

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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:
BARBARA S. SEMSKER, et al., :
:
Plaintiffs, :
:
v. : Civil No. 283674
:
NORMAN A. LOCKSHIN, et al., :
:
Defendants. :
:
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PLAINTIFFS' CLOSING AND REBUTTAL

Rockville, Maryland

November 13, 2008

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WHEREUPON, the proceedings in the above-entitled
matter commenced

BEFORE: THE HONORABLE JOHN W. DEBELIUS, III, JUDGE

APPEARANCES:

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For the Plaintiffs

Rebuttal for the Plaintiffs:

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P R O C E E D I N G S

CLOSING ARGUMENT BY PATRICK A. MALONE, ESQ.

ON BEHALF OF THE PLAINTIFFS

Thank you, Your Honor. And may it please the Court, Barbara, ladies and gentlemen. Here's our whole case, right here.

These doctors knew, and this is exactly what I promised to you a week ago yesterday, that was going to be our case, turns out to be our case. These doctors knew, these dermatologists knew, that this man had a worrisome mole on his lower back, and it needed to be taken off. They documented the enlargement. They never did anything about it. And a patient who would have had a 100 percent chance to a 95 percent chance of being alive today, if they had done the right thing at any time up to the fall of 2004, would still be with us, and we would not be here in court.

We have said that this is a case where the reason we are in court is that these doctors refuse to accept responsibility for not doing their job. And that we ask you to enforce patient safety standards, basic patient safety standards that prevent patients from falling through the cracks because of miscommunications, and because of failure to retain important medical records.

Now, our case is the same as it was a week ago. The defense case is dramatically contracted. All the evidence you

1 heard yesterday and Monday, from both Dr. Hash, the former
2 employee, and Dr. Albert, about how oh, we would have told him
3 to come back after the fall of '04 for further skin checks, the
4 Judge has told you that that's not in the case anymore. And
5 the reason it's not in the case is that sadly, all the evidence
6 is, and we heard from a top melanoma expert from University of
7 Pittsburgh, one of the top people in the whole country, John
8 Kirkwood, told us that there's still an excellent chance, clear
9 up through the fall of '04.

10 But sadly, the door was closing rapidly on Richard
11 Semsker after that. And when he left those offices after the
12 fall of '04, the fuse was lit, and sometime in the course of
13 the next couple of years, that bomb went off, and then was not
14 discovered until August '06, when it was way too late and he
15 had cancer riddled through his whole body.

16 So their blame against this patient now, based on the
17 evidence, all boils down to one simple accusation that they
18 make, which is Dr. Lockshin must have told the patient in the
19 fall of 1998 to get this mole taken off his lower back.
20 Although Dr. Lockshin also says now, no big deal to me that he
21 did that, which of course is his excuse for why the patient
22 falls through the cracks. So those are two kind of
23 contradictory thoughts that you, they want you to hold in your
24 mind and juggle together. That it's not my fault, because he
25 should've figured out what the right thing to do was. But it

1 didn't need to be done anyway, so if I told him casually that
2 it didn't need to be done, how can you make it his fault? How
3 does that add up?

4 But it all boils down to the claim that, well, I must
5 have told him, because I always tell people, even though I'm
6 cramming in 50 patients every day into this busy, busy
7 practice, and even though I've got 10 minutes per patient. He
8 must have known.

9 And then for some weird reason, this man, who was an
10 excellent patient otherwise, just decided for whatever reason
11 to take a gamble on his own health care with respect to the
12 possibility of skin cancer, and just totally blew it off.
13 That's really the whole defense. That's all it comes down to.

14 Now, I'm going to show you a little timeline that I
15 put together, so you see what all the missed opportunities were
16 in this case. And let me do that right now. I didn't have
17 time to print this out on poster board, so we're just going to
18 have it on the screen.

19 What was done wrong here? What were the lost
20 opportunities to save a life, between 1998 and 2004?

21 And the reason on my timeline I go from green to
22 black, after the end of '04, is that's what the evidence is.
23 So we've got a green light for saving a patient's life, clear
24 up to the fall of '04, and even maybe a little thereafter,
25 according to Dr. Kirkwood. And what should these

1 dermatologists have done?

2 Well, in 1998, Dr. Lockshin should have told the
3 patient clearly about removal of the nevus, the mole. And he
4 should have coordinated the next step with Dr. Marcus.

5 I don't know, I don't have it on the slide just now,
6 but I showed you a slide in the opening statement, which I
7 called the teamwork rule, that when a specialist and a primary
8 care doctor are both taking care of a patient for the same
9 thing, they need to coordinate together to decide what is the
10 next step, and who's going to carry it out.

11 And Dr. Lockshin, when he was on the witness stand,
12 told us that well, generally that's a good idea. He agrees to
13 the rule. He just wants to make exceptions for violating the
14 rule that when two doctors are taking care of the same patient,
15 they need to get together on the next step. It's their job to
16 get together. So he didn't do that.

17 And then the next thing, my next little timeline
18 block up there, and the reason I have arrows on this next box
19 here is to show you that he had an ongoing responsibility, from
20 the fall of '98 clear up through the fall of '04, to simply
21 remind the patient, and/or Dr. Marcus. If either you're too
22 busy to tell the patient, or somehow it slips your mind, or
23 somehow you haven't communicated clearly to the patient, does
24 the patient only get one chance? Do you really not give a
25 reminder to the patient?

1 And then the number one thing that Dr. Lockshin did
2 wrong is this third block here. You are supposed to retain
3 records of reasonable value to the patient. That's not Pat
4 Malone's rule. That's the rule of the American Medical
5 Association. We have the leadership of the American medical
6 establishment on our side of this case. I'm going to show you
7 what they said. I'm going to put it up here for a second.

