SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Re: Connie L. Gates, Individually and as Administatrix of the Estate of Gordon Edward Gates. v. Texaco, Inc.
C.A. No. 05C-05-043 RRC

Submitted: December 31, 2007
Decided: March 20, 2008

Upon Defendant's Motion For A Directed Verdict, Or In The Alternative, A New Trial And Relief From The Verdict. DENIED.

Dear Counsel:[1]

On October 31, 2007 a jury returned a verdict in favor of Connie L. Gates ("Plaintiff"), individually and as administatrix of the estate of Gordon E. Gates, and against Texaco, Inc. ("Defendant"). The jury found that Defendant's negligence caused Mr. Gates to have been exposed to benzene while he worked at the Delaware City Refinery ("the refinery") for Defendant and for prior owners of the refinery, which exposure caused Mr. Gates's leukemia and ultimately his death. The jury found Gordon Gates to

[1] The Court admitted three attorneys for Defendant *pro hac vice*: Louis B. Woolf, Esq., of Woolf, McClane, Bright, Allen & Carpenter, PLLC, of Knoxville, Tennessee; Eric W. Wiechmann, Esq., and Moyahoena N. Ogilvie, Esq., both of McCarter & English, LLP, of Hartford, Connecticut.

have been 17% comparatively negligent. The jury awarded Plaintiff a total of $3,426,166.28, which will be reduced by 17% to reflect the comparative negligence finding. These motions followed.

For the following reasons, Defendant's "Motion for a Directed Verdict, or in the Alternative a New Trial and Relief from the Verdict," is **DENIED**.

I. OVERVIEW OF THE FACTS / PROCEDURAL HISTORY

Gordon Gates died from complications of leukemia on June 11, 2003. Subsequently Plaintiff brought an action against Defendant claiming that Defendant was responsible for damages resulting from Mr. Gates's illness and resultant death. Plaintiff alleged that Defendant negligently allowed Mr. Gates to be exposed to toxic levels of the chemical benzene while Mr. Gates worked for many years at the refinery as a millwright.

Prior to trial Defendant filed a motion in limine seeking to exclude the testimony of Plaintiff's expert Dr. Mark Nicas, an industrial hygienist, who was to provide an estimate of Mr. Gates's cumulative exposure levels to benzene in the "reformer unit," an area where Mr. Gates disassembled and cleaned chemical pumps. Defendant objected to Dr. Nicas's estimate on the grounds that it was based on unreliable data. The Court denied the motion in limine, holding in essence that Defendant's arguments for excluding Dr. Nicas's testimony went to the weight of Dr. Nicas's testimony, not its admissibility.

Defendant also sought by motion in limine to exclude a statement Mr. Gates had allegedly made to Dr. Martha Hosford-Skapof, Mr. Gates's treating physician, who apparently was the first doctor to diagnose Mr. Gates with chronic myelomonocytic leukemia ("CMML"). Mr. Gates told Dr. Hosford-Skapof that he had "bathed in benzene" while working at the refinery. Defendant asserted that the statement was hearsay and that it was unfairly prejudicial to Defendant. The Court denied this motion as well, holding that the statement fell under medical diagnosis hearsay exception contained in Delaware Rules of Evidence 803(4), and that its probative value was not substantially outweighed by any unfair prejudice to Defendant.

Trial began on October 22, 2007. During trial both sides dedicated a significant amount of time presenting evidence as to the amount of benzene Mr. Gates had been exposed to, with both sides attempting to undermine the testimony of the opposition's witnesses and experts. Plaintiff presented Dr. Nicas's exposure estimate, and also presented the testimony of Dr. Hosford-Skapof who reiterated the statements made to her by Mr. Gates. Plaintiff

additionally offered the testimony of Mrs. Gates and two of her children, who all stated the Mrs. Gates had been unable to work since her husband's death as a result of her depression resulting from her husband's death.

At both the close of Plaintiff's case and at the close of all the evidence Defendant moved for judgment as a matter of law, arguing that Plaintiff had not met its burden of proof on the issue of "specific causation"[2] because the testimony supporting it (specifically, Dr. Nicas's testimony) was inadmissible. The Court denied both of these motions, holding in essence that Defendant's arguments went to the weight of the testimony at issue, not its admissibility.

During closing arguments Plaintiff's counsel made statements with which Defendant now takes issue. First, Plaintiff's counsel incorrectly stated the trial testimony when Plaintiff's counsel told the jury three times that Mr. Gates had said to Dr. Hosford-Skapof, "[m]y God, I bathed in [benzene]."[3] Next, Plaintiff's counsel argued that Defendant had "contrived" [4] a defense to Plaintiff's claims, and that Defendant had "fed"[5] its witnesses information. Finally, Plaintiff's counsel cited a study by the Environmental Protection Agency that contained references to benzene concentrations of the pumps in the reformer area. Plaintiff's counsel stated the number of pages in the study and the number of components the EPA examined in its inspection of the refinery. No objection was raised by Defendant at the time of closing arguments to these statements.

On October 31, 2007, the jury found in favor of Plaintiff, but found Mr. Gates 17% comparatively negligent. The jury awarded the estate of Mr. Gates $1,426,166.28, which included various medical expenses, and awarded Mrs. Gates $2,000,000, which included lost past and future lifetime earnings.[6]

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[2] "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *LeBlanc v. Chevron Inc.*, 2007 WL 1772057, at *1 (E.D. La.) (quoting *Knight v. Kirby Inland Marine, Inc.*, 482 F.3d 347 (5th Cir. 2007)).

[3] Tr. Trans. at 74 (October 30, 2007 (P.M.)).

[4] *Id*. at 85.

[5] *Id*. at 81, 83.

[6] One other post-trial motion was filed in this case, Plaintiff's "Bill of Costs," which the Court granted in part in *Gates v. Texaco, Inc.*, Del. Super., C.A. No. 05C-05-043, Cooch, J. (March 20, 2008) (ORDER).

II. CONTENTIONS OF THE PARTIES

A. Defendant's Motion for a Directed Verdict

As the bases for its motion for a directed verdict (technically now called a "motion for judgment as a matter of law" in Superior Court Civil Rule 50), Defendant argues that, as a matter of law, Plaintiff failed to prove both general and specific causation. Defendant argues that Plaintiff failed to prove to a reasonable degree of medical certainty general causation: that CMML, the specific type of leukemia from which Mr. Gates suffered, can be caused by exposure to benzene.[7] Defendant asserts that it is not procedurally barred from making this argument because it raised the issue in its two previous motions for directed verdict at the close of Plaintiff's case and at the close of the evidence.[8] Furthermore, Defendant alleges that Dr. Nicas relied on "fallacious unsupported assumptions"[9] in making his exposure estimates, and that therefore Plaintiff could not have met its burden showing specific causation to a reasonable degree of medical certainty; that is, that Mr. Gates was exposed to a sufficient amount of benzene to cause his leukemia.[10]

Plaintiff responds that Defendant's general causation argument is procedurally barred since Defendant did not raise the argument in its Superior Court Rule 50(a) motion it brought at the close of evidence.[11] Notwithstanding Plaintiff's procedural argument, Plaintiff also contends that she proved general causation through expert testimony, and that Defendant's argument is therefore substantively invalid.[12] Plaintiff asserts that Defendant's criticisms of Dr. Nicas's exposure estimate go to the weight of his testimony and not its admissibility.[13] Plaintiff argues that the jury simply "found Plaintiff's exposure evidence to be more reliable than Defendant's exposure evidence and ruled on behalf of the Plaintiff."[14] Thus Plaintiff maintains that she met her burden of proving specific causation.

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[7] Def.s Br. in Support of its Mot. for a Directed Verdict, or in the Alternative, Mot. for a New Trial and Relief from the Verdict (hereinafter "Def. Opening Br."), at 12-15.

[8] Def. Reply Br. in Support of Def. Opening Br., at 10.

[9] Def. Opening Br., at 4.

[10] *Id*. at 3-11.

[11] *Id*. at 14.

[12] *Id*. at 15-18.

[13] Pl. Answering Br. to Def. Opening Br., at 1.

[14] Def. Opening Br., at 6.

B. Defendant's Motion for a New Trial

As an alternative to its request for a directed verdict Defendant seeks a new trial. Defendant additionally argues that the Court erroneously allowed Mr. Gates's doctor, Dr. Martha Hosford-Skapof, to testify as to statements Mr. Gates allegedly made to her about his exposure to benzene.[15] Defendant contends that the statements were inadmissible hearsay, that the statements were unreliable, and that their probative value was substantially outweighed by the prejudice to Defendant.[16] Defendant also takes issue with Plaintiff's use of the statements in Plaintiff's closing argument, asserting that Plaintiff used them to mislead the jury.[17] As additional grounds for its motion for a new trial Defendant cites certain other remarks made by Plaintiff's counsel during closing argument. First, Defendant claims that Plaintiff went beyond the scope of the evidence presented at trial in its closing argument; specifically, Defendant cites Plaintiff's statements in its closing argument about an Environmental Protection Agency study that Defendant claims was not part of the record of the case.[18] Furthermore, Defendant claims that Plaintiff's statement in closing argument, that Defendant's counsel had "contrived" a defense to Plaintiff's claims, and had "fed" its witnesses information, is a sufficient ground for a ordering a new trial.[19]

In response Plaintiff asserts that the Court properly admitted Dr. Hosford-Skapof's testimony, contending that Mr. Gates's statement fell under the hearsay exception of D.R.E. 803(4), and that the probative value of Dr. Hosford-Skapof's testimony was not substantially outweighed by its prejudice to Defendant.[20] Plaintiff maintains that Defendant's arguments as to those statements made by Plaintiff's counsel during closing arguments must amount to "plain error" for a new trial to be granted since Defendant did not take issue with the statements at the time they were made. Plaintiff argues that the statements were in any event proper because the statements were based on evidence presented at trial.[21]

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[15] *Id.* at 15-16.
[16] *Id*. at 16-18.
[17] *Id.*
[18] *Id*. at 18-20.
[19] *Id*. at 20-21.
[20] Pl. Answering Br. to Def. Opening Br., at 18-20.
[21] *Id*. at 23-26.

C. Defendant's Motion for "Remittitur"

The Court notes here that that part of Defendant's motion styled "remittitur"[22] is really a motion for judgment as a matter of law. Defendant does not concede that Plaintiff's claims were correctly submitted to the jury, and that the jury's verdict was merely excessive. Instead, Defendant contends in each of its arguments for "remittitur" that Plaintiff's claims should not have been presented to the jury at all. This is, in essence, an argument for judgment as a matter of law as to each of the challenged claims. Thus, the Court will hereinafter address these arguments as a "motion for judgment as a matter of law."

Assuming *arguendo* that the Court does not grant a directed verdict or a new trial, Defendant asserts that it is entitled to judgment as a matter of law on several of Plaintiff's claims. First, Defendant contends that Mrs. Gates was not entitled to an award for lost wages. [23] Defendant maintains that Plaintiff premised her claim for lost lifetime wages on the basis of Mrs. Gates allegedly suffering from depression; Defendant argues that expert medical testimony is required to establish causation for depression significant enough to make a person unable to work for the remainder of that person's life, and that Plaintiff could not, as a matter of law, submit the claim for lost wages since Plaintiff did not produce such an expert.[24] Defendant additionally argues that "[t]he sole claim relating to Mrs. Gates in the Complaint is a loss of consortium claim," that Plaintiff's interrogatory responses did not mention Mrs. Gates's lost lifetime wages, and that therefore the claim came too late when Plaintiff later included it in its expert reports and in the pretrial stipulation.[25] For this reason, Defendant contends that the lost lifetime wages claim should not have been submitted to the jury, and that Defendant is therefore entitled to a judgment as a matter of law. Second, Defendant argues that Plaintiff failed to produce "credible evidence as to actual medical expenses,"[26] and that the much of the information Plaintiff did supply was presented untimely. As such, Defendant maintains that Plaintiff was entitled to present to the jury only those medical bills that were produced during the discovery period.[27]

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[22] Def. Opening Br., at 22.
[23] *Id*. at 22-31.
[24] *Id*. at 24-26.
[25] *Id*. at 22.
[26] *Id*. at 26.
[27] *Id*. at 29-31.

Plaintiff contends that she was entitled to present a claim for lost wages, maintaining that she was not required to present expert testimony in order to establish that Mrs. Gates was unable to work due to depression.[28] Plaintiff further argues that Defendant's arguments are procedurally barred since Defendant did not raise them until the midst of trial. Plaintiff asserts that she timely provided Defendant with the necessary documentation pertaining to medical bills which were then properly entered into the record.[29]

III. STANDARDS OF REVIEW

A. Motion for Judgment as a Matter of Law

When determining a motion for a judgment as a matter of law, the Court does not weigh the evidence, but rather views the evidence in the light most favorable to the non-moving party and, drawing all reasonable inferences therefrom, determines if a verdict may be found for the party having the burden.[30]

B. Motion for New Trial

When reviewing a motion for new trial, the jury's verdict is entitled to "enormous deference."[31] This Court will not upset the verdict "unless 'the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result' or the Court is convinced that the jury disregarded applicable rules of law, or where the jury's verdict is tainted by legal error committed by the Court during the trial."[32]

IV. DISCUSSION

A. Defendant's Motion For Judgment As A Matter Of Law On The Issue Of Causation Is Denied.

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[28] Pl. Answering Br. to Def. Opening Br., at 27-28.

[29] *Id*. at 26, 30.

[30] *McCloskey v. McKelvey*, 174 A.2d 691, 693 (Del.Super.1961).

[31] *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997).

[32] *Mitchell v. Haldar*, 2004 WL 1790121, at *3 (Del. Super.) (quoting *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1977)).

1. Defendant's Argument that Plaintiff Failed to Show "General Causation" is Procedurally Barred, and Otherwise Lacks Merit.

Superior Court Civil Rule 50(b) procedurally bars Defendant from arguing that Plaintiff failed to establish that benzene "generally" causes CMML. Therefore, Defendant is not entitled to judgment as a matter of law on this issue.

Defendant's argument as to general causation is procedurally barred. Defendant brought its current motion for directed verdict pursuant to Superior Court Rule 50(b). Rule 50(b) provides that a motion made pursuant to Superior Court Rule 50(a) "may be renewed by service and filing not later than 10 days after entry of judgment."[33] Therefore, any argument made pursuant to Rule 50(b) must have previously been raised in a motion made pursuant to Rule 50(a).[34]

At the close of Plaintiff's case Defendant moved for judgment as a matter of law pursuant to Superior Court Rule 50(a). At that time Defendant stated that "general" causation "is not the keystone of this argument. The keystone is you have to show specific causation."[35] Indeed, it is apparent from the transcript that Defendant only mentioned general causation in order to provide a definitional introduction and context to specific causation.[36] Defendant then went on to argue that Plaintiff had not met its burden of proof as to specific causation. Defendant made no arguments related to

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[33] Superior Court Civil Rule 50(b).

[34] *William H. Porter, Inc. v. Edwards*, 616 A.2d 838, 840 (Del. 1992) (quoting *Peters v. Gelb*, 314 A.2d 901, 904 (Del. 1973) ("The law is well settled that a motion for a directed verdict, filed in compliance with Rule 50(b), 'is a prerequisite to a motion for judgment notwithstanding the verdict....'").

[35] Tr. Trans. at 23 (October 26, 2007 (A.M.)).

[36] Defendant's counsel stated:

> In this type of case the claim made by Mr. Gates they have to prove several things, putting aside negligence and duty, they have to prove that some act of my client caused his disease. In these types of toxic tort cases there are two types of causation: general causation, and specific causation.
>
> General causation, you have to see does the substance to which plaintiff claims he was exposed, could it in any circumstance cause the disease. You have heard a lot about that, benzene and AML, CMML. There has been some dispute about whether even though it may can cause AML, did it cause CMML, which is the precursor disease here. That is not the keystone of this argument. The keystone is you have to show specific causation….

Tr. Trans. at 23 (October 26, 2007 (A.M.)).

general causation.[37] At the close of all the evidence Defendant again brought a motion for judgment as a matter of law pursuant to Superior Court Rule 50(a). At that juncture Defendant raised arguments solely pertaining to Dr. Nicas's testimony and specific causation.[38] Defendant has now brought its current motion for judgment as a matter of law pursuant to Superior Court Rule 50(b), which contains Defendant's argument that Plaintiff failed to meet its burden of showing general causation. There can be no "renewal" of an argument that was never made, thus the argument is procedurally barred under Rule 50(b).

Nevertheless, and alternatively, the Court holds that Plaintiff in fact sufficiently established general causation, through the expert testimony of Dr. Peter Infante and Dr. Goldstein, to the extent needed to submit the case to the jury.

Dr. Infante, an epidemiologist, testified that Mr. Gates had "a typical … benzene induced leukemia,"[39] and that "it is established beyond a doubt that benzene is a cause of leukemia, particularly in those cases that have blood abnormality prior to their diagnosis with leukemia and then they transition into leukemia. And that's exactly what we're talking about in this case with Mr. Gates."[40] Defendant argues that Dr. Infante's was rendered insufficient because he did not state that his opinion was "within a reasonable medical degree of probability." The Court disagrees. Delaware Courts do not "require medical experts to couch their opinions in legal terms."[41] The Court holds that the "substance of the proffered testimony as a whole … was sufficiently reliable to present to the jury."[42]

Dr. Goldstein testified, to a reasonable degree of medical probability, that Mr. Gates's exposure to benzene while working at the refinery caused Mr. Gates's CMML.[43] He based this opinion on Dr. Nicas's exposure estimate as well as multiple studies examining the health of refinery workers

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[37] *Id*. at 23-28.

[38] Tr. Trans. at 36-39 (October 30, 2007 (A.M.)).

[39] Tr. Trans. at 39 (October 23, 2007 (A.M.)).

[40] *Id*. at 52-53.

[41] *Green v. Weiner*, 766 A.2d 492, 495 (Del. 2001) (reversing and remanding a Superior Court decision to exclude medical expert testimony because the expert did not articulate the precise standard of care).

