IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOSEPH W. HABBART,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 00C-12-169 RRC
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY,	)	
	)	
	)	
Defendant.	)	

Submitted: December 6, 2002
Decided: February 20, 2003

Upon Defendant's "Amended Motion for New Trial."[1]
DENIED.

This 20th day of February, 2003, upon consideration of the submissions of the parties, it appears to this Court that:

1. This automobile accident case began in this Court as an appeal from an Insurance Commissioner's arbitration panel award that was adverse to plaintiff Joseph W. Habbart ("Habbart"). Habbart had filed a request for the arbitration after his insurer, defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual"), refused to pay, on causation and necessity grounds, certain medical expenses that Habbart had incurred and which he

[1] Defendant Liberty Mutual's original motion was filed before transcripts had been prepared and thus did not contain transcript citations to assist the Court.

claimed were covered under the Personal Injury Protection ("PIP") portion of the insurance policy Liberty Mutual had issued him.[2] The arbitration panel found that Habbart had failed to prove that an April 16, 1999 multiple-vehicle automobile accident in which he was involved caused the injuries that he contended led to the unpaid medical bills that he had submitted to Liberty Mutual.[3]

Habbart thereafter filed his complaint on appeal, in which he requested that a jury make the factual determination of the "amount sufficient to compensate him for all damages caused by Liberty Mutual's breach of its insurance contract," and that the Court thereafter aggregate "interest [thereon], attorneys' fees[,] and costs of suit."[4] Before proceeding to trial, Habbart's case was arbitrated pursuant to Superior Court Civil Rule 16.1. The arbitrator ruled in favor of Liberty Mutual and assessed costs against Habbart;[5] Habbart then demanded a trial *de novo*.

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[2] Under title 21, section 2118(j) of the Delaware Code, all insurers of motor vehicles required to be registered within Delaware must submit to arbitration "any claims for losses or damages within…[the PIP coverage clauses of the subject insurance] and for damages to…motor vehicle[s]…upon request of the party claiming to have suffered a loss or damages within …[the PIP coverage clauses of the subject insurance] or to such…motor vehicle[s]."

[3] See "Arbitration Panel Award" (Ex. "A" to Compl.).

[4] Compl. ¶ 10.

[5] Arb. Order of 5/18/01 (Dkt. #6).

The matter was subsequently tried before a six-person jury to which a special verdict form had been submitted. The form read, in its entirety, "Is Liberty Mutual legally obligated to pay Mr. Habbart's medical expenses totaling $6,629?" The jury answered "yes," thereby determining that Habbart's claimed medical expenses were causally related to the April 16, 1999 auto accident, and were reasonable and necessary under the circumstances. This motion (and two related motions that Habbart has filed post-trial)[6] followed.

2. One ground that Liberty Mutual advances in support of the requested new trial is this Court's "exclusion of evidence of [Habbart's] health insurance, which in light of…counsel's misleading and improper remarks[,] so tainted and prejudiced the jury that Liberty Mutual was denied a fair trial."[7]

As stated, Habbart ostensibly brought suit because Liberty Mutual had deemed certain past medical expenses that he had incurred as not causally related to the automobile accident and/or as unreasonable and

[6] In addition to Liberty Mutual's motion currently under consideration, Habbart has submitted a "Motion for the Treatment of Attorneys' Fees as Taxable Costs" and "Bill of Costs and Related Motion," both of which are disposed of in a separate order entered contemporaneously herewith.

[7] Am. Mot. for New Trial ¶ 9.

unnecessary to remedy his claimed injuries. An issue that was not the exclusive focus before or during trial was Habbart's need to have any further medical treatments including surgery, although counsel for Liberty Mutual had explored this area during a pre-trial deposition of Bruce Katz, M.D., Habbart's treating physician:

> Q. What reason did…[Habbart] give you for not having had the surgery?
> A. He said he needed to obtain a lawyer to help him get approval for surgery.
> Q. And to your knowledge he hasn't had that surgery yet?
> A. Not by myself, no.[8]

Thus the issue of prospective surgery had been injected into the case by Liberty Mutual despite the focus of the issues presented having supposedly been limited to the reasonableness and necessity of Habbart's prior medical treatments.

