IN THE UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE J. McCUSKER, Plaintiff, v. SURGICAL MONITORING ASSOCIATES, INC., et al., Defendant.	)	Civil Action No. 01- 891 KAJ

MEMORANDUM ORDER

I. INTRODUCTION

This case involves a claim of medical negligence under the Delaware Medical Malpractice Act (the "Act"), 18 *Del. C.* § 6853. Jurisdiction is proper under 28 U.S.C. § 1332. Plaintiff George J. McCusker ("Plaintiff") filed this action on December 21, 2001, alleging that defendant Neurosurgery Consultants, P.A. ("Defendant"), acting through its agent Dr. Bikash Bose, was negligent in rendering medical care during and following back surgery performed on Plaintiff on September 20, 2000. (Docket Item ["D.I."] 1.) Presently before me is the Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, for New Trial. (D.I. 129; the "Motion".) For the following reasons, the Motion will be denied.

II. BACKGROUND[1]

The Plaintiff suffered from chronic neck and arm pain. (2/11/04 Tr. at 81.)[2] He consulted Dr. Bose, a neurosurgeon. (*Id*. at 83.) Testing revealed that the Plaintiff had significant congenital stenosis and disc and bone spurs pressing on his spinal column. (D.I. 136 at 4; 2/10/04 Tr. at 38-40.) On September 20, 2000, Dr. Bose performed surgery on the Plaintiff's neck, consisting of an anterior cervical discectomy at the spinal cord levels C3-4, C4-5, C5-6. (*Id*.) During the surgery, Dr. Bose used "Grafton," a surgical putty, to pack the surgical area. (*See* 2/11/04 Tr. at 71.)

Following the surgery, the Plaintiff failed to recover his upper body strength on what would be considered a normal schedule. (D.I. 136 at 4; *see* 2/9/04 Tr. at 182-83.) Dr. Bose therefore ordered a CT scan that same afternoon to rule out any problems causing spinal cord compression which would explain the Plaintiff's upper body weakness. (D.I. 136 at 4; 2/9/04 Tr. at 182-84.) Within 30 to 45 minutes, the CT scan was reviewed by a resident in radiology and a "wet reading," i.e., a preliminary report on the scan, was forwarded to Dr. Bose. (*See* D.I. 136 at 4.) Dr. Bose also stated that it was his practice to review such studies himself, either by going to the Radiology Department within the hospital or by viewing the scan on the internet. (*Id*.; 2/9/04 Tr. at 213.) Based upon the wet reading he received and his own review of the scan, Dr. Bose determined that it was not necessary to again operate on the Plaintiff to check on

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[1]Plaintiff has conceded that the statement of facts set forth in Defendant's Opening Brief (D.I. 136) in support of its Motion is accurate (D.I.139 at 3), and the background information provided herein is based largely on that rendition of the facts, as amended by additional citations to the trial testimony. (*See* D.I. 136 at 4-9.)

[2]Citations to "([Date] Tr. at [page number])" are to the trial transcript.

the spinal column. (D.I. 136 at 4; 2/9/04 Tr. at 211-12.) Instead, the doctor was satisfied that he should continue to treat the Plaintiff conservatively with a steroid drip. (*See* D.I. 136 at 4; 2/9/04 Tr. at 135-36.)

Summing up the situation in the aftermath of the surgery, Dr. Bose testified:

> [The Plainitff] had a problem but it was rapidly improving. So you know if people are rapidly improving, there is no urgency to take the patient back to the Operating Room or do CAT scans because every time you are moving a patient or you are taking them back to the Operating Room, there is again the risk of anesthesia, risk infection, risk of making them worse. So I have to weigh the pros and cons, and as long as somebody keeps on improving, the I have that option to watch an see how things evolve.

(2/9/04 Tr. at 211.)

The Plaintiff never did recover the strength in his arms. On the contrary, he suffers daily with the challenges posed by partial paralysis. (*See* 2/10/04 Tr. at 46; 2/11/04 Tr. at 174-75.) He filed the instant suit, which went to trial in February of this year.

