



the plaintiff. Damages were assessed in the amount of \$100,000, which was molded accordingly for an award of \$75,000.00.

Following the trial, both parties filed timely post trial motions. Defendant filed a motion seeking judgment notwithstanding the verdict or, in the alternative, a new trial. Plaintiff filed a motion seeking delay damages pursuant to Rule 238 of the Pennsylvania Rules of Civil procedure. After briefs were submitted and argument was heard thereon, the defendant's motion was denied and plaintiff's was granted. These will be discussed in turn.

Defendant raises several arguments in support of his motion for post trial relief. Initially, defendant argues that plaintiff's case should have been dismissed for failure to substitute a legal party defendant before this matter was called to trial. On December 29, 2000, the named defendant, Agostino DeCicco, died. Pennsylvania Rule of Civil Procedure 2352 provides that a successor in interest may become a party to a pending action upon the filing of a statement of the material facts upon which the right of substitution is based. No time limits are set forth in the rule. In the instant matter, a Suggestion of Death was not filed by defense counsel until April 23, 2001. On May 21, 2001, prior to trial, plaintiff filed a petition with the Register of Wills, and an estate was raised on behalf of defendant, Agostino DeCicco. Letters of Administration Pendente Lite were issued the same day. Trial commenced on the next day, May 22, 2001. In light of the above, and in consideration of Rule 1033, which provides that pleadings may be amended at any time with leave of court, the case was properly allowed to proceed.

Next, defendant argues that the court improperly limited the cross-examination of plaintiff's expert, Christopher Boucher, D.C. A reversal based on an erroneous evidentiary ruling is warranted only where the ruling has caused actual prejudice. Aldridge v. Edmunds, 561

Pa. 323, 750 A.2d 292 (2000). The examination which was curtailed was during voir dire on Dr. Boucher's qualifications, and concerned types of treatment allowed to chiropractors by law. Such limits were proper. Even if the limitations were to be held in error, any such error would be harmless, as there was no claim made for medical bills, including those from the witness. Plaintiff has failed to demonstrate any actual prejudice. A new trial is not warranted on this ground.

Third, defendant claims a new trial is warranted because the court erred in rejecting defendant's proposed jury instructions numbers 18 and 19. To be granted a new trial based on an erroneous charge a plaintiff must show that the trial court either abused its discretion or committed an error of law that controlled the outcome of the case. Stewart v. Motts, 539 Pa. 596, 654 A.2d 535 (1995). The charges will be found adequate unless the issues are not made clear to the jury, or the judge's instructions palpably misled the jury, or there is an omission in the charge which amounts to fundamental error. Id. In addition, in determining the adequacy of a charge an appellate court must review the trial court's jury instructions in their entirety. Wilson v. Anderson, 616 A.2d 34, 36, 420 Pa. Super. 169 (1992). The rejected points for charge concerned plaintiff's specific acts as they pertained to contributory negligence. The court rejected these in favor of the standard jury instructions on comparative negligence which included no references to the facts of this case. A new trial is not warranted on this ground.

Defendant next argues that he entitled to a new trial because the jury's verdict was against the weight of the evidence, and was based on speculation and conjecture. When reviewing a jury's verdict, the evidence must be viewed in the light most favorable to the verdict winner. Boutte v. Seitchik, 719 A.2d 319 (Pa. Super. 1998). A jury's determination is not to be disturbed

as long as there is sufficient evidence on the record to support it. Fannin v. Cratty, 331 Pa. Super. 326, 480 A.2d 1056 (1984). It is the province of the jury to determine the credibility of each witness. Commonwealth v. Glover, 399 Pa. Super 610, 582 A.2d 1111 (1990). The jury may decide to accept all, some or none of a witness's testimony. Commonwealth v. Purcell, 403 Pa. Super. 342, 589 A.d. 217 (1991). The jury heard two witnesses testify as to how the accident occurred. They also heard medical testimony concerning plaintiff's injuries as well as plaintiff's own testimony as to his injuries. In light of the fact that the jury apportioned negligence between the parties, it is clear that they listened to and weighed all the testimony. The verdict should not be disturbed.

Defendant asserts that if a new trial is not granted, then a remittitur is appropriate, arguing that the verdict was excessive. The assessment of damages is peculiarly within the province of the jury, and the jury's award will not be set aside unless it is clearly based on partiality, prejudice or passion. Haines v. Raven Arms, 536 Pa. 452, 640 A.d. 367 (1994). The amount awarded must not only be larger than that which the court would have awarded, but so excessive as to shock the conscience of the court. Bennyhoff v. Pappert, 790 A.d. 313 (Pa. Super. 2001). In this case, the jury heard evidence from the plaintiff describing the injuries he sustained, which if believed, support the damages awarded. Remittitur is not warranted.

Finally, having found that the verdict was supported by the evidence, we turn to plaintiff's motion for delay damages pursuant to Pa.R.C.P. 238. This rule provides for damages for delay from one year after service of the complaint until either a written offer of settlement or the date of the jury verdict. Here, no written offer was made. The complaint was served on

December 8, 1999. Hence plaintiff is entitled to delay damages from December 8, 2000 until May 24, 2001, in the amount of \$3,534.24<sup>1</sup>.

For all of the above reasons, the post trial motions of both parties were properly decided and judgment as entered on February 19, 2002, in favor of plaintiff in the amount of \$78,354.24, should be affirmed.

By the Court:

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Myrna Field, A.J.

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<sup>1</sup> The award was calculated as follows: 23 days in 2000 at the annual rate of 9.5 % plus 143 in 2001 at the annual rate of 10.5% :  $([23/366] \times 9.5\% \times \$75,000 = \$448.97 ; 9[143/365] \times 10.5\%) \times \$75,000 = \$3,085.27; \$448.97 + \$3,085.27 = \$3,534.24$