

The Last Steak*

In Department 47 of the Bray Building, Judge Raymond Carlton reviewed his meticulous notes from *Serafina Abada and Edward Abada v. John Chambers, M.D.* in preparation for the motion for new trial. Three weeks earlier Judge Carlton imagined he had been observing Jack London's pugilist Tom King in a different arena, an aging warrior armed with words, not boxing gloves, mentally spent and bodily exhausted. Judge Carlton recently reread London's poignant short story "A Piece of Steak" about a graying, over the hill boxer named Tom King who tried to use his last ounce of experience to vanquish a youthful, strong opponent, to put food on the table for his family, to buy that nourishing piece of steak he so desperately needed before the fight and couldn't buy.

Plaintiff's attorney Frank McCauley was like King, a no-holds-barred brawler, in the twilight of his career, looking for one last victory. McCauley, now a seasoned, paunchy 71 year old, had fought in more civil trials than any other Contra Costa lawyer and needed his last piece of steak. Recent financial times had been hard on Frank McCauley -- the 2008 financial crisis swallowed up the equity in his home and depleted his 401(k). After leaving a five lawyer partnership during his tumultuous divorce, he had been in solo practice for a number of years and no longer had a line of credit left to finance cases. Time was running out. McCauley sensed this prize fight in Judge Carlton's courtroom was his last hurrah, a chance to walk away with hands held up in triumph, to grab the brass ring of a potential seven figure recovery, and help deserving clients.

The case management statement announced a ten day, grueling match. Settlement sessions before JAMS' best personal injury mediator could not settle the case. Dr. Chambers would not capitulate.

McCauley knew from his 47 years as a lawyer the most difficult case for a plaintiff to win was a medical negligence trial. The defense won nearly 90% of the time, especially before Contra Costa juries. And this time he was a 9 to 1 underdog facing the best lawyer from the top medical malpractice firm in the East Bay, ranked number one in the heavyweight division and 30 years his junior.

Brian Anderson was the Doctors Protective Insurance Company's Paladin, traveling to various Bay Area venues where he successfully defended a string of ten medical cases in four years. Berkeley Law School educated, Anderson was tutored by his older partners in the craft of defending doctors, divining the meaning of medical records, carefully constructing hypothetical questions understandable to lay people on the standard of care, and scripting an accused doctor in dress and language to transform a poor bedside manner into an engaging personality. Anderson took the art of defense several steps further with effective Power Point presentations, digitized records easily retrievable on his laptop, and three dimensional anatomical images that jurors could grasp. He personally trained an entourage of in-house paralegal medical assistants, graphic arts consultants, and associates with instant connection to

Online medical cases and medical books. The firm had easy access to a stable of leading defense experts from Stanford and UCSF medical schools.

McCauley was old school, using a trial binder indexed in topical hand written manila folders, his own highlighted, earmarked deposition summaries. His "PDA" was his longtime secretary, Joan, who knew how to subpoena witnesses and documents, prepare jury instructions and give him fresh black coffee in the late afternoon. She was a whiz with computer word processing and the latest digital advances.

Brian Anderson worked out regularly at the Renaissance Fitness Club to keep his body trim and mind sharp. He cultivated an appealing presence before jurors. Frank McCauley struggled with high cholesterol, high blood pressure, and high anxiety about the fate of Serafina Abada who needed a win as badly as McCauley did.

Two years before the trial, the Bar Association Lawyers Referral Service sent Edward Abada to McCauley for help with his wife's plight. No one else would take the case. The story was simple with a disastrous ending. Dr. John Chambers, board certified ob/gyn, admitted his patient Serafina Abada, age 58, in good health, to Central Valley Hospital for a routine hysterectomy for a uterus that had developed large polyps. Edward explained that after the uneventful surgery, his wife of 40 years, during post recovery lost consciousness. Now she was in a long term convalescent facility in a coma vigil, not comprehending, in need of twenty-four hour care. Her eyes were open to the movement of visitors, but without signs of recognition. Imprisoned in herself, Serafina had no response to external stimuli.

Edward and Serafina had been inseparable during their marriage. She prepared his breakfast every morning at 6:00am before he left for work as a truck driver for Federal Express. Now he faithfully stopped by each morning before work to feed his wife and to exercise her arms and hands for muscle therapy and to feel the touch of her soft skin that he knew so well. He returned after work to help feed and bathe his wife, not out of duty but from the love that flourished with forty years of memories and the hope she would somehow recover. Dr. Chambers had spent 10 minutes attempting to explain what might have caused the problem. Edward did not understand the explanation, and Chambers did not return any of Edward's later calls.

Although California law capped general damages for pain and suffering damages at \$250,000, the law allowed recovery of the cost of past and future medical care for Serafina, estimated to be over a million dollars, well beyond the limits of Edward's health insurance coverage for his wife. To obtain the humane, compassionate care Serafina required, McCauley had to win the case. Edward did not understand the legal nuances of loss of consortium, but McCauley knew it was priceless to him.

McCauley investigated the case. He obtained hard copies of the digital medical records and sent them to several consultant medical experts-- unshackled, retired doctors now willing to testify against members of the profession. The reports came back mixed with criticism of the differential diagnosis. Serafina had suffered an episode of extreme hyponatremia, a severe depletion of her electrolytes, particularly sodium. The confirming lab test was ordered after the operation. The recovery room nurses' entries and the progress note of the attending anesthesiologist did not shed much light on the cause. A neurologist's consultation note was inconclusive. Dr. Chambers' progress note, with an entry at 7:00pm after the procedure, was unusual in its length. It posited several theories for his unconscious

patient, and a battery of lab and neurological tests were ordered as well as a spinal tap and liver biopsy. Usually progress notes are short, rarely over a page, but Chambers' note was three and a half pages long with references to medical journals. The detailed exposition postulated several possibilities, including Reyes Syndrome that attacks the brain and liver and can lead to unconsciousness. McCauley learned from the note that Reyes syndrome is generally found in children, with aspirin involved, and rarely develops in adults. But some of the laboratory data was supportive of the Reyes Syndrome theory in Serafina's case. One of the experts McCauley consulted supported a case against Dr. Chambers' care, enough to warrant the filing of a complaint.

The depositions were difficult, like a twisting roller coaster ride plunging into darkness. Several long tenured Central Valley Hospital nurses testified about their urgent calls to Dr. Chambers' cell phone and answering service when the patient remained non responsive in the post recovery room. Cautious in their answers and protective of Dr. Chambers, they assumed the doctor received their call because his progress note indicated an examination time of time of 7:00pm, although none of those who were deposed remembered talking to him. Like good soldiers they circled the wagons.

In an all day deposition, Dr. Chambers treated McCauley with condescension as he used his progress note as a script to carefully explain a medical quandary. Anderson guided Dr. Chambers through the shoals, with speaking objections, lifelines, and strategically timed recesses to control the deposition. McCauley, however, treated the deposition as a sparring session to size up his adversary. Dr. Chambers was self-confident but combative and defensive. As McCauley, wet with perspiration, drove back to his office after the deposition, he felt in his gut that Chambers was hiding something. In his forty-seven years as a plaintiff's attorney McCauley had never seen such a detailed, annotated progress note. Despite that note, McCauley instinctively knew Serafina deserved better.

The discovery preliminaries led to stepped up trial preparation, and then to the Monday morning 9:00 am call for the jury to Department 47 for the main event. McCauley was satisfied with the seven men, five women jury and only used three peremptory challenges. Anderson used all six of his peremptories. None of the jurors showed an inclination to subjectively favor a professional in a caring profession over the plaintiffs.

McCauley realized the case was closer than the odds. Edward was a sympathetic, appealing witness. Serafina's condition and the need for lifetime care weighed in their favor, but the medical complexity and Dr. Chambers' well-versed experts in contrast to the plaintiffs' one retired gynecologist expert tilted the odds toward the defense. McCauley knew the case ultimately rested on whether the jury trusted Dr. Chambers.

A hard copy of the digitized hospital records with the original digital record was received into evidence as plaintiff's exhibit 1 and 1a. Most of the jurors took notes and placed them in their own confidential binders at the end of the day for safekeeping by the bailiff. The jury wanted to do what was right.

Both attorneys were in their best form in opening statements, and direct and cross-examination of witnesses. The trial progressed with blows and counter blows and some carefully timed uppercuts.

There were few clinches. Anderson grabbed the jurors' attention with a multimedia presentation of digital exhibits, deposition excerpts placed on video screens, and medical graphics worthy of Madison Avenue. McCauley countered with incisive, understandable questions honed from years of practice. Edward left some of the jurors with tears in their eyes as he explained how much he loved Serafina, how he helped care for her each day, and how lonely he felt in his empty home.

Exuberant youth appears brighter than fading age. During the noon recess each day, McCauley washed his face with cold water to appear revitalized and changed into a fresh dry dress shirt that Joan put in a separate "to do" briefcase. He did not want Anderson or the jury to know how old he felt or how tired he was.

