# Superior Court of the State of Delaware

William L. Witham, Jr. Resident Judge Kent County Courthouse 38 The Green Dover, Delaware 19901 Telephone (302) 739-5332

April 11, 2014

David A. Boswell, Esquire Hudson Jones Jaywork & Fisher, LLC 18354 Coastal Highway Lewes, Delaware 19958

Mary E. Sherlock, Esquire Weber Gallagher Simpson Stapleton Fires & Newby, LLP 19 South State Street, Suite 100 Dover, Delaware 19901

Re: Thomas O. Jackson, Jr. v. Ann Aglio Civil Case No. K11C-10-008 WLW

Dear Counsel,

The parties in this matter have each filed several motions *in limine*. I have reviewed each of the motions and the responses thereto as well as the relevant case law. I shall now discuss my decisions on each motion in turn, beginning with Plaintiff's first motion, followed by each of Defendant's three motions, then Plaintiff's second motion, as it was the last in time to be filed and appears to be made in response to Defendant's third motion.

# Plaintiff's first motion: Plaintiff's unemployment benefits

Plaintiff's first motion *in limine* seeks to preclude any reference to Plaintiff's receipt of unemployment benefits under the collateral source rule. Plaintiff was unemployed at the time of his accident in 2009; Plaintiff collected \$19,282 in

unemployment benefits in 2010, despite earning \$6,695 from working "odd jobs" following his recovery from his injuries. Defendant argues that the collateral source rule does not bar reference to Plaintiff's unemployment benefits and that such evidence would be relevant for impeachment purposes.

The collateral source rule is a doctrine that is "firmly embedded" in Delaware law, and bars a tortfeasor from mitigating any damages he is liable to pay a plaintiff "because of payments or compensation received by the injured person from an independent source." The rule is "predicated on the theory that a tortfeasor has no interest in, and therefore no right to benefit from monies received by the injured person from sources unconnected with the defendant." However, in Sears, Roebuck and Co. v. Midcap, the Supreme Court held that the collateral source rule did not prevent the defendant from showing that the plaintiff was receiving pension and social security benefits which the plaintiff had claimed were lost.<sup>3</sup> The *Midcap* Court explained that the collateral source rule did not prevent the defendant from introducing evidence "to show that a payment that is represented to the jury as a benefit that the plaintiffs lost as result of...injury or death, was in fact not lost, either in whole or in part, and is actually being received." The Supreme Court has also recognized an exception to the general rule of inadmissibility of collateral source evidence, allowing evidence of payments from a collateral source for the limited purpose of impeaching a witness' credibility.<sup>5</sup>

By Order dated April 2, 2014, this Court denied Plaintiff's Motion for Partial

<sup>&</sup>lt;sup>1</sup> *Mitchell v. Haldar*, 883 A.2d 32, 37-38 (Del. 2005) (citing *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964)).

<sup>&</sup>lt;sup>2</sup> *Id*.

<sup>&</sup>lt;sup>3</sup> Sears, Roebuck and Co. v. Midcap, 893 A.2d 542, 553 (Del. 2006).

<sup>&</sup>lt;sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> James v. Glazer, 570 A.2d 1150, 1155 (Del. 1990).

Summary Judgment as to Past Lost Wages, on the grounds that several genuine disputes of material fact exist as to Plaintiff's employment status at the time of his accident. Plaintiff collected \$19,282 in unemployment benefits in 2010; normally, Defendant would be precluded from introducing evidence of Plaintiffs' receipt of these benefits under the collateral source rule. However, Plaintiff was already unemployed prior to his accident, and given the unclear nature of his "interim" job that was to start the day after his accident in 2009, it may very well be that Plaintiff would have collected unemployment benefits at some point in 2010 even if the accident had not occurred. Thus, this appears to be a case that more squarely falls within the scope of *Midcap* than under the traditional collateral source doctrine. Further, Defendant is correct that evidence of Plaintiff's unemployment benefits would be admissible under the impeachment exception to the collateral source rule, depending on Plaintiff's testimony on direct examination.

Accordingly, Plaintiff's first motion *in limine* to exclude evidence of Plaintiff's receipt of unemployment benefits is **DENIED**.

#### Defendant's first motion: testimony of Dr. Evan Crain

Defendant's first motion *in limine* seeks to limit the trial testimony of Plaintiff's expert, Dr. Evan Crain, in two ways. First, Defendant seeks to preclude Dr. Crain from testifying as to Plaintiff's increased susceptibility to developing post-traumatic arthritis in the left-knee due to his accident, and as to surgeries Plaintiff may have to receive in the future as a result. Second, Defendant argues that Dr. Crain has no basis to testify that Plaintiff's medical bills were reasonable and necessary because Dr. Crain was not Plaintiff's treating physician.

