

IN THE COURT OF COMMON PLEAS OF LAWRENCE COUNTY

COMMONWEALTH OF :
PENNSYLVANIA :
 :
vs. : No. 1181 C 2004
 :
WILLIAM MANGINO :

OMNIBUS MOTION

**MOTION FOR A DIRECTED VERDICT OF NOT GUILTY
OR IN THE ALTERNATIVE, REQUEST FOR
ADDITIONAL JURY INSTRUCTIONS**

TO THE HONORABLE COURT:

NOW COMES the defendant, Dr. William Mangino, by his undersigned counsel, and respectfully presents the two above referenced matters, and we believe that if by first presenting the Request For Additional Instructions, the COURT will gain a more clear understanding as to why the Motion for a Directed Verdict (presented on page 7) should be granted:

I. Further Instruction on the Applicable Law and Expert Opinion

Please advise the Jury ----:

- A. Considering that after my initial Jury instructions on the Law, given to you before you began your deliberations on Wednesday afternoon, July 3rd, and
- B. that you returned with a very astute and intelligent question several hours later; a question that went directly to one of the legal issues presented to you, and
- C. that I repeated that same carefully crafted jury instruction given to you earlier in the day, and
- D. that you have still been unable to reach a verdict, although I hasten to add that we are pleased that you are still deliberating with dedication;
- E. I think some further instruction on that issue may be beneficial to you during the next round of your deliberations.

First, I will repeat the previously given instruction, with which you may be having some difficulty. Then, I will provide an illustration to you, based upon the testimony and evidence presented.

(Instruction repeated)

Now, by way of illustration:

- A. Dr Evanko testified, in essence, that the “levels of medication” prescribed were acceptable for ALL eleven patients, considering their injuries and complaints of pain, but only that there was insufficient chart documentation to SUPPORT that level of medication.
- B. Keeping in mind that Dr Mangino was NOT obligated to even present Any defense or ANY expert,
- C. And further, that testimony to support a finding of NOT guilty need NOT necessarily come from a DEFENSE witness, because the defense is not required to call any witness,
- D. **Unless you accept Dr Evanko’s testimony on THAT aspect of his testimony, BEYOND A REASONABLE DOUBT, then you must find Dr. Mangino NOT guilty on ALL of those drug act violations.**
- E. **ONLY** if you believe the following, **BEYOND A REASONABLE DOUBT**, may you **consider** finding Dr Mangino guilty on the Drug Act counts:
(And I emphasize that word “consider”, and will explain why in a moment)
 - 1. that the following portion of Dr. Evanko’s opinion is accepted by you, **“beyond a reasonable doubt”**: that
 - a. Dr Evanko’s credentials entitle him to speak on behalf of **ALL** responsible segments of the medical community, **and**
 - b. **that**
“No responsible segment of the medical community” would find Dr. Mangino’s recordkeeping “acceptable”
 - 2. **the reason I said “consider” finding Dr Mangino guilty is because-**
 - 3. Contrary to Dr Evanko’s testimony on that issue, was the testimony of expert Forest Tennant, MD and PhD in Public Health.

Dr. Tenant testified, amongst many other things, (that included in his experience) is that:

- a. he is the editor of the leading Pain Journal in the United States, with 38,000 subscribers, including 4 to 5 thousand anesthesiologists, and

- b. based upon the charts and other evidence upon which Dr Tennant based his opinion, Dr Mangino's role was as a consultant to pre-existing patients of "work-Med" who:
 - (1) were already receiving these levels of medication prior to him providing his services, and
 - (2) whose charts were not initially prepared by him, and,
- c. Dr Mangino's expertise in Pain Management and training as an Anesthesiologist do not require him to provide the same depth and level of recordkeeping as, let's say, a family practitioner, and
- d. In Dr Tenant's opinion,
 - (1) There IS a responsible segment of the medical community, throughout the nation (not simply restricted to PA) who DO find that the supporting charts and recordkeeping are "acceptable." And
 - (2) Dr Tenant finds them "acceptable" and in fact, considering that this was 2003, Dr Mangino was a "frontrunner" in his diagnostic and clinical approach; and
- e. That "acceptable" does not necessarily mean "perfect", and in particular, acceptable under the circumstances of the consulting service provided by an anesthesiologist to a pre-existing patient of another physician.

4. If, in weighing the testimony of Dr Tenant as against Dr Evanko, **unless** you still find Dr Evanko's testimony (on this issue) persuading to the extent of **"beyond a reasonable doubt"** then you must find Dr. Mangino **NOT guilty on those charges.**

5. **Now this next point is very important - - -**

In order to find Dr Mangino NOT guilty of these charges: You need NOT be persuaded "beyond a reasonable doubt" by any of the testimony of Dr. Tennant, but only to the extent that it may "RAISE" a reasonable doubt about the opinion of Dr Evanko on this issue.

6. **The same standards apply to Expert witnesses as do fact witness.**

REPEAT short version of standards (believe ALL, some, or none)

7. Simply because a witness has been qualified as and presented as an "expert" does NOT REQUIRE you to accept ALL, or ANY of their testimony or opinions. The purpose of the expert is to help clarify an issue which might otherwise be confusing.

8. **If you decide to disregard the testimony of both experts, for whatever reason, including perhaps your inability to resolve the conflict in their opinions (as to that one aspect or issue), then you must find Dr Mangino NOT guilty.**

9. **The reason is because in this case, under these circumstances and under this law with which DR Mangino is charged, without testimony accepted by you (“beyond a reasonable doubt”) that there is “no responsible segment of the medical community” who would find such recordkeeping “acceptable”, YOU as laypersons, are unable to decide WHAT IS a “responsible segment of the medical community”. And even if you were, you would be unable to decide what such a segment WOULD find as “acceptable” recordkeeping.**

10. **So, without an accepted Expert opinion, “beyond a reasonable doubt” you must find Dr Mangino not guilty as to those 11 charges.**

11. In weighing the testimony of the experts, you may consider the following factors:
 - A. *REPEAT Standard Instruction on Experts*

 - B. This includes the extent of their experiences in the area of expertise in which they have testified,**

 - C. This also includes the same standards by which you will judge the credibility of any other witness, including, but not limited to:
 - a. their interest In the outcome of the case
 - b. the possibility that they be mistaken and/or misinformed, and
 - c. any motive (good or bad) which they may have for testifying, and
 - d. the amount of money, if any, that they have been paid for their testimony

II. INITIAL INSTRUCTIONS ON STATEMENTS AND ADMISSIONS

12. Even IF you believe and accept that Dr Mangino may have made a statement that the Commonwealth has characterized as an admission, unless you find that such an admission was to a “crime” then such an admission has no bearing on the issue of “acceptable” recordkeeping.

13. The issue as the voluntariness of a so-called “statement” is also ALWAYS one for the jury to consider, as well as the circumstances under which such statement or admission was made.

14. Unless you find, “beyond a reasonable doubt” that Dr Mangino made such a statement, as Was testified to by Agent Smith, and unless you find that such a statement (if made) was in connection with the subject of the *lack of “acceptable” recordkeeping*, then you cannot use such an admission for the purposes of satisfying the element #2 in the statute I have twice read in my Instructions.
15. In considering what, if any portion of Dr Mangino’s conversation with Agent Smith constituted an admission relevant to the charges at hand, you may consider:
 - A. the circumstances under which the statement was made,
 - B. who initiated the discussion,
 - C. what documents, if any, such as “notes” have been produced as evidence to support the accuracy of Agent Smiths testimony as to WHAT Dr Mangino said, and
 - D. If there were any other persons or agents present to witness this conversation, what was their recollection as to what was said, IF they were presented as a witness.

III. Further Explanation and Example of “Beyond A Reasonable Doubt”

17. I have previously explained that ALL of the elements of any crime must by proven “Beyond A Reasonable Doubt”

So as to assist you in understanding the meaning and application of that term, I will provide you with a practical example.

Give the classical example such as crack in the foundation of the basement wall in the house you are inspecting, before submitting an offer to BUY it.

