



IN THE SUPREME COURT OF
THE STATE OF DELAWARE

SCOTT O'RILEY
Plaintiff Below, Appellant,
v.
SHAWN ROGERS,
Defendant Below, Appellee

No: 144,2012

APPELLEE'S ANSWERING BRIEF ON APPEAL FROM
THE SUPERIOR COURT OF THE STATE OF DELAWARE

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NATURE AND STAGE OF THE PROCEEDINGS

A two day trial was held on December 7, and 8, 2009, before Judge Richard Stokes, resulting in a jury verdict and judgment being entered against Appellee in the amount of \$292,300.

Three (3) post-trial Motions were filed by Appellee.

After full briefing and oral argument on August 30, 2011 Judge Stokes denied a new trial on liability but granted Appellee a new trial on damages only. (Judge Stokes' August 30, 2011 Opinion is attached to Appellant's Opening Brief as Exhibit "A")

Appellant sought an Interlocutory Appeal to this Honorable Court which was denied by Judge Stokes on September 15, 2011 and this Court on September 21, 2011.

A new jury trial took place on August 7, 2012 before Judge Stokes. On August 7, 2012 the jury returned a unanimous verdict in the amount of \$7,500. (A-124)

On August 9, 2012 Appellant filed this appeal of Judge Stokes' Opinion and Order granting a new trial on damages only.

On September 24, 2012 Appellee filed a Motion to Affirm. The Motion to Affirm was denied on September 27, 2012.

This is Appellee's Answering Brief in opposition to this appeal.

SUMMARY OF ARGUMENT

DENIED - THE TRIAL COURT WAS NOT CORRECT WHEN IT SUA SPONTE STRUCK THE TESTIMONY OF THE TREATING PHYSICIAN REGARDING THE POSSIBILITY THAT IF AN EMG OCCURRED THERE WAS A POSSIBILITY FURTHER TREATMENT MAY DECREASE THE PERMANENT INJURIES CLAIMED BY PLAINTIFF.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SET ASIDE THE JURY'S VERDICT SINCE CROSS-EXAMINATION AS TO POSSIBILITIES IS PERMISSIBLE FOR TESTING AND IMPEACHING THE EXPERT'S OPINIONS.

STATEMENT OF FACTS

This personal injury lawsuit arose out of a September 18, 2006 automobile accident at the intersection of Old Furnance and German Road in Seaford, Delaware when the front of Shawn Rogers' pick-up truck struck the left rear of the work van Scott O'Riley was operating.

Scott O'Riley had no complaints of any injuries at the scene. His first medical treatment was 9 days post-accident with his family doctor. He had three (3) follow-up appointments with his family doctor followed by six (6) visits to Dr. Paul Harriott, an orthopedic surgeon, and two (2) months of physical therapy that he failed to complete. That was the full extent of his medical treatment. All of his diagnostic tests were normal.

Scott O'Riley is employed as an HVAC technician for Hyatt Refrigeration and he was restricted from work from September through December, 2006. He returned to work as an HVAC technician in January, 2007 full-time with no medical restrictions. After returning to his job he testified he received a promotion to Sr. Technician and a raise (B-1). He testified his job requires the use of both of his upper extremities and involves some heavy lifting. (B-1)

There were no boardable past or future lost wages and/or medical expenses introduced at trial. In the Pretrial Stipulation and Order Shawn Rogers' counsel indicated that she intended to file a Motion in Limine to exclude any evidence or testimony, by Dr. Paul Harriott, as to any permanent injury and any need for future surgery on the grounds such opinions had never been produced and were speculative in nature.

(A-70) Scott O'Riley's counsel represented to the Court that permanent injuries were not being pursued at trial and Judge Graves wrote on the Pretrial Stipulation and Order on November 9, 2009 "No permanent injuries being offered". (A-70)

Despite Scott O'Riley's counsel's representations to the Court that no permanent injuries were being pursued at trial during Dr. Paul Harriott's November 30, 2009 video-taped trial deposition Dr. Harriott, in fact, did opine and testify, on direct examination, that Scott O'Riley had permanent injuries to his left elbow and left hand. (A-20 - A-22)

Dr. Harriott testified that Scott O'Riley's neck and left shoulder complaints had improved and were not permanent. (A-22) However, Dr. Harriott testified, within reasonable medical probability, that Scott O'Riley's subjective complaints in his left elbow and left hand were permanent. (A-22)

The cause of Scott O'Riley's subjective complaints of pain in his left elbow and left hand had not been determined or substantiated by any objective diagnostic test.