8 "Physicians have an obligation to retain patient
9 records which may reasonably be of value to a patient." That's
10 the bottom-line rule, that first sentence.

11 And by the way, if you want to write any of this
12 down, you would need to do it now or soon, because this is
13 evidence, but this particular poster does not go back to the
14 jury room, for technical evidence reasons. But it is evidence
15 in the case. It's just not a document that you'll have back
16 there with you.

17 And then there's all kinds of important stuff after
18 that. "Medical considerations are the primary basis for
19 deciding how long to retain medical records. In deciding
20 whether to keep certain parts of the record, an appropriate
21 criterion is whether a physician would want the information if
22 he or she were seeing the patient for the first time."

23 Now I questioned both Dr. Lockshin and Dr. Albert
24 very closely about that. Seeing this patient in 2004, wouldn't
25 you have wanted to know this prior record, that the mole was

1 only half as big in 1998? And after a lot of hemming and
2 hawing, they both reluctantly agreed, yes, that would have been
3 a valuable piece of information to have. So it shouldn't have
4 been destroyed. It's that simple.

5 And then the whole defense comes down to, well, we
6 take our marching orders from Annapolis, Maryland, the
7 legislature. They say to only save records for five years, and
8 so we throw them out after five years. That's not what the law
9 says. The law says you save records for a minimum of five
10 years, and then you have to use your medical skill to decide,
11 is this record of potential future value to a patient? Or is
12 it not? And if it's not, and you have complied with the state
13 minimum, remember, both those conditions, that's what number
14 two says, then you can throw a record away. Although you
15 should also, before you discard an old record, give the patient
16 a chance to claim the record.

17 So you know, medical records are the lifeline of the
18 patient. They are the doctors' memory bank. It's not like a
19 loaf of bread on a bakery shelf, where the medical record
20 expires after a certain number of days, and you put it in the
21 truck and take it off to the homeless shelter and donate it. A
22 medical record that is of potential reasonable value to a
23 patient has got to be saved.

24 Well, what does Dr. Lockshin say? Actually, let me
25 show you first, I want to show you what Dr. Marcus said on a

1 couple of very important things, where he gave testimony in
2 this case that put the lie to this claim that Richard Semsker
3 was not a good patient who would have followed through. Here's
4 what, one thing Dr. Marcus said.

5 "Did he, was he a good patient in the sense of
6 hearing what you had to say, following up on what you asked him
7 to do, and trying to the best of his ability to carry out your
8 recommendations?"

9 "As far as I remember, yes."

10 And then he also said, and this was the whole --

11 "You have no doubt, do you" --

12 -- line of the case.

13 -- "that if Mr. Semsker knew about something like
14 this that needed to be done, based on your dealings with him
15 and his history, he would have had it done?"

16 "I have to assume that he would have, again."

17 End of case.

18 But Dr. Lockshin, everything is too burdensome for
19 Dr. Lockshin.

20 "I think it would be a tremendous burden. I don't
21 think most people do that. And it's just an added, it's time-
22 consuming, and it's expensive. And unless there's a need, we
23 just don't do it. It doesn't seem practical. As I said, we
24 see a lot of one-time patients. And to, you know, call every
25 single patient and track those down, it's a tremendous amount

1 of work."

2 I should have said before I played those, those were
3 three put together. The first question was, you know, after
4 the patient's gone home from this fall, or December of 1998
5 visit, and of course he doesn't know if he told him about the
6 mole when he's doing the painful work on the back on the first
7 visit or, it's all speculation about whether it happened then,
8 if it happened that all, or whether it happened as Dr. Lockshin
9 was on his way out the door after taking the sutures out a week
10 later.

11 But my question was, why not just remind the patient?
12 You know, six months later, something like that. Hey, we
13 recommended something. They've got these big office front
14 staffs. What are they there for? They're not there just to
15 fill out insurance forms to make money for the doctor. They're
16 part of the team that's supposed to help the patient. And he
17 said no, that's too much burden.

18 And then I asked him, well, why not give a patient,
19 or mail the patient, a copy of this same letter that you send
20 to the referring doctor? Oh, that's too much trouble, too.

21 Now, I'm not saying every single letter needs to go
22 to the patient. If all he said on the letter was hey, I took
23 this cyst off and, et cetera, et cetera, that's the end of my
24 care, the patient doesn't need to see that.

25 But if there's unfinished business on there, here's

1 something else I think needs to be done, Dr. Marcus, why not
2 copy in the patient? Why not spend the 42 cents on a stamp?

3 And then the last question I asked him there was, you
4 know, before you throw away the records, why not give the
5 patient a chance to pick up the record? Why not send a
6 postcard? Or why not have your people just make a, one phone
7 call? Too much trouble. We're throwing away too many records.
8 We have too many patients.

9 Part, they just don't, he just doesn't get it. Part
10 of the point of the case is, if you're that busy, you need to
11 slow down. Maybe you need to see fewer patients every day, or
12 maybe you need to have a system in place so that patients don't
13 fall through the cracks.

14 There is plenty of evidence in these records, by the
15 way, I'm going to show you in just a second, that this isn't
16 just the standard of care. And by the way, who took "care" out
17 of standard of care? Doesn't standard of care mean that you
18 care about the patient, that you're not indifferent to whether
19 the patient gets recommended treatment? That you just maybe
20 take some modest steps to see that the patient really knows
21 about your recommendation? And good doctors, careful doctors,
22 do that.

23 And this is not just from the testimony of Dr.
24 Richardson from Charlottesville. This is throughout Mr.
25 Semsker's records. Let me just show you a couple of examples.

1 Here's -- darn it. I'm going to need to, I have to get this
2 right. Oh dear. Let me get out a copy of the, a hard copy of
3 the records. I think this will work, sooner or later. If at
4 first you don't succeed -- may I just have two minutes?

