

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

VINCENT MCCALLA, SR. and : CIVIL ACTION
REBECCA E. MCCALLA :
 :
v. :
 :
 :
NUSIGHT VISION CENTERS : NO. 02-CV-7364
OF PENNSYLVANIA, P.C. :
THERESE ALBAN, M.D. :

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, S.J.

February 20, 2004

INTRODUCTION

Vincent and Rebecca McCalla brought an action against Dr. Therese Alban for negligently performing Lasik eye surgery on Vincent McCalla ("McCalla") at Nusight Vision Centers/Millennium Laser Eye Centers. Lasik eye surgery involves two steps. First, cutting a flap in the cornea and second projecting a laser into the eye (laser ablation). Ophthalmologist Brian Marr, M.D., who was dismissed from this action, began the Lasik procedure on McCalla's right eye on October 12, 2000. Dr. Marr encountered a complication while cutting the corneal flap in McCalla's right eye and could not perform the laser portion of the surgery that day. McCalla was told to wait three months and return for a second attempt.

On January 5, 2001, McCalla returned for surgery; Dr. Alban was the ophthalmologist assigned to perform McCalla's surgery. Dr. Alban was aware of the prior aborted procedure and intended to

make a larger and deeper cut on the right eye to encompass the original flap in diameter and depth. Dr. Alban encountered a problem when the cut she made to the cornea intersected with the flap Dr. Marr had cut. She attempted to smooth the corneal stromal bed, but in the process, removed some tissue from the eye. She completed the right eye and proceeded with the Lasik procedure without complication on McCalla's left eye.

Plaintiffs asserted it was a breach of the standard of care for Dr. Alban to continue with the surgery after the flap complication. Plaintiffs argued that McCalla suffered headaches and permanent irregular astigmatism resulting from the surgery, must wear a contact lense in his right eye to correct his vision, and is unable to wear glasses.

A jury trial was held on October 27, 2003. Dr. Alban's expert testified that her choice in proceeding with McCalla's surgery was appropriate. Witnesses for the plaintiffs testified that Dr. Alban should have aborted the surgery when she encountered the intersecting flap. On October 29, the jury returned a verdict in favor of Dr. Alban. Plaintiffs, filing a timely motion for new trial, argue that improper and prejudicial remarks were made by defendant's counsel during closing argument.

STANDARD OF REVIEW

Whether conduct by counsel warrants a new trial is within the discretion of the trial court. Fineman v. Armstrong World

Industries, Inc., 980 F.2d 171, 207 (3d Cir. 1992). Not all improper remarks are so prejudicial that they require a new trial. The test is "whether the improper assertions have made it 'reasonably probable' that the verdict was influenced by prejudicial statements." Id. (quoting Draper v. Airco, Inc., 580 F.2d 91, 95 (3d Cir. 1978)). The court looks to the cumulative effect of the statements to determine if the verdict was improperly influenced. Davis v. General Accident Ins. Co. Of Am., 153 F. Supp. 2d 598, 602 (E.D. Pa. 2001).

DISCUSSION

Plaintiffs first object to defense counsel's comment on plaintiffs' failure to call a witness. Prior to trial Vincent McCalla had been examined by Dr. Kremer, but plaintiffs did not call Dr. Kremer as a witness. Noting Dr. Kremer's absence, defense counsel stated during closing argument, "And by the way, where is Dr. Kremer? Don't you think if Dr. Kremer had something helpful to say [for Mr. McCalla]...don't you think he would be here?" Plaintiffs' counsel immediately objected and the court instructed the jury that Dr. Kremer was "equally under the control of the plaintiff and the defendant, the defendant could also have brought in Dr. Kremer, if he had something favorable to the defendants, therefore, I'll sustain your objection." The court also repeated this instruction at the end of trial.

The court cured any unfair influence the statement might

have had. See, e.g., United States v. Thornton, 1 F.3d 149, 155 (3d Cir. 1993). Defense counsel's reference to plaintiffs' failure to call Dr. Kremer as a witness is not grounds for new trial.

Plaintiffs next argue that defense counsel made "derogatory remarks regarding opposing counsel's veracity and integrity." Defense counsel stated that had Dr. Alban aborted the procedure and subjected McCalla to a third, more complicated surgery, as plaintiff contended she should have, "Ms. Giordano would be in the courtroom now suing her for that." Defendant argues this statement was not meant to inflame the jury or attack counsel, but to refer to the difficult professional decision Dr. Alban faced when performing the surgery on Mr. McCalla. This singular statement was not sufficiently inflammatory or egregious to warrant a new trial. Anastasio v. Schering Corp., 838 F.2d 701, 706 (3d Cir. 1988); cf. Fineman, 980 F.2d at 207 (plaintiff's counsel made numerous "vituperative" statements regarding opposing counsel and other "impassioned" inappropriate statements).

Plaintiffs also argue that defense counsel made an improper comment that Dr. Alban had never been sued before. When plaintiffs objected, to this comment, the court instructed the jury to ignore the comment and any other comment invoking sympathy or bias; this was sufficiently curative.

Plaintiffs assert that defense counsel attempted to engender sympathy towards defendant by questioning her about her emotional stress on failing the medical specialty board examinations the first time she took them. This was not an appeal to sympathy but a response to plaintiffs' repeated attempts to discredit Dr. Alban. Even if it were an appeal to sympathy, the court instructed the jury to disregard sympathy or bias. Neither comment to which plaintiffs objected warrants a new trial.

Finally, plaintiffs contend that defense counsel improperly argued facts not in evidence. First plaintiffs state that defense counsel improperly argued that plaintiffs could not find an expert in Pennsylvania. Plaintiffs' counsel did not object to this statement or request a curative instruction. This statement was not so prejudicial as to constitute plain error and is not a ground for a new trial. Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 771-772 (3d Cir. 1975).

Plaintiffs argue that defense counsel made improper statements about mitigation of damages, specifically, that McCalla could have another corrective surgery. Plaintiffs failed to object or request a curative instruction, but the court instructed the jury that, "the law doesn't require an injured person to undergo a medical procedure that doesn't have a reasonable chance of improving the plaintiff's condition or is too risky or has some unusual risks or burdens." Defense

counsel's comment on failure to mitigate damages does not warrant a new trial.

Third, Plaintiffs object to defense counsel's statement that Mr. McCalla had no medical proof that the headaches, for which damages were claimed, were related to his injuries or the care provided by Dr. Alban. This does not warrant a new trial for several reasons: the jury, having found that Dr. Alban did not provide negligent care, did not reach issues of causation or damages; plaintiffs did not object to defense counsel's comment or request a curative instruction; although the court ruled that no medical testimony was required to claim damages for headaches, the court did not preclude arguing the lack of expert testimony to the jury.

CONCLUSION

Plaintiffs assert that the cumulative effect of defense counsel's improper statements improperly influenced the verdict. The trial record disputes this assertion. There was strong evidence supporting the jury's finding in favor of Dr. Alban and no reason to believe a new trial might result in a different verdict. When viewed in light of the entire trial record, defense counsel's comments did not improperly influence the jury verdict. Plaintiffs' motion is **DENIED**.

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ORDER

AND NOW, this ___ day of February 2004, upon consideration of Plaintiff's Motion for Post-Trial Relief (paper no. 50) and Defendant's response thereto (paper no. 57), for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the motion is **DENIED**.

Norma L. Shapiro, S.J.