At trial, counsel for Liberty Mutual sought to explore other insurance Habbart may have had than the PIP coverage potentially available under the policy it had issued him. Thus the following exchanges took place between Eric D. Boyle (counsel for Liberty Mutual), Roger D. Landon (counsel for Habbart) and the Court:

> Mr. Boyle: Now, at the time of your accident, of your employment with Wyman Electric, I believe you had Blue Cross and Blue Shield through Wyman?
> Habbart: Yes.

[8] Katz Dep. at 51-52 (Ex. "C" to Am. Mot. for New Trial).

Mr. Landon: Your Honor, may we approach?
The Court: With the court reporter.
(The following sidebar conference was held.)
Mr. Landon: I move to strike that last question. It is getting into a collateral source area.
The Court: I heard no reference to other insurance coverage to that question.
Mr. Boyle: Well, there is a question as to why he did not claim he still hadn't had the surgery. I think it goes to his motivation for not having surgery. The issue of credibility, not necessarily collateral source, but rather, it goes to his motivation for not having—why he did not have the surgery covered. I think he indicated that he did not want to miss time from work.
The Court: Was this covered in the [P]retrial [S]tipulation, this issue, in any way?
Mr. Boyle: I don't believe it was. It came up in prior testimony.
The Court:…in response?
Mr. Landon: There is no issue in the case about whether or not medical expenses for the [prospective] surgery have to be paid. He never [has] had the surgery. It is irrelevant why he never had the surgery. I don't think the issue has been—
The Court: I am prepared to rule. I am going to sustain the objection because: one, I think it does potentially get into the collateral source rule which is not at issue in this case. Secondly, independently, I think under Rule 403, even if it were deemed relevant for purposes of allegedly impeaching his credibility, I think the probative value of any such impeachment testimony is substantially outweighed by the issue of prejudice to…[Habbart]. I will direct the jury to disregard….[9]

Liberty Mutual now represents that "[t]he basis for [eliciting] this testimony [concerning other insurance] was to attack…[Habbart's]

[9] Tr. of Cross-Exam. of Habbart at 10-12 (Ex. "A" to Am. Mot. for New Trial).

credibility…[relative to his] continued complaints[ ] [of ongoing pain] voiced to Dr. Katz."[10]

Furthermore, during counsel for Habbart's closing argument, counsel said (relative to the findings of Liberty Mutual's independent medical examiner, Martin Gibbs, M.D.) :

> [Liberty Mutual's] doctor does not support their case.[11]...All he said was I disagree with Dr. Katz['s] [recommendation of the necessity for future surgery]. And so Liberty Mutual [wa]s not planning to have [to] pay for the [prospective] surgery, did not pay for it. In that sense, they have won.
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> They have won on that issue because the time frame for him to get surgery is now up, it is beyond two years.[12] If he has the surgery tomorrow they have no obligation to pay and never will under his PIP coverage. So they won. They won on that case, they lose on this case[,] the case you have to decide.
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> They lose on this case because we have presented a *prima facie* case, presented you with the evidence that proves our case and they have not.[13]

But at the very end of counsel for Habbart's closing argument he stated:

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[10] Am. Mot. for New Trial ¶ 2. Counsel for Habbart interprets this statement to mean "Liberty [Mutual] is arguing that because Habbart had health insurance that might have paid for…surgery, and because he did not have the…surgery, the jury should not believe that he was actually…[in continued] pain." Resp. to Am. Mot. for New Trial ¶ 4.

[11] Habbart had moved for judgment as a matter of law on this ground immediately before trial had progressed to closing arguments; the Court had reserved judgment on Habbart's application, and when the jury returned a verdict in his favor, the motion was mooted.

[12] Under the PIP section of title 21, section 2118 of the Delaware Code, compensation is available "to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident…."

[13] Tr. of Counsel for Habbart's Closing Arg. at 11-12 (Ex. "B" to Am. Mot. for New Trial).

> [Liberty Mutual has] agreed that if…[Habbart's arguments] are right[,] that…[his] number is right[,] all you have to decide is whether or not those [past] medical expenses that are in issue…are reasonable and necessary and causally related to the accident, all of which is unrebutted in this case. It is just simply not rebutted in this case. It just isn't.
>
> And so that is what you are to decide, your question at the end of the set of jury instructions on the special verdict sheet says simply this: Is Liberty Mutual legally obligated to pay Mr. Habbart's medical expense totals [sic] $6,629? Yes. Thank you.[14]

Liberty Mutual characterizes counsel for Habbart's strategy as "misleading the Court into handcuffing the [d]efense by excluding health insurance evidence, and then deliberately stating to the jury that…[Liberty Mutual] already won the case because of…[expiration of the two-year limitations period contained in the PIP section of title 21, section 2118 of the Delaware Code]."[15] With regard to counsel for Habbart's closing argument, Liberty Mutual contends that counsel "mislead[s] the jury to believe that his client's claims were only denied so…[Liberty Mutual] did not have to pay for the surgery, and so were legitimate on their face."[16] Liberty Mutual posits that Habbart's counsel "essentially told the jury to punish…[it] for bringing the case to trial…."[17]

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[14] Id. at 18.

[15] Id. ¶ 8.

[16] Id.

[17] Am. Mot. for New Trial ¶ 5.

In response, Habbart reduces Liberty Mutual's motion to an asking "for another chance to try the case…[by] arguing improper conduct by…[Habbart]'s counsel and error by the Court on evidentiary rulings."[18] In support thereof, Habbart argues that "[t]he testimony which Liberty [Mutual] sought to elicit is clearly excluded by the collateral source rule as noted by the Court during the trial," and that "[e]ven if Liberty [Mutual] could clear that [evidentiary] hurdle, the relevance is extremely marginal at best and it is hard to fathom how that information…would've caused a different outcome."[19] Lastly, with regard to his supposed "improperly introduc[ing] the surgery issue to the jury[ ][,]" counsel for Habbart states that "the surgery issue was introduced by Liberty [Mutual] through [Dr. Gibbs][ ]" whom Habbart argues "was…put…on the stand (knowing that Habbart was not suing Liberty [Mutual] for the cost of surgery) to try to support its position that it had no contractual obligation to pay for the other medical expenses at issue[ ];"[20] according to Habbart's counsel, such expert testimony confused the jury because "Dr. Gibbs was retained…[only] to express an opinion as to whether or not…[Liberty Mutual] had an obligation

[18] Resp. to Am. Mot. for New Trial ¶ 2.

[19] Id. ¶ 4.

[20] Id. ¶ 5.

to pay for…[prospective] surgery."[21] (Indeed, correspondence introduced at trial indicated that Dr. Gibbs was to conduct an independent medical examination "to determine if the [prospective] surgery recommended by Dr. Katz [wa]s related to the 4/16/99 motor vehicle accident," but invariably that examination led into other areas, as evidenced by the doctor's statement that a "fine point [of my conducting defense independent medical exams] is that I always put patients' welfare first.")[22]

3. A second ground that Liberty Mutual advances in support of its motion for a new trial is its assertion that "admission of the photographs [of Habbart's damaged vehicle was] without proper expert foundation [and] impermissibly lead[ ] the jury to speculat[e] concerning the force of impact."[23]

Prior to trial, Liberty Mutual had filed a motion in limine seeking to exclude photographs of Habbart's vehicle from evidence; relying upon

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[21] Id.

[22] Tr. of Cross-Exam. of Dr. Gibbs at 23-24 (Ex. "A" to Resp. to Am. Mot. for New Trial).

[23] Am. Mot. for New Trial ¶ 9.

Davis v. Maute,[24] Liberty Mutual argued that because Habbart had retained only medical expert witnesses not correlating vehicular damage and seriousness of injury (and otherwise had only lay witnesses to prove his case), Habbart "ha[d] not laid the proper foundation of competent expert testimony…[required to introduce the photographs into evidence]."[25] Habbart's counsel thereafter agreed that he would not seek to introduce the photographs at trial, essentially mooting Liberty Mutual's motion.

At trial, however, Habbart's counsel explored how Dr. Gibbs had formed his opinions[26] during the carrying out of his independent medical exam:

> Q. …Let me ask you some general questions about conducting an independent medical examination. One of the important things, I take it, would be to talk to the patient, or the examinee, if you will, because he is not your patient, to get a accurate history of what actually happened to him or he thinks resulted in his injury?
> A. …Yes, we tried to get as much of that information as we can, time

[24] 770 A.2d 36 (Del. 2001) (holding that a party in a vehicular personal injury case generally may not argue a correlation between the seriousness of injury and the extent of vehicular damage absent competent expert testimony on the issue, and may not rely on photographs of the vehicle(s) involved to indirectly accomplish the same purpose).

[25] Liberty Mut.'s Mot. in Limine "To Exclude Evidence of Vehicular Damage" ¶ 1 (Dkt. # 21).

[26] When Habbart's counsel cross-examined Dr. Hibbs relative to the reasonableness and necessity of Habbart's previous medical treatments, Dr. Hibbs stated that those treatments "were pretty much what you expect in this community." Tr. of Cross-Exam. of Dr. Gibbs at 27.

allowed.[27]

And more specifically:

> Q. In this case, you have testified already [on direct examination] that you believe the accident was aside swipe accident, not a broad side accident?
> A. I—impression I got was it wasn't head on. It wasn't broad side. It was a glancing type, perhaps.[28]

Dr. Gibbs was then shown the photographs of Habbart's vehicle taken after the accident and asked:

> Q. Would you agree that th[e] damage [shown in the photographs] is consistent with a broad side accident?
> A. Yes….[29]

At this time counsel for Habbart sought to introduce the photographs into evidence. Mr. Boyle (Liberty Mutual's counsel) objected, and the following conversation between he and Mr. Landon (Habbart's counsel) and the Court took place:

> Mr. Boyle: The objection is…[the photographs] are irrelevant. H[abbart] doesn't have an expert to determine the force of impact. Impact of the Davis case. We file[d] our motion [in limine], Mr. Landon agreed to withdraw, now he is trying to get them in front of…[the jury].
> The Court: I understood you to be withdrawing the application to produce photographs.
> Mr. Landon: I did, Your Honor. That was my intention initially was to use the photographs as evidence during my case in chief. However, circumstances have arisen where during…[Liberty Mutual]'s case in chief…[it]'s expert was asked specifically

[27] Tr. of Cross-Exam. of Dr. Gibbs at 9-10.

[28] Id. at 11.

[29] Id. at 13.

> on direct examination about how the impact occurred and he testified that he thought it was side swiping impact. These photographs clearly impeach his testimony on that point. [Liberty Mutual] opened the door to it on direct examination during…[its] case. I think I am entitled to impeach the witness with photographs which he had now admitted [ ] are inconsistent with the side swiping testimony.
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> The Court: Mr. Boyle.
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> Mr. Boyle: …[Mr. Landon] can impeach….The[ ] [photographs] still don't need to come into evidence for the jury. Use them for impeachment. [Mr. Landon] identified them. [He] is trying to make an inference [as] to force of impact.
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> The Court: Well, I think although the photographs—counsel indicated he was not going to use photographs, [but] there was an unexpected development [that] occurred through…[the] testimony of Dr. Gibbs. I will allow the[ ] [photographs] in over all your objections for limited purpose of impeaching the testimony of Dr. Gibbs, how the accident occurred, used for no other purpose than that. I will give…[the jury] [limiting] instructions either now or at the end [of all evidence] if that is requested.
>
> Mr. Boyle: I do request that at the end of instructions.[30]

Notably, counsel for Liberty Mutual later withdrew his request for a limiting instruction relative to the photographs that had been admitted into evidence.

In its motion, Liberty Mutual now argues that "[t]he purpose for which the photographs came into evidence was satisfied without allowing the jury to view them [because Dr. Gibbs was impeached after observing the photos][ ][,]" and that "[a]llowing the jury to see the photographs without the proper expert foundation as to the force of impact and the mechanism of injury was prejudicial…."[31] Liberty Mutual posits that "[t]he same principle

[30] Id. at 14-15.

[31] Am. Mot. for New Trial ¶ 7.

that resulted in Davis v. Maute[ ] still applies…[even though] the photographs were used as impeachment evidence on cross[-]examination."[32] Thus Liberty Mutual asserts that by "allowing the photographs into evidence…[an] error [was committed] based on the current state of the law."[33]

In response, Habbart argues that "the Supreme Court [in Davis v. Maute] also acknowledged that photographs are not per se inadmissible and can be admissible for other purposes."[34] Habbart states that "[t]he Court properly admitted the photos for the purpose of impeach[ing] [Dr. Gibbs][,]" and that "[a]fter withdrawing its request for a limiting instruction, Liberty [Mutual] cannot now properly be heard to complain that the limiting instruction should have been given."[35] Habbart therefore urges the Court to deny Liberty Mutual's motion given that its defense "evaporated" at trial during cross-examination of Dr. Gibbs and it "completely failed to rebut…[Habbart]'s *prima facie* case."[36]

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[32] Id.

[33] Id. ¶ 6.

[34] Resp. to Am. Mot. for New Trial ¶ 3.

[35] Id.

[36] Id. ¶ 1.

4. When considering a motion for a new trial, the jury's verdict is presumed to be correct.[37] A jury's verdict should not be disturbed unless it is manifest that it was the result of passion, prejudice, partiality or corruption, or that it was clearly in disregard of the evidence or applicable rules of law.[38] Enormous deference is given to jury verdicts under Delaware law.[39]

5. The Court finds that neither of the two reasons that Liberty Mutual advances for the granting of a new trial warrants such relief. The Court, giving the appropriate amount of deference to the jury's determination that Delaware case law (and the Delaware Constitution) requires, holds that the verdict in this case was not the "result of passion, prejudice, partiality or corruption," nor was it "clearly" in disregard of the evidence produced at trial or the applicable rulings that the Court made at trial.

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[37] Lacey v. Beck, 161 A.2d 579, 580 (Del. Super. Ct. 1960).

[38] Storey v. Camper, 401 A.2d 458, 465 (Del. 1979).

[39] Young v. Frase, 702 A.2d 1234, 1236 (Del. 1997) (citing the Delaware Constitution which provides that "on appeal from a verdict of a jury, the findings of the jury, if supported by the evidence, shall be conclusive." DEL. CONST., art. IV, § 11(1)(a)).

Initially the Court notes that any issue of prospective surgery that Habbart may have required was injected into the case by Liberty Mutual itself. This fact is demonstrated by Dr. Gibbs's engagement letter which seemingly limited his expert qualifications in this case to formulating an opinion on whether "the [prospective] surgery recommended by Dr. Katz [Habbart's treating physician] [wa]s related to the 4/16/99 motor vehicle accident[ ][.]"[40] As Habbart has argued, Dr. Gibbs was called at trial despite Liberty Mutual's knowledge that it was not being sued for the cost of prospective surgery, but rather for previously incurred medical expenses that Habbart contended resulted from the April 1999 auto accident. Furthermore, Liberty Mutual—through tactical choice or otherwise—made prospective surgery an issue in the case when it deposed Dr. Katz pre-trial and asked, "What reason did…[Habbart] give you for not having had the [prospective] surgery?"[41]

Thus it was permissible for Habbart's counsel to state during closing arguments that Liberty Mutual's doctor did not "support [Liberty Mutual's] case," *i.e.*, the defense of the suit that Habbart had brought to recover the unpaid medical expenses; to be sure, Dr. Gibbs was retained to conduct an

[40] Tr. of Cross-Exam. of Dr. Gibbs at 23-24.

[41] Katz Dep. at 51.

I.M.E. on the limited topic of financial responsibility for future surgery, if any, and his duties were appropriately to be limited to that topic. But, as stated, the scope within which Dr. Gibbs was to testify was expanded when the issue of potential need of future surgery developed during trial beyond what was perhaps contemplated earlier.

Liberty Mutual's argument that during closing arguments Habbart's counsel misled the jury and urged it to "punish"[42] Liberty Mutual has some, but not ultimate, persuasiveness. It is true that by branching off into the limitations period built into the PIP section of title 21, section 2118 of the Delaware Code, Habbart's counsel risked confusion of the issues to be litigated at trial. However, Habbart's counsel remedied the potential consequences of his actions when he concluded with "all you [the jury] have to decide is whether or not those [past] medical expenses that are in issue…are reasonable and necessary and causally related to the accident…."[43] That this statement effectively clarified the jury's understanding of its role is substantiated by the fact that the single interrogatory produced to the jury asked whether or not Liberty Mutual was to be responsible for the (apparently stipulated-to) amount of past medical

[42] Am. Mot. for New Trial ¶ 5.

[43] Tr. of Counsel for Habbart's Closing Arg. at 18.

expenses that Habbart had sustained, $6,629. Furthermore, Liberty Mutual's counsel did not object to this aspect of Habbart's counsel's closing argument.

With that backdrop, it is hard for this Court to determine what, if any, advantage Liberty Mutual would have gained if it had cross-examined Habbart about other potentially available insurance coverage. After reviewing the submissions currently under consideration as well as other transcript portions not cited by the parties, the Court does not believe that counsel for Habbart "misled" the Court "into handcuffing the defense." The Court heard argument at sidebar during the trial and found that even if this proposed line of questioning did not invade the protections of the collateral source rule as recognized by Delaware case law, such a line of inquiry was properly excluded based on Rule 403 grounds.[44] Given that the Court ruled as such within its understanding that this case concerned past medical expenses and not insurance potentially available for prospective medical bills, such a ruling was not in error and will not be disturbed now.

The Court also finds Liberty Mutual's assertions that introduction of the photographs of Habbart's damaged motor vehicle were contrary to Davis

[44] Delaware Rule of Evidence 403 states in pertinent part that "[a]lthough relevant, evidence may be excluded it its probative value is substantially

v. Maute similarly unpersuasive. As the Davis Court itself recognized, "photographs of…[a party]'s car…[can] conceivably serve some valid purpose other than supporting the [prohibited]…inference [of a correlation between extent of the damages to motor vehicles and personal injuries]."[45] Thus, such photographs "are not per se inadmissible."[46]

Here, the valid "other" purpose that introduction of the photographs served was the impeachment of Dr. Gibbs's testimony. Such impeachment was necessary because although Dr. Gibbs was apparently only to exam Habbart for any need of any prospective surgery relative to the April 1999 accident, in reality Dr. Gibbs's examination went beyond that proscription as evidenced by the doctor's testimony itself—"I always put patients' welfare first." So when cross-examination at trial revealed that Dr. Gibbs may not have fully comprehended the nature of the accident leading to Habbart's injuries, Habbart's counsel appropriately sought to impeach the doctor with photographic evidence. Once the doctor was impeached with such evidence, this Court believes that the jury was properly permitted to see the photographs as well, lest it be left only to speculate as to what exactly the

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outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury…."

[45] Davis, 770 A.2d at 41.

[46] Id.

damage to Habbart's vehicle was and which Dr. Gibbs erroneously assumed was the result of a "glancing"-type of collision.

The fact that Habbart's counsel withdrew his earlier planned use of the photographs in response to opposition from Liberty Mutual (only to later introduce those photographs in response to Dr. Gibbs's testimony) is of no moment. As the Court stated in its ruling at trial, "unexpected developments" do occur at trial, and, as the Davis Court held, "the admissibility of…photographs [in cases such as this] must turn on whether the risk that the jury will draw an improper inference from the photographs 'substantially outweighs' the probative value of the photographs…."[47] The Court has already made a determination that such a risk did not exist when it made its ruling at trial, and that ruling will not be reversed now. If counsel for Liberty Mutual was overly concerned about such risk, it could have insisted on the giving of an appropriate limiting instruction, but, as noted, despite initially so requesting, counsel ultimately withdrew that request, and

[47] Id.

should not now be heard to complain otherwise. Furthermore, Liberty Mutual's concern over admittance of the photographs is mitigated by the Court-given instruction that a verdict must be based "solely on the evidence and law," and not upon sympathy.[48]

6. Because the Court finds that neither of the two reasons that Liberty Mutual advances for the granting of a new trial warrants such relief, and because of the presumed correctness of jury awards in this jurisdiction, Liberty Mutual's Amended Motion for New Trial is **DENIED**.

IT IS SO ORDERED.

/s/
Richard R. Cooch, J.

oc: Prothonotary
xc: Roger D. Landon, Esquire and John S. Spadaro, Esquire, Attorneys for Plaintiff
Eric D. Boyle, Esquire, Attorney for Defendant

[48] See Jury Instructions, Dkt. #27.