

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: February 5, 2016)

HELEN M. CAHILL and
ROBERT W. CAHILL

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V.

C.A. No. PC 08-4932

CYNTHIA M. ALVES, M.D. and
COASTAL MEDICAL, INC.

DECISION

PROCACCINI, J. Before the Court is Defendant Cynthia M. Alves, M.D.’s (Dr. Alves or Defendant) renewed Super. R. Civ. P. 50(b) motion for judgment as a matter of law on Count II of Plaintiff Helen M. Cahill’s (Mrs. Cahill or Plaintiff) Amended Complaint. This case was tried before a jury in November 2015. The Defendant properly moved for judgment as a matter of law on Count II at the close of all evidence. Decision was reserved on the motion, and the issues were submitted to the jury. The jury was unable to return a verdict, resulting in a mistrial. For the reasons stated herein, the motion is hereby denied.

I

Facts and Travel

In 1998, Mrs. Cahill was diagnosed with atrial fibrillation (AFib). AFib is a heart rhythm disorder that occurs when the left chamber of the heart, the atria, beats too fast and out of rhythm, reducing the ability of the heart to pump blood. The most serious risk associated with AFib is thromboembolism. See Pl.’s Prelim. Hr’g Mem. 2. Thromboembolism occurs when blood clots form, break away from the heart, and travel to the brain or other critical organs. Therefore, patients diagnosed with AFib are at an increased risk of thromboembolic stroke.

Mrs. Cahill was particularly concerned about the possibility of suffering a stroke as her mother passed away due to a stroke in her 50s. Her primary care physician, Dr. Ruggieri, placed her on Coumadin (a common blood thinner used to prevent blood clots) and hypertension medication and referred her to Dr. Alves. Dr. Alves's ultimate treatment plan included both chemical and electrical cardioversion. From October 30, 1998 to October 22, 2006, Dr. Alves electrically cardioverted Mrs. Cahill a total of seven times at Roger Williams Hospital.

A cardioversion is performed in an attempt to "shock" the patient's heart back into normal rhythm, reducing the chance that the AFib will cause a blood clot to form and break away. See Trial Tr. 17:7-19, Nov. 2, 2015; Pl.'s Prelim. Hr'g Mem. 3. Yet, at the same time, the procedure that alters AFib actually puts the patient at an increased risk of a clot breaking off—the very fear that induces the patient to get the electrical cardioversion in the first place.¹ See Trial Tr. 28:16-29:24, Nov. 2, 2015; Pl.'s Prelim. Hr'g Mem. 4-5. Therefore, most patients are prescribed a blood thinner prior to undergoing a cardioversion and continue the medication following the procedure as well.² See Trial Tr. 25:19-28:3, Nov. 2, 2015; Pl.'s Prelim. Hr'g Mem. 3-4. If a patient is not taking a blood thinner, it is important that the electrical cardioversion be performed shortly after AFib begins. See Trial Tr. 68:15-22, Nov. 2, 2015; Pl.'s Prelim. Hr'g Mem. 4-7. These precautions reduce the chance that a blood clot will form during AFib and subsequently break off during or after the electrical cardioversion.³

¹ Trial Tr. 28:11-15, Nov. 2, 2015 ("Q. So, [the heart] gets back in rhythm but it is not beating hard yet and the fear is when it starts to beat hard if there is a clot there it will break off and cause a stroke or some other injury, right? A. That is the theory.").

² The pre-op prescription reduces the chance of a clot forming during AFib, while the post-op reduces the chance of a clot forming during the "stunning" phase that follows the cardioversion. See Trial Tr. 25:19-28:3, Nov. 2, 2015.

³ See also Cardioversion, American Heart Association, http://www.heart.org/HEARTORG/Conditions/Arrhythmia/PreventionTreatmentofArrhythmia/Caradioversion_UCM_447318_Article.jsp#.VpkeG7YrKUK ("If you have atrial fibrillation, blood

Following Mrs. Cahill's fourth electrical cardioversion, a bleeding issue was discovered, and her prescription for Coumadin was substituted with aspirin and Plavix (a different blood thinner). From November 2005 to April 2006, Mrs. Cahill went into AFib repeatedly and was safely treated with both chemical and electrical cardioversions. Mrs. Cahill was placed back on Coumadin in August 2006, but removed after she was diagnosed with a subdural hemorrhage on October 17, 2006. Two days later, Mrs. Cahill again exerted signs of AFib. A chemical cardioversion was attempted, but Mrs. Cahill went back into AFib the next day. On October 22, 2006, more than seventy-two hours after the initial onset of Mrs. Cahill's AFib, Dr. Alves performed Mrs. Cahill's seventh electrical cardioversion. Mrs. Cahill was not taking a blood thinner at the time of the procedure. The next morning, a blood clot broke off from Mrs. Cahill's heart and traveled to her brain. As a result, Mrs. Cahill suffered a stroke in the middle cerebral artery, affecting the left temporal and parietal areas of her brain.

On July 28, 2008, Mrs. Cahill filed a two count Complaint against Dr. Alves and Coastal Medical, Inc. Mrs. Cahill alleged that Dr. Alves acted negligently by performing an electrical cardioversion without adequately investigating the duration of Mrs. Cahill's AFib and while Mrs. Cahill was not taking a blood thinner. The Complaint was amended on December 18, 2013 to include a lack of informed consent count against Dr. Alves. Mrs. Cahill alleged that Dr. Alves did not obtain sufficient consent to perform the above procedure because she failed to adequately inform Mrs. Cahill of the increased risk of stroke if the procedure was performed over forty-eight hours after the onset of the AFib and while Mrs. Cahill was not taking a blood thinner.

clots can form in your heart's left atrium. Cardioversion may knock loose a blood clot in your left atrium. If the clot (embolus) travels to your brain, it can cause a stroke. To avoid this, your doctor may give you medicine . . . to make your blood less likely to form blood clots.”).

A jury trial was held in November 2015. At the close of Plaintiff's case, Defendant moved for judgment as a matter of law on the informed consent count pursuant to Super. R. Civ. P. 50 (Rule 50). The motion was renewed at the close of all evidence but before the case was submitted to the jury. The Court reserved ruling and submitted the case to the jury. The jury returned deadlocked and unable to reach a verdict. A mistrial was declared, and Defendant again renewed her motion for judgment as a matter of law.

Prior to turning to the renewed Rule 50(b) motion, this Court must decide the threshold question of whether the trial judge is required to rule on such a motion following a hung jury, or whether consideration of the motion is within his or her discretion.

II

Standard of Review

With respect to a motion for judgment as a matter of law, “[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party . . .” Rule 50(a)(1). Furthermore,

“[w]henever a motion for a judgment as a matter of law made at the close of all the evidence is denied . . . the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment.” Id. at Rule 50(b).

Our Supreme Court has consistently held that a trial justice, when considering a motion for judgment as a matter of law, “must examine ‘the evidence in the light most favorable to the nonmoving party, without weighing the evidence or evaluating the credibility of witnesses, . . . draw[ing] from the record all reasonable inferences that support the position of the nonmoving party.’” Children’s Friend & Serv. v. St. Paul Fire & Marine Ins. Co., 893 A.2d 222, 226 (R.I.

2006) (alteration in original) (quoting Mktg. Design Source, Inc. v. Pranda N. Am., Inc., 799 A.2d 267, 271 (R.I. 2002)). Thereafter, “[i]f . . . there remain factual issues upon which reasonable persons might draw different conclusions, the motion for [judgment as a matter of law] must be denied.” Id. at 226-27 (alteration in original) (quoting Wellborn v. Spurwink/Rhode Island, 873 A.2d 884, 887 (R.I. 2005)).

III

Analysis

A

Rule 50 Motion Following a Hung Jury

Defendant contends that this Court is required to rule on a renewed Rule 50(b) motion even if the jury is unable to reach a verdict. She argues that the rule anticipates this specific conundrum and only requires that a party must be fully heard on the issue before the Court makes a finding against that party. Citing case law from other jurisdictions, she additionally posits that the motion is “ripe for decision” and cannot be “ignored.” In opposition, Plaintiff argues that the Court has a choice in the matter because the rule explicitly states that the Court “may” grant judgment as a matter of law, or “may” order a new trial.

The Rhode Island Supreme Court has not yet had the opportunity to consider whether a trial judge is required to rule on a renewed Rule 50(b) motion following a deadlocked jury, or whether consideration of such a motion is discretionary. Rule 50(b) reads, in pertinent part: “If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.” (Emphasis added.) “[W]hen the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” State v. Hazard, 68 A.3d

479, 485 (R.I. 2013) (alteration in original) (quoting Alessi v. Bowen Court Condo., 44 A.3d 736, 740 (R.I. 2012)). “May” is ordinarily meant to denote permissive authority, not mandatory. See Carlson v. McLyman, 77 R.I. 177, 182, 74 A.2d 853, 855 (1950). However, the term can be construed as the latter, dependent upon the “intent of the legislature as ascertained from the language, the nature, and the object of the statute.” Id. (quoting Nolan v. Representative Council of Newport, 73 R.I. 498, 502, 57 A.2d 730, 732 (1948)).

Under the circumstances presented, there is no evidence that the term “may” in Rule 50(b) actually leaves the Court without discretion. To be sure, the discretion does not permit the Court to simply “ignore” the motion as Defendant contends. The rule specifically states that, “in disposing of the renewed motion” the Court can either direct entry of judgment as a matter of law, or merely order a new trial. Rule 50(b) (emphasis added). Two avenues are provided for disposing of the motion. Moreover, this interpretation is supported by the fact that the trial judge is also granted these options when presented with a renewed Rule 50(b) motion and a jury that does return a verdict. There, the judge has the option to let the verdict stand, order a new trial, or direct the entry of the judgment as a matter of law.⁴ These options are consistent with the Federal Rules of Civil Procedure, after which our Rules are modeled. See Bragg v. Warwick Shoppers World, Inc., 102 R.I. 8, 11, 227 A.2d 582, 584 (1967); Fed. R. Civ. P. 50(b).

Likewise, this Court is not convinced that the cases cited by Defendant stand for the proposition that a trial judge is required to rule on a pending Rule 50(b) motion following a hung jury. Rather, the cases cited merely state that “a jury’s inability to reach a verdict, by itself, will [not] operate to prevent the entry of a directed verdict under Rule 50.” DeMaine v. Bank One,

⁴ It is clear from Super. R. Civ. P. 59(d) that the trial judge has the authority to grant a new trial on his or her own initiative for any reason that a new trial may have been granted by motion. Therefore, the judge is not merely presented with these options when the party moves for new trial consideration.

Akron, N.A., 904 F.2d 219, 221 (4th Cir. 1990); see also Hagan v. Echostar Satellite, L.L.C., 529 F.3d 617, 623 (5th Cir. 2008) (acknowledging that the jury could not reach a verdict because they were confused on the law, not the facts); Noonan v. Midland Capital Corp., 453 F.2d 459, 463 (2d Cir. 1972) (“That the case was originally sent to the jury which twice reported itself deadlocked, after considerable deliberation, does not mean that the actual disagreement was fair and reasonable. If the position of some jurors favoring plaintiff is enough, there could never be a judgment for insufficiency of the evidence notwithstanding a verdict, nor the direction of judgment on that ground after a mistrial. Both are commonplace and envisaged by Rule 50(b), F.R.C.P.”). In essence, the courts recognize that the motion is not rendered moot by a hung jury. However, the judicial decisions lack any language that provides that ruling on the motion is mandatory. See Suttles v. City of Chattanooga, Tenn., 859 F.2d 153, 1988 WL 98604, at *3 (6th Cir. Sept. 26, 1988) (“[The rule] expressly recognizes the authority of the court to grant the motion after the jury hung . . .” (emphasis added)). In fact, many of the cases actually quote the language of Rule 50(b), confessing that the trial judge may rule on the motion or order a new trial. See, e.g., PPM Am., Inc. v. Marriott Corp., 875 F. Supp. 289, 293 (D. Md. 1995); Daniels v. Pac.-Atl. S. S. Co., 120 F. Supp. 96, 96-97 (E.D.N.Y. 1954).

