

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

GERARD BILLEBAULT : CIVIL ACTION
 :
 v. :
 :
 PETER M. DIBATTISTE, M.D., et al. : NO. 96-6501

MEMORANDUM AND ORDER

BECHTLE, J.

MARCH 29, 1999

Presently before the court are defendants Peter M. DiBattiste, M.D. ("Dr. DiBattiste") and Main Line Cardiovascular Associates, Ltd.'s ("MLCA") (collectively "Defendants") Motion for Judgment as a Matter of Law and New Trial or, in the alternative, Remittitur or New Trial on Damages, plaintiff Gerard Billebault's ("Mr. Billebault") motion for delay damages and the responses thereto. For the reasons set forth below, Defendants' motion will be denied and Mr. Billebault's motion will be granted.

I. BACKGROUND

On February 16, 1995, Mr. Billebault, complaining of chest pains and breathing difficulty, consulted Dr. Lamberto Bentivoglio ("Dr. Bentivoglio") at MLCA. Dr. Bentivoglio recommended that Mr. Billebault undergo a cardiac catheterization

and angioplasty procedure.¹ He informed Mr. Billebault that his colleague, Dr. DiBattiste would administer the procedure.² Mr. Billebault signed a consent form authorizing Dr. DiBattiste to perform "cardiac catheterization and percutaneous transluminal coronary angioplasty." ("PTCA") (Def.'s Mem. Supp. at 8.) On February 22, 1995, Dr. DiBattiste admitted Mr. Billebault to Lankenau Hospital and performed the catheterization procedure. While administering the catheterization procedure, Dr. DiBattiste decided to perform a surgical procedure, known as a directional coronary atherectomy, ("DCA") to eliminate the obstruction in the artery.³ While Dr. DiBattiste was performing the DCA, the tip of a coronary guide wire used to guide the catheter through the artery fractured and separated from the rest of the wire. Dr. DiBattiste attempted to extract the separated portion of the wire. However, he was unsuccessful in retrieving the wire fragment. Immediately following Dr. DiBattiste's retrieval attempts, Mr. Billebault underwent emergency coronary bypass surgery.

1. Mr. Billebault alleged that Dr. Bentivoglio described the angioplasty as a "balloon" procedure.

2. At that time, Dr. DiBattiste was President of MLCA and Dr. Bentivoglio was an associate at MLCA.

3. A DCA procedure is performed to eliminate or lessen blockages of coronary arteries by employing an atherectomy device to mechanically shave and remove plaque from the diseased vessel. The procedure involves the use of a cutting instrument as opposed to a non-cutting balloon procedure.

A jury trial commenced in this action on June 22, 1998.⁴ Three theories of liability were asserted at trial. Mr. Billebault alleged that: (1) Dr. DiBattiste failed to obtain Mr. Billebault's informed consent for the DCA procedure; (2) Dr. DiBattiste negligently performed the DCA procedure; and (3) Dr. DiBattiste was negligent in his efforts in attempting to retrieve the broken guide wire. The jury found that Dr. DiBattiste did not obtain Mr. Billebault's informed consent prior to performing the DCA procedure and that Dr. DiBattiste was negligent in his efforts to retrieve the broken guide wire. The jury also found that Dr. DiBattiste was not negligent in performing the DCA procedure. On June 30, 1998, judgment was entered against Dr. DiBattiste and MLCA in the amount of \$2,493,000.00. Defendants timely filed a motion for renewed judgment as a matter of law and new trial, or in the alternative, remittitur or a new trial on damages.⁵

II. LEGAL STANDARDS

A court may grant a motion for judgment as a matter of law if "a party has been fully heard on an issue and there is no

4. The court has subject matter jurisdiction over this action because diversity of citizenship exists between the parties and the amount in controversy exceeds \$75,000.00. 28 U.S.C. § 1332.

5. At the close of the plaintiff's case, the court denied Defendants' motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The court also denied Defendants' renewed motion for judgment as a matter of law at the close of all the evidence.

legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). A court may grant a renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) only if, "viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." McDaniels v. Flick, 59 F.3d 446, 453 (3d Cir. 1995). "In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version." Id.