Dr. Paul Harriott testified in his video-tape deposition on cross-examination, that he recommended an EMG test for Scott O'Riley so he could make a more "definitive" diagnosis and "maybe we can help with the numbness in his hand". (A-24) Dr. Harriott, in cross-examination, testified that the results of Scott O'Riley's EMG test would help him formulate a treatment protocol and determine whether surgery might help improve Scott O'Riley's symptoms. (A-25)

As a follow-up cross-examination question Dr. Harriott was asked: "And is it possible, Doctor, that his (Scott O'Riley's) symptoms may improve depending on the treatment protocol?" (A-26)

"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 decompression 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." (A-26)

As a follow-up, on cross-examination, Dr. Harriott was asked: "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-26) Dr. Harriott's response was: "It's possible, yes." (A-26)

During Dr. Harriott's video-taped trial deposition there was no objection to the above line of cross-examination by Scott O'Riley's counsel.

Based on Dr. Harriott's trial testimony counsel for Appellee filed a Motion in Limine. (B-6, B-7)

On the morning of trial, prior to selecting a jury counsel for Appellee presented her Motion in Limine to exclude the trial testimony of Dr. Paul Harriott as it related to any permanent injury. (B-8-B-16)

At that point the cross-examination of Dr. Harriott was discussed as well.

Scott O'Riley's attorney then stated: "The terminology he used is possibility. That was actually in response to a proper leading question on cross-examination, was this a possibility, if you do something, that things would change. (Emphasis added) (B-10)

Judge Stokes then began sua sponte to explore and inquire whether Appellee's counsel could cross-exam Dr. Harriott as to "possibility" or whether the cross-examination had to be phrased and limited to "reasonable medical probabilities". (B-10 - B-16) Counsel for Appellee pointed out that what was being presented to the Court was Defendant's Motion in Limine, no objection, to her cross-examination was ever contemporaneously raised by appellant's counsel nor had counsel filed a Motion in Limine to strike her cross-examination. (B-15)

After the jury was selected Judge Stokes ruled, on the record, that "...cross-examination has to be probabilities, possibilities don't cut it." (B-17)

Based on Judge Stokes' ruling that the cross-examination wasn't proper the cross-examination was stricken and not read to the jury in the first trial that took place December 7 and December 8, 2009.¹

After the close of the evidence the jury on December 8, 2009 was instructed that if they should award Scott O'Riley for his injuries they should award him for past and future pain and suffering and compensation for permanent injury. (B-18 - B-20) The jury was also

¹ Appellant's Opening Brief, pg. 8, states the parties "agreed as to what portion should be taken out" but that was in light of the Court's previous ruling that the cross-examination was inadmissible. Appellee's position and objection was noted on the record.

instructed that Scott O'Riley had a projected life expectancy of 32.4 years. (B-20)

On December 8, 2009 the jury returned a verdict of \$8,200 a year based on what was written on the jury verdict sheet (Exhibit B-21) Judge Stokes then inquired: "You said \$8,200 a year?" The foreman then responded: "Yes, for 35 years." Judge Stokes then started to instruct the jury that they needed to continue their deliberations to put one dollar amount on the verdict when a juror yelled out in open court "\$297.000" and then the Forman yelled out "A total of \$292,330". (A-57)

The Court clerk entered \$292,330 as a judgment against Shawn Rogers which Judge Stokes determined, post-trial, was appropriate denying Appellee's application to have the amount entered on the Jury Verdict Form, \$8,200, entered as the judgment. (A-5)

The December 8, 2009 jury verdict was the subject of three (3) post-trial Motions including a (1) Motion for Relief from the Judgment, pursuant to Rules 49 and 60, (2) Motion to Alter or Amend the Judgment pursuant to Rule 59 (d) and (3) Motion for New Trial pursuant to Rule 59 (a).

The basis for the Motion for New Trial, under Rule 59 (a), in part, was that Judge Stokes erred in sua sponte ruling that Appellee's counsel's cross-examination of Dr. Harriott was improper under Delaware law, and had to be phrased "within reasonable medical probability." (A-29 - 60)

After written and oral argument, on August 30, 2011, Judge Stokes, under Rule 59 (a), granted Shawn Rogers' Motion for New Trial,

on damages only. (Attached to Appellant's Opening Brief as Exhibit "A") In his Opinion Judge Stokes pointed out: "The permanent nature of the injuries was the critical element for this verdict." (Exhibit "A" to Opening Brief p. 3)

Judge Stokes went on to state in his Opinion: "However, cross-examination has an impeaching quality of testing the basis of expert opinion and whether possibilities are considered. The jury understood that an EMG was desired, and the jury knew Dr. Harriott wanted more information for a definitive diagnosis. A jury was tasked with measuring the depth and credibility of the permanency opinion. But the jury was not told that the injuries may not be permanent in nature depending on further treatment protocols without straightforward information, Dr. Harriott's opinion was not fully tested, and the jury may have given it more weight than it deserved. "Upon review, this testimony should have been presented. Its exclusion was not harmless given the prominence of Dr. Harriott's opinion. Defendant was prejudiced. (Exhibit "A" to Opening Brief, pg 7 & 8) Judge Stokes referred to a 2005 Florida opinion, At&T Wireless Service, Inc. v. Castro, 896 So.2d 828 (Fla. Dist. Ct. App., 2005) that pointed out wide latitude should be given on cross-examination, including the ability to question on possibilities rather than probabilities, in order to test the integrity of medical expert's opinion.

