

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JOSEPH HINEMAN,)
)
Plaintiff,)
)
v.)
)
PAUL M. IMBER, D.O. and)
EAR, NOSE, THROAT AND)
ALLERGY ASSOCIATES)
LLC, a Delaware Company)
)
Defendant.)
)

C.A. No. N10C-03-014 CLS

ORDER

AND NOW, TO WIT, this 20th day of June, 2012, **IT IS HEREBY**

ORDERED as follows:

Introduction

Before the Court is Defendants’ Memorandum of Law pertaining to the admissibility of Plaintiff’s, Joseph Hineman (“Plaintiff”) use of marijuana on the day of his injury. The evidence is relevant and is admissible pursuant to D.R.E. 403. Accordingly, Defendants’ Motion *in Limine* to introduce evidence of Plaintiff’s marijuana use on the day of the injury is **GRANTED**.

Facts

On December 5, 2007, Plaintiff fell on a metal rod attached from a plow marker during a snowball fight, injuring the left soft pallet of his mouth. An hour after the incident, Plaintiff went to Dr. Imber's office complaining of a headache, pain in his temples and a sore throat. Dr. Imber examined the Plaintiff and observed two cuts on the roof of his mouth. Dr. Imber cleaned the wounds with a cotton ball and released Plaintiff to return home.

According to the Complaint filed on March 1, 2010, at about 5:00 p.m. on December 5, 2007, Plaintiff's mother found him in his kitchen in a pool of his own blood. Plaintiff was transported to Christiana Hospital where he was diagnosed with an infarct on his left internal carotid artery. On that same day, Plaintiff suffered a stroke and brain damage. Plaintiff underwent emergency surgery, was hospitalized for 13 days after the surgery and remained in recovery for 2 months. The Complaint alleges that as a result of Dr. Imber's medical negligence in assessing Plaintiff's injuries, Plaintiff is now permanently paralyzed.

Defendants seek to admit evidence of Plaintiff's use of marijuana, particularly on the day of his injury. During Plaintiff's deposition in this case, he admitted that he smoked marijuana "possibly a couple hours" before the accident, but did not know how much he smoked.¹ Another case was filed in the Court of

¹ Defts. Mot. in Limine, Ex. A.

Common Pleas in Delaware County. In the case filed in Delaware County, Joseph Hineman and Dorothy Hineman are listed as Plaintiffs and Michael Epp and Clifford Hineman are listed as the defendants. Plaintiff was deposed in connection with the Delaware County case on June 16, 2011. During the deposition, Plaintiff was specifically asked, “did you feel you were under the influence at all of the marijuana at the time this incident occurred?” Plaintiff answered, “I hope so. Otherwise, I wasted my money.”²

The Plaintiff retained Dr. Bogdasarian as an expert witness. Dr. Bogdasarian testified that Plaintiff’s use of marijuana use prior to the date of the incident may have contributed to his lightheadedness.³ The Defendant retained Dr. M. Boyd Gillespie as an expert. The Defendant asked Dr. Gillespie to state a medical opinion as to the role of marijuana smoking on the medical care of the

² After Plaintiff answered, the following relevant questions and answers followed:

Q: How was it that the marijuana would make you feel?

A: Just happy.

Q. All right. Did it affect your ability to perceive any objects that were there that day?

A: No.

Defts. Mot. in Limine, Ex. B.

³ The testimony of the deposition states the following:

Q: Mr. Hineman has reported that he had been smoking marijuana that afternoon before this happened, do you have any reason to belief that being high[,] as he claims he was[,] would have any significance in any part of your evaluation in this case?

A: Well, fortunately[,] I guess I can say I don’t have personal experience with his sensation, but I would say that I suppose it may have something to do with lightheadedness possibly. I’m really not an expert though in the effects of marijuana[,] I’m afraid.

Defts. Mot. in Limine, Ex. C.

Plaintiff. Dr. Gillespie submitted an affidavit based on the sworn testimony of Plaintiff that he smoked marijuana prior to the injury and that he was “under the influence” of marijuana at the time of the accident. According to the affidavit submitted by the Defendant, it is Dr. Gillespie’s medical opinion that:

1. Because marijuana is a sedative, a person under the influence of marijuana may perceive less pain and therefore report less pain to the doctor.
2. Marijuana can cause confusion and memory loss such that the ability to relate a full and accurate history by a patient to a doctor would be impaired.
3. Mr. Hineman testified that being under the influence of marijuana made him feel “happy.” A feeling of euphoria could result in Mr. Hineman’s misperception of the extent of his injury and, therefore, the manner in which he reported it to his doctor.
4. Mr. Hineman should have told Dr. Imber that he had smoked marijuana and considered himself under the influence so that Dr. Imber could understand the possible inaccuracies of Mr. Hineman’s reported history and symptoms.⁴

Parties’ Contentions

The Defendants argue that Plaintiff’s testimony and the opinions of the experts demonstrate that Plaintiff’s perceptions, feelings, symptoms or behaviors at the time of his injury and when he conveyed his injury to Dr. Imber, may have been skewed by his marijuana use. Defendant submits that the Plaintiff’s marijuana use is relevant because it impacted Dr. Imber’s opportunity to make adequate recommendations to the patient. Additionally, Defendant submits that

⁴ Defts. Mot. in Limine, Ex. D.

this evidence is admissible under D.R.E 403 because its probative value substantially outweighs the danger of unfair prejudice.

Plaintiff opposes Defendants Motion. Plaintiff submits that the evidence of Plaintiff's prior marijuana use is not relevant because: (1) there is no evidence for an expert state, with reasonable medical probability, that plaintiff was under the influence at the time of Dr. Imber's examination; and (2) that Dr. Imber had a duty to ask Plaintiff whether he used drugs prior to the accident. Therefore, the Plaintiff argues that the only inquiry before this Court is whether Dr. Imber was negligent for sending Plaintiff home instead of referring Plaintiff to the emergency room for treatment. Also, Plaintiff contends that the probative value of mentioning to the jury that Plaintiff smoked marijuana is greatly outweighed by the danger of unfair prejudice and is thus inadmissible pursuant to D.R.E. 403.

Discussion

The evidence of Plaintiff's marijuana use on the day of the accident is relevant and its probative value substantially outweighs the danger of unfair prejudice. Therefore, the evidence is admissible.

The evidence of Plaintiff's marijuana use a couple of hours before his snowball accident must first be relevant to be admissible at trial.⁵ Relevant

⁵ D.R.E. 402 ("All relevant evidence is admissible, except at otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.").

evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁶ The Delaware Supreme Court has held that “[t]he definition of relevance encompasses materiality and probative value.”⁷ Evidence is deemed material if it is offered to prove “a fact that is of consequence to the action.”⁸ “Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be.”⁹ In making a relevancy determination, it is necessary to examine the purpose for offering the evidence.¹⁰ Absent a clear abuse of discretion, relevancy determinations will not be reversed on appeal.¹¹

Though relevant, evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.”¹²

In *Laws v. Webb*, the Delaware Supreme Court upheld the decision of this Court admitting evidence of the plaintiff’s alcohol consumption prior to a car

⁶ D.R.E. 401.

⁷ *Stickel v. State*, 975 A.2d 780, 783 (Del. 2009) (citing *Lilly v. State*, 649 A.2d 1055, 1060 (Del. 1994)).

⁸ *Id.* at 783.

⁹ *Id.*

¹⁰ *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

¹¹ *Id.*

¹² D.R.E. 403.

accident.¹³ This Court first determined that the alcohol consumption was relevant to the degree of plaintiff's fault and the evidence could assist the jury in determining plaintiff's perceptive abilities near the time of the accident.¹⁴ This Court then weighed the probative value of the plaintiff's alcohol consumption against its prejudicial value and concluded that any prejudice was "outweighed by the defendant's fair need to have the jury understand as much as possible about the background of one of the potential proximate causes of the accident."¹⁵ The Delaware Supreme Court held that this Court did not abuse its discretion.¹⁶

Similarly, in *Rachko v. Nationwide Mutual Insurance Co.*, this Court held that evidence of plaintiff's alcohol consumption was admissible to show plaintiff's ability to perceive and react in a case resulting in a car accident.¹⁷ This Court left the determination of contested facts a question of fact for the jury to resolve.¹⁸

Also, in *Scott v. Ritterson*, this Court admitted evidence of plaintiff's consumption of alcohol on the day of the accident.¹⁹ The plaintiff was not impaired and passed field sobriety tests at the scene of the accident.²⁰ In holding that the evidence of plaintiff's alcohol consumption prior to the accident was

¹³ 658 A.2d 1000, 1010 (Del. 1995) (overruled on other grounds by *Lagola v. Thomas*, 867 A.2d 891 (Del. 2005)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 1997 WL 817860, at *1 (Del. Super. Oct. 17, 1997).

¹⁸ *Id.*

¹⁹ 2004 WL 1790134, at *2 (Del. Super. Aug. 9, 2004).

²⁰ *Id.* at *1.

relevant, the Court reasoned that, “[t]he jury must assess the credibility of the parties in making its determination of liability. The ability of the parties to perceive and react to the auto accident is relevant to the jury’s determination of liability.”²¹ This Court further held that any prejudicial effect the testimony may have had was greatly outweighed by the jury having all information necessary in making an assessment of negligence and proximate cause.²²

In this case, evidence of the Plaintiff’s admission that he smoked marijuana a couple of hours before the injury is relevant. This is a medical negligence case where Plaintiff alleges that Dr. Imber’s treatment of Plaintiff’s condition fell below the requisite standard of care. Defendants are not contending that the evidence is relevant to show that Plaintiff was in anyway at fault in causing his injury. Instead, Defendants argue that Plaintiff’s marijuana use may have affected his perception of his injury or pain threshold. The evidence is admissible for that purpose. The jury must assess the credibility of the parties in making the determination of medical negligence. Similar to this Court’s holding in *Scott*, the ability for the Plaintiff to perceive and react to his accident is relevant to the jury’s determination of the alleged medical negligence.

Having determined that the evidence of Plaintiff’s marijuana use on the day of the accident is relevant, the Court must now determine whether the prejudicial

²¹ *Id.* at 2.

²² *Id.*

effect of that evidence substantially outweighs its probative value. It is essential for the jury to be presented with facts that could potentially affect the Plaintiff's perception at the time of his office visit with Dr. Imber. The evidence in this case shows that the Plaintiff's perception of pain may have been decreased or he was not able to appreciate the severity of his symptoms. Any prejudicial effect that this testimony may have is substantially outweighed by the jury's determination of the Plaintiff's perception at the time he was examined by Dr. Imber.

Conclusion

Based on the foregoing, Defendants' Motion is **GRANTED**.

IT IS SO ORDERED.

/s/ Calvin L. Scott
Judge Calvin L. Scott, Jr.