[Cite as *Rericha v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-1480.]

IN THE COURT OF CLAIMS OF OHIO

MICHAEL RERICHA, et al. Plaintiffs v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al. Defendants	Case No. 2019-01000JD Judge Lisa L. Sadler Magistrate Robert Van Schoyck DECISION

{¶1} Plaintiff, Michael Rericha (Michael), brought this action alleging negligence, vicarious liability, and negligent entrustment claims, and Plaintiff, Karen Rericha (Karen), brought this action alleging loss of consortium claims, against Defendant, Ohio Department of Rehabilitation and Correction (ODRC). Defendant, Office of Risk Management (ORM), was added to this case pursuant to the December 12, 2019 Order of the Magistrate. Collectively, the Court will refer to Michael and Karen as Plaintiffs and ODRC and ORM as Defendants. The case was tried before a Magistrate. On May 26, 2023, the Magistrate issued a Decision, in which he recommended judgment in favor of Plaintiffs in the total amount of $945,491.56, with Michael entitled to $795,466.56 and Karen entitled to $150,000.00, which included the $25.00 filing fee paid by Plaintiffs.

{¶2} Defendants timely filed their Objections to the Decision of the Magistrate that are now before the Court for consideration. A full transcript of the proceedings has been provided.[1] For the reasons set forth below, the Court overrules Defendants' Objections.

Standard of Review

[1] Volume 1 and Volume 3, which are transcriptions of in-court testimony, appear on the Court's docket and Volume 2, which consists of videotaped deposition testimony, was already part of the record. (Defendants' June 23, 2023 Notice of Filing the Trial Transcript).

{¶3} "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision * * *." Civ.R. 53(D)(3)(b)(i). Objections "shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). "An objection to a factual finding, whether or not specifically designated as a finding of fact * * *, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding * * *." Civ.R. 53(D)(3)(b)(iii).

{¶4} The court "shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). In reviewing the objections, the court does not act as an appellate court but rather conducts "a de novo review of the facts and conclusions in the magistrate's decision." *Ramsey v. Ramsey*, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, ¶¶ 16-17. However, "[i]f an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate's factual findings and limit its review to the magistrate's legal conclusions." *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 13. "Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification." Civ.R. 53(D)(4)(b).

Factual Background and Procedural History

{¶5} The Court has conducted an independent review of the testimony, evidence, and case history, and states its findings, in relevant part, as follows for purposes of resolving Defendant's pending objections.

{¶6} On October 26, 2017, Michael was operating a motor vehicle, owned by his employer Acorn Stairlifts, traveling on Interstate Route 80, when he was rear-ended by a motor vehicle owned by ODRC and operated by an employee of ODRC, Brian Hill (hereinafter "first collision"). After the first collision, Michael drove himself home and upon arrival was experiencing shakiness, left knee pain, left shoulder pain, and low back pain. Michael drove to the emergency room the following morning with complaints of headache, left knee pain, left shoulder pain, low back pain, and neck pain. Michael was examined by Dr. Francis Mencl, an attending emergency room physician, at Lodi Community Hospital. Dr. Mencl examined Michael but did not order any imaging. Dr. Mencl

diagnosed Michael with a cervical (neck) strain, an injury to the soft tissues and muscles, and discharged him with muscle relaxers and recommended over-the-counter pain medication. Dr. Mencl recommended that Michael return or seek other medical attention should his pain continue. Michael returned to work after missing 3-4 days, and though not placed on restrictions, required Karen's help for at least one work appointment. Michael's symptoms worsened to the point where he scheduled a consultation at Advanced Spine Joint and Wellness for November 9, 2017.

{¶7} However, on November 8, 2017, Michael was operating a motor vehicle, owned by his employer Acorn Stairlifts, and while stopped at a red light he was rear-ended by a non-party to this case, Pauline Dolph (hereinafter "second collision"). Michael was transported by emergency services from the scene of the second collision to the hospital for evaluation. Michael was experiencing neck pain, lower back pain, and left knee pain. Michael had x-rays of his lumbar spine, cervical spine, and left knee. At the emergency room, Michael was diagnosed with a neck strain, back strain, and left knee contusion. Michael was discharged with medication and recommended not to return to work until following up with his primary care physician or another physician.

{¶8} After moving his November 9, 2017 appointment at Advanced Spine Joint and Wellness because of the second collision, Michael followed up with Advanced Spine Joint and Wellness on November 10, 2017, with ongoing neck pain, low back pain, and left knee pain. Although Advanced Spine Joint and Wellness referred Michael to a pain management specialist, Michael found his own pain management specialist who diagnosed him with spondylosis. Michael also visited his primary care physician, who referred him to a sports medicine specialist.

{¶9} Michael's symptoms worsened, and he developed tingling in his extremities. After visiting an orthopedist, Michael was recommended for fusion surgery in the cervical spine. Michael underwent a series of procedures including, but not limited to, cervical fusion, epidural injections, lumbar decompression, and resultant physical therapy. However, Michael, still having complications, sought further opinions from different medical providers. Michael underwent a subsequent cervical spine surgery and was also diagnosed with myelomalacia, which is a softening of the spinal cord. Michael also underwent a subsequent lumbar spine surgery. At the time of trial, Michael was still

suffering from primarily lower back pain, and will require future medical procedures. Michael receives Medicare and Social Security benefits.

{¶10} Prior to these collisions, Michael was active and involved in many hobbies and activities, including horsemanship, gardening, woodworking, cooking, and golfing. Michael had a previous motor vehicle collision in 1994 and a previous cervical spine discectomy and fusion but had fully recovered before these collisions. Michael, however, did have some degenerative disc disease in the cervical spine and lumbar spine prior to the collisions.

{¶11} Michael and Karen are married and have been living together for approximately 30 years. Michael and Karen's lives changed after the collisions and the couple has suffered romantically and interpersonally. Because Michael was unable to work or sustain household chores, Karen became the sole breadwinner and homemaker. Moreover, Karen served as caretaker for Michael during his recovery. To assist in Michael's recovery, Michael and Karen sold their multi-story home so they could purchase a one floor model for Michael's ease of movement.

