NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

REGINALD ECTOR AND JAMES MARK BOUDREAU, A/K/A MARK JAMES BOUDREAU, Appellants v. STEPHEN A. KING AND RICHARD KING, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 128 EDA 2012

Appeal from the Judgment Entered February 23, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): August Term, 2003 No. 4788

REGINALD ECTOR AND JAMES MARK BOUDREAU, A/K/A MARK JAMES BOUDREAU, v. STEPHEN A. KING AND RICHARD KING, APPEAL OF: STEPHEN A. KING, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 129 EDA 2012

Appeal from the Order Dated September 28, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): August Term, 2003 No. 4788

BEFORE: STEVENS, P.J.,* BOWES, and PLATT,** JJ.

MEMORANDUM BY BOWES, J.:[1] **FILED SEPTEMBER 09, 2013**

Stephen A. King appeals from the judgment entered on the jury verdict in favor of Reginald Ector and James Mark Boudreau following the denial of post-trial motions in this negligence action. Mr. Ector and Mr. Boudreau have also appealed to challenge the trial court's decision to grant Mr. King's motion for remittitur, which reduced the verdicts the jury awarded to Mr. Ector and Mr. Boudreau. We refuse Mr. King's request that we enter judgment notwithstanding the verdict as to Mr. Ector, but we do conclude that Mr. King is entitled to a new trial. In light of the award of a new trial, we need not address the remittitur issue.

Mr. Ector and Mr. Boudreau filed this negligence action against Mr. King[2] in connection with a motor vehicle accident that occurred on September 5, 2001. In their complaint, Mr. Ector and Mr. Boudreau alleged that they were traveling north in Mr. Ector's car on 7th Street in Philadelphia.

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* President Judge Stevens did not participate in the consideration or decision of this case.

** Retired Senior Judge assigned to the Superior Court.

[1] This matter was reassigned to this author.

[2] Mr. Ector and Boudreau also named Richard King as a plaintiff alleging that, at the time of the accident, Stephen A. King was acting within the scope of his employment with Richard King. The action was subsequently discontinued as to that defendant.

Mr. King's vehicle was ahead of Mr. Ector's vehicle, traveling in the same direction. Mr. Ector and Mr. Boudreau asserted that Mr. King negligently attempted to make a left hand turn onto Spring Garden Street from the right lane and struck Mr. Ector's vehicle, which was in the left lane. Emergency personnel transported Mr. Ector and Mr. Boudreau to the emergency room at Hahnemann Hospital where they were given diagnostic tests, including CAT scans. Both men were released from the hospital later that evening.

The parties initially submitted this matter to arbitration on two separate occasions. Unsatisfied with the decisions of the arbitrators, Mr. Ector and Mr. Boudreau appealed and demanded that the matter proceed to a jury trial. On May 9-11, 2011, the trial court conducted a jury trial where the following testimony was given. Mr. Ector and Mr. Boudreau presented the expert testimony of Dr. Vincent Baldino through his video deposition. The day after the accident, Mr. Ector consulted the doctor for back pain. He recommended a program of physical therapy, ice, heat, ultrasound, and pain medication for Mr. Ector's recovery. After these remedies did not alleviate Mr. Ector's pain, Dr. Baldino ordered a MRI of Mr. Ector's lumbar and cervical spine. Mr. King objected to the admissibility of the MRI results as he was never provided the actual MRI films, which had been lost. The trial court overruled Mr. King's objection and allowed Mr. Ector to present the portion of Dr. Baldino's video deposition setting forth the MRI results, which Dr. Baldino had referenced in his expert report.

Dr. Baldino stated that the results of the MRI revealed that Mr. Ector had cervical and lumbar herniations, which Dr. Baldino noted were consistent with Mr. Ector's symptoms. As a consequence, Dr. Baldino referred Mr. Ector to Dr. Glen Miller for steroid injections, which gave Mr. Ector relief for a certain amount of time, but eventually Mr. Ector's pain returned. Dr. Baldino discussed the option of surgery, but Mr. Ector decided against this option because it was not financially feasible. In his deposition, Dr. Baldino concluded that Mr. Ector's injuries were permanent and his symptoms caused a serious debilitation to his person, affecting his ability to perform daily living activities.