A new trial may be granted when the verdict is contrary to the great weight of the evidence and "'a miscarriage of justice would result if the verdict were to stand.'" Olefins Trading, Inc. v. Han Yang Chem Corp., 9 F.3d 282, 289 (3d Cir. 1993) (citation omitted). The trial court may not substitute its "judgment of the facts and the credibility of the witnesses for that of the jury." Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992). Additionally, a jury verdict may not be overturned as against the clear weight of the evidence unless "the verdict, on the record, cries out to be overturned or shocks [the] conscience." Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991) (citation omitted).

District courts have wide discretion in ruling on a motion for a new trial based on an alleged error involving a matter

within the sound discretion of the court, "such as the court's evidentiary rulings or points of charge to the jury." Mack v. Wal-Mart Stores, Inc., No. 97-5222, 1999 WL 79505, *3 (E.D. Pa. Feb. 9, 1999) (citing Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 921-22 (3d Cir. 1986)). Under Federal Rule of Civil Procedure 61, the court must determine (1) whether an error was in fact made, and (2) whether the error was so prejudicial that a refusal to grant a new trial would be "inconsistent with substantial justice." Fed. R. Civ. P. 61.

III. DISCUSSION

Defendants advance several arguments in support of their motion for renewed judgment as a matter of law and new trial, or in the alternative, remittitur or a new trial on damages. Defendants argue that: (1) the evidence was insufficient to support the jury's finding that Dr. DiBattiste failed to obtain Mr. Billebault's informed consent for the DCA procedure; (2) the court committed reversible error when it precluded Defendants from offering evidence that Mr. Billebault's counsel offered to dismiss Dr. Bentivoglio from the case if Dr. Bentivoglio testified that he did not obtain Mr. Billebault's consent for a DCA procedure; (3) the court committed reversible error by not instructing the jury that a patient's failure to listen or understand a physician's explanation of a procedure to be performed does not mean that proper consent has not been obtained; (4) the court committed reversible error by allowing

Mr. Billebault's expert, Dr. Charney, to testify regarding the difference in risks between a PTCA and DCA procedure; (5) the court committed reversible error by allowing Mr. Billebault's treating physician, Dr. Meilman, to testify as to the definition of PTCA; (6) Mr. Billebault did not offer sufficient evidence to support the jury's finding that Dr. DiBattiste was negligent in his efforts to retrieve the fractured guide wire; and (7) the court erred in allowing Mr. Billebault to testify regarding an anonymous statement. Defendants seek judgment as a matter of law or a new trial on each of these issues. Defendants also argue that the verdict was excessive and request remittitur or a new trial on damages. The court will address each argument separately. Additionally, Mr. Billebault seeks delay damages pursuant to Pennsylvania Rule of Civil Procedure 238.

A. Sufficiency of Evidence Supporting Jury's Finding of a Lack of Informed Consent

Defendants argue that the jury was not presented with sufficient evidence to find that Dr. DiBattiste did not obtain Mr. Billebault's informed consent before performing the DCA procedure. Under Pennsylvania law, a plaintiff alleging a claim for lack of informed consent must show, by a preponderance of the evidence, that the physician did not "advise the patient of those material facts, risks, complications, and alternatives to surgery that a reasonable person in the patient's situation would consider significant in deciding whether to have the operation." Foflygen v. Allegheny Gen. Hosp., 723 A.2d 705, 708 (Pa. Super.

Ct. 1999) (citation omitted). It is for the jury to determine what information a reasonable patient would consider significant. Id.

