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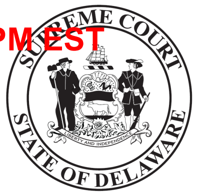

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NADIV SHAPIRA, M.D. and NADIV SHAPIRA, M.D., LLC, Defendants Below, Appellants, v. CHRISTIANA CARE HEALTH SERVICES, INC., Defendant Below, Appellant/Cross Appellee, v. JOHN HOUGHTON and EVELYN HOUGHTON, Plaintiffs Below, Appellees.	)	No. 392, 2013 On Appeal from the Superior Court of the State of Delaware, in and for New Castle County C.A. No. N11C-06-092 MJB

APPELLANT/CROSS-APPELLEE
CHRISTIANA CARE HEALTH SERVICES, INC.'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Appellant/Cross-Appellee Christiana Care Health Services, Inc. ("CCHS") incorporates by reference the Nature of Proceedings section set forth in its Opening Brief previously filed with the Court. This is CCHS' Answering Brief in opposition to the argument set forth in Appellant Dr. Shapira's Opening Brief (Section III, pages 23- 29) related to Dr. Shapira's cross appeal against CCHS.

SUMMARY OF ARGUMENT

1. Admitted.

2. Admitted.

3. Denied. The trial judge did not err as a matter of law when she permitted the jury to return a supplemental verdict to apportion the liability of CCHS by comparing Dr. Castellano's conduct versus Dr. Shapira's conduct. However, the trial judge erred when she found that the verdict should not be reformed to reflect the jury's supplemental finding that as to the 35% liability assessed to CCHS, 75% was assessed to Dr. Shapira and 25% to Dr. Castellano would result in the ultimate apportionment of liability of 91.25% to Dr. Shapira and 8.75% to CCHS.

4. Admitted.

5. Admitted.

STATEMENT OF FACTS

CCHS incorporates by reference the Statement of Facts section set forth in its Opening Brief previously filed with the Court.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE VERDICT SHOULD NOT BE REFORMED TO REFLECT THE JURY'S SUPPLEMENTAL FINDING THAT AS TO THE 35% LIABILITY ASSESSED TO CCHS, 75% WAS ASSESSED TO DR. SHAPIRA AND 25% TO DR. CASTELLANO WOULD RESULT IN THE ULTIMATE APPORTIONMENT OF LIABILITY OF 91.25% TO DR. SHAPIRA AND 8.75% TO CCHS.

A. Question Presented

Did the Superior Court err when it found that the verdict should not be reformed to reflect the jury's supplemental finding as to the liability of CCHS? (A-348-369.)

B. Scope of Review

"When determining the propriety of a jury instruction, the question is whether the instruction 'undermined the jury's ability to intelligently perform its duty in returning a verdict....'" *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 71 (Del. 1993) (*quoting Haas v. United Technologies Corp.*, 450 A.2d 1173, 1179 (Del. 1982).

C. Merits of Argument

Not unexpectedly, defendant Dr. Shapira relies on the opinion of Judge Brady to support his position. With all due respect to Judge Brady, there is an undercurrent in the opinion that counsel for CCHS somehow misled the Court.[1]

[1] The trial Court stated the following at the January 4, 2013 hearing: "I'm not saying you misled [sic] me, but if I had appreciated the real reason you were asking." (B-9 at 34.)

For example, the opinion states: "The Court allowed this supplemental question to go forward because it was under the impression, based upon representations from CCHS's counsel, that there was an issue pertaining to CCHS's position as an excess insurance carrier." (A-363.) Additionally, the opinion states:

> The Court expressed its dissatisfaction with CCHS's true purpose in requesting the supplemental instruction:
>
> > [I]f I had appreciated at the time that I gave the supplemental instruction that the purpose of that was to see if the jury really meant what the jury said, I would not have given it because I was satisfied that I had done what needed to be done to properly instruct the jury with the initial instructions and interrogatory sheet as to allocate responsibility and the bases upon which define liability. And had I realized at that point in time that the reason you wanted me to give the supplemental instruction was to make sure the jury really meant what they said in the initial verdict sheet, I would not have done it.

(A-365-66.) (footnotes omitted).

