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 OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

LAW OFFICE OF EDWARD C. GILL, P.A.

/s/ Edward C. Gill
Edward C. Gill, Esquire
Attorney for Plaintiff
Below Appellant
Bar ID 2112
P.O. Box 824
Georgetown, DE 19947
(302) 854-5400

DATED: September 25, 2012

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- B. THE SCOPE OF REVIEW IS WHETHER THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN OVERTURNING THE JURY VERDICT IN THIS CASE AND GRANTING THE DEFENDANT A NEW TRIAL.
- C. MERITS OF ARGUMENT: THE TRIAL COURT WAS CORRECT WHEN IT SUA SPONTE STRUCK THE TESTIMONY OF THE TREATING PHYSICIAN REGARDING THE POSSIBILITY THAT IF AN EMG OCCURRED THERE WAS A POSSIBILITY THAT SURGERY COULD TAKE PLACE AND IF THE POSSIBLE SURGERY TOOK PLACE THE POSSIBILITY THAT THE SURGERY MAY DECREASE THE PERMANENT INJURIES SUFFERED BY PLAINTIFF AND WAS INCORRECT WHEN IT SET ASIDE THE JURY'S VERDICT IN THIS CASE SINCE THE TESTIMONY WAS ONLY AS TO POSSIBILITIES, NOT PROBABILITIES, AND THE ONLY ISSUE IT WAS RELEVANT TO CONCERNED THE AFFIRMATIVE DEFENSE OF MITIGATION OF DAMAGES.

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Scott O'Riley was injured in an automobile accident which occurred on September 18, 2006. The matter came to trial in the Sussex County Superior Court. On December 8, 2009, the jury entered a verdict in favor of plaintiff and against the defendant, Shawn Rogers, in the amount of \$292,330.00. (A57)

Defendant Rogers filed a timely Motion for New Trial on December 16, 2009. (A58-98) Plaintiff answered the motion, opposing the Motion for New Trial on December 23, 2009. (A99-123)

The Court entered its decision on August 30, 2011, granting the defendant's Motion for New Trial. (Exhibit A)

Plaintiff applied for an Interlocutory Appeal on September 1, 2011. Appellee filed a response in the trial Court on September 9, 2011. The request for certification was denied by the Superior Court on September 15, 2011. (A10-11) The application for Interlocutory Appeal was denied by this Court on September 21, 2011. (A11)

As a result of the Court ordering a new trial the matter came to trial again in the Superior Court and on August 7, 2012, a verdict was entered in favor of plaintiff and against the defendant in the amount of \$7,500.00. (A124) Plaintiff appellant took a timely appeal to this Court, appealing the trial Court setting aside the jury verdict and ordering a new trial. This is plaintiff appellant's opening brief on appeal.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT WAS CORRECT WHEN IT SUA SPONTE STRUCK THE TESTIMONY OF THE TREATING PHYSICIAN REGARDING THE POSSIBILITY THAT IF AN EMG OCCURRED THERE WAS A POSSIBILITY THAT SURGERY COULD TAKE PLACE AND IF THE POSSIBLE SURGERY TOOK PLACE THE POSSIBILITY THAT THE SURGERY MAY DECREASE THE PERMANENT INJURIES SUFFERED BY PLAINTIFF AND WAS INCORRECT WHEN IT SET ASIDE THE JURY'S VERDICT IN THIS CASE SINCE THE TESTIMONY WAS ONLY AS TO POSSIBILITIES, NOT PROBABILITIES, AND THE ONLY ISSUE IT WAS RELEVANT TO CONCERNED THE AFFIRMATIVE DEFENSE OF MITIGATION OF DAMAGES.

STATEMENT OF FACTS

September 18, 2006, was the first day of plaintiff, Scott O'Riley, building his home along with Habitat for Humanity. On his way home he traveled a familiar route. As he was traveling on German Road he came to a stop sign at the T intersection of Old Furnace Road.

Mr. O'Riley saw a pickup truck slowing down on Old Furnace Road to turn onto German Road. However, behind that pickup truck he saw the defendant's pickup truck on Old Furnace Road traveling at a, "very good speed," "high rate,". (A37-38)

Defendant Rogers, who was operating the second pickup truck, then shot by the first vehicle and went through a ditch and up onto German Road. He struck plaintiff's vehicle on the left rear of plaintiff's vehicle. (A39)

Dr. Paul Harriott testified in this case. Dr. Harriott testified that he is licensed in Delaware, Pennsylvania and New Jersey. (A14) Dr. Harriott is a board certified orthopedic surgeon who attended Cornell and Harvard Medical School. (A15-16) He had previously testified as an expert in the field of orthopedics and was familiar with the term "reasonable medical probability" and testified to that standard. (A17) He testified that it was not unusual for injuries and pain complaints such as were in the case at bar to surface two days after the accident. (A18-19)

He testified that plaintiff suffered injuries to his shoulder, elbow, hand and neck. He indicated his opinion that the elbow and the pain and numbness in his hand are permanent

injuries. He indicated that all those injuries were related to the accident. (A20-22)

Plaintiff testified that at the time of the accident his whole left side and face struck the driver's side door. (A39) He was out of work from September 18, 2006 through December 15, 2006. (A40).

Scott O'Riley did take pain medication but he was unable to take that medication and successfully perform his job. (A41-42)

He still took the nerve medication and over the counter pain killers. (A42)

Plaintiff's life was changed in many respects. The change in his life includes his ability to play with his children, wrestle with his children, play ball, bicycle and do yard work. He lost his ability to do crafts as he had skill in building things of wood and yard items before. His ability to mow his lawn was affected. Household chores such as dusting and cleaning were affected. In fact, plaintiff could not reach up above his shoulder. His fingers were numb and tingling. Plaintiff's elbow was throbbing. He described it to the jury like he was being hit with a hammer every time his heart beat. (A43-45)

Mr. O'Riley worked in heating and air conditioning. The injuries affected his job. He lost strength. (A46) Sex was out. (A47)

He could not work with his daughter to help her with her goal of getting into the Navy. In fact, he almost lost the home which he had begun to build on the date of the accident. (A47-48)

At the time of trial he still experienced problems with his elbow, hand and arm. (A49) Sleep has been affected. (A51-52)

Mr. O'Riley described the pain as going up to a level 8 on a 1-10 scale. On an average day the pain would go between 5 and 8 on this scale. In fact, plaintiff experiences pain every day.

(A52)

Hilary O'Riley, plaintiff's 17 year old daughter also testified pointing out the depression that plaintiff suffered after the accident and how his lifestyle had completely changed from an active one to a sedentary one after the accident. (A54)

On the first day of trial the trial Judge was reviewing the trial testimony of Dr. Harriott, which had been take by video deposition before the trial. Sua sponte, he questioned defense counsel about questioning on cross examination regarding possibilities that an EMG which had not been done possibly could show the possibility of surgery taking place and the possible surgery possibly decreasing the permanent injuries to the plaintiff. (A27-34) The Court ultimately ruled that that testimony on possibilities was to be excluded. (A35)

Before Dr. Harriot's testimony was presented to the jury the parties agreed as to what portion should be taken out. (A55) The portion of the testimony which the parties agreed should be taken out is as follows:

"Q Okay. And is it possible, Doctor, that his symptoms may improve, depending on the treatment protocol? A Very possibly right. So if the compression of his nerve that resulted in the numbness was from his elbow, you could move the nerve to a more favorable location and perhaps the numbness would resolve. Or perhaps from his neck, and then it might require more invasive, you know, some sort of decompressive surgery at his neck.

So usually problems of numbness, you can tackle, unless it's a neuropathy or like MS or something like that, so I think at least you would do the work-up. So it's sort of frustrating, it's been frustrating for me not to be able to pursue this to the level of scrutiny that I'd like to.

Q So it's possible at least that the numbness and some of the subjective pain symptoms may not be permanent in

The jury did hear Dr. Harriott testify as follows:

nature, depending on future treatment protocol?

It's possible, yes." (A26)

- "Q And you recommended an EMG to evaluate his left elbow? A Mostly for the nerve, the numbness in his hand, so to try to determine whether it was coming from his elbow or perhaps higher up from his neck.
- Q Were you recommending the EMG so you could try to make a more definitive diagnosis?
- A More definitive, and give him some possibility of definitive treatment, yeah.
- Q And it looks like you did not see or evaluate Mr. O'Riley from July 21, 2008 until June 10, 2009, is that correct?
- A That's correct.
- Q And today, you are still recommending an EMG test, is that correct?
- A Yeah, I think it's you know, we can help individuals, sometimes you can't. But certainly an EMG test is a minimally invasive test, it can offer a lot of information, I still think it would be a good thing because possibly the idea would be maybe we can help with the numbness in his hand." (A23-24)
- "Q Would the results of the EMG test govern your treatment protocol?
- A It would help me proceed. It's hard to proceed any further, I mean that's why I was offering him therapy, because I don't think he could afford the EMG, so your hands are somewhat tied.

