

Crespo v. Hughes

Medical malpractice — Post-trial motions — Hydrofluoric acid injury — Lost wages — Standard of care — Remittitur

Treatment for an acid burn to the hands of two men led to the unwanted result of tissue necrosis, which required amputation in the more necrotic hand of one of the plaintiffs. Trial pursued several questions to the standard of care and loss of earning capacity caused by the amputation, and the jury awarded over \$4.5 million to that plaintiff for wages plus pain and suffering and future medical care, and a lesser amount to the second plaintiff. Defendants appealed the outcome and amount of the verdict.

On June 16, 2011, while powerwashing a brick wall with hydrofluoric acid, plaintiffs Antonio Crespo and Edward Torralvo were exposed to the solution despite protective gear. The acid caused itchiness and “slight painful sensations” on their hands within the following 24 hours, when the men sought treatment at codefendant Temple University Hospital’s emergency room. Attending burn specialist, defendant William Hughes, developed a treatment plan for both men. Calcium gluconate was injected into Crespo’s second and third digits, which caused the tissue at the injection site to bleed and turn black and necrotic. Torralvo ceased treatment, but Crespo’s fingers needed to be amputated around the first knuckle.

During trial, testimony was given as to the proper standard of care, and for Crespo’s loss of wages. Crespo had been looking at a promising career as a cuatro guitarist. The jury awarded Crespo \$2.262 million for lost wages. The jury also awarded for pain, suffering, and disfigurement of both men, and for Crespo’s future medical care. Defendants’ motions for post-trial relief were denied.

On appeal, defendants asserted nine errors. They alleged that the amputating physician, who needed to review the case prior to surgery, should not have been allowed to explain his notes about the cause of the necrosis. They also objected to his not producing a formal expert report and thus his testimony was an unfair surprise, while he in reality quoted from the notes he had made at the time of treatment.

As for defendants’ objections to the testimony of Crespo’s band manager and music manager, the court restricted their trial testimony to their direct experience with Crespo, and since defendants failed to cite to any specific records, the matter was deemed waived.

Defendants had sought to preclude the wage loss claim, based on a reported zero income for two years prior to the injury. The jury heard

about the income Crespo's playing generated revenue that was realized by the manager, which "would have in time converted to his income." The estimate of value lost over expected working career was within the range of the expert testimony.

Crespo had a prior conviction for receiving stolen property, and defendants thought the court should have issued a jury charge on *crimen falsi*. The trial court found that the line of questioning went to a collateral attack on a wage-loss year, rather than addressing plaintiff's credibility, and therefore denied the requested charge. The details of punishment were deemed irrelevant. The court allowed full cross-examination on credibility, which defendants used.

The court granted plaintiff's motion to preclude references to Crespo's marijuana use for pain from a prior back injury and child support orders. It was within the court's discretion to exclude evidence which could be confusing or prejudicial, which would have been the case.

The court also precluded testimony from the defense psychiatric expert regarding childhood molestation by an uncle as prejudicial rather than recent and relevant.

The court allowed testimony from plaintiffs' standard of care expert that defendants argued was outside the scope of his expert report. The testimony included hospital policy on the amount of calcium gluconate to be injected. The court characterized the testimony as proper based on the circumstances.

Finally defendants found error in the court's denial of remittitur, arguing the verdicts were excessive. The lost wages award was well within the range submitted by the vocational experts. The jury had sufficient evidence to support their awards for pain, suffering, and disfiguration, and the court found the jury award should not be disturbed.

C.P. of Philadelphia County, July Term, 2012 No. 3490;
2231 EDA 2016

Joshua Ryan Van Naarden, for plaintiffs/appellees.

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for defendant/appellant William Hughes and Hughes &
Hensell Associates, P.C.

SHREEVES-JOHNS, *J.*, Sept. 2, 2016—Defendants-Appellants are William Hughes, M.D. and Hughes & Hensell Associates, P.C. (hereinafter "Defendants").

Plaintiffs-Appellees are Antonio Crespo (hereinafter “Crespo”) and Edward Torralvo (hereinafter “Torralvo”).

This case was called to trial with jury selection on January 29, 2016. After hearing evidence, the jury rendered a verdict for Plaintiffs against Defendants on February 12, 2016. The jury verdict for Crespo was in the gross amount of \$4,526,000. The jury verdict for Torralvo was in the amount of \$500,000 for non-economic damages only.

Defendants filed a timely Post Trial Motion on February 22, 2016. Plaintiffs filed an Answer in Opposition to the Post Trial Motion on February 24, 2016. This court issued a Scheduling Order for briefs on the Matter on March 3, 2016, and this court rescheduled by Order the deadlines due to court holiday. Said Defendants timely filed their Brief in Support of their Post-Trial Motion on March 28, 2016. Plaintiffs timely filed their reply brief on April 11, 2016.

Defendants’ Post Trial Motion was denied by Order and Opinion on May 27, 2016.

Defendants filed their appeal on July 12, 2016. The trial court entered an Order on July 14, 2016 requiring Defendants to file a Statement of Matters Complained of on Appeal. Defendants filed such statement on July 29, 2016.

Background Facts

On the evening of June 16, 2011, Plaintiffs Crespo and Torralvo were power washing a brick wall when, despite using protective gear, some of the hydrofluoric acid solution they were using made contact with their hands. The next day, June 17, 2011, Plaintiffs’ hands began to itch; this itching developed into slight painful sensations. They proceeded to the Temple University Hospital (“TUH”)

emergency room that afternoon at around 2:00 p.m.

The burn unit at TUH was consulted, and attending burn specialist William Hughes, M.D. formulated a treatment plan for both patients. The treatment plan included initial treatment for pain management of the affected areas of the digits by injection of lidocaine. The treatment plan also included injection of calcium gluconate into the affected digits. The calcium gluconate was injected to counter-act the hydrofluoric acid.

Crespo's affected digits were his left index finger and his left middle finger (his second and third digits]. Those two fingers, though itching and having slight painful sensations, had appeared normal prior to the injections of calcium gluconate. Shortly after the injections, Crespo's two fingers became discolored, weeping and bleeding from the injected areas.

Torralvo, after having seen the effects of the injections of calcium gluconate on Crespo's fingers, terminated treatment after receiving some of the proposed injections. Crespo was discharged from the hospital and Torralvo was either discharged or left the hospital.

Crespo's second and third digits became black and necrotic over the coming days, and they required partial amputation at or around the first knuckle away from the palm. Torralvo complained of pain after his limited set of injections, and he received surgery to remove a necrotic portion of his finger on the palmer side, reducing the mass and diameter of his index finger somewhat, especially towards the tip of the finger. They both complain of ongoing neurological injuries, with pain at the sites of the surgeries, especially with contact.

Plaintiffs' expert on standard of care and causation, Dr. Mosier, testified that treatment of the areas affected with

a calcium gluconate topical gel would have been within the standard of care on these facts, but injecting calcium gluconate into the affected digits, especially in this volume, was outside the standard of care on these facts, due to the risk of increased pressure cutting off blood flow to the digits. Moreover, Dr. McClellan, Plaintiffs' treating physician for the amputations and excisions after the injuries occurred, also testified to causation as it pertained to his treatment of Crespo. Plaintiff Crespo's psychiatric expert, Dr. Tereo, testified to Crespo's state of mind before and after the injuries occurred. Defendants offered Dr. Lozano as an expert on standard of care and causation and Dr. Toborowsky as a psychiatric expert. Relevant experts are discussed below in this section.

Crespo had significant pre-existing injuries to his back, which, at the time of his injuries giving rise to this suit, had prevented him from doing hard labor. However, prior to the injuries giving rise to this suit he had been a "cuatro" guitarist — a cuatro guitar is a kind of stringed instrument popular in Puerto Rico. Crespo had played using the fingers of his left hand to place on the strings to obtain the notes; Crespo's left hand was his fret hand. His right hand was his "pick hand." The amputations of the fingers at or around the first knuckle on his fret hand affected his ability to obtain the notes.

Crespo testified that after the amputations, despite great effort, he was no longer able to play the cuatro with any significant musical ability. Crespo's former music manager, David LaPointe, testified at trial as to Crespo's former ability, album, and fee arrangements. Charlie Cruz, a prominent Puerto Rican vocalist and band leader, testified as to Crespo's abilities and Cruz's experience with Crespo in his band, as well as the fee arrangements.

Specifically, the testimony, viewed in a light most

favorable to Plaintiff Crespo, was as follows: (1) Cruz would receive a certain lump sum for a show; (2) Cruz would pay a portion of that lump sum to Crespo's music manager, David LaPointe ("LaPointe"), for Crespo's performance, and (3) LaPointe would use the money to build Crespo's "brand" through promotion, travel, music production, and various media appearances, much of which was documented in the exhibits.