{¶12} Michael was also in the course and scope of his employment with Acorn Stairlifts at the time of each collision. Michael had been employed at Acorn Stairlifts for a few weeks prior to the collisions. Michael returned to work after the first collision, but he never returned to work after the second collision.

{¶13} Plaintiffs filed two separate Motions for Summary Judgment, which the Court denied in its June 27, 2022 Entry Denying Plaintiffs' Motions for Summary Judgment. One Motion sought summary judgment on indivisibility of harm as Plaintiffs allege both motor vehicle collisions were a substantial factor in causing harm to Michael, but the Court determined that a genuine issue of material fact existed as to whether Defendants' negligence was a substantial factor in causing harm to Michael. (June 27, 2022 Entry Denying Plaintiffs' Motions for Summary Judgment, pp. 2-4). The other Motion sought summary judgment claiming Defendants were not entitled to a R.C. 2743.02(D) setoff of underinsured motorist insurance proceeds from the second collision, but the Court denied the Motion determining that the question of apportionment of damages remained to be determined at trial. (June 27, 2022 Entry Denying Plaintiffs' Motions for Summary Judgment, pp. 4-5).

{¶14} As a threshold matter, the parties stipulated Defendants' liability, which left only causation and damages for trial. (*See* May 26, 2023 Decision of the Magistrate, p. 24). After presentation of evidence, the Magistrate held that Plaintiffs were each entitled to damages and concluded that Plaintiffs "demonstrated by a preponderance of the evidence that the conduct of each tortfeasor in the first and second collisions was a substantial factor in producing his harm," which denotes a single indivisible injury. (May 26, 2023 Decision of the Magistrate, pp. 24-29). Moreover, the Magistrate found that "the evidence does not demonstrate that the harm produced by [Defendant ODRC's] employee and by Dolph is capable of apportionment." (May 26, 2023 Decision of the Magistrate, pp. 29-30). Accordingly, the Magistrate conducted a damages analysis, including applying insurance collateral source setoffs in R.C. 2743.02(D), which resulted in an award being recommended in the total amount of $945,491.56, with Michael entitled to $795,466.56 and Karen entitled to $150,000.00, which included the $25.00 filing fee paid by Plaintiffs. (May 26, 2023 Decision of the Magistrate, pp. 30-34).

Defendants' Objections

{¶15} Defendants timely filed five extensive enumerated objections, some with sub-parts, to the Magistrate's Decision, including the Magistrate's findings of fact and conclusions of law. Although Defendants clearly marked their objections, the Court will analyze the subparts, where applicable, as specific objections stated with particularity. The Court will use Defendants' numbering of their objections and subparts as an outline.[2] Defendants' first four objections overlap and relate to causation, specifically divisibility and apportionment of Michael's injuries to each collision. Defendants' fifth objection relates to the calculation of Plaintiffs' damages.

{¶16} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E. 2d 212 (1967), paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.

[2] For example: Defendants' first objection, subpart A, would be referenced as "objection 1.A" for clarity.

2d 548 (1964). Therefore, the Magistrate, as the trier of fact in a bench trial, is free to rely on the facts he deems most relevant and material to the issues at hand and free to disregard some evidence and rely on other evidence, in part, in whole, or any deviation in between. *See Siegel v. Univ. of Cincinnati College of Med.*, 2015-Ohio-441, 28 N.E.3d 612, ¶ 12 (10th Dist.) (Any "suggestion that a magistrate * * * is incapable of deciding the facts and weighing the credibility of witnesses, lacks merit.").

{¶17} When a court independently reviews objections to a magistrate's decision, a court may give weight to a magistrate's assessment of witness credibility in view of a magistrate's firsthand exposure to the evidence. *See id.* "'Although the trial court may appropriately give weight to the magistrate's assessment of witness credibility in view of the magistrate's firsthand exposure to the evidence, the trial court must still independently assess the evidence and reach its own conclusions.'" *Sweeney v. Sweeney*, 10th Dist. Franklin No. 06AP-251, 2006-Ohio-6988, ¶ 15, citing *DeSantis v. Soller*, 70 Ohio App.3d 226, 233, 590 N.E.2d 886 (10th Dist.1990).

Defendants' First (1.A-1.I), Second (2.A), Third, and Fourth Objections

{¶18} In objections one through four, Defendants ultimately allege that the two collisions, and Michael's resultant injuries, are divisible and capable of apportionment. Accordingly, the Court will analyze these four objections, and subparts, together.

{¶19} Defendants' first objection alleges that the Magistrate "erred in finding that Michael's injuries were indivisible and not capable of apportionment. (Decision, 27-29)." (Defendants' Objections, pp. 4-14). Defendants' first objection has nine subparts, which are labeled alphabetically, A through I. Defendants, in objection 1.H, allege that "Plaintiffs failed to prove that Michael's injuries were indivisible." (Defendants' Objections, pp. 11-13). Defendants, in objection 1.I, allege that "Defendants did prove that the injuries suffered by Michael in both accidents is capable of being apportioned." (Defendants' Objections, pp. 13-14).

{¶20} The Magistrate analyzed the evidence currently before the Court using the following case law: [3]

> "'Proximate causation' is described as 'some reasonable connection between the act or omission of the defendant and the damage the plaintiff has suffered.'" *Marsh v. Heartland Behavioral Health Ctr.*, 10th Dist. Franklin No. 09AP-630, 2010-Ohio-1380, ¶ 40, quoting Prosser, Law of Torts (5 ed.1984) 263, Section 41. "The reasonable connection may be broken by an intervening act." *Id.* "Proximate cause does not require that the conduct of one defendant be the sole cause of a legal injury. As a matter of law, there may be more than one proximate cause of an injury." *Kelemen v. Williams*, 10th Dist. Franklin No. 92AP-1205, 1993 Ohio App. LEXIS 1325, *11 (Mar. 4, 1993), citing *Taylor v. Webster*, 12 Ohio St.2d 53, 231 N.E.2d 870 (1967).
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> "'Where a plaintiff suffers a single injury as a result of the tortious acts of multiple defendants, the burden of proof is upon the plaintiff to demonstrate that the conduct of each defendant was a substantial factor in producing the harm.'" *Sotos v. Edel*, 10th Dist. Franklin No. 02AP-1273, 2003-Ohio-6471, ¶ 42, quoting *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph five of the syllabus. "'The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using the word in a popular sense, in which there always lurks the idea of responsibility, rather than the so-called "philosophical sense," which includes every one of the great number of events without which any happening would not have occurred.'" *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686, 653 N.E.2d 1196 (1995), quoting Restatement of the Law 2d, Torts (1965), Section 431, Comment a. "An 'actor's negligent conduct is not a substantial factor in bringing about harm to another if the

[3] For purposes of clarity, the Court has used the Magistrate's full recitation of case law to accurately analyze the totality of Defendants' objections.

> harm would have been sustained even if the actor had not been negligent.'" *Skinner v. N. Market Dev. Auth.*, 10th Dist. Franklin No. No. 96APE12-1655, 1997 Ohio App. LEXIS 3015, *7 (July 10, 1997), quoting Restatement of the Law 2d, Torts (1965) 430, Section 432(1). "[T]he substantial factor test as spelled out in *Pang* does not change the traditional concepts of proximate cause in cases where the actions of more than one tortfeasor join to cause a single, indivisible injury to a plaintiff." *Pancoe v. Dye*, 9th Dist. Summit Nos. 15546 & 15583, 1992 Ohio App. LEXIS 5419, *11 (Oct. 21, 1992).

(May 26, 2023 Decision of the Magistrate, pp. 24-25).

{¶21} In addressing the Magistrate's case law, Defendants argue that *Sotos* and *Pang*, cited by the Magistrate, are distinguishable and instead *Skinner* and *McDougall* are instructive. (Defendants' Objections, pp. 11-13). The Court disagrees.

{¶22} The Tenth District Court of Appeals in *Sotos*, which involved a plaintiff injured in two collisions ten months apart, and the Supreme Court of Ohio in *Pang*, which involved a plaintiff injured in three collisions in four months, reviewed, among other issues, the trial court analysis on indivisibility of injury. *Sotos* at ¶¶ 2-3; *Pang* at 187-190. In each case, the court found that some harm suffered by the plaintiff could be appropriately determined to be indivisible among the collisions. *Sotos* at ¶¶ 68-70; *Pang* at 198-199.

{¶23} Defendants, however, argue that the Magistrate's reliance on *Skinner*, which cites Restatement of the Law 2d, Torts (1965) 430, Section 432(1), supports the finding that Michael's injuries are "divisible and therefore capable of apportionment." (Defendants' Objections, pp. 12 ("Thus, the actions of Defendants' state driver in rear-ending Michael in the first accident is not a substantial factor if the harm sustained by the second tortfeasor (Ms. Dolph) would still have happened.")). But Defendants' reading of this citation is too narrow because the Supreme Court of Ohio, in analyzing Section 432 of the Restatement of the Law 2d, Torts (1965), has stated that:

> It is a well-established principle of tort law that an injury may have more than one proximate cause. See Prosser and Keeton, Law of Torts (5 Ed.1984) 266-268, Section 41; 2 Restatement of the Law 2d, Torts (1965) 432, Section 433; 1B Larson, Law of Workers' Compensation (1991) 7-612 to 7-941, Section 41.64; 1 Ohio Jury Instructions (1988) 183, Section 11.10

> ("There may be more than one proximate cause."). Ohio case law also supports this fundamental tenet of tort law: "In Ohio, when two factors combine to produce damage or illness, each is a proximate cause." *Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App.3d 66, 67, 548 N.E.2d 304, 305.

Murphy v. Carrollton Mfg. Co., 61 Ohio St. 3d 585, 587-588, 575 N.E.2d 828 (1991); *see also Neal v. A-Best Prods. Co.*, 2d Dist. Montgomery No. 22026, 2008-Ohio-6968, ¶¶ 82-89.

{¶24} Defendants' reliance on *McDougall* is also misplaced. *McDougall v. Smith*, 191 Ohio App.3d 101, 2010-Ohio-6069, 944 N.E.2d 1218 (3rd Dist.). In *McDougall*, the plaintiff was a paramedic responding to the scene of a collision, and then was subsequently injured in a second collision on the way to the hospital from the first collision; plaintiff was not injured in the first collision. *Id.* ¶ 2. The *McDougall* court held that the at fault driver in the first collision could not be liable for plaintiff's injuries because plaintiff was not involved in, or injured in, the first collision, and the second collision was not a foreseeable consequence of the first collision thus breaking the causal chain. *Id.* ¶¶ 4-6. Here, unlike *McDougall*, Michael was involved, and injured, in two separate collisions on different dates and suffered the same and similar injuries 13 days apart. Defendants did not cite any cases similar to these facts.

{¶25} Upon independent review of the evidence, the Court finds that the Magistrate properly analyzed the evidence using *Sotos* and *Pang* because both involve similar fact patterns and evidence as is currently before the Court. Analysis turns on "the indivisibility of harm, not the indivisibility of causation." *Pang*, 53 Ohio St.3d at 197-198, 559 N.E.2d 1313. Accordingly, the Court must determine if the Magistrate's application of the facts to the law results in, as the Magistrate held, a determination that each collision was a "substantial factor" in causing Michael's indivisible injuries, which were incapable of apportionment.

{¶26} Defendants, in objection 1.A, allege that "[Michael] had a minor soft tissue injury following the first accident." (Defendants' Objections, p. 4). Defendants' second objection alleges that the Magistrate "incorrectly found that Defendants did not provide any evidence that Michael only suffered a soft tissue injury. (Decision, p. 28)."