At the trial, the Plaintiff called doctor Isabelle L. Richmond as his medical expert on the applicable standard of care and the question of whether Dr. Bose breached that standard.[3] (*Id.* at 9.) Dr. Richmond is a retired neurosurgeon, formerly Chief of Neurosurgery at Norfolk General Hospital in Virginia (*Id.* at 17-18), who teaches and consults. (*Id.* at 22-24.)

The Defendant called several medical experts, some of whom provided fact testimony and some of whom restricted their testimony to expert opinions. In addition to

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[3]The Plaintiff also called Dr. Michael Saulino, a physiatrist, to testify about the Plaintiff's condition and rehabilitation efforts after the operation (*see* 2/11/04 Tr. at 165) and Ms. Ellen Barker, a nurse, who testified about a rehabilitation plan for the Plaintiff (*see* 2/11/04 Tr. at C-3 – C-64).

Dr. Bose, who testified both as an adverse witness in the Plaintiff's case (2/9/04 Tr. at 178) and as a witness for the defense (2/12/04 Tr. at 96), the Defendant called Dr. Donlin M. Long (2/13/04 Tr. at E-48), a practicing neurosurgeon at Johns Hopkins Hospital in Baltimore, Maryland and formerly the Chief of Neurosurgery at that hospital (*id.* at E-49); Dr. Bruce G. Ammerman (2/11/04 Tr. at 122), a practicing neurosurgeon and faculty member at George Washington University School of Medicine in Washington, D.C., Chief of Neurosurgery at Sibley Memorial Hospital in Washington, D.C., and the former Chair of the Neurosurgery Section of the District of Columbia Medical Society (*id.* at 122-26); Dr. David Yosem (2/12/04 Tr. at 47), a practicing neuroradiologist and the Director of Neuroradiology at Johns Hopkins Hospital (*id*. at 47-48); and Dr. Carlos Flores (*id.* at 8), a neuroradiologist practicing locally who reviewed the post-operative CT scan of the Plaintiff (*Id.* at 9).

At the conclusion of the trial, the jury returned a verdict for the Plaintiff and awarded damages of $3,600,000. (2/13/04 Tr. at 160.)

III. STANDARD OF REVIEW

Federal Rules of Civil Procedure Rule 50(b) provides, in part:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial ... under Rule 59.

A court may grant a motion under Rule 50(b) and direct entry of judgment as a matter of law "only if, viewing the evidence in the light most favorable to the nonmovant and giving [that party] the advantage of every fair and reasonable inference, there is

insufficient evidence from which a jury reasonably could find liability." *Warren ex rel. Good v. Reading School Dist.*, 278 F.3d 163, 168 (3d Cir. 2002) (internal quotation marks and citation omitted).

"[I]f a court denies a motion for judgment as a matter of law, the [losing] party still has an opportunity to prevail on a motion for a new trial." *Smith v. Delaware Bay Launch Service, Inc.,* 842 F.Supp. 770, 778 (D. Del. 1994). Federal Rule of Civil Procedure 59 provides, in part:

> A new trial may be granted to all or any of the parties and on all or part of the issues ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ... .

One of the bases upon which a new trial may be granted is the trial court's assessment that the verdict is against the weight of the evidence. *Roebuck v. Drexel University*, 852 F.2d 715, 735 (3d Cir.1988) ("deference [to trial court's decision to grant a new trial] is peculiarly appropriate in reviewing a ruling that a verdict is against the weight of the evidence because the district court was able to observe the witnesses and follow the trial in a way that we cannot replicate by reviewing a cold record."); *China Resource Products (U.S.A.) Ltd. v. Fayda Intern., Inc.*, 856 F.Supp. 856, 862 (D. Del.1994) ("Among the firmly established grounds for granting a new trial at common law are that the jury's verdict is against the weight of the evidence and that the jury's damage award is excessive.") (internal quotation marks and citation omitted).

