

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DANIEL MILLER and)
DENISE MILLER) CIVIL ACTION NUMBER
)
)
 Plaintiffs) 06C-01-150-JOH
)
)
 v.)
)
)
 SCRATCH MAGOOS a/k/a SCRATCH)
 MAGOOS RESTAURANT & BAR)
)
)
 Defendant)

Submitted: September 8, 2008

Decided: November 20, 2008

MEMORANDUM OPINION

*Upon Motion of the Plaintiffs for Additur or New Trial - **DENIED***

*Upon Motion fo the Plaintiffs for New Trial Regarding Juror #11 - **DENIED***

Appearances:

James P. Hall, Esquire, of Phillips Goldman & Spence, P.A., Wilmington, Delaware,
attorney for plaintiff

Mary E. Sherlock, Esquire, of Mary E. Sherlock, P.A., Dover, Delaware, attorney for
defendant

HERLIHY, J.

Plaintiffs Daniel and Denise Miller have moved for additur or for a new trial on damages. They have separately moved for a new trial based on this Court's decision to keep a juror whom they claim should have been excused.

Daniel Miller was injured when he swallowed a shard of glass while drinking a beer at defendant Scratch Magoo's, a bar and restaurant in Wilmington. It became lodged in his upper throat and had to be surgically removed. He claimed damages for that and a subsequent upper GI condition. His wife, Denise, claimed loss of consortium.

On August 13, 2008, after a two and a half day trial, the jury awarded Daniel Miller \$17,500.00 and his wife, Denise, \$1,670.00. Daniel Miller argues his award is inadequate in light of his injuries and medical bills.

During the trial, it developed juror #11 knew of a doctor, through his sister, who did not testify but whose records were mentioned by one of the doctors who did. The Court, after examining the juror, found the juror could be impartial. She was allowed to sit through the remaining testimony and participate in the deliberations.

Based on the evidence and the jury's role as a fact-finder, the Court sees no basis to award additur or to have a new trial on damages. Further, the Court sees no error in allowing juror #11 to remain. Accordingly, plaintiffs motions are DENIED.

Factual Background

Miller¹ was enjoying a round of beers with some friends in Scratch Magoo's. This

¹ All references to Miller, hereafter, unless otherwise noted are to Daniel Miller as primary plaintiff.

was on March 11, 2004. After taking a sip or two, he felt something lodged in his throat. He and his friends discussed options, such as eating to dislodge whatever it was. He was trying not to swallow, and it felt like “two needles” in his throat. He had increased difficulty breathing. After a brief time he decided to drive himself to the hospital where he had a long wait.

Ultimately an x-ray was taken but it showed nothing upon first examination. But Miller’s symptoms remained, and he was upset. There was a discussion by hospital staff that he would be sent home about which Miller was not happy. A second hospital person examined the x-ray and observed an object in his throat. After this discovery, hospital staff acted quickly. Dr. Gerald Suh performed a laryngoscopy removing a glass shard from Miller’s lower throat but above the entrance to the esophagus. Miller’s beer glass at Scratch Magoo’s had been intact. Denise Miller had arrived by this time and was very upset.

When he woke up after the surgery, he felt immediate relief. He was prescribed Tylenol 3 (with codeine), an antibiotic and Zantac. He testified he got better daily and after several days, he returned to work and was eating normally. He has resumed drinking beer.

Miller saw Dr. Suh on March 25th. Dr. Suh reports² Miller told him that “overall, he feels he is doing well.” Miller reported to Dr. Suh that he was back to a normal diet. Dr. Suh’s impression was that Miller was doing well. Dr. Suh also reported that Miller

² Plaintiffs’ Exhibit 1, tab D.

had some mild heartburn since the incident and was taking Zantac. He went on to report that Miller has some residual gastroesophageal reflux disease (hereafter "GERD"). He recommended taking Prevacid for a month, instructed him about reflux precautions and reported he - Miller - would follow up if symptoms recurred. There was no follow with Dr. Suh.

Miller testified that he started taking Tums within thirty-six hours of the operation because of heartburn. He had never had heartburn, he said, prior to this incident. The symptoms worsened over the summer. He was taking stronger and stronger over-the-counter medication. He experienced pain three to four times per week. He finally decided to see his family doctor, Dr. Bernard King, for these symptoms on December 2, 2004.

Miller testified Dr. King said he had GERD, grade 1, which was not serious but detectable. Miller was to stay off caffeine and elevate his bed. This did not help, however. Dr. King prescribed Nexium. For more than a year, Miller said, he would vomit after eating certain foods. He told the jury he had vomited the Friday night before the trial. The heartburn persists, he testified.

On cross examination, Miller inferred there could have been a second piece of glass which went down his esophagus and caused the GERD. There is no evidence, however, to conform this belief. Miller continued to see Dr. King and was asked, however, why the doctor's records do not mention GERD from April 2005 into 2006. The first reference was in a record of January 16, 2007.

Dr. King referred Miller to Dr. Christopher Ruffini who examined him on June 10, 2008. Plaintiffs placed into evidence Dr. Ruffini's report to Dr. King about that visit.³

In pertinent part it said:

Daniel has undergone an upper endoscopy both in 2004 as well as more recently in 2007 by our group which failed to reveal any significant abnormalities. A CT scan done prior to his lat endoscopy did perhaps show some antral wall thickening and this was the reasoning for the follow up endoscopy. Biopsies were performed on both endoscopies and essentially no abnormalities were noted on biopsy.

* * * * *

ASSESSMENT AND PLAN:

1. Gastroesophageal reflux disease with intermittent vomiting - Daniel's symptoms are somewhat unusual in that they sound like episodic gastroparesis with fullness and post prandial vomiting despite normal endoscopic evaluation.

He did have a gastric emptying scan done about a year ago which was borderline abnormal, but he did not improve at all when taking the Reglan and the Reglan was discontinued.

At this point, I do not have a firm etiology of his symptoms although I certainly can see how they are disturbing him. He brought up the glass which he had swallowed and was concerned perhaps a further piece had gotten beyond what was retrieved from his hypopharynx. I think this is certainly possible although I was expecting him to be somewhat sicker if he had glass embedded in his bowel wall or if it had protruded into his peritoneum. He could have partial obstruction due to injury from swallowed glass and I did take the opportunity to order and upper GI and small bowel series. I did not see the clear worth in repeating an endoscopy at this time, although I would consider this in the future. I gave him samples of Aciphex to try instead of Nexium as he does relate some of the vomiting symptoms to this use of Nexium. I have asked him to follow up closely with a phone call when using the Aciphex and will evaluate him further after his upper GI and small bowel series.⁴

³ Plaintiffs' Exhibit 1, tab E.

⁴ *Id.*

There was testimony about the medications Miller has been taking and may need to take in the future.

Dr. King testified he had been and is the Millers' family physician. He had reviewed the hospital records, and from his interpretation of them, the glass shard had become lodged in the esophageal inlet. Miller's complaint at the first office visit in December, 2004 was that his heartburn was like someone standing on his chest.

Dr. King said Miller's GERD was caused by the swallowing of the glass shard. He was asked about his 2005 office notes and that the last reference to a complaint of heartburn was on April 7th. The next time for such a complaint was January 2007 with an additional complaint of vomiting. He prescribed Nexium. A CT scan that month revealed some mild-moderate stomach wall thickening which is not normal. With necessary tests and medications, Dr. King estimated Miller's future medical expenses would be \$3,000.00 annually.

Dr. King agreed on cross examination that Dr. Suh did not and could not examine Miller's esophagus because the scope he used would not have been able to go down it. He was also asked about Dr. Ruffini's report that he could not establish a firm etiology of Miller's symptoms.

Miller's medical expenses for the throat operation and the follow-up exam with Dr. Suh totaled \$5,766.20.⁵ For Dr. King's exams and other tests, his medical expenses were

⁵ Plaintiffs' Exhibit 1, tab G.

an additional \$4,286.41. Miller's present value future medical expenses, using different approaches for frequency of office visits and tests, were either \$72,336.00⁶ or \$60,596.00.⁷

Denise Miller testified that the two of them had been married for ten years. She said a friend who had been drinking beer with her husband called her about her husband and she went to the hospital. She described his complaints of pain, the onset of vomiting in 2005, and how on occasion he excuses himself from meals to vomit.

Dr. Joel Chodos testified for Scratch Magoo's. He examined Miller on February 19, 2008.⁸ He is a gastroenterologist who has been practicing in Delaware for twenty years. He treats patients who have had foreign objects in their hypopharynx but not in their esophagus. GERD is a common ailment and ranks second in the number of patients he treats.

Dr. Chodos said Dr. Suh's records state he removed the glass from the hypopharynx. It would not have gone into the esophagus. It did not enter the esophageal inlet. He said he could not see a causal relationship between swallowing the glass and

⁶ Plaintiffs' Exhibit 3.

⁷ Plaintiffs' Exhibit 4.

⁸ Miller while testifying had complained of what he felt was the brevity of Dr. Chodos' exam. Dr. Chodos said that the exam was only ten minutes. That is due to the inability to conduct an examination of an internal area. The doctor said he spent about fifty minutes speaking to Miller.

Miller's GERD. He also cannot find a physiological explanation from ingesting the glass to reflux and vomiting. Miller may have GERD, he testified, but another condition, gastromotility (a gastric emptying disorder), may be involved. Vomiting is a forceful thing but not as part of reflux disease; reflux patients regurgitate. He noted a normal endoscopy in January 2007 with no scars and a normal biopsy. Basically GERD is a lower esophageal condition and not in the area of the throat where the glass was lodged.

Scratch Magoo's conceded negligence for the glass shard being in Miller's beer glass, for the damages claimed for its removal and Dr. Suh's follow-up, and related pain and suffering. The claim dispute was over the cause of GERD and, therefore, damages including pain, suffering, past and future medical bills.

During the trial juror #11 brought to the Court's attention that she knew Dr. Ruffini. She had mentioned this first to two other jurors at lunch. It turned out her sister had worked for Dr. Ruffini for sixteen years. The Court questioned her. She said to the other two only that she knew Dr. Ruffini. She said she would be fair and impartial and her demeanor was consistent with that statement. The plaintiffs' asked that she be removed the first time it became known she had made the remark to other jurors. Their reason as that she has disobeyed the Court's instruction not to discuss the case (including witnesses) and because of her sister's employment. Plaintiffs renewed their application to excuse before the jury started to deliberate. The Court denied plaintiffs' application on both occasions.

Applicable Standard

A jury's verdict is presumed to be correct.⁹ It will not be set aside unless it is manifestly against the great weight of the evidence.¹⁰ This Court will not set aside a verdict as insufficient unless it is clear that verdict was the result of passion, prejudice, partiality or corruption, or if it is clear the jury disregarded the evidence or rules of law.¹¹ A jury has the right to accept a portion of a witness' testimony and reject other parts.¹² And a jury has the right to accept one expert over another.¹³ This Court has the authority to award additur if warranted.¹⁴

Discussion

There are two issues which plaintiffs present. The first is that the damage award is insufficient for the injuries suffered and warrants an additur or a new trial on damages. The second relates to juror #11.

As noted earlier, Scratch Magoo's conceded its negligence resulted in the glass shard getting in Miller's beer glass. It conceded it was liable for the damages he suffered,

⁹ *Lacey v. Beck*, 161 A.2d 579, 580 (Del. Super. 1960).

¹⁰ *Gannett Co., Inc. v. Re*, 496 A.2d 553, 558 (Del. 1985).

¹¹ *Riegel v. Aastad*, 272 A.2d 715, 717-18 (Del. 1970).

¹² *Pryor v. State*, 453 A.2d 98, 100 (Del. 1982).

¹³ *Delaware Tax Center v. Fox*, 401 A.2d 97, 100 (Del. Super. 1979).

¹⁴ *Young v. Frase*, 702 A.2d 1234, 1237 (Del. 1997).

hospital and medical bills and pain and suffering. Those hospital and medical bills totaled \$5,766.20.

But Miller argues he has suffered GERD as a causal result of swallowing the glass shard. The additional medical bills he has incurred relating to that condition total \$4,286.41. He has projected future medical expenses of \$60,000.00 or \$72,000.00, along with his discomfort, vomiting, pain discomfort and distress. He views the award of \$17,500.00 as a mockery. It shocks the conscience, he asserts, and justifies additur.

That argument ignores several important points. One, is the jury's authority to accept the testimony of one expert over that of another.¹⁵

Dr. King opined that Miller's GERD was causally related. He reviewed all the complained of symptoms while also considering where he believed the glass had been lodged in Miller's body. Because Miller had not presented with these symptoms before the glass incident, Dr. King opined the glass as the cause of the GERD.

On the other hand, Dr. Chodos could not relate Miller's GERD to this incident. First, it never entered the esophagus. It was in the hyperpharynx area and not in the esophageal inlet as Dr. King, mistakenly, believed it had been. That location is where Dr. Suh had removed it from. Second, he would have found a causal connection had the glass gone into Miller's lower esophagus, but it did not. Third, vomiting is not consistent with

¹⁵ *DiSabatino Bros. V. Wortman*, 453 A.2d 102, 105-06 (Del. 1982).

GERD, regurgitation is and the latter is not Miller's symptomology. In short, there are too many disconnects between the incident and the onset of GERD. The story suggests that another disorder unrelated to the incident is the underlying cause of his symptoms. Testing has failed to confirm aspects of GERD, too, though Dr. Chodos said Miller may have it.

In a case such as this, it is impossible to know whether the jury found that either the plaintiffs failed to meet their burden on proximate cause or that there was no proximate cause. Whichever it is, there is evidence to support its verdict (choice). Either way a causal connection to the glass shard and GERD was not established.

That finding leads to two results. The first is that the medical bills and all claims relating to GERD past and future could not be awarded. There is more than ample evidence in the record to support the verdict of no causal connection. The jury was entitled, and apparently did, accept Dr. Chodos' opinion over that of Dr. King.

When it did, it found Scratch Magoo's liable for \$5,766.20 in medical bills relating to the initial treatment and a sum for pain and suffering relating to that treatment. The verdict is basically a \$12,000.00 award for pain and suffering for Miller. Mrs. Miller's award for what she experienced at the hospital and a brief period thereafter is also adequate. This Court finds that sum to be adequate.

The second result of the verdict is obviously its rejection of the other medical bills incurred relating to GERD, future medical expenses related to it, and the pain and

suffering related to it. Miller's argument is, of course, not for a damage award for the initial incident and its aftermath for a week or two thereafter, but for several years. The jury, based on the evidence and law before it was, contrary to Miller's view, entitled to parse his injuries. It did so. Once it made that decision, its award of \$17,500.00 is fair and reasonable.

In sum, the Court finds no basis to award additur or to grant a new trial on damages only. The plaintiffs' have not shown how the continued presence of juror #11 prejudiced them. The Court was and remains convinced she was fair and impartial throughout. The doctor for whom her sister worked was not a witness and plaintiffs chose to put his report into evidence. There is no basis to grant a new trial on that ground either.

Conclusion

For the reasons stated herein, plaintiffs' motions for additur or a new trial on damages and for a new trial are **DENIED**.

J.