error. Mr. Baird argues that this testimony is speculative.

Testimony of medical experts who testify with a "reasonable degree of medical certainty" meets the requirements of the Federal Rules of Evidence. Schulz v. Celotex Corp., 942 F.2d 204, 208 (3d Cir. 1991) (stating the phrase "is a useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert testimony."). Although this phrase is not dispositive of the issue, "it may indicate the level of confidence the expert has in the expressed opinion." Id. at 209. Here, Dr. Reiter did not merely speculate, but based his testimony on his measurements of the CT-scan, as well as his review of several types of x-rays. See Holbrook v. Lykes Bros. S.S. Co., Inc., 80 F.3d 777, 784 (3d Cir. 1996) (finding testimony had sufficient scientific basis where expert based his

opinion on his review of plaintiff's medical records and exposure to radiation, and on his own research and study). Further, when questioned by the court, Dr. Reiter explicitly stated that he was testifying to a "reasonable degree of medical certainty." (Tr., 4/28/97 at 12.) I thus find that not only did he mouth the familiar magic words, but in fact the underlying empirical and logical bases of his opinion were sufficiently solid as well. See Daubert v. Merrell Dow Pharm., 509 U.S. at 579. His testimony was not speculative, but rather, met the degree of certainty required for admissibility.

D. Standard of Care

Plaintiff also demands a new trial on the ground that the court's charge to the jury regarding the standard of care due by a physician to his patient was erroneous because it contained the word "correctional." Specifically, in charging the jury I stated that the "plaintiff must establish the applicable standard of correctional care at the time of his injury." (Tr., 4/29/97 at 8-9.)

The standard for review of jury instructions is "whether the charge, taken as a whole and viewed in light of the evidence, fairly and adequately submit[ted] the issues in the case to the jury." Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 922 (3d Cir. 1986) (quoting United States v.

Fischbach & Moore, Inc., 750 F.2d 1183, 1195 (3d Cir. 1984) (citations omitted)). A trial judge has broad discretion to decide what points for charge are appropriate in light of the evidence that has been presented to the jury. See Hook v. Ernst & Young, 28 F.3d 366 (3d Cir. 1994). In this case, the charge to the jury comported with the evidence submitted during the trial. Moreover, viewing the jury instruction at issue, in light of the charge as a whole, I find that the single reference in question, given during the course of a lengthy charge, did not visit reversible error upon the plaintiff.

E. Section 1983 Claims

On the second day of trial, this court granted judgment as a matter of law on the civil rights claims against all defendants. The plaintiff now claims that the court erred in dismissing the civil rights claims against Dr. Goldstein, Prison Health Services, Inc. ("PHS"), the City of Philadelphia ("City"), the Warden of Holmesburg Prison ("Warden"), and the Acting Commissioner of Prisons ("Commissioner").

A plaintiff who claims that his medical treatment during incarceration was unconstitutional must allege facts or omissions sufficiently harmful to evidence "deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). Allegations merely stating a claim for

medical malpractice do not support a § 1983 claim for deliberate indifference to serious medical needs. Id.

The evidence presented at trial demonstrated that the plaintiff received immediate medical attention following the incident. The record also indicated that plaintiff received treatment for his injury on an almost daily basis. Accordingly, it was undisputed that plaintiff did receive medical treatment, including examinations and x-rays, for his injuries. Plaintiff only quarrels with the adequacy of the medical care afforded by the defendant. This is not enough to support a § 1983 claim. Plaintiff alleges that "had Dr. Kaufman's testimony been permitted regarding the standard of care and the departure therefrom, other testimony of the neglect of Plaintiff's injuries" would have supported a § 1983 claim against Dr. Goldstein. (Pl.'s Mem. at 5.) However, neglect cannot form the basis of a claim under § 1983. Estelle, 429 U.S. at 105-106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment.").

Moreover, even if Dr. Kaufman disagreed with Dr. Goldstein's treatment, this does not give rise to a civil rights claim. No Eighth Amendment claim "is stated when a doctor disagrees with the professional judgment of another doctor." White v. Napoleon, 897 F.2d 103, 110 (3d Cir. 1990). Thus, even

"[i]f the doctor's judgment is ultimately shown to be mistaken, at most what would be proved is medical malpractice, not an Eighth Amendment violation." Id.

Similarly, plaintiff's civil rights claims against PHS, a private contractor of medical services for the inmate population at Holmesburg Prison, and the City were properly dismissed, as plaintiff failed to offer evidence to show that either defendant promulgated a policy, or followed a given course of conduct or custom, whereby it deliberately refused medical care to the plaintiff. Indeed, at trial, counsel for plaintiff stated: "We are talking about an individual incident and nothing more than that. That is the treatment that Frank Baird received or failed to receive from January 23, 1995 to the coming months." (Tr., 4/24/98 at 111-112.) These statements flatly contradict the allegations in his motion for a new trial regarding policies and procedures of PHS and the City.

Also, during argument on the motions for judgment as a matter of law, counsel for plaintiff admitted that the record contained no evidence to support any claims against the Warden or the Commissioner. (Tr., 4/24/98 at 179.) Nor does the plaintiff now point to any evidence that could support such claims. Thus, he has not shown any error in granting judgment for these defendants.

The evidence at trial and the weight of authority point to the conclusion that it was indeed appropriate to grant judgment for the defendants on the civil rights claims, and, indeed, that to have taken a different course would have been error. Accordingly, I must deny the motion for a new trial on these claims.

F. Punitive Damages

Finally, plaintiff seeks a new trial because the court did not allow an amendment to the complaint alleging punitive damages for the negligence claims. Negligence, however, is not a proper basis for punitive damages; only "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, [are] sufficient to trigger a jury's consideration of the appropriateness of punitive damages." Smith v. Wade, 461 U.S. 30, 51 (1982). Since I have already concluded that the defendants were properly granted judgment as a matter of law on plaintiff's civil rights claims, plaintiff's claims for punitive damages must also be rejected. See Unterburg v. Correctional Med. Sys., Inc., 799 F. Supp. 490, 498 n.6 (E.D. Pa. 1992). So also, in view of the underlying liability verdict, the punitive damages issue is moot.

IV. Conclusion

Because the weight of the evidence supports the jury's specific finding that Dr. Goldstein was not negligent in

providing medical care to Mr. Baird, he cannot recover from any of the defendants. This was a fair trial in accordance with the law, and the verdict must stand.

An order follows.

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O R D E R

AND NOW, this day of April, 1998, the plaintiff's Motion for a New Trial is DENIED.

BY THE COURT:

Robert S. Gawthrop, III, J.