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6-16-05

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

NICHOLAS A. MUSS,
EXECUTOR OF THE ESTATE OF
ELIZABETH L. MUSS, DECEASED

Plaintiff

vs.

AT LAW NO. 218068

CYNTHIA GOLDSTEIN COHEN, M.D.

Defendant

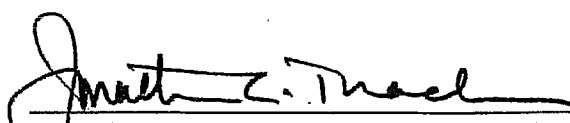
ORDER

THIS MATTER came before the above Honorable Court upon Plaintiff's Motion for Costs and Attorneys' Fees, upon Defendant's opposition filed thereto, and upon argument of counsel; and

IT APPEARING TO THE COURT that Plaintiff's motion is proper and should be granted; it is accordingly

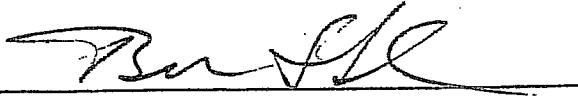
ADJUDGED, ORDERED AND DECREED that Plaintiff's Motion for Costs and Attorneys' Fees be, and the same hereby is granted, in the amount of \$ 22,079.40

ENTERED this the 16 day of June, 2005.


HONORABLE JONATHAN C. THACHER
CIRCUIT COURT JUDGE

Mo envelope 6/17/05

We ask for this:



Michael J. Shevlin
Brian C. Shevlin
SHEVLIN & SMITH
Counsel for Plaintiff
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- Request No. 11: The Lamictal prescribed by you caused Elizabeth Muss to develop a hypersensitivity drug reaction.
- Request No. 12: Elizabeth Muss died as a result of complications arising from your prescription of Lamictal.

See Plaintiff's First Request for Admission to Defendant Cynthia Goldstein Cohen, M.D., Exhibit 1.

4. On October 26, 2004, the Defendant filed her response, failing to admit to the truth of the matters requested. See Defendant Cynthia Goldstein Cohen, M.D.'s Responses to Plaintiff's First Request for Admission, Responses to Request for Admissions Nos. 11 & 12, Exhibit 2. The Defendant did not assert any objections to either Request for Admission. Id.

5. On March 10, 2005, the Plaintiff took the discovery deposition of Defendant's sole causation expert, Dr. Robert Stern. At the deposition, Dr. Stern testified in accordance with the Plaintiff's causation theory. More importantly, he testified in a fashion inconsistent with the Defendant's responses to Plaintiff's two Requests for Admission.

- Relating to Plaintiff's Request for Admission No. 11, Dr. Stern testified as follows:

“[s]tarting about September 11 or 12, I believe {Elizabeth Muss} developed what we call hypersensitivity syndrome or DRESS as a result of the Lamictal that she had started, as I recall, about six weeks before. And that's the diagnosis I am most certain of.

Deposition of Robert S. Stern, M.D., p. 20, Exhibit 3. See also id. at 22, 61-62.

- Relating to Plaintiff's Request for Admission No. 12, Dr. Stern testified as follows:

I think it is much more likely than not that if {Elizabeth Muss} had not had the reaction to Lamictal – it is more likely than not that she would not have died in – is it March? . . . April – that she would not have died from these reasons in April.”

Id. at 109.

Importantly, Dr. Stern testified that his main review of this case occurred in April or May of 2004 (id. at 17), which was ten months prior to his deposition and five to six months before the Plaintiff submitted his two Requests for Admission.

6. On March 30, 2005, the Plaintiff took Dr. Stern's *de bene esse* deposition. At this deposition, Dr. Stern again testified in accordance with Plaintiff's causation theory and in contradiction of the Defendant's response to Plaintiff's Request for Admissions. Specifically, he testified that Elizabeth Muss developed a hypersensitivity reaction in September of 2002 that was caused by Lamictal. See de bene esse deposition of Robert S. Stern, M.D., p. 56, Exhibit 4. On numerous occasions, he testified that Elizabeth Muss would not have died in April, 2003 if she had not taken Lamictal. Id. at 77, 78 & 104.

7. On April 19, 2005, at the close of the Defendant's evidence, this Court granted Plaintiff's motion for partial summary judgment on the ground that it was uncontested that Lamictal was the proximate cause of Elizabeth Muss' death. In fact, counsel for Defendant acknowledged that the evidence was uncontested. He did not argue the issue of proximate cause to the jury in his closing argument.