Immediately after the jury was polled there was a sidebar conference during which the following, among other things, was stated:

> Mr. Ferri: Because I thought there was confusion about the vicarious liability and the independent liability of Christiana, I'm wondering, or I'm requesting, if you could ask the jury whether or not they have found Dr. Castellano was negligent, because I think there could have been confusion about the - - once they found apparent agency, whether or not then they go to - - they still think they have to - -
>
> The Court: they made an independent finding that Christiana Care was negligent, an independent finding, and Dr. Castellano with Christiana Care in another instruction.

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> Mr. Ferri: Well, I know Your Honor, but I had requested Dr. Castellano be put in the interrogatory answer so it would be clear, and my paralegal just asked me today, on the - - earlier today she said, you know, "Well, if we win on the independent claim, how much will they - - how much do you think they'll apportion to us, if any, on the other?" So, she was confused, and I think the jury could be confused, and I would simply - - I think it's a point that we could clarify right now, and I'd be happy with whatever the answer is, in other words, just clarify things.

(A-583-84.)

The overwhelming majority of the sidebar discussion focused upon CCHS' concern that the jury may have been confused by the multiple legal issues involved in this case including joint and several liability, apparent agency, and the imputation of an agents negligence to the principal. (A-583-596.)

The issue related to further litigation in the future was raised by counsel for Dr. Shapira. (A-590.) This was candidly admitted by counsel for Dr. Shapira during the January 4, 2013 hearing before Judge Brady. (B-9 at 35-36.)

Again, with all due respect to the trial judge, it is difficult to understand how the trial judge did not appreciate the reasons for the requested clarification. Admittedly, the sidebar conference included a discussion of future litigation; however, the majority of the argument pertained to jury confusion and a request for clarification.

The trial judge did not rush into a decision about submitting to the jury supplemental instructions with a supplemental verdict sheet. In fact, the trial judge

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declared a recess for the purpose of discussing the matter with colleagues. (A-596.) The record reflects that the trial judge did discuss it with colleagues who concurred that the supplemental verdict should be submitted to the jury. (A-599-600.)

The supplemental instructions given by the trial judge were clear and concise. The initial remarks by the trial judge to the jury were as follows:

> The Court: Ladies and gentlemen of the jury, you have been good and true soldiers in this process. I wanted to ask one more thing of you. This probably should have been on the verdict sheet, the attorneys concede at this point, but was not, and there is one supplemental question. It's very clear.

(AA-471.)[2]

The Court included potential examples of how the supplemental question could be answered including the example of assigning "a hundred [percent] to one party and zero to the other." (AA-472.)

If the jury had understood the original jury instructions correctly, it would have had to answer the supplemental verdict sheet by assigning 100% to Dr. Castellano and 0% to Dr. Shapira. By answering the supplemental verdict sheet by assigning 75% to Dr. Shapira and 25% to Dr. Castellano, proves that the jury did not understand that jury questions 4 and 5 applied only to Dr. Castellano.

[2] References "AA" refers to the Appendix to Dr. Shapira's Opening Brief.

CCHS had clearly requested that jury questions 4 and 5 specifically mention Dr. Castellano's name which would have avoided the confusion on the part of the jury as evidenced by the supplemental verdict.

CCHS clearly requested that Dr. Castellano's name be inserted in questions 4 and 5 to the jury. This was acknowledged by Judge Brady. (B-7 at 28; A-566-67.)

Dr. Shapira's reliance on *Lavin v. Silver*, 2003 WL 21481006 (Del. Super. June 10, 2003) (Exhibit A) is misplaced. In *Lavin*, one party wanted the Court to amend the verdict sheet after it had been submitted and filled out by the jury. In denying the motion to amend the Court stated:

> If Plaintiffs had an objection to the wording on the Verdict Sheet, that objection should have been raised before the case was submitted to the jury for its verdict. The Plaintiffs' proposed change is not merely to correct a clerical error but rather is to change the substance of the Verdict Sheet. The Plaintiffs cite no authority that would allow this Court to substantively change a Verdict Sheet after the jury returned its verdict.

Id. at *3.

In this case, CCHS objected to the wording of the verdict sheet prior to its submission to the jury. The objection went to the very heart of the issue of liability and apportionment of liability. This is not a situation where the Court has to speculate about whether or not the jury intended one result as opposed to another. The issue was actually submitted to the jury with proper instructions, and the jury

returned a supplemental verdict clearly stating the result of its deliberations. The Court should not simply ignore this verdict. Dr. Shapira wants this Court to simply ignore the supplemental verdict as if it never happened. It did happen, and it reflects the collective judgment of the jury sitting on this case and should be enforced.