Judge Carlton could feel the tension as each side pressed forward without producing any knockdowns. The judge denied the defense motion for a nonsuit after McCauley rested his case. McCauley watched the jurors' reaction during his presentation, worried that he had not been persuasive enough and was behind on points. McCauley knew somehow he would have to come from behind during the defense case. Examination of the defense witnesses went as McCauley generally expected. The defense experts held their ground with a few concessions as they used Chambers' progress note to justify his judgment. McCauley could see that Anderson was laying the groundwork for a devastating, dual defense from the standard jury instructions: a doctor is not necessarily negligent if his efforts are unsuccessful or if he makes an error that was reasonable; and he is not necessarily negligent because he chooses one medically accepted method of treatment or diagnosis and it turns out another medically accepted one would have been a better choice. The court recessed early for the day at 3:00pm, in the ninth round, with McCauley on the ropes as the bell sounded. The last witness in the last round was Dr. Chambers at 9:00 am.

In the corner of the empty courtroom, Frank McCauley tried to regroup and again studied the timeline from the notes, orders, and lab results, from the time of admission to the post-operative recovery room through the next day. Something wasn't right. He called Joan to discuss some last minute jury instructions and shared his misgivings with her. As he explained the time line of events, she asked him if he had verified all of the times from the metadata on the original digitized hospital records. He knew from his classic Greek course at Santa Clara "meta" meant "with," or "among," and could be used to mean something "new." But what was metadata? Joan explained that besides the images of the entries in the records, the original disc, exhibit 1a, would also contain additional imbedded data showing the precise dates and times when entries were made, and by whom. While McCauley waited nervously in the courtroom, Joan contacted a computer specialist who arrived at the Bray Building at 4:30pm with a retrieval application for accessing the digital record, exhibit 1a. The result was stunning. Although Dr. Chambers had entered the time of his examination conveniently close to the nurses' call to him, the metadata showed his long entry was actually made hours later at 9:58pm. Chambers had not responded to Serafina's plight in a timely manner as he said under oath in his deposition. He was not at the hospital when she needed him most and the staff was relying on him for follow up care. His note was a lie, a cover-up.

As the bell for the final round sounded, a self-confident Dr. Chambers looked directly at the jurors, answered Anderson's carefully prepared questions, and used Power Point displays to explain the conundrum that confronted him after the hysterectomy and why the mysterious Reyes' Syndrome might have been the culprit.

Fear of losing emboldened McCauley who devised a cross-examination limited to twenty-five minutes, to maximize the impact of what he wanted to accomplish. He summoned up the strength for one final round. Dr. Chambers had no choice but to agree that a doctor's progress notes must be accurate, including the time specified, because nurses and other doctors rely on the continuity of notes for proper patient care. Hippocrates would have demanded nothing less. The jurors looked at their copies of the progress note as McCauley committed Chambers to the 7:00pm entry. Then the old fighter held up the digitized original and bore in on the defendant with the pivotal question. "Doctor, if you were at the patient's side at 7:00 pm, why does the original digital time from the records department show your own entry at 9:58 pm?" A basic trial rule is never ask an opposing witness "why;" but this question was like a taut vise squeezing Chambers, and proved the exception to the rule.

Dr. Chambers looked like a leaf falling from a sudden gust. The silence was agonizing as he struggled to explain the discrepancy. He could not rest on the ropes or clinch his opponent. Anderson called for a short recess, but Judge Carlton denied the request. Jarred by a quick flurry of follow up punches, Dr. Chambers was forced to admit he left the hospital after the operation and was at an important social event because he did not expect any complications after an uneventful procedure on a healthy patient. He missed the calls for help, and when he later found out what was happening, prepared the long note with researched citations to Reyes Syndrome because he indeed believed it was the cause. Apologetically he asserted it would have made no difference if he had been at Serafina's bedside and tried to explain why. A reeling Anderson attempted to counterpunch from the stunning blow by developing the same theme in his rehabilitative redirect examination. McCauley asked no more questions. The defense rested. Closing arguments commenced.

Anderson forcefully argued lack of causation and failure of proof to the jury. No one really knew what caused the coma, and certainly Dr. Chambers' absence and improperly timed entry made no difference. Like a medical school professor Anderson took the jury through the records and testimony that supported his fall back defenses. The jury remained attentive. On rebuttal, McCauley delivered a final blow with a quote from Hippocrates and the commandment "Thou shall not bear false witness."

Everyone in Department 47 waited anxiously for the jury's decision as the foreperson as part of the legal ritual handed the signed form to the bailiff to give to the judge for his review, and then on to the clerk. The clerk's voice reverberated as she announced the verdict: "We, the jury, find in favor of plaintiffs in the sum of \$1,790,975."

Three weeks later, as he reflected on the trial, Judge Carlton concluded twelve jurors saw Dr. Chambers played with the truth and failed Hippocrates' imperative, "Do no harm." Dr. Chambers' fabricated note, his absence during a critical time of need, and his seemingly contrived Reyes Syndrome explanation were decisive. Judge Carlton denied the motion for new trial.

Frank McCauley earned that last piece of steak.

*By Justice James Marchiano (ret.)