The specific dollar value that Cruz testified to was as follows: "Sometimes three, five [shows] a month. I would pay him between \$1,500, sometimes \$1,000, sometimes \$2,000. Depends on the venue, how much I get paid, I pay the musicians" NT, 2/4/2015, Morning Session, 68:5-8. Cruz later clarified by answering "yes" to a question as to whether the money went to management. *Id.*, 68:13-14.

In addition to the testimony just described, the jury viewed a music video produced to feature Crespo playing his cuatro. Vocational expert Robert Cipko, Ph.D. and economist David Hopkins testified as to income and lost wages.

Dr. Cipko, Crespo's vocational expert, testified to an hourly income range, then summed the hourly rate to an annual income; from \$49,379 at the median for Philadelphian musicians and vocalists to \$142,750 in the top ten percent of that same class, *see* NT, 2/3/16, Morning Session, Cipko, 82:23-84:10, *less* the residual earning capacity in the range of \$16,230 in the bottom ten percent of entry level cashiers to \$17,390 in the bottom twenty percent of cashiers, *see id.*, 88:11-15. Dr. Cipko also testified to other ranges such as slightly higher annual incomes for Pennsylvania musicians and vocalists, and slightly higher ranges for other entry level low physical labor employment.

Mr. Hopkins, Crespo's economist, testified to a total work-life lost earning capacity of between \$962,321 to \$6,311,287, depending on retirement age, projected income less residual earning capacity, and adjustments for the time-value of money and interest. NT, 2/4/2016, Morning Session, Hopkins, 43:15-25. The higher figure was a result of using, among other factors, the higher range from Dr. Cipko for musicians and vocalists in Philadelphia (90th percentile), a retirement age of 70, and a discount rate to present value using a rate of 2.5%. *Id.*

The jury, given its verdict, apparently did not find the evidence sufficient to support the higher range of the wage loss claim. The jury ultimately concluded on the basis of the evidence that Crespo was entitled to recover for his lost future earnings in the amount of \$2,262 million dollars. The jury's finding for the lost wages claim was well within the range of the testimony of Dr. Cipko and Mr. Hopkins.

The remainder of the verdicts were for pain, suffering, disfigurement, and future medical care of Crespo, and pain, suffering and disfigurement of Torralvo.

Matters Complained of on Appeal

Hughes Defendants state the following matters complained of on appeal:

- (1) The court abused its discretion when it permitted "fact witnesses," Dr. McClellan, Charlie Cruz, and David Lapointe to offer expert opinions at trial;
- (2) The court erred in denying Defendants' pre-trial Motion in Limine seeking to preclude Plaintiff Crespo's wage loss claim;
- (3) The court erred in its handling of Plaintiff Crespo's

criminal conviction;

(4) The court erred in not permitting Defendant Hughes and Defense expert Lozano from addressing pathology findings that were raised and/or referenced by treating physician, Dr. McClellan;

(5) The court erred in permitting cross-examination of Defendant Dr. Hughes with literature from 2015;

(6) The court erred in granting Plaintiffs Motion in Limine seeking to preclude references to Plaintiffs marijuana use and child support orders;

(7) The court erred in limiting the testimony of defense psychiatric expert, Dr. Toborowsky;

(8) The court erred in allowing Plaintiffs' standard of care expert, Dr. Mosier, to testify outside the scope of his pretrial report; and

(9) The court erred in denying Defendants' Motion for Remittitur.

Analysis

(1) Whether the court abused its discretion when it permitted “fact witnesses,” Dr. McClellan, Charlie Cruz, and David Lapointe to offer expert opinions at trial.

Dr. McClellan, and those of his office, were Plaintiffs' treating physicians during the amputations of Crespo's fingers and excisions of portions of Torralvo's finger — these treatments of course were *after* the injections giving rise to this lawsuit.

First, Defendants state in their Brief in Support of their Post-Trial Motion (hereinafter “Defendants' Brief”) that Dr. McClellan “was permitted to testify, over objection,

that it was his opinion that Dr. Hughes' injections caused the injuries to the patients' fingers, as opposed to the acid itself, as the defense had claimed." Defendants Brief, p. 3. Defendants argue that this causation testimony was improper. Defendants' rationale is that "it did not make a difference [at the time of Dr. McClellan's treatment] what [had] caused the fingers to become necrotic; whether it was from the acid, the calcium injections, or some other source," *Id.*, p. 4.

