



IN THE SUPREME COURT OF THE STATE OF DELAWARE

SCOTT O'RILEY, :
 :
 PLAINTIFF BELOW, :
 APPELLANT, :
 :
 v. : No. 444, 2012
 :
 SHAWN ROGERS, :
 :
 DEFENDANT BELOW,
 APPELLEE

**PLAINTIFF APPELLANT'S REPLY BRIEF ON APPEAL FROM THE SUPERIOR
COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY**

LAW OFFICE OF
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DATED: October 26, 2012

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Exhibits

Galindez v. Narragansett Housing Associates,
2006 WL 3457628 (Del. Super. 2006)

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STATEMENT OF FACTS

At pages 3 through 4 of Appellee's answering brief he claims that the plaintiff represented that he was not pursuing a permanent injury claim since Dr. Harriott had not put in his report that there was any permanent injury and that that was recorded in the Pre-Trial Stipulation. It is correct that it was recorded in the Pre-Trial Stipulation.

However, Appellee attempts to mislead the Court by failing to point out the reason why it was improperly reported in the Pre-Trial Stipulation. The reason was it was improperly included in the Pre-Trial Stipulation was an error, which appeared to be innocent at the time, by the defense which was represented to the Trial Court. Immediately after the Pre-Trial Stipulation the defense attempted to cure that error by sending a letter to the Court pointing out that Dr. Harriott does indicate that there is a permanent injury. Attached to that letter was a copy of Dr. Harriott's report. (AR1-4)

Further, this issue was addressed by the trial Court on the first day of trial. When asked whether that was a mistake to have that in the Pre-Trial Stipulation defense counsel indicated, "Yes, Your Honor." (AR5)

Despite this acknowledgement that this was error the appellee includes this sequence as a supposed statement of fact. Apparently this is done in an attempt to confuse the Court as to the issues or unfairly prejudice this Court against the plaintiff by making the Court think that the plaintiff had not been pursuing permanent injuries properly in the Superior Court.

A similar scenario occurs on page 6 of the appellee's answering brief. It correctly refers to the transcript as indicating that plaintiff's counsel indicated that defense counsel made a, "proper" question on cross examination regarding possibilities. (AR6)

However, while looking at the overall context of what was being said it is clear that the Court Reporter simply typed the work proper where the word improper should have been used. On the page immediately after plaintiff's counsel speaking the Court, by its question, makes it clear that the plaintiff's position was that the testimony on opinions has to be to a reasonable medical probability. (AR7) Further, if there is any doubt of the plaintiff's position, plaintiff's counsel indicated his strong disagreement with defense counsel's position that opinions may be to possibilities. Plaintiff's counsel stated,

"Your Honor, I disagree. I don't think there is a distinction made. And if we look - you have a form jury instruction in front of you which is given in just about I guess every personal injury case that I've ever tried, which is recognized by this Court. And it requires that any medical doctor opinions have to be to a reasonable medical probability. And this is obviously an opinion."
(AR8-9)

ARGUMENT I

A. QUESTION PRESENTED: SHOULD A JURY VERDICT BE SET ASIDE WHEN A TRIAL COURT SET ASIDE THAT JURY VERDICT DUE TO ITS SUA SPONTE EXCLUSION OF A TREATING PHYSICIAN'S OPINION BASED ON POSSIBILITIES IN SUPPORT OF A DEFENDANT'S CLAIM THAT THE PLAINTIFF FAILED TO MITIGATE HIS DAMAGES? PLAINTIFF PRESERVED THIS QUESTION IN THE TRIAL COURT BY OBJECTING TO THE DEFENDANT'S REQUEST FOR NEW TRIAL BY FILING THE APPROPRIATE AND TIMELY OPPOSITION TO THE MOTION ON DECEMBER 23, 2009. (A99-123)

