IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ANDREW S. KERR,	:	
	:	C.A. No. 03C-05-030 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
CHARLES W. ONUSKO,	:	
	:	
Defendant.	:	

Submitted: July 29, 2004
Decided: October 20, 2004

ORDER

Upon Defendant's Motion for New Trial.
Denied.

Jeffrey J. Clark, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiff.

Jeffrey A. Young, Esquire of Young & Young, P.A., Dover Delaware; attorneys for the Defendant.

WITHAM, J.

Defendant Charles W. Onusko has filed a Motion for a New Trial based on several contentions. Defendant's first contention is that this Court improperly admitted expert testimony regarding future medical expenses that overwhelmingly impacted the jury and ultimately resulted in an excessive verdict. Defendant also contends that this Court committed legal error in its application of the collateral source rule. For the reasons set forth below, Defendant's Motion for a New Trial is denied.

When a court decides whether a new trial is warranted based on a claim of excessive damages, a jury's determination of damages is given great deference and presumed to be correct.[1] A jury verdict will be set aside only when it is against the "great weight" of the evidence.[2] Thus, a new trial is granted only when it is "clear that the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice."[3] Accordingly, a jury's verdict will not be disturbed so long as there is a "sufficient evidentiary basis" to support the verdict.[4] *Expert Medical Testimony*

The trial judge functions as a gatekeeper with respect to expert testimony and must assess whether the evidence is reliable and relevant before admitting such

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

[2] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

[3] *Young,* 702 A.2d at 1237 (*quoting Mills v. Telenczak*, 345 A.2d 424, 426 (Del. 1975)).

[4] *Id.*

testimony. The Court, in performing this role, must be " . . . certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[5] The trial judge's determination of whether to admit or exclude expert testimony is reviewed for abuse of discretion.[6] Defendant claims that the Court erred in admitting Dr. Schwartz's testimony concerning future medical expenses. Defendant argues a new trial is required because the jury's verdict was excessive as it was overwhelmingly impacted by Dr. Schwartz's inadmissible testimony.

The admissibility of expert testimony is governed by the Delaware Uniform Rules of Evidence 702.[7] The Supreme Court in *Goodridge v. Hyster Co.*[8] articulated the five-step test used in determining whether expert testimony is admissible. To be admissible, the trial judge must find:

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[5] *Ward v. Shoney's, Inc.*, 817 A.2d 799, 803 (Del. 2003).

[6] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999) (*citing General Electric Co. v. Joiner*, 522 U.S. 136, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997)).

[7] D.R.E. 702 (provides " If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.").

[8] 845 A.2d 498 (Del. 2004).

1) The witness to be a qualified expert;

2) The testimony to be relevant and reliable;

3) The testimony to be based upon information reasonably relied upon by experts;

4) The testimony will assist the trier of fact; and

5) The testimony will not create unfair prejudice or confuse or mislead the jury.[9]

The trial judge has broad discretion in determining the reliability of expert testimony and has discretion to deviate from the *Daubert* factors to determine reliability in a particular case if the facts so require.[10] For the reasons set forth below, this Court finds Dr. Schwartz's testimony was properly admitted for consideration by the jury.

Dr. Schwartz is an orthopedic surgeon. To become an orthopedic surgeon Dr. Schwartz went to four years of college, four years of medical school, and five years of orthopedic residency training. Further, Dr. Schwartz received Board Certification from the American Board of Orthopedic Surgeons. Accordingly, this Court found Dr. Schwartz to be a qualified expert.

This Court also found Dr. Schwartz's testimony to be relevant, reliable, and based on information reasonably relied upon by experts in his field. Dr. Schwartz's characterization of Plaintiff's injury as permanent was in accordance with

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[9] *Id.* at 503.

[10] *M.G. Bancorporation, Inc.*, 737 A.2d at 522 (Del. 1999).

guidelines established by the American Medical Association and his diagnosis was based on objective factors. Dr. Schwartz opined that Plaintiff would incur future medical expenses as a result of his permanent injury. Dr. Schwartz's testimony was based on his personal treatment of Plaintiff and Plaintiff's medical records. Based on Dr. Schwartz's knowledge and experience, Dr. Schwartz testified what an average person with a similar injury to Plaintiff would require in future medical expenses. Accordingly, Dr. Schwartz believed Plaintiff would require, on average each year, one or two visits with him, two or three prescriptions for medicine, and twelve to fourteen visits to physical therapy. This Court found this information to be both reliable and the basis upon which other medical experts formulate opinions.

This Court also concluded Dr. Schwartz's testimony would assist the trier of fact in determining reasonable future medical expenses. Without an expert, a jury would be left to unduly speculate as to the potential future medical expenses incurred by a person with such an injury. Dr. Schwartz's testimony provided an average that the jury may utilize in evaluating Plaintiff's future medical expenses.