IV. DISCUSSION

Medical malpractice cases are governed by Delaware's Health Care Medical Negligence Act, 18 *Del. C.* § 6801 *et seq*. (the "Act"),[4] which defines "medical negligence" as "any tort ... based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient." 18 *Del. C.* § 6801(7). The Act further states that "[t]he standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed in the same or similar field of medicine as defendant, and the use of reasonable care and diligence." *Id.*[5] "The adoption of the Act in 1976 was the response of the Delaware General Assembly to what it perceived to be a malpractice crisis in medical care." *DiFilippo v. Beck*, 520 F.Supp. 1009, 1011 (D. Del. 1981). The General Assembly sought to establish "a strictly construed fault principal[,]" to help balance high quality and affordable health care with the need to provide fair recompense to those who have been wrongly injured by negligent care. *See id.* (quoting the preamble to the Act).

One key aspect of the Act is its requirement that "[n]o liability shall be based upon asserted negligence unless expert medical testimony is presented as to the

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[4]In a case where, as here, jurisdiction is based upon diversity of citizenship, I am required to apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78-80 (1938). If the highest state court has spoken on the specific issues before me, those pronouncements are controlling. *General Refractories Co. v. Fireman's Fund Ins. Co.,* 337 F.3d 297, 303 n. 1 (3d Cir.2003). And, while not binding, the jurisprudence of lower state courts is persuasive authority. *Id.* (citation omitted). The name of the Act is noted in *Walton v. Galinat*, 2000 WL 1504937 at *1 n.2 (Del. 2000).

[5]This section of the Act was amended in 1998 to remove a former requirement that the standard of care be the one followed in the locality where the alleged malpractice occurred. *See Walton*, 2000 WL 1504937 at *1 n.3.

alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death ... ."[6] 18 *Del. C.* § 6853(e). With limited exceptions not applicable here, "there shall be no inference or presumption of negligence on the part of a health care provider." *Id.* In keeping with that language, the Delaware Supreme Court has consistently held that the fault standard imposed by the Act requires that a qualified expert testify that the challenged care was both negligent and the cause of the alleged injury. *See Timblin v. Kent General Hosp.*, 640 A.2d 1021, 1023-24 (Del. 1994) (holding that "plaintiff must present expert medical testimony regarding the defendant's alleged deviation from the applicable standard of care and the cause of the alleged personal injury[,]" and citing additional authority to same effect). Standing alone, an undesirable outcome, even an unusual one, is not a basis for relief. "[T]he doctrine [of *res ipsa loquitur*] is not applicable in malpractice actions in which the only proof is the fact that the treatment of the patient terminated with poor results, even if the results are highly unusual." *Thomas v. St. Francis Hosp., Inc.*, 447 A.2d 435, 437-38 (Del. 1982) (internal quotation marks and citation omitted).

These well established principles have an equally well-established corollary: where two possible causes may explain an injury, one of which can be said to be defendant's fault while the other is not, the plaintiff cannot recover without

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[6]The Act includes two caveats to this rule: first that "such expert medical testimony shall not be required if a medical negligence review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence;" and, second, that a rebuttable inference of negligence will arise under certain enumerated circumstances, none of which is present in this case. 18 *Del. C.* § 6853(e)

demonstrating that the fault-based cause was more likely the source of the injury. *Hammond v. Colt Ind. Operating Corp.*, 565 A.2d 558, 561 (Del. Super. 1989). In short, the requirement of negligence plus proximate cause is iron-clad and must be supported at each step by expert medical testimony.

In the case at bar, the evidence included moving testimony by the Plaintiff and people close to him about the terrible change in his life resulting from the surgery. There is no question that the outcome was abysmal. The Defendant adduced evidence that the Plaintiff still manages to do some things for pleasure, including riding a motorcycle, but the defense effort to paint the Plaintiff as a malingerer and an exaggerator of his injuries obviously rang false with the jury. I think it fair to say that the overwhelming weight of the evidence shows that complications from the surgery left the Plaintiff very badly injured. The questions posed by the Defendant's Motion, however, focus on the separate issues of the weight of expert medical evidence regarding the standard of care and the connection of the Defendant's care to the Plaintiff's injury.

