Control No. 17113261

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NILSA BRUNO **Plaintiff**	:	MAY TERM, 2016
vs.	:	NO. 1889
CASTOR AVENUE MARKET, LLC a/k/a SUPREME SUPERMARKET **Defendant**	:	

ORDER

And Now, this 13th day of February, 2018, after considering the Motion for Post-Trial Relief filed by Defendant Castor Avenue Market, LLC and Plaintiff's Response thereto, and for the reasons set forth in the Memorandum filed this date, it is hereby **ORDERED** that the Defendant's Motion is **DENIED in its entirety.**

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.

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NILSA BRUNO **Plaintiff**	:	May Term, 2016
vs.	:	No. 1889
CASTOR AVENUE MARKET, LLC a/k/a SUPREME SUPERMARKET **Defendant**	:	

MEMORANDUM IN SUPPORT OF ORDER DENYING DEFENDANT'S MOTION FOR POST-TRIAL RELIEF

MASSIAH-JACKSON, J.

February 13th, 2018

I. PROCEDURAL HISTORY

On May 21, 2014, Ms. Nilsa Bruno, a cosmetology student and Mary Kay Cosmetics consultant, fell at the Supremo Supermarket in Philadelphia, Pa. A container of clear vegetable oil had spilled out onto the aisle floor. Ms. Bruno suffered injuries to her right ankle and right wrist.

In May, 2016, following two years of conservative treatment, Ms. Bruno underwent arthroscopic wrist surgery. The surgery was successful and her constant wrist pains have subsided. Ms. Bruno, however, has been left with reduced strength in her right hand. She is unable to engage in repetitive hand use or sustained hand intensive activities.

Ms. Bruno initiated civil litigation in May, 2016. During three days of trial in November, 2017, the jury was presented with four expert witnesses. Each party presented an orthopedic surgeon and a vocational expert. The jury heard from Ms. Bruno and they saw color photographs of the oil spill and interior aisles at Defendant's store. On November 17, 2017, the jury returned a verdict in favor of Nilsa Bruno in the amount of $523,200.00. The verdict award included $500,000.00 for past and future lost earnings. Ms. Bruno was unable to complete her studies at cosmetology school and secure a license to practice.

A post-trial briefing schedule was coordinated by the Court and counsel. Both parties agreed to waive oral argument. The Defendant-Supermarket is seeking a new trial or remittitur because it disagrees with certain evidentiary rulings. For the reasons which follow, all of the Motions for Post-Trial Relief, Control No. 17113261 filed by this Defendant are **DENIED**.

II. CHRONOLOGY

May 21, 2014	–	Nilsa Bruno slips and falls in a pool of spilled vegetable oil on the floor at Supremo Supermarket. Transported to Hospital Emergency Room by Fire Department. See photos.
May, 2014	–	Visit to Family physician, Dr. Nair.
July 3, 2014	–	Dr. Joseph J. Thoder orthopedic surgeon/hand specialty.
July 10, 2014	–	Dr. Ray Moyer/orthopedic surgeon and ankle specialty. Provided support stockings and ankle brace.
August 25, 2014	–	Normal EMG.
August 28, 2014	–	Dr. Thoder gives steroid injection into right wrist.
December 12, 2014	–	Dr. Moyer for ankle and wrist complaints.
June 22, 2015	–	MRI – suggestive of Triangular Fibrocartilage tear (TFCC)/ulnar side of right wrist
August, 2015	–	Dr. Thoder – wrist pains.
September 24, 2015	–	Dr. Thoder – steroid injection to reduce inflammation in wrist.
October 8, 2015	–	Dr. Thoder visit.
January 7, 2016	–	Dr. Thoder – third steroid injection provides "transient relief."

February 3, 2016	–	Dr. Thoder – removed Ms. Bruno's cast.
February 21, 2016	–	MRI – normal findings with inflammation.
March 17, 2016	–	Dr. Thoder – complaints of wrist pain.
April 28, 2016	–	Dr. Thoder – pain on ulnar side of wrist.
May 17, 2016	–	Dr. Thoder performs arthroscopic wrist surgery; TFCC tear was found; inflammation found; debridement of cartilage.
June 2, 2016	–	Dr. Thoder – post-op visit.
June 16, 2016	–	Dr. Thoder – pain improved; recommend physical therapy.
July 7, 2016	–	Missed visit.
September 26, 2016	–	Improvements; residual discomfort; no numbness or tingling. Needs to attend physical therapy.
November 7, 2016	–	Significant progress.
December 19, 2016	–	Dr. Thoder gave Ms. Bruno a strength test. Reduced strength on right wrist.
February 20, 2017	–	Final visit with Dr. Thoder – "maximal medical improvement."

III. FACTUAL BACKGROUND

On May 21, 2014, Ms. Nilsa Bruno, age 30 years, was walking through the aisles of Supremo Supermarket, a neighborhood food store in Philadelphia. Nov. 16, 2017, N.T. 46-48. She held her shopping basket in one had as she turned left near the corner of the

aisle. Ms. Bruno's feet started slipping, she twisted her ankle, heard it pop, and fell onto the floor. Nov. 16, 2017, N.T. 48-50. She put her right hand out to try to stop her fall. She was on the floor in clear vegetable oil for at least twenty minutes. Ms. Bruno was crying and screaming until the Emergency Responders arrived. Nov. 16, 2017, N.T. 49-52. She was unable to move due to pain in her ankle. Nov. 16, 2017, N.T. 49-52.

The Fire Rescue officers arrived and instructed the store employees to spread cooking flour to cover the spilled vegetable oil. Ms. Bruno was taken to the hospital by the Fire Rescue. Nov. 16, 2017, N.T. 59-62. She told the medical personnel that her ankle and right hand were hurting. Nov. 16, 2017, N.T. 62-64. She was given a walking boot for her ankle and advised to see her primary doctor.

When Ms. Bruno went to her family physician, she was referred to Dr. Ray Moyer, an orthopedic doctor who specializes in legs and feet, Nov. 16, 2017, N.T. 66, and Dr. Joseph J. Thoder, an orthopedic doctor who specializes in hands and wrists. Nov. 16, 2017, Nt. 66-67. During the next two years, Plaintiff-Bruno underwent testing and conservative treatments for her right wrist including casts and injections. In May, 2016, arthroscopic wrist surgery was successfully performed at Jeanes Hospital by Dr. Thoder. A TFCC tear of cartilage was confirmed. Internal inflammation was confirmed. Dr. Thoder performed a debridement and cleared that area inside the Plaintiff's wrist.

By February 17, 2017, after post-operative healing and physical therapy, Ms. Bruno reached maximal medical improvement. Dr. Thoder's narrative Expert Report dated February 20, 2017, concludes at page 4:

> "Based on my review of her medical records, a review of her treatment for the right wrist complaint, my personal involvement in her care, specifically the findings at surgery; **it is my opinion with a reasonable degree of medical certainty that the injury to her triangular fibrocartilage is directly causally related to the fall of May 21, 2014.** Specifically there is no causal relationship to prior gestational carpal tunnel complaints. Subsequent to surgical intervention, she has regained mobility and strength compared to her preoperative state, still lacking 15% of the strength of her opposite unaffected side."

IV. LEGAL DISCUSSION

A Trial Court has broad discretion to grant or deny a new trial. This jury was charged to weigh the evidence and inferences, to judge the credibility of witnesses, and to draw the ultimate conclusion as to the facts. In the circumstances presented here, the record supports the Trial Court's evidentiary rulings and the jury's determinations for liability, causation and damages. See generally, Criswell v. King, 834 A.2d 505, 512 (Pa. 2003, a new trial based on the weight of the evidence only in "truly extraordinary circumstances"; Armbruster v. Horowitz, 813 A.2d 698, 703 (Pa. 2002), credibility is solely for the jury; Martin v. Evans, 711 A.2d 458 (Pa. 1998), a jury is free to believe all, part or none of the witnesses' testimony; Gunn v. Grossman, 748 A.2d 1235, 1243 (Pa. Superior Ct. 2000),

to constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful to the complaining party. This trial record does not support Castor Avenue Market's post-trial motion for a new trial or remittitur.

A. The Plaintiff's Expert Reports and Trial Testimony Were Offered With a Reasonable Degree of Professional Certainty.

Joseph J. Thoder, M.D.

For reasons which remain unclear, the Defendant-Supermarket in pre-trial, trial and post-trial submissions argues that Dr. Thoder's narrative Report and his video trial testimony were not rendered a reasonable degree of medical certainty. The records do not support this claim.

Not only do the words of the Report, dated February 20, 2017, and the transcript, taken November 7, 2017, expressly opine about causation and sequelae of the injury to a "reasonable degree of medical certainty", when the evidence and record are reviewed as a whole, the Plaintiff clearly met her burden of proof. Dr. Thoder's trial testimony was well within the fair scope of his Report. Shiflett v. Lehigh Valley Health Network, 174 A.3d 1066 (Pa. Superior Ct. 2017); Stimmler v. Chestnut Hill Hospital, 981 A.2d 145, 154 (Pa. 2009); Callahan v. Amtrak, 979 A.2d 866, 877 (Pa. Superior Ct. 2009).

Dr. Thoder, Ms. Bruno's treating orthopedic surgeon, testified to a reasonable degree of certainty at N.T. 37, that the TFCC tear in Ms. Bruno's wrist was caused by the fall in the supermarket in May, 2014. The jury accepted the medical opinions of Dr. Thoder.

Next, Defendant-Supermarket asserts at Item 4 of the Memorandum, dated December 20, 2017, that Dr. Thoder's testimony and opinions about Ms. Bruno's inability to work in the future are beyond "the four corners of his report." At page 3 of Dr. Thoder's Report, he notes that when he tested Ms. Bruno "her strength remains below 70% of her opposite unaffected side." He concluded:

> "Based on that lack of strength, she will have difficulty returning to her preinjury job in cosmetology, owing to the need for repetitive hand use for tasks that include blow drying, and other hand intensive activities."

Dr. Thoder's trial testimony was well within the four corners of his written Report when he explained Plaintiff's limitations and inability to manipulate a hand tool, such as a hair dryer, over a sustained period of time. With Ms. Bruno's strength deficits, he opined that "she would be incapable of performing the primary tasks of someone in cosmetology." N.T. 27-30.

The Defendant also objected at N.T. 85 to Dr. Thoder's trial testimony about what the hospital emergency room records state. Item 5 of Defendant's Memorandum, dated December 20, 2017. The record reveals that similar testimony was presented to the jury at N.T. 12-13 without objection. The Supermarket has been unable to articulate any legal basis for its claims of error or how this testimony caused prejudice. See also, Dr. Abboudi, N.T. 75-77.

Next, Defendant-Supermarket asserts that when the treating orthopedic surgeon described Ms. Bruno's ongoing pains and discomfort and other wrist injuries, he did so without the requisite degree of medical certainty. Items 6 and 7 of Defendant's Memorandum, dated December 20, 2017. Dr. Thoder's descriptions of Ms. Bruno's injuries and pains were developed during his two and one half years of treatments. (July, 2014 – February, 2017) Opinions formed for the purpose of medical care are analogous to any other testimony of historical events. Dr. Thoder's testimony included his observations, diagnosis and impressions contained the medical records that were prepared contemporaneously with his treatment of Ms. Bruno. Polett v. Public Communications, Inc., 126 A.3d 895 (Pa. 2015). The Defendant was neither surprised nor prejudiced by the review of medical records.

The transcript reveals at N.T. 14-18, that Dr. Thoder properly testified about his office notes and findings made during treatments on July 3, 2014, and August 28, 2014. The physician reviewed EMG tests and said that he gave Ms. Bruno a steroid injection. He explained that he evaluated her for "diffuse wrist pain", "numbness and tingling", possible median nerve compression and inflammation of flexor tendons in her wrist. The testimony at N.T. 93-97, referred to by Defendant, is simply a reiteration of earlier testimony, that is, Ms. Bruno suffered ongoing wrist discomforts and inflammation beyond the area of TFCC tear.

It is well-settled in Pennsylvania that absent a manifest abuse of discretion or error of law, evidentiary rulings are not grounds for a new trial. In Whitaker v. Frankford Hospital, 984 A.2d 512 (Pa. Superior Ct. 2009), the Superior Court commented at 522:

> "'Evidentiary rulings are committed to the sound discretion of the trial court, and will not be overruled absent an abuse of discretion or error of law.' *Takes v. Metropolitan Edison Co.*, 440 Pa.Super. 101, 655 A.2d 138, 145 (1995) *(en banc), reversed in part on other grounds*, 548 Pa. 92, 695 A.2d 397 (1997). 'In order to find that the trial court's evidentiary rulings constituted reversible error, such rulings must not only have been erroneous but must also have been harmful to the complaining party.' *Collins [v. Cooper]*, 746 A.2d [615,] 619 [(Pa.Super.2000)] citing *Romeo v. Manuel*, 703 A.2d 530, 532 (Pa.Super.1997). ''Appellant must therefore show error in the evidentiary ruling and resulting prejudice, thus constituting an abuse of discretion by the lower court.'' *Id.* at 620[.]
>
> *Oxford Presbyterian Church v. Weil–McLain Co., Inc.*, 815 A.2d 1094, 1099–1100 (Pa.Super.2003)."

All of the challenges to Dr. Thoder's testimony are meritless.

Philip Spergel, Ed.D.

Defendant-Supermarket claims that it was reversible error for Plaintiff's vocational expert to rely on Dr. Thoder's medical assessments of Ms. Bruno's capabilities and limitations when Dr. Spergel rendered his opinions of future work abilities. See Item 1 of Defendant's Memorandum, dated December 20, 2017. This Court does not agree.

Rule 703 of the Pennsylvania Rules of Evidence states:

> "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."

In Kearns v. DeHaas, 546 A.2d 1226, 1230-1231 (Pa. Superior Ct. 1988), the Superior Court determined that a vocational expert properly relied on "various medical, psychological and psychiatric reports" when he provided his opinion about future employment for a plaintiff. See also, Edwards v. WCAB, 858 A.2d 648, 652 (Pa. Commonwealth Ct. 2004), Labor Market expert reliance on claimant's physician, education and background ". . . is precisely the kind of third party information that Rule 703 contemplates as an acceptable foundation for expert opinion testimony."

Dr. Spergel's written Report, dated March 6, 2017, opines at page 16:

> "Based on the documents reviewed, the clinical interview and the psychological testing, it is the opinion of this rehabilitation psychologist/vocational expert that Ms. Bruno has experienced a loss of earning potential. She is unable to function in the capacity of a hairdresser (cosmetologist). As noted, that position requires considerable bilateral upper extremity psychomotor functions including fine and gross manipulation. Her injury prevents her from utilizing the tools needed in order to function successfully in that capacity."

Dr. Spergel relied on the medical report of Dr. Thoder when considering Ms. Bruno's limitations and future employability. N.T. 24-25. Dr. Thoder stated to a reasonable degree of medical certainty that Ms. Bruno "has regained mobility and strength compared to her

preoperative state, [however] still lacking 15% of the strength of her opposite unaffected side." The vocational expert provided his opinions about how her right wrist weakness and limitations will affect Ms. Bruno's future employability and lost earnings.

At trial Dr. Spergel explained to the jury that due to Ms. Bruno's pains in her right hand and inability to maintain a grip on objects in her hand, she will experience "significant limitations that will affect her from being a cosmetologist." N.T. 16. Additionally, because her ankle will swell if she stands for lengthy periods, she cannot work as a hairdresser. N.T. 16. Dr. Spergel was clear, however, that Ms. Bruno is employable in a sedentary job, such as a cashier or a hostess. N.T. 17. He opined at N.T. 20:

> "I'm saying she can work. She can do jobs that don't demand right hand functioning and are consistent with her education and background and work experiences. She does have lost earning potential in my opinion."

