2013 PA Super 320

MARGO POLETT AND DANIEL POLETT Appellees v. PUBLIC COMMUNICATIONS, INC., ZIMMER, INC., ZIMMER USA, INC., AND ZIMMER HOLDINGS, INC., Appellants	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1865 EDA 2011

Appeal from the Judgment Entered June 10, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No. 02637, August Term 2008.

BEFORE: BENDER, P.J., FORD ELLIOTT, P.J.E., BOWES, J., GANTMAN, J., DONOHUE, J., SHOGAN, J., LAZARUS, J., OLSON, J., and WECHT, J.

DISSENTING OPINION BY WECHT, J. **FILED DECEMBER 20, 2013**

Following careful review, I am unable to join the learned majority's decision, which vacates the lower court's judgment and remands this case for a new trial. Accordingly, I respectfully dissent.

The majority aptly summarizes the history of the case. Maj. Op. at 1-3. I need not repeat that history here.

Appellants' first two issues relate to their motion for JNOV. I join the majority in its disposition of those issues.[1]

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[1] I follow the majority's reordering of Appellants' six issues. Maj. Op. at 4-5.

The third issue raised by Appellants relates to the trial judge's jury instructions. Appellees assert that the issue is waived. I join the majority in concluding that the issue is not waived. Yet, I disagree with the majority's determination that the causation instruction was fatally infirm. As I explain below, I would decline Appellants' invitation to mandate a new trial by reason of the trial court's jury charge.

Appellants' fourth issue challenges Dr. Booth's expert testimony on causation. I join the majority in finding that the expert testified with sufficient certainty. However, the majority finds reversible error in the trial court's refusal to bar that expert testimony for violation of Pa.R.C.P. 4003.5's disclosure mandate. For the reasons that I detail below, I differ with the majority's disposition of this issue.

Appellants' fifth issue relates to the tolling agreement executed between Appellees and Dr. Booth in his capacity as Mrs. Polett's treating physician. I would affirm the trial court's decision to exclude the agreement from the trial evidence.

By virtue of these holdings, I would reach Appellants' sixth issue, wherein Appellants challenge the denial of their request for remittitur. As discussed below, I would affirm the trial court's ruling in this regard as well.

JNOV

I join the majority's holding that the trial court did not err in denying Appellants' motion for JNOV. I agree that Appellees presented sufficient

evidence that the exercise bike was a substantial factor in causing Mrs. Polett's injuries. I also join in affirming the trial court's ruling that the general risk of harm from use of the exercise bike was reasonably foreseeable to Appellants. Maj. Op. at 6-12.

Jury Instructions

I agree with the majority that Appellants' challenge to the causation jury instruction is not waived. ***See*** Maj. Op. at 13-15. However, I disagree with the majority's treatment of the merits of that challenge.

In the context of jury instructions, we will grant a new trial only if the charge, viewed in its entirety, was "unclear, inadequate, or tended to mislead or confuse the jury." ***McSorely v. Deger***, 905 A.2d 524, 532 (Pa. Super. 2006). It is clear beyond peradventure that we are not free to view the challenged instruction outside the context of the entirety of the charge. ***Id.*** We also are bound to remember that the trial judge enjoys vast discretion in her choice of language, so long as the charge conveys the appropriate law. ***Id.*** Moreover, we do not reverse a trial court for "isolated inaccuracies" in the jury charge. ***Butler v. Kiwi, S.A.***, 604 A.2d 270, 273 (Pa. Super. 1992).

