

January 13, 2003

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Re: *Jesse Paul Giles & Melissa Lynn Giles v. Nationwide Ins. Co.*
Civil Action No. 01C-06-015 WLW
Motion in Limine

Defendant seeks to exclude testimony and documents concerning Plaintiffs' present and future medical expenses and present and future lost income. The Court announced its decision orally on January 10, 2003, and this is the written decision.

1. Present and Future Medical Expenses

Defendant is contesting Plaintiffs' use of evidence relating to the cost of prescription medication and Dr. Coveleski as an economic expert because neither were previously disclosed in discovery nor in the pretrial.

In a December 6, 2002 letter, Plaintiffs explain that they seek to introduce evidence that Mr. Giles is entitled to \$565.00 per month in prescription medication. Furthermore, in that same letter, Plaintiffs state; "Dr. Coveleski will testify that medical costs in the future will rise at least equivalent to inflation, if not much more so, particularly regarding prescription drugs, and thus, there is no reason to discount future medical costs for present value."¹

A. Prescription Medication Expenses

¹ Letter from Jeffrey Young to Brian Shirey, December 6, 2002.

During discovery, Defendant specifically inquired into any information concerning any claim to future medical expenses to which the Plaintiffs responded to be determined. Plaintiffs did provide a summary of post PIP specials that identified \$837.70 in expenses for prescription medicine from May 13, 2001 through July 17, 2002. On Dec. 6th the Plaintiffs did tell the Defendant that they planned to provide evidence that Mr. Giles' prescription cost are \$565 per month. Plaintiffs explain in response that this information was given to Defendant as soon as the information became known to the Plaintiffs. Apparently, Mr. Giles was covered for prescriptions under his wife's medical insurance. Mr. Giles and his wife separated so he is no longer covered. Once this change of circumstances was known Plaintiffs gave the new figures to the Defendant.

There is no evidence that Plaintiffs were purposefully withholding information from the Defendant, and Plaintiffs apparently disclosed the information in a timely manner once it became known to them. Therefore, Plaintiffs will be allowed to present the evidence to the jury that prescription costs are likely to be \$565 per month.

B. Dr. Coveleski's Testimony

In addition, Defendant states that Plaintiffs did not disclose Dr. Coveleski as an expert who will testify regarding the present value of medical expenses. Defendant further claims that Dr. Coveleski lacks the expertise to express an opinion on economic matters. Dr. Coveleski was identified by the Plaintiffs as their medical expert to testify regarding future treatment. Plaintiffs claims that Dr. Coveleski is not going to be used in the capacity of an economic expert. Plaintiffs

state that Dr. Coveleski will simply confirm that medical costs are expected to continue to increase into the future.

This Court will allow Dr. Coveleski to testify in the capacity in which he was named in the pretrial as a medical expert who will testify regarding future treatment. As such he can state that medical expenses are expected to increase into the future, but he can not quantify the increase [i.e. he cannot state, as was stated in the Plaintiffs' December 6th letter, that medical costs in the future will rise at least equivalent to inflation]. If Plaintiffs wish to introduce this type of information, they must utilize their economic expert.

2. Present and Future Lost Income

Defendant claims that the Plaintiff Jesse Paul Giles' lost income is speculative in nature and that the opinions provided do not provide a reasonable basis upon which a jury may estimate with a fair degree of certainty the probable loss.

According to the facts of this case, Mr. Giles' employment with Lee F. Slaughter, Inc. was going to discontinue shortly after the collision in this case because the company was moving from Dover to Rehoboth Beach. However, Mr. Giles' earning potential was not going to end. There is evidence that the company would have continued Mr. Giles' employment despite the move; furthermore, Mr. Giles was planning on opening his own business, working out of a garage behind his home. Plaintiffs also proposed to present the testimony of Mark Slaughter that he was planning on sending all Lee F. Slaughter's Dover business to Mr. Giles.

According to the Supreme Court in *Henne v. Balick*:

The law does not permit a recovery of damages which is merely speculative or conjectural. As a general rule, it refuses to allow a plaintiff damages relating to the future consequences of a tortious injury unless the proofs establish with reasonable probability the nature and extent of those consequences. There must be some reasonable basis upon which a jury may estimate with a fair degree of certainty the probable loss which plaintiff will sustain in order to enable it to make an intelligent determination of the extent of this loss. The burden is upon the plaintiff to furnish such proof. If he fails in this respect, the jury cannot supply the omission by speculation or conjecture. The fact that there is some uncertainty as to plaintiff's damage or the fact that the damage is very difficult to measure will not preclude a jury from determining its value. But this does not mean that there need be no proof at all as to plaintiff's earning capacity. Plaintiff must at least offer some evidence of loss of earnings in the future as a result of his permanent injury and, if possible, the nature and extent of his loss.

We do not agree with the contention of plaintiff that the mere showing of permanent injuries, such as plaintiff sustained in this case, is, of itself, under the circumstances of this case, sufficient evidence of the extent of the impairment of plaintiff's future earning capacity. To support a finding of a specific sum as damages there should generally be other evidence than that which merely shows the nature of plaintiff's injuries and his vocation. . . . While, of course, the amount of plaintiff's loss as to future earnings could not have been fixed with the same degree of certainty as was possible in the case of past earnings, nevertheless, some tangible evidence relating to the extent of plaintiff's loss of future earnings should and probably could have been produced.²

Therefore, according to *Henne* and the cases that follow, there must be evidence that establishes with a reasonable probability the nature and extent of future damages.

² *Henne v. Balick*, 51 Del. 369, 373-74 (Del. 1958).

Evidence of substantial permanent injuries and the nature of plaintiff's vocation, standing alone, is an insufficient basis for the jury to determine loss of future wages.³ The issue of whether a litigant has produced sufficient evidence to warrant an instruction as to loss of future earnings is a matter soundly within the discretion of the trial judge.⁴

In *McNally*, the plaintiff was set to retire from the armed forces in 31/2 years and he then planned to get a civilian job and work through the age of retirement. In that case, plaintiff was discharged from the armed forces and was unable to work since then. Plaintiff presented evidence of the following: (1) the incessant nature of the injury; (2) that his condition will not improve; and (3) economist testimony that based on factors such as projected promotions, incremental pay raises, entry salary in the private sector, annual percentage increases over work life expectancy, and total inability to be gainfully employed to ascertain the projected future earnings. In *McNally*, the court found that it was clear that there was sufficient evidence to instruct the jury on loss of future earning capacity.

In another case, *Gallegos v. State Farm*, the court was faced with the question of whether plaintiff can present and recover lost wages even though she was not actually employed at the time of the accident.⁵ The plaintiff in the case had resigned from employment the day before the accident in order to move to California with

³ *McNally v. Eckman*, 466 A2d 363 (Del. 1983).

⁴ *Christinia School District v. Rueling*, 577 A2d 752 (Del. 1990).

⁵ *Gallegos v. State Farm Mut. Auto. Ins. Co.*, 2000 Del. Super. LEXIS 327.

her husband, where she planned to find alternate employment. The court ruled that she was “not required to show that she was employed on the date of the accident, only that compensation to which she was otherwise entitled at that point in time, was interrupted following and because of aforementioned accident.” The court further stated that the “question of the sufficiency of the proof is one for the jury absent a determination prior to trial that the claimant can not establish anything other than the prospect that she or he had the capability to and would have secured employment sometime in the future.” Furthermore, the court stated “[w]hether she can establish a claim for future lost wages given these allegations and in light of the discussion above seems doubtful.⁶ However, the Court is not prepared to state that she can never do so.”

In the case at bar, Mr. Giles was making over \$60,000 a year as a master mechanic. Mr. Giles was employed at the time of the accident; however, he admits that shortly after the accident his employment was going to end. Plaintiff is prepared to offer testimony that he had firm plans to open up his own business, and that there were plans in place to generate a clientele. Furthermore, Plaintiffs are prepared to present testimony that Mr. Giles' current employer would have continued Mr. Giles' employment if he had so desired.

⁶ The facts plaintiff rely upon are as follows: “The Plaintiff is alleging that she was fully employed for the two years prior to the accident in the same field in which she was going to seek employment in California. Her yearly pay in Delaware on her last job as legal secretary/administrator was \$ 33,500. She also states that it was her intent after moving to California to obtain a job in the legal secretarial field. She in fact began employment on February 6, 1995 doing clerical/legal work for \$ 31,824 a year, but she claims that due to the physical demand she had to leave the job.”

The claims for future lost wages is a matter for the jury to determine. There appears to be enough evidence if presented to meet the requirement under *Henne* that Plaintiffs will at least offer some evidence of loss of earnings in the future as a result of his permanent injury. *Henne* specifically states “The fact that there is some uncertainty as to plaintiff’s damage or the fact that the damage is very difficult to measure will not preclude a jury from determining its value.” The Plaintiff may present evidence of his loss of future income, and Defendant may present evidence to the contrary. If for some reason at the end of trial Plaintiffs have not meet their burden with respect to Mr. Giles’ future earnings, then Defendant can request that the jury not be instructed on this point.

IT IS SO ORDERED.

J.

WLW/dmh

oc: Prothonotary
xc: File Distribution
File