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Case Number 302,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACW CORPORATION (a.k.a.ARBY'S) and EASTERN ALLIANCE INS. CO., as Subrogee of SHANARA SHAVON WATERS,	)	C.A. No. 302,2019
Plaintiffs Below/Appellants,	)	On Appeal from the July 10, 2019 Decision of the Superior Court C.A. No. N18C-02-004 CLS
v.	)	
CHRISTOPHER ROBERT MAXWELL and DONEGAL MUTUAL INS. CO. (a.k.a. DONEGAL INS. GROUP),	)	
Defendants Below/Appellees.	)	

APPELLEES, CHRISTOPHER ROBERT MAXWELL and DONEGAL MUTUAL INS. CO.'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiffs/Appellants ACW Corporation (a.k.a. Arby's) and Eastern Alliance Ins. Co. as subrogee of Shanara Devon Waters filed a notice of appeal on July 15, 2019, upon a grant of summary judgment in favor of defendants/appellees Christopher Robert Maxwell and Donegal Mutual Ins. Co. (a.k.a. Donegal Ins. Group) on July 10, 2019. The Court issued a briefing schedule which when extended required the Appellants' Opening Brief to be filed on or before September 13, 2019. The Plaintiffs/Appellants filed a timely Opening Brief and Appendix on September 13, 2019.

The subrogation complaint filed in the Superior Court of the State of Delaware on February 1, 2018, alleged that Shanara Waters as an employee of ACW Corporation (a.k.a. Arby's) was paid worker's compensation benefits in the sum of $13,133.25. Of this sum $12,500 was a commutation of benefits before the Industrial Accident Board pursuant to 19 *Del. C.* § 2358. (A028; A052; A093). The Court held a pretrial conference on May 13, 2019. (A-081) Subsequent to the pretrial conference the parties entered into a proposed joint stipulation of facts (A-092).

Defendants/Appellees also filed a Motion for Summary Judgment on January 9, 2019 (A-042). Plaintiffs/Appellants filed a response to the Motion for Summary

Judgment and a cross motion for summary judgment on February 11, 2019 (A-062). Defendants/Appellants filed a Motion in Limine to bar any testimony or evidence on the part of the Plaintiffs as to the basis of the $12,500 settlement (A-055). The Court granted the Motion in Limine at the pretrial conference on May 13, 2019 (A-088). Oral argument was held on the Motion for Summary Judgment on June 10, 2019 (A-095). The Court granted summary judgment to the Defendants/Appellees on July 10, 2019, and on the same date it denied the Plaintiffs/Appellants' Motion for Summary Judgment. No appeal has been filed as to the grant of the Motion in Limine.

This is the Defendants/Appellees' Answering Brief on Appeal.

STATEMENT OF FACTS

Shanara Waters filed suit against Christopher Robert Maxwell and Evodio Colin on or about June 21, 2017 (B-1). The Waters suit alleged that on February 18, 2016, she was injured in an accident involving she and Christopher Robert Maxwell. The Complaint included a second accident against defendant Evodio Colin for an accident of March 13, 2016. The Shanara Waters claims against Maxwell were settled for the sum of $5,000 (A-098, 099, 105, 106). The *Waters v. Maxwell* case was dismissed on January 25, 2018.

At about the same time as the *Waters v. Maxwell* case was concluded Waters filed a stipulation and order for commutation before the Industrial Accident Board on December 29, 2017 (A-024 to A-030). At paragraph 3 of Waters' Affidavit appended to the Petition the Plaintiff stated, "I have agreed to accept a lump sum payment of $12,500 in exchange for giving up my right to any and all future indemnity benefits and medical benefits." (A-024). The stipulation and order at paragraph 5 states that "(e)mployer has also agreed to waive its lien against claimant in connection with her third-party settlement recovery. However, this Agreement is being made based upon Employer's understanding that Claimant only recovered $5,000 from the third-party carrier." (A-028). The commutation and petition also states at paragraph 7 of the stipulation and order that "(c)laimant agrees that Dr. Zerefos treated her for neck and back injuries and that, on 4/25/16, he issued a note

attributing 50% of her injuries to the 2/2/16 work accident (with the other 50% being attributable to a subsequent and unrelated car accident or about 3/13/16)." (A-029). For the purposes of the summary judgment motion defendants/appellees provided the Affidavit of Joel E. Fredricks, Esquire which states in full as follows:

AFFIDAVIT OF JOEL H. FREDRICKS, ESQUIRE

I, Joel H. Fredricks, Esq. do depose and swear as follows:

1. I am a member of the Delaware Bar, ID number 5336, and at all relevant times I represented Shanara Devon Waters ("Waters") for a motor vehicle accident of February 2, 2016. Attached as Exhibit "A" is a copy of the Complaint filed in this Court in the matter of Shanara D. Waters against Christopher R. Maxwell and Evodio Colin.[1] The Complaint alleges that Mr. Maxwell was negligent in a manner proximately causing injury to Waters.

2. In addition to operating a motor vehicle registered in the State of Delaware and to which personal injury coverage applied pursuant to 21 *Del. C.* § 2118, Waters was also in the course and scope of her employment with ACW Corporation (hereinafter Arby's") and as such she was also entitled to worker's compensation pursuant to 19 *Del. C.* § 2301 et seq. The workers' compensation insurer for Arby's is Eastern Alliance.

[1] The attachment to the Fredricks Affidavit are not attached except as separately included in the Plaintiffs' Appendix.

3. All of the medical bills and lost wages were submitted to and paid by the personal injury protection carrier except for medical bills in the amount of $633.25 as exemplified in a lien notice from Eastern Alliance to me of November 2, 2017, and attached as Exhibit "B." Upon information and belief, medical bills were submitted to the worker's compensation carrier and were denied per a defense medical report of Dr. Schwartz. The bills were then submitted and paid pursuant to 21 *Del. C.* §2118.

4. Commencing on September 21, 2017, I started negotiating with Eastern Alliance on behalf of Arby's to commute (lump sum) all worker's compensation benefits due or said to be due to Waters pursuant to 19 *Del. C.* § 2358. Through a series of demands and offers Eastern Alliance and Waters agreed to a settlement of $12,500. Thereafter a Petition for Commutation was filed with the Industrial Accident Board of the State of Delaware on December 18, 2017 (Exhibit "C"). The Stipulation & Order for Commutation provided at paragraph 3 that:

> The parties have agreed to commute any and all worker's compensation benefits including, but not limited to, temporary total disability benefits, temporary partial disability benefits, permanent impairment benefits, disfigurement benefits, death benefits and past, present, and future medical benefits, to which the Claim may now be or in the future become entitled, pursuant to the provisions of 19 *Del. C.* § 2322, 2324, 2325, 2326, and 2330.

As stated at paragraph 4 of the Petition the commuted sum upon which the parties agreed was $12,500.

5. At the time of the agreement and the filing of the Petition Waters had no outstanding medical expenses and nor did she have any present claims for lost wages. Ms. Waters did not have any expert medical reports identifying permanent or partial impairments pursuant to 19 Del.C. § 2325 or 19 *Del. C.* § 2326. She did not have any medical reports identifying the future medical expenses or lost wages. The medical proof as identified at paragraph 7 of the Petition was an office note of Dr. Zerefos dated April 25, 2016, identifying his medical treatment of Waters as attributable 50% each to the motor vehicle accidents of February 2, 2016 (Maxwell) and March 13, 2016 (Colin). (A-052 to A-054).

/s/_____

Joel H. Fredricks, Esquire

On the same day that the defendants/appellees moved for summary judgment they also filed a motion in limine (A-055). The motion was granted on May 12, 2019.

At the pretrial conference on May 13, 2019, there was a discussion between the Court and counsel about a bench trial. The Court ordered counsel to provide the Court a stipulation and order of agreed facts by June 5, 2019. (B-). Although Plaintiffs decided later not to waive a jury trial the stipulated facts were provided to the Court as follows:

STIPULATION OF FACTS

1. Defendant Maxwell rear ended subrogee plaintiff Waters on February 2, 2016.

2. Liability for that MVC is not contested.

3. At the time of this MVC, Waters was within the course and scope of her employment with plaintiff ACW/Arby's, and ACW/Arby's was insured for worker's compensation by plaintiff Eastern Alliance Ins. Co. (EAI).

4. At the time of this MVC, Maxwell was insured by defendant Donegal Mutual Ins. Co. under a policy of motor vehicle liability insurance.

5. Worker's compensation carrier EAI paid $633.25 for two medical bills and the balance of Water's medical bills were paid by her personal injury protection (PIP) carrier.

6. Waters was involved in another MVC on March 13, 2016. Waters subsequently filed a single Complaint on June 21, 2017 against both Maxwell for the February 2, 2016 MVC and Evidio Colin for the March 13, 2016 MVC.

7. On April 25, 2016, Dr. Demetrios Zerefos prepared an office note identifying 50% of his treatment of Waters at time to the February 2, 2016 MVC and 50% to the March 13, 2016 MVC.

8. Joel Fredricks, Esq. represented Waters in both her worker's compensation case and in her third party liability case against defendants Maxwell and Colin. Elissa Greenberg, Esq. represented plaintiffs in the worker's compensation case.

9. According to the Affidavit of Fredricks (ex. To D.I. 20) and the emails between Fredricks and Greenberg (ex. To D.I. 35), negotiations were initiated between them regarding commutation, i.e. a lump sum payment of all worker's compensation benefits due or said to be due to Waters to settle all her worker's compensation claims.

10. Through a series of demands and offers, Waters and EAI agreed to a commutation settlement of $12,500 to fully and finally close out Waters' present and future worker's compensation claims.

11. Thereafter a Petition for Commutation was filed with the Industrial Accident Board of the State of Delaware on December 18, 2017, accompanied by the required stipulation and affidavit supporting both party's agreement to commutation. The Stipulation & Order for the Commutation provided at paragraph 3 that:

> The parties have agreed to commute any and all worker's compensation benefits including, but not limited to, temporary total disability benefits, temporary partial disability benefits, permanent impairment benefits, disfigurement benefits, death benefits and past, present, and

future medical benefits, to which the Claim may now be or in the future become entitled, pursuant to the provisions of 19 Del. C. § 2322, 2324, 2325, 2326 and 2330.

12. At the time of the agreement and the filing of the Petition, Waters had no outstanding medical expenses or lost wages, no expert medical reports identifying permanent or partial impairments, and no medical reports identifying future medical expenses or lost wages.

13. Although the parties stipulate that EAI paid the sum of $12,500 for the commutation as stated herein, defendants do not agree that the payment was made as a consequence of the motor vehicle accident of February 2, 2016. (A-092).

SUMMARY OF ARGUMENT

1. Denied. Benefits available only through the entitlement of the Worker's Compensation Act are not recoverable in a tort action.

2. Denied. The issue is whether a commutation that was not based upon any reason other than to conclude a claim without underlying evidence is recoverable against a tortfeasor.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THERE ARE CERTAIN BENEFITS AVAILABLE ONLY THROUGH THE ENTITLEMENT OF THE WORKER'S COMPENSATION ACT AND THAT SUCH BENEFITS ARE NOT RECOVERABLE IN TORT PURSUANT ACTION TO 19 DEL. C. §2363 (e).

A. Question Presented

Did the Court properly conclude that certain worker's compensation benefits were not recoverable in a tort action? This issue was raised in the motion for summary judgment (A-042), in the pretrial stipulation (A-081), and at oral argument (A-093).

B. Scope of Review

As this matter raises a legal question, this Court will review the matter de novo. *Henry v. Cincinnati Ins. Co.*, 212 A.3d 285 (2019).

C. Merits of Argument

Certain benefits of the Worker's Compensation Act are unique to worker's compensation and are not recoverable against the tortfeasor. These include matters that cannot be asserted in a tort claim in a trial court.

The Delaware Worker's Compensation Act is found at 19 *Del. C.* § 2301 et seq. Subsection 2304 states "every employer and employee, adult and minor, and except as expressly excluded in this Chapter, shall be bound by this Chapter

respectfully to pay and to accept compensation for personal injury or death by accident arising out of it in the course of employment regardless of the question of negligence and to the exclusion of all other rights and remedies." Included within the rights and remedies are certain remedies unique to the Worker's Compensation Act. In particular 19 *Del. C.* § 2326 (a) through (e) provides for compensation for certain permanent injuries subject to specific losses with specific limitations depending upon the loss of the whole or a part of a portion of the body. Each body part is rated up to 250 weeks with certain impairments not specifically rated at subsection (g) being entitled to compensation up to 300 weeks. 19 *Del. C.* § 2326 (f) awards disfigurement.

The Worker's Compensation Act and particularly as it applies to 19 *Del. C.* § 2326 and 19 *Del. C.* § 2326 (f) as well as the commutation provisions of 19 *Del. C.* § 2358 are unique. Section 2326 in particular and as it is presently constituted does not require the actual loss of a body part so much as it requires the loss of use and with the most common calculation done by using the AMA Guide as to the evaluation of permanent impairment whether it be the 5th Edition or the 6th Edition. *Carrie Biggers v. State of Delaware*, Hearing No. 1306692 (March 16, 2016). There is no requirement before the Industrial Accident Board that the plaintiff have any actual limitations to obtain an impairment rating an award that is calculated by the use of the AMA Guide or that there be any effect on the Plaintiff's social or work

life. However, the Superior Court Pattern Jury Instructions, Instruction 22.1 – Measure of Damages – Personal Injury, has specific requirements for a jury to issue a verdict which may include permanent impairment as a element. As stated at subsection (3) of Jury Instruction 22.1 (Del. P.J.I. Civ. § 2000, revised in part August 15, 2006). The instruction states:

*****

> In evaluating impairment or disability, you may consider all the activities that (*plaintiff's name*) used to engage in, including those activities for work and pleasure, and you may consider to what extent these activities have been impaired because of the injury and to what extent they will continue to be impaired for the rest of (*his/her*) life expectancy (it has been agreed that a person of [*plaintiff's names*], age and sex would have a life expectancy of ____ years.
>
> The law does not prescribe any definite standard by which to compensate the injured person for pain and suffering or impairment, nor does it require that any witness should have expressed an opinion about the amount of damages that would compensate for such injury. Your award should be just and reasonable in light of the evidence and reasonably sufficient to compensate (*plaintiff's name*) fully and adequately.

The standard that the Industrial Accident Board must apply in awarding a permanent impairment by statute relates to the determination of the number of weeks of impairment for particular portions of the body part. A jury verdict only includes permanent impairment not as a separate award but only as part of a single verdict of which permanent impairment is one element of compensation. At jury instruction 22.1 the jury is told "the law shall not prescribe any definite standard by which to

compensate an injured person for pain and suffering or impairment..." In fact while the Industrial Accident Board has a choice to pick between the impairments posited by opposing medical witnesses at its base the impairments must in fact be rated by a medical doctor so that the Industrial Accident Board has a choice of a percentage of impairment and which is then awarded as a number of weeks. While the Industrial Accident Board may well choose the opinion of one medical expert over another based upon its perception of the claimant/employee's limitations it is required by statute to pick a body part and to rate that body part in consideration of the compensation rate. That is, the Industrial Accident Board will grant one claimant a larger amount of compensation than another where the AMA Guide impairment is exactly the same. A jury considers a permanent impairment as only one element of a verdict.

The case of *Charles Harris v. New Castle Cty.*, 513 A.2d 1307 (Del. 1986) and its predecessor *State v. Donahue*, 472 A.2d 824 (Del. Super. 1983) does not stand for the proposition for which the Plaintiffs assert it. All that either case stands for is that as a public policy decision the Court will consider an action in tort pursuant to 19 *Del. C.* § 2363 (e) against an uninsured or underinsured motorist carrier as it would against the tortfeasor. As this Court stated in the *Harris* matter "(w)e agree with Superior Court's characterization of *Harris'* recovery though received from the county's uninsured motorist carrier, the sum involved "represent(s)" the damages

(the third party tortfeasor) would be required to pay upon adjudication of guilt in a tort action but for his lack of insurance." Supra at pg. 1310". There's no reference in *Harris* to the proposition that the particular element of recovery was at issue as opposed to the entity or person from which the recovery was being sought.

To be sure the case of *Firemen's Fund Ins. Co. v. Delmarva Power & Light Co.*, 1987 WL 14874 (Del. Super. July 27, 1987) does stand for the proposition that in an action to enforce the liability of a third party the plaintiff (insurer) may recover any amount which the employee or his dependents would be entitled to recover in an action in tort. *Delmarva Power & Light* argued that *Firemen's Fund* as the insurer would not be entitled to recoup amounts which were paid out pursuant to the obligations of 19 *Del. C.* §2326. The Superior Court concluded that any award would be receivable. Having reached that conclusion the Superior Court stopped.

The Defendants request that this Court take the inevitable next step. Permanent impairments as addressed by the Industrial Accident Board and as practiced in the Superior Court despite the use of the same word "permanent" are two entirely different issues. As the Industrial Accident Board applies it the use of 19 *Del. C.* § 2326 (and which is equally applicable to section 2326 (f)) is a mathematical calculation based upon opinions of medical professionals conversant with the calculations posited by the AMA Guide and independent of any actual effect upon the claimant/employee in his social or work activities. As stated the Industrial

Accident Board may be inclined to award an impairment as to what it perceives to be the effect upon the claimant/employee but even so its not constrained to award either sum as posited by the medical professional since it decides what award to make. Conversely a Superior Court jury is not offered any guidance as to the percentage of impairment and which is as specific to 19 Del. C. § 2326 but it is simply offered an option to include a permanent impairment as part of its single verdict and then it's left to decide how that impairment has affected the plaintiff through a life expectancy that may either be stipulated or offered as evidence by a competent professional.

II. THE PAYMENT OF $12,500 THAT THE PLAINTIFF'S SOUGHT IN THE SUPERIOR COURT WAS SPECULATIVE AND NOT PROVED WITH REASONABLE PROBABILITY AND THE SUPERIOR COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS MAXWELL AND DONEGAL.

A. Question Presented

Were the Plaintiffs' able to prove in the Trial Court that they were entitled to the sum of $12,500 from Defendants, Maxwell and Donegal.

B. Scope of Review

This case reviews the Superior Court's decision on a motion for summary judgment de novo, applying the same standard as the trial Court. It must determine whether the record shows that there is no genuine material issue of fact and the moving party is entitled to judgment as a matter of law. When the evidence shows no genuine issues of material fact in dispute, the burden shifts to the nonmoving party to demonstrate that there are genuine issues of material fact that must be resolved at trial. If there are material facts in dispute, it is inappropriate to grant summary judgment and the case should be submitted to the fact finder to determine the disposition of the matter. *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140 (Del. 2009).

C. Merits of Argument

The Plaintiffs' focus solely on the Waters' commutation of worker's compensation benefits as an allegedly recoverable amount misstates the basis for the

trial court granted summary judgment to the Defendants. The trial court granted summary judgment in part because the damages were speculative and could not have been proven with reasonable probability. Therefore, there was nothing left for a jury to try.

The underlying case started with a Complaint by Shanara Waters against Christopher Maxwell and Evidio Colin on June 26, 2017. The Complaint alleged that Plaintiff Waters was injured twice once each on February 2, 2016 (Christopher Maxwell) and March 13, 2016 (Evidio Colin). The case against Maxwell was eventually resolved for the sum of $5,000.

The parties stipulated that whatever medical treatment Waters had and whatever loss of earnings she incurred as a consequence of the February 2, 2016 accident was paid almost entirely by the personal injury protection insurer for either Arby's (ACW Corporation) or Shanara Waters. The only amount ever paid by Eastern Alliance Ins. Co. (EAI) to or on behalf of Waters was the sum of $633.25. There was no underlying basis for the $12,500 commutation other than to close a file.

On December 29, 2017, Waters filed a "Stipulation & Order for Commutation" along with an affidavit with the Industrial Accident Board. The Affidavit states, inter alia, at paragraph 2, "I have previously received workers' compensation benefits including total disability benefits, partial disability benefits,

permanency benefits, and payment of medical expenses."[2] Paragraph 3 of the Affidavit states "I have agreed to accept a lump sum payment of $12,500 in exchange for giving up my right to any and all further indemnity benefits and medical benefits."

At the time that the petition for commutation was filed Claimant Waters had no outstanding medical expenses and nor did she have any present claim for loss wages. Claimant Waters did not have any expert medical reports identifying permanent or partial impairments pursuant to 19 Del. C. § 2325 or 19 Del. C. § 2326. She did not have any medical reports identifying future medical expenses or lost wages. The only medical proof identified in the Commutation Petition at paragraph 7 was an office note of Dr. Zerefos dated April 25, 2016, identifying the medical treatment of Waters as attributable 50% each to the motor vehicle accidents of February 2, 2016 (Maxwell) and March 13, 2016 (Colin).

Defendants filed two motions on January 9, 2019. One motion was for summary judgment contending in part that there was no proof to support the basis for the $12,500 payment. EAI responded to this motion on February 11, 2019, and stating at the first sentence of the response "*there being no dispute as to the material facts*, Plaintiffs submit this as a response in opposition to Defendants' motion and as

[2] Although paragraph 2 of the affidavit states what is stated in the text of this page in reality the worker's compensation carrier EAI paid only $633.25 in medical expenses and no other benefits.

a cross-motion for summary Judgment pursuant to Super. Civ. R. 56 (h). (Emphasis supplied).

Among the arguments made by EAI in response to the motion is that a tort case permits "purely speculative future medical expenses or lost wages (as) both are considered damages. The response further states that Plaintiffs paid Waters' speculative future damages as permitted by the Worker's Compensation statute." In the briefing in the Superior Court EAI agreed that not only was the $12,500 payment speculative but it also argued that speculative damages are permitted in the Superior Court. In fact speculative damages are not permitted. *Henne v. Balick*, 146 A.2d 394, 396 (Del. 1958); *Drozdo v. Webster*, 345 A.2d 895, 896 (1975); *Gannett Co. v. Kanaga*, 750 A.2d 1174, 1188 (Del. 2000), (Del. P.J.I. § 22.1 (2000, revised in part August 25, 2006); *Coles v. Spence*, 202 A.2d 569, 571 (Del. 1964).

The Defendants filed a second motion on January 9, 2019. (A-055). The second motion was filed to bar any efforts on the part of the Plaintiffs to offer testimony or evidence as to the basis of the $12,500 settlement. As stated in the text of the motion the parties had agreed through counsel for months to permit the deposition of the adjuster for EAI, Robin Mayes as a Civil Rule 30 (b)(6) witness to testify as to the calculation as to the damages with specific questions leading to that testimony. Having agreed for months to produce a witness as late as December 5, 2018, by January 2, 2019, Plaintiffs' counsel abruptly changed course stating that

the testimony was no longer relevant and was privileged. (A-059). The Court granted the motion in limine on May 13, 2019.

The pretrial conference was held on May 13, 2019. (A-081 to A-089). The only witnesses listed for the Plaintiffs were Shanara Waters, Dr. Eric Schwartz by trial deposition and Dr. Demetrios Zerefos by trial deposition. The Court by Judge Scott signed the pretrial stipulation and handwrote on the pretrial stipulation "motion in limine granted." (A-088). Three days later on May 16, 2019, then Plaintiffs' counsel wrote to Judge Scott stating "I was just provided the attached stream of e-mails between Elissa Greenberg, Esq. and Joel Fredricks, Esq., which shed light upon how the amount of the commutation was determined. I respectfully request that these e-mails be added as an exhibit to our pending Cross-Motion for Summary Judgment." The letter then requested that the pretrial stipulation be amended to add Elissa Greenberg, Esq. as a witness to lay the foundation for admission of these e-mails at trial, should trial occur, and also to add Joel Fredricks as a witness for the plaintiffs." (A-090). The letter completely ignores the fact that the Motion in Limine to bar any testimony or evidence on the part of the Plaintiffs as to the calculation of the commutation amount was granted three days earlier. Plaintiffs did not seek relief from the order they simply ignored it. The order was not vacated and it was still extent when the Superior Court granted the Defendant's Motion for Summary Judgment.

Although quite a bit of time was spent at the pretrial conference off the record discussing the merits of the Plaintiffs' claim the Court granted oral argument which was held on June 10, 2019. (A-095 to A-146). Since the claim was a subrogated claim through Shanara Waters the defense argued had Ms. Waters brought the claim in the Superior Court she could not have sought the matters addressed in the commutation because she had no medical expenses, she had no proof of future medical expenses, she had no loss of earnings, and she had no proof of future loss of earnings. She could not have proved any of her claims in terms of a reasonable medical probability. (A-102). In response to the argument of the Defendants that the future claims were speculative and citing 2006 Pattern Jury Instruction 22.1. Plaintiffs' counsel made the remarkable statement:

> Now, this argument about the difference between - - well, first of all, the argument is made that the Jury Instruction 22.1 is the law. Jury instructions are not the law in Delaware. They are not dispositive. They are suggestions. But the greater point with that Jury Instruction is that it is for a completely different cause of action.

In fact jury instructions are the law in Delaware. In the matter of *Green v. St. Francis Hosp.,* 791 A.2d 731, 741 (Del. 2002), this Court stated:

> A party has an "unqualified right to have the jury instructed with a correct statement of the substance of the law." The instruction need not be perfect so long as it is "reasonably informative and not misleading, judged by common practices and standards of verbal communication." Reversal is only required where the error undermines the "jury's ability to intelligently perform its duty."

See also Russell v. K-Mart Corp., 761 A.2d 1, 4 (Del. 2000).

Plaintiffs' counsel then agreed "that there is no way Miss Waters could recover from Mr. Maxwell for future, whatever you want to call it, future damages without some sort of proof of that. That's a different case. That's not what we are here to do." (A-129). However, that is exactly what EAI wanted the jury to do.

The Court by Judge Scott pointed out that there has to be proof of the damages and to which Plaintiffs' counsel responded "(h)ow does one prove something that never happened because it didn't have to? Because they commuted. If you look at the commutation petition, the second page is a stipulation between the parties." (A-137). And to which Judge Scott responded "(s)o I'm a bit confused. Because it seems like the only reason to have a trial is to prove these payments were related to medical expenses or something else. But there is not going to be any proof offered." (A-138).

At the very end of the oral argument the Court said "(w)hat would a jury instruction look like in this case? And maybe that's what I need you to submit. What would you ask the jury to decide?" (A-145 through A-146).

The Plaintiffs submitted a set of jury instruction which was not quite what the Court required. However the Nature of the Case was actually the argument of counsel rather than an instruction that the Court could actually have given. (A-152 to 153). In response to a letter from defense counsel pointing out that the Nature of the Case is not something that the Court could give the Plaintiffs then submitted a

second instruction which provided no more clarity than the first. (A167). Shortly thereafter the Court granted summary judgment to the Defendants. What the Plaintiffs seem to have forgotten is that the usual rules of evidence and proofs to be provided to a jury are not waived simply because the matter is one of subrogation. The Plaintiffs provided the usual set of jury instructions without understanding that they could not prove that the amount at issue was anything more than speculation a point to which they very much agreed in the briefing in the court below. It was this very point that Judge Scott addressed where he said that "any damages related to the commutation would be speculative and not proved with reasonable probability."

The Plaintiffs complain in this Court that they were prepared to prove the evaluation of the commutation through the testimony of Joel Fredricks, Plaintiffs' counsel Elissa Greenburg, Dr. Eric Schwartz, and Dr. Demetrios Zerefos. However, the Plaintiffs have forgotten several things. First, the response to the Motion for Summary Judgment agreed in the very first sentence that there is no dispute as to the material facts. Secondly, Greenburg would not be permitted to testify in part because she was not listed on the pretrial stipulation but in the main because the Motion in Limine was granted and which barred the Plaintiffs from producing any evidence or testimony as to the basis for the calculations. Up through and including to the date of the grant of summary judgment the pretrial stipulation was not amended and the grant of the Motion in Limine was not vacated.

The Plaintiffs contend that they were barred from offering testimony by Dr. Schwartz and Zerefos. In fact Plaintiffs through counsel identified Dr. Schwartz as a medical expert in a letter to defense counsel on June 21, 2018. (A-040). What was enclosed was a report from Dr. Schwartz dated May 11, 2016. The letter says "Plaintiffs expect that Dr. Schwartz will testify in accordance with his findings as stated on the report." (A-040). The report written a bit more than three months after the February 2, 2016 accident and a bit less than two months after the March 13, 2016 accident says no more than the division of the complaints is related 50-50 to the several motor vehicle accidents. There is absolutely nothing about the report which would suggest how anyone came to the conclusion that the Plaintiffs' claims are worth $12,500 in 2017 or that Dr. Schwartz had an opinion as to any of the issues raised by the commutation stipulation and order. As for Dr. Zerefos the Stipulation of Facts upon which the Court asked counsel to agree says no more than at paragraph 7 "on April 25, 2016, Dr. Demetrios Zerefos prepared an office note identifying 50% of his treatment of Waters at (the) time to the February 2, 2016 MVC and 50% to the March 13, 2016 MVC." (A-093). There is absolutely nothing about the report of Dr. Schwartz or the one office note of Dr. Zerefos which would explain how Waters and EAI decided that Waters' claim was worth $12,500 sometime after September 2017, other than to buy peace. The notion that simply because counsel

for Waters at one point suggested that a permanent impairment report might be procured is in and of itself speculative.

Finally, on this issue, it is of no concern to Christopher Maxwell, his auto insurance carrier or to this Court that commutations may decrease the docket of the Industrial Accident Board or how many hearings were held and how many petitions filed. Whether the worker's compensation premiums would be higher or lower or how the insurance commissioner sets rates is of no moment to the issues in this case. What Judge Scott ruled and to which the Plaintiffs agreed is that the worker's compensation settlement was speculative and to the extent that EAI contends that speculation is permitted in the Superior Court the Plaintiffs are simply wrong.

CONCLUSION

Although not specifically identified in the commutation petition before the Industrial Accident Board Waters and EAI agreed that the $12,500 payment included permanent impairments, disfigurement and future medical expenses. Whether the impairments were a major or minor portion of the settlement is unknown. The only jurisdiction that the Industrial Accident Board had over the impairments was 19 *Del. C.* § 2326 and 2326 (f) and these claims could not be made in the trial court.

As to the commutation sum of $12,500, the trial court granted summary judgment by holding that the damages related to the commutation are speculative and not proved with reasonable probability. The Plaintiffs agreed in their response to the summary judgment motion that there is no dispute as to material facts and the parties stipulated to certain facts just prior to the June 10, 2019 oral argument. The problem seems to be as encapsulated in the Plaintiffs' response to the motion for summary judgment that the Industrial Accident Board can award speculative damages and so can a Superior Court jury if it decides not to follow the Court's suggested jury instructions. EAI may conclude as many claims as it likes and with and without proof. However, if it expects to recover that sum against a tortfeasor or its auto insurance carrier it must have actual proof.

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