[42] *Barriocanal v. Gibbs*, 697 A.2d 1169, 1173 (Del. 1997) ("The fact that [the medical expert] did not express his medical opinions in perfect 'legalese' should not preclude him from being able to present expert testimony regarding Delaware's standard of care").

[43] Tr. Trans. at 66 (October 24, 2007 (P.M.)).

and their increased risk of developing leukemia as a result of their exposure to benzene.[44] Defendant argues that Dr. Goldstein's opinion is unsupportable because he relied on Dr. Nicas's exposure estimate in making his opinion, which Defendant contends was based on unreliable data (this argument is addressed *supra*.) Notwithstanding the Court's holding that Dr. Nicas's estimate was sufficiently reliable to establish in part a *prima facie* case of causation, the Court holds that Dr. Goldstein's opinion as to general causation can stand without Dr. Nicas's testimony. Dr. Nicas's opinion merely supported Dr. Goldstein's opinion that benzene exposure caused leukemia in the specific case of Mr. Gates, and the Court agrees with Plaintiff that "implicit in Dr. Goldstein's opinion that Mr. Gates's [leukemia was] caused by his benzene exposure at the refinery is [his] opinion that benzene can cause CMML..."[45] Thus, Defendant's argument also lacks substantive merit.

2. Alternatively, Plaintiff Produced a Sufficient Amount of Evidence to Prove "Specific Causation."

As part of proving specific causation Plaintiff introduced the testimony of Dr. Nicas, who gave his exposure estimate. Dr. Nicas based his estimate in large part on information provided to him by two of Mr. Gates's coworkers, Gregory Roche and Gordon Laxton, who spoke with Dr. Nicas before trial about the average number of pumps they serviced, how much spillage occurred while they worked on the pumps, and their belief that the pumps contained 100% benzene.[46] Notably, the coworkers' assumptions were at least partially supported by a study done by the EPA at the refinery (introduced by Plaintiff during examination of one of Defendant's witnesses) that showed some of the pumps in the reformer area contained 100% benzene, and that the average concentration was 71% benzene.[47] Dr. Nicas then factored in the time periods that Mr. Gates worked at the refinery. Dr. Nicas used this data to provide several estimates, including an estimate that took into account a possible 71% concentration of benzene in the pumps.[48]

Defendant maintains that the data relied upon by Dr. Nicas for his estimates were inaccurate and unreliable. Specifically, Defendant points to the testimony of the coworkers that they were not aware of exactly how

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[44] *Id*. at 67.
[45] Pl. Answering Br. to Def. Opening Br., at 16.
[46] Tr. Trans. at 15, 14, and 27 (October 24, 2007 (A.M.)).
[47] Tr. Trans. at 96, 97 (October 30, 2007 (P.M.)).
[48] Tr. Trans. at 50 (October 24, 2007 (A.M.)).

many pumps were in the reformer unit, and the coworkers' assumptions that the fluid in the pumps contained 100% benzene.[49] Defendant argues that since the data were unreliable, Dr. Nicas's opinion could not be rendered with a reasonable degree of medical certainty, and that Plaintiff cannot show specific causation as a result.[50] Defendant also draws attention to the fact that Dr. Nicas's exposure estimate was based on pretrial testimony, namely the depositions of Mr. Gordon and Mr. Roche, rather than the testimony of Mr. Gordon and Mr. Roche at trial.[51]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc*., the seminal case on expert testimony, the United States Supreme Court noted that "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[52] Additionally, the Delaware Supreme Court has held that "[t]he foundation for an expert's causation opinion need not be established with the precision of a laboratory experiment."[53]

Defendant had ample pre-trial and trial opportunity to cross-examine Dr. Nicas and challenge his opinion. Indeed, Defendant did vigorously challenge Dr. Nicas's opinion, and presented several witnesses who contradicted the testimony of Mr. Gates's coworkers. These witnesses testified as to their own recollections of the number of pumps in the reformer unit and the concentration of benzene contained in those pumps, which Defendant highlights in its opening brief.[54]

Despite Defendant's efforts, the jury found in favor of Plaintiff, evidently concluding that Dr. Nicas's opinion was reliable and that Plaintiff had met her burden of proof concerning specific causation. Defendant's arguments in the current motion merely go to the weight of Dr. Nicas's opinion, not its admissibility. The Court holds that, viewing the evidence in the light most favorable to the Plaintiff, the jury could properly have found that Plaintiff had met her burden of proof.

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[49] Def. Opening Br., at 5-7.

[50] *Id*. at 3-5.

[51] *Id*. at 5.

[52] *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 596.