At trial, Mr. Billebault testified that on February 16, 1995, when he visited MLCA, Dr. Bentivoglio only discussed a balloon angioplasty procedure with him and that Dr. Bentivoglio did not advise him that he may possibly undergo a DCA surgical procedure. (Tr. 6/22/98 at 51-58). Gail Breyer, who accompanied Mr. Billebault on his visit to MLCA, also testified that Dr. Bentivoglio only discussed a balloon angioplasty procedure and did not advise Mr. Billebault that he may possibly undergo a DCA procedure. (Tr. 6/26/98 at 92-101). Mr. Billebault also testified that when he met Dr. DiBattiste at MLCA on February 16, 1995, that he did not mention the possibility of a DCA procedure. (Tr. 6/22/98 at 56.) Mr. Billebault also offered into evidence the consent form he signed on February 16, 1995. The consent form authorized Dr. DiBattiste to perform "cardiac catheterization and percutaneous transluminal coronary angioplasty." (Def.'s Mem. Supp. at 8.) On February 22, 1999, Mr. Billebault arrived at Lankenau Hospital. Id. at 58. Mr. Billebault testified that Dr. DiBattiste did not visit his room prior to meeting him in the catheterization lab where the procedure was performed. Id. at 60. Dr. DiBattiste testified that it was his normal practice to provide a patient with a complete run down of the procedure and the associated risks in the catheterization lab prior to performing a procedure. (Tr.

6/26/98 at 180-81.) Dr. DiBattiste also testified that he did not remember the exact words that he said to Mr. Billebault. Id. On cross-examination, Dr. DiBattiste stated that he did not make a notation in any of the hospital records about informing Mr. Billebault about the DCA procedure and that he did not recall the length of the conversation. Id. at 215.

After considering all the evidence presented by the parties on the issue of informed consent, the jury determined that Mr. Billebault was not provided with the material information necessary to decide whether to go forward with the DCA procedure and found Defendants liable on the informed consent claim. Both sides presented testimony on the issue and the jury made a determination based on that testimony. Although the parties presented conflicting testimony, it is well within the jury's province to weigh the evidence presented and to make credibility determinations regarding witnesses. Fineman, 980 F.2d at 211. The court finds that sufficient evidence was presented for the jury to reasonably find liability against Defendants on the informed consent claim and will deny Defendants' renewed motion for judgment as a matter of law. Additionally, the court finds that the verdict was not contrary to the great weight of the evidence and will deny Defendants' motion for a new trial on the informed consent claim.

B. Jury Instruction on the Informed Consent Claim

Defendants argue that the court committed reversible error by failing to include the second sentence of Defendants'

proposed Point for Charge Number 20 in its instructions to the jury.⁶ Defendants assert that the court should have added the following sentence to its jury charge:

The fact that a patient does not listen to or ask questions regarding the information provided by his or her physician, or fails to read material provided by the physician does not suggest that a proper consent has not been obtained.

(Def.'s Mem. Supp. at 21.) Defendants argue that this omission could have misled or confused the jury and that the verdict could have been based on the jury's mistaken belief that the test for informed consent was whether Mr. Billebault subjectively understood what he was told, rather than the objective remarks of Dr. DiBattiste and Dr. Bentivoglio.

Upon reviewing its charge to the jury, the court's inquiry is whether the charge, "taken as a whole, properly apprises the jury of the issues and the applicable law." Smith v. Borough of Wilkinsburg, 147 F.3d 272, 275 (3d Cir. 1998) (citation omitted). In Pennsylvania, the primary focus "with respect to informed consent is to guarantee that a patient is supplied with all the material facts from which an intelligent choice as to medical attention may be reached." Millard v. Nagle, 587 A.2d 10, 13 (Pa. Super. Ct. 1991); See Blakesley v. Wolford, 789 F.2d 236, 239 (3d Cir. 1986) ("Informed consent in Pennsylvania thus focuses on insuring that the patient be

6. Defendants properly preserved this objection to the jury charge for purposes of filing post-trial motions by objecting to the exclusion of this charge before the jury retired to consider its verdict. (Tr. 6/30/98 at 48.); see Fed. R. Civ. P. 51.

apprised of all feasible alternatives and possible adverse affects which might arise from the medical procedure."). Pennsylvania law focuses on what information was provided to the patient. In accordance with Pennsylvania law, the court's instructions to the jury also focused on what information was provided to the patient. (Tr. 6/22/98 at 21-24.) The court's charge, taken as a whole, properly apprised the jury of the applicable law and the issues that they were to decide. The court will not grant a new trial on this ground.