CONCLUSION

For the foregoing reasons set forth above and the reasons set forth in CCHS' Opening Brief, the Superior Court's decision should be reversed, and a new trial should be granted.

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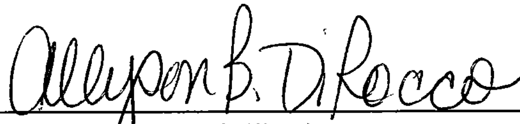

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Dated: December 2, 2013

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EXHIBIT A

Citation/Title
2003 WL 21481006, Lavin v. Silver, (Del.Super. 2003)

***21481006** Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Brian LAVIN, Kathy Lavin and Katie Lavin, Plaintiffs,
v.
Robert A. SILVER, Jr., Defendant, Third-Party Plaintiff,
v.
AAA MID-ATLANTIC INSURANCE COMPANY, Third-Party Defendant.

No. Civ.A. 01C06033 WLW.
Submitted May 12, 2003.

Decided June 10, 2003.

Upon Plaintiffs' Motion to Amend Complaint. Denied.

Upon Plaintiffs' Motion to Amend Verdict Sheet. Granted in part; Denied in part.

Joseph M. Jachetti, of Kenneth R. Schuster & Associates, P.C., Wilmington, Delaware, for the Plaintiffs.

Robert B. Young, of Young & Young, Dover, Delaware, for the Defendant, Third-Party Plaintiff Robert A. Silver, Jr.

Anthony N. Forcina, Jr., Newark, Delaware, for the Third-Party Defendant, AAA Mid-Atlantic Insurance Company.

I. Introduction

WITHAM, J.

****1** This Court is being asked to decide a variety of motions presented in a somewhat haphazard fashion. Presently, before the Court is Plaintiffs' Motion to Amend their Complaint to add a direct claim against AAA Mid-Atlantic Insurance Company (Third-Party Defendant), and Plaintiffs' Motion to Amend the Verdict Sheet. After reviewing the submissions of the parties and the applicable case law, it appears to this Court that the Motion to Amend the Complaint is *denied.* In addition, the Court determines that Plaintiffs' Motion to Amend the Verdict Sheet shall be *granted* as to the change of date, but shall be *denied* as to the substantive change.

II. Background

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This case arose out of an auto accident that occurred on June 25, 1999. The accident occurred when the car driven by Plaintiff Brian Lavin was rear ended by Defendant Silver's vehicle causing the Plaintiffs' vehicle to strike the vehicle in front of it. On June 25, 2001, Plaintiffs brought suit against Silver contending that his actions proximately caused Plaintiffs' injuries. On August 15, 2001, Silver brought a Third-Party claim against the Third-Party Defendant, AAA Mid-Atlantic Insurance Co., alleging that the accident was proximately caused by an unknown, phantom vehicle which came to a complete stop on Route 13. On September 26, 2002, an Arbitration Hearing was held. After the Arbitration Order was filed, the Defendant demanded a trial *de novo*. The trial in this case began on April 28, 2003. At the conclusion of evidence, but prior to the verdict, the Plaintiffs moved to amend the Complaint to assert a direct claim against the Third-Party Defendant. This Court deferred judgment on this issue. On April 30, 2003, the jury returned with its verdict in favor of the Plaintiffs. The jury returned its verdict which determined that the percentage of negligence attributable to Defendant Silver was ten percent (10%), and the percentage attributable to Third-Party Defendant AAA Mid-Atlantic Insurance was ninety percent (90%). Subsequently, the parties filed their post-trial motions. This Order is only resolving two of the five post-trial motions, (FN1) specifically, Plaintiffs' Motion to Amend the Complaint and Plaintiffs' Motion to Amend the Verdict Sheet.

III. Analysis

A. Plaintiffs' Motion to Amend the Complaint

Superior Court Civil Rule 15(a) governs the amendment of pleadings stating that after the responsive pleading is served a party can only amend its pleading with leave of the court or by written consent of the adverse party. Rule 15 further explains that leave of the court shall be "freely given when justice so requires." (FN2) Subsection (b) of Rule 15 further provides for amendments during and even after trial stating:

> (b) Amendments to conform to the evidence.--When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence. (FN3)

****2** However, when a party wishes to amend its complaint to add a new party after

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the statute of limitations has run, the amendment is governed by subsection (c) of Rule 15. (FN4) In a cause of action for damages due to personal injury there is a two year statute of limitations. (FN5) Thus, the amendment requested in this case to add a new cause of action against the Third-Party Defendant would fall within Rule 15(c). Consequently this Court will now turn to the requirements of Rule 15(c).