Next, the Defendant suggests that it was prejudiced when Dr. Spergel was asked one question to comment on Dr. Ronald Rosenberg's conclusion that Ms. Bruno would not likely set up her own business and hair salon. N.T. 22-23. See, Item 2 of Defendant's Memorandum, dated December 20, 2017. Dr. Spergel's trial testimony was videotaped in August, 2017. The defense vocational expert testified live, in the courtroom, on November 17, 2017. The record reveals the jury heard extensive questioning from both counsel to Dr. Rosenberg about the viability of Ms. Bruno becoming a salon owner. Nov. 17, 2017, N.T. 25-30, 36-37, 42-44, 48. This post-trial challenge is without merit.

B. The Defense Experts Did Not Prejudice the Defendant's Case.

Jack Abboudi, M.D.

The Defendant-Supermarket challenges the following cross-examination testimony made by its defense medical expert at N.T. 69-70, about Dr. Grossinger:

> "**Mr. Morris:** And you disagree with both of their conclusions, is that correct?
>
> **Dr. Abboudi:** No, that's not correct at all. So first of all, Dr. Grossinger's notes. You have to look at the notes. He renders conclusions about things that he doesn't document that he actually evaluated. So if one looks at the notes, he's commenting on structures and issues that he has not evaluated. So like, for example, it's like me commenting on whether somebody has heart problems and I don't examine the chest or the heart or take out my stethoscope. So how does that person arrive at that conclusion? And I'm happy to go over the evaluation with you. So I don't know how he evaluated and concludes some of the conclusions that he comes up with . . . .
>
> Well, no. I actually wrote down in my note that I looked at these different structures and I said okay, I evaluated for this problem and it's not tender, it's stable, everything about it is okay, so this structure is okay and for this structure and so forth. But in Dr. Grossinger's note there is no evaluation for the area that he's arriving at his conclusion to say that this is abnormal. But I'm looking at the documentation and say well, how did you arrive at that conclusion. I don't see any description that you examined that part. Also, he's describing things of weakness and muscle atrophy and loss of motion that I don't see them. Range of motion is completely normal. I measured the muscles myself and they're completely normal."

It is claimed that this testimony by Dr. Abboudi "was intended by Plaintiff's counsel to bolster those opinions stated by Dr. Thoder by implying that Dr. Grossinger held the same opinions." Because Dr. Grossinger did not testify, the Defendant-Supermarket seeks a new trial. Item 3 of Defendant's Memorandum, dated December 20, 2017.

Assuming *arguendo*, these rather vague comments were understood by the jury, the record reflects that it was counsel for the Defendant-Supermarket who first brought Dr. Grossinger's medical records to the witness' attention. N.T. 32. Further, in the case relied on by Defendant, Cacurak v. St. Francis Medical Center, 832 A.2d 159 (Pa. Superior Ct. 2003), the Superior Court held that an expert witness cannot bolster his own credibility by reading into a record Reports of a non-testifying expert. See also cases cited at 823 A.2d 172-173. Here, Dr. Abboudi did not agree with the medical notes and evaluation of Dr. Grossinger. Moreover, there is no information presented to this Court, that Dr. Grossinger ever prepared an expert Report. Finally, there is nothing in the challenged passage to indicate that Dr. Grossinger (a neurologist) and Dr. Thoder (orthopedic surgeon) either agreed with each other, or, that Dr. Abboudi compared the two physicians who treated Ms. Bruno.

Generally, evidentiary rulings are committed to the sound discretion of the trial court. See, e.g. Boucher v. Pennsylvania Hospital, 831 A.2d 623, 629 (Pa. Superior Ct. 2003), the scope of cross-examination is within the trial court's discretion absent an abuse

of discretion; Oxford Presbyterian Church v. Weil-McLain, Co., 815 A.2d 1094, 1100 (Pa. Superior Ct. 2003), appellant must show error in the evidentiary ruling and resulting prejudice in order to warrant a new trial.

Ronald Rosenberg, Ph.D.