On August 7, 2012 a new trial was held before Judge Stokes. This time the complete testimony of Dr. Paul Harriott, including the pertinent cross-examination, in question, was heard by the jury. The

jury unanimously returned a verdict in favor of Scott O'Riley, in the amount of \$7,500. (A-124)

I. ARGUMENT

A: QUESTION PRESENTED - DID JUDGE RICHARD F. STOKES ABUSE HIS DISCRETION IN ORDERING A NEW TRIAL ON DAMAGES, ON THE BASIS HIS SUA SPONTE STRIKING APPROPRIATE CROSS-EXAMINATION OF APPELLANT'S ONLY MEDICAL EXPERT WAS PREJUDICIAL TO THE APPELLEE?

B: SCOPE OF REVIEW

The scope of review, in this appeal, is whether Judge Stokes abused his discretion, as the trial judge, in granting a new trial on damages. Generally, in an appeal from either the grant or denial of a new trial, the sole question is whether the decision constituted an abuse of discretion. Storey v. Camper, Del. Supr., 401 A.2d 458 (1979) (citing Chavin v. Cope, Del. Supr., 243 A.2d 694 (1968) and Trowell v. Diamond Supply Co., Del. Supr., 91 A.2d 797 (1952) "Equally well settled in our law is the proposition that except for the abuse of its discretion by the trial court, an order either granting or denying a new trial is not appealable." Larrimore v. Homeopathic Hospital Ass'n. of Delaware, Del. Supr., 54 Del. 449 (1962) (citations omitted)

C. MERITS OF ARGUMENT

In a post-trial motion for new trial the trial judge has the separate common law function of viewing all the evidence from the unique viewpoint of the trial judge. Storey v. Camper, Id.

"The essence of judicial discretion is the exercise of judgment directed by conscience and reason, as opposed to capricious or arbitrary action; and where a court has not exceeded the bounds of reason in view of the circumstances, and has not so ignored recognized rules or law or practice, so as to produce injustice, it's legal discretion has not been abused." Pitts v. White, Del. Supr., 109 A.2d 786 (1954).

"In determining whether or not the discretion of the trial court has been abused this Court has consistently held to the view that where the Court has not exceeded the bounds of reason in view of the circumstances, and has not ignored recognized rules of law so as to produce injustices, its legal discretion has not been abused and will not be interfered with this Court." 5.97752 Acres of Land in New Castle County v. State of Delaware, D Del. Supr., 202 A.2d 924 (1964) (citations omitted).

This Court has previously stated: "We review the Superior Court's evidentiary rulings restricting or allowing expert testimony under an abuse of discretion standard." Sammons v. Doctors for Emergency Services, P.A., Del. Supr., 913 A.2d 519 (2006) "The trial judge has discretion in determining which modes of impeachment may be used." Sammons, Id.

As previously noted Appellant was not making a claim for past or future medical bills or lost wages. Appellant did not suffer any scars or disfiguring injury. Appellant's entire personal injury claim was based on pain and suffering and permanent injuries to his left elbow and left hand. As Judge Stokes aptly noted in his Opinion granting a new trial: "The permanent nature of the injuries was the critical element for this verdict." (Exhibit "A" to Appellant's Opening Brief, p. 3)

Appellant, in his Opening Brief, repeatedly and erroneously argues that the stricken cross-examination was for the purpose of proving Appellant's defense of mitigation of damages. (Appellant's Opening Brief, pgs. 13, 15 & 16)

In fact, the stricken cross-examination was for the purpose of impeaching Dr. Harriott's opinions and the basis for his opinions that Scott O'Riley's left upper extremity complaints and symptoms were permanent. As Judge Stokes aptly observed, in his opinion: "A jury was tasked with measuring the depth and credibility of the permanency opinion. But the jury was not told that the injuries may not be permanent in nature depending on future treatment protocols. Without straightforward information, Dr. Harriott's opinion was not fully tested, and the jury may have given it more weight than it deserved". Upon review, this testimony should have been presented. Its exclusion was not harmless given the prominence of Dr. Harriott's opinion. Defendant was prejudiced". (Exhibit "A" to Appellant's Opening Brief, pgs 7 & 8)

Certainly, Judge Stokes' decision that the cross-examination and testimony of Dr. Harriott that he excluded was permissible cross-examination for impeachment purposes and for purposes of testing Dr. Harriott's permanency opinion was reasonable and was not capricious and/or arbitrary.

