EFiled: Mar 30 2016 09:52AM EDT
Filing ID 58786106
Case Number 642,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JENNIFER L. SMITH and EDWARD SMITH,	:	
	:	**No. 642-2015**
Plaintiffs Below/Appellants,	:	
	:	**On Appeal from the Superior Court of the State of Delaware in and for New Castle County, Case No. N12C-10-046 MMJ**
v.	:	
DELAINE MAHONEY, NICOLE MARIE RICHARDS, and THEOPHIL M. HOLLIS,	:	
Defendants Below/Appellees.	:	

BRIEF OF *AMICUS CURIAE* DELAWARE TRIAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANTS JENNIFER L. SMITH AND EDWARD SMITH

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March 30, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, AND RULES

OTHER

STATEMENT OF IDENTITY AND INTEREST OF AMICUS AND OF ITS AUTHORITY TO FILE BRIEF

The Delaware Trial Lawyers Association ("DTLA") is a Delaware not-for profit corporation. As its mission, DTLA seeks to champion the cause of all citizens of Delaware, rich or poor, who seek justice for injuries and damages caused by the improper conduct of another. The failure to apply the collateral source rule to cases where the plaintiff's medical expenses were discounted due to Medicaid will impact the rights of poor citizens to seek justice and therefore is of vital interest to DTLA. Further, DTLA has an interest in seeing plaintiffs' damages are not discounted base on speculation and conjecture.

Authority for DTLA to file its amicus brief is found in Supr. Ct. R. 28.

ARGUMENT

I. AFFIRMANCE OF THE DECISION BELOW WILL IMPEDE ACCESS TO JUSTICE FOR MEDICAID RECIPIENTS BECAUSE LAWYERS WILL HAVE LESS ABILITY TO SHARE THE RISK OF LITIGTION IN SUCH CASES.

The expenses of bringing a lawsuit have increased and are significant which restricts the ability of lawyers to bring meritorious claims where the damages are not significant. Should the Superior Court's decision be affirmed, this will be particularly true with those meritorious claims of the poor. Therefore, the ability to seek justice as promised by Article I, Section 9 of the Delaware Constitution will be diminished for the less fortunate in our state.

Personal injury actions are generally brought by attorneys representing plaintiffs on a contingency basis and by advancing costs because their clients cannot afford to pay a lawyer on an hourly basis or advance the costs of litigation.

> Automobile accident tort suits are not the only type of litigation in which the typical plaintiff bears high internal pretrial costs. Virtually every form of personal injury tort suit, breach of contract suit, and many statutory causes of action (e.g., single-instance employment discrimination) inherently require searching inquiry into the plaintiff's interactions with the defendant and into the plaintiff's purported injuries.

Stancil, Paul, Article: Balancing the Pleading Equation, 61 Baylor L. Rev. 90, 126-127 (2009). Lawyer financing of cases is important to ensure citizens of low and middle income can have access to justice, which can sometimes be very expensive. As one Court explained:

> Contingency fee agreements serve an important function in American life. Such agreements permit persons of ordinary means access to a legal system which can sometimes demand extraordinary expense.

In re Estate of Johnson, 899 N.E.2d 198, 203 (Ohio Ct. App., Tuscarawas County 2008).

The cost of litigation is increasing. In all personal injury actions the required costs include the fee for filing the complaint ($190.00), all subsequent filings on Lexis Nexis ($10.00 plus $245.00 for each increment of 50 filings), (see http://courts.delaware.gov/Superior/fees.stm) service fees of ($30 per defendant), (see http://nccde.org/177/Fee-Schedule), as well as the fees to procure the plaintiff's medical records, depositions, and other discovery.

Plaintiff's counsel must advance the fees to pay the physician treating experts and/or forensic experts separately for all communications with them, reports, deposition related expenses, Daubert hearing testimony, and testimony at trial. Such experts are necessary to issue reports (see Superior Court Rule 26(b)(4)) and to testify regarding medical causation, injuries, damages, and reasonableness of treatment. Money v. Manville Corp. Asbestos Disease Compensation Trust Fund, 596 A.2d 1372, 1375 (Del. 1991); Rayfield v. Power, 840 A.2d 642 (Del. 2003). The fee schedule for one local medical firm is attached at Ex. A. In November 2013, in the context of a Superior Court Rule 54(d) bill of costs a, the Superior Court held that a "reasonable fee for a [medical doctor's]

deposition lasting up to two hours was $1,371-$2,741." Darden v. New Castle Motors, Inc., 2014 Del. Super. LEXIS 190, *2, 2014 WL 1464323 (Del. Super. Ct. Mar. 27, 2014). This is just for testimony at trial and does not count preparation fees or any fees for work leading up to trial, which were necessary to get to trial.

Non-medical experts on standard of care issues are often necessary in personal injury litigation. See, e.g., Pettit v. Country Life Homes, Inc., 2005 Del. Super. LEXIS 344, *9 (Del. Super. Ct. Aug. 19, 2005) (how a saw reactivates itself without the trigger being depressed is outside the scope and common knowledge of the average juror necessitating expert testimony); Cruz v. G-Town Partners, L.P., 2010 Del. Super. LEXIS 515, *49 (Del. Super. Ct. Dec. 3, 2010) (the proper installation, maintenance, and repair of a wall mounted sink is beyond the ken of an average juror); Vohrer v. Gary Kinnikin & Del. State Hous. Auth., 2014 Del. Super. LEXIS 848, *11 (Del. Super. Ct. Feb. 26, 2014) ("It cannot be said that an ordinary layperson would know that inserting a three-pronged plug into a four-pronged outlet could result in an electric shock."); Abegglan v. Berry Refrigeration Co., 2005 Del. Super. LEXIS 436, *8 (Del. Super. Ct. Dec. 2, 2005) (expert testimony required for standard of care in repairing an ice machine); Erhart v. DirecTV, Inc., 2012 Del. Super. LEXIS 283, *9, 2012 WL 2367426 (Del. Super. Ct. June 20, 2012) (expert required to testify as to the technical and/or ethical standards associated with professional cable installation); Bond v. Wilson, 2015

Del. Super. LEXIS 134, *8-9 (Del. Super. Ct. Mar. 16, 2015) ("the proper installation, mounting or maintenance of the railing requires an expert's technical knowledge and analysis, which is outside the ken of a typical juror.").

ADR has become mandatory. See Superior Court Rule 16(b)(4). Private mediators charge fees ranging from hundreds to thousands of dollars per hour.

While each case is different, almost every case involves a significant advance of expenses.

> Cases involving scientific evidence, such as suits alleging product defects or medical malpractice, frequently result in out-of-pocket expenditures (not counting attorneys' fees) in the low six figures.
> Cash is needed to pay for simple things like court filing fees, medical exams, photocopying, travel, and the compensation of stenographers, investigators, videographers, and experts.

Engstrom, Nora Freeman Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again, 61 UCLA L. Rev. Disc. 110, 112-113 (September 2013).

Thus, the decision to bring such cases involves a risk assessment balancing the cost and risk of proceeding with the litigation with the potential of a successful judgment or settlement that will compensate the attorney for the time and costs expended on the case. The risk is significant as the likelihood of success in cases brought to trial is only fifty percent. The federal Bureau of Justice Statistics survey of state trial results estimated that, in civil jury trials, plaintiffs were successful only approximately half of the time, and this survey included states where

plaintiffs do not have to convince 12 jurors to unanimously agree and where attorneys are permitted to suggest damages for pain and suffering, which make it easier to get to win and obtain higher damages. Bureau of Justice Statistics, U.S. Department of Justice, NCJ 223851, Civil Bench and Jury Trials, 2005, at 4 (rev. ed. Apr. 9, 2009), available at http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf. (last visited on February 21, 2016).

This presents serious concerns about access to justice for the poor. "Costs that would seem negligible to a corporate general counsel can present serious access to justice issues to low and moderate-income Americans." Emery G. Lee, III, Law without lawyers: access to civil justice and the cost of legal services, (2014 Symposium Issue: Leading from Below), 69 U. Miami L. Rev. 499, 502 (2015). "High litigation costs may burden defendants, but unless tort litigation is free, those costs are most problematic for plaintiffs whose expected damage awards are unlikely to exceed the cost of litigating." Steven Croley, Symposium: Summary Jury Trials in Charleston County, South Carolina, 41 Loy. L.A. L. Rev. 1585, 1610 (2008).

Juries use medical bills as guideposts for value of a plaintiff's case, including pain and suffering. See Valerie P. Hans and Valerie F. Reyna, To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards, 8 J. Empirical Legal Stud. 120, 141 (2011). Without evidence of the full

value of the medical treatment received, regardless of reimbursement scheme, the jury will be deceived into thinking the extent of treatment and the pain and suffering a plaintiff endured were less than they actually were.

If the collateral source rule is not applied to injured Medicaid recipients, the ability of attorneys to share the risk and costs of litigation in cases involving injured Medicaid recipients will diminish. This will result in less access to justice for Medicaid recipients than for other members of the public who had similar medical treatment.

II. THE SUPERIOR COURT CORRECTLY DETERMINED THAT FUTURE MEDICAID ELIGIBILITY AND WRITE-OFFS WERE SPECULATIVE.

The Superior Court correctly ruled that since Medicaid is voluntary, based on current income and resources, and Medicaid beneficiaries are encouraged to move off of Medicaid as soon as possible, reducing future medical costs that were testified to by an expert at trial down to what Medicaid may be paying for that service at the time is pure speculation. Smith v. Mahoney, C.A. N12C-10-046 MMJ at 9 (Del. Super. November 20, 2015) (citing16 Del. Admin. C. §§ 14000 and 13400-70). At trial, the plaintiff's medical expert gave an opinion as to the amount of the medical treatment plaintiff would need, to a reasonable degree of medical certainty. The jury based its decision on the evidence that was presented. In fact, the jury decided to award much less than what plaintiff requested at trial.

This Court has held that if "there is any competent evidence upon which the jury's verdict could be based, the findings of the jury will not be disturbed." Furek v. University of Delaware, 594 A.2d 506, 514 (Del. 1991).

> Interference with the verdicts of a jury are permitted by the Delaware Supreme Court only with great reluctance. Burns v. Delaware Coca Cola Bottling Co., Del. Super., 224 A.2d 255, 256 (1966). Every verdict is presumed to be correct. Lacey v. Beck, Del. Super., 161 A.2d 579 (1960).

Vermuelen v. D'Angelo, 1988 Del. Super. LEXIS 206, *2-3, 1988 WL 67698 (Del. Super. Ct. June 14, 1988). The Court should not disturb the jury's award which was clearly supported by the evidence at trial.

Moreover, the law does not permit a recovery of damages which is merely speculative or conjectural. Henne v. Balick, 146 A.2d 394, 396 (Del. 1958); DE Pattern Jury Instructions 22.1 (2006). Since it would be merely speculative or conjectural that plaintiff would be eligible for Medicaid in the future the Court correctly refused to reduce the jury's award.

CONCLUSION

Respectfully, the Superior Court's decision that the collateral source rule does not apply to plaintiffs whose medical services were paid for by Medicaid should be reversed. The Superior Court's decision that future medical expenses should not be reduced by speculating that the plaintiff will be Medicaid eligible and have the expenses reduced should be affirmed.

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