During the voir dire cross-examination on qualifications, Dr. Rosenberg, Defendant's vocational expert *sua sponte* provided non-responsive testimony at Nov. 17, 2017, N.T. 17-18:

> "**Mr. Morris:** How often do you testify for the defendant's law firm?
>
> **Dr. Rosenberg:** Well, I'm registered with a referral service, RX Medical Experts, okay. And they give me referrals. And to my knowledge, this is about the third case that Farmers Insurance was involved in that I was involved, going back about a year to a year and-a-half, as far as I know. I don't have an exact chronology, but it's about the third case where Farmers Insurance was --
>
> **Mr. Boyle:** Objection, Your Honor.
>
> **The Court:** Let's move forward. You know, we do have to end today.
>
> **Mr. Morris:** That was actually my last questions I would say that he is qualified to serve as an expert."

After Defense counsel's objections the Court promptly halted the inquiry.

Rule 411 of the Pennsylvania Rules of Evidence states in pertinent part:

> "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully."

See, Bernstein, 2016 Pa. Rules of Evidence, Comments 1-5 to Pa.R.E. 411 (Gann) for a comprehensive overview.

In this trial there is no claim that counsel solicited or intended Dr. Rosenberg's non-responsive answer to the questions. Rather, the line of Appellate case law which holds that "mere mention of the word insurance does not necessitate a new trial unless the aggrieved party can demonstrate prejudice" is controlling here. e.g. Bernstein, supra.

When examining the passing reference to insurance in the totality of the circumstances, there is no indication that a mistrial was requested. Nor was there a request for a curative instruction by defense counsel. Here, as in Dolan v. Fissell, 973A.2d 1009 (Pa. Superior Ct. 2009), the mention was inadvertent and was not exploited by counsel for Ms. Bruno. Further, the Trial Court promptly responded to defense counsel's objection. See also, Allied Electrical Supply Co. v. Roberts, 797 A.2d 362 (Pa. Superior Ct. 2002), holding that the failure to request a mistrial was waiver; Carpinet v. Mitchell, 853 A.2d 366, 375-377 (Pa. Superior Ct. 2004), holding the movant must show prejudice; Dolan v. Carrier Corporation, 623 A.2d 850, 852-853 (Pa. Superior Ct. 1993), inadvertent mention of insurance does not warrant a new trial.

C. The Verdict Award Does Not Shock This Court's Conscience.

Defendant-Supermarket asserts that the verdict award of $500,000.00 for past and future lost earnings is unjustified and excessive. The trial record included expert evidence of economic loss with a past and future work life of between 20 years to at least 35 years. Ms. Bruno was 30 years old in May, 2014.

In Stoughton v. Kinzey, 455 A.2d 1240 (Pa. Superior Ct. 1982), the Superior Court held that when a plaintiff's verdict is supported by the evidence, an order of the court modifying it would be an abuse of discretion. 455 A.2d at 1242. See also, Tindall v. Friedman, 970 A.2d 1159, 1176-1177(Pa. Superior Ct. 2009); McManamon v. Washko, 906 A.2d 1259 (Pa. Superior Ct. 2006). The test for remittitur is well established and often repeated, Harding v. Conrail, 620 A.2d 1185 (Pa. Superior Ct. 1993); Kemp v. Philadelphia Transportation Co., 361 A.2d 362 (Pa. Superior Ct. 1976).

In this case, the Defendant's challenge is **not** to the non-economic losses. The trial jury considered the opinions of two well qualified vocational and economic experts. Both experts agreed that Ms. Bruno is employable, however, she has educational and health limitations. Dr. Spergel rendered his opinion that Ms. Bruno's vocational life expectancy between the ages of 65 to 70 years, represents lost earnings in the range between $634,000.00 and $724,800.00. N.T. 20-22. Dr. Rosenberg opined that, given Ms. Bruno's other health issues, she would not work continuously for 35 to 40 years. He testified that she had a 20 year work life and her lost earnings would amount to $150,000.00.

The jury chose a middle ground between the economic ranges proffered by the Plaintiff's expert and Defendant's expert. The verdict award reflects thoughtful deliberation by our trial jurors. The verdict does not shock this Court's sense of justice. The award is not plainly excessive or exorbitant under the facts and circumstances present here.

V. CONCLUSION

For all of the reasons set forth above, the Motion for Post-Trial Relief filed by Castor Avenue Market, LLC a/k/a Supreme Supermarket is **DENIED**.

BY THE COURT:

FREDERICA A. MASSIAH-JACKSON, J.