

[Cite as *Vespoli v. Encompass Ins. Co.*, 2010-Ohio-5359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94305

DAVID VESPOLI

PLAINTIFF-APPELLANT

vs.

ENCOMPASS INSURANCE CO.

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-647446

BEFORE: Sweeney, J., Gallagher, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 4, 2010

ATTORNEYS FOR APPELLANT

Joseph W. Diemert, Jr.
Daniel A. Powell
Joseph W. Diemert, Jr. & Associates Co.
1360 S.O.M. Center Road
Cleveland, Ohio 44124

ATTORNEYS FOR APPELLEE

Thomas M. Coughlin, Jr.
Ritzler, Coughlin & Paglia, Ltd.
1360 East Ninth Street
1000 IMG Center
Cleveland, Ohio 44114

Rebecca L. Campbell
55 Public Square, Suite 1331
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, David Vespoli (“Vespoli”), appeals following judgment on his claim for underinsured motorists’ benefits against his automobile insurer, Encompass Insurance Company (“Encompass”). The gravamen of Vespoli’s appeal concerns the trial court’s order that granted Encompass’s motion in limine to exclude all evidence relating to his shoulder injury. For the reasons that follow, we reverse and remand.

{¶ 2} In 2005, Vespoli sustained injuries in an automobile accident. Encompass contracted to provide Vespoli with uninsured motorists benefits and which is the a basis of this lawsuit.

{¶ 3} On April 14, 2009, Vespoli deposed his expert witness, Dr. Fetterman, M.D., by videotape and intended to introduce this testimony at trial. During the deposition, Dr. Fetterman opined that the March 17, 2005 accident proximately caused Vespoli to suffer multiple injuries; among them a left shoulder injury. Initially, Dr. Fetterman testified that the tear found in Vespoli's left shoulder was possibly caused by the accident. Later, Dr. Fetterman testified, within a reasonable degree of medical certainty, that Vespoli did suffer a shoulder injury on March 17, 2005 that worsened a degenerative condition in his left shoulder.

{¶ 4} On July 10, 2009, Encompass filed a motion in limine to exclude all evidence relating to the injury, care, and treatment of appellant's left shoulder. Encompass argued that the plaintiff could not produce expert testimony that this injury was proximately caused by the automobile collision. Encompass maintained that Dr. Fetterman's testimony merely established a definite possibility that the auto accident caused the left shoulder injuries.

{¶ 5} Appellant opposed Encompass's motion in limine and also requested leave to clarify Dr. Fetterman's testimony or obtain additional

expert evidence on the issue of causation. Appellant referred the trial court to Fetterman's testimony that stated an opinion, based upon a reasonable degree of medical certainty, that Vespoli suffered a left shoulder injury on March 17, 2005. Specifically Fetterman opined that Vespoli's chronic left shoulder injury was made worse by "his left shoulder injury" suffered on March 17, 2005.

{¶ 6} The trial court granted Encompass's motion. It did not rule on appellant's request for leave to clarify or obtain additional expert testimony.

{¶ 7} Appellant then moved the court to dismiss his case without prejudice. He argued that the exclusion of evidence of his shoulder injury would deprive him of full compensation for his injuries. The court denied this motion.

{¶ 8} The case was then re-assigned to a visiting judge for trial where the court declined to reconsider the prior judge's ruling that had granted Encompass's motion in limine. The visiting judge believed that he did not have authority to re-visit the earlier ruling. He stated that he was "bound by the ruling of the trial judge that had the file before [he] had it."

{¶ 9} The parties waived their right to a jury trial and proceeded to a bench trial before the visiting judge.

{¶ 10} At trial, the court heard the redacted testimony of Dr. Fetterman and the testimony of appellant. Appellant proffered evidence concerning his

shoulder injury. At the conclusion of the trial, the court entered judgment for appellant for \$15,000.

{¶ 11} In his first assignment of error Vespoli contends that the trial court erred by granting the motion in the first instance and that the visiting judge who was assigned to try the case erred by excluding proffered evidence of his left shoulder injury on the belief that the preliminary ruling on the matter was binding. Finding merit to his primary assigned error, we reverse and remand for further proceedings.

{¶ 12} In this case, the trial court preliminarily excluded all evidence of appellant's shoulder injury. At trial, appellant proffered evidence of the injury and the treatment he obtained. The court specifically asked counsel, "[d]o you have opinion evidence anywhere in the record that ties the proximate cause basis, ties the accident to the left shoulder surgery?" But ultimately, the trial court declined to admit the evidence with the belief that he was bound by the previous judge's ruling on the motion in limine. This was error. The trial judge was incorrect when he suggested that he was bound by his predecessor's ruling on the motion in limine.

{¶ 13} A motion in limine is a preliminary ruling. *Pena v. N.E. Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 108, 670 N.E.2d 268; *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 4, 573 N.E.2d 32. The trial court is

free to change its ruling on the disputed evidence in its actual context at trial. Id.

{¶ 14} “[A] proponent who has been temporarily restricted from introducing evidence by virtue of a motion in limine, must seek the introduction of the evidence by proffer or otherwise at trial in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal.” *Collins v. Storer Communications, Inc.* (1989), 65 Ohio App.3d 443, 584 N.E.2d 766; *State v. Grubb* (1986), 28 Ohio St.3d 199, 503 N.E.2d 142. Id.

{¶ 15} Accordingly, when Appellant proffered evidence of his shoulder injuries (which had been excluded by virtue of the preliminary ruling on Encompass’s motion in limine), the court was enabled to make the final determination as to its admissibility. Instead of exercising its independent discretion, the trial court declined to admit the evidence solely upon its mistaken belief that it was “bound” by the prior ruling.

{¶ 16} Dr. Fetterman did testify that appellant’s shoulder injury was caused by the collision and he confirmed that his opinion was stated within a reasonable degree of medical certainty. Expert evidence of causation must be expressed in terms of a probability. *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 504 N.E.2d 44. While Dr. Fetterman’s earlier testimony was that the tear found in Vespoli’s shoulder was *possibly*

caused by the accident, his later testimony stated his opinion (within a reasonable degree of medical certainty) that Vespoli did suffer a shoulder injury on March 17, 2005 that made his degenerative condition in that shoulder worse.

{¶ 17} The trial court erred by excluding all evidence of relating to shoulder injury and/or treatment and erred by declining to reconsider the admission of this evidence upon the erroneous belief that it was bound by the prior ruling on the motion in limine. The first assignment of error is sustained, which renders the remaining assigned errors moot.

Judgment reversed and remanded for a new trial concerning appellant's alleged shoulder injuries.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR

