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OPINIONS

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PLJ

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Opinions

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Trizechahn Gateway, LLC v. Paul H. Titus, et al

Attorney's Fees—Garnishee

Attorney's fees claimed by law firm were not reasonably related to their duties as a garnishee and were denied as excessive.

No. GD-00-13044. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, S.J.—September 13, 2017.

MEMORANDUM IN SUPPORT OF ORDER

Introduction

The pertinent history of the instant matter, involving execution proceedings against the capital account of Defendant David Oberdick, Esq., was set forth in an earlier Memorandum filed on December 5, 2007, in support of an order also filed that date.

In the summer of 2006, during the pendency of the appeal of the original judgment against the defendants and after execution proceedings had commenced (no appeal bond having been posted), Mr. Oberdick contended that his capital account was exempt from execution as being wages. Eight years later, on May 5, 2014, he filed a different claim for exemption from execution and no longer pursued the argument that the Capital Account was wages (which had been rejected by the Bankruptcy Court). Instead, he contended that the capital account was exempt from execution because it was entireties property. On the same day, his wife, Sally Oberdick, filed a property claim with the Sheriff, stating that the capital account was entireties property.

Meyer, Unkovic & Scott, LLP ("MUS") filed preliminary objections to the writ of execution against the capital account of judgment debtor David Oberdick. The objections raised (and overruled) were (1) that service of the writ was improper and (2) that the capital account was exempt from execution because it was in the nature of wages since Mr. Oberdick's partnership interest was very small. MUS also argued that a charging order rather than a garnishment proceeding was the appropriate way for the judgment debtor, Plaintiff herein, to seek to obtain the monies in Mr. Oberdick's capital account. After the undersigned overruled those objections, Mr. Oberdick sought bankruptcy protection, on January 23, 2008. Several years later, the capital account dispute was referred back to our Court to resolve and was eventually assigned to the undersigned. MUS then filed an amended answer and new matter to the interrogatories in garnishment, asserting that the capital account was entireties property as set forth by Mr. Oberdick; MUS also claimed it was entitled to more than $52,000 in related fees and costs.

Both of the Oberdicks' claims are now ripe for decision, as is the claim of MUS for counsel fees for responding to the Interrogatories propounded to it as Garnishee.

Discussion

1. The monies in Mr. Oberdick's Capital Account are not entireties property and are not exempt from execution.

Mr. and Mrs. Oberdick rely on case law dealing with marital property in divorce situations. Those cases would apply only if the Oberdicks were getting a divorce and had disputes with each other regarding equitable distribution. They have no applicability to whether or not property is held jointly by a married couple and is therefore held by the entireties.

The Capital Account is in the name of Mr. Oberdick only. It is not entireties property.

2. The attorney's fees claimed by MUS are not reasonably related to their duties as a garnishee and must be denied as excessive.

A garnishee's duties are very limited: to truthfully answer interrogatories and to hold the money until an order of court resolves any disputes between the judgment debtor and the judgment creditor. A garnishee has no duty to defend the judgment debtor; at most, the garnishee has only to notify the judgment debtor that the monies have been garnished. Any actions MUS took beyond that were as a volunteer and the fees for such actions are not reimbursable by the judgment creditor.

However, we cannot say it was absolutely unreasonable for MUS to file its preliminary objections to service of the writ or to contend that the Capital Account was in the nature of wages and was exempt from execution. However, once those objections were overruled, it had no further duties to the judgment debtor, Mr. Oberdick, merely because he was a partner and later an employee.

Because the fee demand is so overreaching, we might be justified in denying it in full. However, we will award MUS the amount of $1,000.00 for the clerical time spent in looking up the value of Mr. Oberdick's Capital Account and for drafting, presenting and arguing the preliminary objections.

Conclusion

David Oberdick's claim for exemption and Sally Oberdick's property claim must be denied. The claim of MUS for fees in excess of $52,000 must also be denied and the full balance in the Capital Account of David Oberdick must be delivered to Plaintiff, less only the sum of $1,000.00 for reasonable costs and counsel fees. See order filed herewith.

BY THE COURT:
/s/Friedman, S.J.

Date: September 13, 2017

ORDER

AND NOW, to-wit this 13th day of September 2017, for the reasons set forth in the Memorandum in Support of Order filed herewith, it is hereby ordered as follows:

1. The property claim of Sally Oberdick and the claim for exemption of David Oberdick are denied.

2. The claim for attorney's fees and costs of Garnishee Meyer, Unkovic and Scott is granted in part and it is awarded the reasonable amount of $1,000.00.

3. The full amount in the Capital Account of David Oberdick must be delivered to the Plaintiff, less only the sum of $1,000.00 described above.

BY THE COURT:
/s/Friedman, S.J.

BCJ Management, L.P. v. Maxine Thomas

Credibility

Court found that the plaintiff's failure to rebut earlier testimony when it was in a position to do so is relevant and probative. The Court, as fact-finder, accepted the implication that the testimony would have been unfavorable to plaintiff.

No. LT-15-000913. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, S.J.—October 3, 2017.

OPINION

PROCEDURAL HISTORY

Plaintiff had filed a "Motion to Schedule Judicial Evidentiary Hearing to Determine Whether Defendant Should Be Found in Default of Settlement Agreement." The hearing on whether or not Defendant should be found in default was conducted in our General Motions Court where the undersigned was sitting at the time. We entered an order with a supporting memorandum denying Plaintiff's Motion on October 19, 2016. Plaintiff filed Post-Trial Motions rather than a direct appeal.

We handled the Post-Trial Motions in the ordinary course without focusing on the issue of whether they were inappropriate in this instance, where a motion was denied by an order after a hearing had been held. We had to wait for a transcript of the hearing to be prepared before setting a briefing schedule. By order of February 2, 2017, we set that schedule and further directed Plaintiff to explain why a direct appeal of our order should not have been filed. We are not convinced by his argument but do not take any position on timeliness in this opinion.

We do note, however, that the Motion probably should have been denied without a hearing since it appears to be asking for an advisory opinion, which the Rules of Court do not permit. We take no position on this issue either, except to express regret that we did not perceive the problem at the time we reviewed the case prior to the hearing.

The Plaintiff's Motion for Post-Trial Relief was denied on the merits, judgment was entered and this appeal followed.

ISSUES ON APPEAL

Plaintiff raises five issues in its Statement of Matters Complained of on Appeal. They are rather lengthy and not easy to summarize so they are simply incorporated herein by reference. We will address them in the order used by Plaintiff. We note that the main complaint seems to be our determination of credibility, which is generally not appealable.

DISCUSSION

1. The credible evidence showed that Defendant's adult son, Sherman Thomas, Sr., had been given "limited permission" to be on the Plaintiff's premises and to go to Defendant's home to pick up and drop off his children.

Plaintiff argues that we should have rejected Mr. Thomas's testimony because he did not specify when he had been given limited permission to pick up and drop off his children, before or after his mother and the Plaintiff entered into the Settlement Agreement. This was something that could have been asked by Plaintiff during cross-examination. More importantly, Plaintiff did not call anyone in rebuttal to refute Mr. Thomas's testimony regarding his having been given such permission. Mr. Rowan, the Senior Property Manager was in Court and had testified in Plaintiff's case on other matters.

We found Mr. Thomas credible and had no other credible evidence available to make us disbelieve him.

2. The court's determination was indeed supported by the weight of the evidence.

It is Plaintiff who failed to meet its burden to support its contention that Defendant was in breach of her lease.

3. There were no improper evidentiary rulings made.

Our review of the Hearing Transcript (HT) reveals that counsel for Plaintiff made seven objections, some of which were overruled and some of which were sustained. See HT, page 44, ll. 8-14; page 51, ll. 15-22; page 54, ll. 7-17; page 54, l. 23 - page 55, 1.4; page 65, ll. 5-7, p.86, l. 25 - page 87, 1.7; p. 117, 1.17 - page 118, 1.17. None of the rulings made were improper.

4. The evidence, or lack thereof, considered by the Court was relevant.

The failure to rebut earlier testimony when one is in a position to do so is certainly relevant and highly probative. Plaintiff could have questioned Mr. Rowan regarding the issue of limited permission having been granted to Mr. Thomas by the prior senior property manager, Mr. Madden, when it re-called Mr. Rowan, but failed to do so. Under well-settled principles, the Court, as factfinder, can accept the implication that the testimony would have been unfavorable to Plaintiff.

The testimony of Mr. Thomas, that he had limited permission to be on the premises, was certainly relevant to the question of whether his mother, the Defendant, had wrongly allowed him to be there.

The other items are minor comments and certainly did not provide the basis for our decision.

5. Ordinarily, an order of court entered after a hearing on a motion is to be directly appealed within thirty days of its entry.

We believe that the mere fact that there might have been a hearing on a motion does not mean that resultant order is a "verdict," necessitating the filing of a motion for post-trial relief. The Court, at HT page 106, 1. 8, clearly stated "This is a hearing rather than a trial, so I think we will hear from [Movant/Plaintiff] first." In a trial, the Plaintiff usually has the last word. At a hearing on a motion, the movant has to argue why the motion should be granted before the opponent of the motion is required to respond, and the court then issues a ruling, memorialized, as here, in an order.

We also note that Plaintiff's Motion for Post-Trial Relief, paragraph A.1.a., expressly recognizes that the Court entered an "Order of Court and Memorandum in Support of Order."

We leave it to the appellate courts to decide whether our failure to immediately perceive Plaintiff's procedural mistake gives it a free pass on the 30-day deadline and whether the interests of justice requires the motion for post-trial relief be deemed appropriate in the circumstances. We note only that we have no duty to alert parties to possible procedural errors so we doubt that our misunderstanding corrects Plaintiffs failure to file a timely appeal within 30 days of our order filed October 19, 2016.

BY THE COURT:
/s/Friedman, S.J.

Date: October 3, 2017

Village Land Company, LLC v. Stonebrook Condominium Association

Pennsylvania Uniform Condominium Act—Amendments to Declaration of Condominium

The Pennsylvania Uniform Condominium Act, 48 Pa. C.S. s.3211(a) requires that amendments to a Declaration of Condominium be done by the declarant. Therefore, an amendment to a condominium declaration reallocating common expense liabilities was excepted from the requirement of unanimous unit owner consent under 68 Pa.C.S. s.3219(2)(1). The termination of the period of declarant control does not terminate a valid reservation of rights to property owned by the declarant.

No. GD 15-8202. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—October 4, 2017.

OPINION

Village Land Company created the Stonebrook Condominium in 2003 by recording a declaration of condominium that submitted its real estate in the town of McCandless into a flexible condominium. At that time there were nine condominium units, eight of them being townhomes in two separate two story buildings and the ninth being an assisted living unit in a three story building containing thirty-one apartments. This thirty-one apartment assisted living building is known as Unit 700. Being a flexible condominium, the Condominium Declaration permitted Village Land Company to add real estate during the next seven years and to amend the percentage interest in the common expense liability for additional units.

The Declaration of Condominium recorded in 2003 contemplated the future construction of one more assisted living unit and an indefinite number of townhome units. However, Declarant Village Land Company first focused on the construction and sale of approximately fifty additional townhome units and postponed construction of the other assisted living unit until approximately 2015. This second assisted living unit, known as "Building 600," contains sixteen apartments.

Control of the Stonebrook Condominium Association transitioned from Declarant Village Land Company to the other unit owners in June of 2009. *See* 68 Pa. C.S.§3303(c). In April of 2015 the Stonebrook Condominium Association adopted bylaws that contained a provision that prevented more than fifteen percent of the units in the condominium from being used as rental property. In May of 2015 Village Land Company initiated this litigation by filing a complaint requesting a declaratory judgment invalidating the bylaw rental provision. Stonebrook Condominium Association filed a counterclaim that alleged Village Land Company was delinquent in paying its common expenses on the newly constructed assisted living unit, Building 600. Stonebrook Condominium Association alleged the delinquency resulted from the allocation of common expense liability for only one unit to Village Land Company for the sixteen apartments in Building 600 when its allocation should have been for sixteen units. The counterclaim also alleged that Village Land Company's conduct in allocating only one unit of common expense liability for Building 600 was deceptive in violation of the Unfair Trade Practices and Consumer Protection Law. *See* 73 P.S. §201-1 et seq. Finally, the counterclaim alleged that Village Land Company negligently constructed the Condominium.

The dispute was resolved with a non-jury trial before me on March 30 and 31, 2017. My verdict invalidated the rental bylaw provision, denied the counterclaim for delinquent common expenses on Building 600 and Unfair Trade Practices but granted the counterclaim as to negligent construction of the road that runs through the Condominium. After I denied the Motions for Post-Trial Relief, judgment was entered on my verdict. Stonebrook Condominium Association then timely appealed to the Commonwealth Court of Pennsylvania and thereafter filed a concise statement of the errors complained of on appeal ("concise statement"). Because it is not in the concise statement, my decision to invalidate the bylaw limiting rentals to fifteen percent of the condominium units is not being appealed. The balance of this Opinion, per Pennsylvania Rule of Appellate Procedure No. 1925(a), sets forth the reasons for each ruling complained of in the concise statement.

Stonebrook Condominium Association contends that I made an error by allowing the same common expense percentage for Building 600 as was allocated to each townhome unit. It argues that Village Land Company did not have the unanimous consent of the unit owners required by the Pennsylvania Uniform Condominium Act (*see* 68 Pa. C.S. §3219(d)(1)) when it allocated the common expense percentage for Building 600 in an Amendment to the Declaration of Condominium recorded in July of 2010. Stonebrook is correct that the July, 2010 Amendment lacked unanimous consent. However, it was the Fourth Amendment to the Declaration recorded in August of 2008, with the unanimous consent of the unit owners, that allocated the same common expense percentage for Building 600 as each townhome. *See* trial exhibit 3. A chronological examination of the relevant provisions in the Declaration and its Amendments is necessary to explain how the August, 2008 Amendment created this new allocation of common expenses. In the 2003 Declaration, under the heading *Defined Terms*, subsection 1.2.21 defines "Assisted Living Units" as "the two(2) Units consisting of buildings of three stories each, with each containing 20-40 apartments."[1] *See* trial exhibit 1, p.2. In EXHIBIT "B" to the 2003 Declaration, Assisted Living Unit 700 is allocated 65.6 percent and the townhomes 34.4 percent (4.3 percent apiece) of the common expenses. *Id.* at p. 17. Also in the 2003 Declaration under the heading *Percentage, Interests, Votes and Common Expense Liabilities*, subsection 2.1.1 allows the amendment of the Percentage Interest "by the Declarant upon the addition of Units described in this Declaration as 'NEED NOT BE BUILT,' or the Additional Real Estate as herein described." *Id.*, p. 3. This occurred in June of 2006 when the Declaration was amended with the addition of real estate that includes "PROPOSED BUILDING 600, 25 TO 40 UNITS (NEED NOT BE BUILT)." *See* trial exhibits 2 and 15, p. 2. Then, in August of 2008, the Fourth Amendment to the Declaration was recorded, and it contains the unanimous consent of the unit owners. In EXHIBIT "B" to this August, 2008 Amendment, Assisted Living Unit 700 is allocated 2.7028 percent and each of the thirty-six townhome units existing at that time is allocated 2.7027 percent of the common expenses. *See* trial exhibit 3. Importantly, the August, 2008 Amendment adds this sentence under the heading *Percentage Interests, Votes and Common Expense Liabilities* in Section 2.1: "Each Unit shall have the same percentage interest." Thus, from Declaration subsection 1.2.21 it is clear that assisted living building Unit 700 is one unit and assisted living building 600 also is one unit. With the June of 2006 Amendment adding building 600 and the August of 2008 Amendment apportioning the same percentage interest to each unit, indeed there was unanimous consent when Building 600 was allocated the same percentage interest in the common elements as each townhome unit. Therefore, I was correct in allowing the same common expense percentage for Building 600 as was allocated to each townhome unit.

Even if the August of 2008 Amendment did not accomplish the allocation of the same common expense percentage for Building 600 as for each townhome unit, the July, 2010 Amendment did not require the unanimous consent of the unit owners. Stonebrook Condominium Association argues unanimous consent of the unit owners is required by 68 Pa. C.S. §3219(d)(l), which states:

> Except to the extent expressly permitted or required by other provisions of this subpart, no amendment may create or increase special declarant rights, increase the number of units or change the boundaries of any unit, the common element interest, common expense liability or voting strength in the association allocated to a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

Stonebrook Condominium Association, however, neglects any analysis of the exception for "the extent expressly permitted or required by other provisions of this subpart…." In fact, this provision in the Pennsylvania Uniform Condominium Act, 68 Pa. C.S. §3211(a), requires amendments adding units in a flexible condominium to be done by the declarant:

> **General rule**—To convert convertible real estate or add additional real estate pursuant to an option reserved under section 3206(1) (relating to contents of declaration; flexible condominiums), the declarant shall prepare, execute and record an amendment to the declaration (section 3219) and comply with section 3210 (relating to plats and plans). The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each unit formed in the convertible or additional real estate and reallocate common element interests, votes in the association and common expense liabilities….

Italics added. Since there is not a reference to unit owners or the condominium association, this provision expressly requires the amendment adding Building 600 and reallocating common expense liabilities to be made exclusively by the declarant, Village Land Company. Therefore, the addition of Building 600 and reallocation of the common expense liabilities are excepted from the unanimous consent of the unit owners required under 68 Pa. C.S. §3219(2)(1). Since the July, 2010 Amendment was done exclusively by Village Land Company, as required by 68 Pa. C.S. §3211(a), it is valid.

Stonebrook Condominium Association also contends the plans for Building 600 in Supplement No. 1 from July of 2010 (*see* trial exhibit 11) "conclusively establish….common expense liability for Building 600 must be calculated based on sixteen (16) separate units, rather than one (1) Unit." Concise statement, p. 3. I strongly disagree with the Condominium Association. Instead, Supplement No. 1 states "the percentage interests appurtenant to each unit which is part of the Condominium, including Building 600, shall henceforth be as set forth in Exhibit 'B-3'", and Exhibit "B-3" is a schedule designating the same 1.72414 percent common element interest for the one unit identified as Building 600, the one unit identified as Unit 700 and for each unit identified as a townhome. *See* trial exhibits 11 and 12. While the plans in Supplement No. 1 contain a unit number inside each of the sixteen apartments, it is apparent that the architect, artist or other individual who made the plans did not intend them to be "an identifying number to each unit" within the meaning of 68 Pa. C.S. §3211(a) in the Pennsylvania Uniform Condominium Act. Assisted Living Unit 700's plans also contain a unit number inside each of the thirty-one apartments, but it has been treated as one condominium unit since the Condominium's creation in 2003. The fact that the individual who made the plans intended "unit" to mean a living unit rather than a condominium unit identifying number also is borne out by the fact that adopting the Condominium Association's argument would result in having two units with identical unit numbers throughout the Condominium (e.g., there is a townhome unit 201 in the Schedule of Unit Identifying Numbers and Building 600's plans have a unit 201). Stonebrook Condominium Association therefore is mistaken, as Building 600's plans do not establish it as having sixteen condominium units.

Stonebrook Condominium Association additionally contends that assigning only one condominium unit to Building 600 discriminates in favor of the units owned by Declarant Village Land Company. Stonebrook argues that an allocation of the percentage interest in the common elements that discriminates in favor of the units owned by the declarant is prohibited by the Pennsylvania Uniform Condominium Act. *See* 68 Pa. C.S. §3208, Uniform Law Comment No. 1. However, Robert Pritchard, the President of the Condominium Association since 2013, acknowledged during the trial that the Association is not responsible for the insurance, maintenance, upkeep, repair or replacement for Building 600 and the acreage surrounding it. *See* Transcript of Non-jury Trial, March 30-31, 2017 ("T." hereafter), pp. 262-276 and trial exhibit 3, pp. 3-4. Because the Condominium Association has no direct expenses for Building 600 and the surrounding acreage, Mr. Pritchard believes the common charge for indirect expenses to the Condominium Association proportionate to Building 600 should be for two, rather than sixteen units. *See* T., p. 267. I found the testimony of Donald Pohl, the owner of Village Land Company, is more credible relative to the Condominium Association's expenses from Building 600. Mr. Pohl credibly testified that the total monthly expense to the Condominium Association for both Building 600 and Unit 700 is $251.45, while each currently pays common expenses of $195 or a total for both of $390 per month. See T., 7 p. 306. Since the expense to the Condominium Association of Building 600 is actually less than what Village Land Company pays, there is no discrimination in favor of Village Land Company, the owner of Building 600.

Stonebrook Condominium Association also contends that "no formula was introduced into evidence to explain the common expense liability other than the formula in the original" 2003 Declaration of Condominium. Concise statement, pp. 4-5. 68 Pa. C.S. §3208(a) does require a condominium declaration to "allocate a fraction or percentage of…the common expenses of the association…to each unit and state the formulas used to establish those allocations." However, Stonebrook is incorrect about no formula being introduced into evidence other than the formula in the original 2003 Declaration. Exhibit 3, the August of 2008 Fourth Amendment to the Declaration, was admitted into evidence. In Section 2.1.1 of this Amendment, which is the Section number containing the formula in the original 2003 Declaration, that formula is replaced with this statement: "Each Unit shall have the same percentage interest." Implicit from very basic math is the formula of dividing one hundred by the total number of units in the condominium to calculate the same percentage interest for each unit in the condominium. Therefore, Stonebrook is wrong in its argument that no formula was introduced into evidence.

Stonebrook Condominium Association additionally contends that Village Land Company's July, 2010 Amendment reallocating the common expense liabilities is invalid because it was done after control of the Stonebrook Condominium Association transitioned from Declarant Village Land Company to the other unit owners. However, as mentioned above, 68 Pa. C.S. §3211(a) requires amendments that reallocate common expense liabilities reserved in a flexible condominium declaration to be done by the declarant. Hence, whether control of the Stonebrook Condominium Association was turned over to the unit owners has no impact on Village Land Company's ability to reallocate common expense liabilities in accordance with the reservation to do so contained in the flexible Condominium Declaration. This concept, that termination of the period of declarant control does not terminate a valid reservation of rights to property owned by the declarant, also is acknowledged by the Superior Court of Pennsylvania in *MetroClub Condominium Ass'n v. 201-59 North Eight Street,* 2012 PA Super 122, 47 A.3d 137 (holding that the Declarant's reservation of rights to assign parking spaces owned by it as limited common elements or to rent them was unaffected by termination of the period of declarant control). Thus, there is additional authority that shows Stonebrook Condominium Association's argument lacks merit.

Stonebrook Condominium Association also contends that I erroneously considered arguments based on equitable considerations. *See* concise statement, p. 8, ¶ no. 5. First, this contention is too vague for me to respond to other than with an equally vague response that I am unaware of having considered arguments based on equitable considerations. In any event, the Pennsylvania Uniform Condominium Act "contemplates application of general 'principles of law and equity'…." *Metroclub v. Condominium Assn, supra*, p. 145 *citing Country Classics at Morgan Hill Homeowners' Association, lnc. v. County Classics at Morgan Hill, LLC*, 780 F.2d 367, 374 (E.D. Pa. 2011).

Stonebrook Condominium Association's final contention is that Village Land Company's July, 2010 Amendment violated the Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 et seq., ("UTPCPL") because it was recorded after the period of declarant control had ended and was not approved by the Condominium Association. However, as explained above, the recording of the July, 2010 Amendment was proper and therefore not deceptive under the UTPCPL. In addition, the declarant is required to provide all unit purchasers a "Public Offering Statement" that discloses various features of the condominium. *See* 68 Pa. C.S. §3402. But, Stonebrook Condominium Association failed to produce this disclosure statement that could have revealed any alleged deception by Village Land Company. In any event, Mr. Pohl of Village Land Company credibly and repeatedly testified that all purchasers of units knew that Building 600 would be treated as one unit, with no unit owner being deceived. T., pp. 50, 150, 151, 158, 161, 180, 188, 316-317 and 327. Therefore, Stonebrook Condominium Association failed to prove a violation of the UTPCPL.

BY THE COURT:
/s/Hertzberg, J.

[1] As constructed in 2015, the second "Assisted Living Unit" is three stories but contains only 16 apartments and residents are not provided with assisted living.

Barbara Stemmerich v. Glenn Massung, III and Pittsburgh Mobile Television, Inc.

Auto Collision—Pain and Suffering—Damages

Court found jury verdict of $600 for pain and suffering allegedly suffered in auto collision adequate. Jury had a basis for finding plaintiff's pain and suffering complaints were not credible or were caused by pre-existing injuries.

No. GD 15-23133. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—September 28, 2017.

OPINION

The issue addressed in this Opinion is whether a jury verdict for pain and suffering of $600 is adequate compensation for Plaintiff Barbara Stemmerich's injuries. I find this jury verdict of $600 for pain and suffering is adequate, and my reasons for this decision are set forth below.

On January 31, 2014, Defendant Glenn Massung, while employed by Defendant Pittsburgh Mobile Television, Inc., was driving a tractor trailer on Butler Street in the City of Pittsburgh. The trailer component of the vehicle consisted of a tank used to haul recycled oil, but the tank was empty. It was 5:00 p.m., hence it was rush hour, traffic was heavy and Mr. Massung was moving slowly towards an intersection controlled by a traffic light. The traffic in front of him stopped, requiring him to stop by pressing both the clutch and brake pedals. Mr. Massung had oil on his boots, and his foot slipped off the clutch pedal, which caused the truck to lunge forward and collide with the rear of a car being driven by Mrs. Stemmerich. At impact, Mr. Massung did not think his truck was moving very fast, and if he had to guess, less than twenty miles per hour. While the collision crushed a portion of the trunk of Mrs. Stemmerich's trunk, the air bag inside of her vehicle did not deploy. Mrs. Stemmerich's car seat back broke during the collision and she collapsed backwards in the car and could not control the continuing movement of the car or see where it was going. Her car ultimately stopped due to lack of momentum, but she then needed assistance from paramedics to exit her car. This experience severely upset Mrs. Stemmerich.

Mrs. Stemmerich, then 68 years old, had multiple pre-existing medical conditions. In June of 2006, she had reconstructive surgery of her right foot and ankle followed by reflex sympathetic dystrophy/complex regional pain syndrome of her right leg. In 2009, Mrs. Stemmerich developed sacroiliitis that caused low back pain, which was treated with injections into the sacroiliac joint. She also was diagnosed with fibromyalgia (overactive nerves that magnify the aches and pains over her entire body). In May of 2011, Mrs. Stemmerich had right knee replacement surgery. In December of 2013, she developed right shoulder rotator cuff tendonitis after reaching behind herself to grab something. It was being treated with physical therapy, anti-inflammatories, pain medication and steroid injections. Before the collision, Mrs. Stemmerich also had "bone on bone" arthritis of her left knee (another knee replacement surgery was contemplated), severe stenosis of the lumbar spine and a bone spur and arthritis in her right shoulder joint.

Paramedics took Mrs. Stemmerich from her vehicle to the emergency room of West Penn Hospital. Mrs. Stemmerich complained of pain in her right knee from it hitting the dashboard and of pain in her chest from the pressure of her seatbelt. An x-ray showed no fracture or other obvious injury to her artificial right knee joint, and there was ecchymosis (bruising below the surface of the skin) visible on the left side of her chest. After diagnosing no serious injury, West Penn Hospital discharged Mrs. Stemmerich on the same day as the collision.

Due to her pre-existing medical conditions, Mrs. Stemmerich had a regular appointment with her pain management specialist, Dr. Conerman, three days later. She complained of pain in her low back and mid back radiating down the leg. Dr. Conerman treated Mrs. Stemmerich by continuing previously prescribed physical therapy, muscle relaxants and Vicodin, with the prescribed amount of Vicodin increased. During additional appointments, he also injected steroids into the most painful areas of her back. Three days after the collision Mrs. Stemmerich also was able to see the orthopedic surgeon who had been regularly treating her, Dr. Groff. She

reported that her right shoulder felt much worse due to the collision. Dr. Groff treated Mrs. Stemmerich with continued physical therapy, pain medication and steroid injections. Mrs. Stemmerich, however, did not seem to be improving, and on August 20, 2014 an MRI test was done on her right shoulder that showed a partial tear of the rotator cuff. Then, on October 31, 2014, Dr. Groff performed arthroscopic surgery on her right shoulder, debriding the partial tear of her rotator cuff, decompressing the area around the rotator cuff, removing the pre-existing bone spur and removing the end of the clavicle bone to treat the pre-existing arthritis.

Mrs. Stemmerich filed a lawsuit against Mr. Massung and his employer on December 30, 2015 by means of a writ of summons, and she filed a complaint on March 22, 2016. On March 31 and April 3-4, 2017 I presided over a jury trial of the parties' dispute. Mr. Massung testified as the plaintiff's first witness and admitted that his negligence caused the collision, which left Mrs. Stemmerich's money damages as the only dispute for the Jury to resolve. Mrs. Stemmerich's treating physicians, Dr. Conerman and Dr. Groff, testified by videotaped deposition, as did a pain management physician hired by the Defendants, Dr. Cosgrove. Dr. Conerman opined that the collision caused injuries to Mrs. Stemmerich's back and that her treatment would extend into the future. Dr. Groff opined that the collision caused the partial tear of Mrs. Stemmerich's right rotator cuff and the arthroscopic surgery he performed to repair it. Dr. Cosgrove, however, opined that the only injuries caused by the collision were the bruises from the seatbelt and aggravation of her pre-existing back problems, which resolved in a few months. The Jury also received an itemized list of past medical expenses in the total amount of $9,936.57.

The written Jury Verdict that I prepared classified damage amounts into three separate categories: (1) past medical expenses; (2) future medical expenses; and (3) pain and suffering. The Jury returned a verdict of $1,170 for past medical expenses, $0 for future medical expenses and $600 for pain and suffering. Mrs. Stemmerich appealed the verdict to the Superior Court of Pennsylvania following my denial of her Motion for Post-Trial Relief. In her appeal Mrs. Stemmerich argues that the Jury Verdict of $600 for pain and suffering must be set aside because it is inadequate and shocks one's sense of justice. I disagree and set forth below why I disagree.

"Generally, a verdict will not be disturbed merely on account of the smallness of the damages awarded or because the reviewing court would have awarded more." 22 Am. Jur. 2d, *Damages*, §1029 (1988). Furthermore, "[i]t is the exclusive province of the jury, as factfinder, to hear evidence on damages and decide what amount fairly and completely compensates the plaintiffs." *Matheny v. West Shore Country Club*, 436 Pa. Super. 406, 407, 648 A.2d 24, 24 (1994). A jury verdict is not to be set aside on the basis of inadequacy unless the injustice of the verdict shines "forth like a beacon" and "where it clearly appears from uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff." *Kiser v. Schulte*, 538 Pa. 219, 648 A.2d 1, 4 (1994) (citing *Elza v. Chovan*, 396 Pa. 112, 152 A.2d 238 (1959)).

Under this standard Mrs. Stemmerich is able to reference instances from other cases where the test for setting aside a jury verdict is met. For example, in *Yacabonis v. Gilvickas* (376 Pa. 247, 101 A.2d 690 (1954)) the Pennsylvania Supreme Court upheld the trial court's grant of a new trial. Following an automobile accident, a passenger was hospitalized for nineteen days with eight fractured ribs, caught pneumonia in the hospital and was in an oxygen tent for twelve days and then went home where she stayed in bed for four months. The Pennsylvania Supreme Court determined that the jury's award to the passenger of medical expenses but nothing for pain and suffering was totally inadequate and affirmed the trial judge's decision to grant a new trial.

In *Davis v. Mullen* (565 Pa. 386, 773 A.2d 764 (2001)), the Pennsylvania Supreme Court explained the existence of two seemingly inconsistent lines of its cases. In the first line of cases the trial court correctly granted a new trial when a jury awarded medical expenses but no pain and suffering. *See*, e.g., *Yacabonis* above. The plaintiffs' injuries were too severe for the jury to have a reasonable basis for awarding medical expenses but no pain and suffering. In the second line of cases, the granting of a new trial when a jury awarded medical expenses but no pain and suffering was incorrect. *See*, e.g., *Boggavarapo v. Ponist*, 518 Pa. 162, 542 A.2d 516 (1988) and *Catalano v. Bujak*, 537 Pa. 155, 642 A.2d 448 (1994). The Pennsylvania Supreme Court explained that the second line of cases differed because the jury either had a basis to find a plaintiff's pain and suffering complaints were not credible or were caused by a pre-existing injury. Hence, in *Davis v. Mullen* the trial judge was correct to deny Mr. Davis a new trial when the jury awarded him medical expenses but no pain and suffering because Mr. Davis missed no work, waited twenty days after the accident to be treated by a chiropractor for neck and back pain and the chiropractor was uncertain about whether the injuries could have been caused by three prior automobile accidents. The Pennsylvania Supreme Court also attributed the appropriateness of the jury verdict of no pain and suffering by Mr. Davis to "the power of the jury as the ultimate finder of fact and the need for the judiciary to guard against usurping the role of the jury." 565 Pa. 386, 393, 773 A.2d 764, 768.

While the Jury did award Mrs. Stemmerich a small amount for pain and suffering, the principles set forth in *Davis v. Mullen* when a jury awards no pain and suffering are applicable. Mrs. Stemmerich's injuries undoubtedly place her in the second line of cases because the Jury had a basis for finding many of her pain and suffering complaints were not credible or were caused by pre-existing injuries. Since she complained of only knee and chest pain at the Emergency Room (*see* Jury Trial transcript, p. 148), the Jury may have found her later complaints of back and shoulder pain were not credible. Both of Mrs. Stemmerich's physicians acknowledged it was very difficult to tell whether her pain was caused by the collision or her pre-existing medical conditions. Dr. Conerman was unable to state the percentage of her pain that was caused by the collision (*see* Videotaped Deposition Transcript of Dr. Conerman, p. 74), while Dr. Groff acknowledged there was no way to definitively know whether her rotator cuff had been torn before the collision because no MRI study was done until after the collision (*see* Videotaped Deposition Transcript of Dr. Groff, pp. 55-56). Dr. Groff relied on Mrs. Stemmerich saying her shoulder pain increased after the collision for his opinion that the collision caused the rotator cuff tear (*see* Dr. Groff Transcript, p. 39), but the Jury may not have believed Mrs. Stemmerich was being honest with Dr. Groff. Dr. Conerman also acknowledged Mrs. Stemmerich's pre-existing and ongoing back pain was due to chronic ankle and knee problems that made her gait uneven (*see* Dr. Conerman Transcript, p. 57) as well as her severe lumbar spine stenosis (*see* Dr. Conerman Transcript, pp. 64-65 and 68-69).

Dr. Cosgrove, the physician hired by Mr. Massung, disagreed with both of Mrs. Stemmerich's physicians and attributed only the aggravation of Mrs. Stemmerich's pre-existing low back and neck pain, "primarily during the early months of 2014," to the collision. Videotape Deposition Transcript of Dr. Cosgrove, p. 66. Dr. Conerman additionally stated that Mrs. Stemmerich had pain on a 1-10 scale of 2 before the collision, 6 just after the collision, but the pain decreased to a level of 2 by April 2, 2014. *See* Dr. Conerman Transcript, pp. 54 and 80. Therefore, the Jury may have found this testimony by Dr. Conerman to be the most objective test of her pain from the collision, which in duration lasted no more than the 61 days from January 31 to April 2. Finally, to the extent photographs showing bruising from the seatbelt are an indication of pain, Dr. Cosgrove explained that Mrs. Stemmerich was more susceptible to the bruises because she was taking a blood thinner called Plavix. *See* Dr. Cosgrove Transcript, pp. 28-29.

Ms. Stemmerich, her husband and her daughter all testified that the collision, which had a significant emotional impact, was a life changing experience that prevented her from continuing to care for her grandchildren and doing many activities of daily living she used to do. With her physicians opining that her shoulder surgery and ongoing back pain were caused by the collision, Mrs. Stemmerich appeared convinced of this and therefore was very disappointed by the Jury's verdict of only $600 for her pain and suffering and other non-economic losses. However, a jury is "not obliged to believe that every injury causes pain or the pain alleged." *Boggavarapu v. Ponist*, 518 Pa. 162, 542 A.2d 516, 518. Mrs. Stemmerich's Jurors may have found her collision related pain was minimal, or it may have placed a lower value on her pain than she expected. But, "there is no mathematical formula to arrive at a figure for the intangible damages of pain and suffering." *Kaufman v. Campos*, 2003 PA Super 229, 827 A.2d 1209, 1212. In summary, the $600 pain and suffering Verdict does not shine forth like a beacon of injustice, and there is contradictory evidence of the losses sustained in the collision. *See Elza v. Chovan*, 396 Pa. 112, 152 A.2d 238. Therefore, granting a new trial would usurp the proper role of the Jury. Accordingly, I was correct in denying Mrs. Stemmerich's request for a new trial.

BY THE COURT:
/s/Hertzberg, J.

Matthew Deivert v. Pittsburgh Chauffeur, LLC

Personal Injury—Pain and Suffering—Damages

Plaintiff sustained third degree burn on knee due to overcrowded limousine. Jury returned a verdict in favor of plaintiff and against limousine owner/operator. Trial court denied motion in limine seeking to preclude plaintiff's medical expert under Frye where defendant claimed the expert's conclusion was novel rather than his methodology. Trial court allowed $500,000 jury verdict to stand where there was evidence of pain, suffering, embarrassment and disfigurement.

No. GD 15-19904. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—October 26, 2017.

OPINION

I. Background

Plaintiff Matthew Deivert, age 25, was invited to celebrate the birthday of a friend named Chelsy during the evening of February 1, 2014. Mr. Deivert took a taxi to get to Chelsy's home located in the Southside Slopes neighborhood of Pittsburgh. A group of between thirty and forty people, which included friends Mr. Deivert knew from attending Allegheny College, began the celebration by socializing and drinking alcoholic beverages at Chelsy's home. Then, the birthday celebration moved via a party bus provided by Defendant Pittsburgh Chauffeur, LLC to a dance club in Pittsburgh's Strip District called Cavo Nightclub.

Mr. Deivert and the others danced, socialized and consumed alcoholic beverages until Cavo Nightclub closed at 2:00 a.m. For the trip back to Chelsy's home, Pittsburgh Chauffer provided a limousine designed to accommodate ten passengers. Mr. Deivert was one of the first passengers to get inside the limousine and take a seat. It was cold outside and most members of the group were tired and desirous of getting out of the cold and back to Chelsy's home as quickly as possible. This resulted in approximately twenty people rapidly cramming into the limousine in a situation that Mr. Deivert later described as "sardines in a can fitting any way we could." Transcript of Jury Trial, Date: May 9, 10, 11, 2017 ("T." hereafter), p. 111.

At a speed of approximately fifteen miles an hour, the limousine ride lasted for twenty to twenty-five minutes, with it "bottoming out" when going around some corners. Mr. Deivert's right knee was driven against the knee of the man next to him with such force that it became painful. Of course, he attempted to extricate his leg, but people were so tightly squeezed together that his knee remained wedged in place. Although Mr. Deivert played small college and semi-professional football, his size, five feet five inches tall and less than one hundred fifty pounds, is atypical for a football player and he did not appear to be unusually strong. He pleaded with people to please move, but they were unable to do so. He screamed because the pain on the side of his knee was increasing as he squirmed to try to remove his knee from the vice-like situation. He screamed to the driver to stop the limousine and let him out (T., p. 80), but this did not happen. Mr. Deivert was finally able to "break free" about one or two minutes before the vehicle reached its destination.

Immediately after Mr. Deivert got out of the limousine, with both men and women present, he pulled his pants down to look at the side of his right knee. Mr. Deivert and the other passengers saw a "softball size red mark" that "looked kind of like a brush burn" with the top layer of skin removed. T, pp. 81-82. Apparently it was a gruesome sight as "[a] couple of people were like, whoa, what is that, then turned around or turned away." T., p. 82. A day later Mr. Deivert photographed the wound with his cell phone and sent the photograph by text message to some of his friends who had been in the limousine.

The wound did not improve, and on February 6 Mr. Deivert went to a UPMC Walk-In Clinic. A physician there examined the wound and directed Mr. Deivert to go to the emergency room at Mercy Hospital. From Mercy Hospital's emergency room Mr. Deivert was transferred to the burn unit. The physicians there first attempted to heal the wound by applying creams and wrapping it, but the technique was unsuccessful. Instead, Mr. Deivert had a surgical procedure later in February involving the placement of cadaver skin over the wound. In March Mr. Deivert had a second surgical procedure. The physicians harvested skin from Mr. Deivert's right thigh and grafted it to the wound. While the skin graft eventually healed the wound, Mr. Deivert was left with two large, permanent scars on his right leg. One scar is located on the outside of his knee and the other scar is located on his thigh where the skin was harvested from his thigh.

Mr. Deivert commenced this litigation in November of 2015 by filing a complaint averring negligence by Pittsburgh Chauffeur. The depositions of nine of the other passengers were taken during the discovery process, but all provided testimony consistent with Mr. Deivert's description of the limousine ride. The dispute was assigned to me for resolution by way of a jury trial.

Preliminarily, counsel argued motions *in limine* to obtain rulings on evidentiary issues expected to arise during the trial. Pittsburgh Chauffeur submitted a motion *in limine* to exclude the causation testimony of physician Gregory Habib, because he

allegedly utilized novel science that is not generally accepted among physicians. *See Frye v. United States*, 293 F. 2d 1013 (D.C. Cir. 1923) (adopted first in Pennsylvania in *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977) and then in Pennsylvania Rule of Evidence no. 702(c)). After hearing argument from counsel, I denied the motion and allowed the Jury to view Dr. Habib's videotaped deposition. The Jury also received live testimony from Mr. Deivert, two of his friends, the limousine driver, the owners of Pittsburgh Chauffeur, as well as the videotaped deposition of its physician expert witness, Dr. James Cosgrove. Pittsburgh Chauffeur's defense was that the injury resulted from some unidentified cause other than its overcrowded limousine. Rejecting this defense, the Jury reached a unanimous verdict in favor of Mr. Deivert in the amount of $500,000.

Pittsburgh Chauffeur appealed from the judgment entered on the verdict, and I write this Opinion to explain the rulings identified in its Concise Statement of Errors Complained of on Appeal ("Concise Statement" hereafter). See Pennsylvania Rule of Appellate Procedure No. 1925(a). Most of Pittsburgh Chauffeur's complaints concern my rulings on Dr. Habib's videotaped deposition. *See* Concise Statement, ¶ nos. 1, 2, 3, 4 and 5.

II. Plaintiff's Expert Testimony

Pittsburgh Chauffeur first contends I erroneously denied its motion *in limine*. It argues Dr. Habib's opinion on causation is inadmissible pursuant to *Frye v. United States*, because he relies on novel science that is not generally accepted among physicians. However, Pittsburgh Chauffeur incorrectly interprets *Frye*. The Pennsylvania Supreme Court has emphasized that valid challenges under *Frye* must be made to a novel methodology and not to an expert's conclusions, which need not be generally accepted by the relevant scientific community. *See Commonwealth v. Puksar*, 597 Pa. 240 at 254, 951 A.2d 267 at 276 (2008) *citing Commonwealth v. Dengler*, 586 Pa. 54, 890 A.2d 372 at 382 (2005). Dr. Habib's methodology was to take a history from Mr. Deivert, perform an examination of his injury, review photographs of the injury, review medical records and deposition transcripts, then provide an opinion on causation based on his education, training and experience. This methodology is by no means novel as it is the methodology almost universally employed by medical experts in personal injury cases. *See Folger ex rel. Folger v. Dugan*, 876 A.2d 1049 at 1058 (Pa. Super. 2005). Because it is Dr. Habib's conclusion and not his methodology that Pittsburgh Chauffeur alleges is novel, denial of its motion *in limine* was appropriate.

Assuming, for the sake of Pittsburgh Chauffeur's argument, that it may challenge Dr. Habib's conclusion by claiming it relies on novel science, Mr. Deivert proved pursuant to *Frye* that the conclusion is generally accepted by physicians. Dr. Habib testified to general acceptance by other physicians of his conclusion that the combination of pressure and friction caused the burn. *See* Videotaped Deposition of Gregory Habib, D.O. pp. 7-8, 12-15, 20, 38, 46-47 and 60-61. In addition, Pittsburgh Chauffeur's medical expert witness actually agreed with Dr. Habib that "pressure and friction [can] combine together to form a burn...." Videotape Deposition of James L. Cosgrove, M.D., p. 56. Therefore, since Dr. Habib's conclusion is generally accepted by other physicians, I correctly denied the motion in limine.

Pittsburgh Chauffeur next contends Dr. Habib "did not support his opinion with any medical literature or epidemiological studies." Concise Statement, ¶ no. 1. However, an expert medical witness may rely on experience and need not support his or her opinion with medical literature. *See Catlin v. Hamburg*, 56 A.3d 914 at 921 (Pa. Super. 2012), *appeal denied* 74 A.3d 124 (Pa. 2013). Therefore, I was correct to allow Dr. Habib to give his opinion.

Pittsburgh Chauffeur next contends Dr. Habib "falsely testified to a bony prominence when photographic evidence, medical records and a view of Plaintiff's leg located the injury on the thigh...." Concise Statement, ¶ no. 1. Ironically, Mr. Deivert's counsel argued to the Jury that Dr. Cosgrove (Pittsburgh Chaufffeur's medical expert) had inaccurately concluded the wound was to the thigh because he neither examined Mr. Deivert nor took a history from him. T., pp. 334-339. The Jury saw the photographic evidence and viewed Mr. Deivert's leg, and based on its verdict, the Jury likely agreed with Mr. Deivert's counsel. I also found Dr. Cosgrove's conclusion that the wound did not develop over a bony prominence was not credible. Hence, there was no false testimony by Dr. Habib. Instead, there was testimony by Dr. Cosgrove that lacked credibility. Thus, allowing Dr. Habib to testify that the wound developed over a bony prominence was proper.

Pittsburgh Chauffeur next contends Dr. Habib's testimony about necrotic tissue was contradictory and he was unable to quantify the amount of force necessary to cause the injury. *See* Concise Statement, ¶ no. 1. However, this is simply an argument that Dr. Habib was not credible, which Pittsburgh Chauffer's counsel made to the Jury. *See* T., pp. 314-317. Since this clearly does not make Dr. Habib's opinion or any other part of his testimony inadmissible, his opinion on the cause of Mr. Deivert's injury was properly admitted into evidence.

Pittsburgh Chauffeur next contends I should have granted judgment notwithstanding the verdict or a new trial because there was not competent evidence that the pressure and friction from the overcrowded limousine caused Mr. Deivert's injury. *See* Concise Statement, ¶ nos. 2 and 3. This argument is meritless. The testimony by Mr. Deivert and two of his friends who were in the limousine was competent evidence that the overcrowded limousine caused Mr. Deivert's injuries. In addition, the expert medical testimony from Dr. Habib was competent evidence that the overcrowded limousine caused Mr. Deivert's injuries. Finally, even though it was Dr. Cosgrove's opinion that the overcrowded limousine did not cause Mr. Deivert's injury, he acknowledged seeing pressure injuries develop over bony prominences, and he would not rule out the possibility that pressure and friction from the overcrowded limousine injured Mr. Deivert. *See* Deposition of Cosgrove, pp. 55-57. Therefore, I correctly denied the motions for judgment notwithstanding the verdict and for a new trial.

Pittsburgh Chauffeur next contends I should have granted judgment notwithstanding the verdict or a new trial because Dr. Habib's causation opinion was given "without medical or scientific support or foundation...." Concise Statement, ¶ no. 4. However, as I previously explained, the methodology employed by Dr. Habib is standard for medical experts in personal injury cases, his conclusion that pressure and friction caused the wound is generally accepted by physicians and he is permitted to rely on his own education and experience for his opinion. Therefore, this contention lacks any merit.

Pittsburgh Chauffeur next contends I erroneously permitted Dr. Habib "to give testimony outside of the scope of his report." Concise Statement, ¶ no. 5. In the Brief in Support of Defendant's Post-Trial Motions, that testimony from Dr. Habib is described as criticism of Dr. Cosgrove, the force required to cause pressure sores and the way burns progress. Pennsylvania Rule of Civil Procedure No. 4003.5(c) prohibits "direct testimony of the expert at trial...beyond the fair scope of his or her" expert's report. With the purpose for this rule being avoidance of unfair surprise, the focus of the analysis is on the word "fair." *See Mansour v. Linganna*, 787 A.2d 443 (Pa. Super. 2001) *appeal denied* 796 A.2d 984, 568 Pa. 702. With respect to Dr. Habib's criticism of Dr. Cosgrove, one should not be surprised but instead should be expecting this. In any event, Dr. Cosgrove's testimony was equally critical of Dr. Habib. *See* Deposition of Cosgrove, pp. 24-25 and 45-46. As to force and pressure sores, pressure sores are mentioned

in Dr. Habib's expert report. Additionally, most of the testimony on the amount of force was elicited during cross examination. With respect to the way burns progress, there was no surprise since Dr. Cosgrove testified extensively about the size of the wound. In addition, Dr. Habib was describing the photographs mentioned in his expert's report when he provided the testimony. Therefore, no direct testimony outside the "fair scope" of Dr. Habib's expert report was given.

Pittsburgh Chauffeur next contends I erroneously permitted Dr. Habib to give testimony in the form of argument and to comment on the credibility of other witnesses. *See* Concise Statement, ¶ no. 5. In the Brief in Support of Defendant's Post-Trial Motions, the argumentative testimony is described as Dr. Habib saying no cause of the injury was identified other than the overcrowded limousine. This testimony, however, is appropriate because it is a fact assumed by Dr. Habib in rendering his opinion. The comment on credibility is described as Dr. Habib saying he believed Mr. Deivert and his friends had given truthful deposition testimony about what occurred during the limousine ride. Again, these are facts that Dr. Habib properly could assume in rendering his opinion. In any event, the testimony is no different than Dr. Cosgrove's comment that Mr. Deivert "has a case of what is called false attribution." Deposition of Cosgrove, p. 43. Therefore, this testimony by Dr. Habib was permissible.

Pittsburgh Chauffeur next contends that Dr. Habib's testimony about the overcrowded limousine being the only identified cause of injury assigned "an unfair burden of proof upon the Defendant." Concise Statement, ¶ no. 5. This contention lacks any merit because I instructed the Jury that "[t]he Plaintiff has the burden of proving….the defendant's negligence was a factual cause in bringing about the harm." T., p. 345; Pennsylvania Suggested Jury Instruction (Civil) No. 5.00. Hence, an unfair burden of proof was not assigned.

Pittsburgh Chauffeur next contends I erroneously permitted Dr. Habib "to testify that Defendant's expert testimony was defective for failing to provide an alternative theory of causation." Concise Statement, ¶ no. 5. However, as pointed out above, Dr. Cosgrove is critical of Dr. Habib. He criticized Dr. Habib for not being a treating physician and having an inconceivable opinion on causation. *See* Deposition of Cosgrove, p. 24-25 and 45-46. Relative to causation, Dr. Cosgrove also testified Mr. Deivert falsely attributed the wound to the limousine ride. Since it would therefore be unfair to disallow criticism of Dr. Cosgrove's opinion on causation, I properly permitted the testimony from Dr. Habib.

III. Jury Charge and Written Verdict Form

Pittsburgh Chauffer next takes issue with my instructions to the Jury on the applicable law. It contends "the Court abused its discretion and committed error in denying Defendant's Points for Charge…regarding the mere happening of an accident, the mere fact of damages and speculation not being a basis for any award." Concise Statement, ¶ no. 6. Instructions or the "charge" to the jury is adequate "unless there is an omission in the charge which amounts to a fundamental error." *Quinby v. Plumsteadville Family Practice, Inc.*, 589 Pa. 183, 197, 907 A.2d 1061, 1069-1070 (2006). My denial of the charge, that the plaintiff has the burden to prove the defendant negligent by a preponderance of the evidence with the occurrence of an accident not being evidence of negligence, was not fundamental error. Such a charge would have been repetitious or the concept sufficiently covered by the charge I gave the Jury that defined preponderance of the evidence and instructed "[t]he Plaintiff has the burden of proving….[t]he Defendant was negligent…" T., p. 345. Since Pittsburgh Chauffeur acknowledged the limousine was carrying more passengers than was appropriate (*see* T., pp. 282-285) and the dispute was focused on whether this caused Mr. Deivert's injury, the requested charge also could have misled the Jury from focusing on the main dispute.

I denied the charge, that sustaining damages by itself is not a reason to award damages, because it is highly repetitious. Before I instructed the Jury on damages I said "[t]he fact that I am now going to instruct you about damages does not imply any opinion on my part as to whether damages should be awarded. If you find that the Defendant is liable to the Plaintiff you must then find an amount of money damages…." T., p. 348. I also instructed the Jury that the Plaintiff has the burden to prove the extent of damages. *See* T., p. 345. In addition, the written verdict template I prepared required the Jury to find negligence and factual cause in order to award damages.

I denied the charge, that speculative expert testimony is to be disregarded, because it was repetitious or the concept sufficiently covered by another charge. I instructed the Jury that the Plaintiff had the burden to prove negligence and factual cause and that "[a] factual cause cannot be an imaginary or fanciful factor having no connection or only an insignificant connection with the harm." T., p. 346. I also provided the Jury with extensive, suggested guidance on evaluating expert witness testimony. *See* T., pp. 354-356. Giving the instruction also could have misled the Jury to focus on whether one of the experts speculated when the real dispute between experts boiled down to which one was more credible. Finally, the Superior Court of Pennsylvania deemed a very similar charge unnecessary in *Gillingham v. Consol Energy, Inc.*, 2012 PA Super 133, 51 A.3d 841 at 858 (2012).

Pittsburgh Chauffeur next contends I erroneously prepared a written verdict template (or verdict slip) that asked if Pittsburgh Chauffeur's conduct "fell below the highest standard of care" instead of asking if Pittsburgh Chauffeur "was negligent." Concise Statement, ¶ no. 7. According to Pittsburgh Chauffeur, this confused and misled the Jury. *Id.* However, as I said on the record during the charging conference (*see* T., pp. 295-297), in this case asking if the defendant was negligent had the potential to confuse the Jury.

Even though Pittsburgh Chauffeur is a "common carrier," neither party submitted a proposed jury instruction on a common carrier's duty to passengers. *See*, e.g., *Connolly v. Philadelphia Transp. Co.*, 420 Pa. 280, 283, 216 A.2d 60, 62 (1966) declaring "[a] common carrier…owes its passengers the highest degree of care." Hence, Pittsburgh Chauffeur did not object when I proposed to give Pennsylvania Suggested Jury Instruction (Civil) no. 13.120 on a common carrier's duty of care. At the same time, Pittsburgh Chauffeur insisted that Mr. Deivert was negligent and that the verdict slip ask if he was negligent. With a higher standard of care applicable to Pittsburgh Chauffeur than the ordinary negligence standard of care applicable to Mr. Deivert, using the same negligence standard for both parties could have confused the Jury. It is within my discretion to grant or refuse a proposed verdict slip. *See Wiggins v. Synthes*, 2011 PA Super 172, 29 A.3d 9 at 18. Therefore, I properly exercised my discretion by eliminating the potential for jury confusion with a verdict slip that asked if Pittsburgh Chauffeur's conduct fell below the highest standard of care.

IV. Verdict Amount

Pittsburgh Chauffeur's final contentions relate to the amount of the verdict, $500,000. It first contends the verdict is excessive because there only were noneconomic damages. *See* Concise Statement, ¶ no. 8. However, to analyze an excessive verdict claim, one begins "with the premise that large verdicts are not necessarily excessive verdicts." *Paliometros v. Loyola*, 2007 PA Super 242, 932 A.2d 128, 135. A verdict is not to be deemed excessive because it does not include medical expenses, lost earnings or other similar expenses. *Id.* At 136 (1998 sexual assault resulted in $590,000 jury verdict involving only noneconomic damages) *citing Botek v. Mine Safety Appliance Corp.*, 531 Pa. 160, 611 A.2d 1174 (1992) (1982 incident resulted in $350,000 jury verdict involving

only $783 in economic losses). The factors relevant in determining whether the $500,000 verdict is excessive include the severity of the injury, whether it is manifested by objective physical evidence and whether it is permanent. *Id.* at 135.

Mr. Deivert's injury clearly is manifested by objective physical evidence and has left permanent scars. The injury is severe. It is a third degree burn. The Jury saw a progression of photographs of the wound and also viewed the actual scars from it while Mr. Deivert testified during the trial. The injury appeared very ugly in its early stages. Both experts agree the injury was painful when it was sustained, the two surgeries were painful and recovery was painful. The severity of the injury also is apparent from the high degree of embarrassment and humiliation it has inflicted on Mr. Deivert. He is asked, "what happened to you?" when people at his gym notice the scar, and his level of frustration and embarrassment increases further when he tells them "an overcrowded limo." T., p. 95. When he goes to walk dogs at the dog park "[t]here will be people pointing. Kids go there. You know how honest kids are. They'll be like eww, eww, gross." T., p. 96. The injury also negatively impacts Mr. Deivert's romantic life. See T., p. 95. Pittsburgh Chauffeur disputed none of this, and I found Mr. Deivert and his two friends were extremely credible witnesses. The $500,000 verdict for Mr. Deivert's uncontroverted pain and suffering, embarrassment, humiliation, loss of enjoyment of life and disfigurement is not so "grossly excessive as to shock [my] sense of justice." *See Paliometros v. Loyola* at 134. Therefore, my decision to let the Jury's decision stand was correct.

Pittsburgh Chauffeur next contends "[t]he Jury's questions revealed confusion and misunderstanding as to their determination of damages." Concise Statement, ¶ no. 8. This alleged confusion, according to Pittsburgh Chauffeur, resulted when Mr. Deivert's failure to offer his medical expenses into evidence[1] left the Jury "with nothing to fairly gauge the value of the case…." Brief in Support of Defendant's Pot-Trial Motions, p. 35. The written questions the Jury submitted to me during deliberations were:

1. "Can we get the total amount of medical expenses because of the injury?" T., p. 365.

2. "We are having trouble determining an amount for an award of damages. Is there any evidence we can review that would assist with that or can the Judge clarify how we decide?" T., p. 369.

3. "Is the amount we write down going to be the final amount awarded?" T., p. 373.

I do not interpret these questions as an indication of "confusion" or "misunderstanding," and those terms or similar terms are not contained in any of the questions. The questions certainly indicate the Jury was struggling to determine the appropriate amount of compensation. The amount of medical expenses, however, have no relevance to the degree and extent of a person's pain and suffering or other noneconomic losses. *See Martin v. Soblotney*, 502 Pa. 418, 466 A.2d 1022(1983). In addition, long-standing Pennsylvania jurisprudence prohibits attorneys from suggesting the amount of an award for noneconomic damages. Hence, this Jury, similar to many Pennsylvania juries, expressed the difficulty inherent when intangible losses must be quantified without the use of any mathematical formula. The verdict, therefore, did not result from confusion, and the questions submitted by the Jury reflect the difficulty inherent in determining noneconomic damages[2].

Lastly, Pittsburgh Chauffeur contends the verdict "represents a value guided only by emotion, sympathy for the Plaintiff or speculation." Concise Statement, ¶ no. 9. Pittsburgh Chauffeur, however, offers no direct evidence that emotion, sympathy or speculation influenced the Jury, and I did instruct the Jury "[n]either sympathy nor prejudice should influence your deliberations." T., p. 362. Pittsburgh Chauffeur seems to argue the influence of emotion, sympathy or speculation in the $500,000 Verdict can be inferred because of the allegedly insignificant damages. I disagree because the damages to Mr. Deivert were significant and the Verdict therefore not the product of emotion, sympathy or speculation.

BY THE COURT:
/s/Hertzberg, J.

[1] Mr. Deivert's counsel announced the decision not to offer medical bills into evidence during an on the record discussion about Pittsburgh Chauffeur's "Motion in Limine Re: Insurance Benefits and Medical Expenses." Pittsburgh Chauffeur had argued that evidence the lien for medical expenses would be satisfied from any recovery would be prejudicial. As would be expected, Pittsburgh Chauffeur had no objection to Mr. Deivert's medical bills not being offered into evidence. See T., pp. 14-15.

[2] Counsel for Pittsburgh Chauffeur agreed that the answers to each question that I provided to the Jury were appropriate. *See* T., pp. 365-377.