C. Preclusion of Testimony by Dr. Bentivoglio's Counsel

Defendants argue that the court committed reversible error when it precluded them from offering evidence that Mr. Billebault's counsel offered to dismiss Dr. Bentivoglio from the case if Dr. Bentivoglio testified that he did not obtain Mr. Billebault's consent for a DCA procedure. Defendants sought to introduce the testimony of counsel who represented Dr. Bentivoglio.⁷ Defendants argued that counsel for Dr. Bentivoglio would testify that Mr. Billebault's counsel offered to dismiss Dr. Bentivoglio from the case if he testified that he failed to obtain Mr. Billebault's consent for a DCA procedure and that Dr. Bentivoglio refused this offer. (Tr. 6/26/98 at 3-9.) Defendants further argued that the testimony would be offered to show a prior consistent statement by Dr. Bentivoglio regarding

7. The court granted Dr. Bentivoglio's motion for summary judgment and dismissed all claims against him by Order dated May 19, 1998.

informed consent for the DCA procedure. The court precluded the testimony. (Tr. 6/26./98 at 3-11.) Defendants argue that the testimony was admissible as a prior consistent statement and was necessary to rehabilitate Dr. Bentivoglio's testimony.⁸

Under Federal Rule of Evidence 801(d)(1)(B), a prior statement by a witness is admissible if: (1) the witness testifies at trial and is subject to cross-examination concerning the statement; and (2) the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d)(1)(B). Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because he has been discredited. Tome v. United States, 513 U.S. 150, 157-58 (1995) ("The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of a story told."). A prior consistent statement is inadmissible absent any charge of recent fabrication or improper influence or motive. United States v. Asher, 854 F.2d 1483, 1499 (3d Cir. 1988). The record does not demonstrate that Mr. Billebault's counsel was seeking to attack Dr. Bentivoglio's credibility or testimony by charging him with recent fabrication

8. Defendants also argue that the testimony was admissible under Federal Rule of Evidence 408 to rehabilitate Dr. Bentivoglio's testimony. The court disagrees, and as explained at trial, there could be any number of reasons why Dr. Bentivoglio did not agree to the offer of compromise making the testimony's relevance too speculative for the court to admit it under Rule 401.

or improper influence or motive. (Tr. 6/26/98 at 148-155.) Rather, the record demonstrates that Mr. Billebault's counsel was questioning Dr. Bentivoglio's recollection of the initial consultation with Mr. Billebault on February 16, 1995 and questioning him concerning the consent form signed by Mr. Billebault on that same date. Id. Accordingly, the court properly excluded the offered testimony and will not grant a new trial on this ground.

D. Admissibility of Dr. Charney's Testimony Concerning the Differences between the PTCA and DCA procedures.

In addition to the circumstances surrounding Mr. Billebault's initial visit to MLCA and his visit to the hospital, both parties presented evidence on the meaning of the phrase "percutaneous transluminal coronary angioplasty ("PTCA")." The meaning of this medical term became important because Mr. Billebault claimed that he only received information concerning the risks of a balloon angioplasty and not a cutting procedure like the DCA that was actually performed by Dr. DiBattiste. Mr. Billebault's expert, Dr. Charney, testified that PTCA referred to a balloon procedure and not a cutting procedure like a DCA. (Tr. 6/3/98 at 50).⁹ Dr. Charney also explained that each procedure involved different risks. Id. Counsel for Dr. DiBattiste objected to this portion of the video tape and any similar

9. Dr. Charney testified by video tape. References to the transcript of June 3, 1998 correspond to Dr. Charney's video deposition that was recorded on that date and played for the jury on June 24, 1998.

references from Dr. Charney on the ground that the differences between a PTCA procedure and a DCA procedure were not covered in his expert report. The court overruled the objection.

Defendants argue that the court committed reversible error in allowing Dr. Charney's testimony concerning the differences between a PTCA procedure and a DCA procedure to be heard by the jury.