(Defendants' Objections, pp. 14-16). Defendants' second objection has one subpart, which is labeled A. Defendants, in objection 2.A, allege that "testimony throughout the trial support the fact that Michael only suffered a minor injury following the first accident." (Defendants' Objections, pp. 15-16).

{¶27} In objection 1.B, Defendants allege that "Defendants' biomechanical and accident reconstructionist expert irrefutably testified that the magnitude of the second collision was larger than the first and would be more likely to cause the injuries that Michael was treated for following the second accident." (Defendants' Objections, pp. 4-6). Specifically in objection 1.B, Defendants allege that "[t]he magistrate erred in his findings regarding the differences of forces between the two accidents. (Decision, p. 28)." and that "[t]he magistrate incorrectly infers that the first accident caused a greater impact on Michael, because the forces were unexpected and Michael was unprepared and was in no way prepared to brace for them. (Decision, p. 28)." (Defendants' Objections, pp. 4-6).

{¶28} Defendants do not put forth the argument that Michael was not injured in the first collision, but rather that it was a "minor soft tissue injury" and distinct from more severe injuries caused by the second collision. It is undisputed that Dr. Mencl diagnosed Michael with a cervical strain at the emergency room the day after the first collision, which is also referred to as a soft tissue injury. However, use of the word "minor" to describe the injury does not appear in Dr. Mencl's, or any medical testimony, as an adjective to describe Michael's injuries.

{¶29} Defendants allege that their biomechanical and accident reconstructionist expert, Douglass Morr, who is a licensed professional engineer, "testified credibly that the magnitude of the second collision was larger than the first and would be more likely to cause the injuries that Michael complained of following the second accident * * * and opined that the amount of force Michael's body experienced in the first collision was no more than the force he would have experienced in activities that he used to participate in, like golf and riding horses." (Defendants' Objections, p. 5). Defendants point to Mr. Morr considering lack of preparedness to brace for impact into his calculations, which would have been the same for both collisions, but still determining that "the force of the second accident involved far greater force than the first accident was undisputed and unrebutted."

(Defendants' Objections, p. 5). Mr. Morr went on to testify regarding the first collision, as Defendants note, "[m]y calculation would show that it would not be likely that it's a substantial injury, but I can't exclude a minor sprain/strain event." (Defendants' Objections, p. 6, quoting Tr., p. 359:6-9). Furthermore, Defendants also raise issue with the Magistrate giving weight to opinions of practicing physician Dr. Kevin Trangle, M.D., Plaintiff's medical expert, regarding the forces experienced and cause of injury because, unlike Mr. Morr, Dr. Trangle "lacks biomechanical and accident reconstructionist experience and his testimony on these issues should not have been given weight." (Defendants' Objections, p. 6).

{¶30} Much like Defendants are not arguing that Michael was not injured to some extent from the first collision, "Plaintiffs are not disputing that the force of the second accident was greater than the first." (Plaintiffs' Response, p. 5). Plaintiffs, however, allege that "the testimony of a medical expert only, such as Plaintiff's medical expert, Dr. Trangle, M.D., can satisfy this requirement in proving causation." (Plaintiffs' Response, p. 4). But Plaintiffs did not file an objection to the Magistrate's Decision regarding Mr. Morr's competency to opine on medical causation based on the forces in play during each collision. Plaintiffs, nonetheless, argue that "[t]he magistrate properly weighed the medical evidence presented by Drs. Trangle and Mencl in finding that [Michael] was in the acute phase of injury when the second accident occurred." (Plaintiffs' Response, pp. 19-20). The Court agrees.

{¶31} The Magistrate found Mr. Morr credible as an expert for the purposes of calculating forces involved in the collisions and opining on medical causation of resultant injuries related to those forces. While preparedness to brace for impact was calculated into the force calculations by Mr. Morr, upon independent review of the evidence, the Court does not agree that the Magistrate used this lack of preparedness factor inappropriately.

{¶32} "[P]roving causation between a plaintiff's injuries and the defendant's conduct may require expert testimony." *Darnell v. Eastman*, 23 Ohio St.2d 13, 17, 261 N.E.2d 114 (1970). "Except as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific inquiry, it must be

established by the opinion of medical witnesses competent to express such opinion." *Id.* But "[t]he somewhat ambiguous term 'medical witnesses' does not require that such witnesses be medical doctors." *Shilling v. Mobile Analytical Servs.*, 65 Ohio St.3d 252, 255, 602 N.E.2d 1154 (1992) ("Many issues of medical diagnosis involve areas of expertise. Doctors often rely on lab studies performed by experts who are not licensed physicians. For instance, a doctor may give a medical diagnosis where the diagnosis relies upon the test results of a chemist or technician to determine blood-alcohol content (provided the chemist is qualified and the test results have been properly admitted).")

{¶33} Upon independent review of the evidence, and comparing the backgrounds of the two experts, Mr. Morr has an extensive background as a professional engineer in biomechanics and evaluation of relevant force exposure on the human body in accident reconstruction, and Dr. Trangle has an extensive background as a doctor in occupational and environmental medicine and internal medicine. While Mr. Morr's testimony is competent and relevant on the forces exerted upon Michael in each collision, upon independent review of the evidence, Michael's symptoms tend to rely more on medical causation testimony of a medical doctor as sufficient evidence. *See Dixon v. Miami Univ.*, 10th Dist. Franklin No. 04AP-1132, 2005-Ohio-6499, ¶ 39, citing Gibbs v. General Motors Corp., 11th Dist. Trumbull No. 3625, 1987 Ohio App. LEXIS 6288, 4 (Mar. 27, 1987) (low back sprain/strain characterized as "internal and elusive in nature unaccompanied by any observable external evidence."). The Court finds that Dr. Trangle is properly equipped with education and experience to opine regarding proximate causation of Michael's internal injuries based on calculated forces and the human body/injury mechanisms, whereas Mr. Morr is properly equipped to opine to the calculation of the forces present in a collision and could have opined to more certainty if Michael's injuries were sufficiently external. *See id.* ¶¶ 39-40. Accordingly, upon independent review of the evidence, the Court finds that the Magistrate properly found Dr. Trangle more credible than Mr. Morr on the issue of medical causation based on the forces in play during each collision.

