IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

SUSAN SCHNEIDER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C. A. No. 02-1590-MPT
	:	
JOHN CHICKADEL,	:	
	:	
Defendant.	:	

MEMORANDUM

Francis J. Jones, Jr., Esquire, Morris, James Hitchens & Williams, 16 Polly Drummond Hill Road, Newark, Delaware 19711, attorney for plaintiff, Susan Schneider.

James Joseph Haley, Jr., Esquire, Ferrara, Haley, Bevis & Solomon, 1716 Wawaset Street, P.O. Box 188, Wilmington, Delaware 19899, attorneys for defendant, John Chickadel.

Dated: July 8, 2003

Wilmington, Delaware

Thynge, U.S. Magistrate Judge

I. Introduction

This suit is a diversity action involving personal injury claims arising from a May 2001 motor vehicle accident between the plaintiff and defendant. The case is scheduled for trial in mid-August. Presently before the court are plaintiff's motions for summary judgment on causation, past medical expenses and lost wages, and home improvement costs.

II. Background[1]

On May 14, 2001, as plaintiff was yielding to exit Interstate-95, defendant hit her motor vehicle from behind. According to plaintiff, she experienced immediate neck and back pain. She was examined that day by her primary care physician, who ordered x-rays of the neck and upper back, and prescribed a muscle relaxant. In addition to her neck and back pain, plaintiff experienced pain in her arms and right leg, numbness in her fingertips, poor balance and headaches on a daily basis. Consequently, her primary care physician referred her to an orthopedic surgeon who performed neck fusion surgery, which, after twelve-weeks of physical therapy yielded limited improvement. The surgery improved plaintiff's arm pain, headaches and balance, but back and neck pain remain.

According to plaintiff, the injuries she sustained from the accident have not only caused her to incur significant medical expenses, but also prevented her from doing many of the activities that she enjoyed. For example, plaintiff has been unable to

[1]The facts contained in this section appear in D.I. 27 at Exhibit C.

exercise as she had before and has stopped restoring her 19th Century home, an activity and project which she greatly enjoyed. Thus, plaintiff requests reimbursement for her medical expenses and lost wages and compensation to hire contractors to complete the restoration.

Plaintiff has retained Ali Kalamchi, M.D. ("Dr. Kalamchi") as an expert in this case. According to Dr. Kalamchi, plaintiff suffered from an asymptomatic degenerative disc disease before the accident, and a herniated disc condition. Dr. Kalamchi further opines that the pain and other symptoms plaintiff experienced since the accident are directly caused by the injuries sustained in the accident.

Defendant has retained three experts, Michael L. Brooks, M.D. ("Dr. Brooks"), William L. Sommers, D.O. (Dr. Sommers), and Robert S. Fijan, Ph.D. ("Dr. Fijan").[2]

In his review, Dr. Brooks also finds that plaintiff suffers from a degenerative disc disorder which is not related to the accident. However, he too opines that plaintiff herniated a disk, which is associated with the car accident.

Likewise, Dr. Sommers concludes that since the plaintiff did not exhibit symptoms relating to her degenerative disorder, there is a causal relationship between the accident and her current symptoms.

Dr. Fijan conducted an accident reconstruction and biomechanical analysis of plaintiff's injuries. He concludes that the accident caused plaintiff to sustain "compressive forces in her lower back that are only a small fraction of the compressive

[2]Dr. Fijan, according to his letterhead, has a Ph.D. Nothing has been submitted to this court advising of the branch of science in which he earned his Ph.D. However, it is abundantly clear that he is not a medical doctor, and there is no evidence suggesting he has had any medical training. His proffered testimony is relevant only to the biomechanics of the accident.

forces she experienced during many everyday bending and lifting activities." D.I. 27 at Exhibit D pg. 12.

III. Legal Analysis

A. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the parties dispute a material fact, it is inappropriate for the court to grant a motion for summary judgment.[3] However, the parties' disagreement must be genuine.[4] A genuine issue of fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248 (citations omitted).

The party moving for summary judgment bears the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). That party can meet this burden by "pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Further, a party opposing a supported motion must present evidence showing that there is a

[3] *See Anderson et. al. v. Liberty Lobby, Inc., et. al.,* 477 U.S. 242, 248; "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

[4] "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson,* 477 U.S. at 247-48.

genuine issue of material fact, rather than relying on the pleadings.[5] The court should grant summary judgment if either party "fails to make a showing sufficient to establish the existence of an [essential element] . . . on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of [that] . . . party's case necessarily renders all other facts immaterial." *Id.*

When reviewing a motion for summary judgment, a court must evaluate the facts in a light most favorable to the nonmoving party drawing all reasonable inferences in that party's favor. *See Anderson,* 477 U.S. at 255. The court should grant the motion "unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." *Id.* at 251. In deciding a motion, the court should apply the evidentiary standard of the underlying cause of action. *See id. at 251-52.*

> In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed. . . . The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient.

Id. at 251.

B. Discussion

1. Causation

Plaintiff argues that she is entitled to summary judgment on causation, since none of the experts, including those proffered by defendant, refute that she sustained injuries from the accident. According to plaintiff, Dr. Brooks and Dr.

[5]Rule 56(e) provides that the opposing party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Sommers found that her injuries are related to accident, while Dr. Robert Fijan does not deny that the accident caused her injury.

In support of her position, plaintiff cites two cases: *Cooper v. Daniels*, 1999 WL 1441996 (Del. Super. 1999); and *Rizzi v. Mason*, 799 A.2d 1178 (De. Super. 2002). In *Cooper,* the Delaware Superior Court held that when there is uncontradicted evidence that a plaintiff suffered injury from an accident, it is inappropriate for the jury to award zero damages, regardless of the extent of the injuries.

The Delaware Supreme Court addressed this issue in *Amalfitano v. Baker*, 794 A.2d 575 (Del. 2001). The court held that uncontradicted medical evidence coupled with objective physical testing, constitutes conclusive evidence that the accident in issue caused injury to the plaintiff. *Id.* at 577. Thus, a jury is required to award some amount of damages when such conclusive evidence is established. *Id.*

Three years later, in *Rizzi*, the Delaware Superior Court took *Amalfitano* a step farther, by ordering a directed verdict in the plaintiff's favor in a factual scenario similar to the present matter. In that case there were two distinct injuries. The first was related to the accident, as shown through the uncontradicted evidence. The parties disputed whether the second injury was related to the accident. The court found that the medical evidence and the objective physical testing was unrefuted evidence that the accident caused the plaintiff's first injury. Accordingly, the court, seeking to clarify the issues for the jury, awarded a directed verdict in favor of the plaintiff on that injury.

The *Amalfitano, Cooper, and Rizzi* cases are indistinguishable from the present facts, although this case is in a different procedural posture. Given the case law in Delaware, the next logical extension is to apply *Amalfitano* at the summary judgment

stage of litigation.

In this case, plaintiff has presented evidence in the form of expert reports indicating that she is injured due to the accident, although the extent and effect of those injuries is not established. Plaintiff's expert and two defense experts indicate that her present injuries are related to the accident. All of the medical experts conclude that plaintiff's injuries are visible through x-rays.

The defense argues that Dr. Fijan's report shows that there is a genuine issue of material fact because he criticizes Dr. Brooks' opinion that plaintiff received some injury from the accident. However, his report presents no medical evidence contradicting Dr. Brooks' conclusion.[6] Such evidence is necessary for defendant to meet his burden to refute summary judgment since, whether plaintiff sustained medical injuries is directly related to causation. Thus, under *Amalfitano*, such uncontradicted evidence becomes conclusive evidence that plaintiff's injuries were caused by the accident and therefore, she is entitled to some jury award for damages.

2. Medical Expenses and Lost Wages

Plaintiff also requests judgment in her favor for admission at trial of all medical expenses and lost wages.[7] The defendant does not dispute $41,000 of plaintiff's medical expenses and the lost wages incurred for time that plaintiff was out of work following her surgery. Thus, summary judgment should be rendered in favor of plaintiff

[6]Whether such evidence would be admissible through Dr. Fijan is the subject of a motion in limine to be decided in a separate memorandum opinion.

[7]In conjunction with her motion for summary judgment, plaintiff also filed a motion *in limine* essentially on the same issue – admissibility of those amounts. *D.I.* 29. Since plaintiff references the *in limine* motion in her summary judgment motion and the two motions are clearly related, this decision shall address the *in limine* motion as well.

for the $41,000 in medical expenses and her lost wages since there is no issue of any material fact regarding those amounts.

Aetna, plaintiff's health insurance carrier, Nationwide, her automobile insurance carrier and plaintiff paid the medical expenses. Aetna had an arrangement with some of plaintiff's health care providers where, after Aetna paid the agreed upon portion of a bill, the providers would write off the remaining amount. The amount of the write-offs is $19,040.[8]

Plaintiff's motion requires a review of Delaware state law on collateral source payments. *Lomax v. Nationwide Mut. Ins. Co.,* 964 F.2d 1343, 1345 (3d Cir. 1992). The issue presented by the facts of this case is whether the collateral source rule permits a plaintiff to recover, from both a tortfeasor and a collateral source (i.e., an insurance company), when the plaintiff has paid for coverage on the loss in question. Inherent within this inquiry is whether the proper measure of damages is the amount billed or the amount paid. Neither issue has been addressed by the Delaware courts, although the Delaware Supreme Court has provided guidance through its decision in *State Farm Mut. Auto. Ins. Co. v. Nalbone*, 569 A.2d 71 (Del. 1989).

Under Delaware law, the admission of evidence that an injured party received compensation for tort-related injuries from a source other than the tortfeasor is precluded. *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964). This doctrine is based on the rationale "that a tortfeasor has no interest in, and therefore no right to benefit

[8]To date, the total amount of plaintiff's medical expenses is $64,040. Of that amount, $4,271.29 was paid by plaintiff. Apparently, there is no dispute that plaintiff is entitled to recover her out-of-pocket medical expenses.

from monies received by the injured person from sources unconnected with the defendant." *Id.* The fact that an innocent plaintiff may receive a windfall by requiring the tortfeasor to be completely responsible for his negligence is irrelevant. *Nalbone*, 569 A.2d 71 at 73. The Delaware Supreme Court has also expressed concern that a plaintiff might suffer prejudice by the jury's awareness of "double recovery." *James v. Glazer,* 570 A.2d 1150, 1151 (Del. 1990).

In *Nalbone*, the court addressed whether a plaintiff is entitled to recover from both a defendant and a collateral source, when the plaintiff did not pay any consideration to the source of the collateral payment. The court held that absent consideration, a plaintiff was not entitled to such double recovery. The court emphasized that the absence of consideration was critical to its decision.

On the extent of consideration necessary to entitle a plaintiff to double recovery, the court commented, "[i]n our view, any consideration will support recovery." Such comments, although not part of its holding in *Nalbone,* provide insight into how the Delaware Supreme Court would decide the issue if faced with the present facts.[9] *Id*. at 76.

In this case, plaintiff paid for part of the premium on her health insurance policy and the entire premium for her no-fault coverage. In light of the analysis in *Nalbone*, this court finds that the Delaware Supreme Court would allow plaintiff to present to the jury the entire amount of her medical expenses, including those costs that were written-

[9]The defendant cited numerous cases from other jurisdictions which support differing policies on the collateral source rule. As a federal court sitting in diversity, this court's function is not to choose a policy for the state courts of Delaware to adopt. Rather, this court is charged with the responsibility to predict what the Delaware Supreme Court would do if presented with similar facts.

off. Since plaintiff was partly responsible for her health insurance premiums, under Delaware's application of the collateral source rule, plaintiff, rather than defendant, should receive the benefit of Aetna's agreement with her health care providers.

Moreover, defendant does not dispute the payments made by Nationwide, plaintiff's no-fault carrier under her Maryland policy. Those payments were not subject to a similar arrangement as the health insurance payments. Therefore, the medical bills paid by Nationwide are admissible at trial as evidence of plaintiff's special damages. *Turner v. Lipschultz,* 619 A. 2d 912 (Del 1992).

Accordingly, those medical expenses exceeding $41,000 are admissible. Therefore, the total amount of plaintiff's past medical expenses is admissible, and defendant shall not be allowed to dispute the amount nor present any evidence contradicting that amount.

3. Home Improvement Costs

Although the uncontradicted evidence in this case shows that plaintiff was injured in the accident, the extent of her injuries remains a question for the jury. Since the extent of plaintiff's injuries bear on her physical capabilities and therefore, on whether she is entitled to recover for home improvement costs, in addition to other evidentiary issues, her motion for summary judgment on those expenses is denied.

IV. Conclusion

In light of the foregoing, plaintiff's motion for summary judgment (D.I. 27) is GRANTED in part, and DENIED in part. Plaintiff's motion on causation is GRANTED. Plaintiff's motion with regard to past medical expenses and lost wages is GRANTED.

As a result, plaintiff's related motion *in limine* (D.I. 29) is also GRANTED. Plaintiff's motion seeking home improvement costs is DENIED.