Now in this case, the application of that term goes even further:

Quotations below are from:

Kansas v. Naramore, 25 KAN. App. 2d 302; 965 P. 2d 211: 1998 Kan App. LEXIS 79

(copy of case attached as the Exhibit 2)

“Even though proof beyond a reasonable doubt is a basic principle in the adjudication of criminal charges, it is one that is not completely susceptible to precise definition. *We depend a lot on jurors knowing it when they see it.*”

. . . “Physicians, in providing medical care to their patients, are forced to make difficult decisions under challenging circumstances. The very essence of the practice of medicine is the exercise of clinical judgment. Doctors, drawing upon their years of medical education and training, consider the particular details of a patient’s condition and balance the efficacy of a possible treatment with the risk and severity of potential side effects. In some cases, the correct diagnosis or course of treatment may not be apparent. At other times, particularly involving the terminally ill

or the elderly, a promising treatment may carry--even fatal--risks. After considering the potential benefits and risks, the physician must act in the best interests of the patient.

"Years of medical education and training cannot avoid the simple truth that physicians are human and, consequently, fallible. The fact that a physician makes a reasonable mistake should not subject him to criminal responsibility. **Criminal responsibility should attach only to those physicians whose mistakes are egregious or who demonstrate a gross level of incompetence or indifference in their treatment.**" . . . (Emphasis added by author).

IV. Further Instruction on "Intent"

In order for you to find Dr Mangino guilty of ANY crime, you must ALL find, "Beyond a Reasonable Doubt" that he intended his acts (of the Commonwealth argued deficient recordkeeping) - the arguably not "acceptable" "to a responsible segment of the medical profession" level of Recordkeeping. And further, that he KNEW that such recordkeeping was deficient (as described) to the extent that such a mistake was "egregious or who (which) demonstrate a gross level of incompetence or indifference in their treatment (of the patients).

The word "Treatment" is a key word.

MOTION FOR A DIRECTED VERDICT OF NOT GUILTY

The Defendant again, now in writing, renews their Motion for a Directed Verdict of NOT Guilty on ALL charges, in addition to the previously argued points presented at the conclusion of the Commonwealth's case, based upon the following:

1. The applicable Statute is Void for Vagueness, and
2. The jury's inability to reach a verdict (after 10 hours deliberation) is the perfect example as to why the Statute is Vague. SO vague that it is incapable of application, especially in a case with facts such as these.

Regarding the CONSPIRACY charges AND their application to the Vagueness Issue:

1. "Intent" (mens rea) is required for a criminal conviction
2. This VAGUE Statute, by its' very language, requires the jury to find the defendant guilty UNLESS his conduct (or lack thereof) regarding "treatment principles" is found to be "acceptable" by "a responsible segment of the medical community."
3. It does not require intent or mens rea,
4. But rather appears to be one more resembling "Misfeasance."
5. And it shifts the burden of proof upon the defendant to PROVE that his conduct was NOT criminal, and WAS and IS "acceptable" by a "Responsible segment of the medical community."
6. The statute applies a criminal standard to what should be a civil violation, if any, and is even more confusing (and "Vague" by its legal definition) by applying a criminal standard to conduct which requires proof of "acceptability" by a "responsible segment of the medical profession" WITHOUT:

A. defining either the terms "acceptable" OR regarding the term "*responsible segment of the medical profession.*"

B. by Providing a definition of the words "responsible" OR "segment" (which according to any dictionary can be as few as just one –such as a segment of an orange, or several Physicians “) or as many as thousands (as testified to by the defendant's Expert Forest Tennant MD, PhD (in Public Health). If the Statute fails to define these terms and the Experts disagree, then how can we expect juries to render consistent verdicts with this lack of guidance.

7. The fact that high dosage Opioid treatment is “acceptable” medical treatment by the AMA, many globally (not just US) medical authorities, and the FDA (by permitting the manufacture of high dose and sustained release dosages) – all make it that much more confusing to define “responsible segment of the medical profession.”

RESPECTFULLY SUBMITTED,

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