WALTER A. ROBBINS and IRMA ROBBINS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	JURY TRIAL DEMANDED
	:	
vs.	:	NO. 01-01,305
	:	
SUSQUEHANNA HEALTH SYSTEM, INC.,	:	CIVIL ACTION - LAW
	:	
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: April 23, 2004

OPINION IN SUPPORT OF ORDER OF APRIL 21, 2004

Before the Court is the Defendant's Motion for Summary Judgment filed March 12, 2004. It seeks dismissal of this action because Plaintiffs have not produced expert testimony as to the standard of care applicable to the physical/occupational therapists who were transferring the plaintiff/patient from a bed to a wheelchair. Defendant also seeks dismissal of Plaintiffs' claim for punitive damages because of their failure to produce evidence of knowledge, approval and allowance by the corporate entity, Defendant Susquehanna Health System, Inc., which is necessary to establish responsibility for punitive damages arising from its vicarious liability for the alleged wrongful acts of its employees.

By Order of April 21, 2004, to meet the time constraints of entering a decision, this Court entered an Order denying the Summary Judgment Motion in both respects. This Opinion is issued in support of that Order.

The essential facts are not in dispute. Plaintiff, Walter A. Robbins, age 63 and weighing 280 pounds was admitted to the Muncy Valley Hospital skilled nursing unit ("Muncy Valley") on May 20, 2000 following surgical repair of a fractured right ankle. Muncy Valley is a facility operated by Defendant, Susquehanna Health System, Inc. ("Susquehanna"). The

surgery for the repair of his right ankle had been performed on May 17, 2000. His physician's orders upon discharge to the skilled nursing unit indicated there was to be no weight bearing on the right lower extremity for a period of three months. Upon Mr. Robbins' admission to the skilled nursing facility on May 20th, the nursing and physical therapy staff made initial assessments of his condition. The written nursing assessment noted that Mr. Robbins had weakness in both legs and difficulty standing, difficulty walking and was unable to bear weight and needed total help in transferring from bed to chair. The author of the nursing assessment also indicated that as Mr. Robbins was unable to stand a lift should be used. The initial physical therapy assessment was performed by Cynthia Eastlake, P.T. Her written assessment noted the restriction for Mr. Robbins that there was to be no weight bearing on the right lower extremity. It also noted that Mr. Robbins did not feel his left leg would support him if he tried to step forward on it. There were also indications in the assessment that Plaintiff could perform sit-to-stand elevations with minimum/moderate assistance of one therapist and stand-pivot transfers with moderate assistance of one therapist including instructions to maintain non-weight bearing on his right ankle. Both the nursing assessment and physical therapy assessment were made part of Mr. Robbins' chart on May 20th. The written protocol in effect at Muncy Valley, of which Cynthia Eastlake was aware, provided that patients requiring assistance in transferring from bed to a chair would be provided assistance appropriate for their ability and need including additional staff assistance and mechanical lifts as necessary to facilitate both patient and staff safety in performing transfers.

The following day, May 21, 2000 around 11:00 a.m., Cynthia Eastlake, the physical therapist who had performed the initial assessment and an occupational therapist,

Nicole Pautz, sought to transfer Mr. Robbins from his bed to a wheelchair. A disputed fact exists as to whether or not as Mr. Robbins contends, at that time a nurse was also present and inquired of these two employees as to whether they wanted to use the lift and that they responded in the negative. Regardless of whether or not the nurse made such comment, the physical and occupational therapists, Ms. Eastlake and Ms. Pautz, attempted to have Mr. Robbins leave the bed, stand on his left foot and make a pivot turn to be seated in the wheelchair. In the course of this process the right lower extremity of Mr. Robbins was made to bear weight.

Mr. Robbins contends that his weight went onto his right leg as he was pivoting and the two assisting him left him go or he fell from their grasp. Susquehanna contends that Eastlake and Pautz acted in accordance with the appropriate standard of care, in removing Mr. Robbins from his bed without a lift and in having Mr. Robbins complete the pivot turn.

It is not disputed that as a result of the weight-bearing episode that Mr. Robbins immediately suffered pain in his right ankle, was placed in the wheelchair with the right leg elevated and an ice pack applied for twenty minutes and then he was taken to physical therapy. However, the two therapists did not at the time of the May 21st incident chart the episode of weight-bearing suffered by Mr. Robbins, nor the fact of his immediate and incidental pain nor the treatment with ice. The Muncy Valley nursing notes verify that he continued to complain of pain for the next several days. The notes also indicate that blood was observed coming from his bandaged right ankle at various times between May 21st and May 24th. There is no mention in the notes about the weight-bearing incident between May 21st and May 24th. Subsequently, on May 24th at a regular-scheduled examination, his original operating surgeon, Dr. Batman,