In particular, the Defendant asserts that the Plaintiff's medical expert on the standard of care, Dr. Richmond, simply failed to testify that Dr. Bose's actions constituted a breach of the standard of care or were the cause of the Plaintiff's injury. (*See* D.I. 136 at 13.) According to the Defendant, Dr. Richmond testified that two things may have caused the injury. "First, she testified that <u>possibly</u>, Dr. Bose, while using a hammer and chisel to open the spinal canal, caused a chip of bone to impinge upon the spinal cord. She emphasized, however, that this was a <u>possibility</u>. At no point did she say <u>to a reasonable degree of medical probability</u> that Dr. Bose had done this." (*Id.*; original emphasis.) Nor did she say what portion of the plaintiff's injury could have been

due to the supposed bone chip.[7] Instead she said, "I don't think that's the whole story as far as the injury is concerned. If that had been the only thing that had happened ..., I don't think Mr. McCusker would be as bad off as he is now." (*Id.* at 14 (quoting 2/10/04 Tr. at 62).) As Defendant recounts the testimony of Dr. Richmond, she emphasized instead that a hematoma[8] developed that caused the ischemia[9] leading to the Plaintiff's paralysis (*see* D.I. 136 at 14) and she specifically acknowledged that the development of the hematoma was an expected complication and not in and of itself the fault of Dr. Bose. (*Id.* (citing 2/10/04 Tr. at 62-63).) She then went on to say that Dr. Bose could have gone in and drained the hematoma. "[The Plaintiff] already got an incision right there in his neck. It's just secured with a few stitches. It takes just a minute or two to get that incision open and let out the blood clot ... ." (*Id.* (citing 2/10/04 Tr. at 62).) But, according to the Defendant, "Dr. Richmond did not go the final step and testify that Dr. Bose deviated from accepted standards of care by not draining the hematoma." (D.I. 136 at 14.) Hence, they argue, her testimony did not satisfy the requirements of the Act.

The Plaintiff responds to this by noting other testimony that Dr. Richmond gave. For example, after testifying, as quoted by the Defendant, that it was a "possibility" that

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[7]The Defendant's experts asserted that Dr. Richmond had misread the images of the Plaintiff's spinal canal and that there was no bone chip present post-operatively. (*See, e.g.,* 2/12/04 Tr. at 16-18; *id.* At 50-52, 57-61.) Evidently the jury accepted Dr. Richmond's testimony over the testimony of the Defendant's experts, despite those experts' impressive credentials.

[8]A hematoma is an accumulation of blood, often clotted. (*See* 2/10/04 Tr. at 62.)

[9]Ischemia "means that the spinal cord isn't getting enough blood supply. That's what the term means." (2/10/04 Tr. at 35.)

Dr. Bose's surgical technique drove a piece of bone into the spinal column, she went on to describe it as the only possible explanation for bone in the spinal canal. "[T]he thing that would have been possible to have produced that, the only thing that would be possible is that something that was done intraoperatively to modify or change that bone was the cause of it. The bone just won't jump in there and move into the canal." (2/10/04 Tr. at 132.) She described the injury to the Plaintiff's spinal cord as being the result of substandard care and technical errors by the Defendant. (*See id.* at 86 ("I believe there was an intraoperative spinal cord injury that was based on technical errors.").) As to the hematoma, she indicated that it was undisputedly present following the operation (*id.* at 126-27) and that the Defendant's technique in the use of the Grafton surgical putty was a factor in causing pressure from the hematoma to result in ischemia (*see id.* at 127-28). She asserted that it was the Defendant's failure to plan for the hematoma, which is a known complication of the surgery, and specifically his failure when packing the surgical area with Grafton to leave any egress for accumulating blood that contributed to the Plaintiff's permanent injuries.[10] Again, she said that the

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[10]She testified,

> [hematoma is] something that can happen. However, you plan for it being there because you know it's going to develop to some extent, so you – it's like the escape hatch. ... [I]f the patient wakes up form anesthiesia and he is not right, he's not as good as he was before he went to sleep, then you've got to find out what's causing his problem, because that [the blocked hematoma] could be his problem and, if it is, taking care of that problem is fairly straightforward. He's already got an incision right here in his neck. It's just secured with a few stitches. It takes just a minute or two to get that incision open and let out the blood clot if it – if you don't have that graft on [sic] there.