Finally, this Court found Dr. Schwartz's testimony would not unfairly prejudice the Defendant or confuse the jury. The jury was well-advised throughout Dr. Schwartz's testimony that his opinion was based on the "average" individual with the same permanent injury as Plaintiff. Dr. Schwartz indicated that his opinion was based on an average and Plaintiff may require more or less treatment in a specific year. Dr. Schwartz also explained that this is a standard average that can increase or decrease depending on the particular individual. Further, on cross-

examination, the deposition allowed the jury to hear that Plaintiff has missed and cancelled several appointments for physical therapy. Accordingly, although Dr. Schwartz' s testimony provided an average of future medical expenses, it also provided testimony that would permit a jury to infer that Plaintiff is not the average person. Therefore, Dr. Schwartz' s testimony was not unfairly prejudicial or confusing to the jury.

Based on the foregoing analysis, this Court found Dr. Schwartz' s testimonial deposition to be admissible pursuant D.R.E. 702. Defendant argues that such evidence is inadmissible because Dr. Schwartz' s testimony was simply based on the " average" person in Plaintiff' s condition and that Plaintiff may or may not need any or all of these treatments. However, that merely effects the weight of the evidence and not its admissibility. Here, Dr. Schwartz testified that Plaintiff had suffered a permanent injury and will incur future medical expenses. Dr. Schwartz also testified what an average person with Plaintiff' s condition would require future medical expenses. These were all testified to a reasonable degree of medical probability. Further, although Dr. Schwartz testified that he could not definitively state what future medical expenses Plaintiff would actually incur, he did state to a reasonable degree of medical probability that Plaintiff would require what the average person would require. Future medical expenses are difficult to forecast for any single individual given the diverse health and body structures amongst humans. Further, this particular permanent injury by its nature is difficult to forecast because it may reappear often or quite seldom. However, the fact that Plaintiff suffered a

permanent injury that is difficult to forecast should not preclude an award for future medical expenses. Simply because Dr. Schwartz's testimony was based on an "average" person with the same permanent injury does not make it inadmissible. Accordingly, this court properly admitted and appropriately allowed the jury to consider Dr. Schwartz's testimony regarding future medical expenses.

Collateral Source Rule

Defendant contends a new trial is required because the jury verdict has been enormously inflated as a result of this Court's erroneous application of the collateral source rule. Defendant argues that the rule should not have been applied because there was no collateral source and, *assuming arguendo* a collateral source exists, consideration was not given to any third party for their collateral payments. The collateral source rule precludes a tortfeasor from the right "to any mitigation of damages because of payments or compensation received by the injured person from an independent source."[11] One of the prerequisites of the collateral source rule is that consideration must have been paid by the injured party for the collateral source of payment.

Defendant first argues that there was no collateral source; Plaintiff simply received a discount because he paid in cash. Defendant cites no authority that a treating therapist cannot be a collateral source. Here, Brown and Associates charged the Plaintiff less than the usual rate because the Plaintiff paid in cash.

[11] *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964).

Logically, this situation is indistinguishable from a case where an insurance company pays a portion of the bill. In either scenario the tortfeasor is unaffiliated to the source supplying the insurance or the discount. Accordingly, Brown and Associates constitute a collateral source within the meaning of the rule.

Defendant also argues that the collateral source rule is not applicable because the Plaintiff did not give Brown and Associates any consideration for the collateral source of payment. The question addressed by this Court is whether Plaintiff's sole action of making payments in cash constituted sufficient consideration to trigger the collateral source rule. This Court held that it does.

The Supreme Court has stated that the slightest amount of consideration will suffice when applying the collateral source rule.[12] Double recovery is allowed by the Plaintiff so long as the source of such payment is unconnected to the tortfeasor.[13] The rationale of the collateral source rule is that, in accordance with the deterrence effect of tort law, it is better for the plaintiff to receive a windfall than to allow the tortfeasor to gain from any collateral source. Further, the collateral source rule also allows the innocent plaintiff to be fully compensated for his injuries. Accordingly, this Court found Plaintiff's action of making payments using cash to be sufficient consideration for purposes of the collateral source rule. Therefore, the entire amount of Plaintiff's medical bills was allowed to be considered by the jury.

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[12] *Farrell v. Gordon*, 770 A.2d 517, 521 (Del. 2001).

[13] *Id.*

Conclusion

Defendant's motion for a new trial was premised on the exclusion of Dr. Schwartz's medical testimony regarding future medical expenses and the misapplication of the collateral source rule. This Court determined that the jury was allowed to consider both the expert testimony and the full amount of the services rendered. With respect to Dr. Schwartz's future medical expenses, the jury was instructed as follows:

> You have heard a medical expert being asked to give opinions based on a reasonable medical probability. In Delaware, a medical expert may not speculate about mere possibilities. Instead, the expert may offer an opinion only if it is based on a reasonable probability. Therefore, in order for you to find a fact based on an expert's testimony, that testimony must be based on reasonable medical probabilities, not just possibilities.

After proper instruction, the jury was free to consider what Dr. Schwartz opined to be a "conservative average" as well as Plaintiff's previous history of physical therapy treatments in deciding an award for future medical expenses. In addition, as discussed above, the jury was properly allowed to consider the total bills for Plaintiff's expenses and not simply just the discounted rate. Further, the parties stipulated that an expert economist need not be called regarding future medical expenses: the discount rate and the rate of inflation cancelled each other. In light of Dr. Schwartz's testimony and Plaintiff's medical bills, this Court does not find the jury verdict to be against the "great weight" of the evidence. Accordingly,

Defendant's motion for a new trial is hereby ***denied***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution