NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RACHEL H. REGES & WILLIAM REGES, HUSBAND AND WIFE, Appellants v. SWAMIKKAN A. NALLATHAMBI, M.D., NALLATHAMBI MEDICAL ASSOCIATES, INC., JOSEPH H. NOUR, M.D., AND LAWRENCE COUNTY ANESTHESIA ASSOCIATES, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1199 WDA 2012

Appeal from the Judgment Entered July 23, 2012
In the Court of Common Pleas of Butler County
Civil Division at No(s): 2008-11875, 2012-21387

BEFORE: BOWES, DONOHUE, and MUNDY, JJ.

MEMORANDUM BY BOWES, J.: **FILED SEPTEMBER 30, 2013**

Rachel H. and William Reges appeal from the July 23, 2012 judgment entered on a jury verdict in their favor in this medical negligence action. They challenge the trial court's denial of a new trial premised on the jury's failure to award damages for future medical expenses against Swamikkan A. Nallathambi, M.D. After a thorough review of the record, we agree with the Regeses that the jury's award of $0 damages for future medical expenses was contrary to the uncontroverted evidence. Hence, we affirm in part and reverse in part, and remand for a new trial limited to damages for future medical expenses.

Mr. and Mrs. Reges instituted the within medical negligence action against Dr. Nallathambi and Joseph H. Nour, M.D., their professional corporations and several other entities[1] to recover damages due to a below the knee amputation of Mrs. Reges's left leg. The Regeses alleged that these physicians negligently failed to timely diagnose Mrs. Reges's peripheral vascular disease, resulting in the loss of oxygen to that lower extremity, death of the tissue, and amputation. To satisfy their burden of proving future medical expenses, Appellants introduced the testimony of: 1) Richard P. Bonfiglio, M.D., an expert in physical medicine and rehabilitation; 2) nurse and life care planning expert, B.A. McGettigan; and 3) actuarial expert, David Hopkins, A.S.A.

Dr. Bonfiglio testified that he evaluated Mrs. Reges in her home on two occasions, reviewed all of her medical records, and read the depositions. Based on his observations, education, and experience, he arrived at an opinion as to the nature of Mrs. Reges's abilities and disabilities and future needs due to the amputation. Specifically, he opined that she would require medications for the relief of phantom pain, a new prosthesis every few years, stump socks and liners, a wheelchair, shower chair and other adaptive equipment. N.T., 3/14/12, at 53. Mrs. Reges will also need to be

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[1] Prior to trial, Plaintiffs dismissed their claims against Butler Memorial Hospital, Dr. El-Khatib, Dr. Davliakos, and the Three Rivers Cardiac Institute.

followed by a physiatrist, psychiatrist, and pain management physician and require ongoing physical, occupational and recreational therapies. ***Id***. at 69. Dr. Bonfiglio also delineated that Mrs. Reges will require at least one hospitalization for stump revision, followed by in-home nursing care, therapy and outpatient treatment. ***Id***. at 54-55. He furnished the medical foundation for Nurse McGettigan's life care plan and opined to the requisite degree of reasonable medical certainty that, if Mrs. Reges obtained the care outlined in that plan, it would significantly improve her life expectancy. ***Id***. at 50. He also agreed with Nurse McGettigan that Mrs. Reges would benefit now, and even more in the future, from assistance with housekeeping activities. ***Id***. at 52.

Nurse McGettigan defined a life care plan and explained how she prepared the life care plan for Rachel Reges. She spoke to Mrs. Reges and her prosthetist on two occasions, reviewed the medical records and depositions, and relied on Dr. Bonfiglio's medical expertise regarding future medical needs. She then determined and calculated the cost of these services over Mrs. Reges's lifetime. Nurse McGettigan outlined nine categories of future medical expenses: physicians' appointments, diagnostics and hospitalizations, therapies, prostheses, psychological needs, equipment, medications, transportation and miscellaneous. For each category, she described the services and products required, the expected cost per year, and calculated lifetime total future medical expenses of $1,971,888. The

expense of in-home assistance, listed under "miscellaneous," represented $1,556,464 of that total. Mr. Hopkins offered a range of the cost of future medical expenses from $2.9 million to $5.5 million based on inflation of one and one-half percent, four percent, or six percent.

Neither Dr. Nallathambi nor Dr. Nour offered any experts or evidence to dispute the testimony of Dr. Bonfiglio, Nurse McGettigan, or Mr. Hopkins. However, the defendants did cross-examine the Regeses's damages experts. The defense highlighted Dr. Bonfiglio's extensive experience as a paid expert in these matters, his prior collaboration with Nurse McGettigan, and the manner in which the report was prepared. The focus then shifted to the miscellaneous category of future medical expense: the allocation for household assistance. The experts conceded that neither Mrs. Reges's primary care physician nor her physical medicine and rehabilitation specialist, Dr. James Kreshen, presently recommended an attendant or in-home assistance. Defense counsel also directed the experts to Mrs. Reges's own deposition testimony that she performs her own housework.

The jury returned a verdict, apportioning sixty percent of the liability to Dr. Nallathambi, forty percent to Mrs. Reges, and exonerating Dr. Nour of negligence. Special interrogatories revealed a total damage award of $418,888.88, consisting of past medical expenses, which were stipulated to be $32,243.43, $193,322.72 for past non-economic injuries, and

$193,322.73 for future non-economic injuries. No amount was awarded to Mrs. Reges for her future medical expenses.

Appellants filed a post-trial motion seeking delay damages and a new trial as to damages against Dr. Nallathambi only for future medical expenses and future non-economic damages. After a hearing, the trial court granted the motion for delay damages but denied Appellants' motion for a new trial as to these damages. Upon praecipe of Appellants, the court entered judgment in favor of Appellants and against Dr. Nallathambi in the amount of $277,694.45.

Appellants filed the within appeal[2] and raised a single issue for our review:

> 1. Should the trial court have granted a new damages trial limited to determining Plaintiffs' future medical expenses, where the jury found that Mrs. Reges suffered an amputation of her left leg resulting from Dr. Nallathambi's negligence; the Defendants did not contest numerous future medical expenses relation to life with an amputated leg – e.g., prosthetics, a wheelchair, grab bars, and medication; and yet, despite the existence of substantial uncontroverted evidence, the jury awarded no money for this element of damage?

Appellants' brief at 4.

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[2] Dr. Nour and Lawrence County Anesthesia Associates filed a motion to quash the within appeal as to them. The motion was denied without prejudice to the movant to raise the issue before this panel. Dr. Nour has not formally argued the motion to quash but maintains that no issues were preserved as to him and that he should not be involved in any retrial.

The trial court's grant or denial of a motion for new trial on damages is one of discretion, and we review such a decision for an abuse of discretion. Generally, a new trial on damages is warranted "where it clearly appears from the uncontradicted evidence that the amount of the verdict bears no reasonable relation to the loss suffered by the plaintiff" and "is so contrary to the evidence as to shock one's sense of justice." ***Kiser v. Schulte***, 648 A.2d 1, 4 (Pa. 1994). "If the verdict bears a reasonable resemblance to the proven damages, it is not the function of the court to substitute its judgement for the jury's." ***Id***. It is when "the injustice of the verdict 'stand[s] forth like a beacon,' a court should not hesitate to find it inadequate and order a new trial." ***Id***. (quoting ***Elza v. Chovan***, 152 A.2d 238, 241 (Pa. 1959)); ***Slaseman v. Myers***, 455 A.2d 1213, 1215 (Pa.Super. 1983).

Dr. Nallathambi argues for the first time on appeal that, since the Regeses did not object to the jury's verdict at trial, they have not preserved this issue for appeal. He characterizes the verdict as inconsistent and alleges that an objection had to be raised at the earliest possible time, *i.e.*, when the verdict was rendered. ***City of Philadelphia v. Gray***, 633 A.2d 1090 (Pa. 1993); ***Dilliplaine v. Lehigh Valley Trust Co.***, 322 A.2d 114 (Pa. 1974) (holding that in order to preserve a trial objection for appellate review, counsel must make a specific objection at trial).

The Regeses distinguish ***Gray***, where the jury's responses to the special interrogatories were legally inconsistent. The jury therein found in favor of the plaintiff and apportioned negligence seventy-five percent to the City and twenty-five percent to SEPTA. Meanwhile, this apportionment was inconsistent with the jury's specific finding that the SEPTA trolley driver's negligence was not a substantial factor in causing plaintiff's injuries. No objection to the inconsistent verdict was raised at trial. The plaintiff subsequently filed a post-trial motion seeking judgment against SEPTA. The trial court denied the motion and both the Commonwealth Court and Supreme Court affirmed, finding the issue waived. The Regeses contend that this is not an inconsistent verdict case but a weight of the evidence case, and such a claim is properly raised in a post-trial motion. ***Criswell v. King***, 834 A.2d 505 (Pa. 2003); ***Hobbs v. Royce***, 769 A.2d 469 (Pa.Super. 2001).

In ***Criswell***, as herein, there was no inconsistency on the face of the verdict slip; rather, the verdict was "disappointing and troublesome." ***Criswell***, ***supra*** at 509. The plaintiff argued that the jury's finding that the defendant's negligence was not a substantial factor in causing his injuries was contrary to the testimony of both medical experts, who opined that the accident did cause the plaintiff's neck injuries. Thus, plaintiff maintained that the verdict was against the weight of the evidence. The Supreme Court declined to find waiver under ***Gray*** "to cases in which the verdict is clear and

unambiguous, albeit problematic, troublesome or disappointing." ***King v. Pulaski***, 710 A.2d 1200, 1204 (Pa.Super. 1998).

Here, as in ***Criswell***, the issue is whether the jury disregarded uncontroverted evidence of future medical expenses, which is a challenge to the weight of the evidence, rather than an issue concerning internally inconsistent answers to special interrogatories. We find no waiver as the challenge was properly preserved via post-trial motion. Thus, we turn to the merits.

The thrust of the Regeses's argument is that the trial court should have granted a new trial as to damages for future medical expenses because the jury disregarded uncontroverted evidence of those damages. They continue there was no dispute that Mrs. Reges would incur expenses attendant to the prosthesis, equipment, a future revision surgery, and medical supervision. The only item of damages that was controverted was the need for in-home assistance set forth under "Miscellaneous" in the life care plan. Appellants rely upon the Supreme Court's decision in ***Kiser***, ***supra***, and this Court's decision in ***Rettger v. UPMC***, 991 A.2d 915 (Pa.Super. 2010), for the proposition that, since the defense did not undermine the fundamental premise, *i.e.*, that there would be future medical expenses as a result of the amputation, the award of $0 was clearly inadequate and bore no relation to the loss suffered.

In ***Kiser***, ***supra***, the plaintiff offered the only evidence of damages. In addition to the testimony of the decedent's parents and siblings, Dr. James L. Kenkell, Ph.D., a professor of economics at the University of Pittsburgh, testified that the value of the loss of the decedent's services to her family was in the range of $11,862.50 to $18,980.00. Dr. Kenkell also opined that the net economic loss resulting from the death of Ms. Kiser ranged from $232,400.00 to $756,081.43. The jury returned a total damages award of $25,000, and the trial court denied plaintiff's post-trial motion for a new trial limited to damages. This Court vacated the damage award and remanded for a new trial on damages, characterizing Dr. Kenkell's testimony of net economic loss as uncontroverted. We rejected the defendant's contention that Dr. Kenkell's concessions on cross-examination that the decedent's working lifetime could be less than he projected, and that his deduction for personal maintenance may have been low, rendered the evidence controverted. The Supreme Court affirmed, finding that the denial of a new trial constituted an abuse of discretion "because the jury verdict was clearly inadequate." ***Kiser***, ***supra*** at 4.

In ***Rettger***, the trial court awarded the Estate's representative a new trial on the survival claim after the jury awarded no damages. The survival claim included the value of the decedent's lost wages and there was expert testimony that the decedent, an accountant, would have been highly paid in that capacity. During extensive cross-examination, the expert conceded

that this assumption could not be stated with absolute certainty. On appeal, the defendant hospital argued that this rendered the expert's testimony controverted and that the jury's award was consistent with its prerogative to disregard the expert's opinion on this point as speculative. We disagreed.

This Court noted the tension between the principle that the "verdict must bear a relation to the evidence" and "the notion that a jury may reject any evidence offered, even if uncontroverted[.]" ***Rettger***, ***supra*** at 93 (quoting ***Carroll*** [***v. Avallone***, 939 A.2d [872] at 875 [(Pa. 2007)]. However, since a "verdict cannot be based on whim or caprice," we held that

> if there is no argument or opposition on a particular point, the jury may not be free to disregard such information. Indeed, to controvert means to raise arguments against; voice opposition to. Uncontroverted evidence, therefore, is evidence which is unopposed or unchallenged, not merely uncontradicted. If one party has the burden of proof, opposing counsel may strenuously controvert the evidence through cross-examination and argument; reasons not to accept the plaintiff's evidence may suffice to prevent the meeting of that burden, even without affirmative countervailing evidence.

Rettger v. UPMC Shadyside, 991 A.2d 915, 934 (Pa.Super. 2010) (citations and quotation marks omitted).

We found in ***Rettger*** that the defendant hospital had failed to controvert evidence that the decedent, if properly treated, would have survived and been able to continue in the accounting profession for which he had demonstrated "extraordinary aptitude." ***Id***. at 935. While he would have suffered diminished peripheral vision in one eye had he lived, the evidence was uncontested that this would not have impeded his career. We

held that the defendant hospital's failure to undermine the Estate's documented proof of the decedent's ongoing compensation, his work expectancy, or the indications that he would have advanced in the profession, stood "in stark contrast" to the jury's award of no damages on the survival claim, and we affirmed the grant of a new trial on that claim.

Dr. Nallathambi argues that ***Kiser*** and ***Rettger*** are distinguishable because in this case, the defense "vigorously attacked the credibility of Dr. Bonfiglio and Nurse McGettigan, including the very foundation for their opinions." Appellee Nallathambi's brief at 20. He continues that this case is more similar to ***Carroll v. Avallone***, 939 A.2d 872 (Pa. 2007). Therein, a jury returned a verdict finding decedent and defendants equally negligent, and awarded $29,207 in the wrongful death action and no damages in the survival action. This Court remanded for a new trial on damages, concluding that the plaintiffs' experts' evidence was uncontroverted because the defendants offered no contradictory evidence.

The Supreme Court granted allowance of appeal and reversed, holding that the failure of a defendant to introduce countervailing expert testimony on damages did not necessarily render the plaintiff's evidence uncontroverted. In ***Carroll***, extensive cross-examination of the expert's factual assumptions yielded concessions that his projected wage loss of the decedent was based upon his assumption that the decedent would have been employed as a nurse. The defense introduced evidence, however, that

the decedent suffered from long-term health problems, had been employed in other fields, and that she was unemployed and had no plans to return to work at the time of her death. She was not enrolled in a nursing program and had no plans to return to school. The Court viewed such evidence as "[a] basic factual challenge to the underpinnings of the expert's opinion," ***Carroll***, 939 A.2d at 875, to render the evidence controverted. No new trial was warranted.

We find the facts herein to be analogous to those in ***Rettger*** and ***Kiser*** rather than ***Carroll***. With the exception of Dr. Nallathambi's challenge to the experts' premise that Mrs. Reges required household help, the cross-examination of Dr. Bonfiglio and Nurse McGettigan was limited to their status as paid experts rather than providers, and their extensive litigation experience. We do not believe that this general impeachment of the Regeses's expert witnesses with the amount of their fees or the number of times they have testified, without more, is the type of attack on the factual underpinnings of their opinions at issue in ***Carroll***. Indeed, such impeachment did not in any way contravene the experts' opinions that Mrs. Reges would require future medical care, therapies, and equipment. We agree with the Regeses that evidence of future expenses for medication, revision surgery, new prostheses, adaptive equipment, and therapies was uncontroverted, and that the jury's failure to compensate Mrs. Reges for

those elements of damages "shock[s] one's sense of justice."[3] ***Kiser***, ***supra*** at 3.

The fact that the jury submitted a question during its deliberations does not alter our reasoning.[4] Dr. Nallathambi maintains that the question indicates that the jury considered the evidence and chose not to award future medical expenses. We agree with the Regeses that the jury's question has no legal significance and that this Court is not permitted to speculate about what the jury was thinking. Furthermore, the issue here is not why the jury did not award any damages for future medical care, but whether the verdict was reasonably related to the uncontroverted evidence that Mrs. Reges would incur future medical expenses. No one disputes that

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[3] Counsel for Dr. Nour conceded in closing argument: "We asked no questions about what does a prosthesis cost or a shower curtain, or grab bar in the shower. We didn't ask any questions about the wheelchair, the socks that she used. The one thing that we believe is very questionable, and we asked about, is this live-in attendant care." N.T., 3/20/12, at 44. Counsel then proceeded to question the reasonableness of Mr. Hopkins' calculations for live-in care given "what you've heard about what [Mrs. Reges] can do?" ***Id***. at 44-45. Counsel for Dr. Nallathambi reminded the jury that Mrs. Reges did not need to hire help after the amputation and that at the time, she took care of the house, laundry and grocery shopping without the assistance of anyone other than her husband. ***Id***. at 51. Furthermore, none of Mrs. Reges's treating physicians had recommended in-home assistance. ***Id***.

[4] The question was, "Do we have to adhere to the attached guidelines for costs for damages?" N.T., 3/21/12, at 3-4. Attached to the paper were several plaintiffs' exhibits. The trial court instructed the jury that it did not have to adhere to the guidelines and re-read the instruction regarding damages generally.

the defense called into question the necessity for household help by pointing out to the experts that Mrs. Reges's treating physicians had not recommended such services and Mrs. Reges's own testimony that she performed some household tasks after the amputation. The defense did not, however, challenge or question the need for replacement prostheses, a future revision surgery, special adaptive equipment, medicines, and future medical care and therapies. Thus, the need for and cost of such future medical care was uncontroverted and a damage award of zero dollars for future medical and related expenses was so contrary to the evidence as to shock one's sense of justice.

Dr. Nallathambi contends that any award of a new trial should not be limited to damages. He avers that liability and damages are intertwined and liability is not free from doubt.[5] We disagree. The jury absolved Dr. Nour and his medical practice of liability. It attributed sixty percent of responsibility for Mrs. Reges's injuries to Dr. Nallathambi; forty percent to Mrs. Reges. The apportionment of liability for negligence indicates that this was not a compromise verdict. ***See Stokan v. Turnbull***, 389 A.2d 90, 93 Pa. (1978) (defining compromise verdict as a verdict for the plaintiff but in a

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[5] While Dr. Nour argues that the Regeses have not preserved the right to a new trial as to liability involving him, it is Dr. Nallathambi, not the Regeses, who urges us to order a new trial as to both liability and damages. It is unclear whether Dr. Nallathambi contemplates a new trial that includes Dr. Nour.

lesser amount than it would have if liability questions had been free from doubt). Furthermore, there was no allegation of any error that contributed to the liability verdict. Hence, we see no basis to disturb the liability verdict. ***See Kiser***, ***supra*** (sanctioning use of new trials as to damages where liability fairly determined and damages readily separable from liability).

Since the jury verdict does not bear any rational relationship to the uncontroverted expert testimony regarding the need for and the cost of future medical care, the trial court abused its discretion in denying the motion for a new trial limited to damages for future medical expenses. There is no basis for including Dr. Nour or Lawrence County Anesthesia Associates in any proceedings on remand.

In conclusion, we affirm judgment of liability, reverse that portion of the damages award representing future medical expenses, and remand for a new trial limited to damages for future medical and related expenses as to Dr. Nallathambi and his professional corporation only.[6] Jurisdiction relinquished.

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[6] Dr. Nallathambi makes no argument in support of excluding the expense of future in-home care at a new trial, given that this facet of damages was controverted at trial. In determining the scope of the new trial, we noted that the special interrogatories submitted to the jury listed "future medical care and related expenses" as one item of damages. Furthermore, there was uncontroverted expert testimony that Mrs. Reges would require stump-revision surgery in the future, followed by in-home care and therapy, and the life care plan incorporated that cost. N.T., 3/14/12, at 55. We find the necessity and reasonableness of in-home care to be so intertwined with
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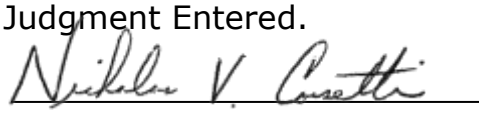
Judgment Entered.



Deputy Prothonotary

Date: 9/30/2013

(Footnote Continued) ———————————

future medical care generally, that the scope of the new trial must encompass these related expenses as well as future medical expenses.