(2/10/04 Tr. at 62-63.)

Defendant had committed technical errors and she equated that to a breach of the applicable standard of care.[11]

The Defendant argues that Dr. Richmond's assertion that the bone was driven into the spinal canal, even though she cannot say specifically how, is not enough to satisfy the requirement that there be testimony that the Dr. Bose's operative technique breached the standard of care. (Oral Arg. Tr. at 17.)[12] That argument, though, flies in the face of the Delaware Supreme Court's specific instruction that an opinion based on an analysis of the circumstances in a case is not mere speculation over the cause of a bad result. *Green v. Weiner*, 766 A.2d 492, 496 (Del. 2001) (quoting *Balan v. Horner,* 706 A.2d 518, 521 (Del. 1998) and further citing it for the proposition that "medical expert's testimony had sufficient support in the evidence despite the fact that the expert did not know exactly how operation in question proceeded"). Similarly, as to the hematoma and the Defendant's use of Grafton putty, Dr. Richmond's testimony was sufficiently explicit to allow a reasonable jury to conclude that the Defendant had breached the applicable standard of care. Since she testified that both the bone in the spinal cord and the unreleased hematoma pressure were contributing factors to the

[11]It is clear that when Dr. Richmond used the term "technical error" she meant an error that was below the applicable standard of care. For example, in response to the direct question of whether driving bone into the spinal canal during surgery was a "deviation in the standard of care in terms of surgical technique[,]" Dr. Richmond answered, "[y]es, that is a technical error." (2/10/04 Tr. at 61.)

[12]Citations to "Oral Arg. Tr. at __" are to the pages of the transcript of the December 15, 2004 oral argument on the Motion.

spinal cord injury and that both were the result of substandard care, the requisites of the Act were met.[13]

It may have been preferable for Dr. Richmond to have concisely summed up her testimony in language akin to that found in the Act and customary to lawyers practicing in the field of medical negligence, but the legal standard "does not require medical experts to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with 'magic words.'" *Green*, 766 A.2d at 495. The jury heard the testimony from both sides. Dr. Richmond's testimony was sufficient to satisfy the requirements of the Act. There was enough in the record for rational jurors to conclude, as the jury did in this case, that they believed Dr. Richmond and disbelieved the Defendant's experts as to the cause of the Plaintiff's injuries. Whether or not I or anyone else disagrees with that assessment is immaterial. It is supported by a sufficient evidentiary basis to withstand both the motion for judgment as a matter of law and the motion for a new trial.

The Defendant has also protested the evidence offered to support the Plaintiff's assertions about his future needs and the reasonable costs of those needs. (*See D.I.* 136 at 16-18.) I overruled the Defendant's objections at trial in this regard, including his objections that one of the Plaintiff's witnesses, Ms. Ellen Barker, R.N., was not qualified

[13]Defense counsel acknowledged at oral argument that if two factors are identified as causing injury and both are the result of negligence, then there is no need to parse out which causal factor contributed what percentage to the damage. (*See* Oral Arg. Tr. at 28.)

to testify.[14] Nothing in the Defendant's post-trial submission persuades me that I was incorrect in that conclusion.

V. CONCLUSION

Accordingly, based on the foregoing reasons and authorities, the Motion (D.I. 129) is hereby DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

February 7, 2005
Wilmington, Delaware

[14]For reasons not apparent to me, the parties did not obtain from the court reporter or place in the record on this Motion the portion of the trial transcript containing my ruling in this regard, but it is my recollection that I so ruled and, given that the disputed evidence was permitted to go to the jury, that recollection is supported by the record that has been provided.