If the EMG was available to us, then we could see whether something more invasive like surgery might help him or, if that was unrevealing, maybe an MRI of the neck. So, again, not knowing, it limits how far we can take his care." (A25-26)

The reason that Scott O'Riley could not have the EMG done was that his no fault insurance had been exhausted and he was unable to afford the \$2,100.00 which it cost. (A49-50) The jury

was instructed that all medical opinions must be to a reasonable medical probability without any objection from the defense. (A56)

The defendant chose not to call any expert to attempt to rebut Dr. Harriott's testimony or establish the defense of plaintiff's failure to mitigate damages. (A28-29)

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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This matter came for trial in the Sussex County Superior Court on December 7, 2009. Prior to trial the trial Judge was reviewing the trial testimony of the treating physician, Dr. Paul Harriott. His testimony had been reduced to transcript since it was being presented to the jury by video deposition. (A27-34)

In reviewing this deposition the trial Court ruled, sua sponte, that opinion testimony regarding possibilities, which was being proffered to support the defendant's contention that the plaintiff failed to mitigate his damages, would be excluded.

(A35)

The parties had agreed on what portions of the transcript should be excluded. (A55) In totality, the following was excluded:

- "Q Okay. And is it possible, Doctor, that his symptoms may improve, depending on the treatment protocol?
 - A Very possibly right. So if the compression of his nerve that resulted in the numbness was from his elbow, you could move the nerve to a more favorable location and perhaps the numbness would resolve. Or perhaps from his neck, and then it might require more invasive, you know, some sort of decompressive surgery at his neck.
 - So usually problems of numbness, you can tackle, unless it's a neuropathy or like MS or something like that, so I think at least you would do the work-up. So it's sort of frustrating, it's been frustrating for me not to be able to pursue this to the level of scrutiny that I'd like to.
- Q So it's possible at least that the numbness and some of the subjective pain symptoms may not be permanent in nature, depending on future treatment protocol?
- A It's possible, yes." (A26)

The following testimony of Dr. Harriott was presented to the jury:

- "Q And you recommended an EMG to evaluate his left elbow?

 A Mostly for the nerve, the numbness in his hand, so to
- try to determine whether it was coming from his elbow or perhaps higher up from his neck.
- ${\tt Q} \quad {\tt Were \ you \ recommending \ the \ EMG \ so \ you \ could \ try \ to \ make \ a \ more \ definitive \ diagnosis?}$
- A More definitive, and give him some possibility of definitive treatment, yeah.
- Q And it looks like you did not see or evaluate Mr. O'Riley from July 21, 2008 until June 10, 2009, is that correct?
- A That's correct.
- Q And today, you are still recommending an EMG test, is that correct?

A Yeah, I think it's - you know, we can help individuals, sometimes you can't. But certainly an EMG test is a minimally invasive test, it can offer a lot of information, I still think it would be a good thing because possibly the idea would be maybe we can help with the numbness in his hand." (A23-24)

"Q Would the results of the EMG test govern your treatment protocol?

A It would help me proceed. It's hard to proceed any further, I mean that's why I was offering him therapy, because I don't think he could afford the EMG, so your hands are somewhat tied.

If the EMG was available to us, then we could see whether something more invasive like surgery might help him or, if that was unrevealing, maybe an MRI of the neck. So, again, not knowing, it limits how far we can take his care." (A25-26)

Thus, the jury in this case heard testimony that Dr.

Harriott wished for the plaintiff to have an EMG and that may affect his treatment protocol. They also heard testimony that this may affect how the plaintiff may end up. They did not hear any testimony regarding possibilities.