Whether causation testimony from Dr. McClellan was proper depends on whether the causal history mattered to Dr. McClellan at the time of his treatment of Crespo. Dr. McClellan testified that the causal history did matter by way of answering Plaintiffs' foundational question somewhat early in his testimony, before proceeding through Crespo's medical chart: "Q: When you first got involved, did you, as a matter of course, review the rest of the medical records contained in the Crozer Medical Center chart that predated your involvement to get a better understanding of his presentation? A: I did." NT, 02/02/16, Testimony of Dr. McClellan, 11:7-12. The following testimony provided more context:

Q: I want to be very clear, Doctor. I am going to ask you to read what you wrote and I am going to ask to you explain for us what you meant by what you wrote in 2011, before there was a lawsuit, before there were parties involved with certain — I will leave it at that. What did you write regarding indications?

A: He had apparently injections of calcium gluconate into the burn areas with a resultant devitalization of the middle and distal phalanges in both fingers.

Q: I just want to deconstruct that a second. When you write he had apparently injections, I want to not talk

about that just yet; you used the word with resultant devitalization. What was the definition that you were utilizing of devitalization? What did you mean by devitalization?

Mr. McGilvery: Objection to that.

Mr. Hosmer: Join in that, Your Honor.

The Court: Overruled. He is permitted to explain his note.

Witness: Death of the fingers. By Mr. van Naarden:

Q: When you said resultant here, what did you mean by that? A: The end result was.

Q: As of 2011, did you document in this chart what the devitalization was a result of?

Mr. McGilvery: I object to that, Your Honor.

Mr. Hosmer: Join.

The Court: It is going to be overruled. By Mr. van Naarden:

Q: Doctor?

A: I felt the treatment rendered previously and the acid caused these injuries.

NT, *id.*, 27:9-28:23.

In short, Dr. McClellan was permitted by the court to testify that the injections of calcium gluconate and the acid caused Crespo's injuries, because that was Dr. McClellan's diagnosis of Crespo at the time of his treatment; such diagnosis was important for Dr. McClellan as a matter of his medical judgment, to obtain a better understanding of

his course of treatment for the surgeries. *Id.*, 11:7-12.

As noted above, Defendants have a different medical judgment than that of Dr. McClellan; namely, Defendants suggest that Dr. McClellan did not have to know the cause of his patients' injuries in order to perform the amputations and excision. This court allowed Dr. McClellan's testimony regarding his medical judgment speak for itself, and finds that there was no error here.

Additionally, Defendants argue, Dr. McClellan did not produce an expert report. As can be gleaned from the excerpt above, Dr. McClellan formulated his opinion as a treating physician, and not in anticipation of litigation. There is no doubt that Dr. McClellan's information and opinions were subject to normal discovery rules. But the issue here is whether Dr. McClellan's opinion was subject to the special rules regarding expert opinions developed in anticipation of litigation. *See Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 488, 664 A.2d 525, 532 (1995) (“[B]ecause Coroner Wetzer's opinions were not acquired or developed with an eye toward litigation, rule 4003.5 is inapplicable.”). *See also, Istnick v. Wyeth*, 2004 WL 2216185 (Phila. Cnty., Glazer, J., 2004) (“Rule 4003.5 does not apply to discovery of facts known or opinions held by a witness, whether or not an expert, if those facts or opinions were acquired or developed independently of the litigation and not for trial.”) (quoting *Scott v. DeFeo*, 2000 WL 1912953 (Lehigh Cnty., Black, J., 2000]).

While Defendants claim that Dr. McClellan's testimony in the absence of an expert report was unfair surprise (Defendants' Brief, p. 4, In. 7), it is hard to see how this can be, given that Dr. McClellan directly quoted his own words in his treatment notes which were in the medical records. Given the law as set forth in *Brass Rail Tavern, Inc.*, given the fact that Dr. McClellan was directly

quoting himself from the medical records made at the time of treatment, prior to suit, this court was not in error in overruling Defendants' objections; Dr. McClellan's opinion was not subject to the requirement that he produce an expert report.

Defendants argue next that Cruz, as detailed above, Crespo's former band manager, was permitted to offer expert opinion in a context in which he was only a lay witness.

Notably, Defendants only made, in their Brief in Support of the Post-Trial Motion, generalized characterizations of Cruz's testimony, and they failed to make any citation to the record of Cruz's testimony. During the course of the trial, the court sustained some of Defendants' objections regarding Cruz's testimony, and overruled some of Defendants' objections, limiting Cruz's testimony to his own experience with Crespo, such as what he paid him, when Crespo was in his band, and whether he had arranged to hire Crespo to play the cuatro after two of Crespo's fret hand fingers were amputated. *See* NT, 2/4/2016, Morning Session, Cambers Discussion, 4:3-13:14; 16:9-21. Cruz was called to testify as a witness to establish that Crespo had been hired and that he was beginning to be recognized as a cuatro player.