discovered Mr. Robbins's right ankle had re-fractured necessitating a repeat operation. At no time had the episode of Mr. Robbins' pain or weight-bearing been reported by the Muncy Valley staff to Mr. Robbins' surgeon. The surgeon attributed the re-fracture to the weight-bearing episode of May 21st. The skilled nursing unit staff including the physical and occupational therapists, Ms. Eastlake and Ms. Pautz, had not made any chart notes about the weight-bearing episode. After discovery by the surgeon of the re-fracture and his attributing it to Mr. Robbins apparently being dropped onto his right foot on May 21st by a therapist. Muncy Valley procured a "P.E.R.T.S." report based upon information supplied by Ms. Eastlake, the P.E.R.T.S. report states:

> "Resident was transferring from bed to wheelchair, going to his (L) (strong) side. During transfer resident put weight on ® ankle. (Prior to transfer, he had been instructed for non WB on ® LE." He c/o immediate pain. Resident was seated in wheelchair and leg elevated. Ice was applied to R. ankle for 20 min. At no time had the episode of pain or weight bearing been reported by the skilled nursing staff to Mr. Robbins' physician.

Dr. Batman has also provided Mr. Robbins an expert report in which he concludes that rather than having the expected recovery from the first surgery Mr. Robbins, as a result of the complications associated with the re-fracture and its treatment, is permanently and severely impaired in his ability to walk.

Susquehanna contends in the summary judgment motion that Mr. Robbins cannot succeed in his claim that he was injured through the actions of Ms. Eastlake and Ms. Pautz because he has failed to produce expert medical testimony to the effect that these therapists violated the standard of care and duty owed to Mr. Robbins in transferring him from his bed to a wheelchair on May 21st. Mr. Robbins contends that this evidence is sufficient

under the facts and circumstances to allow a finding of negligence on the part of these two employees.

Susquehanna further contends that punitive damages are not applicable because the actions do not amount to such wanton indifference by their employees and further that Mr. Robbins is without any proof that Susquehanna knew, approved or allowed this wrongful conduct in its corporate entity status which is required before the corporate entity can be held liable on the vicarious liability theory for the wrongful acts of its employees. Mr. Robbins contends he is entitled to punitive damages because of the willful wanton conduct of failing to use a lift when they knew of his physical condition and that weight-bearing must be avoided on the right foot. Mr. Robbins also offers contested evidence to the effect that prior to the pivot turn being attempted he told Ms. Eastlake and Ms. Pautz they could not support him and also that he did not think his left leg could support him. Nevertheless, they proceeded to remove him from the bed to the wheelchair without a lift. Mr. Robbins also contends he is entitled to punitive damages because of the failure of Muncy Valley staff to notify his surgeon of the weight-bearing episode and the subsequent pain.

Discussion – Expert Testimony

The law concerning whether or not Mr. Robbins needs to call an expert in a medical malpractice case has been thoroughly and recently reviewed by the Pennsylvania Supreme Court in the case of ***Toogood v. Rogal***, 824 A.2d 1140 (2003). Susquehanna relies on ***Toogood*** for the proposition that to establish a breach of standard care by the physical and occupational therapists expert medical testimony is required. This Court, however, is mindful that the Supreme Court in ***Toogood*** was very careful to note that there was a "very narrow

exception to the requirement of expert testimony" where the matter is so simple and a lack of skill or care so obvious as to be within the range of experience and comprehension of even non-professional persons. ***Id.,*** at 1145. ***Toogood*** notes this is often conceptualized in the doctrine of *res ipsa loquitor*. ***Toogood*** states:

> The doctrine of *res ipsa loquitor* allows plaintiffs, without direct evidence of the elements of negligence, to present their case to the jury based on an inference of negligence. The key to the doctrine is that a sufficient fund of common knowledge exists within a jury of laypersons to justify raising the inference. Instead of directly proving the elements of ordinary negligence, the plaintiff provides evidence of facts and circumstances surrounding his injury that make the inference of the defendant's negligence reasonable. . . .
>
> Thus, *res ipsa loquitor* was reserved for obvious cases in which lay jurors could apply their own knowledge and common sense to establish the cause of the injury and deduce an inference of negligence. These were typically the "sponge left in the patient" cases.
>
> An unfortunate result such as death or infection could not, by itself, establish liability and, when an injurious result was a common side effect of the treatment that could occur without negligence, courts refused to allow patients to use *res ipsa loquitor*. n9 Further, when the treatment employed was generally accepted, the mere fact that a patient experienced an unfavorable reaction did not invoke *res ipsa loquitor*. n10

Id., at 1146, 1147.

This Court has attempted to review as many cases as possible under the time constraints we face to determine exactly the type of case and situations in which this narrow exception applies. Many cases have applied the doctrine of *res ipsa liquitor* where expert medical testimony has in fact been introduced to state or explain that a particular event or unfortunate result usually does not occur in the course of the specific medical treatment at issue

in the absence of negligence. *See*, ***Jones v. Harrisburg Polyclinic Hospital***, 437 A.2d 1134 (Pa. 1981); ***Hightower-Warren v. Silk,*** 698 A.2d 52 (Pa. 1997); ***Davis v. Kerr,*** 86 A. 1007 (PA 1913). More rare, however, are cases where there is actually no expert testimony whatsoever, which confronts us here. ***Smith v. Yohe***, 194 A.2d 167 (Pa. 1963) (duty to take x-rays were injuries were such as to raise possibility of bone fractures); ***Killingsworth v. Poon***, 307 S.E 2d 123 (Ga. Cit App. 1983) (injection for pain should not cause a collapsed lung); ***Stumph v. Foster***, 524 N.E. 2d 812 (Ind. Ct. App. 1988) (a broken rib during chiropractic care).

As stated in ***Jones v. Harrisburg Polyclinic Hosp.,*** *supra,* at 1138: "Expert testimony only becomes necessary when there is no fund of common knowledge from which laymen can reasonably draw an inference or conclusion of negligence." Expert testimony has been relied on as not being required, when a sponge or gauze pad is left in a body after an operation and/or a dentist drill slips and cuts a patient's tongue. *See*, ***Restatement of Torts 2d, §328; Dux v. Shaver***, 161 A. 481 (Pa. Super. 932).

> A very narrow exception to the requirement of expert testimony in medical malpractice actions applies "where the matter is so simple or the lack of skill or care so obvious as to be within the range of experience and comprehension of even non-professional persons."

Toogood, *supra* at 1145.

Cramer v. Thelma Clark Memorial Hospital, 172 N.W.2d 427 (Wis. 1969), appears to be consistent with ***Toogood's*** summary of Pennsylvania law, wherein the court stated:

> The standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony because the jury is competent from its own experience to determine and apply such a reasonable-care standard.

Id., at 428.

In ***Cramer*** the court held that negligence could be found without expert testimony, where the plaintiff/patient had been placed in hand restraints for his own safety. Hand restraints had been removed to allow him to feed himself (an arguably therapeutic measure) and thereafter when unattended he proceeded to injure himself.

This Court believes that in the case in front of us that a jury of laypersons has sufficient fund of common knowledge and is certainly competent to determine whether the physical and occupational therapists who attempted to transfer Mr. Robbins from his bed to a wheelchair were or were not negligent. Surely most jurors have assisted others in and out of bed, or have been assisted themselves, in situations where such individuals were in need of different amounts of assistance, whether due to a medical condition or for some other reasons. From their own experiences they can judge whether Mr. Robbins received proper assistance from the therapists. Under Mr. Robbins' evidence, one or both therapists left go of him and he fell with his right leg bearing his weight. There is no complex human anatomy issue involved in this case nor is there any complicated medical treatment. Indeed, the ability to stand on one foot and make a pivot turn is such a common place action that evidence of a person's ability or inability to do so is often presented to a jury to enable them to determine if a person is under the influence of alcohol to the extent that he cannot drive safely. Despite Susquehanna's contentions to the contrary this does not involve a situation where physical and occupational therapists were attempting to employ a therapeutic maneuver or procedure, such as gradually increasing the strength of the leg to become weight bearing or to teach the way to walk or things of that nature. Certainly the defense can argue that part of Mr. Robbins' occupational

therapy was to be able to get out of bed and into a wheelchair. Nevertheless, the action of standing, supporting weight on one foot, making a pivot to turn and then being seated in a chair is not a therapeutic situation that requires medical judgment as to whether or not under the circumstances of this case the therapists should or should not have employed the assistance of a lift, or, whether or not the therapists left go of him or left him fall or otherwise acted negligently in allowing his right foot to strike the floor. A jury can also determine the credibility issues involved as to whether or not the therapists could not or failed to properly support Mr. Robbins' weight. Certainly the jury would be in a position to compare the relative strengths and physical sizes of the two therapists who Mr. Robbins testifies it was obvious they by themselves could not support him in making a transfer from his bed to the wheelchair. A jury can also determine the credibility issues as to whether or not the nursing assessment and known protocols of the hospital suggested that a lift should be used in those circumstances and whether or not a lift was recommended by an attending was whether or not the therapists proceeded in disregard of this known risk that weight-bearing would occur to Mr. Robbins' right foot from their actions and the potential of the harm that could result.

The most factually similar case which this Court has been able to find is found in the 1937 California case of ***T. E. Stevenson v. ALTA BATES, INC.*** 66 P.2d 1265; (1937 Cal App.). The ***Stevenson*** court held that the following facts supported a finding of negligence without plaintiff having presented any expert testimony as to the applicable standard of care:

> On January 30, 1935, Mrs. Stevenson had so far recovered that with assistance she could walk. With the assistance of one person and her cane she could stand. Indeed, with the assistance of one person and her cane she could walk short distances. In the morning of that day at about 9:30, Mrs. Swendson and Miss Pike had taken their patient to the sun room. They had stepped out of

> the elevator and were in the room. As they entered Mrs. Stevenson carried a substantial cane in her right hand. Mrs. Swendson was walking at her right side firmly holding her right arm. Miss Pike carried a blanket and was walking on Mrs. Stevenson's left side holding the patient's left arm which was resting in Miss Pike's right hand. Having entered the sun room Miss Pike released her hand and stepped forward to prepare the chair in which the patient was to be seated. Although there was testimony that on other occasions, before releasing her hold on the patient, Miss Pike made statements to the effect that she was about to do so, on this particular occasion there was evidence that she made no statement retarding her intention of releasing her hold on the patient. There was evidence that immediately after Miss Pike so released her hand Mrs. Stevenson began to totter or fall. Under these circumstances we think it may not be said, as a matter of law, that there was no evidence of negligence and no basis on which the jury might have inferred negligence. ***Id***., at 1268.

In reaching its conclusion that these facts supported a verdict of negligence the court in ***Stevenson*** also rejected the defendant's contention that the negligence finding could only be based on expert testimony, stating:

> The defendants complain because the trial court refused an instruction which they had requested and which was to the effect that the negligence or non-negligence of the defendants could be proved only by the testimony of competent expert evidence. (***Patterson v. Marcus***, 203 Cal. 550 [265 P. 222]). The plaintiffs do not question that rule but contend it applies only to such facts as are peculiarly within the knowledge of such professional experts and not to facts which may be ascertained by the ordinary use of the senses of a non-expert. (***Barham v. Widing***, 210 Cal. 206, 214 [291 P. 173].) That contention, with reference to the facts of the instant case, we think is well founded. ***Ibid.***

Likewise, whether or not the therapists were negligent in transferring Mr. Robbins from his bed to his wheelchair can be ascertained by the ordinary senses of the jury without the aid of expert testimony or the facts relating to whether or not there was negligent conduct in doing so are relatively simple and obvious.

Punitive Damages

This Court also believes that the issue of punitive damages is also for the jury to determine. If Mr. Robbins is to be believed, a hospital employee, a nurse, witnessed the transfer and interrupted the transfer to suggest that a lift should have been used but did not take steps to make sure the nursing assessment and perhaps the protocol of the hospital was followed. The hospital acts through its employees. Mr. Robbins can at least make out a showing that one such employee knew, approved or allowed this to occur and/or it occurred over a nurse's disapproval. More strikingly, however, is the clear aspect that many people in the hospital staff certainly knew of the weight-bearing incident, or should have known about it, and failed to take any action to contact Mr. Robbins' surgeon to discuss the matter. Clearly, that he was initially given ice for this pain after being placed in a wheelchair, is in and of itself is somewhat unusual as he was expected to be placed in the wheelchair and taken promptly to physical and/or occupational therapy. Arguably many staff members of Muncy Valley would or could have observed this icing treatment and delay in proceeding to physical therapy. He was subsequently observed and charted to be in pain of a significant nature. The initial assessments make it clear this pain was inconsistent with the pain he had upon initial admission to the unit. It is clear that Mr. Robbins will be able to offer evidence that many of the hospital's employees knew, approved or allowed him to remain in pain for three days without reporting this matter to his surgeon/physician, causing a further delay in his treatment and relief and contributing to his permanent disability. The type of care Mr. Robbins contends he received is not what one expects from a skilled nursing unit when one goes for therapy, but instead would be a gross, wanton disregard for the patients' needs and evidences a deliberate

failure to provide appropriate and necessary follow-up evaluation and care all to a great detriment of the patient. Such, if accepted by the jury, could sustain an award of punitive damages.

BY THE COURT:

William S. Kieser, Judge

David Lingenfelter, Esquire (Plaintiff)
David Shipman, Esquire (Defendant)
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)

WALTER A. ROBBINS and IRMA ROBBINS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	JURY TRIAL DEMANDED
	:	
vs.	:	NO. 01-01,305
	:	
SUSQUEHANNA HEALTH SYSTEM, INC.,	:	CIVIL ACTION - LAW
	:	
Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: April 21, 2004

ORDER

The Motion for Summary Judgment of Defendant filed March 12, 2004 is denied. An Opinion in support of this will be filed.

BY THE COURT:

William S. Kieser, Judge

David Lingenfelter, Esquire (Plaintiff)
David Shipman, Esquire (Defendant)
David R. Bahl, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)