[53] *New Haverford Partnership v. Stroot*, 772 A.2d 792, 800 (Del. 2001) (also holding that "the failure to conduct extensive baseline testing [in order to determine other possible causes of illness] goes to the weight of the experts' opinions, not their admissibility").

[54] Def. Opening Br., at 5-7.

B. Defendant's Motion For New Trial Is Denied.

1. The Statements Made by Mr. Gates to Dr. Hosford-Skapof Were Admissible Exceptions to the Hearsay Rule, and the Probative Value of the Statements was Not Substantially Outweighed by Any Unfair Prejudice to Defendant.

The Court holds that Mr. Gates's statement to Dr. Hosford-Skapof, Mr. Gates's treating physician, that Mr. Gates had "washed in" and "bathed in" benzene at the refinery, are admissible as an exception to the hearsay rule under D.R.E. 803(4). Rule 803(4) provides that the following statements are not excluded by the hearsay rule: "[s]tatements made for the purposes of medical diagnosis or treatment and describing medical history or past and present symptoms, pains, or sensations, or the inception or the general character of the cause or external course thereof insofar as reasonably pertinent to diagnosis or treatment." The statements made by Mr. Gates were to his treating physician, who questioned him as to whether he had been exposed to benzene after diagnosing him with leukemia. The statements clearly fall under this hearsay exception.[55]

The Court agrees with Defendant that the colloquial nature of Mr. Gates's statements ("bathed" in benzene; "washed" in benzene) were not technically accurate statements; however, the jury undoubtedly was well aware that the statements were not meant literally, but simply showed that Mr. Gates believed he had been exposed to a significant amount of benzene. Furthermore, the probative value of the statements was high. The case turned in large part on the extent to which Mr. Gates was exposed to benzene; his statements to his treating physician spoke directly to that issue.

For the preceding reasons, the Court holds that Defendant is not entitled to a new trial, because the statements fell under the hearsay exception of D.R.E. 803(4), and the probative value of the statements was not substantially outweighed by any unfair prejudice to Defendant.

2. Plaintiff's Statements in Closing Argument Were Either Supported by the Record or Did Not Amount to Plain Error.

[55] *See, e.g., Banther v. State*, 823 A.2d 467, 483 (Del. 2003) (citing D.R.E. 803(4)) ("Statements for medical diagnosis and treatment are admissible as an exception to the hearsay rule because such statements are deemed to be inherently trustworthy").

Defendant objects to certain statements made by Plaintiff's counsel in closing argument. Defendant raises these objections for the first time in these motions, and does not explain why any objections were not contemporaneously made. The Delaware Supreme Court has held that Superior Court Civil Rule 46 "requires counsel to state his objection to anything taking place during the trial, and his failure to do so prevents him from urging the point on appeal."[56] The only exception to this general rule is the statements amount to "plain error."[57] Statements amount to plain error only if "the error complained of is so prejudicial to substantial rights as to jeopardize fairness and integrity of the trial process."[58]

Plaintiff's counsel's inaccurate references, in his initial closing argument, to Mr. Gates's statements to Dr. Hosford-Skapof, that Mr. Gates washed and bathed in benzene, did not amount to plain error. Plaintiff asserted three times in closing argument that Mr. Gates said to his doctor, "my God, I bathed in it."[59] Plaintiff also stated that Mr. Gates was testifying "from the grave through his doctor."[60] Although Plaintiff's counsel did misquote the statements, and although reference to the decedent's "grave" was also inappropriate, the Court cannot conclude that Plaintiff's statements amounted to "plain error." The statements made by Plaintiff's counsel as to what Mr. Gates had told Dr. Hosford-Skapof were substantially similar to what Dr. Hosford-Skapof testified to; furthermore, the jury was instructed to rely on their own memory of the witnesses' testimony, not on the statements of attorneys.

Defendant also takes issue with the fact that Plaintiff's counsel stated in his initial closing argument that Defendant's counsel "contrived"[61] a

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[56] *Hamilton v. Wrang*, 221 A.2d 605 (Del. 1966) (citing Delaware Superior Court Civil Rule 46).

[57] *Medical Center of Delaware, Inc. v. Lougheed*, 661 A.2d 1055, 1060 (Del. 1995) (citing *Mason v. State*, 658 A.2d 994, 996 (Del. 1996) ("failure to object generally [to statements in closing argument] constitutes waiver of the right subsequently to raise the issue…. An exception arises, however, if plain error exists").

[58] *Id*.

[59] Tr. Trans. at 74 (October 30, 2007 (P.M.)).

[60] *Id*. at 76-77.

