The Odd and the Quirky

Knudsen v. Brownstein, 2019 Pa. Super. Unpub. LEXIS 3403 (September 9, 2019), which involved a peculiar factual situation few of us are likely to encounter, provides an interesting read, and a cautionary legal tale. This odd case involved a matter where there was a default judgment against a person who was not a licensed physician but who nevertheless represented that he was a doctor and was, as a friend, providing advice and care to the plaintiff. After the default judgment was obtained, a hearing was held on damages. The trial court awarded zero damages. The trial court ruled that the plaintiff/patient must still prove causation elements of a negligence claim with expert testimony. The issue, therefore, was whether a plaintiff in a tort action who obtains a default judgment has to prove causal connection between the tortious conduct of the defendant and the damages sought.

On appeal, the Superior Court noted that, surprisingly, no Pennsylvania court has explicitly addressed the question of whether a plaintiff in a negligence action who obtained a default judgment has the burden, at a trial for damages, to prove that his or her injuries were caused by the defendant's negligence. The Court looked to cases in other jurisdictions, and to the general principle under Pennsylvania law that a victim is entitled to be compensated in damages, but limited to all losses proximately caused by a party's negligence or fraud. The Court concluded that a plaintiff who obtains a default judgment in a tort action is not relieved of his obligation to provide evidence of a causal connection between the defendant's tortious conduct, the negligent advice which caused him to delay seeking treatment, and the damages for which he seeks relief. In this case, Appellant needed to present expert medical testimony on that issue as it related to most of his claimed damages.

Appellant was diagnosed with the following, "ischemic left foot/left forefoot gangrene; acute arterial thrombus…myeloproliferative disorder causing thrombocytosis; and hypercoagulable gene mutation[.]" He required surgery, and ultimately amputation of several toes.

The appellate tribunal agreed with the trial court that "[Appellant] failed to present sufficient or credible evidence regarding the causal relationship between his injury on September 13, 2010 [a laceration of the shin]...and the amputation involving his toes[.]...We disagree, however, that there was insufficient evidence to award 'any and all other damages claimed.' "

Appellant testified that on September 15, 2010, Khushman evaluated his leg injury and told him it was unnecessary to seek additional treatment. He also testified that his leg was in pain between that day and the next time Khushman visited him on September 20, 2010. The Court believed that Appellant presented uncontested evidence regarding his pain and suffering that was attributable to the progression of his leg injury and his delay in seeking legitimate treatment. The Superior Court remanded

for a hearing on damages, narrowly limited to pain and suffering related to the advancement of the leg injury caused by Khushman's advice to delay seeking additional treatment.

Arnold v. Whitestone Healthcare Grp, No. 2396 Civ. 2016, 2018 Pa. Dist. & Cnty. Dec. LEXIS 7160 (Monroe Co. April 9, 2018)(Williamson, J.), aff'd. *No. 1592 EDA 2018* (Pa. Super. August 22, 2019), is another unique, non-precedential opinion. This case involved injury which occurred by virtue of a delay in utilizing a Hoyer Lift that facilitated the patient's transfer from wheelchair to bed. The health care workers left the patient alone in the room for up to forty-five minutes and it was reported that the patient fell asleep and slipped out of the wheelchair, suffering a right hip fracture. The Court found that the verdict, including a punitive damages award, was appropriate.

The Court repeatedly relied upon the low staffing issues from the various *Scampone v. Grane Healthcare* cases. The evidence in this case was similar to the evidence presented in *Scampone*, mainly testimony of current and former employees at the facility that it was continuously understaffed; that the complaints to management fell upon deaf ears; that mistakes were made and resident care suffered because of understaffing.

The Department of Health had also weighed in and made certain conclusions. The Court found that the evidence concerning problems at the facility were justified and it was not difficult to make a connection that if there had been enough staff available, someone could have helped the patient while the Hoyer Lift was retrieved so that the harm could have been avoided.

It was not error to admit into evidence Department of Health surveys prior to April 22, 2014, the date of the incident. Numerous witnesses including defendant's own experts testified that Department of Health surveys are a frequent occurrence in every nursing home around the state. The fact that these occurred, was not prejudicial to defendants. The evidence was admitted to demonstrate notice of the staffing problems at the facility. Defendants further objected to their admission based upon the limited nature of the harm alleged by Mr. Arnold and the short period in which he was a resident at the defendant facility. Such objections were deemed without merit; there is no lesser standard of care because a person is not in a nursing home for a lengthy period of time.

There were other falls that the Court found did not relate to the injuries in this case. The Court excluded that evidence because sufficient similarity of the incidents was not shown.

Serious questions were also raised concerning the court's decision to deny the Defendants' the use of records of a subsequent fall in examination of their expert and in cross examination of plaintiff's expert witnesses. The Court held that even if any hearsay problem was overcome, the evidence was nevertheless not relevant as the lack of similarity made evidence of the other falls not probative. Further it was not error to allow questioning of defense witnesses regarding an entry in the records added several

days after the incident that Mr. Arnold had tried to self-transfer, a fact which did not appear in the initial report. Discrepancies in medical records is a question for the jury to consider.

Perhaps most interestingly, the Court found that a new trial is not required because of lack of bifurcation with respect to the punitive damage component. The evidence Defendants alluded to as prejudicial would have been admissible under the Scampone line of cases for the purpose of proving both corporate negligence and punitive damages. Therefore, denial of bifurcation was appropriate in this case.

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