

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DANIEL MILLER and)	
DENISE MILLER)	CIVIL ACTION NUMBER
)	
Plaintiffs)	06C-01-150-JOH
)	
v.)	
)	
SCRATCH MAGOOS a/k/a SCRATCH)	
MAGOOS RESTAURANT & BAR)	
)	
Defendant)	

Submitted: December 5, 2008

Decided: January 8, 2009

MEMORANDUM OPINION

*Upon Motion of the Plaintiffs for Reargument and/or Reconsideration- **DENIED***

Appearances:

James P. Hall, Esquire, of Phillips Goldman & Spence, P.A., Wilmington, Delaware, attorney for plaintiff

Mary E. Sherlock, Esquire, of Mary E. Sherlock, P.A., Dover, Delaware, attorney for defendant

HERLIHY, J.

Plaintiffs Daniel and Denise Miller have moved to reargue this Court's earlier decision denying their separate motions for a new trial and for a new trial or additur.¹ The Millers' contention now is that this Court erred in an in-trial evidentiary ruling regarding the defendant's medical expert. The testimony the Court allowed, they assert was so "damaging," a new trial is warranted.

The defendant's medical causation expert was Dr. Joel Chodos. The Court in its earlier decision summarized his testimony:

Dr. Joel Chodos testified for Scratch Magoo's. He examined Miller on February 19, 2008. He is a gastroenterologist who has been practicing in Delaware for twenty years. He treats patients who have had foreign objects in their hypopharynx but not in their esophagus. GERD (gastroesophageal reflux disease) is a common ailment and ranks second in the number of patients he treats.

Dr. Chodos said Dr. Suh's records state he removed the glass from the hypopharynx. It would not have gone into the esophagus. It did not enter the esophageal inlet. He said he could not see a causal relationship between swallowing the glass and Miller's GERD. He also cannot find a physiological explanation from ingesting the glass to reflux and vomiting. Miller may have GERD, he testified, but another condition, gastromotility (a gastric emptying disorder), may be involved. Vomiting is a forceful thing but not as part of reflux disease; reflux patients regurgitate. He noted normal endoscopy in January 2007 with no scars and a normal biopsy. Basically GERD is a lower esophageal condition and not in the area of the throat where the glass was lodged.

* * * * *

On the other hand, Dr. Chodos could not relate Miller's GERD to this incident. First, it never entered the esophagus. It was in the hypopharynx area and not in the esophageal inlet as Dr. King, mistakenly, believed it had been. That location is where Dr. Suh had removed it from. Second, he would have found a causal connection had the glass gone into Miller's lower esophagus, but it did not. Third, vomiting is not consistent with GERD, regurgitation is and the latter is not Miller's symptomology. In short, there

¹ *Miller v. Scratch Magoo's*, 2008 WL 5206782 (Del. Super. Nov. 20, 2008).

are too many disconnects between the incident and the onset of GERD. The story suggests that another disorder unrelated to the incident is the underlying cause of his symptoms. Testing has failed to confirm aspects of GERD, too, though Dr. Chodos said Miller may have it.²

The Millers' argument is that (1) at his pre-trial deposition Dr. Chodos could not say with reasonable medical probability what the cause is/was for Daniel Miller's symptoms, (2) that Dr. Chodos opined at trial that the motility disorder was the cause, and (3) Dr. Chodos expressed a causation opinion at trial which he had not covered in his report.

Normally, a motion for re-argument is not used for raising new issues.³ Such motions are not vehicles to rehash prior arguments but can be used to address an issue the court may have overlooked.⁴ In this instance, the Millers are rearguing a point made in their motion for new trial or additur. The Court, however, did not expressly speak to it in its earlier decision. It will now.

The Miller's contention that the Court permitted, over their objection, "Dr. Chodos to testify that a motility disorder caused Mr. Miller to suffered [*sic*] vomiting which in turn caused chest pain and GERD symptoms. That trial testimony, which was totally contradictory to his testimony at his discovery deposition, was never disclosed to plaintiffs prior to trial in any manner."⁵

² *Id.*

³ *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).

⁴ *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91 (Del. 1992)(TABLE).

⁵ Plaintiffs' Motion for Re-argument, ¶ 8.

The record in this case does not support this argument. In his April 5, 2008, symptoms report to defense counsel, Dr. Chodos stated as follows about Daniel Millers situations:

1. Symptoms compatible with GERD but also suspect GI dysmotility which could be adding to the reflux symptoms, I cannot connect, on a physiological basis, the glass ingestion in the hypopharynx with the symptoms he is having now.

* * * * *

2. It is my belief that Mr. Miller does indeed have gastroesophageal reflux disease and that it is likely that a gastric motility is playing a significant role in why he has these symptoms as well as why he has the symptoms of vomiting and early satiety. It is unusual for a slender young man like him to have troublesome reflux. A gastric emptying disorder could help explain this and his current symptoms of vomiting.⁶

Thereafter, the Millers took Dr. Chodos' discovery deposition. In it, he elaborated on the motility disorder as a possible cause for Daniel Miller's symptoms. It would unduly lengthen his opinion to repeat that testimony.⁷ Dr. Chodos testified that he could not say Miller's symptoms were, within reasonable medical probability, caused by a motility disorder. That is consistent with his summary report.

His testimony at trial was consistent with these earlier statements. He did not, as the Millers argue, opine at trial that Daniel Miller's symptoms were caused by a motility disorder. And his inability to do so, based on lack of testing and other things, is what he repeated. He said he urged Daniel Miller to get such testing to see if that disorder were a cause or playing a role in his symptoms.

⁶ Plaintiffs' Motion for New Trial or Additur, Exhibit A.

⁷ It can be found, however, in Exhibit B to Plaintiffs' Motion for Reargument.

This Court discussed in the earlier opinion⁸ that Dr. Chodos did not make a causative link with motility and Miller's current symptoms. In short, it is inconceivable the Millers can claim (1) surprise at trial and/or (2) a variation in Dr. Chodos' opinions that prejudiced this case. Their argument overlooks a fundamental component of tort cases. The plaintiff(s) bear the burden of having to prove a causative connection between the defendant's negligence and the injuries suffered.⁹ Defendants have no such burden. Often defendants rely on cross-examination of plaintiffs' doctors to undermine medical causative testimony and have no medical expert (cost being a major reason) because of where the burden lies. Yet, the logic of the Millers' argument would put a burden of proof on defendants which the law does not require.

Conclusion

For the reasons indicated herein, plaintiffs' motion for re-argument and/or reconsideration is **DENIED**.

J.

⁸ *Supra*. note 1.

⁹ *Russell v. K-Mart*, 761 A.2d 1, 5 (Del. 2000).