Rule 15(c) neither expands nor contracts the scope of amendments available under Rule 15(a). (FN6) Rather Rule 15(c) establishes a series of additional "requirements that *must* be satisfied if the movant wishes to render the amendment effective as of the time of the filing of the original complaint." (FN7) The determination as to whether the proposed amendment satisfies the requirements of Rule 15(c) is within the trial court's discretion. (FN8) Nonetheless, according to the Supreme Court in *Mullen v. Alarmguard of Delmarva, Inc.,* (FN9) the trial court "cannot 'bend the clear language of a Rule.' " (FN10) The Supreme Court further directed that:

> In order for an amendment adding or substituting a party after the running of the statute of limitations to be related back to the filing date of the action, three conditions *must* be satisfied:
>
> (1) the claim or defense asserted in the amended pleading arose out of the*same conduct, transaction or occurrence* set forth or attempted to be set forth in the *original pleading;*
>
> (2) within the period provided by law for commencing the action against the party (i.e., the statute of limitations), the party to be brought in by the amendment received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and
>
> (3) within the period provided by law for commencing the action against the party, the party to be brought in by the amendment knew or should have known that *but for a mistake concerning the identity* of the party the suit would have been brought against the party. (FN11)

Judge Quillen in *Walley v. Harris v. Harmon,* (FN12) a case analogous to the case at bar, discusses the requirements of Rule 15 as they relate to amending a complaint to add a direct cause of action against a third-party defendant. In *Walley,* approximately eight months before trial the plaintiff moved to amend her complaint to add a direct claim against a third-party defendant. The court determined that there was no prejudice, in any real sense, (FN13) of amending the complaint to bring a direct cause of action against a third-party defendant. It was also determined that there was no inexcusable delay because the case was not scheduled for many months. Therefore, the court determined that there was no discretionary reason to prevent the amendment. Next, the Court dealt with whether the amendment was *legally* permissible using the three conditions set forth in *Mullen* as noted above. The court determined that the amendment satisfied the first two conditions; however, the Court determined that the third condition was not satisfied. The Court stated that:

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> ****3** [C]learly there is no "mistake concerning the identity of the party" to be brought in by the amendment. The identity of the Third-Party Defendant has been readily available to the Plaintiff since the day of the accident and shortly thereafter a Delaware attorney, by the filing of the Third-Party Complaint, certified there is evidentiary support to establish the Third-Party Defendant's liability.... The Plaintiff here deliberately chose to sue one Defendant with full knowledge of the existence and identity of another potential Defendant....The Rule does not protect a Plaintiff who is fully aware of a potential Defendant's identity even if the Plaintiff is not fully aware of such Defendant's responsibility for the harm alleged. Lack of knowledge regarding a known party is not a mistake. The Plaintiff's failure here "must be considered a matter of choice, not mistake." (FN14)

Therefore, the Court did not allow the plaintiff to amend her complaint to allege a direct action against the 3rd party defendant.

In the case at bar, the Plaintiffs waited until the close of evidence in the trial to make the motion to amend the complaint. This indeed may be considered inexcusable delay, especially given the fact that the Third-Party Defendant was brought in on August 15, 2001 and after that date the Third-Party Defendant even participated in Arbitration for this matter. It would appear to this Court that the time to amend the complaint would have been months before trial when the Third-Party Defendant was brought into the case. Thus, unlike *Walley,* there appears to be discretionary reasons to prohibit the amendment. However, assuming *arguendo* that there are no discretionary reasons to prohibit the amendment, the amendment would still be prohibited by the mandatory conditions of Rule 15(c) as set forth in *Mullen.* The Plaintiff in this case choose to bring suit only against Silver. After the Third-Party Defendant was in the suit, the Plaintiffs obviously were fully aware of the Third-Party Defendant's identity and potential liability; nevertheless, the Plaintiffs, for whatever reason, strategically choose not to bring a claim against the insurance company. The Court finds that this was a conscious decision on the part of the Plaintiffs. The Plaintiffs' decision must be considered "a matter of choice, not mistake," so under the Rule and the case law interpreting the rule, Plaintiffs' motion to amend the complaint must be denied.

B. Plaintiffs' Motion to Amend the Verdict Sheet

The Plaintiffs move to amend the verdict sheet in two ways. First, the jury returned its verdict on April 30, 2003, yet the verdict was docketed on April 29, 2003. This appears to be a clerical error and as such the docket shall be corrected to reflect the correct date of the verdict. Second, the Plaintiffs argue that the Verdict Sheet should be amended to reflect that both Defendants are jointly and severally liable to the Plaintiffs for the awarded damages. In support of its argument Plaintiffs point out that all parties agreed to and in fact the jury was charged with the standard JOINT TORTFEASORS jury instruction. The Plaintiffs argue that although it is implicit in the proceedings that the Defendants are jointly and severally liable, Plaintiffs request that the Verdict Sheet should be changed to be clear with regard to this issue. The parties all

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agreed on the Verdict Sheet before it was submitted to the jury. If Plaintiffs had an objection to the wording on the Verdict Sheet, that objection should have been raised before the case was submitted to the jury for its verdict. The Plaintiffs' proposed change is not merely to correct a clerical error but rather is to change the substance of the Verdict Sheet. The Plaintiffs cite no authority that would allow this Court to substantively change a Verdict Sheet after the jury returned its verdict. In addition, in this Court's determination, it does not appear to be sound policy to amend a Verdict Sheet subsequent to the jury making its award. Therefore, this portion of the Plaintiffs' Motion to Amend the Verdict Sheet is denied.

IV. Conclusion

****4** In conclusion, this Court determines that according to Superior Court Civil Rule 15 and the case law that interprets that Rule, Plaintiffs' Motion to Amend its Complaint must be *denied.* In addition, Plaintiffs' Motion to Amend the Verdict Form to reflect the proper date is *granted,* but the motion to clarify the Verdict Sheet is *denied.* This Court will note that neither of its rulings today change the law of the case. The jury was given the standard Joint Tortfeasor instruction so the rulings set forth in this Order should not, in any way, inhibit the Plaintiffs' ability to collect the damages awarded by the jury.

As this Order only resolves two of the five post-trial motions, the parties should simultaneously present their positions to the Court by letter within ten (10) days on any remaining issues in this case.

IT IS SO ORDERED.

(FN1.) The five post trial motions as this Court can surmise are as follows: 1) Plaintiff's Motion to Amend its Complaint; 2) Plaintiff's Motion to Amend the Verdict Sheet; 3) Plaintiff's Motion for Judgment as a Matter of Law against Defendant Silver; 4) Plaintiff's Motion to Strike Third-Party Defendant's post trial motions; 5) Third-Party Defendant's Motions for Judgment as a Matter of Law, New Trial and Remittitur. The Court will remind the attorneys that the Superior Court Civil Rules contemplate that motions should be separately presented and filed unless they are presented in the alternative.

(FN2.) SUP.CT. CIV. R. 15(a).

(FN3.) SUP.CT. CIV. R. 15(b).

(FN4.) SUP.CT. CIV. R. 15(c). Rule 15(c) states:

Relation back of amendments.--An amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or (3) the amendment changes the party or the naming of the

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party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(FN5.) DEL.CODE ANN. tit. 10, § 8119 states "Personal injuries: No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained."

(FN6.) *Mullen v. Alarmguard of Delmarva, Inc.,* 625 A.2d 258, 264 (1993).

(FN7.) *Id.* (emphasis added).

(FN8.) *Id.*

(FN9.) 625 A.2d 258 (1993).

(FN10.) *Id.* (quoting *Mergenthaler, Inc. v. Jefferson,* 332 A.2d at 399.)

(FN11.) *Id.* at 264.

(FN12.) 1997 Del.Super. LEXIS 543, 1997 WL 817867 (Del.Super.Ct.1997).

(FN13.) Judge Quillen specifically stated that: "This Judge might think there is prejudice in being a primary Defendant as opposed to being only a secondary Defendant at risk only if another is first found liable, and even then only for part of the damages. But it is probably not prejudice under the Rule, not prejudice in maintaining a defense on the merits." *Id.* at *2.

(FN14.) Id. at *4-*5.

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