The admissibility of expert testimony is subject to a five-prong test: (1) the witness must be qualified as an expert by knowledge, skill, experience, training, or education; (2) the testimony must be relevant; (3) the opinion must be based upon information reasonably relied upon by experts in that particular field; (4) the expert's

<sup>&</sup>lt;sup>6</sup> Jackson v. Aglio, C.A. No. K11C-10-008 WLW, at \*5 (Del. Super. Apr. 2, 2014).

testimony will assist the trier of fact; and (5) the expert testimony will not create unfair prejudice, confusion or mislead the jury.<sup>7</sup> Courts have excluded expert testimony on future medical expenses when the testimony was too vague and uncertain "to enable the jury to do more than engage in impermissible speculation and conjecture.<sup>8</sup> When a medical expert offers an opinion it must be stated in terms of a reasonable medical probability or certainty, because an expert's opinion about what is merely possible "is no more valid than the jury's own speculation as to what is or is not possible." However, under the "increased risk doctrine," an expert may testify about the plaintiff's increased risk of suffering a negative medical condition in the future as a result of negligence, even if the increased risk is not prescribed a precise statistical percentage of occurring, so long as the expert offers an opinion on the increased risk with reasonable medical probability.<sup>10</sup>

Dr. Crain states in his reports that Plaintiff is "prone to developing posttraumatic arthritis of the knee as a result of the extensive nature of this injury." This opinion was stated within a reasonable degree of medical probability. Even Defendant's expert, Dr. Michael Mattern, stated in a letter dated October 28, 2013 that Plaintiff "may develop some degree of arthritis" as a result of the accident. In other words, the parties' experts seem to agree that Plaintiff is at increased risk to developing arthritis in his knee as a result of a his injuries. Accordingly, Dr. Crain will be permitted to generally testify about this increased risk.

However, the remainder of Dr. Crain's challenged testimony constitutes impermissible speculation, and shall be excluded. Specifically, after describing the

<sup>&</sup>lt;sup>7</sup> *Pignataro v. George and Lynch, Inc.*, 2013 WL 1088333, at \*4 (Del. Super. Mar. 13, 2013) (citing *Sturgis v. Bay Health Ass'n Chartered*, 942 A.2d 579, 584 (Del. 2007)).

<sup>&</sup>lt;sup>8</sup> Acme Mkts., Inc. v. Downward, 314 A.2d 171, 172 (Del. 1973) (citations omitted).

<sup>&</sup>lt;sup>9</sup> O'Riley v. Rogers, 69 A.3d 1007, 1011 (Del. 2013) (citing Oxendine v. State, 528 A.2d 870, 873 (Del. 1987)).

<sup>&</sup>lt;sup>10</sup> Pignataro, 2013 WL 1088333, at \*4-5.

"significant risk" of Plaintiff developing arthritis over a ten-to-fifteen year period, Dr. Crain states that treatment "would include medication, exercise, brace, and if ineffective, surgery." Dr. Crain states that the surgery would "likely" be in the form of an arthroscopic surgery, and goes on to state that he is "hopeful" that a total knee replacement would not be required. Notwithstanding this, Dr. Crain states that "typically" the costs of treatment and arthroscopic surgery would be \$15,000 and the knee replacement, if performed, would be \$60,000.

This is all nothing but conjecture and speculation, and requires too many "what-ifs" in order to get to the \$15,000 cost of treatment and surgery and the \$60,000 total knee replacement, that even Dr. Crain himself acknowledges may not be required. Thus, while Dr. Crain may be permitted to generally testify as to the increased risk of arthritis Plaintiff faces as a result of the accident, Dr. Crain will not be allowed to testify as to the potential surgeries and cost thereof, as such testimony enters the realm of impermissible speculation.

As to the reasonableness and necessity of Plaintiff's medical bills, Dr. Crain may testify that Plaintiff's medical treatment was reasonable and necessary. Dr. Crain's testimony meets the five-pronged test for admissibility. Even though Dr. Crain was not Plaintiff's treating physician, Dr. Crain's reports indicated that he reviewed Plaintiff's medical bills, and has offered his opinion within a reasonable degree of medical probability. Defendant misconstrues the case offered in support of her position, as it involved treating physicians who could not recall specific treatment that was provided and could not account for that treatment in their billing. This Court has never held that only a treating physician may testify that his or her own medical bills are reasonable and necessary. Because Dr. Crain has reviewed Plaintiff's medical bills and because his testimony on the subject otherwise satisfies the test for admissibility, Dr. Crain shall be permitted to testify that the medical treatment was reasonable and necessary.

Defendant's first motion in limine is **GRANTED** in part as to preclude Dr.

<sup>&</sup>lt;sup>11</sup> See Katz v. Nationwide Mut. Ins. Co., 2007 WL 625285, at \*1 (Del Super. Jan. 3, 2007).

Crain from testifying as to treatment and surgeries and costs thereof relating to Plaintiff's potential arthritis. Defendant's first motion is **DENIED** in part as to allow Dr. Crain to generally testify as to Plaintiff's increased risk of developing arthritis and to testify as to the reasonableness and necessity of Plaintiff's medical treatment.

# Defendant's second motion: Plaintiff's medical illustrations

Defendant next moves to exclude several medical illustrations offered by Plaintiff. There are five: (1) medical illustrations and x-ray photograph of Plaintiff's left leg fractures; (2) illustrations portraying the surgery Plaintiff received on October 22, 2009 to repair the fractures in his left leg; (3) illustrations purporting to show Plaintiff's knee and the developing stages of post-traumatic arthritis; (4) illustrations purporting to show Plaintiff's future knee arthroscopy; and (5) illustrations purporting to depict Plaintiff's future knee replacement surgery. The illustrations were all prepared by Amicus Visual Solutions, and were created by drawing directly on top of Plaintiff's x-ray films.

It appears that these illustrations would be used as exhibits in support of Dr. Crain's testimony at trial. Defendant raises objections to each of them, based upon a review of the illustrations by Dr. Mattern. Defendant argues that the use of "severe" in the first exhibit ("Exhibit A-1") depicting Plaintiff's fractures is argumentative; in response, Plaintiff has revised Exhibit A-1 to remove use of the word "severe" completely. Thus, Plaintiff shall be permitted to introduce Exhibit A-1 at trial.

Defendant also argues that the second illustration ("Exhibit A-2") inaccurately depicts Plaintiff has having a very separated fracture after his 2009 surgery. Defendant has offered a revised Exhibit A-2 depicting a fragment in the fractured area in a different way. It is unclear whether this revision adequately addresses Defendant's concerns. Accordingly, the Court reserves decision on the admissibility of revised Exhibit A-2 until trial.

The remaining three exhibits shall not be admitted at trial. As already noted *supra*, any testimony by Dr. Crain about any future arthroscopy or knee replacement

surgery would be too speculative. Accordingly, Plaintiff's proffered exhibits depicting those surgeries ("Exhibit A-4" and "Exhibit A-5" respectively) shall be excluded. Plaintiff's third exhibit ("Exhibit A-3") is excluded for similar reasons. While the Court, in regards to Defendant's first motion *in limine*, has held that Dr. Crain shall be permitted to testify generally about Plaintiff's increased risk of arthritis, Exhibit A-3 is too potentially misleading and speculative. It portrays an illustration of Plaintiff's fractured leg, with an x-ray photograph of Plaintiff's knee below the illustration, and three pictures to the right of the illustration apparently depicting what Plaintiff's knee looked like during his injury, and what it would look like in the early and later stages of arthritis. The way Exhibit A-3 is laid out could potentially mislead and confuse the jury by portraying arthritis as an actual condition Plaintiff currently has, rather than a potential condition Plaintiff may or may not actually have at some point in the future. Because any probative value Exhibit A-3 has is substantially outweighed by the danger of confusing the jury, <sup>12</sup> Exhibit A-3 shall be excluded.

Defendant's second motion *in limine* is **GRANTED** in part as to exclude Plaintiff's Exhibits A-3, A-4 and A-5 from trial. The motion is **DENIED** in part as to admit Plaintiff's revised Exhibit A-1 at trial. The Court reserves decision on the admissibility of Plaintiff's Exhibit A-2 until trial.

# Defendant's third motion: Plaintiff's past lost wage claim and future lost wages

The arguments raised in Defendant's final motion *in limine* have already been addressed by the Court's rulings *supra*. First, Defendant argues that evidence of Plaintiff's unemployment benefits is admissible as impeachment evidence, notwithstanding the collateral source rule. As noted *supra* in regards to Plaintiff's first motion, the Court agrees that such evidence would fall under the impeachment exception to the collateral source doctrine.<sup>13</sup>

<sup>&</sup>lt;sup>12</sup> See D.R.E. 403.

<sup>&</sup>lt;sup>13</sup> See Glazer, 570 A.2d at 1155.

