SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

Edward C. Gill, Esquire
P.O. Box 824
Georgetown, DE 19947

Mary E. Sherlock, Esquire
8 The Green, Suite 4
Dover, DE 19901

Re: ***O'Riley v. Rogers***
C.A. No. S08C-07-020 RFS

Upon Defendant's Motion for New Trial.
Granted in Part. Denied in Part.

Submitted Date: May 4, 2011
Decided Date: August 30, 2011

Dear Counsel:

Defendant Shawn Rogers ("Rogers") has moved for a new trial under Civil Rule 59(a). Plaintiff, Scott O'Riley ("O'Riley") obtained a judgment against Defendant, Shawn Rogers ("Rogers") in the amount of $292,330. The damages were for personal injuries suffered in a motor vehicle accident on September 18, 2006.

A transcript of the trial was obtained. Oral argument was held last April.

Following review, a new trial is granted on the issue of damages only. Other motions filed by the defense are moot.

The accident happened at the intersection of Old Furnace and German Roads near Seaford, Delaware. Plaintiff was lawfully stopped on German Road. He observed Defendant's truck driving to the right side of another vehicle on Old Furnace Road at a high rate of speed. As a result of the swerve, the Defendant struck the rear of Plaintiff's truck. The driver of the other vehicle was named George Dilks ("Dilks").

Although the impact was forceful, O'Riley did not require immediate treatment. However, he developed pain, and he was referred to an orthopedic surgeon, Dr. Paul Harriott. Dr. Harriott's testimony was taken by deposition. He was the principal medical expert on the extent of Plaintiff's injuries.

Dr. Harriott testified that Plaintiff suffered injuries to his left upper extremities. They included injury to the cervical area, shoulder, and elbow. Pain and numbness radiated to O'Riley's left hand. The shoulder injuries healed. However, Dr. Harriott found permanent injury to the elbow and to the left hand with its numbness and pain.

Plaintiff and his daughter testified as to the effect of these injuries on his lifestyle. His relationship with his children was impaired, and he suffered depression. Activities and household chores changed for the worse. Fortunately, Plaintiff was able to resume work as an HVAC contractor. It required strenuous physical activity.

At the time of trial, Plaintiff was not medically restricted. His life expectancy was estimated to be 32.4 years. From the accident date of September 18, 2006 until trial on December 7, 2009, approximately 3.25 years had passed. The jury award of $292,330 reflected the multiplication of $8,200 per year over 35.65 years.[1]

The permanent nature of the injuries was the critical element for this verdict. Dr. Harriott testified that his diagnosis of permanent injury would be more definitive if Plaintiff had an Electromyography ("EMG") examination.[2] An abnormal EMG would be evidence of an impaired nerve root. Potentially, treatment could minimize problems caused by an impinged elbow nerve. Depending on the EMG result, a Magnetic Resonance Imaging ("MRI") test might also be indicated. Dr. Harriott desired further information because the source of the radiating pain and numbness was not certain. It was either from the elbow or neck.

To complicate matters, Plaintiff broke his neck while in high school. A cervical fusion was done with good results. Unfortunately, the accident with Rogers aggravated an arthritic condition in the neck.

The defense argued that Plaintiff failed to mitigate damages. Plaintiff did not complete two prescribed periods of physical therapy. The first period ended prematurely

---

[1] *O'Riley v. Rogers*, C.A. No. S08C-07-020, Stokes, J. (Letter Order) (Dec. 16, 2009).

[2] An EMG is an objective diagnostic test, and medical opinions of permanent injury may be based on the test to a reasonable degree of medical probability. *Espinal v. Ragland*, 2010 WL 289105 (N. J. Super. Ct. App. Div.)

because Plaintiff experienced chest pain during a session. A catheterization was necessary, and Plaintiff did not feel well enough to immediately resume therapy. The Rogers accident did not cause heart trouble as Plaintiff had chest and arm pain beforehand. O'Riley terminated another period because he needed income from work.

Although Dr. Harriott recommended that an EMG test be done, Plaintiff did not have enough money to cover the $2100 cost. Usually, no fault insurance, Personal Injury Protection "(PIP") benefits, would pay for an EMG. However, Plaintiff's belief was that his PIP benefits were exhausted. His counsel gave him this advice.

Whether or not Plaintiff had PIP available to pay for the EMG is not crystal clear. He was driving a company truck, and it had $15,000 limits. Two different adjusting companies were involved. There was conflicting testimony about when certain payments were made. It appeared that approximately $4,000 for lost wages was paid for PIP coverage after the time Dr. Harriott recommended an EMG. The $15,000 limit was used for medical expenses including disbursements for Dr. Harriott, physical therapy, and lost wages.

Ultimately, the jury had enough information to conclude that damages should not be reduced for failure to mitigate. A jury could find that Plaintiff acted reasonably in not completing the physical therapy regimen because of his heart problems and need to work. A jury could determine that Plaintiff could not afford an EMG and that Plaintiff

reasonably believed PIP coverage was not available.[3]

A plaintiff must exercise reasonable care to reduce damages resulting from an injury including reasonable medical treatment and tests.[4] Defendant has the burden to show "both the unreasonableness of the victim's refusal of treatment and the consequent aggravation of injuries."[5] Generally, the failure to mitigate damages is an affirmative defense.[6] Consequently, the burden of proof would be on a defendant.[7]

Moreover, there must be competent proof of causation, that is, if a plaintiff followed a medical option, the condition would improve.[8] Where the consequences of a failure are obvious and commonly known, expert testimony is not necessary to establish causation. For example, a patient's failure to take prescription medications can routinely

---

[3] 3 Stein on Personal Injury Damages Treatise § 18:7. (3rd Ed.).

[4] Del. P.J.L. Civ. § 22.4 (2000); 3 Stein on Personal Injury Damages Treatise § 18:4. (3rd Ed.)

[5] DAPFA § 19.18.

[6] *Tanner v. Exxon Corp.*, 1981 WL 191389 (Del. Super.) (observing that "[f]ailure to mitigate damages is an affirmative defense, and the burden of proving the failure falls upon the defendant."). *Tanner* was based on breach of contract, but nothing limits the rule to contract cases. Indeed, in personal injury litigation, states which generally follow federal rules of procedure have found mitigation of damages to be an affirmative defense as ". . . any other matter constituting an avoidance or affirmative defense." *See also* Super. Ct. Civ. R. 8(c). 22 Am.Jur.2d § 698; 61 Am.Jur.2d § 318 (2nd Ed.).

[7] 61A Am.Jur.2d § 280 (2nd Ed.).

[8] 3 Stein in Personal Injury Damages Treatise § 18.10 (3rd Ed.)

be seen to cause or prolong infection. A defendant should not have responsibility for damages that a reasonable person could avoid through medication.

Other circumstances may require a competent expert opinion. Where an argument is made that a plaintiff should have undergone an invasive but beneficial procedure there must be appropriate medical testimony. Bright lines are hard to draw. Practitioners sometimes seek to elicit favorable opinion on cross examination of an opponent's expert, rather than calling their own expert. But this effort is risky if the responses are not adequate, and the party has not retained a defense medical expert, as occurred here.

Where expert opinion is required, the quality of the evidence must be to a reasonable degree of medical probability. Traditionally, medical opinions must satisfy this standard in Delaware.[9] Possibilities are speculative and a doctor's testimony that a certain thing is possible is not evidence at all.[10]

On the morning of trial, part of Dr. Harriott's deposition testimony was stricken *sua sponte*. Trial evidence must be properly presented even without an objection.[11] The excluded part was defense cross examination of Dr. Harriott. Both questions and answers

---

[9] *See, e.g., Kardos v. Harrison,* 980 A.2d 1014, 1017 (Del.2009); *Rizzi v. Mason*, 799 A.2d 1178, 1185 (Del.Super. 2002), *aff'd, Mason v. Rizzi*, 2004 WL 439690 (Del.); *Christina School District v. Reuling*, 1990 WL 725598 (Del.); *Floray v. State*, 720 A.2d 1132 (Del. 1998); *Riegal v. Aastad*, 272 A.2d 715, 718 (Del. 1970).

[10] *Oxendine v. State*, 528 A.2d 870, 873 (Del. 1987).

[11] *State Highway Department v. Buzzuto*, 264 A.2d 347 (Del. 1970).

were couched in terms of possibilities rather than probabilities. At first blush the cross examination appeared to seek substantive opinions.

The stricken testimony was:

Q: And is it possible, Doctor, that his symptoms may improve, depending on the treatment protocol?

A: Very possibly might . . .

Q: So it's possible at least that the numbness and some of the subjective pain symptoms may not be permanent in nature, depending on future treatment protocol?

A: It's possible, yes.

My impression was that the defense was attempting to establish that Plaintiff's injuries could have been avoided by taking the EMG and that his physical condition would have improved. The proffered evidence would not support a mitigation of damages defense in that aspect.

However, cross examination has an impeaching quality of testing the basis of expert opinion and whether possibilities were considered. The jury understood that an EMG was desired, and the jury knew Dr. Harriott wanted more information for a definitive diagnosis. A jury was tasked with measuring the depth and credibility of the permanency opinion. But the jury was not told that the injuries may not be permanent in

nature depending on future treatment protocols. Without straightforward information, Dr. Harriott's opinion was not fully tested, and the jury may have given it more weight than it deserved.

Upon review, this testimony should have been presented. Its exclusion was not harmless given the prominence of Dr. Harriott's opinion. Defendant was prejudiced.[12]

Furthermore, Defendant argues that a new trial should be granted on liability because Dilks was dismissed by Plaintiff before closing arguments. As indicated, Dilks was driving a truck on Old Furnace Road. He was ahead of Defendant. Dilks intended to turn right onto German Road where Plaintiff was stopped. Defendant drove to the right side of Dilks' truck and hit the rear of Plaintiff's vehicle.

Before trial, Plaintiff served the complaint on Dilks and obtained a default judgment for his failure to answer. The trial was Plaintiff's opportunity for an inquisition on damages. The defense did not serve a cross claim for contribution. Service is required under Civil Rule 5(a). It was dismissed before opening statements.

Thereafter, the defense wanted to limit Dilks' role only to damages and not liability questions. The Plaintiff took no position. Initially, the defense objection was that Dilks' role would unduly prolong the trial. This point was tenuous given the limited number of witnesses. Because Dilks' responsibility to Plaintiff's claims depended upon proximate

---

[12] *AT&T Wireless Services, Inc. v. Castro*, 896 So.2d 828 (Fla. Dist. Ct. App. 2005) (permitting wide latitude in cross examination includes the ability to question on possibilities rather than probabilities to test the integrity of a medical expert's opinion).

cause and damages, Dilks was given the opportunity to question Plaintiff, Plaintiff's daughter, and Defendant. Dilks wanted to be heard on these points and he was a party.

When the closing instructions were considered, a joint and several tortfeasor's instruction could not be given. Plaintiff was still seeking a judgment against Dilks. Because of the posture of the case, Plaintiff chose to dismiss Dilks. Technically, although there could be no joint and several instruction, the jury could have been instructed to return one judgment for Plaintiff, Dilks, and Rogers. The apportionment of responsibility between Dilks and Rogers was not relevant at that juncture. Even a defendant with one-percent or less negligence would have complete responsibility to a plaintiff. The Plaintiff had concerns whether Dilks should remain a named defendant and might delete the strength of his case. At that point, the decision to dismiss Dilks or not was for Plaintiff's counsel to make alone. Indeed, Defendant could not and did not object.

Thereafter, the jury was instructed not to speculate on the reason for Dilks' dismissal. No contemporaneous objection was made about the Court's instruction nor was other language suggested. Nothing was offered to modify the instruction as given. Any complaint on the instruction was waived.

As to liability, the jury was instructed that Plaintiff had the burden to prove all elements of the negligence case, concurrent causes, and all other aspects of a typical personal injury case. Instructions were given about the affirmative defenses of

unavoidable accident and emergency.

The jury could, and did, find that Defendant was negligent irrespective of Dilks' role. Defendant pled guilty to inattentive driving. The jury could reject his intention to contest the ticket. On cross examination, Rogers acknowledged partial responsibility. Defendant argued to the jury that both Dilks and Rogers were honest. Further, Rogers' attorney questioned witnesses about whether Dilks did or did not have on his right-hand turn signal in order to show Dilks' negligence. Defense counsel also asserted in opening and closing statements that Rogers was not negligent but acted reasonably in response to a sudden emergency created by Dilks' failure to put on his right-hand turn signal.

The jury had ample reasons not to credit the affirmative defenses. The Defendant deviated from his pretrial deposition by understating his speed and exaggerating the distance of his vehicle behind Dilks truck. In effect, defense counsel tried the case as though there was no default against Dilks and as though the cross claim remained to be proved.

In this letter opinion, only properly made trial objections are considered. Different positions asserted in post trial briefing have been waived. Consequently, the motion for a new trial is granted as to damages but denied as to liability as Defendant was not prejudiced.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv
cc: Prothonotary