8. Based upon the Court's ruling and the acknowledgement of Defendant's counsel, an award of expenses and attorney's fees to the Plaintiff is warranted in this case. For the reasons stated below, none of the exceptions to such award, as set forth in Rule 4:12(c), apply in this case:

a. The Defendant asserted no objections to the Requests for Admissions at issue in this case. Therefore, the exception under Rule 4:12(c)(1) is inapplicable.

b. The Requests for Admission were substantially important to the Plaintiff's case as they related to the issue of causation. It is well-established under Virginia law that, in a

medical malpractice case, a plaintiff has the burden of not only proving that a defendant violated the applicable standard of care, and therefore was negligent, but also that the negligent acts constituted a proximate cause of the injury or death. Bryan v. Burt, 254 Va. 28, 34 (1997).

c. The Defendant had no reasonable ground to believe that she might prevail on the issue of causation. Defendant's sole causation expert, Dr. Stern, testified that he had reviewed the Plaintiff's medical records in April or May of 2004, many months before Plaintiff's counsel submitted the Requests for Admission relevant to this Motion. Discovery Deposition of Robert S. Stern, M.D., p. 17, Exhibit 3. Dr. Stern's opinions, as outlined above, were thus well-known to the Defendant prior to the submission of Plaintiff's Request for Admissions.

d. The Defendant had no other good reason for failing to admit to Plaintiff's two Requests for Admissions. Indeed, if Dr. Stern's Expert Witness Designation is reviewed, he was not even designated to render an opinion on the proximate cause of Elizabeth Muss' death. See Defendant's Amended Expert Witness Designation, pp. 12 - 14, Exhibit 5.

9. The Virginia Supreme Court has stated that the purpose of Requests for Admissions is "to expedite a trial by narrowing the contested facts and issues." Shaheen v. County of Mathews, 265 Va. 462, 475 (2003). The Plaintiff sought to achieve this purpose by submitting the two Requests for Admission before having to incur substantial costs to prove the proximate cause. If the purpose for Requests for Admission is to have any meaning, then parties refusing to admit the truth of uncontested facts and issues should be held accountable for their refusal.

10. Beginning on November 1, 2004, the Plaintiff incurred \$15,879.40 in expenses to prove his causation theory. These costs are as follows: \$6,777.50 in fees paid to Dr. Grant Anhalt; \$4,806.50 in fees paid to Dr. Mark Wick; \$1,500.00 in fees paid to Dr. Stern for his discovery deposition; \$2,034.60 for costs incurred in obtaining the deposition transcripts of Dr.

Anhalt, Dr. Wick and Dr. Stern; and \$760.80 in travel costs incurred in traveling to Boston, Massachusetts on two occasions for Dr. Stern's discovery and *de bene esse* depositions. See Bills, Exhibit 6.

11. The Plaintiff also requests an award for reasonable attorney fees associated with the above expenses. Plaintiff's counsel estimates the following hours were spent in the case: 20 hours for preparation, travel and deposition time to Dr. Stern's two depositions in Boston, Massachusetts; 5 hours for preparation, travel and deposition time for Dr. Anhalt's deposition in Baltimore, Maryland; 6 hours for preparation, travel and deposition time for Dr. Wick's deposition in Charlottesville, Virginia. Plaintiff's counsel submits that the hourly rate charged by Defendant's counsel to cover these depositions is a reasonable rate of reimbursement.

12. This Motion is the first time Plaintiff's counsel has requested an award of costs and fees under Rule 4:12(c). The Motion is filed because of the unique circumstances in this case. These unique circumstances include the following: (a) the complete lack of expert support for contesting proximate cause in this case; (b) recognition by Defendant's counsel during the Plaintiff's motion for partial summary judgment that the issue of proximate cause was uncontested; and (c) this Court's granting of Plaintiff's motion for partial summary judgment. The Plaintiff has been unfairly required to incur substantial costs in this matter that were unnecessary. He will likely face a motion to reduce the jury's verdict in accordance with Virginia Code §8.01-581.15. If such a motion is ultimately granted, the Plaintiff should not be required to pay unwarranted expenses from a reduced verdict, which would only further deprive the beneficiaries of Elizabeth Muss' estate from just compensation suffered as a result of her death.

WHEREFORE, your Plaintiff respectfully prays that an Order issue granting his Motion for Costs and Attorneys' fees.

Respectfully submitted,

NICHOLAS A. MUSS,
EXECUTOR OF THE ESTATE OF
ELIZABETH L. MUSS, DECEASED

SHEVLIN & SMITH

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