State Trial Courts

VERDICT: $514, low-speed rear-end Army truck/van, property/disk disease, admitted negligence.

POST-TRIAL RULINGS: Substantial evidence for verdict, insufficient evidence that jury was exposed to colloquy concerning issue of nonpayment to expert, no evidence of misconduct by defense counsel, failure to properly disclose expert... Colberg.

A Billings jury found that Christian Peterson's admitted negligence in a vehicle collision in Billings in 4/97 was a cause of injuries to Loren Cerkoney and awarded $514: $263 past medicals, $0 past wage loss, $251 property damage, $0 pain & suffering, $0 past loss of enjoyment of life.

Cerkoney was driving his 1954 GMC 2½-ton Army truck east on 1st Ave. N. at Hwy 87. Peterson was behind Cerkoney in his custom van and hit the back of Cerkoney's truck. Cerkoney claimed that his truck was pushed forward 10'. Peterson conceded that he was unable to stop before hitting Cerkoney, but contended that Cerkoney's claims for damages and losses are attributable in part or in whole to factors other than this accident and that damage to Cerkoney's truck was only $9.97.

Cerkoney, 41, claimed property damage to his vehicle, disk disease, and at least $40,000 lost income. He incurred $4,989 medicals.

Plaintiff's experts: PT Kimberly Larson, Billings; GP Robert Nichols, Billings; David Healow, Billings (pain management/anesthesiology); radiologist Kathleen Ryan, Billings. Orthopedic surgeon Gregory McDowell, Billings, was called by Plaintiff but disputed his role as an expert for Plaintiff (see below). Biophysicist John Jurist, Billings, was excluded for inadequate disclosure (see below).

Defendant's experts: forensic engineer Jerry Ogden, Littleton, Colo.

Demand, $25,000; offer of judgment, $500. Jury request, no specific amount; jury suggestion, $132.97: $9.97 tail light, $26 labor, $50 paint, $47 same-day care.

Jury deliberated 1 hour 50 minutes 3rd day.

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Judge Colberg subsequently denied Cerkoney's motion to alter/amend judgment or for a new trial:

There is substantial evidence to support the verdict. Cerkoney contends that the only medical testimony causally connected his medical treatment to the accident. McDowell opined that Cerkoney's resulting medical condition was caused by the accident. However, during cross McDowell testified that Cerkoney had reported to him that the accident occurred at 40-45 mph and that his vehicle was stopped and the impact had pushed it forward 10'. He testified that Cerkoney had not told him that he did not know the speed of the other vehicle and that the damage to his vehicle was only paint scratches and a broken taillight. McDowell testified that such information would be significant to his opinions. At the end of his cross he testified:

> Q. Dr. McDowell, I'd like you to make these assumptions. The force of the impact on the back of this Army truck unstopped was less than 5 miles per hour.... That the only damage to the truck was some scratched paint and a broken taillight lens.... Those assumptions, Dr. McDowell, would you retain the same opinion that this disk disease was caused by that type of accident?
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> A. I would not on the basis of my understanding of low-speed impact. Vehicular injuries causing personal injury at speeds under 5 miles an hour are very unlikely to occur, so it would be more likely than not to be unrelated in that instance.

There is evidence to support the verdict since there was evidence that the impact could have been less than 5 mph and was relatively minor. The jury was entitled to not give weight to McDowell's opinion.

Cerkoney's lawyer claims that the jury foreman told him that the jury door was open and the jury could overhear matters conducted in their absence in the courtroom. He filed an affidavit stating that the foreman said that "he was surprised to hear, through the door leading to the jury room, that plaintiff had not paid for the services of Dr. McDowell relative to Dr. McDowell's in-court testimony." The Court is very careful in making certain that the doors are closed in such circumstances. Peterson has submitted an affidavit of the foreman in which the foreman denied making the statements attributed by Cerkoney's lawyer and stating that "from the jury room, I did not hear any proceedings in the court room, and no other juror mentioned at any time that they heard proceedings in the court room." During McDowell's exam by Cerkoney the following testimony and colloquy occurred in the presence of the jury:

> SISLER: Are other remedies available to a person whose pain is not finally resolved by an epidural?
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> McDOWELL: Yes.
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> SISLER: What are those remedies?
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> McDOWELL: They may include surgery. They may include other nonsurgical techniques, which might include but not be limited to various forms of surgery, which is manipulative in nature, massage, other medications and so forth, which haven't been employed.
>
> And I would like to pose a question to the judge. Is it the case, Judge, I am to represent the medical report at this time or am to interpret this in any manner as an expert witness? If I am being asked to interpret the record as an expert witness, my charge for that is $400 an hour.
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> SISLER: I think, Doctor, that you're just being asked to look at these records, but the questions will be asked--
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> COLBERG: I'm not sure what you're asking me. I'm just the judge in this case and you're the witness and I don't know about any arrangements concerning that, so ... I don't know what you're asking me to do.
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> McDOWELL: Well, the dilemma for me --
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> SISLER: Your Honor, could we have a sidebar outside of the presence of the jury?

The jury was excused and there was significant colloquy concerning payment to experts. It was obvious that McDowell had been subpoenaed and no prior arrangement made for his payment. Although Sisler

claimed that McDowell had not responded to phone calls prior to trial because of a letter from defense counsel, McDowell further stated outside the presence of the jury:

> McDOWELL: So to that extent I believe that you're asking me to serve in a capacity of an expert witness for you, and you have made no attempt to meet with me on any previous occasion to sit down and go over these records to obtain my opinion, to make a statement of any form, whether it be verbal to you or videotaped. You have made no offer to reimburse me for my time in this capacity, and I think it is a problem. I believe it sets a precedent which is not tenable in general for the practice of medicine and law.
> SISLER: Doctor, I can sense that that was your feeling, but I'd like to ask, have you received any of the last 10 or 15 phone calls I've placed to your office?
> McDOWELL: I did receive telephone calls. I received notification of three phone calls from you, and I placed phone calls to your office and also one to your home and spoke with your wife.
> SISLER: On Friday?
> McDOWELL: I gave her a telephone number for you to reach me which was an all-hours phone number.
> SISLER: That was on Friday?
> McDOWELL: That was this weekend when I was on call.

There is insufficient information to indicate that colloquy out of presence of the jury was heard by the jury. Testimony of McDowell in the presence of the jury indicated that arrangements had not been made to pay him a fee for expert testimony elicited by questions from Cerkoney's lawyer. No prejudice has been demonstrated. There is no showing to grant a new trial.

There was no manifest injustice due to alleged misconduct of defense counsel. This relates to allegations and counter-allegations between counsel concerning whether medical depositions could have been utilized rather than live testimony. At least McDowell had indicated that he would, if paid a professional fee, consult with attorneys prior to trial. An allegation that the medical providers would not consult with counsel because of the letters is not demonstrated by any affidavits or other information furnished to the Court. It seems disingenuous to subpoena medical providers into court, have them give their opinions, and then claim that letters from defense counsel prior to trial prejudiced Plaintiff's case.

Evidence proposed by biophysicist John Jurist was properly excluded for lack of appropriate disclosure (by prior plaintiff's counsel Donald Sommerfeld) under Rule 26. To suggest that his evidence is rebuttal (of Jerry Ogden) is incorrect. He was disclosed at the pretrial conference as a proposed witness and defense counsel objected based on failure to previously disclose. There was a disclosure which gave very brief information about his opinions and stated as to the substance of the facts and opinions that "Dr. Jurist's expert opinions have not yet been received." Such disclosure were never made pretrial. To now contend that he should have been allowed to testify as a rebuttal witness to rebut the evidence of Defendant when proper pretrial disclosures were not made is not persuasive. Jurist in the context of this case was not a rebuttal witness. *Billings Clinic* (Mont. 1990). Ogden's evidence does not justify a new trial or amendment of judgment.

***Cerkoney v. Peterson,* Yellowstone DV 97-1022, verdict 1/20/00, post-trial rulings 3/30/00.**

Matthew Sisler (Sisler Law Firm), Missoula, for Cerkoney; James Halverson (Herndon, Sweeney & Halverson), Billings, for Peterson (USAA Ins.).