An expert may testify on matters outside of his or her report if the matter is within the expert's expertise, absent unfair surprise or bad faith. DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1201-02 (3d Cir. 1978); Kelly v. GAF Corp., 115 F.R.D. 257, 258 (E.D. Pa. 1987). Dr. Charney's expert report states that other alternatives to a DCA procedure were available to Dr. DiBattiste in treating Mr. Billebault. (Def.'s Mem. Ex. E at 2.) The report also states that the alternatives "included coronary artery bypass surgery, coronary stenting and angioplasty." Id. The report further states that "[a]ll of these alternatives should have been discussed when obtaining an informed consent." Id. The court finds, as it did at trial, that because these alternatives are listed in the report and the report states that these alternatives should be discussed with a patient prior to performing any one of them, it is not prejudicial or unfair for the expert to define or explain terms or procedures contained in or utilized in preparing an expert report. Additionally, Dr. Charney's references to the differences between a PTCA procedure and a DCA procedure were

within the scope of his expertise in interventional cardiology for which the court qualified him as an expert witness under Federal Rule of Evidence 702. There is no suggestion of bad faith and given the content of Dr. Charney's expert report and the issues in the case there was no prejudicial surprise to the Defendants. The court will not grant a new trial on this ground.

E. Dr. Meilman's Testimony

Defendants argue that the court erred in permitting Dr. Meilman, Mr. Billebault's treating physician, to testify as to the definition of the term PTCA. During Dr. Meilman's testimony, Mr. Billebault's counsel asked him to explain the term "percutaneous transluminal coronary angioplasty." (Tr. 6/23/98 at 18.) Counsel for Defendants objected. Before returning to questioning Dr. Meilman, Mr. Billebault's counsel sought to qualify Dr. Meilman as an expert in the field of interventional cardiology. The court asked counsel for Defendants if there was any objection to Dr. Meilman being qualified as an expert in that field. Defendants' counsel responded, "none, your Honor." (Tr. 6/23/98 at 18.) The court accepted Dr. Meilman as an expert in interventional cardiology. As an expert in that field, Dr. Meilman was competent to explain the meaning of the term "percutaneous transluminal coronary angioplasty." This explanation was relevant to his testimony concerning his evaluation of Mr. Billebault's condition. The court finds that it did not err in allowing this testimony and will not grant a new trial on this ground.

F. Sufficiency of Evidence Supporting the Jury's Finding of Negligent Retrieval

Defendants argue that Mr. Billebault did not offer sufficient evidence to support the jury's finding that Dr. DiBattiste was negligent in his efforts to retrieve the fractured guide wire. At trial, Dr. Charney, an expert in interventional cardiology, testified that Dr. DiBattiste was negligent in conducting an "aggressive and prolonged" attempt to retrieve the broken guide wire section from Mr. Billebault's artery. (Tr. 6/3/98 at 142.) Dr. Charney also testified:

the attempt at retrieving the guide wire went on for approximately four hours. This is an extremely long amount of time to continuously attempt to put down snares of the wires down into the coronary arteries.

(Tr. 6/3/98 at 65.) After considering this testimony and all the evidence presented by the parties on the issue, the jury determined that Dr. DiBattiste was negligent in his retrieval efforts. The court finds that sufficient evidence was presented for the jury to reasonably find that Dr. DiBattiste was negligent in his retrieval efforts and will deny Defendants' renewed motion for judgment as a matter of law. Additionally, the court does not find that the verdict was contrary to the great weight of the evidence and will deny Defendants' motion for a new trial on the negligent retrieval claim.

G. Admissibility of Anonymous Hearsay Statement

Defendants argue that the court erred in allowing Mr. Billebault to testify regarding an anonymous statement that he claimed to have heard in the operating room. Immediately after

Dr. DiBattiste ended his attempt to retrieve the broken guide wire, he rushed Mr. Billebault to the operating room for emergency bypass surgery. (Tr. 6/24/98 at 26.) Mr. Billebault testified that while he was in the operating room, he heard someone say, "we have to do it now, we are going to lose him, we cannot wait any longer." (Tr. 6/22/98 at 71.) Defendants argue that this testimony is hearsay and does not fall within an exception to the general prohibition on presenting hearsay statements. Additionally, Defendants argue that admitting the statement resulted in unfair prejudice to Defendants. The court disagrees and finds, as it did at trial, that the statement is admissible under either the present sense impression or excited utterance exceptions to the hearsay rule. Additionally, the court finds that the statement was not unfairly prejudicial.