This Court is also not persuaded by Defendant’s argument that courts often consider a renewed Rule 50(b) motion following a hung jury despite having already declared a mistrial and scheduled a new trial. See Gonzalez Perez v. Gomez Aguila, 312 F. Supp. 2d 161, 164-65 (D.P.R. 2004). This point is extraneous to the Court’s analysis simply because a mistrial, and subsequent new trial, is procedurally the next step after a jury is unable to reach a verdict. The parties are under no obligation to file a renewed Rule 50(b) motion after a hung jury, and if they do not decide to do so, a new trial commences. However, if the parties proceed to file such a

motion, the Court is obligated to dispose of it, either by considering it or ordering a new trial. In summary, a new trial is procedurally what comes next after a hung jury, and the order has no significance on whether ruling on a renewed Rule 50(b) motion is mandatory or discretionary. Defendant is correct that a renewed Rule 50(b) motion is still “ripe for decision” following a scheduled new trial, but Rule 50(b) itself provides two different avenues to deal with its “ripeness.”

This all being said, courts do routinely utilize their discretionary authority and consider the renewed Rule 50(b) motion following a hung jury. As one court succinctly put it when considering such discretion: “When a directed verdict is appropriate, the court may direct a verdict upon a motion to reconsider made after a mistrial. On the other hand, when the moving party is not entitled to a directed verdict, a mistrial requires a new trial.” Hasselmann v. Hasselmann, 596 N.W.2d 541, 545 (Iowa 1999) (citation omitted) (reading Iowa’s version of Rule 50(b) in unison with the State’s rule regarding mistrials after a hung jury). This Court concludes that ruling on Defendant’s pending Rule 50(b) motion on the informed consent count is discretionary, and further, the Court will exercise its discretion and decide the motion at this time. It is to this issue the Court now turns.

B

Informed Consent

“The problem with communication . . . is the illusion that it has been accomplished.”
- *George Bernard Shaw*

The theory of informed consent is founded in negligence and “imposes a duty upon a doctor which is completely separate and distinct from his responsibility to skillfully diagnose and treat the patient’s ills.” Wilkinson v. Vesey, 110 R.I. 606, 620, 295 A.2d 676, 685 (1972). Under the theory, a doctor has a duty to disclose all material information to his patient upon

which he can base an informed consent. Id. at 625, 295 A.2d at 688. In order to prove causation, “the plaintiff must prove that if he had been informed of the material risk, he would not have consented to the procedure and that he had been injured as a result of submitting to the procedure.” Id. at 628-29, 295 A.2d at 690. The vast majority of jurisdictions require that the plaintiff prove causation using an objective standard—that being, whether a reasonable person in plaintiff’s position would have followed through with the procedure had he or she received adequate disclosure of all material information. See, e.g., Canterbury v. Spence, 464 F.2d 772, 791 (D.C. Cir. 1972); 4 Medical Malpractice, Ch. 22, § 22.06 (Matthew Bender 2013). Only a minority of jurisdictions analyze the causal element using a subjective test. See, e.g., Scott v. Bradford, 606 P.2d 554, 558-59 (Okla. 1979); Arena v. Gingrich, 733 P.2d 75, 79 (Or. Ct. App. 1987), aff’d 748 P.2d 547 (Or. 1988) (en banc).

The Rhode Island Supreme Court has not explicitly considered whether causation should be analyzed using an objective or subjective test. However, language in both the seminal case of Wilkinson, 110 R.I. 606, 295 A.2d 676 and Flanagan v. Wesselhoeft, 712 A.2d 365 (R.I. 1998) indicates that the test in our jurisdiction is analogous to the minority subjective approach. In Flanagan, a doctor performed a node removal on an eleven-month old in order to test for malignancy. 712 A.2d at 366. The parents of the child were never provided with nonsurgical alternatives or advised that their child could suffer a remote risk of nerve damage from the procedure. Id. at 366-67. The child did, in fact, suffer nerve damage, and the parents sued for, inter alia, lack of informed consent. Id. at 367-68. The Supreme Court considered whether it was proper for the trial judge to grant judgment as a matter of law on the plaintiff’s informed consent count. Id. at 369. The trial judge granted the motion because she did not believe that disclosure of a remote risk would persuade the plaintiff to pursue alternative treatment when the

node could have possibly been malignant. Id. The Court found that the trial judge’s finding “offend[ed] the very nature of informed consent.” Id. at 370.

Citing to Wilkinson, the Court noted:

“‘The keystone of [informed consent] is every competent adult’s right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession, or even the community.’ The essential inquiry then is not which course of treatment the trial justice, expert medical professionals, or even a reasonable person might elect. Rather, ‘the patient’s right to make his decision in the light of his [or her] own individual value judgment is the very essence of his freedom of choice.’” Id. (alterations in original) (quoting Wilkinson, 110 R.I. at 624, 295 A.2d at 687).

It is clear from this language that, although the Wilkinson Court relied upon Canterbury, 464 F.2d at 791 in adopting the theory of informed consent, the Flanagan Court deviated from Canterbury’s objective test for causation. The Supreme Court has chosen to define the bounds of disclosure by using a blended standard to define materiality, see Wilkinson, 110 R.I. at 627-28, 295 A.2d at 689, and has placed significance on upholding a patient’s ultimate “freedom [to choose],” id. at 624, 295 A.2d at 687. Adopting an objective standard for causation would severely undercut this policy and the deference afforded to the patient’s choice. See also Scott, 606 P.2d at 559 (“To the extent the plaintiff, given an adequate disclosure, would have declined the proposed treatment, and a reasonable person in similar circumstances would have consented, a patient’s right of self-determination is Irrevocably [sic] lost.”).

In these jurisdictions that have adopted a subjective approach, it is clear that the plaintiff’s testimony itself is significant. See id.; Arena, 733 P.2d 75. However, this Court refuses to hold that a plaintiff’s testimony is required to satisfy the causal link under Wilkinson. As Plaintiff correctly points out, and is the case here, not all plaintiffs are able to successfully testify as to what they would have done had they been adequately informed. For example, a

plaintiff may not actually survive the surgical procedure, or the plaintiff may be left with mental infirmities that prevent the plaintiff from sufficiently voicing his or her opinion. If a plaintiff's testimony were required, deceased or profoundly injured plaintiffs would be foreclosed from pursuing an informed consent theory, and such cannot be the case. As a result, this Court finds that the causal element must be proven by either the plaintiff's testimony or "other evidence that pertains directly to the plaintiff's subjective choice." Arena, 733 P.2d at 79.⁵

Due to Mrs. Cahill's stroke, she was unable to testify as to whether she would have consented to the electrical cardioversion had she been adequately informed that she was at an increased risk of stroke if the cardioversion was performed while she was off a blood thinner. When simply asked to define a stroke, Mrs. Cahill was unable to articulate a coherent answer. See Trial Tr. 4:5-8, Nov. 6, 2015. However, when the record is viewed in the light most favorable to the non-moving party, there is sufficient evidence that Mrs. Cahill's fear of stroke was a material factor in deciding whether to consent to an electrical cardioversion. Dr. Alves's treatment notes indicate that Mrs. Cahill's mother passed away due to a stroke. See Pl.'s Mem. Ex. 1, Dr. Alves's Note (Aug. 4, 1998). Another note indicated that Mrs. Cahill was very concerned about the possibility of a stroke if she discontinued Coumadin and did not immediately recognize that she was in AFib. See Pl.'s Mem. Ex. 2, Dr. Alves's Note (Nov. 12, 1998); Pl.'s Mem. Ex. 3, Dr. Alves's Note (Mar. 1, 1999). Dr. Alves also admitted at trial that

⁵ The court in Arena also stated:

"The question that the jury must answer is whether the plaintiff would in fact have withheld consent if apprised of the undisclosed information, but the jury may consider, in deciding that question and in weighing the plaintiff's credibility, the likelihood that a competent and prudent person would make the decision which the plaintiff claims that he would have made." 733 P.2d at 79 (emphasis in original).

The Court makes no determination on whether this blended standard applies in our jurisdiction and therefore does not adopt the Arena court's standard in full.

Mrs. Cahill was “particularly sensitive” to stroke concerns. See Trial Tr. 129:22-130:2, Nov. 2, 2015.

The evidence presented indicates that many of Mrs. Cahill’s medical choices were driven by her desire to avoid a stroke. Mrs. Cahill originally consented to the electrical cardioversion because she was previously informed by Dr. Alves that the procedure would actually decrease her risk of stroke. Id. Furthermore, she remained concerned about discontinuing the blood thinner even though that medication was causing a brain bleed or other major organ. See Pl.’s Mem. Ex. 2. As previously noted, an electrical cardioversion places patients at an increased risk for the very risk they aim to avoid: a clot breaking off and traveling to the brain. This is especially so when time has passed before the procedure is performed and while the patient is not taking a blood thinner. A patient in Mrs. Cahill’s position is faced with two choices: (1) attempt to treat the AFib through alternative treatment methods that may not work, leaving the patient at an increased risk of stroke, or (2) attempt the electrical cardioversion, also leaving the patient at an increased risk of stroke. While both avenues placed Mrs. Cahill at an increased risk of stroke, it was Mrs. Cahill’s decision with respect to which risk she found greater upon appropriate disclosure by Dr. Alves. See Flanagan, 712 A.2d at 370-71. This Court acknowledges that it can be quite difficult to determine which avenue Mrs. Cahill would have selected without more direct testimony. However, if she was willing to risk a brain bleed in order to decrease her risk of stroke, a reasonable jury could find that she was willing to “hedge her bets” and forego an electrical shock that could shake loose a sturdy clot.

IV

Conclusion

Finding that a trial judge has the discretion to consider a renewed Rule 50(b) motion or order a new trial following a hung jury, this Court exercises its discretion and considers the motion. The evidence pertaining to Mrs. Cahill's longstanding awareness and treatment for AFib, her familiarity with electrical cardioversion and drug therapy, her concerns related to her family history of stroke, and her sensitivity and vigilance in seeking treatment for her condition—when viewed through the lens of the well-settled law applicable to this Rule 50(b) motion—present a factual basis upon which reasonable persons might draw different conclusions on the informed consent issue raised by Plaintiff. Therefore, Defendant's renewed Rule 50(b) motion for judgment as a matter of law on the informed consent count is denied. As a result of the mistrial, a new trial will be scheduled. Counsel shall submit an appropriate order and judgment consistent with this Decision for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Cahill v. Alves, et al.

CASE NO: PC 08-4932

COURT: Providence County Superior Court

DATE DECISION FILED: February 5, 2016

JUSTICE/MAGISTRATE: Procaccini, J.

ATTORNEYS:

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