[61] The *Merriam Webster's Online Dictionary* definition of "contrive" is:

> 1 a: devise, plan <contrive ways of handling the situation> b: to form or create in an artistic or ingenious manner <contrived household utensils from stone>2: to bring about by stratagem or with difficulty : manage <he contrived to win their support>

http://www.merriam-webster.com/dictionary/contrive.

defense to Plaintiff's claims and "fed" its witnesses information. The record supports Plaintiff's counsel's statement to a large extent. At trial, Plaintiff elicited testimony from Mr. Spencer that Defendant's counsel had drafted a document designating Mr. Spencer as a witness who would testify that Mr. Gates was exposed to less than the permissible limits to benzene, but that Defendant's counsel drafted this document *before* Mr. Spencer had done any assessment for his own "exposure" opinion. Thus, it was fair for Plaintiff to argue that Defendant had already devised a defense to Plaintiff's claims, and that Plaintiff's counsel made a reasonable inference based on the evidence presented. Plaintiff's counsel's use of the terms "contrived" and "fed," as used in the context of this case, were not improper.

Finally, Plaintiff's counsel's argument, in rebuttal to Defendant's closing argument, about the Environmental Protection Agency study, which contained references to the concentration of benzene in the reformer area pumps, was either based on the record or did not amount to plain error. During Plaintiff's counsel's examination of Mr. Spencer, Mr. Spencer acknowledged that the document showed that some of the pumps in the reformer area contained 100% benzene, and that the average concentration was 71% benzene.[62] Though Plaintiff's counsel described the study in more detail than was elicited by the examination of Mr. Spencer (Plaintiff's counsel described the number of pages in the study, how many components were monitored, and what the lowest concentrations of benzene were in the pumps that the EPA examined[63]), the key aspects of the study, that being the highest and average concentration levels of benzene in the reformer area pumps, were part of the record. Plain error did not result from Plaintiff's counsel's statements as to the number of pages in the study or to the number of components the EPA examined.

C. Defendant's Motion for Judgment as a Matter of Law On The Issue Of Plaintiff's Claim For Lost Wages And For Medical Expenses Is Denied.

1. Defendant's Motion for Judgment as a Matter of Law on Plaintiff's Claim for Lost Wages is Procedurally Barred.

[62] Tr. Trans. at 96, 97 (October 30, 2007 (P.M.)).

[63] Plaintiff described the number of pages in the study, how many components were monitored, and what the lowest concentrations of benzene were in the pumps that the EPA examined. Tr. Trans. at 140 (October 30, 2007 (P.M.)).

The issue is whether Defendant can raise its argument despite its not having raised the issue (i.e., whether expert testimony was required to support Mrs. Gates's claim for lost wages in this instance) until the midst of trial, on the last day of Plaintiff's case.[64] The Court holds that Defendant is procedurally barred from doing so, since Defendant had failed to raise the issue in the pretrial stipulation.

The Superior Court puts great emphasis on pretrial stipulations as the universe in which legal issues should be identified; timely identification of legal issues is paramount in effective trial management. For this reason, this Court has held that it will "not consider … an argument regarding an issue of law not earlier identified in the pretrial stipulation."[65] Plaintiff did not identify this issue in the pretrial stipulation as one "remain[ing] to be litigated."[66] Thus, Defendant's motion is denied.

Defendant argues that since Plaintiff's claim for lost wages was not raised in her complaint, she should therefore not have been allowed to present the claim because doing so unfairly surprised Defendant. Defendant correctly notes that "the days of trial by surprise are long over."[67] However, it is clear that Defendant was put on notice of Plaintiff's claim, and Defendant knew that Plaintiff did not plan to present expert medical testimony on the issue of Plaintiff's depression and resulting lost wages. First, Plaintiff identified her claim for lost wages in the expert report of Andrew Verzilli, an economist, whom Plaintiff presented to provide an estimate of Plaintiff's lost future earnings. Plaintiff produced Mr. Verzilli's report to Defendant on June 29, 2007, several months before trial. Second, Plaintiff identified her claim for lost wages in the pretrial stipulation, and Plaintiff's witness list in the pretrial stipulation did not include a medical expert who was to testify on the subject of Plaintiff's mental state. Finally, Defendant's counsel acknowledged that he "wanted to wait until [Plaintiff] rested at this stage"[68] to raise Defendant's argument on this issue. For these

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[64] Tr. Trans. at 23 (October 25, 2007 (P.M.)).

[65] *Jacob v. Harrison*, 2002 WL 31840890, at *5 (Del. Super.) (citing Supr. Ct. R. 8) (holding that the parties were limited to addressing only those issues presented in the pretrial stipulation); *see also, Alexander v. Cahill*, 829 A.2d 117, 129 (Del. 2003) (holding that an affirmative defense is waived where a defendant does not give notice of such a defense before or in the final pretrial stipulation).