1. Present Sense Impression

Under Federal Rule of Evidence 803(1) an out-of-court statement is admissible as a present sense impression if it is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Fed. R. Evid. 803(1). Three principal requirements must be met before hearsay evidence may be admitted as a present sense impression: (1) the declarant must have personally perceived the event described; (2) the declaration must be an explanation or description of the event rather than a narration; and (3) the declaration and the event described must be contemporaneous. United States v. Mitchell, 145 F.3d 572, 576

(3d Cir. 1998). Mr. Billebault testified that just after he entered the operating room he heard the statement at issue. The statement plainly relates to the events taking place in the operating room and was contemporaneous with those events. Defendants challenge the reliability of the statement given that the declarant is unknown.

A principal requirement of the present sense impression exception is that the declarant must personally perceive the event or condition about which the statement is made. Mitchell, 145 F.3d at 576. The court may infer that an unknown declarant personally perceived the event if the words of the statement or circumstances surrounding the event "show more likely than not that the declarant saw the event." Id. at 577 (citing Miller v. Keating, 754 F.2d 507, 511 (3d Cir. 1985)).

The circumstances in this case provide sufficient context from which the court finds by a preponderance of the evidence that the unknown declarant personally perceived the event. First, Mr. Billebault was in a hospital operating room for unscheduled, emergency bypass surgery when he heard the utterance. Under normal circumstances this is a restrictive environment containing hospital personnel. Second, the content of the statement -- "we cannot wait" -- indicates that the declarant was likely one of the group of medical personnel attending to Mr. Billebault or was at the least in close proximity to Mr. Billebault. Third, Mr. Billebault testified that at the time he heard the statement he could see persons in

hospital garb with masks and surgical clothing around him. Under these circumstances, the court finds that it is more likely than not that the unknown declarant personally perceived Mr. Billebault lying on the operating room table being prepared for emergency bypass surgery and that the anonymity of the declarant does not effect the statement's reliability.

2. Excited Utterance

Under Federal Rule of Evidence 803(2) an out-of-court statement is admissible as an excited utterance if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2). In order for a hearsay statement to constitute an excited utterance there must be: (1) a startling occasion; (2) a statement relating to the circumstances of the startling occasion; (3) a declarant who appears to have had opportunity to personally observe the events; and (4) a statement made before there has been time to reflect and fabricate. Mitchell, 145 F.3d at 576. In this case the declarant appears to have perceived at least the preparation for or the initial stages of an emergency coronary bypass. As discussed above, the statement was contemporaneous with the event and is plainly related to the circumstances surrounding the event.

3. Unfair Prejudice

Federal Rule of Evidence 403 allows the court to exclude relevant evidence if the probative value of that evidence

is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. The statement is probative of Mr. Billebault's emotional and mental state at the time of the events and thereafter. That probativeness balances against potential prejudice or the possibility that the jury was inflamed by the testimony. Additionally, Defendants' counsel was given the opportunity to cross-examine the witness on the reliability aspects of the statement and the contextual setting. The court finds that the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. The court will not grant a new trial on this ground.

H. Damages

Defendants argue that the verdict was excessive and request remittitur or a new trial on damages. A district court may review damages awards for excessiveness. Kazan v. Wolinski, 721 F.2d 911, 914 (3d Cir. 1983). However, the court must be "extremely reluctant to interfere with the time-honored power of the jury, in the exercise of its collective judgment, to assess the damages sustained by the plaintiff." Tann v. Service Distributors, Inc., 56 F.R.D. 593, 598 (E.D. Pa. 1972). A motion for remittitur is left to the discretion of the trial judge, who is in the best position to evaluate the evidence presented and determine whether or not the jury has come to a rationally based conclusion. Spence v. Board of Educ., 806 F.2d 1198, 1201 (3d Cir. 1986). It is an insufficient basis to reverse a jury's award of damages simply because the court finds that an award is

extremely generous, or that the court would have found the damages to be considerably less. Walters v. Mintec/Int'l, 758 F.2d 73, 80 (3d Cir. 1985). The jury's verdict must be so large as to "shock the conscience" of the court. Kazan, 721 F.2d at 914.