{¶34} Defendants allege it is significant that only Dr. Mencl has first-hand knowledge of Michael after the first collision and before the second collision and his instructions were to return if symptoms worsen or make an appointment with a primary care physician, orthopedic physician, or return to the emergency room. Defendants note

that it is significant that he instead scheduled a chiropractor. Related to the chiropractor, Defendants, in objection 1.G, allege that "[t]he magistrate incorrectly found that Michael had made an appointment for chiropractic care on November 9, 2017 at the Advanced Spine Joint and Wellness Center (Decision, p. 3, 5, 26, 27), when in fact the appointment took place on November 10, 2017." (Defendants' Objections, pp. 10-11). Upon independent review of the evidence, the Magistrate properly found that Michael's testimony established that he initially had scheduled a chiropractic appointment on November 9, 2017, at Advanced Spine Joint and Wellness Center but changed it to November 10, 2017, after the second collision.[4]

{¶35} While it is true that treating emergency room physician Dr. Mencl initially diagnosed Michael with a soft tissue injury, cervical strain, in the emergency room after the first collision, Dr. Mencl's testimony did not establish Michael's final diagnosis given other credible expert testimony. Dr. Mencl testified that a cervical strain could take several weeks or longer to heal, specifically in an individual like Michael who suffered from pre-existing conditions, such as his degenerative disc disease and prior cervical fusion, which was corroborated by Dr. Trangle. Therefore, upon independent review of the evidence, Dr. Mencl's emergency room diagnosis is not irrefutable evidentiary proof of Michael's ultimate injuries.

{¶36} Dr. Trangle also discussed Michael's acute phase of injury and recovery. Dr. Trangle reviewed Michael's medical records, conducted an independent exam of Michael, and reviewed Mr. Morr's calculations and report to form an opinion on whether each collision was a significant factor in Michael's harm and his injuries were indivisible

[4] The Magistrate does state "Michael testified that the next day he visited Advanced Spine Joint and Wellness," which alludes to Michael starting treatment on November 9, 2017 instead of November 10, 2017. (May 26, 2023 Decision of the Magistrate, p. 4). However, this appears in the Magistrate's "Summary of Testimony" and not "Analysis." Findings of fact are inherently different than a summary of testimony. *See State ex rel. Papin v. Huddle*, 10th Dist. Franklin No. 76AP-470, 1977 Ohio App. LEXIS 8215, *4-5 (Nov. 29, 1977) ("Inasmuch as referee's findings * * * are essentially a summary of evidence, rather than findings of fact from the evidence, they are rejected by this court."). A magistrate's decision can include all findings of fact and conclusions of law under a single heading as long as there is sufficient detail to frame objections and allow the Court to review them in the absence of separately captioned sections. *See McNeilan v. Ohio State Univ. Med. Ctr.*, 10th Dist. Franklin No. 10AP-472, 2011-Ohio-678, ¶¶ 42-44. In the findings of fact, the Magistrate found "Michael therefore made an appointment for November 9, 2017," but ultimately gave no weight to Defendants' argument that this is circumstantial evidence in analyzing indivisibility of harm and apportionment that the appointment did not predate the second collision. (May 26, 2023 Decision of the Magistrate, pp. 26-27).

between the collisions. Dr. Trangle testified that at the time of the second collision, Michael was still in the acute phase of injury and recovery. Michael was still having pain associated with the first collision and while still recovering he was susceptible to further injury. Dr. Trangle testified to the difficulties presented in dividing the collisions because the forces available in the first collision were significant enough to cause the ultimate injury, but no diagnostic tests were done until after the second collision. However, Dr. Trangle testified that the forces from the first collision on a person similarly situated as Michael, could have resulted in all of Michael's injuries and it was likely that Michael had more than a soft tissue injury after the first collision, but diagnostic tests were never completed. Dr. Trangle stated that the diagnoses after each emergency room visit were similar and the totality of Michael's treatment can be related to his injuries sustained in both collisions. Upon independent review of the evidence, Dr. Trangle ultimately opined within a degree of medical certainty that both collisions caused Michael's injuries and the extent of Michael's injuries cannot be divided from a medical standpoint between the collisions.

{¶37} Upon independent review of the evidence, the Court finds that the Magistrate correctly determined that "Michael demonstrated by a preponderance of the evidence that the conduct of each tortfeasor in the first and second collisions was a substantial factor in producing his harm." (May 26, 2023 Decision of the Magistrate, p. 29). Moreover, upon independent review of the evidence, the Court finds that Plaintiffs produced sufficient evidence for the Magistrate to conclude Michael suffered indivisible harm from the two collisions. (May 26, 2023 Decision of the Magistrate, p. 27-28 ("It was established that the actions of both Hill and Dolph caused Michael's injuries, including shoulder and knee contusions along with substantial aggravation of preexisting degenerative disc disease and disc herniations, and that his injuries are not divisible between the two collisions.")). Accordingly, Defendants have the burden to show apportionment of the harm. *Pang*, 53 Ohio St.3d at 197, 559 N.E.2d 1313 ("a prima facie evidentiary foundation has been established supporting joint and several judgments against the defendants. Thereafter, the burden of persuasion shifts to the defendants to demonstrate that the harm produced by their separate tortious acts is capable of apportionment.").

{¶38} Defendants, in objection 1.I, allege "[t]he magistrate erred in concluding that the injuries suffered by Michael in both accidents is not capable of being apportioned. (Decision, p. 2)." (Defendants' Objections, p. 13). Defendants state that because they raised an affirmative defense under R.C. 2307.23, that the Court "must apportion the percentage of liability between Defendants and Ms. Dolph." (Defendants' Objections, p. 13). Moreover, Defendants' third objection alleges that the Magistrate "erred in concluding that the second tortfeasor (Ms. Dolph) was not an intervening and superseding cause that cut off Defendants' liability. (Decision, p. 29)." (Defendants' Objections, pp. 17-19). Defendants' third objection does not have subparts.

{¶39} In Ohio, defendants asserting an affirmative defense "have the burden of proof in establishing such defense." *Miller v. Ohio Dept. of Trans.,* 10th Dist. Franklin No. 13AP-849, 2014-Ohio-3738, ¶ 64, quoting *Olentangy Condo. Assn. v. Lusk*, 10th Dist. No. 09AP-568, 2010-Ohio-1023, ¶ 23. R.C. 2307.23(C) states that "[f]or purposes of division (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury * * * is attributable to one or more persons from whom the plaintiff does not seek recovery in this action." R.C. 2307.23(A)(2) states that "[i]n determining the percentage of tortious conduct attributable to a party in a tort action under section 2307.22 * * * the court in a nonjury action shall make findings of fact * * * that shall specify * * * [t]he percentage of tortious conduct that proximately caused the injury * * * that is attributable to each person from whom the plaintiff does not seek recovery in this action." The Ohio Supreme Court has stated that:

> "* * * Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm."

Pang at 196-197, quoting 2 Restatement of the Law 2d, Torts (1965) 440, Section 433A, Comment *i*.

{¶40} Defendants argue that the differences in the collisions are so significant that the comparative severity of the collisions alone resolves the issue of causation. However, the facts in evidence before the Court do not support this conclusion.

{¶41} Defendants provided the Court with the force numbers involved in each collision calculated through Mr. Morr's expertise, but ultimately Dr. Trangle was more credible in the explanation of how the force numbers relate to causation of Michael's injuries. As previously discussed, the Magistrate properly gave more weight to Dr. Trangle's testimony of medical causation given Michael's internal symptoms. Dr. Trangle testified that motor vehicle damage and injuries are not directly correlated. Ultimately, Dr. Trangle concluded that, in his review of Mr. Morr's report and calculations, the forces in each collision can be used to show medical causation; that Michael suffered medically indivisible injuries between the collisions given the timeline of events and evidence before the Court. As such, Dr. Trangle's testimony is more direct on medical causation of Michael's injuries than Mr. Morr. Moreover, even if the Court gave more weight to Mr. Morr's testimony on medical causation, he did testify that Michael was more susceptible to injury, and he could not definitively rule out the first collision as a cause of injury even if the second collision had higher forces.

{¶42} Upon independent review of the evidence, the Court finds that Defendants' arguments, without further credible medical expert testimony as to the apportionment of injury, do not carry as much weight as Dr. Trangle's testimony that Michael's injuries were indivisible between the collisions. Accordingly, the Court cannot sustain Defendants' objections that the Magistrate failed to find apportionment under the facts because Defendants have failed to prove a logical or reasonable basis for apportionment.

{¶43} Accordingly, upon independent review of the evidence, the Court finds that the Magistrate correctly held that "[t]he evidence does not demonstrate that the harm produced by its employees and by Dolph is capable of apportionment." (May 26, 2023 Decision of the Magistrate, p. 29). Moreover, because the Court already determined that the Magistrate properly held that Michael's injuries were and, as such, both collisions were significant factors in creating the indivisible injury that cannot be apportioned, then by law, as the Magistrate properly held, Defendants' liability cannot be cut off and "Dolph's negligence cannot relieve [Defendants] of liability where it was not 'of itself an efficient,

independent, and self-producing cause' of Michael's harm." (May 26, 2023 Decision of the Magistrate, p. 29, quoting *Berdyck v. Shinde*, 66 Ohio St.3d 573, 585, 613 N.E.2d 1014 (1993)).

{¶44} Defendants' fourth objection alleges that the Magistrate "incorrectly applied the theory of the eggshell plaintiff. (Decision, p. 29)." (Defendants' Objections, pp. 19-20). Defendants' third objection does not have subparts. Plaintiffs, however, allege that "due to [Michael's] pre-exiting conditions, he was an eggshell plaintiff at the time of both the first and second accidents, thus requiring both accidents' tortfeasors to take him as they found him." (Plaintiffs' Response, pp. 21-22).

{¶45} "The 'thin skull' or 'eggshell plaintiff' rule is a creature of tort law, which states that, 'a defendant who negligently inflicts injury on another takes the injured party as he finds her, which means it is not a defense that some other person of greater strength, constitution, or emotional makeup might have been less injured, or differently injured, or quicker to recover.'" *Fleckner v. Fleckner*, 177 Ohio Ap.3d 706, 2008-Ohio-4000, 895 N.E.2d 896, ¶ 22 (10th Dist.), quoting *McDevitt v. Wenger*, Tuscarawas App Bo. 2002AP090071, 2003-Ohio-6096, ¶ 34. This rule "has no bearing on duty or causation—it applies only to the extent that when a tortfeasor proximately caused the plaintiff's damages, the tortfeasor is liable for any superfluous damages resulting from the plaintiff's abnormal frailty or pre-existing condition." *Boroff v. Meijer Stores Ltd. Partnership*, 10th Dist. Franklin No. 06AP-1150, 2007-Ohio-1495, ¶ 13, citing Restatement of the Law 3d, Torts (2005) Section 31. The eggshell skull rule is thus a "rule of damages that 'evolved in the context of preexisting injuries to provide that if a defendant's wrongful act causes injury, the defendant is fully liable for the resulting damage even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a plaintiff without a preexisting condition or injuries.'" *Weinkauf v. Pena*, 10th Dist. Franklin No. 19AP-707, 2020-Ohio-3293, ¶ 17.

{¶46} Upon independent review of the evidence, the Court finds that the Magistrate properly applied the eggshell skull rule in this case to both collisions. Based on the testimony, Michael had preexisting conditions prior to each collision that made him more susceptible to injury. Prior to the first and second collision, Michael had a preexisting history of degenerative disc disease and his prior cervical fusion. And, prior to the second

collision, Michael was also still in the acute phase of injury and recovery from the first collision. Accordingly, Defendants and Ms. Dolph each took Michael as he was on the date of their collision.

{¶47} Defendants, in objections 1.C though 1.F, allege that the Magistrate improperly applied weight and credibility to certain evidence and testimony. Defendants, in objection 1.C, allege that "[t]he magistrate improperly weighed the photographic evidence of both accidents. (Decision, p. 28-29)." (Defendants' Objections, pp. 6-7). Defendants, in objection 1.D, allege that "[t]he magistrate erred in finding Michael credible and did not give enough weight to Michael's prior statements where he distinguished the accidents." (Defendants' Objections, pp. 7-8). Defendants, in objection 1.E, allege that "[t]he magistrate erred in not giving more weight to the fact that Michael returned to work 3-4 days after the first accident to show that he did not have substantial injuries following the first accident. (Decision, p. 26)." (Defendants' Objections, pp. 8-9). Defendants, in objection 1.F, allege that "[t]he magistrate erred in finding Dr. Trangle credible and/or giving too much weight to Dr. Trangle's opinion that there was not enough time for Michael to obtain additional medical treatment between the emergency department visit following the first accident until the second accident. (Decision, p. 10)." (Defendants' Objections, pp. 9-10).

{¶48} Upon independent review of the evidence, as discussed throughout the Court's Decision hereto, it is apparent to the Court that the Magistrate properly considered the facts and testimony that Defendants draws issue to, and that the Magistrate thereby reached a different conclusion, or applied a different weight to the facts, than Defendants wish for purposes of a determination on their case.

{¶49} Accordingly, the Court OVERRULES Defendants' objection 1, including all subparts 1.A through 1.I, objection 2, including lone subpart 2.A, objection 3, and objection 4, holding that the Magistrate properly determined that Michael's injuries were indivisible and not capable of apportionment.

Defendants' Fifth Objection (5.A-5.D)

{¶50} Defendants' fifth objection alleges that the Magistrate "erred in finding that Defendants are liable for a total judgment of $945,491.56. (Decision, p. 34)."

(Defendants' Objections, pp. 20-23). Defendants' fifth objection has four subparts, which are labeled alphabetically, A through D.

{¶51} Plaintiffs presented expert testimony from economist, Alex Constable, life care planner, Maryanne Cline, R.N., and vocational rehabilitation counselor, Barbara Burk, on economic damages. Defendant did not present any independent expert witness testimony on economic damages.

{¶52} The Magistrate accounted for R.C. 2743.02(D) set off's for: medical bills paid from one or more health insurance plans, including Medicare, and the Ohio Bureau of Worker's Compensation; lost wages from the Ohio Bureau of Worker's Compensation; settlement from Ms. Dolph's motor vehicle insurance; and settlement from Plaintiffs' underinsured motor vehicle insurance. (May 26, 2023 Decision of the Magistrate, pp. 31-34).

{¶53} Defendants, in objection 5.A, allege that "[t]he magistrate erred in finding that Michael is entitled to $1,227,358 in future medical treatment and lost household services. (Decision, p. 32)." (Defendants' Objections, pp. 20-21). Defendants, in objection 5.B, allege that "[t]he magistrate erred in using any economic numbers from Plaintiffs' economist expert Alex Constable after noting two of his opinions were unpersuasive. (Decision, p. 32)." (Defendants' Objections, pp. 21-22). Defendants, in objection 5.C, allege that "[t]he magistrate erred in finding that Michael is entitled to lost wage in excess of $682. (Decision, p. 32)." (Defendants' Objections, pp. 22-23). Defendants, in objection 5.D, allege that "[t]he magistrate erred in finding that Defendants are liable for all of Plaintiffs' past and future pain and suffering and loss of consortium. (Decision, p. 34)." (Defendants' Objections, p. 23).

{¶54} Initially, as discussed in analyzing Defendants' first four objections hereto, the Court determined that the Magistrate properly held that Michael's injuries were indivisible and not capable of apportionment. As such, Defendant is jointly and severally liable for the full damages amount. *See Pang*, 53 Ohio St.3d at 196-197, 559 N.E.2d 1313, quoting 2 Restatement of the Law 2d, Torts (1965) 440, Section 433A, Comment *i.* Moreover, as discussed hereto, the Magistrate can view and give weight to the credibility of all or any part of a witness's testimony. *See State v. DeHass*, 10 Ohio St.2d at paragraph one of the syllabus; *State v. Antill*, 176 Ohio St. at 67. Upon independent

review of the evidence, the Court finds that the Magistrate illustrated adequate justification for not giving weight to all of Mr. Constable's opinions on damages, including Ms. Cline's valuation of household services had more evidentiary support and Michael's testimony did not support Mr. Constable's assumption that Michael would work longer than his statistical work life expectancy. (May 26, 2023 Decision of the Magistrate, pp. 31-33).

{¶55} The Court then turns to the Magistrate's calculation of damages. "In a tort action, the measure of damages is normally that which will compensate and make whole the injured party." *Corwin v. St. Anthony Med. Ctr.*, 80 Ohio App.3d 836, 840, 610 N.E.2d 1155 (10th Dist.1992). Compensatory damages are intended to make injured parties whole for the wrong done to them by a defendant. *Fantozzi v. Sandusky Cement Prods. Co.*, 64 Ohio St.3d 601, 612, 597 N.E.2d 474 (1992). "'It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.'" *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC*, 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 226, 685 N.E.2d 246 (11th Dist.1996). "[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture * * *." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, ¶ 20 (10th Dist.).

{¶56} Once a determination of damages is made against the state, R.C. 2743.02(D) provides, in relevant part, that "[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant."

{¶57} Defendants allege that "the Magistrate erred in not setting off Michael's anticipated access to health insurance in order to pay for his future medical care and treatment." (Defendants' Objections, pp. 20-21). Defendants also allege that in relation to lost wages, the Court "should at least set off the $1100 per month that Michael receives in social security retirement income." (Defendants' Objections, pp. 22-23). The Court disagrees with both arguments.

{¶58} Plaintiffs argue that Defendants failed to raise arguments at trial that "lost wages and future medical treatment awards should be set off by [Michael's] social

security income and his anticipated access to health insurance, respectively" and, as such, the Court does not have authority to decide this under Civ.R. 53(D)(4). (Plaintiffs' Response, p. 24, citing *Vogel v. Campanaro*, 180 N.E.3d 594, 2021-Ohio-4245, ¶ 69 (12th Dist.) ("an objection raises an issue not presented or decided by the magistrate, the objecting party is improperly asking the court to reach a different decision based on a new ground. The court does not have this authority under Civ.R. 53(D)(4).")). Plaintiffs further argue that if the Court finds these objections proper, then such arguments are barred by the collateral source rule under R.C. 2315.20(A) and *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195. (Plaintiffs' Response, pp. 24-25). The Court disagrees as well.

{¶59} Determining any set offs under R.C. 2743.02(D) to the award of damages was an issue addressed by the Magistrate. Social Security and Medicare are types of collateral source benefits courts can contemplate for set offs if given the appropriate evidence. *See Buchman v. Bd. of Edn.*, 73 Ohio St.3d 260, 264-265, 652 N.E.2d 952 (1995) (analyzing R.C. 2744.05(B), an analogous statute to R.C. 2743.02(D), for political subdivisions). As such, the Court is required to abide by mandatory reductions under R.C. 2743.02(D), and evidence of Michael receiving Social Security benefits and Medicare benefits was presented. *See* R.C. 2743.02(D) ("[r]ecoveries against the state *shall* be reduced * * *) (Emphasis added). However, Defendants still had the burden of proving they were entitled to calculation of the set offs against the award of damages and did not present to the Court an expert witness on damages to refute the credible statements provided by Plaintiffs' expert witnesses on economic damages. *See Van Der Veer v. Ohio Dept. of Transp.*, 113 Ohio App.3d 60, 68-69, 680 N.E.2d 230 (10th Dist.1996), overruled in part on other grounds by *McMullen v. Ohio State Univ. Hosp.*, 10th Dist. Franklin No. 97API10-1301, No. 97API10-1324, 1998 Ohio App. LEXIS 4436 (Sep. 22, 1998) ("the burden of proving that one is entitled to an offset for collateral benefits is on the defendant, which is the state in this case.").

{¶60} In his testimony, Michael conceded that he is a Medicare recipient. However, while the Court could address future health insurance, such as Medicare, as a collateral source against future medical damages, upon independent review of the evidence, Defendants do not provide the Court with an adequate way to value the amount

of Medicare coverage or calculate any potential set off of Medicare coverage for future medical services. Thus, a set off of Medicare benefits for future medical services is unsupported under the facts in evidence before the Court.

{¶61} In his testimony, Michael also conceded that he draws Social Security benefits. However, R.C. 2743.02(D) contains a "matching" requirement, which means that collateral benefits are reduced from a recovery against the state only to the extent that the loss for which the collateral benefits compensate is included in the damage award. *See Nevins v. Ohio Dept. of Transp.*, 132 Ohio App.3d 6, 22, 724 N.E.2d 433 (10th Dist.1998). As such, knowing that Michael receives monthly Social Security benefits is not conclusive that it should automatically be applied as a set off. Upon independent review of the evidence, the Court finds that Mr. Constable credibly testified that "Mr. Rericha's earning capacity is separate and distinct from his social security benefits. And because he could have done both. He could have drawn social security anyway and continued working full time." (Constable Tr. Depo., p. 26:9-27:10). Moreover, Defendants did not provide any evidence to refute Mr. Constable's testimony or show how a potential set off should be adequately calculated for Social Security benefits, even knowing the amount of Michael's monthly Social Security benefits. Thus, a set off of Social Security benefits is inappropriate under the facts in evidence before the Court.

{¶62} Because the other set offs are not objected to, upon independent review of the evidence, the Court finds that the Magistrate appropriately applied R.C. 2743.02(D) to the facts in evidence before the Court.

{¶63} Accordingly, the Court OVERRULES Defendants' objection 5, including all subparts 5.A through 5.D, holding that the Magistrate properly determined Plaintiffs' damages.

Conclusion

{¶64} Upon an independent review of the record pursuant to Civ.R. 53, and for the above stated reasons, the Court OVERRULES Defendants' objections.

{¶65} Accordingly, Judgment is rendered in favor of Plaintiffs in the total amount of $945,491.56, with Michael entitled to $795,466.56 and Karen entitled to $150,000.00, which includes the $25.00 filing fee paid by Plaintiffs.

LISA L. SADLER
Judge

[Cite as *Rericha v. Ohio Dept. of Rehab. & Corr.*, 2024-Ohio-1480.]

MICHAEL RERICHA, et al. Plaintiffs v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al. Defendants	Case No. 2019-01000JD Judge Lisa L. Sadler Magistrate Robert Van Schoyck JUDGMENT ENTRY

IN THE COURT OF CLAIMS OF OHIO

{¶66} Upon an independent review of the record pursuant to Civ.R. 53, the Court finds that the Magistrate has properly determined the factual issues and appropriately applied the law. As such, Defendants' objections are OVERRULED.

{¶67} Accordingly, the Court adopts the Magistrate's Decision and Recommendation, including findings of fact and conclusions of law contained therein, consistent with the Decision filed concurrently herewith. Judgment is rendered in favor of Plaintiffs in the total amount of $945,491.56, with Michael entitled to $795,466.56 and Karen entitled to $150,000.00, which includes the $25.00 filing fee paid by Plaintiffs. Court costs are assessed against Defendants. The clerk shall serve upon all parties notice of this Judgment and its date of entry upon the journal.

LISA L. SADLER
Judge

Filed March 8, 2024
Sent to S.C. Reporter 4/18/24