5 THE COURT: Sure.

6 MR. MALONE: I'm sorry, ladies and gentlemen. This
7 darned old thing. Okay, well, I can deal with the hard copies
8 that my trusty companion is pulling out for us. I apologize
9 for that. And I just, I need to show you these up close,
10 ladies and gentlemen, so that you can see what I'm talking
11 about. So can everybody look at this, please?

12 Here is a, page 24 from Exhibit 3. And by the way,
13 if you want to just, if anybody wants to kind of just jot down
14 a note, it's Exhibit 3, page 24. And you see how we've got
15 these page numbers here?

16 This is Dr., this is the pathology report on the
17 melanoma. And here's what's interesting here. Look at this,
18 you see this stamp here? This thing that's slightly crooked on
19 the page? This stamp is a stamp from Dr. Lockshin's office,
20 that they've stamped on the record. And the first thing is it
21 says date, and then it says called by, and then it says patient
22 informed of results. And you see the X there, that says
23 patient informed of results? Right there.

24 And then there's more stuff on there. Right below
25 that it says message left with the results. You know, in case

1 the patient's not there, you leave a message. Then it says
2 message left to call back. And then the form says, the stamp
3 says no answer. So, you know, they have a form. They know how
4 to document when you tell a patient something you want the
5 patient to know about.

6 Now I can already hear Dr. Lockshin's lawyer saying
7 oh, but that was, that was cancer, so we've got to tell him
8 that. Does it really makes sense to tell somebody something
9 when it's too late, but not tell them something that is
10 important enough that it could save their life, when there's
11 still time to save their life?

12 Okay, I've got a few more I want to show you. Here's
13 one. This is Exhibit 5, page 30. Yes, this is Exhibit 5, page
14 30, where a licensed practical nurse is documenting her follow-
15 up with the patient on his wound care, because he had this
16 giant wound in his groin where they dug out all these lymph
17 nodes that had cancer in them. And he had to have this wound
18 vacuum device for a while.

19 And she talks exactly about what she does. And then
20 she says exactly what she did, went over s/s. That's signs and
21 symptoms of infection with the patient. He is aware to call
22 the office if he is having any problems with the wound vac, or
23 notices any unusual drainage. So she's documenting her
24 conversation with the patient.

25 Exhibit 9, page 26. This is an outfit called Home

1 Call Montgomery County. Another nurse saying exactly what she
2 did, and then saying "instructed PTCG," that's patient's
3 caregiver, "in IV therapy," et cetera, et cetera. And then it
4 says patient's caregiver had received instruction and had
5 performed while patient still hospitalized. Reviewed written
6 instructions, et cetera, et cetera. So they have written
7 instructions. And then it says "Patient and patient caregiver
8 verbalized understanding. Written instructions left in home
9 with patient and patient's caregiver."

10 Here's another one, Exhibit 11, page 54. He's having
11 radiation treatment. They give him a written sheet of
12 instructions. He signs the instructions. "I have received and
13 understand my discharge instructions." So they give him
14 everything right there on a piece of paper for him to
15 understand.

16 There's a couple more, going back in time, back to
17 2003. This is Exhibit 16, page 75, when he had the chest pain
18 and he had the cardiac catheter thing that we heard about.
19 Here's written instructions for follow-up care, exactly what to
20 do. Here's the patient's significant other signing, Barbara
21 Semsker signing this, so they've got a piece of paper. They
22 know what to do.

23 Now here's one, and this is my absolute favorite.
24 This is actually from Dr. Marcus's records, at page 249 and
25 250. And they're similar, but they're slightly different.

1 This is a, some lab work, Capital Gastroenterology, this Dr.
2 Musselman that we heard that he went to when he had some
3 prostate problem. Actually, over on this one, page 249. Here
4 it is. Quest Diagnostics. And they're reporting in urine
5 culture, no growth. All that means is, hey, he's got a normal
6 urine culture.

7 Well, look down here. Here's the key part. They've
8 got a stamp in their office, too, just like Benjamin Lockshin
9 had in his office. And it says, they just stamp all the lab
10 results. It says "reviewed by," and then they've got initials
11 for all their different doctors. And they circle R.M. for Dr.
12 Musselman. He puts the date that he has reviewed it. And then
13 it says "action, voice message, called patient, note to
14 patient, file." And he, they fill out "called patient,"
15 initialed by Dr. Musselman, and the date.

16 Same over here on this one, which also has normal
17 results on it. You're documenting the follow-up. Why are you
18 documenting follow-up?

19 You can sit down, folks.

20 Why are careful doctors doing this? It's not just to
21 CYA when, so that they can prove later on. It's as a reminder
22 to yourself that yes, I did something that I know I'm supposed
23 to do. And when you put it in writing, it helps you remember
24 to do it. Wait a second, you know, I've got this stamp here,
25 you know, I'd better do that. I'd better just make sure that

1 the patient knows about this.

2 If I'm indifferent to whether the patient knows about
3 something, you know, maybe sometimes it won't matter. But
4 maybe sometimes it'll turn out to be huge. And you never can
5 tell up front, so that's why you don't pick and choose. You
6 have a system. You follow your system. You don't just assume
7 people know. You don't wave the patient goodbye and not give
8 them anything in writing, or not have a reminder. You tell the
9 people. And then patients don't drop through the cracks. It's
10 that simple.

11 You know, one thing you won't find in these records
12 is entries like this: "Patient was advised to schedule removal
13 of mole on lower back. Patient declined to have mole removed.
14 Patient missed appointment." Anywhere on any of these records,
15 patient missed appointment.

16 Or how about this one? "Office tried to contact
17 patient re: need to schedule mole. Message left at patient's
18 phone number." You know, something like that.

19 Or how about this one? "Postcard mailed to pick up
20 old records."

21 This case, I almost lose it when I think of the
22 outrage that a postcard could have saved a man's life. Too
23 cheap to send a postcard. What would it have done? We know
24 that we have a responsible, reliable, honest person, and a good
25 patient. He gets a postcard from his dermatologist he's been

1 to. Well, sure, I guess we ought to get these records. Why
2 not? You know, I'm up there anyway, seeing Dr. Marcus. Let's
3 get the records. Oh, what's this? I don't remember anything
4 about getting a mole taken off the last time I saw this guy.
5 Well, I guess I should talk to Dr. Marcus. I guess I ought to
6 get it done. And oh, wait a second. Here now in 2004
7 somebody's telling me this mole is twice as big as it was
8 before. That doesn't sound good. That sounds, I'm going to
9 ask the doctor, of course, but that sounds like maybe it's
10 cancer, or going into cancer. I'm not going to gamble with my
11 life if I know those two facts. What patient would gamble on
12 that? What a ridiculous defense.

13 It's just an insult, this defense, for a couple of
14 reasons. One is, and I wrote this down during the defense
15 opening statement. Let's see, let me find it. "Richard
16 Semsker was a smart guy, an attorney. He knew he had to say he
17 was never told, or he'd have no case." Oh? What's the
18 implication of that? They're calling him a liar.

19 And when you spin that out, what does that mean?
20 That means he built, this man who was such a good man before,
21 has suddenly turned into some kind of Frankenstein, and he's
22 built an entire case on a lie, on a fabrication, on the idea
23 that yeah, I did know, but I'm going to blame somebody else.
24 And so he drags his family through an ugly piece of litigation
25 that he knows he has no business bringing.

1 And for what? To make somebody else take the fall
2 for something that he knows was his own fault. That's what
3 they're saying. So his legacy to his family, even if he won
4 the case, would be ill-gotten gains. Well, if you think that,
5 turn us out in five minutes. Take less. Take one minute.

6 And his wife, you know? This daughter of a doctor,
7 well, she's part of the conspiracy, because she has to be a
8 liar, too, under their theory. Because she said I talked to my
9 husband, and he didn't know anything about any of this. We
10 were careful. So I guess that makes her a liar, too.

11 Where is the evidence supporting the character
12 assassination? Because that's what it is. According to the
13 defendant's son, he said I'll never forgive myself if this is
14 melanoma. Assuming he said that, of course, it's not
15 documented, you have to put it in context. Here's somebody
16 who's just been told he's got a skin cancer. All that he can
17 remember is this vague conversation on an airplane, sometime
18 back. At that time, he doesn't remember when it was.

19 So what does he learn later? He goes and he looks up
20 his records, and he realizes well, wait a second. This was on
21 our Disney trip in December '03, January '04. And I went to
22 Dr. Marcus before that. He looked at my back. I never heard
23 anything about it from that.

24 And then nine months later I went to Dr. Lockshin's
25 office and I asked the doctor, even though I was there for

1 cysts on my back, these eruptions, I asked him to do a whole
2 body check, just to make sure. And he decided not to take it
3 off. So he didn't do anything wrong. This is not a confession
4 of error.

5 During this entire time, he's seeing doctors. He's
6 not missing appointments. We don't just have Dr. Marcus
7 telling us he's a good, responsible patient. We also have Dr.
8 Michaels, the orthopedic surgeon that you heard from. The
9 friend, the employer of Barbara Semsker. He's the one who I
10 wrote all these items up there.

11 So where are the witnesses who say, you know, that
12 Richard Semsker, you couldn't trust him as far as you could
13 throw him? Where are they?

14 But we're asked to believe that because we are
15 doctors, we never make mistakes. And we don't ever fail to
16 tell people things, even when we're rushed and we're trying to
17 cram all these patients into our workday, by gosh, we never get
18 it wrong.

19 And the patients, they always understand exactly what
20 we say, even if what we say is very ambiguous. And it's their
21 fault if they don't understand.

22 That's why you have these checklists. That's why you
23 have these stamps. That's why you make sure patients, you
24 know.

25 You know, we've got to talk a little bit about Dr.

1 Albert. Obviously he's not as responsible as Dr. Lockshin. It
2 was his first day on the job. But he made a terrible
3 assumption, that he had no business making. He assumed that it
4 was a, quote, "congenital nevus." We saw the textbook. A
5 congenital nevus is a birthmark.

6 And Dr. Richardson told us you can't just assume that
7 because somebody can't remember when they didn't have
8 something, that doesn't necessarily mean that it's, (a) that
9 it's always been there since birth. And more importantly, it
10 doesn't mean it's been stable. Because to be a birthmark, to
11 be a congenital nevus, you've got to have that information
12 before you can safely know that it's okay just to leave it
13 there.

14 And what he should have done would have been very
15 simple, and also would have saved this man's life, even without
16 knowing the six millimeters, the change between the six and the
17 13. He should've said you know, you're coming back anyway for
18 three other things. Just to be safe, on this one on the lower
19 back, it's big enough now that its fits the D for diameter of
20 the A, B, C, D's. And you tell me, Mr. Semsker, that you don't
21 really notice it back there very much, so you can't tell me
22 that it's always been that size. So let's just be safe, and
23 let's just take it off. And obviously the patient would have
24 done that.

25 So let me just take a second.

1 Where is the bottom line in the case? We do not want
2 your sympathy. This family got plenty of sympathy at the
3 funeral, and thereafter when they sat shiva, all of that. The
4 reason this family came to court, the reason Richard started
5 this lawsuit, hired me, hired John, the reason Barbara took
6 over the case after he died, is something very simple. They
7 want justice. This shouldn't have happened. And there's only
8 one way we can do justice in the civil courts. And that's with
9 assessing the total of the harms that have been caused, and
10 balancing them out with money. That's all we have.