Defendants argue that Mr. Billebault's counsel made inflammatory and unfairly prejudicial statements that more likely than not caused an excessive verdict. The record does not support this argument. There is no demonstration that Mr. Billebault's counsel made inflammatory and unfairly prejudicial statements or introduced extraneous evidence that more likely than not caused an excessive verdict. See Draper v. Airco, Inc., 580 A.2d 91, 97 (3d Cir. 1978). The court will not grant a new trial on this ground.

Defendants also argue that the evidence presented does not support the amount of the verdict and that the court should grant a new trial on damages or remittitur. The court disagrees. Mr. Billebault presented evidence that he suffered extensive injuries during the unsuccessful retrieval process, which lasted over four hours. He presented evidence that two arteries that were normal prior to the DCA procedure were damaged during the retrieval process. Further, the evidence showed that the fractured portion of the guide wire remains lodged in Mr. Billebault's left anterior descending artery. Additionally, Dr. Brady, a psychiatric expert, testified that Mr. Billebault suffers from post-traumatic stress disorder as a result of the

events that took place during and after the retrieval process and will need future psychiatric care. (Tr. 6/24/98 at 55-61.) In addition to the extensive testimony on pain and suffering and physical injuries suffered during the DCA, Mr. Billebault also presented evidence that he expended \$100,000.00 in out-of-pocket medical expenses. (Def.'s Mem. Supp. at 47.) The court finds that the verdict is supported by the evidence of record and is neither shocking nor excessive. The court will not grant a new trial on damages and will not reduce the verdict.

I. Delay Damages

Mr. Billebault seeks delay damages pursuant to Pennsylvania Rule of Civil Procedure 238.¹⁰ That rule provides for the calculation of such damages from one year after the date a defendant was first served with original process. Pa. R. Civ. P. 238(a)(2)(ii). The rule further provides that damages for delay shall be calculated at the rate equal to one percent above the prime rate as listed in the first edition of the Wall Street Journal published for each calendar year for which the damages are awarded. Pa. R. Civ. P. 238(a)(3).

Mr. Billebault requests delay damages to be calculated from October 21, 1997 to June 30, 1998. The prime rate published in the first edition of The Wall Street Journal for the years 1997 and 1998, plus one percent, are nine and one quarter percent

10. Pennsylvania Rule of Civil Procedure 238 is a substantive rule that must be followed by federal courts sitting in diversity and applying Pennsylvania law. Kirk v. Raymark Indus., Inc., 61 F.3d 147, 168 (3d Cir. 1995).

and nine and one half percent respectively. (Pl.'s Mot. at 2.) Plaintiff requests \$162,949.98 in delay damages under the calculation prescribed by Pennsylvania Rule of Civil Procedure 238. Defendants do not oppose Mr. Billebault's motion for delay damages. Accordingly, the court will modify the judgment of \$2,493,000.00 to reflect delay damages in the amount of \$162,949.98.

III. CONCLUSION

For the forgoing reasons, the court will deny Defendants' renewed motion for judgment as a matter of law and new trial or, in the alternative, remittitur or new trial on damages. Additionally, the court will grant Mr. Billebault's motion for delay damages.

An appropriate Order follows.

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

GERARD BILLEBAULT : CIVIL ACTION
v. :
PETER M. DIBATTISTE, M.D., et al. : NO. 96-6501

ORDER

AND NOW, TO WIT, this 29th day of March, 1999, upon consideration of defendants, Peter M. DiBattiste, M.D. and Main Line Cardiovascular Associates, Ltd.'s Motion for Judgment as a Matter of Law and New Trial or, in the alternative, Remittitur or New Trial on Damages, plaintiff Gerard Billebault's motion for delay damages and the responses thereto, IT IS ORDERED that:

- (1) defendants Peter M. DiBattiste, M.D. and Main Line Cardiovascular Associates, Ltd.'s Motion for Judgment as a Matter of Law and New Trial or, in the alternative, Remittitur or New Trial on Damages is DENIED; and
- (2) plaintiff Gerard Billebault's motion for delay damages is GRANTED. The judgment entered on June 30, 1998 in the amount of \$2,493,000.00 is hereby MODIFIED to reflect delay damages in the amount of \$162,949.98 for a total award of \$2,655,949.98.

LOUIS C. BECHTLE, J.