Unfortunately, Scott O'Riley could not afford to have the EMG done. He is a single father of three whose insurance had been exhausted and who could not afford the \$2,100.00. (A49-50)

The only purpose that this evidence was relevant at all to the jury was to support the defendant's defense of mitigation of damages. "Generally, the failure to mitigate damages is an affirmative defense. Consequently, the burden of proof would be on a defendant." (O'Riley v. Rogers, C.A. No. SO8C-07-020 RFS, P.5) (Exhibit A)

The jury was also instructed on the law in this case. One of the standard instructions, which was given without objection,

was that a medical expert may only testify to a reasonable medical probability. (A56)

Defendant filed a post trial motion attacking the jury's verdict. It cited the case of <u>General Motors Corporation v.</u>

<u>Joseph Freeman</u>, Del. Supr. 164 A.2d 686 (1960). This case does not stand for the proposition that reasonable medical probability only applies to plaintiff's burden of proof. Rather it is a decision which would not be appropriate in Court today. It discusses the interchangeable validity of the words possibility and probability and suggests that there is no need to even show probability when considering all the circumstances.

In fact, a medical doctor must testify to a reasonable medical probability. The case of Rizzi Mason, Del. Super. 799
A.2d 1178 (2002), is instructive. In that case a doctor's testimony regarding whether the plaintiff could have elected surgery for a preexisting cervical disc injury was properly excluded due to the fact that the doctor did not testify to a reasonable medical probability. However, the Court pointed out, in dicta, that a 1990 opinion letter as to the need for future surgery was inadmissible since it was not stated to a reasonable medical probability. This is in fact analogous to the issue in the case at bar where defendant sought to have evidence introduced as to the possibility of future testing showing the possibility of future surgery with a possibility of a decrease in permanency.

In fact, Delaware's approach to this issue is not novel.

For example, the possibility of age or activity being a possible

cause of an injury as being brought out in cross examination is not admissible. Bruce v. Jungham, Ohio Ct. App. 912 NE2.d 1144 (10th Dist. 2009); also see State v. Kuehn, Neb. 728 NW2.d 589 (2007).

The trial Court in its decision setting aside the jury verdict does not seem to dispute the proposition that this evidence of possibility was not admissible substantively to support the defendant's affirmative defense of mitigation of damages. However, without explanation it suggested that it goes to the issue of credibility.

Particularly when considering the remainder of the testimony in this case this testimony in no way detracts from the credibility of Dr. Harriott's trial testimony. The jury was told that Dr. Harriott desired that the EMG be performed and what Dr. Harriott would do as a result. All the facts were known to the jury. The only things that were excluded were opinions regarding possibilities which only were relevant when considering the affirmative defense of mitigation of damages. Therefore, while plaintiff certainly posits that no error whatsoever occurred with regards to the trial Court's original ruling any error which may have occurred was certainly harmless.

While the defense was unable to provide any relevant case law to the Court to support its Motion for New Trial the trial Court only relied upon one decision. That is the decision of a District Court in Florida in AT & T Wireless Services, Inc. v. Castro, Fla. Dist. Ct. App. 896 S02.d 828 (2005).

However, that case involved a workman's compensation case. It also involved a case in which the trial Court had ordered that every question on cross examination must be to a reasonable probability. It also dealt with possibilities of malingering. This is to be contrasted to the case at bar where the question was whether a possible diagnostic test could lead to a possible surgery which would lead to a possible better long term result for the plaintiff. Clearly, all those issues were far beyond the scope of other than expert opinion.

Therefore, it is respectfully submitted that the trial Court was initially correct in its decision to exclude opinion evidence as to possibilities of medical care possibly making plaintiff's injuries less in the long run. The only relevance of the series of questions was to attempt to support the affirmative defense of mitigation of damages. With regards to facts regarding the doctor's desire to have an EMG all that evidence was directly in front of the jury.

It is respectfully submitted that the trial Court erred in changing its opinion almost two years after the trial and setting aside the verdict of the jury in this case. Therefore, it is respectfully submitted that the Superior Court's order dated August 30, 2011, granting the Motion for New Trial be set aside and the verdict of the jury of December 8, 2009 be ordered to 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.

LAW OFFICE OF EDWARD C. GILL, P.A.

/s/ Edward C. Gill
Edward C. Gill, Esquire
Attorney for Plaintiff
Below Appellant
Bar ID 2112
16 North Bedford Street
P.O. Box 824
Georgetown, De 19947
854-5400

DATED: September 25, 2012

AFFIDAVIT OF ELECTRONIC MAILING

BE IT REMEMBERED that on this 25th day of September, 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
19 South State Street
Suite 100
Dover, DE 19901