11 So let's talk about that. You know, I want to just
12 show you one thing Richard Semsker said, because this is an
13 important piece of his suffering that you heard about.

14 "That is just something that I really can't get past,
15 knowing that based upon my conversations with the
16 dermatologists and my oncologist, that if it had been caught
17 early and they had taken care of it, you wouldn't be where you
18 are today. And that, that just eats at me terribly.

19 "The other thing is knowing that I'm not going to be
20 here to grow old with my wife and my kids. You know, I look at
21 my, my grandfather is still living at 95. I have my parents
22 who are both in the mid-70s, and my in-laws in their mid-70s.
23 I mean I look at, you know, the life that they have now with
24 their spouses, and I'm not going to experience that. I'm not
25 going to be able to grow old with my wife and my kids. And

1 it's a very, very difficult thing to live with on a daily
2 basis."

3 You know, so how do you do it? How do you balance
4 that out?

5 I want you to read over the instructions carefully.
6 You will see that the scales of justice, when the Judge
7 introduces in the section that talks about the damages, once
8 you get there, it says that your award, and that's the only
9 thing I don't like on these damages is award. It's not like a
10 prize. It's not like a lottery. This is just pure justice.

11 But what it says is, quote, "It must adequately and
12 fairly compensate for what happened." To compensate is to just
13 balance out what happened.

14 And then I wrote these words. "Your verdict should
15 just be objective, logical, rational, and justifiable."

16 But to do that, you've got to consider a lot of
17 stuff. Because the people who wrote the wrongful death statute
18 for the State of Maryland said there are a lot of things that
19 have to be considered if you're going to do justice when
20 somebody has died wrongfully, due to somebody else's
21 negligence. And here's briefly what they are.

22 We have Barbara's mental anguish, her loss of
23 companionship. There are some other words I'm going to go back
24 to, to talking about in a little bit, because they're in the
25 statute. Meryl and Julia, to the same effect. Richard's

1 physical pain, his mental anguish, his disfigurement, his
2 humiliation.

3 And then the easier part is the economic damages, the
4 past and future financial support, the loss of services, the
5 medical and the funeral bills.

6 Now, I think a way to think about these damages,
7 especially Richard's own damages, is to put yourself back, I
8 put myself back on the night before August 3, 2006. And you
9 imagine a conversation with Richard Semsker. Richard, you're
10 going to see the doctor tomorrow, and he's going to find
11 something on your back that's been there for a long time. It
12 should've been taken off before. Now you're going to find out
13 that it's too late.

14 And you're going to find out that these doctors had
15 in their files the knowledge, that they threw stuff away, that
16 they broke medical ethics. Lots of bad stuff happened, and
17 that this should not have happened to you, Richard Semsker.
18 But there's nothing we can do about it, except to make up for
19 it later on down the road.

20 So here's the way it's going to work, Richard. Under
21 our system of justice that we've had for 200 years in this
22 country, the court system will call in a group of people from
23 the community, randomly chosen, a cross-section of the
24 community. They will sit as the enforcers of the standards for
25 patient safety, and as the people who measure the amount that

1 you and your family deserve to have.

2 They will be fair, because they're sworn to be fair.
3 They're sworn not to use any sympathy for either side on the
4 thing. That's just the way it is going to work.

5 And they will consider a lot of unpleasant things
6 that you are going to go through. And one of them, Richard, is
7 the knowledge that will eat at you, that this didn't have to
8 happen. And the knowledge in the last 14 months of your life,
9 Richard, that now that you're empty nesters with your wife,
10 you're not going to enjoy what all the other empty nesters
11 enjoy, which is the freedom to, you know, have more fun when
12 your kids aren't there.

13 And your girls, you know, they're not going to,
14 you're not going to be able to be there for their milestones,
15 their graduation. You'll get to the high school graduation,
16 but you won't get to the college graduation. You won't get to
17 the wedding aisle.

18 But they will be fair. They will consider all that.
19 I'm afraid you're going to have a heck of a lot of bad things
20 happen to you. You're going to be struggling to beat this
21 thing, and you're going to go at it with the same calm, and the
22 same kind of reliability of a good, compliant patient that
23 you've always done throughout your life. You're just going to
24 go see these doctors, and whatever they suggest to you, you're
25 going to do it.

1 So they suggest to you this extreme treatment, this
2 interleukin treatment at Johns Hopkins Hospital, where you have
3 to lie in a bed and have this stuff dripped into you, and watch
4 a clock and see when 20 minutes comes on, where the
5 uncontrollable shaking will start. And they'll put warm towels
6 on you because you'll be so cold, and they'll give you
7 morphine, but it still won't stop the pain. And you're going
8 to go through that 14 times, because you're going to try hard,
9 just like you've always tried hard, because you want to live
10 for your family.

11 And you're going to get bolts drilled into your head,
12 to get radiation to your whole brain. You're going to get a
13 gamma knife to your brain. Eventually, I'm afraid to tell you,
14 Mr. Semsker, that at the end it will, it's going to be so bad
15 that you will be shrieking in pain. And it'll be like this,
16 because you can't stop the pain, and the medicine can't stop
17 the pain in your head.

18 But they will consider it, because they are impartial
19 people, and they know that a peaceful, serene death is worth a
20 lot in this country. That's what we always say, well, at least
21 he went quietly. At least it was a peaceful death. And so to
22 make up for unfairly being deprived even of a peaceful death,
23 they will take that into account.

24 Otherwise, if they didn't take it into account, it
25 would be, to put someone negligently through 14 months of hell

1 would be the same as running them over with a truck and killing
2 them instantaneously. If you didn't count the fact that you
3 had the 14 months of the unnecessary suffering, if it doesn't
4 count for a lot, then it doesn't mean anything.