Mr. Ector testified that he continued to take pain medication daily. With the assistance of medication, Mr. Ector is able to sleep but cannot sit for long periods of time. He experiences pain in his back and neck that radiates down his legs to his toes. Mr. Ector reported that the pain prevents him from going to his son's football games, picking up his granddaughter, or volunteering at a local homeless shelter. He did not present evidence of lost wages as he is unemployed and receives social security/disability benefits.

Mr. Ector's passenger, Mr. Boudreau, also reported injuries from the crash. Specifically, Mr. Boudreau claimed his face hit the windshield and he lost two teeth. A few days after the accident, Mr. Boudreau also consulted Dr. Baldino for pain. After diagnosing Mr. Boudreau with a concussion, posttraumatic lumbar and cervical strain and sprain, and ribcage contusion,

Dr. Baldino prescribed physical therapy and ice treatments. Although Mr. Boudreau claims that he continued to experience cervical and lumbar stiffness, he discontinued therapy, and he did not have another appointment with Dr. Baldino until August 2004. Dr. Baldino "assumed" the pain Mr. Boudreau reported in 2004 was related to the 2001 accident. Deposition, 11/18/10, at 15. Dr. Baldino did not mention that he observed missing teeth. Mr. Boudreau's counsel claimed at trial that Mr. Boudreau's treating dentist could not testify because he was serving in Iraq. Mr. King's counsel objected to this statement of facts not in evidence. The trial court sustained the objection.

Mr. King was not present to testify in his own defense, but his counsel presented his video deposition. Defense counsel also admitted the expert testimony of Michael Brooks, M.D., through video deposition. Dr. Brooks reviewed Mr. Ector's CAT scan results and found degenerative changes in Mr. Ector's spine that resulted from long-standing wear and tear predating the accident. Dr. Brooks asserted the CAT scan showed no sign that any of Mr. Ector's disks were herniated. Although Dr. Brooks admitted that an MRI may be a more sensitive test for investigating spinal injuries, he maintained that a CAT scan is "perfectly appropriate in [an] emergency situation to exclude disc herniation." Deposition, Brooks, 10/6/10, at 45. As the MRI films had been lost, Dr. Brooks never had the opportunity to read the actual MRI films.

At the conclusion of the trial, the jury found Mr. King's negligence caused the accident and awarded Mr. Ector and Mr. Boudreau damages in the amount of $250,000 and $37,000, respectively. On May 20, 2011, Mr. King filed a motion for post-trial relief requesting judgment n.o.v. or a new trial. Mr. King thereafter, at the trial court's request, filed a second post trial motion seeking remittitur. The trial court, on September 28, 2011, denied Mr. King's first post-trial motion, but, on October 18, 2011, granted Mr. King's motion for remittitur and reduced the jury's awards to Mr. Ector and Mr. Boudreau to $50,000 and $25,000, respectively. These orders were docketed on November 9, 2011.

On October 31, 2011, Mr. Ector and Mr. Boudreau filed a motion for reconsideration of the trial court's order granting remittitur. The trial court denied that motion on November 15, 2011. On December 13, 2011, Mr. Ector and Mr. Boudreau filed an appeal from the order denying reconsideration of the grant of remittitur. On December 22, 2011, Mr. King filed a cross-appeal challenging the trial court's denial of his initial post-trial motion. On February 10, 2012, the trial court filed an opinion pursuant to Pa.R.A.P. 1925(a) indicating that it believed both appeals should be quashed

as untimely filed. However, neither appeal was untimely because the trial court never entered final judgment.[3]

As a result, on February 16, 2012, this Court entered an order *per curiam* directing the parties to praecipe the prothonotary to enter judgment on the docket. Judgment was entered on the verdict on February 23, 2012. Accordingly, we will treat the parties' appeals as if they were filed from entry of judgment. ***See*** Pa.R.A.P. 905(a) ("A notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof."); ***American & Foreign Insurance Co. v. Jerry's Sport Center, Inc.***, 948 A.2d 834, 842 (Pa.Super. 2008), *affirmed*, 2 A.3d 526 (Pa. 2010) (treating the defendant's appeal from the verdict as having been taken from the final judgment when judgment was entered after the appeal was filed).

Due to its belief that both appeals should be quashed as untimely, the trial court had not discussed the merits of this case in its 1925(a) opinion. Thus, this panel remanded to the trial court for the preparation of a supplemental opinion addressing each of the parties' claims on appeal and

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[3] The trial court's denial of post-trial motions is not the final appealable order; instead, the appeal is properly filed from judgment entered on the verdict. ***Prime Medica Associates v. Valley Forge Insurance Co.***, 970 A.2d 1149, 1154 n.6 (Pa.Super. 2009). Likewise, an appeal does not lie from the trial court's denial of reconsideration, but from the underlying judgment. ***Erie Insurance Exchange v. Larrimore***, 987 A.2d 732 (Pa.Super. 2009).

cross-appeal.[4] On March 14, 2013, the trial court filed an opinion in which it admitted that it should have granted Mr. King's post-trial motion as the jury's verdict showed no reasonable relationship to the losses allegedly suffered by plaintiffs Mr. Ector and Mr. Boudreau. Specifically it noted:

> In the case *sub judice* as pertains to Plaintiff Ector, this Court did not find him to be particularly honest or credible, based on statements he made in his prior deposition testimony. This Court also determined that Plaintiff was not entitled to economic damages since, although he testified that he was employed at the time of the accident and was unable to work after the accident, he did not present testimony showing his actual loss. Essentially, Plaintiff treated with a general practitioner for approximately four months. He did not have surgery, nor was he admitted to a hospital as an inpatient.
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> Similarly, Plaintiff Boudreau's evidence did not support such a damage award. His only claimed injuries were to five teeth. He presented no expert to support his claim, and his own testifying doctor examined Plaintiff's mouth within a week of the accident and found no sign in injury.

Trial Court Opinion, 3/12/13, at 2. For this reason, the trial court asks this Court vacate the judgment and remand the matter for a new jury trial. ***Id***. at 3.

As noted above, Mr. Ector and Mr. Boudreau appealed to challenge the trial court's decision to remit the jury verdicts in their favor to $50,000 and

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[4] Our resolution of this appeal was also delayed as the certified record sent to this Court did not contain the relevant transcripts of the trial and the depositions of the parties' expert witnesses. However, after conducting an informal inquiry into the matter and entering an order directing the trial court to obtain these documents and certify them as a supplemental record, the certified record contains the documents necessary for our review.

$25,000, respectively. In his cross appeal, Mr. King claims the trial court erred in refusing to grant his motion for judgment n.o.v. since Mr. Ector, who was subject to the limited tort option, did not sustain serious bodily injury. In addition, Mr. King asserts that the trial court should have granted him a new trial as (1) the jury's verdict was against the weight of the evidence; (2) Mr. Ector's counsel made numerous factually unsupported and prejudicial comments; and (3) the trial court improperly admitted evidence which had never been presented to Mr. King's counsel. As Mr. King's claims on cross-appeal are dispositive issues that affect our resolution of Mr. Ector and Mr. Boudreau's appeal, we review Mr. King's appeal first.

We first review the judgment n.o.v. request, which relates to Mr. Ector and whether his damages were sufficient to overcome the limited tort option applicable to him. In reviewing a trial court's denial of a motion for judgment n.o.v., our standard of review is well-established:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact. If any basis exists upon which the [court] could have properly made its award, then we must affirm the

> trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

V-Tech Services, Inc. v. Street, ___ A.3d ___, 2013 PA Super 166 (quoting ***O'Kelly v. Dawson***, 62 A.3d 414, 419 (Pa.Super. 2013)).

The pertinent facts follow. As Mr. Ector was an uninsured owner of a motor vehicle at the time of this accident, the parties agree that he was deemed to have elected the limited tort option under the Motor Vehicle Financial Responsibility Law ("MVFRL"). ***See*** 75 Pa.C.S. § 1705(a)(5) (providing that "an owner of a currently registered private passenger motor vehicle who does not have financial responsibility shall be deemed to have chosen the limited tort alternative"). The MVFRL provides that drivers subject to the limited tort option "may seek recovery for all medical and other out-of-pocket expenses, but not for pain and suffering or other nonmonetary damages unless the injuries suffered fall within the definition of 'serious injury' as set forth in the policy or unless one of several other exceptions noted in the policy applies." 75 Pa.C.S. § 1705(a)(1).

Our courts have held that the issue of whether a plaintiff suffered a "serious injury" is a question of fact for the jury. ***Robinson v. Upole***, 750 A.2d 339, 342 (Pa.Super. 2000) (citing ***Washington v. Baxter***, 719 A.2d 733, 740 (Pa. 1998)). The MVFRL defines "serious injury" as "[a] personal injury resulting in death, serious impairment of body function or permanent serious disfigurement." 75 Pa.C.S. § 1702.

In ***Washington***, our Supreme Court established a two-part inquiry to determine whether a plaintiff's injury constitutes a "serious impairment of body function":

> The 'serious impairment of body function' threshold contains two inquiries:
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> a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
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> b) Was the impairment of the body function serious? The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function. Generally medical testimony will be needed to establish the existence, extent, and permanency of the impairment.... In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. An impairment need not be permanent to be serious.

Washington, ***supra*** at 740 (citation omitted).

In ***Robinson***, ***supra***, this Court reversed a trial court's grant of judgment n.o.v. on the basis that plaintiff, who had injuries similar to those sustained by Mr. Ector, had not sustained serious bodily injury under the MVFRL. We concluded that the plaintiff had averred sufficient facts to allow the jury to determine whether the plaintiff had sustained a "serious injury" in order to recover non-economic damages. The plaintiff presented evidence that she suffered from chronic pain syndrome, fibromyalgia, and sleep impairment as a result of an accident caused by the defendant. Her expert opined that her condition was permanent, and the plaintiff represented that her pain essentially eliminated her ability to participate in recreational

activities, perform household tasks, and sleep normally. This Court found that the trial court erred in granting judgment n.o.v. in favor of the plaintiff since reasonable minds could have differed on whether she sustained a "serious injury" pursuant to the MVFRL. ***Id***. at 343; ***see also Leonelli v. McMullen***, 700 A.2d 525 (Pa. Super. 1997) (reversing trial court's entry of summary judgment when a genuine issue of material fact existed as to whether plaintiff had sustained a serious impairment of a bodily function when the plaintiff's disk bulges and herniated disk substantially interfered with her ability to participate in normal activities without pain).

When viewing the evidence in this case in a light most favorable to Mr. Ector, as the verdict winner, we find that reasonable minds could differ on whether Mr. Ector suffered a serious injury for the purposes of the MVFRL. Mr. Ector sought treatment for his injuries in the emergency room and, the day following the accident with Mr. Baldino. Although Mr. Ector followed Dr. Baldino's treatment plan of pain medication, ice, and physical therapy, these remedies did not alleviate Mr. Ector's discomfort. After MRI results revealed that Mr. Ector had herniated disks, Mr. Ector received steroid injections for the pain but avoided surgery due to financial constraints. While Mr. Ector acknowledged that pain medication helps alleviate the suffering and assists him in sleeping, he stated that his pain prevented him from sitting for extended periods of time and participating in

numerous activities. Accordingly, we conclude that the trial court correctly denied Mr. King's motion for judgment n.o.v.

Mr. King also claims the trial court should have granted his request for a new trial as 1) the jury's verdict was against the weight of the evidence, 2) the plaintiffs' attorney made several inappropriate comments at trial, and 3) the trial court allowed the admission of an expert report discussing an MRI Mr. Ector received when neither the MRI films nor the report was provided to Mr. King to review.

Our review of a weight of the evidence claim is guided by the following standard:

> Appellate review of a weight claim is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.
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> Significantly, a new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Helpin v. Trustees of University of Pennsylvania, 969 A.2d 601, 615-16 (Pa.Super. 2009) (citation and quotation marks omitted).

Moreover, when an appellant challenges a jury's determination of damages, our standard of review is limited:

> The duty of assessing damages is within the province of the jury and should not be interfered with by the court, unless it clearly appears that the amount awarded resulted from caprice, prejudice, partiality, corruption or some other improper influence. In reviewing the award of damages, the appellate courts should give deference to the decisions of the trier of fact who is usually in a superior position to appraise and weigh the evidence.
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> ***Ferrer v. Trustees of University of Pennsylvania,*** 573 Pa. 310, 825 A.2d 591, 611 (2002) [internal citations omitted]. "If the verdict bears a reasonable resemblance to the damages proven, we will not upset it merely because we might have awarded different damages." ***McManamon v. Washko,*** 906 A.2d 1259, 1285 (Pa.Super. 2006).

