EVIDENCE HOT TOPICS

Judge Lynn M. Egan
Judge Edward S. Harmening

January 25, 2017

SCENARIO FACTS

- February 14, 2013: low speed car accident. No air bag deployment or damage to striking vehicle. Plaintiff's car displays only minor scratches, but he immediately complains of neck/back pain & is taken to hospital, where he is treated in ER & released. Subsequently receives extensive PT & injections from pain management specialist.

- Responding police officer interviews defendant & detects smell of alcohol & believes his eyes are bloodshot. Upon inquiry, he learns defendant was at a bar immediately prior to the accident, where he had "lunch." Defendant admits he had 1 beer with his meal. Breathalyzer records a BAC of .10 & defendant ticketed for DUI.

- Plaintiff's PI suit is stayed for over 3 years due to pending DUI case. At time of civil jury trial, plaintiff had not been seen by any physician for 17 months.

RECENT EXAM

Discovery revealed that plaintiff was returning from a visit to his chiropractor at the time of the accident, although he claims it was merely to "check in" & that he had been symptom –free for over a year. Records reveal he had a 6 year history of neck/back pain for which he treated continuously until 1 year before the accident.

MOTION: Prior to jury selection, defendant moves to prevent plaintiff from eliciting any testimony about prognosis or permanence because he has not been seen by any physician for 17 months.

Ruling?

RECENT EXAM

"The calendar alone does not determine whether the evidence should be admitted or excluded."

Decker v. Libell, 193 Ill.2d 250, 254 (2000).

Courts must consider the following factors:

- The nature of plaintiff's injury or condition
- The type of treatment received by plaintiff
- The length of time plaintiff received treatment
- The number & frequency of plaintiff's visits
- The length of time between plaintiff's last treatment & the witness' formation of opinion
- The length of time between formation of the opinion & trial
- Any other circumstances that bear on the relevance & reliability of the proposed testimony. *Id.*

RECENT EXAM

CAUTION!

Do not be misled by post-*Decker* decisions that continue to use language that suggests the time of a physician's last exam controls the admissibility of a prognosis or permanence opinion.

SAME PART OF THE BODY RULE

Defendant has no expert to testify that plaintiff's prior treatment for back pain is related to his current complaints of pain, but argues the prior history is admissible because it is easily understood by a lay jury & cites the following facts:

- *Plaintiff's current complaints are of tailbone & sacroiliac pain. It is undisputed he had chiropractic care from 2005-2011 for spinal-related conditions, primarily involving the thoracic & lumbar areas & his chiropractor previously diagnosed him with "low back pain."*
- *Plaintiff's attorney notes that the chiropractor & pain management specialist testified that his current complaints were caused by the accident with defendant.*

Ruling?

SAME PART OF THE BODY

- Prior injuries/conditions involving the same part of the body are no longer automatically relevant. Defendants will almost always need expert testimony to demonstrate lack of causation or reduce damages.

Voykin v. DeBoer, 192 Ill.2d 49, 59 (2000).

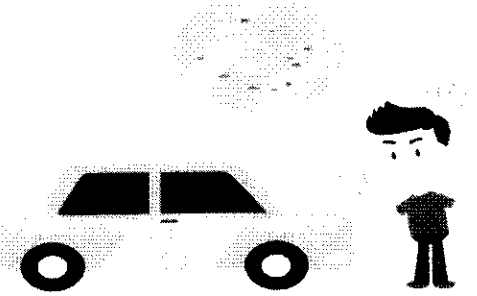
NOTE

Voykin prohibition is inapplicable if plaintiff claiming aggravation of pre-existing condition or otherwise opens the door. *Martinez v. Marten Transport, Ltd.*, *2014 IL App (1st) 131040-U, ¶ 104; Dent v. Menard, Inc., 2011 IL App (5th) 100443-U, ¶ 7.*

PHOTOGRAPHS TO PROVE LACK OF INJURY

- *Plaintiff moves to bar the use of photographs of the vehicles because defendant has no expert to testify that the minor damage means plaintiff was not injured in the accident & cites DiCosola v. Bowman, 342 Ill.App.3d 530 (1st Dist., 2003). Defendant argues no expert is necessary because jurors can understand the import of no air bag deployment, no damage to defendant's van & only minor scratches to plaintiff's car, especially because it is undisputed that defendant's speed was only 10-15 MPH at time of impact.*

Ruling?



PHOTOGRAPHS

DiCosola did NOT establish a bright-line rule requiring expert testimony in order to use photographs of vehicular damage, or the lack thereof.

Przybycien v. Liu, 2012 IL App (1st) 111854-U: There is no "rigid rule regarding the admissibility of photographs depicting vehicular damage without expert testimony."

Williamson v. Morales, 2012 IL App (1st) 110324-U: "The jury could assess the relationship between the vehicular damage & the plaintiff's personal injuries without the aid of an expert witness."

Ford v. Grizzle, 398 Ill.App.3d 639, 648 (5th Dist., 2010): "We find that a jury could assess the relationship between the damage to the vehicles & the plaintiff's injuries without the aid of an expert."

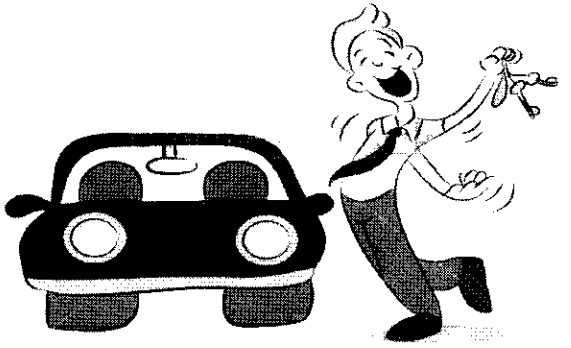
Accord, Fronabarger v. Burns & Ferro v. Griffiths

EVIDENCE OF DRINKING

Defense counsel moves to bar any evidence of Mr. Smith's drinking on the day of the accident, specifically including mention of the fact that he had "lunch" in a bar, that he admitted to drinking a single beer, that the police officer detected an odor of alcohol or that his BAC was .10.

Plaintiff responds that evidence of impairment is unnecessary because the BAC of .10 creates a statutory presumption that defendant was under the influence at the time of the accident.

Ruling?



EVIDENCE OF DRINKING

STARTING POINT: Evidence of drug or alcohol consumption is "extremely prejudicial."

- **Must** have evidence of intoxication, which is not synonymous with "under the influence." *Wade v. City of Chicago Heights, 216 Ill.App.3d 418, 434 (1st Dist., 1991)("Wade I")*

- **BAC** level above the legal limit may not be enough – even with expert support. Usually still need specific information about the driver or the events leading up to the accident. *Petraski v. Thedos, 2011 IL App (1st) 103218.*

PROMISES TO PAY MEDICAL

Defendant presents a motion in limine to prevent any evidence that his attorney in the criminal DUI case contacted plaintiff and offered to pay his medical expenses in exchange for not showing up at the criminal trial.

Ruling?

Is the result different if the offer to pay occurred in the context of the civil trial in exchange for dropping the PI claim?

PROMISES TO PAY MEDICAL

Rule 408. Compromise & Offers to Compromise

(b) Permitted Uses. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations.***Examples of permissible purposes include proving a witness' bias or prejudice; negating an assertion of undue delay; establishing bad faith; and proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical & Similar Expenses

"Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

MEDICAL RECORDS

Prior to trial, plaintiff's attorney obtained copies of Mr. Smith's medical records, along with a certification from the medical providers consistent with Illinois Rule of Evidence 902(11).

At trial, plaintiff's counsel argues that the certified medical records are sufficient to prove that plaintiff's treatment was causally related to the accident and that he does not need to call a physician to provide causation testimony.

Ruling?

MEDICAL RECORDS

Rule 902. Self-Authentication

Extrinsic evidence of authentication as a condition precedent to admissibility is not required with respect to the following:

(11) Certified Records of Regularly Conducted Activity.

This rule merely covers the ***authentication*** of medical records as business records. It does not obviate the need to establish causation. A plaintiff must still establish that the treatment/bills were causally related to the negligence, which usually requires testimony from a medically trained witness.

MEDICAL BILLS

During trial, plaintiff's attorney seeks to introduce evidence of the total amount of Mr. Smith's medical bills, even those that were "written off" by the healthcare provider, rather than paid by plaintiff or his health insurance.

He argues that no testimony about the bills being fair and reasonable is necessary because all bills were "satisfied," either because they were paid or written off.

Ruling?

MEDICAL BILLS

A "satisfied" or "adjusted" bill is not the same as a "paid" bill for foundation purposes.

As a result, if plaintiff wants to submit ALL bills to the jury, including those that have been written off, there must be expert testimony establishing that those amounts are fair and reasonable.

Klesowitch v. Smith, 2016 IL App (1st) 150414

MEDICAL BILLS

PRACTICE TIP

Follow the progress of *Manago v. County of Cook, 2016 IL App (1st) 121365, PLA granted 2016 Ill.LEXIS 1269.*

Appellate Court reversed itself after rehearing and withdrew earlier decision (2013 IL App (1st) 121365) which allowed Stroger Hospital to assert a lien against a judgment for a minor which did not include an award for medical expenses and minor's parents never assigned their Family Expense Act claim to him.

Current State of the Law: "The County cannot pursue a lien against plaintiff...as it is the parent, and not the minor, who is liable for those expenses." Thus, a lien for medical expenses flowing from treatment to a minor is only chargeable to the minor's parents.

ADMITTED EVIDENCE VS. EVIDENCE IN JURY ROOM

Even though plaintiff's medical records were admitted into evidence without objection, no witness offered any testimony about the majority of these records.

Defense counsel objects when he learns that plaintiff's attorney intends to display blow-ups of some of the medical records during closing argument and send them into the jury room while the jurors deliberate.

Ruling?

ADMITTED EVIDENCE VS. JURY ROOM

- **Section 2-1207(d)** provides that "papers read or received in evidence, other than depositions, may be taken by the jury to the jury room for use during the jury's deliberation."

- However, this is a PURELY discretionary decision for the trial judge. Even if the parties stipulated to the admission of the evidence, the trial judge may properly preclude use of it during closing arguments and deny a request to send it into the jury room during deliberations.

Kayman v. Rasheed, 2015 IL App (1st) 132631, ¶ 52-55.

POST-VERDICT REDUCTION OF MEDICAL EXPENSES

After deliberations, the jury returns a verdict in plaintiff's favor, specifically including an award of $79,000 for past medical expenses.

In a timely post-trial motion, defendant moves to reduce this amount pursuant to Section 2-1205.1, arguing that the explanation of benefits forms obtained during discovery reveal that the medical provider had previously written off $30,000 of the $79,000 in bills.

Ruling?

POST-VERDICT REDUCTION OF MEDICAL EXPENSES

- 735 ILCS 5/2-1205 & 2-1205.1 permit defendants to reduce the judgment amount for medical expenses that were paid by another source, provided they are not subject to a right of recoupment.

- However, defendants bear the burden of demonstrating the amount of reduction and must do so in a timely way. *Perkey v. Portes-Jarol, 2013 IL App (2d) 120470, ¶ 108.*

- Additionally, the statute does NOT permit reduction for medical expenses that were written off by the medical provider. *Miller v. Sarah Bush Lincoln Health Center, 2016 IL App (4th) 150728, ¶ 21.*