Causation was contested at this trial, with both parties offering expert testimony. At the charging conference, Appellants' counsel agreed to an instruction that would state that the jury could not speculate on any fact. N.T., 2/18/2010 (a.m.), at 44-45. Appellees' counsel, however, requested a

more detailed speculation instruction because Appellants' expert had not testified to a cause for Mrs. Polett's injuries other than the exercise bike. N.T., 2/18/2010 (a.m.), at 46. Appellees' counsel was concerned that Appellants' counsel would argue in closing that other events caused the injuries despite the fact that there was no causation evidence specifically supporting such a theory. N.T., 2/18/2010 (a.m.), at 46-47. Following a discussion of the proposed speculation charge, the trial judge declined to give the instruction. N.T., 2/18/2010 (a.m.), at 49. Appellees' counsel again raised the concern that Appellants might argue that there were other causes, whereupon the trial judge decided to take the issue under advisement, assertedly in order to allow review of the issue after closing arguments. N.T., 2/18/2010 (a.m.), at 51.[2] Due to timing issues,

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[2] Appellees' counsel argued that a speculation charge should be given because Appellants' counsel should not be permitted to argue that something other than the bike caused Mrs. Polett's synovitis, in view of the fact that Appellants' expert testified that the bike was the cause of that condition. Appellees' counsel made clear that he was not requesting an instruction tantamount to a directed verdict on causation, nor one that shifted the burden. N.T., 2/18/2010 (a.m.), at 45-47. After hearing from both sides, the trial judge said, "So I'm not going to read the [speculation] charge as given." N.T., 2/18/2010 (a.m.), at 49.

Appellees' counsel then inquired whether Appellants could argue that there was some other cause. The court agreed that Appellants could not do so. Significantly, Appellants' counsel said, "They're not going to." N.T., 2/18/2010 (a.m.), at 49.

After continued discussion, the trial judge said, "If there's an issue, then I'm going to hold this under advisement. . . . And let's see how the
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Appellees' counsel suggested that the court charge the jury prior to closing arguments. Appellants' counsel concurred. N.T., 2/18/2010 (a.m.), at 52-53.

The trial court agreed, and then gave its charge, including instructions concerning the burden of proof of each party with respect to claims asserting Appellants' negligence and Mrs. Polett's comparative negligence. N.T., 2/18/2010 (a.m.), at 73-77. The court did not give an instruction on speculation. After a lunch recess, a different attorney made the closing argument for Appellants.[3] Following (and in view of) that argument, the trial judge determined that she did in fact need to give an instruction on speculation. N.T., 2/18/2010 (p.m.), at 104. The judge instructed the jury that it needed medical testimony to find that something other than the bike caused Mrs. Polett's injuries, and that the jury could not speculate as to other causes. N.T., 2/18/2010 (p.m.), at 105. When viewed in developed context (as our law requires), although this instruction came later in time, it

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closings go for both sides . . . . So let's see how that goes." N.T., 2/18/2010 (a.m.), at 51.

[3] From the transcript, it appears that the attorney who made Appellants' closing argument was not present at the charging conference. While no one noted that lawyer's absence, there is no record of him speaking during the charging conference. Later, after Appellants' closing, the judge indicated that she had thought that counsel who participated in the charge conference for Appellants would convey the judge's warning about speculation to his colleague, N.T., 2/18/2010 (p.m.), at 104. This also suggests that the lawyer who closed for Appellants was not present at the charging conference. Representations made at oral argument *en banc* confirmed this.

constituted no more than a warning that the jury must not speculate as to the causes of Mrs. Polett's injuries, but instead should rely solely upon the evidence presented.

We have observed:

> [A] jury of laypersons generally lacks the knowledge to determine the factual issues of medical causation. . . . In such cases, the cause and effect of a physical condition lies in a field of knowledge in which only a medical expert can give a competent opinion .... Without experts we feel that the jury could have no basis other than conjecture, surmise or speculation upon which to consider causation.

Grossman v. Blake, 868 A.2d 561, 567 (Pa. Super. 2005) (internal citations and quotation marks omitted). Appellees offered expert testimony on the medical cause of Mrs. Polett's injuries. Appellants countered that, notwithstanding this expert testimony, Appellees failed to meet their burden of proof. Appellants argued that Appellees demonstrated insufficient causal connection between Appellants' actions and Mrs. Polett's injuries. Appellants used Mrs. Polett's other activities to undermine her expert's testimony on causation. Each of these defense tactics was proper. Conversely, Appellants were not free to rebut Appellees' evidence of causation with mere speculation.

The majority holds that the trial court's speculation instruction improperly shifted the burden of proof to Appellants. The majority characterizes that instruction as temporally "isolated" from the rest of the court's instructions, and concludes that the isolation "improperly focused the

jury's attention" on what the majority deems an incorrect burden of proof. Maj. Op. at 18.

The majority's holding itself is isolated from the full trial context. First, it bears noting that the lower court charged the jury on the burden of proof thoroughly, as follows:

> In a civil case such as this the plaintiff has the burden of proving those contentions which entitle them to relief. When a party has the burden of proof on a particular issue, the party's contention on that issue must be established by a fair preponderance of the evidence. The evidence establishes a contention by a preponderance of the evidence if you are persuaded that it is more probably accurate and true than not.
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> So think of a balance scale, and that's the kind of scale with a pan on each side. Okay? On one side of the scale place all of the evidence that you find favorable to the plaintiffs. On the other side, place all of the evidence that you find favorable to the defendants. If after considering the comparable weight of the evidence you feel that the scales tip ever so slightly or to the slightest degree in favor of the plaintiffs, your verdict must be for the plaintiffs. If the scales tip in favor of the defendants or if they're equally balanced, then your verdict must be for the defendants.
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> In this case Margo and Dan Polett have the burden of proving that the defendants were negligent and that their negligence was a factual cause in bringing about the damages claimed. If after considering all of the evidence you feel persuaded that these propositions are more probably true than not, then your verdict must be for the plaintiffs. Otherwise, your verdict must be for the defendants, PCI and Zimmer.
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> * * *
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> The defendants claim that the plaintiff was negligent and that the negligence was a substantial factor causing the plaintiff's injury. The burden is not on the plaintiff to prove her freedom from negligence and, that is, she does not have to prove that she was not negligent. The defendants have the burden of proof by a fair preponderance of the evidence that the plaintiff was

> negligent and that the plaintiff's negligence was a substantial factor of her injury.
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> You must decide whether defendants have proven that the plaintiff under all the circumstances failed to use reasonable care for her own protection.

N.T., 11/18/10 (p.m.), at 73-74, 76-77. This instruction provided an accurate statement of law. The majority does not suggest otherwise. I am unconvinced that the subsequent short instruction on speculation, considered in the context of the entire trial record -- and particularly the colloquy at the charge conference, the closing arguments of Appellants' counsel, and the court's longer and more detailed instructions on burden of proof -- impermissibly shifted that burden.

Indeed, even if the additional instruction fairly could be construed to suggest some shift in the burden, this would not demand vacatur of judgment and remand for a new trial. We cannot view the speculation instruction outside the context of the entire charge, which clearly articulated the burdens of proof. Nor will we reverse on the basis of "isolated inaccuracies" in the charge. ***See Butler***, *supra*. We do not demand a perfect or immaculate instruction, on pain of vacatur. The cases are legion. ***See, e.g., Cooper ex rel. Cooper v. Lankenau Hosp.***, 51 A.3d 183, 187 (Pa. 2012) ("In reviewing a challenge to a jury instruction, the entire charge is considered, as opposed to merely discrete portions thereof. . . . Trial courts are given latitude and discretion in phrasing instructions and are free to use their own expressions so long as the law is clearly and accurately

presented to the jury."); ***Boutte v. Seitchik***, 719 A.2d 319, 324-25 (Pa. Super. 1998) ("A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission which amounts to fundamental error. A reviewing court will not grant a new trial on the ground of inadequacy of the charge unless there is a prejudicial omission of something basic or fundamental."); ***Havasy v. Resnick***, 609 A.2d 1326, 1335 (Pa. Super. 1992) ("The trial court has wide latitude in formulating its charge so long as it clearly and adequately covers the law pertaining to the issues raised by the evidence. . . . An isolated inaccuracy in an otherwise accurate charge is not a proper basis for reversal.")

I acknowledge the majority's conclusion that Appellants' closing argument did not attempt to link speculative causes to Mrs. Polett's injuries. The majority finds that Appellants' closing argument challenged merely the sufficiency of the evidence and aimed properly to demonstrate Mrs. Polett's comparative negligence and to comment on her credibility. Maj. Op. at 20. I arrive at a different conclusion. In my view, Appellants' closing argument went beyond a mere demonstration of insufficient causal connection and a mere challenge to the adequacy of Appellees' evidence. In essence, Appellants' closing argument raised alternative theories of causation. N.T., 2/18/2010 (p.m.), at 85-101. Those theories must be based upon trial evidence. There was no such basis here. The trial court's decision to retain the proposed speculation instruction under advisement was vindicated when

Appellants chose to venture into this terrain in closing. Thereupon, the supplemental instruction was restored to viability. A litigant may not "simply throw any theory against a wall and see if it sticks." ***Kennedy v. Sell***, 816 A.2d 1153, 1159 (Pa. Super. 2003). Given Appellants' closing argument and the broad deference we afford trial courts in charging juries, I would find no error in the court's speculation instruction.

Appellants raise additional issues related to the jury charge regarding the use of "substantial factor" versus "factual cause," the multiple sufficient cause instruction, and the "egg shell skull" instruction. Appellants' Brief at 50-55. The majority does not reach these challenges to the jury instructions, because it remands on the basis of the speculation instruction. Having parted ways with the majority on the latter, I would perforce reach these additional challenges. I agree with the trial court that these instructions were appropriate statements of the law, were properly calibrated to the issues of the case, and were not misleading for the jury. Trial Court Memorandum and Order ("T.C.M."), 6/10/2011, at 41-46. I would affirm.

Dr. Booth's Testimony

Appellants next challenge the trial court's admission of Dr. Booth's causation testimony. Appellants argue that Dr. Booth's testimony lacked sufficient certainty. I agree with the majority that the trial court did not abuse its discretion in denying a new trial on this issue. However, I disagree

with the majority's decision that Dr. Booth's testimony should have been precluded because he was not disclosed as an expert witness prior to trial.

We reverse a trial court's decision to admit evidence only when there has been a clear abuse of discretion or an error of law. ***Katz v. St. Mary Hospital***, 816 A.2d 1125, 1127 (Pa. Super. 2003). Appellants allege a violation of Rule 4003.5. Appellant's Brief at 23-27. Rule 4003.5 permits a trial court to exclude an expert witness whose identity is not disclosed by the party upon whom interrogatories have been propounded requesting such information. Pa.R.C.P. 4003.5(a), (b). The facts known to the expert and opinions developed in anticipation of litigation also are discoverable under this rule. Pa.R.C.P. 4003.5(a).

Our Supreme Court has held that, when expert opinions are not developed in anticipation of litigation, Rule 4003.5 does not apply. ***Miller v. Brass Rail Tavern, Inc.***, 664 A.2d 525, 532 (Pa. 1995). In ***Miller***, there was an objection to the coroner testifying about time of death, because that testimony required an expert. ***Id.*** at 527. The coroner had been identified as a witness, but not as an expert witness. ***Id.*** at 530. Because the coroner had not developed his opinion as to time of death in anticipation of litigation, the Court held that Rule 4003.5 was not violated. ***Id.*** at 531-32. We have, of course, adhered faithfully to ***Miller***, holding that expert testimony is admissible without prior disclosure when the expert opinions were not developed in anticipation of litigation. ***See, e.g., Jahanshahi v. Centura Development Co., Inc.***, 816 A.2d 1179, 1185 (Pa. Super. 2003) (expert

testimony on lost profits admissible where opinion developed in anticipation of opening business, not litigation); ***Katz***, 816 A.2d at 1127-28 (Rule 4003.5 did not apply where treating physician developed opinions during treatment, not in anticipation of litigation).[4]

Our cases pivot on the point in time at which the witness forms his or her opinions. The question before us is: When did Mrs. Polett's treating physician, Dr. Booth, develop his opinion as to the cause of her injuries? Based upon three notes in Mrs. Polett's file, the trial court determined that Dr. Booth's opinion (to wit, that the bike caused Mrs. Polett's synovitis) was developed prior to the time that Dr. Booth became aware of any anticipated litigation. T.C.M. at 24-25.

I agree with the majority that the third office note was written after Dr. Booth was approached by Appellees with a proposed tolling agreement. Maj. Op. at 25-26. Therefore, I agree that the third note must have been made with some anticipation of litigation. However, the majority further determines that Dr. Booth formed no causation opinion prior to writing that

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[4] ***Compare Kurian ex rel. Kurian v. Anisman***, 851 A.2d 152, 154-56 (Pa. Super. 2004) (treating physician not disclosed as expert until after defendants moved for summary judgment; because treating physician did not form his opinions on causation prior to anticipation of litigation, plaintiff was required to disclose him timely as expert witness). In the case before us, because Dr. Booth reached his causation opinion prior to anticipation of litigation, Appellees were not required to disclose him as an expert.

third note because "his sole concern" was treatment, not etiology. Maj. Op. at 24. After reviewing Dr. Booth's testimony, I disagree.

Dr. Booth's deposition testimony indicates that he reached a causation opinion prior to litigation. Dr. Booth testified that, as of a September 20, 2006 office visit,[5] he believed that Mrs. Polett's knees were swollen due to the exercise bike. N.T. (Booth Deposition), 6/26/2009, at 45. Dr. Booth affirmed that the bike precipitated the events that followed with Mrs. Polett's knees, stating "that's when her difficulties began" and calling it "the watershed moment." ***Id.*** at 47, 49-50. He testified that, as of the October 23, 2006 office visit, the bike was the most likely explanation of the synovitis. ***Id.*** at 52-53, 105. The second note was written on October 23, before any discussion of a tolling agreement. Dr. Booth clearly set forth in his deposition that he believed the bike started the chain reaction that led to Mrs. Polett's condition. ***Id.*** at 177 ("[S]he overexercised . . . and that began swelling, then pain, then instability, then the fracture, then the two failed repairs, then the two failed allografts that get us to where we are now.") While Dr. Booth acknowledged that there could be other factors, he explained that the bike was the most likely cause. ***Id.*** at 180.

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[5] The September 20, 2006 progress note in Mrs. Polett's chart is the first of the three notes referenced.

Dr. Booth's trial testimony was consistent with his deposition. Dr. Booth testified that, as of October 23, 2006, he formed his opinion that riding the bike caused Mrs. Polett's synovitis. N.T., 11/15/2010 (p.m.), at 11.[6] Dr. Booth explained that the synovitis was the first link in a chain of events that led to the failure of the knee replacement. N.T., 11/15/2010 (p.m.), at 13-14, 19, 24-25. Dr. Booth admitted that his information about Mrs. Polett riding the bike came from Mrs. Polett herself. N.T., 11/15/2010 (p.m.), at 94, 104. However, Dr. Booth maintained that he made the connection between the bike and the synovitis at the time that he wrote the note, prior to any anticipation of litigation. N.T., 11/15/2010 (p.m.), at 106. Dr. Booth stated that he was concerned about the cause, because this would indicate whether the inflammation and pain were due to an infection or due to "something mechanical." N.T., 11/15/2010 (p.m.), at 106-07. While this testimony undoubtedly is relevant to Dr. Booth's treatment of Mrs. Polett, it also establishes the timing of the formation of his opinion on causation prior to any anticipation of litigation.[7]

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[6] The September 20, 2006 progress note makes a connection between the synovitis and the bike. While this corroborates Appellees' view that Dr. Booth had formed an opinion as to the cause of Mrs. Polett's synovitis, Dr. Booth was not specifically asked at trial if he had formed an opinion at that time. N.T., 11/15/10 (p.m.), at 4-5.