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When a Court considers a new trial motion it cannot ignore the role of the jury in the justice system. "Under Delaware law, a jury's verdict is presumed to be correct and just." Galindez v. Narragansett Housing Associates, 2006 WL 3457628 (Del. Super. 2006) p.3, (Exhibit A)

"Barring exceptional circumstances, the trial Judge should set aside a jury verdict pursuant to a Rule 59 motion only when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand. This standard gives recognition to the exclusive province of the jury as established by the Delaware Constitution, while preserving the separate common law function of the motion for a new trial where all the evidence can be reviewed from the unique viewpoint of the trial Judge. A trial Judge's determination to grant a new trial is accorded due deference by this Court and will not be disturbed so long as the decision is not unreasonable or capricious." Burgos v. Hickok, Jr., 695 A.2d 1141,1145 (Del. 1997). (Citations omitted).

Appellee argues that the existing law in Delaware is that a doctor must not testify to a reasonable medical probability. However, that in fact is the law of this case. The jury in this case was instructed that this is the law of this case. (A56) This was done without objection.

This instruction in the law of the case does not differentiate between opinions for direct or cross examination purposes. It would be extremely confusing to a jury to instruct a jury to only consider expert opinions to a reasonable medical probability and then allow evidence to the jury as to merely possibilities.

Further, there has been absolutely no authority submitted for the trial Court's position or for appellee's other than a Florida District Court opinion which is in a workman's compensation case which was distinguished in the opening brief. At & T Wireless Services, Inc. v. Castro, 896 S.2d 828 Fla. Dist. Ct. App. (2005).

This Court can only imagine the extent of cross examination which would be allowed if the appellee's position is accepted.

Under the Appellee's theory cross examination of expert witnesses would be allowed as to all possibilities of what is causing an injury or what may possibly occur to minimize the damage caused by the injury. Doctors on cross examination would be subject to extensive examination as to the possibilities of future medical advancement. On causation they would be subject to cross examination on the possibilities of age, prior accidents, subsequent accidents, daily living, sneezing, bending over and everything imaginable as being a cause of the injury. Doctors would have to attempt to answer questions of the possibilities of all different types of treatments and whether that may somehow mitigate the damages in the case.

A prime example of the lack of feasibility of the Appellee's position is this very case. The Appellee's argument is that there was a possibility of having an EMG which would possibly point out the need for one of two possible surgeries, which possible surgeries would then possibly mitigate the permanent damage in the case. This is almost by definition the very type of speculation which a jury should not be asked to undertake. The jury should make decisions on a case based upon the evidence which is presented to them.

The Trial Judge in his opinion recognized that this possibility of opinion evidence could not be used for mitigation of damages. Thus, both the Appellee and the Trial Judge take the position that it is somehow used for impeachment.

However, neither make any explanation as to how having the excluded evidence into evidence in any way impeached the doctor.

It is not inconsistent with anything else he said. Further, the jury clearly heard that Dr. Harriott wished for an EMG to take place. The only thing that the jury did not hear which was excluded was Dr. Harriott's opinion testimony as to medical possibilities.

Therefore, it is respectfully submitted that the Trial Court erred by interfering with the jury verdict in this case. Like in Burgos, Id., this Court should set aside the opinion granting the defense motion a new trial. Therefore, the original verdict of the jury should thus be reinstated.

CONCLUSION

For the reasons set forth herein it is respectfully prayed that this Court set aside the decision of the trial Court dated August 30, 2011, setting aside a jury verdict and granting the defendant a new trial, and reinstate the jury verdict in this case of December 8, 2009.

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DATED: October 26, 2012

AFFIDAVIT OF ELECTRONIC MAILING

BE IT REMEMBERED that on this 26th day of October, 2012 Judy Maddox, Secretary for the Law Office of Edward C. Gill, P.A., does state that she forwarded, via electronic filing, two copies of: Plaintiff Appellant's Opening Brief on Appeal from the Superior Court of the State of Delaware in and for Sussex County

to: Mary Sherlock, Esquire
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/s/ Judy Maddox
Secretary