Plaintiff's collection of unemployment benefits could be used to impeach his testimony, if Plaintiff testifies that he was in fact employed at the time of his accident. It could also be used as impeachment evidence in regards to the \$6,696 Plaintiff received from working "odd jobs" in 2010. However, Defendant's motion also seems to indicate an intent to introduce Plaintiff's 2010 tax return into evidence as potential impeachment evidence as well, to show that the \$6,696 was never included in his tax return. As explained *infra*, Plaintiff's tax return will not be admissible at trial. Thus, the scope of Defendant's impeachment evidence is limited to Plaintiff's testimony on direct examination regarding his employment status and his "odd jobs" in 2010.

Defendant also argues that Dr. Crain's opinion that Plaintiff would be out of work for three months if he receives arthroscopic surgery or a total knee replacement, and thus suffer future lost wages as a result, is too speculative. As noted *supra* in regards to Defendant's first motion, the Court agrees. Such testimony would be entirely speculative, as it is simply conjecture that Plaintiff would even need surgery in the first place. Such speculation by an expert is inadmissible.<sup>14</sup> Because Dr. Crain shall not be permitted to testify about any potential arthritis-related surgery, it follows that Dr. Crain cannot testify to any lost wages Plaintiff would suffer as a result of the surgery.

Defendant's third motion *in limine* is **GRANTED** in part as to allow Defendant to introduce evidence of Plaintiff's unemployment benefits for the limited purpose of impeachment, and to exclude any testimony as to Plaintiff's future lost wages as a result of any arthritis-related surgery or treatment. The motion is **DENIED** in part as to prohibit the introduction of Plaintiff's 2010 tax return into evidence.

# Plaintiff's second motion: Plaintiff's 2010 tax return

Finally, Plaintiff moves to prohibit Defendant from introducing Plaintiff's 2010 tax return into evidence. In the filings before the Court, Plaintiff has acknowledged

<sup>&</sup>lt;sup>14</sup> O'Riley, 69 A.3d at 1011 (citing Oxendine, 528 A.2d at 873).

he received \$6,696 from working various "odd jobs" in 2010, and that Plaintiff omitted this income from his 2010 tax return. Plaintiff argues that the tax return should be excluded under D.R.E. 403 because Plaintiff's failure to report this income is irrelevant and any probative value is substantially outweighed by the danger of unfair prejudice and confusing the jury.<sup>15</sup>

The income Plaintiff received from these "odd jobs" may be relevant to his past lost wages claim, and as already stated may be relevant to impeach Plaintiff's credibility based on the fact that Plaintiff collected unemployment benefits while earning income from these odd jobs. However, the Court agrees with Plaintiff that introducing the tax return would be extremely prejudicial to Plaintiff, as it would potentially portray him as a tax fraud to the jury. The impeachment value of the tax return is minimal as Defendant may simply point out that Plaintiff collected his "odd job" income while collecting unemployment benefits at the same. Any additional impeachment value of Plaintiff's omission of this income from his tax return is substantially outweighed by the danger of unfair prejudice. Defendant is prohibited from admitting the tax return or otherwise referencing Plaintiff's failure to include the \$6,696 in his 2010 tax return at trial.

Plaintiff's motion to exclude his 2010 tax return is **GRANTED**.

#### Summary

Plaintiff's motion to exclude Plaintiff's receipt of unemployment benefits is **DENIED**.

Defendant's motion to limit the testimony of Dr. Crain is **GRANTED** in part and **DENIED** in part. Dr. Crain shall be permitted to generally testify about Plaintiff's increased risk of developing arthritis, but cannot testify as to any future surgeries and the costs thereof if Plaintiff does develop arthritis. Dr. Crain shall also

<sup>&</sup>lt;sup>15</sup> See D.R.E. 403.

be permitted to testify as to whether Plaintiff's medical expenses were reasonable and necessary.

Defendant's motion to exclude Plaintiff's medical illustrations is **GRANTED** in part and **DENIED** in part. Plaintiff's revised Exhibit A-1 shall be admissible at trial. The Court reserves decision on the admissibility of Exhibit A-2. Exhibits A-3, A-4 and A-5 shall all be excluded.

Defendant's motion to limit or exclude Plaintiff's past lost wages claim and exclude any future lost wages claim is **GRANTED** in part and **DENIED** in part. Defendant shall be permitted to introduce evidence of Plaintiff's unemployment benefits as impeachment evidence and subject to the Court's ruling on Plaintiff's first motion *in limine*. Plaintiff is also prohibited from introducing testimony by Dr. Crain on any future lost wages as a result of any arthritis-related surgery or treatment. Defendant is prohibited from introducing Plaintiff's 2010 tax return.

Plaintiff's motion to exclude his 2010 tax return is **GRANTED**.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh