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McElwee v. Bundy, et al

WILLIAM MCELWEE, JR., A MINOR, BY DIANE L. MCELWEE,
HIS MOTHER AND GUARDIAN, Plaintiff,
v. THOMAS BUNDY, M.D., FRANK BURNS, M.D.,
EDWARD SWARTZ, M.D., CHAMBERSBURG OB/GYN
ASSOCIATES P.C. AND CHAMBERSBURG HOSPITAL, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 1583-2000

1. Medical experts may rely upon the opinions, diagnoses, and data in medical records that are not in evidence but upon which an expert customarily relies in the practice of his profession.

2. Defendants may present evidence and cross-examine Plaintiff's experts regarding the amount of expenses actually paid by Plaintiff's parents as a result of the alleged negligence for the limited purpose of establishing actual past expenses as some indication of the anticipated future cost of Plaintiff's care.

3. Evidence regarding collateral sources that might be available to Plaintiff in the future to offset any future expense is inadmissible because there is no assurance these programs will continue to be in existence.

4. Plaintiff may offer evidence of actual costs paid by Plaintiff in the past to support his claim of his probable reasonable and necessary expenses; Plaintiff's evidence must be that of his actual costs, not what he was billed.

5. Parents of Plaintiff may not recover for medical expenses incurred during Plaintiff's minority if they are only listed in a representative capacity

6. Plaintiff may not recover for expenses incurred during his minority.

Appearances:

George S. Tolley III, Esq., *Counsel for Plaintiff*

Henry E. Dugan Jr., Esq., *Counsel for Plaintiff*

Bruce J. Babij, Esq., *Counsel for Plaintiff*

Thomas J. Finucane, Esq., *Co-Counsel for Plaintiff*

Francis E. Marshall Jr., Esq., *Counsel for Defendants Thomas Bundy, M.D., and Edward Swartz, M.D.*

Linda Porr Sweeney, Esq., *Counsel for Defendants Frank D. Burns, M.D., and Chambersburg OB/GYN Associates, P.C.*

Kevin E. Osborne, Esq., *Counsel for Defendant Chambersburg Hospital*

OPINION

Walsh, J., December 16, 2004

Before us for decision are Plaintiff's Motion in Limine as to Admissibility of Stipulated Joint Exhibit

into Evidence; Plaintiff's Motion in Limine as to Contributory Negligence, Comparative Negligence and/or Assumption of the Risk; Plaintiff's Motion in Limine as to Public Assistance; Plaintiff's Motion in Limine as to Collateral Source Evidence; Motion in Limine of Defendants Burns and Chambersburg OB/GYN (seeking to preclude Plaintiff from recovering medical expenses incurred during his minority); and Motion in Limine of Defendants Bundy and Swartz against Plaintiff's Claims for Damages Pertaining to Medical Treatment, Education and Support Incurred During the Period of Minority. The matter is set for jury trial commencing on Tuesday, January 18, 2005. In reaching its decision, the Court relied on the Motions in Limine, the record, briefs filed by the parties, and relevant law.

Procedural History

On May 9, 2000 Plaintiff initiated this lawsuit by filing a Complaint against Defendants alleging medical malpractice for mismanaging Diane McElwee's pregnancy and the birth and immediate neonatal care of William McElwee, Jr. in August of 1982. According to Plaintiff, Defendants' mismanagement caused and/or contributed to William McElwee, Jr.'s injuries, including perinatal asphyxia, hypoxic-ischemic encephalopathy, seizure disorder, and permanent brain damage.

After Defendant Chambersburg Hospital filed Preliminary Objections to Plaintiff's Complaint, Plaintiff filed a First Amended Complaint on July 10, 2000. Count 1 of the First Amended Complaint alleges Negligence against Thomas W. Bundy, M.D.; Count 2 alleges Negligence against Edward F. Swartz, M.D.; Count 3 alleges Negligence against Frank D. Burns, M.D.; Count 4 alleges the theory of Respondeat Superior against Chambersburg OB/GYN Associates, P.C. for the actions of Bundy, Swartz and Burns; Count 5 alleges Corporate Negligence against Chambersburg Hospital; Count 6 alleges the theory of Respondeat Superior against Chambersburg Hospital under Vicarious Liability; and Count 7 alleges Ostensible Agency against Chambersburg Hospital under Vicarious Liability.

On August 7, 2000 Defendant Chambersburg Hospital filed an Answer with New Matter in response to Plaintiff's First Amended Complaint. Defendants Bundy and Swartz filed an Answer with New Matter in response to Plaintiff's First Amended Complaint on August 24, 2000. Defendants Burns and Chambersburg OB/GYN Associates, P.C. filed an Answer on November 9, 2000. Plaintiff filed an Answer [sic][1] to Defendant Chambersburg Hospital's New Matter on August 28, 2000; on September 26, 2000 Plaintiff filed an Answer [sic][2] to Defendants Bundy and Swartz's New Matter.

Plaintiff and Defendants Frank Burns, M.D., Chambersburg OB/GYN, and Chambersburg Hospital filed Motions for Summary Judgment. As to Plaintiff's Motion for Partial Summary Judgment on Affirmative Defenses of Contributory Negligence, Comparative Negligence, and Assumption of the Risk, summary judgment was granted on behalf of minor Plaintiff, as a matter of law as to the issues of contributory negligence and comparative negligence, and, as to the affirmative defenses of comparative negligence and contributory negligence as to Diane McElwee's actions prior to the delivery of Plaintiff, the motion was denied. As to Frank Burns, M.D. and Chambersburg OB/GYN Associates, P.C.'s Motion for Partial Summary Judgment, the Court granted Defendants Burns and Chambersburg OB/GYN's motion as to subparagraphs f, i, j and k of paragraph 68 of Plaintiff's First Amended Complaint; if there is a dispute as to whether or not Defendant Burns did or did not participate in pre-natal care of Diane McElwee prior to August 17, 1982, those issues must be left for the jury to decide. The motion regarding Diane McElwee's claim for medical expenses was granted as barred by the applicable statute of limitations. As to Chambersburg Hospital's Motion for Summary Judgment as to Agency of Thomas W. Bundy, M.D., Frank D. Burns, M.D., and Edward F. Swartz, M.D. and Corporate Negligence, Defendant Hospital's motion regarding agency was granted as a matter of law and Defendant Hospital's motion regarding corporate negligence was denied.

The Motions

We have before us the following motions for disposition:

1. Plaintiff's Motion in Limine as to Admissibility of Stipulated Joint Exhibit into Evidence

2. Plaintiff's Motion in Limine as to Contributory Negligence, Comparative Negligence and/or Assumption of the Risk

3. Plaintiff's Motion in Limine as to Collateral Source Evidence

4. Plaintiff's Motion in Limine as to Public Assistance

5. Motion in Limine of Defendants Burns and Chambersburg OB/GYN (seeking to preclude Plaintiff from recovering medical expenses incurred during his minority)

6. Motion in Limine of Defendants Bundy and Swartz against Plaintiff's Claims for Damages Pertaining to Medical Treatment, Education and Support Incurred During the Period of Minority

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Discussion

1. Plaintiff's Motion in Limine as to Admissibility of Stipulated Joint Exhibit into Evidence

Plaintiff states that pursuant to the Pre-Trial Conference Order dated 22 October 2003, the parties collaborated and prepared a compilation of the medical records of William McElwee, Jr., which is referred to as the Stipulated Joint Medical Exhibit, on 11 November 2003. Plaintiff argues that the parties have stipulated to the authenticity and admissibility of the medical records[3] comprising the Stipulated Joint Medical Exhibit. In support of his argument, Plaintiff relies on the following language in the Court's 22 October 2003 Pre-Trial Conference Order:

> "a. The medical records of Diane McElwee and William McElwee are authentic and admissible without the need for the testimony of any Custodian of Records, treating physicians or any other individual."

Further, Plaintiff argues that the Uniform Business Records as Evidence Act, 42 Pa.C.S.A. §6108 ("UBREA")[4] governs hospital records and records from doctor's offices, making those records competent and admissible evidence at trial. He contends that, by joint operation of UBREA and the stipulation of the parties as to the authenticity of the medical records in question, the Stipulated Joint Medical Exhibit must be deemed admissible in toto. Therefore, Plaintiff claims his experts may offer opinions at trial based, at least in part, upon the opinions and diagnoses reached by William McElwee's treating physicians, as duly recorded in the medical records.

Medical records are admissible only to show the fact of hospitalization, the treatment prescribed, and the patient's symptoms; opinions and diagnoses are not admissible. Pa.R.E. 803(6).[5],[6] See also Williams v. McClain, 520 A.2d 1374 (Pa. 1987) and Commonwealth v. DiGiacomo, 345 A.2d 605 (Pa. 1975). Pennsylvania Rule of Evidence 803(6) is an exception to the hearsay rule and it is clear from the line of cases related to the admission of hospital records as business records that hospital records may be admitted under this exception to show the fact of hospitalization, treatment prescribed and symptoms given, but not medical opinions contained in those records. Primavera v. Celotex Corp., 608 A.2d 515 (Pa.Super. 1992).

The rule with respect to the admissibility of the records themselves notwithstanding, Pennsylvania law allows testifying medical expert witnesses to rely upon the opinions, diagnoses, and data in medical records that are not in evidence but upon which an expert customarily relies in the practice of his profession. Commonwealth v. Thomas, 282 A.2d 693, 698 (Pa. 1971). See also Primavera *supra* (holding that medical expert witnesses for plaintiff in asbestos product liability case were properly permitted to give opinions based in part on medical reports prepared by doctors who did not testify and were not available for cross-examination, where reports were of the type relied on by experts in the practice of their profession). Accordingly, though the medical records themselves of Diane McElwee and William McElwee Jr. are admissible only for limited purposes (i.e. fact of hospitalization, treatment prescribed, and patient's symptoms), nevertheless Plaintiff's testifying medical experts may rely upon those records in their entirety[7] provided they meet the requirements of Pennsylvania Rule of Evidence 703.[8] Specifically, Plaintiff's testifying medical experts may not act merely as conduits for offering diagnoses and opinions of physicians or experts who are not called to testify. An expert may not simply repeat another's opinion or data without bringing to bear on it his own expertise and judgment. Primavera at 521. See also Cooper v. Burns, 545 A.2d 935 (Pa.Super. 1988). However, an expert may rely on and disclose in court the sources on which he relied, whether or not those sources are admissible, as long as those sources are the same as the sources he would use in the practice of his profession.[9] Id. at 523. A medical expert is permitted to express an opinion, which is based in part on medical records not in evidence, which are customarily relied on by experts in his profession. Sheely v. Beard, 696 A.2d 214, 218 (Pa.Super. 1997).

In order for Plaintiff's testifying medical experts to base their opinions on the data, diagnoses, and opinions contained in the medical records of Diane McElwee and William McElwee Jr., Plaintiff must, as a foundational prerequisite, establish that the data, diagnoses, and opinions in those records were in fact relied upon by the testifying medical expert in coming to his own opinion. Primavera at 523. Further, Plaintiff must establish that, in addition to his testifying medical expert relying upon the data, diagnoses, and opinions in those records, that an expert in the testifying medical expert's profession customarily relies

on similar data, diagnoses, and opinions. Sheely at 218. Gratuitous reference to opinions or diagnoses which had no bearing on formulation of the testifying medical expert's opinion is extremely unacceptable and without basis in law; it may be grounds for reversible error. Cooper at 935 (Pa.Super. 1988).

2. Plaintiff's Motion in Limine as to Contributory Negligence, Comparative Negligence and/or Assumption of the Risk

Building upon their Motion for Partial Summary Judgment as to Contributory Negligence, Comparative Negligence and Assumption of the Risk, filed 9 September 2003, on which the Court reserved judgment, Plaintiff states that Defendants have produced no evidence that William McElwee, Jr. proximately caused the injuries, damages and loss in the instant case. In addition, Plaintiff asserts it is Pennsylvania hornbook law that a minor plaintiff cannot be held responsible for the negligence, if any, of his parent. Therefore, Plaintiff submits it would be unfair and prejudicial and it would confuse the issues and mislead the jury to allow Defendants, defense counsel, or any witness under direct examination or cross-examination to state in opening statement, to give testimony, to argue in closing, or, in any other way, to mention, to refer to, to argue, or to bring out in cross-examination the affirmative defenses of contributory negligence, comparative negligence, or assumption of the risk.

We decided the matter regarding contributory negligence and comparative negligence in our Opinion filed 29 December 2003. In that Opinion, we held that any negligence of Diane McElwee could not be used to reduce William McElwee, Jr.'s claims. We have no need to revisit that issue. Further, since Diane McElwee has made no claims for medical bills, etc. within the applicable statute of limitations,[10] those claims cannot now be asserted. Therefore, any issue as to Diane McElwee's contributory or comparative negligence is moot.

Plaintiff's Motion also addresses assumption of the risk, an issue this Court did not dispose of in the Summary Judgment Opinion. None of the Defendants responded to Plaintiff's motion and none of them filed a brief. It appears that none of the Defendants opposes the motion. In part based on the failure of Defendants to respond to Plaintiff's Motion and in part because we have determined that Diane McElwee has no claims involved in this case,[11] the defense of assumption of the risk is out of the case; and the Plaintiff's motion as to it will be granted.

3. Plaintiff's Motion in Limine as to Collateral Source Evidence

Based upon certain discovery requests of Defendants, which relate to public assistance programs, including but not limited to Medicaid and Social Security, Plaintiff anticipates that Defendants will attempt to elicit testimony and otherwise introduce evidence pertaining to the use and/or reliance upon public assistance and/or other entitlement programs by Plaintiff. Plaintiff suggests that Defendants' purpose in doing so would be to disparage Plaintiff before the jury by invoking insidious socio-economic stereotypes. Plaintiff argues that any testimony or evidence pertaining to collateral benefits paid or provided to Plaintiff by third parties should be precluded in conformity with the collateral source rule. In addition, Plaintiff argues that evidence or testimony pertaining to the use and/or reliance upon public entitlement programs by Plaintiff is irrelevant and otherwise so patently unfair and prejudicial as to justify its exclusion under Pennsylvania Rule of Evidence 403.[12]

The collateral source rule provides that payments from a third party collateral source shall not diminish the damages otherwise recoverable from the wrongdoer. Johnson v. Beane, 664 A.2d 96, 100 (Pa. 1995). The collateral source rule was intended to avoid precluding a claimant from obtaining redress for his injury merely because coverage for the injury was provided by some collateral source, e.g. insurance. Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp, 467 A.2d 350, 352 (Pa. 1984). Defendants have properly pointed out that where evidence of insurance is relevant to an issue in the case, Pennsylvania courts have not barred it merely because it might be prejudicial. See Price v. Yellow Cab, 278 A.2d 161 (Pa. 1971); Lenahan v. Pittston Coal Mining Company, 70 A. 884 (Pa. 1908); Jury v. New York Cent. R. Co., 74 A.2d 531 (Pa.Super 1950). In this case, Defendants may present evidence and cross-examine Plaintiff's experts regarding the amount of medical expenses actually paid by Plaintiff's parents as a result of the alleged negligence for a limited purpose: to establish actual past expenses as some indication of the anticipated future cost of Plaintiff's future care. Defendants may examine Plaintiff and/or his witnesses as to the amount of medical expenses incurred in the past so long as there is no mention at any time of third party payors that would be unfairly prejudicial to Plaintiff.[13] Further, we will not permit evidence regarding collateral sources that might be available to Plaintiff in the future to offset any future expenses because there is no assurance these programs will continue to be in existence.[14]

Plaintiff may offer evidence of actual costs paid by Plaintiff in the past to support his claim of his probable reasonable and necessary expenses. Plaintiff's evidence must be that of his actual costs, not what he was billed. In Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786 (Pa. 2001), the Court held that patient's recovery for past medical services was limited to the amount actually paid and accepted as full payment for services rendered by hospital, rather than the fair and reasonable value of the medical services. "The expenses for which a plaintiff may recover must be such as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred." Goodhart v. Penn. R.R. Co., 35 A. 191, 192 (Pa. 1896). When a plaintiff will continue to incur medical expenses, the factfinder should determine the amount of damages that will compensate the plaintiff for those expenses that are reasonably necessary to be incurred. Moorhead at 789. In Moorhead, the court stated that the reasonable value of services should be determined in accord with the Restatement (Second) of Torts, which provides:

> When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recoverable is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended to be a gift to him." Restatement (Second) of Torts, § 911 comment h (1977).

Therefore, Plaintiff may offer evidence of his actual costs paid in the past to support his claim of his probable reasonable and necessary future expenses.

4. Plaintiff's Motion in Limine as to Public Assistance

During discovery, Defendants have inquired about and obtained information concerning the payment of medical and life care expenses, which have been obtained or which may be obtained, by Plaintiff from collateral sources. Plaintiff believes Defendants intend to introduce evidence and testimony at trial that payment of Plaintiffs' injuries and damages has been and/or could be supplied by collateral sources as a means of avoiding responsibility for compensating Plaintiff for injuries and damages, including payment of future medical and life care expenses. Plaintiff submits that Pennsylvania courts traditionally exclude all collateral source evidence in personal injury litigation as irrelevant and unfairly prejudicial to the plaintiff. Therefore, Plaintiff argues that Defendants should be precluded from introducing any collateral source evidence at trial.

Specifically, Plaintiff argues that the prospective evidence and testimony of Defendants' life care planning service, Concentra Integrated Services, Inc., and its representatives at trial, is based upon evidence that Defendants seek to admit in violation of the collateral source rule and thus should be precluded. Plaintiff submits it would be unfair and prejudicial and it would confuse the issues and mislead the jury to allow Defendants, defense counsel, or any witness under direct examination or cross-examination to state in opening statement, to give testimony, to argue in closing, or, in any other way, to mention, to refer to, to argue, or to bring out in cross-examination the past or future payment of hospital expenses, medical expenses, educational, scholastic and life care expenses, etc. by collateral sources unrelated to Defendants.

As we stated above, the collateral source rule provides that payments from a third party collateral source shall not diminish the damages otherwise recoverable from the wrongdoer. Johnson v. Beane, 664 A.2d 96, 100 (Pa. 1995). The collateral source rule was intended to avoid precluding a claimant from obtaining redress for his injury merely because coverage for the injury was provided by some collateral source, e.g. insurance. Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp, 467 A.2d 350, 352 (Pa. 1984). Culpable defendants cannot use collateral source evidence to lessen or offset their liability to an injured plaintiff. The victim of a tort is entitled to the damages caused by the tortfeasor's negligence regardless of compensation the victim receives from other sources. Denardo v. Carneval, 444 A.2d 135, 141 (Pa.Super. 1982). "Clearly, the fact that an injured party has received compensation from a source other than the wrongdoer is without relevancy in a suit brought by the injured party against the wrongdoer to recover damages." Moidel v. People Natural Gas Co., 154 A.2d 399, 403 (Pa. 1959).

The Restatement (Second) of Torts, which Pennsylvania's collateral source jurisprudence generally follows, provides in Comment b to § 902(A) that "it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor .... If the benefit was a gift to the Plaintiff from a third party or established for him by law, he should not be deprived of the advantage it confers." Restatement (Second) of Torts, § 920(A), comment b (cited with approval in Moorhead at 790-91). The collateral source rule in Pennsylvania applies with equal force to all forms of collateral source benefits, regardless of whether those benefits come from a private third party, a government, a charity, etc. See Leonard Packel and Anne Bowen Poulin, Pennsylvania Evidence § 423, at

283-84 (2d ed. 1999 & 2003 Supp.).

Just as the collateral source rules applies to all forms of collateral sources, it likewise applies uniformly to collateral source benefits conferred in the past and collateral source benefits that may be conferred in the future. For the reasons set forth above, the collateral source rule precludes the introduction of evidence regarding potential future sources of collateral benefits. In addition, we do not believe Defendants would be able to produce reliable evidence that Plaintiff will, with certainty, receive any governmental, charitable, gratuitous, or other future benefits. As the court in Cates v. Wilson, 361 S.E.2d 734, 737-38 (N.C. 1987), persuasively stated, "While some programs maintain more stability than others, injured plaintiffs cannot count on their continued availability." The Court notes that the survival of governmental, and some charitable programs, depends in large part on political processes, societal support, and budgets beyond the authority of this Court or these parties and incapable of reliable prediction. A mere possibility that Plaintiff may receive such benefits in the future shall not be sufficient to relieve Defendants of any liability. See Nigra v. Walsh, 797 A.2d 353 (Pa.Super. 2002) (holding that motorist violated collateral source rule by informing or suggesting to jury that passenger was receiving social security disability benefits for the same injuries at issue in his personal injury action, and because it was impossible to determine what effect this violation had on the jury, new trial was warranted).

Therefore, the collateral source rule precludes Defendants from offering testimony and evidence at trial concerning the benefits and services conferred on Plaintiff, or that will be or may be or might be conferred on Plaintiff, from any governmental programs, charitable groups, gratuitous services, or any other collateral sources.

5. Motion in Limine of Defendants Burns and Chambersburg OB/GYN (seeking to preclude Plaintiff from recovering medical expenses incurred during his minority)

In paragraph 70 of Plaintiff's First Amended Complaint, Plaintiff alleges "as a result of the negligence of the Defendant, Frank D. Burns, M.D., the Plaintiff, and his mother and Guardian on his behalf, have been required to incur great expenses for medical care, hospitalizations, and rehabilitation services which were and will be provided to him in the treatment of the injuries and damages which he sustained." In their Answer to Plaintiff's First Amended Complaint, Defendants Burns and Chambersburg OB/GYN deny this allegation. Further, in their Motion, they assert that under Pennsylvania law a personal injury to a minor gives rise to two separate and distinct causes of action: (1) the parents' claim for medical expenses and loss of the minor's services during minority and (2) the minor's claim for pain and suffering and losses after minority. Defendants state that Plaintiff's parents have not asserted an individual claim for reimbursement for medical expenses incurred during Plaintiff's minority and that such a claim, were it to be made, is held exclusively by Plaintiff's parents. Therefore, Defendants argue that since Plaintiff is not entitled to recover the medical expenses incurred during his minority and his parents did not bring a claim for reimbursement of those medical expenses, Plaintiff should be precluded from recovering the medical expenses incurred during his minority.

Personal injury to a minor gives rise to two separate and distinct causes of action in Pennsylvania: [1] the parents' claim for medical expenses and loss of the minor's services during minority and [2] the minor's claim for pain and suffering and losses after minority. Hathi v. Krewstown Park Apartments, 561 A.2d 1261, 1262 (Pa.Super. 1989). Plaintiff is not entitled to recover medical expenses incurred during his minority; only his parents may bring a claim for those medical expenses. Id. "[T]he law is clear that a minor may not recover for medical expenses incurred during his minority, and that such a claim rests solely with the parent." Rodemyer v. Memorial Hospital, (Ct. Com. Pl. York County Docket No. 97-SU-04723-01). The law provides for the parents of the injured minor child to recover medical expenses incurred during the child's minority because the law obligates parents to provide necessities, including medical treatment, education, and support, for their children during the children's minority. Kern v. Peck, et al. (M.D.Pa. Docket No, 4:CV-98-0149). The law, formerly rooted in the belief that a parent owned a child, remains good law, though the reason supporting it has changed. Id. To hold that the child may recover these costs would be to hold that the child would incur these expenses and the idea of imposing such expenses on minors goes against public policy. Id. Accordingly, claims for the costs of providing these necessities to their minor children accrue to the parents and not directly to the minor children to whom the necessities were provided. The minor has no cause of action for these items.

Here, Plaintiff is not entitled to recover for medical expenses incurred during his minority. When the parent of the plaintiff is listed only in a representative capacity, he or she may not assert a claim for medical expenses incurred during the plaintiff's minority. Rodemyer. Neither of Plaintiff's parents has brought suit individually and in their own capacities, as a party in this case, nor have Plaintiff's parents brought a claim for reimbursement of those medical expenses; any such claim is now barred by the statute of limitations. Therefore, Plaintiff is precluded from recovering the medical expenses incurred during his

minority.

6. Motion in Limine of Defendants Bundy and Swartz against Plaintiff's Claims for Damages Pertaining to Medical Treatment, Education and Support Incurred During the Period of Minority

In paragraph 70 of Plaintiff's First Amended Complaint, Plaintiff alleges "as a result of the negligence of the Defendant, Frank D. Burns, M.D., the Plaintiff, and his mother and Guardian on his behalf, have been required to incur great expenses for medical care, hospitalizations, and rehabilitation services which were and will be provided to him in the treatment of the injuries and damages which he sustained." Defendants Bundy and Swartz assert that only Plaintiff's parents may make a claim for damages pertaining to medical treatment, education, and support for Plaintiff incurred during Plaintiff's minority and that no such claim has been made. In addition, Defendants state any such claim would be barred by the statute of limitations.

Plaintiff is precluded from recovering the medical expenses incurred during his minority based on the reasoning outlined in subsection 5 above.

Conclusion

Based on the above, the Court reaches the following conclusions:

As to Plaintiff's Motion as to Admissibility of Stipulated Joint Exhibit, the Stipulated Joint Medical Exhibit is admitted. Further, expert witnesses in this matter may express opinions based, at least in part, upon the opinions and diagnoses contained within those records, provided that, as a foundational prerequisite, Plaintiff establishes that the data, diagnoses, and opinions in those records were in fact relied upon by the testifying medical expert in coming to his own opinion and that an expert in the testifying medical expert's profession customarily relies on similar data, diagnoses, and opinions.

As to Plaintiff's Motion related to Contributory and Comparative Negligence and Assumption of the Risk, Defendants and/or their counsel and/or any witness on direct or cross-examination shall not be allowed to state in opening statement, to give testimony, to argue in opposing argument, to introduce into evidence or, in any other way, to mention, to refer to, to argue, or to bring out in cross-examination the affirmative defenses of contributory negligence, comparative negligence, or assumption of the risk.

As to Plaintiff's Motion regarding Public Assistance, Defendants and/or their counsel and/or any witness under direct examination or cross-examination shall not be allowed to state in opening statement, to give testimony, to argue in opposing argument, to introduce into evidence or, in any other way, to mention, to refer to, to argue, or to bring out in cross-examination any reference to the use and/or reliance upon public assistance or entitlement programs by Plaintiff and/or his parents.

As to Plaintiff's Motion regarding Collateral Source Evidence, Defendants and/or their counsel and/or any witness under direct examination or cross-examination shall not be allowed to state in opening statement, to give testimony, to argue in opposing argument, to introduce into evidence or, in any other way, to mention, to refer to, to argue, or to bring out in cross-examination the past or future collateral source benefits to Plaintiff, including such benefits or services for past or future payment of hospital expenses, medical expenses, vocational expenses, educational expenses, and/or life care expenses to Plaintiff.

As to Defendants' Burns and Chambersburg OB/GYN Motion to Preclude Plaintiff from Recovering Medical Expenses Incurred During His Minority, Plaintiff is not entitled to recover for medical expenses incurred during his minority.

As to Defendants' Bundy and Swartz' Motion Against Plaintiff's Claims for Damages Pertaining to Medical Treatment, Education and Support Incurred During the Period of Minority, Plaintiff is not entitled to recover for medical expenses incurred during his minority.

ORDER OF COURT

Now this 16th day of December 2004, the Court having reviewed the motions and briefs of the parties and the applicable law, it is hereby ordered that:

1. As to Plaintiff's Motion in Limine as to Admissibility of Stipulated Joint Exhibit into Evidence, the Motion is granted. Expert witnesses in this matter may express opinions based, at least in part, upon the opinions and diagnoses contained within those records, provided that, as a foundational prerequisite, Plaintiff establishes that the data, diagnoses, and opinions in those records were in fact relied upon by the testifying medical expert in coming to his own opinion and that an expert in the testifying medical expert's profession customarily relies on similar data, diagnoses, and opinions.

2. As to Plaintiff's Motion in Limine as to Contributory Negligence, Comparative Negligence and/or Assumption of the Risk, the Motion is granted.

3. As to Plaintiff's Motion in Limine as to Public Assistance, the Motion is granted.

4. As to Plaintiff's Motion in Limine as to Public Assistance, the Motion is granted.

5. As to Motion in Limine of Defendants Burns and Chambersburg OB/GYN (seeking to preclude Plaintiff from recovering medical expenses incurred during his minority), the Motion is granted.

6. As to the Motion in Limine of Defendants Bundy and Swartz against Plaintiff's Claims for Damages Pertaining to Medical Treatment, Education and Support Incurred During the Period of Minority, the Motion is granted.

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[1] We assume that Plaintiff was actually replying to the respective Defendants' New Matter. *See* Pa.R.C.P. 1017.

[2] We assume that Plaintiff was actually replying to the respective Defendants' New Matter. *See* Pa.R.C.P. 1017.

[3] Plaintiff refers to scholastic records as part of the Stipulated Joint Medical Exhibit at least twice in his Motion. The Stipulated Joint Medical Record contains scholastic records in Binder VI, making it something of a misnomer. None of the parties made any arguments related to these scholastic records. Therefore, our ruling regarding the Stipulated Joint Medical Exhibit addresses only medical records.

[4] UBREA provides:

(a) Short title of section.--This section shall be known and may be cited as the "Uniform Business Records as Evidence Act."
(b) General Rule.--A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

(c) Definition.--As used in this section **"business"** includes every kind of business, profession, occupation, calling, or operation of institutions whether carried on for profit or not.

[5] Pennsylvania Rules of Evidence 803(6) provides:

(6) Records of Regularly Conducted Activity
A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

[6] The Comment to Pennsylvania Rule of Evidence 803(6) states:

".Pa.R.E. 803(6) does not include opinions and diagnoses."

[7] Plaintiff's testifying medical experts may rely on those portions of the record not in evidence as long as they would customarily rely upon them in the practice of their profession.

[8] Pennsylvania Rule of Evidence 703 states in full:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions of inferences upon the subject, the facts or data need not be admissible in evidence."

[9] The Court in Primavera, quoted from the Advisory Committee's Note to Federal Rule of Evidence 703, stating:

"[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety including **statements** by patients and relatives, **reports** and **opinions** from nurses, technicians and other doctors, hospital records, and X-rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." (emphasis original)

[10] See Section D, subsections 5 and 6 of this Opinion.

[11] See Section D, subsections 5 and 6 of this Opinion.

[12] Pennsylvania Rule of Evidence 403 provides:

Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[13] Defendants Bundy and Swartz filed a Brief against the Plaintiffs' Motion in Limine Pertaining to Future Benefits Available to the Plaintiff. We find the positions taken by Defendants Bundy and Swartz untenable. Their argument that Plaintiff has a duty to mitigate damages entirely misses the mark in the context of this issue. Therefore, argument of Defendants Bundy and Swartz that evidence of the availability of publicly funded programs should be presented to the jury in order to maintain Pennsylvania's policy of limiting damages fails. Further, and just by way of comment, we found insinuated deep in the bowels of Defendants Bundy and Swartz' brief a "motion" for bifurcation of the trial. Seeking such relief in as unorthodox a manner as this is not acceptable and doesn't meet the standards of good practice. We think counsel should know better. In any event, the matter was addressed at one or both of the pre-trial conferences in this case and we will decline to discuss it further here other than to remind counsel that bifurcation is not going to happen.

[14] See subsection 4 below.