However, in light of the absence of a specific citation to the record of Cruz's alleged expert testimony in the Post-Trial Motion, Brief, or Statement of Matters Complained of on Appeal, this matter is deemed waived.

Defendants argue next that Crespo's former music manager, David LaPointe, was permitted to offer expert opinion in a context in which he was only a lay witness. The issue is similar to that of the testimony of Cruz; namely, that Defendants point to no specific testimony to

which there was an objection on the record. LaPointe's testimony was, after the trial court sustained objections from Defendants, restricted to testimony of his own experiences with Crespo. Defendants state in their Brief in Support of the Post-Trial Motion that LaPointe "opined on how much Mr. Crespo would have been expected to earn in the musical industry had he not suffered his injury." Defendants' Brief, p. 5. However, this court finds no such testimony in the record, much less testimony to which there was an objection at trial.

In light of the absence of a specific citation to the record of Lapointe's alleged expert testimony in the Post-Trial Motion, Brief, or Statement of Matters Complained of on Appeal, this matter is deemed waived.

(2) Whether the court erred in denying Defendants' pre-trial Motion in Limine seeking to preclude Plaintiff Crespo's wage loss claim.

The jury was entitled to hear the testimony and see the evidence of Crespo's future earning capacity to give it whatever weight they choose. *O'Malley v. Peerless Petroleum*, 283 Pa. Super, 272, 282 (stating that the court, in considering whether a lost wages claim proceeds to the jury, may allow the claim to proceed where evidence is "not the age, preinjury occupation nor the nature of the proposed profession, but rather the sufficiency of the plaintiff's evidence in showing his skill, likelihood of becoming a member of the profession and availability of work in that area.") (quoting *Hoffman v. Sterling Drug Co.*, 374 F.Supp. 850, 861 (M.D.Pa. 1974)).

Defendants in their Post-Trial Motion specifically point out that Crespo had a reported income of \$0 for the two years prior to his injury, and that he had filed for public assistance one month prior to his injury. Defendants cross-

examined Crespo by use of Crespo's prior statement that he had no income, which was contained in his public assistance filing. *See* NT, Crespo, 02/04/16, 52:22-57:23. Defendants cross-examined Crespo's vocational expert, Dr. Cipko, regarding Crespo's \$0 reported earnings for the relevant years. *See* NT, 02/03/16, Afternoon Session, 7:15-9:5. Indeed, Defendants repeatedly showed to the jury the statement of Crespo's reported earnings of \$0 for the two years prior to the incident that lead to this suit, either on cross examination of Plaintiffs' experts or direct examination of Defendants' experts. *See, e.g.*, NT, 02/04/16, Morning Session, Hopkins, Plaintiffs' actuarial expert, 52:14 -53:17; NT, 02/08/16, Afternoon Session, Leslie, Defendants' vocational expert, 22:12-23:3.

Despite the evidence that Hughes Defendants put forth to the jury on the lost wages claim, the jury had sufficient evidence on the record for its finding that Crespo had lost wages to the amount of \$2,262 million. The trial court did not find here that the jury's verdict was opposed to the facts submitted to it. In fact, the jury had before it a great deal of evidence regarding how Crespo's *cuatro* playing unquestionably generated revenue, and this court will not disrupt the jury finding, in effect, that the revenue would have in time converted to his income, had he not been injured. Once the inference to income is made, it is only a matter of adding up a value over a long expected work-life from Crespo's thirty eight years to his expected retirement. All of this, as detailed above, is well within the range of the expert testimony, which provided the jury with sufficient evidence for its finding.

(3) Whether the court erred in its handling of Plaintiff Crespo's criminal conviction.

With regard to the court's handling of Crespo's criminal conviction, Defendants in their Post-Trial Motion and

Brief argued that the court erred in refusing to issue a jury charge on *crimen falsi*, and argued that the court erred in depriving Defendants from the opportunity to cross-examine Crespo on the underlying crime.

Defendants argued that, given that Crespo testified that he had pleaded guilty to receiving stolen property in 2014, it was improper for the Court to exclude Jury Charge 4.60 (relating to *crimen falsi*).

“Unless the language [in the charge] the court chose incorrectly states the law or mischaracterized the evidence in a way that prejudiced the jury’s considerations and thereby undermined the accuracy of the verdict, [the Superior Court] will not interfere with the court’s exercise of discretion.” *Rettger v. UPMC Shadyside*, 991 A.2d 915, 931 (Pa. Super. 2010).