[66] *See* Pretrial Stipulation, at 7-8.

[67] Def. Opening Br., at 23.

[68] Tr. Trans. at 23 (October 25, 2007 (P.M.)).

reasons, Defendant can claim no surprise that Plaintiff did not provide medical expert testimony in support of her claim for lost wages.[69]

This issue could have been the subject of a motion in limine, or, at the very least, could have been identified in the pretrial stipulation. Since it was not, the Court deems the issue waived and will not consider the argument now. Therefore, the Court need not reach the substance of Defendant's argument,[70] and Defendant's motion for judgment as a matter of law is denied.

2. The Award for Medical Expenses Was Properly Presented to the Jury.

During the discovery period, Plaintiff provided Defendant with Mr. Gates's Blue Cross Blue Shield payment records detailing payments made on behalf of Mr. Gates for treatments related to Mr. Gates's illness. Defendant was also given authorization to obtain Mr. Gates's medical records and billing records.

On October 17, 2007, Plaintiff provided Defendant with a summary of the total amount of medical expenses Plaintiff claimed.[71] However, through apparent oversight of Plaintiff's counsel, Defendant apparently never received copies of the actual bills upon which Plaintiff based its breakdown

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[69] Two of Plaintiff's children, and Plaintiff herself testified on this issue. Plaintiff's son described her as a "shut in," and Plaintiff's daughter testified that Plaintiff had taken antidepressants. Plaintiff testified that she had been unable to work after her husband's death because of her mental state.

[70] Defendant argues substantively that expert testimony is required to prove causation for lost wages resulting from depression. Other courts faced with determining this issue have held that expert testimony is required. *E.g., Ferris v. Pa. Fed'n Bhd. of Maint. of Way Employees*, 153 F. Supp.2d 736, 746 (E.D. Pa. 2001) (opining that depression to be a complex injury "beyond the knowledge of the average layperson," thus requiring expert testimony); *Villalba v. Consolidated Freightways Corp. of Del.*, 2000 WL 1154073, at *4-5 (N.D.Ill. 2000) (holding that a causal connection between an accident and the accident victim's depression requires expert testimony due to the complex nature of depression); *Dimmit v. Ockenfells*, 220 F.R.D. 116, 120 (D. Me. 2004) ("the assertions that [plaintiff] suffers from post traumatic stress disorder and depression appear to require expert testimony, as does the assertion that all of these conditions were caused by the acts of the defendants"). These holdings are supported by secondary authority. *E.g.*, 26 AM. JUR. 3D *Proof of Facts* § 38 (1994); 29 AM. JUR. *Proof of Facts* § 5 (1972). Thus, the Court might have granted Defendant's motion for judgment as a matter of law, at least as to part of Plaintiff's claim for lost wages, if Defendant had timely raised its argument.

[71] *See* Def. Opening Br., Ex. A.

until three days before trial. In the pretrial stipulation the parties had represented to the Court that they were "working on an agreement to resolve any objections to this issue."[72] The parties continued to work to resolve the issue during trial. Nevertheless, these attempts to reach agreement as to each and every medical bill were unsuccessful as of the day that Plaintiff rested her case, and the issue was finally unfortunately only joined when Plaintiff rested her case, although, as stated, the parties had expected to have arrived at an agreed-upon total figure.

During trial Plaintiff presented the uncontroverted testimony of Mrs. Gates that Mr. Gates's medical bills amounted to more than $248,000. Defendant had the opportunity to cross-examine Mrs. Gates, but chose not to do so. Thus, the only figure the jury heard as to the amount of medical expenses was Plaintiff's sum total. Defendant had ample opportunity to obtain and present its own evidence of Mr. Gates's medical expenses, and to cross-examine Plaintiff's witness. Defendant chose not to do so, perhaps as a strategic decision. There was apparently no disagreement that the decdent had incurred very large medical bills, in the neighborhood (if not exactly) of $248,000. Both parties bear a degree of fault on this issue. Thus, Plaintiff's asserted medical expenses were properly submitted to the jury, and Defendant is not entitled to judgment as a matter of law.

V. CONCLUSION

For the preceding reasons, Defendant's "motion for a directed verdict, or in the alternative a new trial and relief from the verdict" is **DENIED**. The original verdict of $3,426,166.28 is reduced by 17% to $2,843,718.01. The Prothonotary shall enter judgment for Plaintiff in the amount of $2,843,718.01.

Very truly yours,

oc: Prothonotary

[72] Pretrial Stipulation, at 4.