Since Judge Stokes' decision to grant a new trial on damages was based on reason and was not capricious or arbitrary the only remaining issue is whether his opinion ignored a recognized rule of law in Delaware.

Appellant cites no Delaware decision, rule of law or statute that states the cross-examination of a medical expert must be phrased in terms of "reasonable medical probability."

In fact, to the best of Appellee's knowledge and belief, there is no requirement, in Delaware, that the cross-examination of a medical expert must be worded or phrased in terms of reasonable medical probability.

Appellant cites only one (1) case, Rizzi v. Mason, Del. Super. 799 A.2d 1178 (2002). Appellant's reliance on Rizzi v. Mason, Id. is misplaced. Rizzi doesn't stand for the proposition that the basis for a medical expert's opinion cannot be impeached, on cross-examination, by inquiring if it is possible that the Plaintiff's condition could improve if additional diagnostic tests and medical treatment were conducted. In Rizzi, Id. Judge Jurden excluded a portion of the direct testimony of the Defendant's IME physician because his opinions were not stated to a reasonable degree of medical probability. Rizzi concerned the standard when a party is proffering their own expert's

medical opinion. Similarly, without exception, all of the cases cited by Judge Stokes in footnotes 9 & 10 of his Opinion deal with the requirement that the party calling an expert, in their case in chief, must elicit opinions on causation and/or standard of care within reasonable medical probability. None of the noted cases limit or confine cross-examination of the opposing party's medical experts.

In his Opinion, granting a new trial, Judge Stokes cited the Florida Appellate case AT & T Wireless Service, Inc. v. Castro., Fla. App. 896 So. 2d 828 (2005) for the proposition that cross-examination of an opposing party's medical expert does not have to be limited to a medical probability standard. (Exhibit "A" to Plaintiff's Opening Brief, footnote 12)

In AT & T the claimant, on appeal, objected to the employer's counsel cross-examining the claimant's IME physician using the word "possible" as opposed to "reasonable medical probability or certainty" and the hearing judge agreed.

On appeal the employer argued such cross-examination of claimant's medical expert was, in fact, appropriate and the appellate Court agreed.

"While it is true the injury, its cause, and any manifestations must be established by competent, substantial evidence within a reasonable degree of medical probability or certainty, this determination is made by the fact finder when deciding whether a party has proven its case. There is no statutory requirement that every question asked of an expert on cross-exam must be phrased in the rigid terms sought by claimant's counsel. Such an inflexible requirement

would be completely at odds with the practice of permitting wide latitude on cross-exam and testing the conclusions drawn by the experts.

Experts' conclusions are presented during direct examination. Ordinarily, on direct examination, the expert testifies his or her conclusions are "within a reason degree of medical probability. The testing of these conclusions and the facts the expert considered in forming his or her opinion are explored in cross-examination. Such testing may lead the fact finder to conclude the expert's opinion is neither well founded nor persuasive because the expert failed to consider the many issues raised in cross-examination."

In granting a new trial on damages Judge Stokes realized that he had erred in not allowing Appellee's counsel to cross-examine Dr. Harriott about his opinion as to the permanent nature of Mr. O'Riley's claimed injuries.

Judge Stokes properly noted that the stricken cross-examination had an impeaching quality of testing the basis for Dr. Harriott's opinions and whether possibilities were considered by him. Without the jury having the benefit of hearing this cross-examination and Dr. Harriott's candid responses "the jury may have given it more weight than it deserved". (Exhibit "A" to Opening Brief, p. 7)

In the retrial the jury heard the cross-examination, in question, and Dr. Harriott's responses and presumably were able to weigh Dr. Harriott's opinions on permanency and returned a unanimous verdict in favor of Scott O'Riley, in the amount of \$7,500.

In summary, Judge Stokes' August 30, 2011 Opinion granting a new trial on damages was logical, based on reason and did not ignore any recognized rule of Delaware law and, therefore, it should be upheld and affirmed on appeal.

CONCLUSION

Judge Richard F. Stokes did not abuse his discretion in granting Appellee a new trial on damages. Judge Stokes' Opinion that the stricken cross-examination of Appellant's medical expert was erroneous and prejudicial to the Appellee was based on reason, did not ignore any recognized rule of Delaware law and should be upheld and affirmed on appeal.

Respectfully submitted,

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