

ELECTRONICALLY FILED

NO. 15-CI-003710

JEFFERSON CIRCUIT COURT
DIVISION TWO (2)
JUDGE ANNIE O'CONNELL

MARSHA D. WALKER

PLAINTIFF

vs.

PLAINTIFF'S MEMORANDUM OF LAW AND FACT

STEVEN F. SAMUEL, M.D., ET AL.

DEFENDANTS

Comes the plaintiff, Marsha D. Walker, by counsel, and herein submits her Memorandum of Law and Fact, pursuant to this Court's Civil Trial Order.

STATEMENT OF FACTS

This matter arises from medical treatment to Plaintiff, Marsha Walker, age 49, by the defendant, Steven F. Samuel, M.D. Ms. Walker had a prior umbilical hernia repair on February 24, 2000, by Dr. Phillip Rosenbloom without complications. Dr. Samuel performed a repair of a recurrent ventral hernia with mesh and an open repair with plug and patch Marlex of a right inguinal hernia on Ms. Walker, on May 30, 2008. On March 3, 2009, Dr. Samuel performed a repair of an incarcerated ventral hernia with mesh on Ms. Walker. On March 16, 2010, Dr. Samuel performed an open repair with large plug and patch Marlex for a recurrent right inguinal hernia on Plaintiff. On June 20, 2014, Dr. Samuel performed a repair of a recurrent incarcerated ventral hernia with mesh on Plaintiff. On each of these surgeries, there is no evidence that old foreign body mesh was removed.

Following the surgery on June 20, 2014, performed by Dr. Samuel, the first thing that struck Ms. Walker in the recovery room was pain that she rated 8 or 9/10 that she hadn't experienced with previous hernia repair. On her 7 – 10 day follow up with Dr. Samuel, she mentioned her pain and he told her that it was just healing. A week or two

later, the stitches were removed, however there was a pea sized opening in her incision that continued to grow. Dr. Samuel attempted to treat the opening with stitches when it reached the size of a quarter. She left that appointment and her incision proceeded to reopen and developed an odor. The mesh was exposed, and it was yellowish green.

Dr. Richard Pokorny, a Board-Certified general surgeon, saw Marsha Walker on August 7, 2014, with a history that she had a non-healing wound from previous treatment of a ventral hernia repair performed on June 20, 2014, by Dr. Samuel. Ms. Walker sought a second opinion from Dr. Pokorny when the wound failed to heal who recognized a photograph of the open wound with exposed mesh. On examination, he found an opening just above the umbilicus with mesh exposed. He recommended that he proceed with surgery to remove the exposed mesh, repair the hernia and close the abdominal wall. He performed that surgery on August 9, 2014.

During the procedure on August 9, 2014, Dr. Pokorny removed Ms. Walker's umbilicus. The mesh and tissue Dr. Pokorny removed was sent to pathology and was cultured to show MRSA. Dr. Pokorny discharged Ms. Walker with antibiotics to cover the MRSA.

Marsha Walker followed with Dr. Pokorny after the surgical procedure and when she continued to complain of pain in the area of the scar from the procedure Dr. Pokorny performed, he referred her to the Baptist Pain Clinic to consider other options of chronic pain management. Dr. Pokorny has been deposed for trial.

Dr. Darel Barnett is an interventional pain specialist, who is employed with Baptist Health. He first saw Marsha Walker on February 27, 2015 on referral from Dr. Richard Pokorny. Ms. Walker presented to Dr. Barnett complaining of several years of abdominal pain and his assessment was abdominal pain and chronic post-operative pain which he

began to try to help her manage. Dr. Barnett had treated Marsha Walker with medication patches, oral medications, trigger point injections and nerve blocks.

Ms. Walker has continued to see Dr. Barnett and there has been discussion of implantation of devices to address her pain. She has been given pain medication and she was sent to a pain psychologist to have a presurgical psychological evaluation in anticipation of implanting a pain-blocking device. That device has not been implanted. Ms. Walker has continued her treatment with Dr. Barnett. Dr. Barnett has been deposed for trial.

Dr. David Faber, the general surgeon expert for Plaintiff, has opined that, the repeated surgeries performed by Dr. Samuel on Plaintiff after May 30, 2008, as well as the surgery Plaintiff underwent on August 9, 2014, were caused by the failure of Dr. Samuel to properly repair the ventral hernias in Plaintiff. Specifically, Dr. Samuel failed to identify that Marsha Walker's recurrent hernias had become a chronic issue. Dr. Samuel repeatedly put more mesh into the previous wound when the prior procedure failed. The standard of care required that Dr. Samuel remove the old foreign body (mesh) and perform a component separation repair early in his treatment of Marsha Walker.