Helpin, ***supra*** at 616 (emphasis added).

Although the trial court denied Mr. King's motion for a new trial, on appeal the trial judge asks this Court to grant Mr. King a new trial in its supplemental 1925(a) opinion. The trial court maintains that it had always felt that the verdicts were excessive as they did not bear a reasonable relationship to the evidence Mr. Ector and Mr. King presented of their injuries. However, instead of granting Mr. King's request for a new trial, the trial judge told Mr. King to file a motion for remittitur and subsequently remitted the jury's verdicts to $50,000 and $25,000, respectively. The trial court did consistently assert that the jury's verdicts were excessive as

demonstrated in the following portion of testimony from the hearing held on Mr. King's post-trial motion:

> [Trial Court:] I think I am going to grant the remitter [sic]. I think that number that was given by the jury was way out of line for the driver, and maybe a little out of line for the passenger, but perhaps not as much.
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> And so, for the driver, I am going to set the damages at 50,000 and for the passenger at 25,000.
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> [Counsel for Mr. Ector and Mr. Boudreau:] Your Honor, if I may? An 80 percent reduction you are saying on a herniated disk documented by MRI, Judge.
>
> [Trial Court:] I heard the trial, Counsel, and I heard the person testify. And quite frankly, he wasn't, not in my mind, overly credible. I don't know but that is our status at this point.
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> But I think under the [remittitur], if it shocks your conscience -- and that amount did – you know, I think this would be, quite frankly, on the case that I heard, 50 and 25 would have been a very good verdict.

N.T., Post-Trial Motion Hearing, 10/19/11, at 9-10.

We agree with the trial court's evaluation of the appropriateness of the jury's award of damages. Mr. Ector had no wage loss or medical expenses. The award of $250,000 in pain and suffering for a person who was already disabled bears no reasonable relation to the damages suffered. Likewise, Mr. Boudreau visited a doctor once after the accident, never proved that he lost teeth, and never returned for pain treatment until three years after the 2001 accident. His expert merely assumed the 2004 pain complaint was related to the 2001 accident. This type of speculation cannot sustain a damages award. ***McMahon v. Young***, 276 A.2d 534 (Pa. 1971).

Additionally, we find the jury's verdict was improperly influenced by comments Mr. Ector and Mr. Boudreau's counsel made during closing argument. Mr. Ector's counsel essentially proposed that the jury calculate Mr. Ector's damages for pain and suffering as if compensating Mr. Ector with a minimum wage salary:

> [Counsel for Mr. Ector:] Now, in speaking about [Mr. Ector] once again, as I said, he had some different thresholds he has to prove in order to receive a verdict, but that threshold was crossed and he has exceeded it. Dr. Baldino told you how his injuries are serious and permanent. So he is entitled to compensation. He has suffered pain, discomfort, disability for 10 years and is expected to suffer the same things for another 20, 20 more years. How can you fairly compensate him?
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> Assume that living with the type of problem he has, he has a minimum wage job. Assume it's a minimum wage job. He has already suffered 10 years for this punishment, and he has 20 more years to go, and **what's a fair compensation for a minimum wage job?**
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> [Counsel for Mr. King:] Objection, Your Honor.
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> [Trial Court:] Sustained. Come on, counsel.
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> [Counsel for Mr. Ector:] **What's the fair compensation for a constant situation of pain and suffering for 30 years and equate it like I said to a minimum wage job. What's that worth[?]**
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> [Counsel for Mr. King:] Objection, Your Honor. That's not proper.
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> [Trial Court:] Overruled.

N.T. Trial, 5/10/11, at 55-56 (emphases added).

Our courts have recognized that counsel is prohibited from estimating or suggesting to the jury the amount of damages a plaintiff should receive

for pain and suffering. ***Clark v. Philadelphia College of Osteopathic Medicine***, 693 A.2d 202 (Pa.Super. 1997).

> Jurors should render their verdict on the basis of deductions from the evidence presented and not on the basis of some calculation, independently proposed and arrived at by trial counsel. In an action where damages are sought, any statement to the jury by counsel that calls the juror's attention to claims or amounts not supported by the evidence is error.

Wilson v. Nelson, 258 A.2d 657, 659-60 (Pa. 1969) (finding trial court did not abuse its discretion in refusing to grant a new trial after it required the plaintiff to withdraw from evidence a chart displaying an estimate of damages not supported by the record).

In this case, we find that it was inappropriate for Mr. Ector's counsel to give the jury his estimation of Mr. Ector's damages for pain and suffering as analogous to payment of wages for a minimum wage job. Although this speculative calculation was not supported by the record, the trial court allowed Mr. Ector's counsel to present this estimation to the jury despite objection from Mr. King's counsel. Counsel's statement called the jurors' attention to an estimation not supported by the evidence and may have improperly influenced their assessment of damages for pain and suffering for Mr. Ector. The trial court's decision to allow this argument was error.

Counsel for Mr. Ector and Mr. Boudreau also made other assertions to the jury that were not supported by the evidence. He advised the jurors that the ten year delay in bringing the case was due to his health problems when

there was no record proof of that fact. In actuality, the delay was partially attributable to the incarceration of Mr. Boudreau.

Next, counsel made an unsubstantiated assertion that Mr. Boudreau's dentist was unavailable due to service in Iraq. In this respect, we note that while Mr. Boudreau claimed that the impact of the accident caused the loss of two of his teeth, but he did not present any evidence to support this claim. Dr. Baldino, who examined Mr. Boudreau within a week of the accident, made no observation in his reports or his video deposition of any damage to Mr. Boudreau's mouth or teeth. Mr. Boudreau claimed that he consulted a dentist named Dr. Abate, who did not testify at trial. In opening statement, Mr. Boudreau's counsel tried to justify Dr. Abate's absence by telling the jury that Dr. Abate could not testify because he was serving in Iraq. Mr. King's counsel immediately objected to this comment as this fact was not in evidence. After the trial court warned Mr. Boudreau's counsel to stick to the facts of this case, Mr. Boudreau's counsel replied, "I will, Your, Honor, and **that's why [Dr. Abate] is not here**." N.T. Trial, 5/9/11, at 25 (emphasis added).

It is established that counsel may not make argument that is unsupported by the evidence. ***Millen v. Miller***, 308 A.2d 115, 117 (Pa.Super. 1973) ("The conduct of counsel in a trial should be directed toward a presentation of the issues. While counsel usually has great latitude in his closing argument, he may not present facts to the jury not in evidence

and which are prejudicial to the opposing party."). When counsel claimed that he could not present the testimony of the dentist, he implied that this dentist would have supported that teeth were lost in the accident. Meanwhile, counsel provided no verification that Dr. Abate was in Iraq.

Herein, the factual assertions lacking in proof were prejudicial to Mr. King. A doctor did not view missing teeth when he examined Mr. Boudreau after the accident. The missing dentist who supposedly would have supported this element of damages was allegedly in another country but no proof was submitted in this respect. Counsel also misrepresented the reason for the delay in trial herein by pointing to an unproven justification, his ill health, that would have engendered sympathy for him from the jury. We cannot allow a verdict to stand that resulted from improper influence. Accordingly, we find that Mr. King is entitled to a new trial.

Having reached this conclusion, we must evaluate the trial court's decision to grant remittitur of the verdicts instead of granting Mr. King a new trial. The trial court recognizes that it did not follow proper procedure in granting remittitur without giving Mr. King the opportunity to accept a remitted verdict or proceed to a new trial:

> The trial court cannot simply grant a remittitur, it can suggest or recommend one to the affected party, and, if refused, the court must grant a new trial. Once the trial court determines that the jury award is excessive under the law and articulates the reasons for its determination, the award winner has the option of accepting the recommended remittitur or, in the alternative, choosing to undergo a new trial.

Refuse Management System, Inc. v. Consolidated Recycling & Transfer System, Inc., 671 A.2d 1140, 1149 (Pa. Super. 1996). As evidenced by the initial post-trial motion and appellate brief filed by Mr. King, he sought a new trial rather than remittitur. Hence, he is entitled to that relief.

The February 23, 2012 judgment is reversed and the case is remanded for a new trial. The appeal at 129 EDA 2012 is dismissed as moot. Jurisdiction relinquished.

Judgment Entered.

Prothonotary

Date: 9/9/2013