[7] Later, Dr. Booth testified that he was not "trying to scrutinize the cause." N.T., 11/15/2010 (p.m.), at 114. However, from context, it is clear the Dr. Booth was referring specifically to the cause of Mrs. Polett's patellar fracture and to the question of whether that fracture resulted directly from
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Further, Appellants have not shown that they were prejudiced by the inclusion of Dr. Booth's testimony. Rule 4003.5's purpose is to prevent surprise. ***Miller***, 664 A.2d at 530 n.3. Here, Appellants participated in Dr. Booth's deposition. That deposition testimony was consistent with Dr. Booth's testimony at trial. I cannot conclude that any prejudice resulted from the court's ruling to admit Dr. Booth's testimony.[8]

Given the deference we are bound to afford the trial court's evidentiary rulings, the lack of resulting prejudice, and the testimony indicating that Dr. Booth reached his conclusions before any anticipation of litigation, I would affirm the trial court and would decline to grant a new trial on this issue.

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riding the bike or from a fall caused by the synovitis. Whether Dr. Booth's level of inquiry was as rigorous as possible goes to the weight of his testimony, not to its admissibility. That testimony certainly and appropriately was challenged on cross-examination and in argument. Weight, of course, is for the jury.

[8] Relying upon ***Kurian***, *supra* n.4, Appellants contend that, despite their participation in Dr. Booth's deposition, the failure to identify him as an expert witness was prejudicial "[a]s a matter of law." Appellants' Supplemental Brief at 14. However, ***Kurian*** held that preclusion of a witness' testimony was a "drastic sanction" and that "prejudice may not be assumed." 851 A.2d at 162. ***Kurian*** placed the burden of proving prejudice squarely upon the complaining party. ***Id.*** In ***Kurian***, the physician's expert report differed from his prior statements, which resulted in prejudice. ***Id.*** Instantly, as shown above, Dr. Booth's opinions and testimony were consistent across his medical notes, his deposition, and his trial testimony. I discern no error in the trial court's determination that no prejudice resulted. ***See*** T.C.M. at 22-26.

Tolling Agreement

Appellants next challenge the trial court's decision to preclude the use of the tolling agreement that Dr. Booth signed with Appellees. Appellants wished to use that agreement to impeach Dr. Booth's credibility. The majority, while acknowledging that there is no direct authority in Pennsylvania on the use of tolling agreements for impeachment, concludes that the agreement is relevant because Dr. Booth did not form a causation opinion until after being approached by Appellees with that tolling agreement. Maj. Op. at 33-37.

I disagree. The trial judge has broad discretion in deciding the admissibility of misleading or confusing evidence. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or confusion. ***Sprague v. Walter***, 656 A.2d 890, 909 (Pa. Super. 1995).

Here, the tolling agreement had obvious and patent potential to confuse or mislead the jury. It can hardly be gainsaid that tolling agreements lie outside the realm of an average lay juror's knowledge. Testimony would have to be introduced, almost certainly by an expert witness, to explain what a tolling agreement is and what its purpose would be in this case. There would be manifest danger that such testimony would invade areas protected by attorney-client privilege, as litigation strategy necessarily would come into play. Issues presumably discussed between Appellees and their counsel, such as whom to sue and when to initiate

litigation, as well as the reasons for later dissolving the tolling agreement, would have to be excavated, aired, and examined thoroughly so that the jury might be able fully to evaluate the extent to which the agreement might have influenced Dr. Booth's testimony. Perhaps Appellees' counsel would have to be disqualified and new counsel retained. At the least, the case would have been lengthened substantially, and the jury would have been treated to the proverbial trial within a trial.

The tolling agreement had little probative value in any event. The agreement was cancelled prior to trial. The parties stipulated prior to trial that Dr. Booth was not negligent. Moreover, my above-stated disagreement with the majority about the timing of the formation of Dr. Booth's causation opinions figures significantly here: as I would hold that Dr. Booth's opinions were developed prior to the anticipation of litigation, the tolling agreement could offer little to no probative value in impeaching Dr. Booth's testimony on causation. Further, Appellants' expert witness agreed that the bike caused Mrs. Polett's synovitis. Therefore, the tolling agreement had limited to no value in the cross-examination of Dr. Booth.

The tolling agreement would have been confusing to the jury, and would have been of limited probative value. I would affirm the trial court's decision to exclude evidence of that agreement.

Remittitur

Because it remands for a new trial, the majority does not reach Appellants' sixth issue, their request for remittitur. Because I would affirm the trial court on the other issues, I would reach this request. We have held that:

> Judicial reduction of a jury award is appropriate only when the award is plainly excessive and exorbitant. The question is whether the award of damages falls within the uncertain limits of fair and reasonable compensation or whether the verdict so shocks the sense of justice as to suggest that the jury was influenced by partiality, prejudice, mistake, or corruption.

Rettger v. UPMC Shadyside, 991 A.2d 915, 932 (Pa. Super. 2010) (quoting ***Potochnick v. Perry***, 861 A.2d 277, 285 (Pa. Super. 2004)). The decision to grant or deny remittitur is within the trial court's sound discretion, and will be overturned only upon a showing of abuse of discretion or error of law. ***Id.*** We cannot substitute our judgment for that of the fact-finder, and we must view the record with consideration of the evidence accepted by the jury. ***Smalls v. Pittsburgh-Corning Corp.***, 843 A.2d 410, 414 (Pa. Super. 2004).

> In determining whether a jury's award of damages is supported by the evidence, the following factors are taken into account:
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> 1.) the severity of the injury;
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> 2.) whether the injury is demonstrated by objective physical evidence or subjective evidence;
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> 3.) whether the injury is permanent;
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> 4.) the plaintiff's ability to continue employment;

> 5.) disparity between the amount of out of pocket expenses and the amount of the verdict; and
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> 6.) damages plaintiff requested in his complaint.

Smalls, 843 A.2d at 415 (quoting ***Stoughton v. Kinzey,*** 445 A.2d 1240, 1242 (Pa. Super. 1982)).

Appellants argue that the award was excessive, given that Appellees did not request any economic damages (e.g., medical expenses or lost earnings). Appellants contend that Mrs. Polett, though required to use a walker, is able nonetheless to engage in many of the same activities in which she engaged prior to her injuries. Appellants argue that the damages award should shock the conscience, given Mrs. Polett's age and the asserted lack of impact on her daily life. Appellants' Brief at 64-69.

Appellees reply that the record supports the award. Mrs. Polett testified about her pain and about her multiple surgeries. Dr. Booth testified to the surgical procedures, including the tendon allographs (using cadaver tissue), and the pain and difficulties attendant thereto. Mrs. Polett spoke about her need to use a walker, her constant fear of falling, her multiple falls, and her dependence upon others to assist her with daily activities and to monitor her safety. Mr. Polett also testified about the surgeries and about Mrs. Polett's pain and lack of mobility. As well, Mr. Polett addressed Mrs. Polett's increased dependence on others and her withdrawal from community activities. Appellees' Brief at 52-56.

The trial court found that the jury award was supported by the record, particularly given Mrs. Polett's surgeries, loss of mobility, and the continuing nature of her disability. T.C.M. at 52. ***See Gillingham v. Consol Energy, Inc.***, 51 A.3d 841, 862, 864 (Pa Super. 2012) (jury award did not shock conscience where plaintiffs provided comprehensive testimony of pain and suffering endured). The trial court noted also that the jury was able to observe Mrs. Polett pre-injury through the video created by Appellants themselves. ***Id.*** The trial court found that the record as a whole, including testimony of Dr. Booth, Mrs. Polett, and Appellants' own expert, supported the jury's award. T.C.M. at 53-56.

A fair assessment of the record supports the jury's conclusion that Mrs. Polett's pre-injury activities were curtailed and that she required increased assistance. I would hold that the trial court did not abuse its discretion in denying remittitur and in deferring to the jury's considered judgment.

In sum, I would affirm the trial court. Therefore, I respectfully dissent.