Dr. Faber has further opined that during the course of the subsequent "recurrent" repairs, Dr. Samuel kept placing new mesh where old mesh had been utilized, without addressing the need for removal of the old mesh in order to obtain proper repair. In Dr. Faber's opinion, there were no "new" or "recurrent" hernias, rather persistent repair failures. Most concerning was the failure to recommend mesh removal after Dr. Samuel's last attempted repair in 2014, despite medical record documentation and photographic evidence of exposed mesh in the wound and in the presence of purulent drainage from the wound.

In Dr. Faber's opinion, in 2009, when Marsha Walker returned to Dr. Samuel with an incarcerated ventral hernia, consideration should have been given to obtaining a pre-op CT scan of Marsha Walker's abdomen. Additional consideration at that time should have been given to performing a more involved repair including removing old mesh and/or considering performing the repair laparoscopically. Dr. Samuel's thought process at that time should have included looking for an explanation of why this ventral hernia in Marsha Walker continued to fail. Upon the recurrence of the ventral hernia in Marsha Walker in 2014, which constituted Dr. Samuel's second repair failure and the third failure of the ventral hernia repair, the standard of care required Dr. Samuel to document his consideration of a pre-op CT scan to look for the reason the prior repair failed. At that time, the standard of care required Dr. Samuel to perform a more involved open procedure to remove the old mesh or to perform the repair laparoscopically. If Dr. Samuel did not perform laparoscopic surgeries in his practice, he should have referred Marsha Walker to another surgeon. Dr. Faber has opined that Dr. Samuel deviated from the expected standard of care in failing to take these steps in his treatment of Marsha Walker. Dr. Faber has stated that if the evidence shows that before July 21, 2014, there was exposed mesh in Marsha Walker's wound, it was a deviation from the standard of care for Dr. Samuel to attempt to repair the open wound by stitching it. Dr. Faber is expected to testify that Dr. Samuel's failure to acknowledge his own failures in the repairs of Marsha Walker's ventral hernia was a deviation from the standard of care. Dr. Faber is further expected to testify that Dr. Samuel's deviations from the standard of care caused Marsha Walker to require the subsequent treatment related to her ventral hernia and abdomen performed by Dr. Richard Pokorny.

The wound expert who the Defendants have identified, Dr. Jeffrey Neal Sharpe, was deposed on July 1, 2020. In his deposition, he acknowledged that he had read the deposition testimony of Dr. David Faber. Dr. Sharpe testified:

Q. You indicated that – you made a comment about Dr. Faber is not doing component separation procedures anymore?

A. **Uh-huh.**

Q. Was there anything else in Dr. Faber's deposition with which you disagreed?

A. **I can't think of one thing in particular, no. No, I didn't – I don't have any – any criticism basically other just – other than, you know, his relatively – relative inexperience with doing complex ventral hernia repairs.**

(Deposition of Dr. Sharpe, Page 88)

Following the surgery performed by Dr. Pokorny, Ms. Walker has had difficulty at work as a pharmacy technician. She lacked the endurance in her job that she previously had. This will be verified by her co-workers. Despite her limitations, Ms. Walker has continued to work through her pain.

As a result of Ms. Walker's surgeries, she cannot perform mundane tasks that involve her stomach muscles such as running the vacuum or carrying a laundry basket. She used to ride bikes with her daughters every other day and no longer can. She keeps a pillow in her car to relieve the pain from the seat belt.

The Walkers used to go to Taylorsville Lake regularly as a family to use their boat. Now, even the boat ride hurts, and she is unable to water ski. If everyone goes swimming, she has to stay at the shore, depending on the water temperature. Otherwise, she gets shooting pain in four or five areas. She still has a scar from the component separation surgery which Dr. Pokorny has testified will be permanent.

LEGAL ISSUES

The first legal issue in this case will be whether Dr. Samuel, in his care of Marsha Walker, met the applicable standard of care. If he deviated from the standard of care, the question will become whether Dr. Samuel's deviations were a substantial factor in causing and/or allowing Ms. Walker's ongoing pain and limitations including the need for the surgery performed by Dr. Pokorny (Blair v. Eblen, 461 S.W.2d 370 (Ky., 1970)) (Lake Cumberland Regional Hospital, LLC v. Adams, 536 S.W.3d 683 (Ky. 2017)).

Ms. Walker is claiming damages of her medical bills for surgeries to correct the hernia surgery, and pain and suffering for her ongoing pain and limitations. She is not claiming lost income. (Davis v. Graviss, 672 S.W.2d 928 (Ky. 1984)) The evidentiary issues are addressed separately in Motions in Limine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of *Plaintiff's Memorandum of Law and Fact* was served electronically and via U.S. Mail on this the 4th day of August, 2021, to:

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