NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

CRISTINA G. TARCA AND DUMITRU TARCA, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NORRISTOWN FORD, NORRISTOWN AUTOMOBILE CO., INC., INDIVIDUALLY AND D/B/A/NORRISTOWN FORD, AND IRVIN JOHNSON,	:	
Appellants	:	No. 3348 EDA 2011

Appeal from the Judgment Entered December 1, 2011,
in the Court of Common Pleas of Montgomery County
Civil Division at No. 07-25935

BEFORE: STEVENS, P.J., FORD ELLIOTT, P.J.E., AND ALLEN, J.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: March 12, 2013

Appellants appeal the judgment entered pursuant to a jury verdict in favor of appellee Cristina G. Tarca in the amount of $4,924,295.90, and in favor of appellee Dumitru Tarca in the amount of $50,000. Finding no error, we affirm.

The following excerpts from the trial court's opinion accurately present the factual and procedural background of this appeal:

> This case involved a motor vehicle accident that occurred on the afternoon of December 8, 2005. Cristina G. Tarca was driving her Toyota RAV 4 SUV northbound on Route 202 in Norristown, PA. She came to a stop at a red light at the intersection with Swede Road. While she was stopped, her RAV 4 was violently rear-ended by a Ford E-150 van driven by

Irvin Johnson, an employee of Norristown Ford, resulting in significant vehicular damage as well as severe bodily injury to Mrs. Tarca. The E-150 was owned by Norristown Ford, and at the time of the accident Mr. Johnson was acting within his scope of employment for Norristown Ford. Mrs. Tarca filed an action against Appellants seeking compensatory and punitive damages, and her husband Dumitru Tarca filed a claim for loss of consortium.

A trial by jury commenced on May 23, 2011 and continued for several days.

. . .

Prior to the jury being charged for this trial, and upon given proposed jury instructions by counsel, the Court gave counsel a chance to review the entire charge the Court planned to read to the jury. One of the proposed instructions was PA SSJI (Civ) 6.02 — Damages in Cases of Undisputed Negligence and Injury. As modified for this case, this proposed charge read as follows:

> The parties agree that the defendant was negligent, and the parties agree that the negligence caused some injury to the plaintiff. Therefore, you must answer "yes" on the Verdict Sheet to Questions 1, 2 and 3. **You must therefore at least award some damages for those agreed upon injuries: i.e. medical bills, pain and suffering, disfigurement, and lost wages.** The parties disagree, however, on the extent of the plaintiff's injuries the defendant caused. Therefore, you must determine the extent of the injuries the defendant caused and return a fair and just verdict in accordance with the law on damages that I will discuss in greater detail now.

Another proposed charge was PA SSJI (Civ) 6.09 — Past and Future Non-Economic Loss. As modified for this case, this proposed charge read, in part, as follows (emphasis added):

> Plaintiffs have made a claim for a damage award for past and future non-economic loss. In this case there are four items that make up a damage award for noneconomic loss, both past and future:
>
> (1) Pain and suffering,
>
> (2) Embarrassment and humiliation,
>
> (3) Loss of ability to enjoy the pleasures of life, and
>
> (4) Disfigurement.
>
> The disfigurement that Mrs. Tarca has sustained is a separate item of damages recognized by the law. Therefore, in addition to any sums you award for pain and suffering, for embarrassment and humiliation, and for loss of enjoyment of life, **Mrs. Tarca is entitled to be fairly and adequately compensated for the disfigurement she has suffered from the time of the injury to the present and that she will continue to suffer during the future duration of her life.**

At the close of evidence, the parties stipulated that both Irvin Johnson and Norristown Ford were negligent and that their negligence was a factual cause of Mrs. Tarca's injuries. Thus, the only issue remaining at trial concerned the amount of damages. The verdict sheet composed by the parties itemized damages into various categories. On March 31, 2011 at approximately 6:22 pm, the jury returned a verdict. As to damages to Mrs. Tarca, the jury

determined the following amounts under Question 4 of the verdict sheet:

A Past medical expenses
$168,102.99

B Additional past medical expenses
$20,000.00

C Future medical expenses
$1,898,778.00

D Past loss of earnings and earning capacity
$142,010.00

E Future loss of earnings and earning capacity
$714,251.00

F Past non-economic loss
$142,010.00

G Future non-economic loss
$0.00

Immediately subsequent to the hearing of the verdict, Appellees' counsel requested a meeting with the Court and counsel outside the jury's presence. Appellees' counsel argued that there was no dispute of fact at trial that Mrs. Tarca will suffer some future non-economic loss. Appellees' counsel specifically noted that there was uncontroverted evidence that Mrs. Tarca suffered permanent scarring as a result of surgery relating to her injuries from the accident, and that scarring is a portion of non-economic loss (and indeed was stated as such in the Court's jury charge). Appellees' counsel argued that the jury must award at least some figure as to future non-economic loss. Appellants' counsel disagreed, contending that the jury is not required to do so. After considering the arguments of counsel, the Court chose to re-read to the jury the instruction pertaining to future non-economic loss and instruct

> the jury to re-deliberate only as to Question 4G (future non-economic loss). After approximately half an hour of further deliberations, the jury returned a verdict pertaining to future non-economic loss in favor of Mrs. Tarca in the amount of $1,329,413.70.

Trial court opinion, dated April 11, 2012, at 1-5 (emphasis in original) (excerpts not in order presented in opinion).

Appellants raise the following issues on appeal:

> 1. Where a jury returns a verdict to which the plaintiff objects and the trial judge finds to be against the weight of the evidence, does the trial court err as a matter of law by reinstructing the jury and directing further deliberations instead of dealing with the issue on post-trial motions and granting a new trial based upon the verdict being against the weight of the evidence?
>
> 2. Did the trial court abuse its discretion in allowing, over objection, one of plaintiff's expert witnesses to opine that plaintiff developed a serious medical condition shortly after the accident, where that opinion contradicted the pre-trial expert reports in which the expert either completely ruled out the condition or opined that it developed approximately four years after the accident, and where allowing the expert to contradict his reports resulted in serious prejudice to defendants?

Appellants' brief at 2.

In their first issue, appellants argue that the trial court improperly returned this case to the jury for further deliberation because the court found the jury's verdict to be against the weight of the evidence, a matter properly remedied by the granting of a new trial. Appellees, on the other

hand, contend that the trial court did not actually find that the verdict was against the weight of the evidence, but rather that the verdict was inconsistent, and properly re-instructed the jury and gave them an opportunity to rectify their inconsistency. As this issue presents a question of law, our standard of review is ***de novo*** and the scope is plenary. ***Fizzano Bros. Concrete Products, Inc. v. XLN, Inc.***, ___ Pa. ___, 42 A.3d 951, 960 (2012).

The ultimate question here is whether the trial court's actions constituted a reweighing of the evidence or merely a correction of an inconsistent verdict. The cases presented by appellants are not particularly helpful in resolving this question because they analyze a different, albeit related issue. Appellants' lead decision, ***Criswell v. King***, 575 Pa. 34, 834 A.2d 505 (2003), decided whether an issue that the verdict was against the weight of the evidence had to be preserved at trial by objection, or whether it could be preserved by post-trial motion alone. There was underlying discussion as to whether the ***Criswell*** trial court faced a verdict that was against the weight of the evidence or merely an inconsistent verdict, but because the issue was not the focus of the decision, the analysis is of limited value presently. ***Criswell*** does give some indication of the parameters of a verdict that is against the weight of the evidence:

> A weight challenge is ***sui generis***. Such a claim is not premised upon trial court error or some discrete and correctable event at trial, but instead ripens only after, and because of, the jury's ultimate verdict in

> the case. The challenge does not dispute the power of the jury to render the verdict it rendered, nor does it even allege any facial error in the verdict of the jury (be it, in the eyes of the challenger, a flaw, an inconsistency or a total injustice). Assuming that the case properly was ripe for jury consideration-i.e., neither of the parties was entitled to a directed verdict because a properly joined issue of material fact remained for resolution-the jury is fully empowered to rule in favor of either or any party. The basis for a weight claim derives from the fact that the trial court, like the jury, had an opportunity to hear the evidence and observe the demeanor of the witnesses; the hope and expectation animating a weight challenge is that the trial court will conclude that the verdict was so contrary to what it heard and observed that it will deem the jury's verdict such a miscarriage of justice as to trigger the courts [sic] time-honored and inherent power to take corrective action.

Criswell, 575 Pa. at 46, 834 A.2d at 512.

We find that the instant dispute did not involve the weight of the evidence because appellees' objection challenged the power of the jury to render a verdict of no award for future non-economic loss in the face of a jury charge that mandated that the jury find some award of future non-economic loss. We agree that the verdict was inconsistent with the instructions given. Of course, had the jury returned some amount of damages that appellees objected to as insufficient, then the matter would be as to the weight of the evidence.

Appellants also argue that an inconsistent verdict can only be found to be inconsistent if the inconsistency is wholly internal, that is, the inconsistency cannot be found by reference to the record or the jury charge.

We disagree. Inconsistent verdicts are often assessed by reference to confusing or erroneous instructions or interrogatories. ***See Gorski v. Smith***, 812 A.2d 683, 707 (Pa.Super. 2002), ***appeal denied***, 579 Pa. 692, 856 A.2d 834 (2004); ***King v. Pulaski***, 710 A.2d 1200, 1204 (Pa.Super. 1998). Likewise, we find that a verdict may be considered to be inconsistent where it directly conflicts with the trial court's instructions.

Nonetheless, even assuming that appellants' position is correct, the verdict rendered by the jury here was also internally inconsistent. The non-economic loss here consisted of items such as pain and suffering and disfigurement. The evidence also revealed that these items were permanent. The jury did award damages for past non-economic loss. However, since appellee Cristina Tarca would suffer from pain and disfigurement both in the past and in the future, an award of damages for past non-economic loss is inconsistent with no award of damages for future non-economic loss. If the pain and suffering and disfigurement had a value in the past, it would continue to have a value in the future.

Finally, appellants argue that the jury's verdict may have been an attempt to render a compromise verdict. While it is within a jury's power to render a compromise verdict, the result here does not indicate that this was the jury's intent. If the jury's original verdict was intended as a compromise verdict, upon re-deliberating, the jury could have simply returned a future non-economic loss award of $1 (or some other nominal amount). Instead,

the jury awarded $1,329,413.70. This does not indicate to us that the original verdict was intended as a compromise. In sum, we find that the trial court properly re-charged the jury and allowed the jury to re-deliberate in order to remedy a verdict that was inconsistent, and not against the weight of the evidence.

In their second argument on appeal, appellants contend that the trial court improperly allowed one of appellees' medical experts to testify in contradiction to the expert's report. Our standard of review on such an issue is abuse of discretion:

> The admission of expert testimony is within the trial court's sound discretion and we will not disturb that decision without a showing of manifest abuse of discretion. An expert's testimony on direct examination is to be limited to the fair scope of the expert's pre-trial report. In applying the fair scope rule, we focus on the word "fair." Departure from the expert's report becomes a concern if the trial testimony "would prevent the adversary from preparing a meaningful response, or which would mislead the adversary as to the nature of the response." Therefore, the opposing party must be prejudiced as a result of the testimony going beyond the fair scope of the expert's report before admission of the testimony is considered reversible error. We will not find error in the admission of testimony that the opposing party had notice of or was not prejudiced by.

Whitaker v. Frankford Hospital of City of Philadelphia, 984 A.2d 512, 522 (Pa.Super. 2009), quoting ***Coffey v. Minwax Company, Inc.***, 764 A.2d 616, 620–621 (Pa.Super. 2000).

Appellants objected to the testimony of Dr. Marc Manzione concerning the time frame in which Cristina Tarca developed reflex sympathetic dystrophy ("RSD"), one of her most serious ailments. Dr. Manzione authored three separate pre-trial reports dated January 20, 2009, February 24, 2010, and May 17, 2011. In the 2009 report, Dr. Manzione does not mention the presence of RSD, although, as appellees indicate, the report does describe symptoms consistent with RSD. In the 2010 report, following Cristina Tarca's diagnosis of RSD by other physicians, Dr. Manzione noted the following:

> It is clear from the newly submitted records that this patient developed a sympathetic dystrophy subsequent to my evaluation on 1/7/09. Sympathetic dysfunction can arise from any type of acute or chronic noxious stimulation. At the time of the my [sic] evaluation on 1/7/09, the patient was still experiencing significant musculoskeletal symptoms as the result of injuries sustained on 12/8/05. These ongoing symptoms have resulted in a complex regional pain syndrome/sympathetic dystrophy. The sympathetic dysfunction which developed following my evaluation is the result of injuries sustained in the 12/8/05 motor vehicle accident.

Report, 2/24/10 at 3.

The 2011 report reconfirms the findings of the 2010 report and again concludes that Cristina Tarca's RSD is the direct result of her accident on December 8, 2005. Report, 5/17/11 at 4.

At trial, Dr. Manzione offered the following testimony pertaining to the onset of Cristina Tarca's RSD:

Q. Now, when you went back and looked at the records that you had reviewed before in 2010, what were some of the findings that you found significant that suggested this to you?

A. It is funny. When I first went back again and looked at these records -- when I authored my second report in 2010, it was clear she had been diagnosed as having reflex sympathetic dystrophy.

When I looked back at my examination -- like I said, there was no evidence of that. And I first assumed that, well, she developed this after I saw her as a result of these various injuries, because anybody who has chronic pain, anything that will stimulate the nervous system can cause this type of sympathetic dysfunction. I see it after fractures, strains, after surgery, after injections. So I thought she developed it at some point in early January of 2009.

It wasn't until I looked at all of these records again –

MR. BUCK: Objection, Your Honor. I think we need to see you at sidebar.

THE COURT: All right. (A conference was held at sidebar, not recorded.)

BY MR. MAYERS:

Q. If you could continue?

A. As I was saying, it wasn't until I really looked back at all of this information in prepping to come here today that I realized there were a lot of findings and signs to indicate that this problem had begun to develop probably in late 2007. And the problem was nobody diagnosed it, not me or not any one of the 12 doctors that saw her before.

> But, again, that is something that is fairly typical for this type of condition.

Notes of testimony, 5/24/11 at 75-77.

Finally, we note that another expert witness for appellees, Dr. Robert Knobler, testified that symptoms of RSD begin to manifest within several days or weeks of the causing trauma. ***Id.*** at 261. Dr. Knobler also indicated that RSD varies greatly from patient to patient and may progress rapidly in one while another develops the condition over a period of years. ***Id.*** at 262-263. Dr. Knobler testified that Cristina Tarca began experiencing physical signs of RSD within a few weeks of the December 8, 2005 accident. ***Id.*** at 262.

Appellants argue that Dr. Manzione's trial testimony prejudicially went beyond the fair scope of his expert reports. In the 2009 report, he failed to describe the presence of RSD, and in the 2010 report he described the RSD as having developed since the 2009 report. In contrast, in his trial testimony, he was permitted to testify that the RSD probably began to manifest itself in late 2007.

Appellants assert that this change in Dr. Manzione's opinion prejudiced them in two ways. First, they complain that it was their strategy to use Dr. Manzione's opinion to show that the RSD began to develop too late to have been caused by the accident at issue. Second, appellants wanted to weaken the testimony of appellees' medical experts by highlighting the

contrast between the described onset dates. We find no prejudice to appellants by the change in Dr. Manzione's opinion at trial.

Dr. Manzione's pre-trial reports set the onset date somewhere between the 2009 report and the 2010 report. At trial, he modified the onset date to somewhere in late 2007. Appellants could still have used the late 2007 onset date to argue that the RSD manifested itself too late to have been caused by the December 8, 2005 accident. While Dr. Manzione's initial estimate placed onset at four years after the accident, his revised estimate was still two years beyond the accident. Appellees' other medical expert testified that symptoms of RSD should begin to manifest within days or weeks of the initial trauma. Thus, appellants still had a plausible argument that the RSD was not caused by the accident because, according to Dr. Manzione, the RSD did not begin to appear until two years after the accident.

Similarly, appellants could still impeach appellees' experts on the different estimations of the onset date. Dr. Knobler testified that Cristina Tarca began experiencing physical signs of RSD within a few weeks of the December 8, 2005 accident. Dr. Manzione's reports placed onset somewhere between 2009 and 2010, while his modified trial opinion placed onset in late 2007. This modified date is still significantly different than that of Dr. Knobler and still could have been used to impeach.

Most importantly, however, both Dr. Manzione and Dr. Knobler consistently affirmed, in both their pre-trial reports and their testimony at trial, that Cristina Tarca suffered from RSD and that the December 8, 2005 accident was the direct cause. The medical opinions expressed at trial indicated that RSD is a condition that may develop at a slow and uneven rate. The symptoms may ebb and flow over time. Given the nature of RSD, it is wholly unsurprising, and of limited probative value, that different doctors might assess different onset dates. We find no abuse of the trial court's discretion in permitting Dr. Manzione to modify his opinion at trial in the manner described.

Accordingly, having found no merit in the issues raised on appeal, we will affirm the judgment entered below.

Judgment affirmed.