5 So what is a fair number for all these intangibles?
6 I'm going to leave that to you, but I'm going to give you some
7 ideas.

8 May I have that exhibit of the, the folded-up chart?
9 Remember the paper that was folded up, with the numbers on it?

10 UNIDENTIFIED SPEAKER: Thirty-nine, I think it was.

11 MR. MALONE: Thirty-nine. Sorry, I forgot to pull
12 this out earlier.

13 A handsome man. He was a handsome man, until he
14 became so bloated with all the pills. And a handsome family.

15 But how do you do justice? (Unintelligible) the
16 chart on the economic loss. And the economist did make a
17 mistake. I'm glad they caught it, and I'm glad we fixed it,
18 because we don't want one penny more than we're entitled to
19 under the law. This is justice. We don't want any extra money
20 for sympathy; just justice. We are asking for a lot, because a
21 lot has been taken. A lot has been destroyed. But if you go
22 back to your chart, you've got to balance it out.

23 So how do you do it? On this chart, we know that
24 working to age 67, as he told us he would likely work to
25 somewhere between 65 and 70. Now remember, this is a man who

1 started working with his grandfather, and his grandfather
2 worked into his 80s. And he says I'm not going there. But
3 between 65 and 70.

4 The reason the economist picked the number 67 is
5 that's where the penalty for Social Security stops, and where
6 you get full Social Security, so it's a reasonable number, 67.
7 And it's roughly \$1.8 million in financial support, and future.
8 And then for the last year of his life, when he worked all the
9 time but made only \$4,500, it's \$87,000, almost 88,000.

10 And then these, the thing that the economist can
11 quantify is these household services. But it's the most
12 piddling part of a husband being in a household, you know.
13 Although it's good, and it's something to consider, and it's
14 all in the instructions. But you know, doing the laundry,
15 taking the kids to school every day, doing all that other stuff
16 that he was there for every day, those are services that an
17 economist can quantify. What an economist cannot quantify is
18 all these non-economic damages for Barbara and the children.

19 Now, one thing, very simple, is to think of a
20 person's life as a circle, and how much is the earnings portion
21 of your life. Just as a portion of the week, a 40-hour work
22 week, if you do the arithmetic, is roughly a quarter of your
23 life during that week. So that's one way to think about it.

24 And then you've got to go on and consider what was
25 special about this man, not just any husband who's out there

1 working, but what was special about this man that makes their
2 loss so severe. This is a dad who was there for his daughters
3 every day, took them to school, did the homework with them,
4 looked online, and chided his daughter just a little bit when
5 she fibbed on what the results of the quiz were. And he saw
6 online that she only got a six out of 10, and she had said it
7 was an eight out of 10. And he told her, you've got to be
8 honest.

9 And having the dinners together, where everybody
10 talked about the highs and lows of their day. And his high,
11 according to his daughter Meryl, was always the fact that I'm
12 here at home with my family.

13 He's the guy who, and I'm sorry, this does affect me
14 personally. I knew him. But I'm trying to be objective, and I
15 am objective, I think. But I'll leave that for you to judge.

16 This is a guy who set up the, when they did a car
17 wash for a fundraiser for the team, he was the first one there
18 in the morning to set it up. He was the one who took it down.
19 Yet according to these people, with the character assassins
20 here, he was irresponsible.

21 He's the guy who drove an hour through a rainstorm to
22 deliver some car keys to the poms coach, so that she wouldn't
23 have to have the kids walk 100 yards through the rain to a
24 dormitory, and just left the car there in Baltimore and rode
25 back with his wife. This is a dedicated father.

1 So I think that's all there. It's a whole life that
2 you have to consider. The Judge told you, and you'll see it on
3 the instructions, 35 years that a husband of this age and a
4 wife of this age could have reasonably expected to live
5 together, just with a normal life expectancy. We're not
6 talking about living to 95, the way his grandfather has, but
7 just living an average, normal life expectancy. Thirty-five
8 years has been taken. You have to consider 35 years.

9 And you have to consider for these girls all that
10 they have lost with the special bond of the father. I did not
11 bring Julia into court. You heard how she has not been taking
12 this, that it's just been so difficult for her. She's had the
13 panic attacks. She couldn't go back to school at Syracuse.
14 Her mom had to drive her up there. She could not get on the
15 airplane. She needs justice, too, though. The only reason I
16 would have brought her into court, it just, it would have not
17 been right, so I didn't do it. If you think she should have
18 been here, hold that against me, not against her. She's, you
19 know from the evidence you've heard, that she's just as hurt as
20 her sister and her mother.

21 So here you have a case where all we want, ladies and
22 gentlemen, is your justice. And I thank you.

23 THE COURT: All right, ladies and gentlemen, we'll go
24 ahead and take a lunch break at this point. And I'll give you
25 an hour, and we'll resume at five minutes of 2:00. All right.

1 MALE CLERK: All rise.

2 FEMALE CLERK: Court stands in recess.

3 (End of requested portion of proceeding.)

4 REBUTTAL ARGUMENT BY PATRICK A. MALONE, ESQ.

5 Well, I guess the question is do you take little
6 snippets of things here and there, out of transcripts, and
7 little things here from the statute, and little things there,
8 or do you try to look at the big picture?

9 And what is your job? Is your job to take out
10 individual pieces of the jigsaw puzzle, or is it to look at the
11 whole thing and see what makes sense here? And who has met the
12 evidence standard that we have in this court, which is who is
13 more likely right than not? It's, you heard the judge say, and
14 you'll see in the instructions, the preponderance of the
15 evidence.

16 The plaintiff only has to tilt a little bit in their
17 favor. We think, of course, it tilts a lot in our favor. But
18 that's your standard. The only way you go to the defense is if
19 it's even, or if it tilts in their direction. But the
20 plaintiff doesn't have to prove every, each and every thing
21 beyond a reasonable doubt.

22 And why is that? It's because it's not a criminal
23 case. We're not putting anybody in jail here. We're not
24 trying to. We're trying to just get civil justice for a
25 family.

1 So when you look at the big picture, you have to ask
2 the big question. Did Norman Lockshin effectively convey to
3 this patient what he wanted to do, or not?

4 Or if you believe he did, then you have to believe,
5 boy, that patient, you know, he may have been diligent with
6 every other thing in his medical life. But for some reason he
7 learned about it, knew it, kept it in the back of his mind,
8 went to his internist, he never talked about it. Went back to
9 the dermatology practice, pretended he was a new patient, and
10 just totally ignored what he knew the advice was. So does that
11 make sense, on a preponderance of the evidence standard? Who
12 wins that one?

13 Or is it much more likely that a rushed doctor just
14 never conveyed it? Or whatever he said, he just chose not to
15 give the patient a second chance? Do patients deserve a second
16 chance?

17 And here's what, in effect, we seem to be hearing
18 from the defense lawyer. And I'm not going to accuse him of
19 insincerity. I don't appreciate being attacked. But whatever,
20 that's part of what we're here for, I guess. If you can't
21 pound on the evidence, you pound on the opposing party, I
22 guess.

23 So in effect what Dr. Lockshin is saying here is two
24 contradictory things. He's saying, hey, Mr. Semsker, listen
25 up. I'm going to say this once, and if you don't hear me,

1 you're never going to hear it again. So you'd better listen
2 this one time. You've got something on your lower back, and I
3 think it should be taken off. But by the way, no big deal.
4 Don't worry about it. Because the only reason I want to take
5 it off is because it's below your beltline. Well, you know,
6 below your beltline.

7 Let's see, where's that photograph of the cancer?
8 Here we go.

9 There we're talking Dr. Lockshin's credibility,
10 because you remember we had this on the screen during the
11 testimony of several witnesses. And here you have benign moles
12 all over the back. They're all below the beltline. Nobody
13 ever recommended that any single one of them be taken off.

14 Why would you ever recommend to take one off, out of
15 dozens? You'll see actually in these Washington Hospital
16 Center records, when they finally counted the moles on this
17 man's body, he had 80 or something.

18 Why, why would a doctor recommend that you take one
19 off? Well, on that occasion he had to have seen something that
20 worried him just a little bit. And he thought let's be safe,
21 let's take it off.

22 Now of course Dr. Lockshin would never admit that. I
23 asked him over and over and over. I said Dr. Lockshin, isn't
24 the only reason you take off moles, it's not the location by
25 itself. It's because it's a little bit of worry, might go bad.

1 So let's take it off. Oh, no, no, no, no. Only because it was
2 below the beltline. Of course that doesn't seem to count for
3 those other ones.

4 But what did the other witnesses say? Remember,
5 you've got to deal not just with snippets, but the whole case
6 here. Well, we had Dr. Hash on the witness stand.

7 And by the way, they're trying to attack Mr.
8 Semsker's credibility through Dr. Hash, who also told us that
9 he never undressed to the point that she even saw this lower
10 back mole, so she never talked to him about this mole.

11 But the tragedy was that whatever was said in the
12 fall of '04, the only thing that would have saved him at that
13 time was taking it off, not annual checks. That's why the
14 Judge told you annual checks are not in the case. It doesn't,
15 it wouldn't have mattered at that time. What would have
16 mattered is Dr. Lockshin, Dr. Albert, doing the right thing at
17 the right time.

18 But what did Dr. Hash tell us on that issue? She
19 said well, yeah, we biopsy moles because they might be
20 cancerous or precancerous. And I asked her, well, do you, you
21 wouldn't ever throw a mole in the trash? You would, wouldn't
22 you always send it to the pathology lab? Sure, of course we
23 send it to the pathology lab. Well, why do you send it to the
24 pathology lab? So they can look at it under the microscope.

25 And then they tell you it's totally benign, or they

1 tell you, you know, there's some funny little changes. Might
2 be dysplastic, you know, a little bit precancerous. Or they
3 tell you the worst news of all. But you always look at it
4 under the microscope, because you can't tell, looking at it
5 with the naked eye. That's why you err on the side of taking
6 it off.

7 Every other dermatologist who testified in the case
8 had to admit that. I asked not just Dr. Richardson. He said
9 he'd never heard of taking off a benign mole that you didn't
10 care about. You only take off moles that look worrisome.

11 But I also asked this fellow that they called from, I
12 think his name was Miller. He finally admitted, after hemming
13 and hawing and hemming and hawing, that yeah, we take them off
14 for cancer prevention. That's what moles are about is cancer
15 prevention. Dr. Albert said the same thing.

16 So whose credibility do you go with on that one? The
17 guy, all the other dermatologists, or the guy who says you
18 know, it's Mr. Semsker's fault for not paying attention to what
19 I said. But by the way, I didn't even mean it. It didn't
20 matter to me if they took it off. It was totally benign.

21 Okay. Now let's talk about the records. Well, I
22 complied with the Maryland law. You saw what the ethics code
23 said. You've got to comply both with the law and with medical
24 reasonableness.

25 And the simplest analogy I can think of is would

1 anybody drive 55 miles an hour in a heavy fog? Would anybody
2 drive 55 miles an hour when there's ice on the highway? And if
3 you get pulled over for that, are you going to say I'm
4 following the law? The law says I can drive 55 miles an hour.
5 Or do you have to pay attention to what's reasonable under the
6 circumstances?

7 Now the instruction you're going to read back in the
8 room, a very important instruction on what is negligence.
9 That's what this case is all about, is what is negligence.

10 Naturally, I don't have it here. Where is that
11 thing? Okay.

12 Negligence is doing something that a person using
13 reasonable care would not do, reasonable, doing something that
14 a person using reasonable care would not do. Or not doing
15 something that a person using reasonable care would do.

16 Reasonable care means that caution, attention, or
17 skill a reasonable person would use under similar
18 circumstances. Ah, yes, similar circumstances.

19 So you don't drive 55 in a fog, even if the highway
20 sign says so. You use, you look for what is reasonable under
21 the circumstances.

22 And then the next thing we heard about the records is
23 well, you could never throw away a record if you follow the
24 ethics code. Really? And how would you know? Well, I'll tell
25 you how you would know if a record's going to be of reasonable

1 value to the patient in the future. You sure don't delegate it
2 to your receptionist. What you do is you flip through your
3 records quickly. Do you see unfinished business? Do you see
4 moles that haven't been taken off, that might be worrisome?
5 All right, let's save this one. We might need it some day.

6 And by the way, a strange set of facts here. They
7 claim we had a right to destroy this record as of December 2,
8 2003. Okay, that's the fifth-year anniversary. He's back to
9 see them in about nine months.

10 We went into a little bit of detail about the
11 circumstances in the office, and we found out they had a front
12 room, and then when that would fill up, they'd have a back
13 room. And they had some boxes, and they were only indexed just
14 on the box lids. And then they had a shredder.

15 So supposedly, if you believe their story, this
16 record went from the front files, to the back files, to the
17 boxes, to the shredder, in nine months. That's a lot of moving
18 of files. So it's just not so, that all records would have to
19 be saved.

20 I could think of a record that could be thrown away.
21 I had acne as a teenager. A lot of us did. If that's all
22 that's in the file, sure, throw it away. Who cares? We're not
23 talking about cancer prevention. That's why they just don't
24 get it. You don't have a blanket throw-away rule. You use
25 medical skill and medical judgment to make the decision.

1 That's why it's not reasonable to just do something a blanket
2 way. You've got to look at what's reasonable under the
3 circumstances. And that's where they fell down.

4 Now another thing that we heard from the defense
5 attorney is, well, they're fine doctors, well, they are
6 reasonably competent doctors. You'd have to determine that
7 they were not reasonably competent.

8 Well, that's not quite right. We're not talking
9 about whether a, let's use our driver analogy. We're not
10 talking about whether somebody driving on the highway gets an
11 overall grade for their driving, over the last 10 or 20 years,
12 of A, or B, or C, or whatever. We're talking about whether
13 they ran a red light on a particular occasion. That's all
14 we're talking about.

15 And we apply the rules to what is reasonable, what
16 would have been reasonable under the circumstances. What would
17 a reasonable dermatologist in their shoes have done under the
18 circumstances? Would you give the patient one and only one
19 chance, and not ever remind them again? And would you then
20 throw away your memory bank? Is that what a reasonable doctor
21 would do?

22 Would you then assume that something that the patient
23 can't tell you exactly when he got it on his back, has been
24 there his whole life and it's a birthmark, when that's a
25 dangerous assumption, when it's bigger than the diameter that

1 you worry about?

2 Oh, I liked this one. The technology is rapidly
3 changing. I have a BlackBerry now. Hang on, ladies and
4 gentlemen. Back in 2003 and 2004, didn't we have scanners?
5 Didn't we have off-site storage facilities if we had to go that
6 far? Didn't we have a computer in Dr. Lockshin's office that
7 had a word processing program on it, that you could save your
8 old computer copy of your old letters on there, if you wanted
9 to?

10 But what did they tell us they did? For convenience
11 sake, we just saved, we would, next time we'd write the same
12 doctor, you know, we'd wipe out the, all this stuff and put in
13 some new content, hit the save button, and boom, it's gone. Is
14 that reasonable, when it'd be so easy to have saved it? To
15 have saved a life with a record?

16 He said, you know, on the witness stand, Dr. Lockshin
17 said I don't have a crystal ball. Actually, he did have a
18 crystal ball. He had it right there. You can see the light
19 shining. Take it off. Don't throw away the patient. Don't
20 throw away the patient's chances.

21 Now, I'm going to end now, and I'm just going to say
22 that you know, when all is said and done, this case is going to
23 be over for me, Mr. Levin, it'll be over for you. One person,
24 one family it's not going to be over for is Barbara and Meryl
25 and Julia Semsker. They have had a hole torn in their hearts,

1 that is not going to heal any time soon. You must consider, in
2 your verdict, you must measure that gap, and figure out how big
3 that hole is.

4 And so when you go home and you have finished your
5 work, you can say to your family, when they say well, what did
6 you do today, you can say you know what, I'm proud of what I
7 did today. I did justice. I voted to uphold patient safety
8 standards. I voted to put the patient first, instead of the
9 doctor's convenience. And so I'm proud that today I did
10 justice for a man who shouldn't have died, a fine man, and for
11 his family. Thank you.

12 THE COURT: Thank you, Mr. Malone, Mr. Levin.
13 Ladies and gentlemen, that concludes closing argument.

14 (End of requested portion of proceeding.)

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√ Digitally signed by Margaret V. Bierwirth

DIGITALLY SIGNED CERTIFICATE

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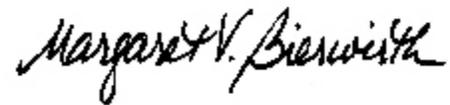
Civil No. 283674

BARBARA S. SEMSKER, et al.

v.

NORMAN A. LOCKSHIN, et al.

By:



Margaret V. Bierwirth
Transcriber