Plaintiff Crespo testified on direct, as a matter of anticipatory disclosure, to his having pleaded guilty to receiving stolen property in 2014. NT, 02/04/16, Afternoon Session, Crespo, 35:17-36:16.

The trial court at the charging conference on the record reviewed Defendants’ brief line of questioning, and found that Defendants’ questions did not sound in impeachment of Crespo’s truthfulness as a witness, but were presented as a collateral attack on a specific year of the wage-loss claim. Therefore, the court denied Defendants’ request for Jury Charge 4.60.

Defendants were permitted to and did indeed argue *crimen falsi* to the jury during closings. NT, 02/09/16; Points for Charge, 23:19-25:4. The court provided the jury with charges relevant to the issues for determining credibility such as those relating to believability of witnesses generally and intentionally false testimony. *Id.* The court’s decision regarding this instruction does

not rise to the level of incorrectly stating the law or mischaracterizing evidence. *Retzger*, 991 A.2d at 931. The jury was given sufficient law on the issue of credibility to make an informed decision.

Defendants have a secondary argument on the issue of *crimen falsi* which they raise in their Brief. Namely, they argue that the court's ruling on a Motion in Limine deprived them of a chance to cross examine Crespo on the underlying crime. Defendants Brief in Support, p. 10. This ruling is at NT, 01/29/2016, Motions in Limine, 18:7-20, There, the court ruled that the specific details of punishment [in this case, the fact of incarceration and the duration of around a year] were irrelevant. It appears that there was agreement on the record in the transcript just cited — that is, there was no objection to omitting from evidence the specific fact that Crespo went to prison.

In any event, contrary to Defendants' claim that the court prevented defense from properly impeaching Crespo on the witness stand with his conviction, the court allowed full cross examination for impeachment. The court merely limited defense questions regarding Crespo's incarceration status as a result of the conviction. Defendants repeatedly raised Crespo's criminal conviction in relation to his lack of participation in the work force during the year of his incarceration. That was the sole line of questioning. NT, 02/04/16, Afternoon Session, Crespo, 50:25-52:20. Defendants' decision not to cross examine Plaintiff on the underlying cause of Crespo's conviction was perhaps due to their judgment in response to Crespo's anticipatory disclosure, but it certainly was not a consequence of this court's rulings that forced Defendants' lack of impeachment questioning.

(4) Whether the court erred in not permitting Defendant Hughes and Defense expert Lozano from addressing

pathology findings that were raised and/or referenced by treating physician, Dr. McClellan.

As noted above, Dr. McClellan and those of his office were the treating physicians during the amputations and excision after the injury had occurred. Defendants object to the trial court precluding testimony from Dr. Hughes and Defendant's expert Dr. Lozano on the findings in the pathology report (on the amputated and excised tissue produced from Dr. McClellan's and those of his office's treatments).

Defendants asked Dr. Hughes questions about the pathology report on the amputated and excised tissue which resulted from the treatments of the Plaintiffs by Dr. McClellan and his associates. NT, Dr. Hughes, 02/05/2016, 23:20-24:24, Plaintiffs objected on the grounds, among others, that Plaintiffs were not patients of Dr. Hughes' at the time of Dr. McClellan's treatment of Plaintiffs. *Id.* The trial court sustained the objections.

The trial court sustained the objections for several reasons which manifested from the fact that Plaintiffs were not patients of Dr. Hughes at the time of Dr. McClellan's treatment of Plaintiffs. Among those were the facts that Defendants had failed to establish that Dr. Hughes was an expert in pathology and that Defendants had failed to establish that Dr. Hughes had formed his opinions about the pathology report prior to litigation. *Id.*, at 24:2-4.

Also, Defendants asked their expert Dr. Lozano about the aforementioned pathology report during their re-direct. NT, Dr. Lozano, 02/08/2016, 97:22-98:9. Plaintiffs objected, and the court sustained the objection on the grounds that questions as to the pathology report were beyond the scope of Plaintiffs' cross-examination. *Id.*

Defendants failed to provide a citation to any passage

in the direct or cross-examination of Dr. Lozano which mentioned the pathology report in their Post-Trial Motion, their Brief in Support, or their Matters Complained of on Appeal. Thus, the issue is waived for failure to adequately brief the court on this issue which conflicts with the court's ruling.

(5) Whether the court erred in permitting cross-examination of Defendant Dr. Hughes with literature from 2015.

Defendants object to the fact that Plaintiffs were permitted to cross-examine Dr. Hughes by use of 2015 materials in a trial in which the underlying malpractice occurred in 2011. Defendant Dr. Hughes himself testified in the affirmative when asked whether the publication *Up to Date* was "generally reliable." NT, 02/02/16, Dr. Hughes (as if on cross), 38:5-10. Additionally, when asked whether *Up to Date* "contains information that [he] believe[s] is reasonably reliable," Dr. Hughes testified that it "probably does." *Id.*, 41:15-19. Furthermore, Dr. Hughes, when asked whether the standard of care was the same in 2011 as it was in 2015, testified: "Your honor, I would like to say that the amount that I inject is the same when I see a patient now as it was in 2011." *Id.*, 40:23-41:2. This testimony was sufficient for authentication of the treatise.

Dr. Hughes testified to the standard of care in this case. NT, 02/05/2016, 24:24-25:10, and elsewhere. Where a defendant physician testifies to the standard of care in his or her case, that defendant testifies as an expert witness and is subject to impeachment. Therefore, the court permitted a judicious question from Plaintiffs regarding the content of the treatise on the topic of standard of care for treatment of hydrofluoric acid exposure. *See also, McDaniel v. Merck, Sharp & Dohme*, 533 A.2d 436 (Pa. Super, 1987)

(There is no requirement that witness rely upon or even know of existence of learned treatise in order to be cross-examined about statements in it).¹ Plainly, there was no abuse of the *limited discretion* exercised by the trial court in this context, much less error warranting a new trial.

(6) Whether the court erred in granting Plaintiff's Motion in Limine seeking to preclude references to Plaintiff's marijuana use and child support orders.

Defendants object to the trial court's ruling granting in part and denying in part Plaintiff's Motion in Limine 16023156 relating to the issues of marijuana use and child support orders. The court's ruling on this motion are found at NT, January 29, 2016, Motions in Limine, 13:10-16:18 and 19:4-22:10

The court granted Plaintiff's Motion to preclude evidence of Crespo's prior marijuana use for pain management of his pre-existing back injury because such evidence would be unfairly prejudicial; this especially because Crespo would testify to use of narcotic pain medication due to his back injury. *Id.*, 14: 4-6. The trial court has broad discretion to exclude potentially misleading and confusing evidence. *General Equip. Mfrs. V. Westfield Ins. Co.*, 635 A.2d 173 (Pa. Super. 1993). Such order is well within the discretion of the court.

Also, the court granted Plaintiffs' Motion to preclude evidence of child support orders against both Plaintiffs on the grounds that such evidence would be prejudicial. *Id.*, 16:10-13. Any evidence of past child support orders would risk inducing the jury to render a verdict based on emotion

1. See *Ohlbaum on the Pennsylvania Rules of Evidence, 2016 Edition*, p. 572 (compiling cases of use of authenticated treatises for impeachment of an expert's credibility, and stating "[a]n expert witness may be impeached with statements in a learned treatise").

or contempt; such evidence was properly precluded. *Capozzi v. Latsha & Capozzi, P.C.*, 2002 Pa. Super. 102. Moreover, the evidence was irrelevant, because Plaintiff did not dispute that he had no personal income in the two years prior to the incident giving rise to the suit as is in the evidence cited above. There was no error here.

(7) Whether the court erred in limiting the testimony of defense psychiatric expert, Dr. Toborowsky.

The court precluded anticipated testimony on Crespo's psychological stressors before his injury by Dr. Toborowsky relating to Crespo's history of molestation at the hands of his uncle. The pertinent ruling at sidebar is at NT February 9, 2016, Morning Session, Dr. Toborowsky, 21:1-18.

There, the court ruled that childhood molestation by an uncle was remote in time in comparison to the loss of his fingers and, therefore, far more prejudicial than probative.

Additionally, Crespo and Crespo's own expert psychologist, Anthony Tereo, Ph.D., testified that Crespo had other psychological stressors due to his back injury, a friend committing suicide, and others. *See, e.g.*, 2/3/2016, Tereo, 19:6-13. In short, Defendants were able to offer evidence that Crespo had prior psychological stressors, but the prior molestation was deemed overly prejudicial due to the nature of the subject matter as well as its being so remote in time. Thus the court finds no error here.

(8) Whether the court erred in allowing Plaintiffs' standard of care expert, Dr. Mosier, to testify outside the scope of his pretrial report.

Defendants argue that Plaintiffs' standard of care expert, Dr. Mosier, added a new theory of liability during his trial testimony that was outside the scope of his expert report,

namely, testimony as to TUH's internal policy about the volume of calcium chloride to inject in cases of certain hydrofluoric acid exposures. Defendants mention in their Brief in Support of Post-Trial Motion, p. 15 the following passage in reference to this issue raised for post-trial relief:

Q: When you take that in connection with Dr. Pagano's note, how much more did Dr. Pagano document she gave than what their policies say?

A: Twice that amount.

Mr. Van Naarden; You [sic] Honor, at this point I would ask to publish that policy, P-25.43.

Mr. McGilvery: Objection, your Honor. It's covered by the testimony.

N.T., 02/01/16, Afternoon Session, Dr. Mosier, 18:25-19:7.

The trial court sees no objection, in what was quoted in their Brief, to Dr. Mosier's testimony covering the TUH policy on the volume of calcium gluconate to inject in such cases; rather, the objection is only reasonably understood as to the needlessly cumulative nature of publishing the TUH policy. Therefore, this issue is waived.

Notwithstanding that the issue was waived, Dr. Mosier's testimony was proper given the foundation that Plaintiff laid with regard to Dr. Mosier's having read the policy prior to issuing his reports, his having based some of his conclusions that too much calcium gluconate was injected during the treatment in his reports, and finally, the fact that the TUH policy was testified to by multiple prior witnesses. *See, id.*, 17:19-18:4.

(9) Whether the court erred in denying Defendants' Motion for Remittitur.

Defendants suggest that the verdicts were excessive and shock the conscience, so remittitur should be granted. “When a jury’s finding is so opposed to the demonstrative facts that looking at the verdict, the mind stands baffled, the intellect searches in vain for cause and effect, and reason rebels against the bizarre and erratic conclusion, it can be said that the verdict is shocking.” *Farelli v. Marko*, 349 Pa. Super. 102, 502 A.2d 1293 (1985) (citing *Green v. Johnson*, 424 Pa. 296, 298, 227 A.2d 644, 645 (1967)).

The jury awarded \$2,262 million to Crespo for lost wages. The factual basis for the jury’s lost wages verdict has already been discussed in great detail.

With regard to the jury’s compensation of \$2 million for Crespo’s pain, suffering and disfigurement, Defendants highlight in their Brief the fact that a video was shown to the jury depicting Crespo, after the injury, playing the cuatro guitar and smiling, and that Crespo got married.

The pursuit to regain the joys of one’s life does not negate the extent of the harm caused. The jury, here too, had sufficient evidence for its damages award. Crespo testified, for example: “My guitar was everything to me and now it just ain’t there no matter how hard I try and that is the fact of this whole matter.” NT, 02/04/16, Afternoon Session, 42:24-43:3. Crespo testified that after injury, prior to amputation, his fingers “looked like wood.” *Id.*, 28:21. Crespo also testified to much physical pain throughout the ordeal, including ongoing pain at the site of the amputations, especially to touch. *See, id.*, generally. On the basis of the evidence, the jury’s compensation for Crespo’s pain, suffering, and disfigurement will not be disturbed.

With regard to the jury’s compensation of \$500,000 for Torralvo’s pain, suffering and disfigurement, the jury here too had sufficient evidence for its verdict Torralvo

testified that his right index finger was repeatedly injected, until the point at which he refused treatment; and the injections caused the following: “It [Torralvo’s finger] had blisters, it was changing colors. It was cold, it was so cold, it was crazy, and it was just so much pain.” NT, 02/04/16, Afternoon Session, Torralvo, 25:10-12. The jury saw photos of Torralvo’s finger after the incident. Some days later, a part of Torralvo’s right index finger on the palmar side was “black” (31:18-19), and he had that portion of his finger removed surgically due to its being necrotic. As a result, his finger was not shortened, but rather narrowed, toward the tip. He complained of ongoing pain, especially to touch. The jury clearly had sufficient evidence to reach its verdict. The court did not commit error of law when it denied Defendant’s motion for remittitur. The verdict was not excessive, and does not shock the conscience, given the evidence before the jury.

Conclusion

For the reasons stated above, the trial court did not commit error of law or abuse its discretion in its rulings.

Jungfer v. Balog

Family law — Custody — Relocation — Bests interests analysis — Parental cooperation

The mother in a child custody case, defendant Susanna Balog, filed for relocation and primary physical custody of their minor child on May 2, 2016. The father, plaintiff Michael Jungfer, opposed the relocation and sought a modification of the custody order. After considering the factors set forth in 23 Pa.C.S.A. §5328 and the best interest of the child in §5337(i), the court granted defendant’s request to relocate and denied plaintiff’s modification request.

Both parents were commended for putting their son’s welfare above their own and were supportive of the role of the other parent, had excellent