IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Z. D. H., a minor, by KIMBERLY HOFFMAN and DOUGLAS HOFFMAN, his parents and natural guardians,	:	CIVIL DIVISION
	:	No: GD-16-004447
Plaintiff,	:	**OPINION AND ORDER OF COURT RE: DEFENDANT BOROUGH OF SEWICKLEY'S MOTION FOR POST-TRIAL RELIEF**
v.	:	
BOROUGH OF SEWICKLEY; AVONWORTH ATHLETIC ASSOCIATION, INC.; and QUAKER VALLEY RECREATION ASSOCIATION,	:	FILED BY:
	:	JUDGE PATRICK M. CONNELLY
Defendants.		

Copies Served by First Class Mail Upon:

Alan H. Perer, Esquire
Swensen & Perer
One Oxford Center, Suite 2501
Pittsburgh, PA 15219

Erin Dolfi, Esquire
Robb Leonard Mulvihill LLP
BNY Mellon Center
500 Grant Street, 23rd Floor
Pittsburgh, PA 15219

John M. Giunta, Esquire
Thomas, Thomas & Hafer LLP
525 William Penn Place
37th Floor, Suite 3750
Pittsburgh, PA 15219

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Defendants.

OPINION AND ORDER OF COURT

This matter comes before this Court on Defendant Borough of Sewickley's Motion for Post-Trial Relief. For the reasons set forth, Defendant Sewickley's motion is DENIED.

Factual Background

This case arises from injuries sustained by Plaintiff, then 11-years-old, while playing in a little league baseball game on April 13, 2015. Plaintiff's team, from Defendant Avonworth Athletic Association (hereinafter "AAA"), was playing against a team from Defendant Quaker Valley Recreation Association (hereinafter "QVRA"). Both AAA and QVRA are non-profit Pennsylvania corporations. The game was played in Sewickley, Allegheny County, Pennsylvania at Chadwick Field, which is owned by Defendant Borough of Sewickley ("hereinafter Sewickley"). During the game, Plaintiff was struck in the head by a batted foul ball as he was inside his team's first base line dugout. Plaintiff sustained serious injuries, including a traumatic brain injury, and continues to suffer from symptoms.

In 2016, Plaintiff filed this action alleging, among other things, that in contravention of established little league baseball custom, "the first base line dugout at Chadwick Field had an opening in the fencing where the backstop ends and the dugout begins. This open area was not covered by any fencing, screen and/or any other type of covering at the time of the accident." *Complaint*, ¶¶ 9-10. Plaintiff asserted negligence counts against all Defendants, and alleged that, but for the failure to fully protect the first base line dugout from batted balls, Plaintiff's injury would not have occurred.

On January 31, 2018, after an eight-day jury trial, Plaintiff won a verdict against all three Defendants, and damages in the amount of $1,721,341.13. The jury apportioned liability as follows: Sewickley, 40%; AAA, 10%; and QVRA, 50%. *Verdict Slip*. Defendant Sewickley timely filed the instant motion for post-trial relief, and raised the following general issues:

- The trial court erred in improperly applying the Real Property Exception of the Tort Claims Act to the facts of this case;
- The trial court erred in not applying the "no-duty" rule to Plaintiff;
- The trial court erred in allowing Drs. Timothy Burg and Melvin Melnick to provide opinion testimony regarding causation and prognosis;
- The trial court erred in allowing David Bizzak, Ph.D. to provide opinion testimony regarding batted ball speed and reaction time; and
- The trial court erred in allowing a summary of Heidi Fawber's life care plan to go to the jury room.[1]

Borough of Sewickley's Motion for Post-Trial Relief, ¶¶ 5-76.

Each of Sewickley's issues will be addressed individually.

[1] Defendant Sewickley's Motion for Post-Trial Relief also included a motion to mold the verdict, which was addressed in this Court's Order of June 1, 2018.

This Court did not err by applying the Real Property Exception to the facts of this case

The Tort Claims Act provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. C.S.A. § 8541. The Borough of Sewickley qualifies as a local agency under the Tort Claims Act, and would have been immune from Plaintiff's tort claims, but for this Court's determination that the real property exception to the Tort Claims Act applies. Sewickley contends that this Court's decision was in error.

The real property exception to the Tort Claims Act reads as follows:

> The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency: The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include:
>
> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
>
> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
>
> (iii) streets; or
>
> (iv) sidewalks.

42 Pa. C.S.A. § 8542(b)(3). "In order to fall within the real property exception, the injured party must show that (a) the injury resulted from a dangerous condition that (b) stemmed from the care, custody or control of real property, not personalty." *Brewington v. City of Philadelphia*, 149 A.3d 901, 905 (Pa. Cmwlth. 2016) (internal citations omitted). The real estate exception applies "only for negligence which makes government-owned property unsafe for the activities for which it is regularly used, for which it is intended to be used, or for which it may be reasonably foreseen to be used." *Vann v. Bd. of Educ. of School Dist. of Philadelphia*, 464 A.2d

684, 686 (Pa. Cmwlth. 1983). In this case, Plaintiff produced evidence at trial that the government-owned property at issue, Chadwick Field, was unsafe for its regular and intended use, youth and recreation baseball.

In *Singer by Singer v. School District of Philadelphia*, plaintiff-student was performing a gymnastics stunt in a school gymnasium, missed the protective matting, and landed on the hardwood floor, breaking his arm. 513 A.2d 1108, 1109 (Pa. Cmwlth. 1986). Student-plaintiff alleged defendant-school district was negligent "by insufficiently protecting the hardwood floors with mats." *Id.* In applying the real property exception, the Commonwealth Court reasoned:

> A necessary element of a gymnasium's hardwood floor, which is regularly used as a gymnastic stunt area is sufficient matting protection to ensure safe landing by the students. Since proper gym floor matting is an essential safety element of a gymnasium floor being utilized for a vaulting stunt, it is an aspect within the District's care, custody and control of its real property, subject to the real property exception.

Id. at 1109-1110. Ten years later, in *Bradley v. Franklin County Prison*, plaintiff-prisoner was injured when he "slipped and fell on wet tile in the drying off area of the prison showers." 674 A.2d 363, 364 (Pa. Cmwlth. 1996). Plaintiff-prisoner alleged defendant-prison was negligent in failing to install a non-slip surface. *Id.* In again applying the real property exception, the Commonwealth Court relied on *Singer*:

> [T]he prison authorities provided the shower facilities where running water was a necessary and inextricable part of the design; the prison constructed the shower and drying-off area knowing and intending that water would necessarily accumulate on the floor where bare feet must tread. As such, the instant case is analogous to *Singer* in that a shower drying off area must have tiles with non-slip properties in order to be safe for its particular use, *i.e.,* being stepped upon by wet feet, just as a school gymnasium floor must have sufficient matting protection in

> order to be safe for its intended, specific use, *i.e.,* gymnastic activities of its students.

Id. at 366-367.

In the instant case, batted balls are a known hazard to baseball players, in particular those in the dugout, who would expect to be protected. Thus, as in *Singer* and *Bradley*, a baseball field "must have" dugouts insulated from batted balls—or, at the very least, line drives—"in order to be safe for its intended, specific use." *Id.* The facts of this case affirmatively showed that Chadwick Field's fencing configuration left the first base line dugout vulnerable to batted balls, especially when compared to Bell Acres and Community fields, other fields owned by Sewickley. T.T. 119:2-121:14; 158:18-159:5; 194:22-196:4. Consistent with the Commonwealth Court's holding in *Singer*, B*radley*, and *Vann, supra.*, it is obvious that a safe dugout is an "essential safety element" of a field being used for its intended purpose—*i.e.*, youth baseball. As the field was clearly in the "care, custody and control" of Sewickley, this court finds as a matter of law that the real estate exception applies.

Sewickley argues that Chadwick Field's fencing was not inherently dangerous, and that Plaintiff "would not have been harmed in the absence of his teammate's batting of the ball." *Borough of Sewickley's Motion for Post-Trial Relief*, ¶ 17. This Court agrees, and notes that, in the absence of a baseball game, Chadwick Field is probably a perfectly safe place to read a book, have a picnic, or conduct all manner of non-baseball activities.[2] However, Sewickley has failed to show that Chadwick Field was safe for youth baseball—*i.e.*, "the activities for which it is regularly used, for which it is intended to be used, or for which it may be reasonably foreseen to be used," *Vann*, 464 A.2d at 686—and thus cannot avail itself of Tort Claims Act immunity.

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[2] In the same vein, *Singer*'s gymnasium floor was probably safe in the absence of gymnastics stunts, and *Bradley*'s shower tiles were likely safe in the absence of running water and bare feet.

Sewickley also relies on *Gaylord v. Morris Township Fire Department*, in which defendant-fire department held a fundraising event called a "Rattlesnake Hunt," that also happened to include a softball tournament, as well as "other attractions." 853 A.2d 1112 (Pa. Cmwlth. 2004). While plaintiff-attendee was observing one of the other attractions, "an errant softball" struck her in the head. *Id.* at 1114. The question of the defendant-fire department's negligence was left for the jury, which returned a verdict of no negligence. Other than the fact that *Gaylord* happened to involve a plaintiff injured by a batted softball, it is unclear how *Gaylord* supports Sewickley's argument. *Gaylord* is factually inapposite from our case in that plaintiff-attendee was observing a "live rattlesnake display," not participating in the softball tournament, when she was injured. Furthermore, she was 300 feet from home plate, and of two witnesses who had coordinated the tournament in each of its 15 years, neither "could recall any foul ball traveling as far as the one that hit [plaintiff-attendee]." *Id.* at 1113-1115. Those factual distinctions notwithstanding, if anything *Gaylord* would seem to support Plaintiff in this case, as the *Gaylord* trial court did not grant summary judgment and/or a non-suit based on the real property exception. Rather, the court let the question of the defendant's negligence go to the jury, as this Court likewise did. The only difference is that the *Gaylord* jury found no negligence, while the jury in this case found that Sewickley was negligent in the care, custody and control of its property.

While Sewickley relies on a litany of other cases wherein our state appeals courts have declined to apply the real property exception, they too are factually distinguishable, and do not influence our case's outcome. Specifically, Sewickley cites *Mascaro v. Youth Study Center*, 523 A.2d 1118 (Pa. 1987) and *Cowell v. Department of Transportation*, 883 A.2d 705 (Pa. Cmwlth. 2005) for the proposition that a landowner cannot be liable when the alleged defect merely

facilitates an injury caused by a third party. 523 A.2d at 1124 (defendant-juvenile detention center was not liable for escaped detainee's subsequent criminal acts); 883 A.2d 705, 710 (defendant-PennDOT was not liable for third party who stood on a bridge and threw an object at a car below). However, those cases are wholly distinguishable from ours, and actually stand for the proposition that "criminal and negligent acts of third parties are superseding causes which absolve the original actor . . . from liability." *Mascaro*, 523 A.2d at 1124. The third party in our case is Plaintiff's teammate, whose foul ball struck Plaintiff. This individual was not acting negligently or criminally, but was merely hitting a baseball, in an organized baseball game, on a baseball field that was specifically intended for youth baseball.

Sewickley next complains this Court improperly denied its request to charge the jury on, or include verdict slip interrogatories regarding, the Tort Claims Act. *Borough of Sewickley's Motion for Post-Trial Relief*, ¶¶ 35-37. Sewickley specifically requested that the jury be asked "to affirmatively find that this injury was factually caused by a defect in the real property owned by Sewickley." T.T. 886:1-5. However, the only theory of negligence raised against Sewickley, and the only evidence presented at trial, involved the allegedly defective condition of its dugout fencing configuration. Thus, when the jury was determining whether Sewickley was negligent, it was necessarily deciding whether there was a defect in the real property at Chadwick Field. Moreover, a trial court enjoys "wide discretion in fashioning jury instructions," and "is not required to give every charge that is requested." *Amato v. Bell & Gossett*, 116 A.3d 607, 621 (Pa. Super. 2015) (internal citations omitted). For these reasons, this Court did not error in its jury charge. It was ultimately left to the jury whether or not Sewickley was negligent, and the jury answered in the affirmative.

This Court did not err in applying the "no-duty" rule to the facts of this case

Sewickley also alleges this Court "erred in determining the applicability of the no-duty rule as a matter of law." *Borough of Sewickley's Motion for Post-Trial Relief*, ¶ B. The no-duty rule holds that a defendant "owes no duty of care to warn, protect, or insure against risks which are 'common, frequent and expected' and 'inherent' in an activity." *Craig v. Amateur Softball Ass'n of America*, 951 A.2d 372, 375 (Pa. Super. 2008) (internal citations omitted). If a court determines that the no-duty rule applies, a plaintiff will be unable to make a *prima facie* case of liability. *Id.* at 375-376.

Sewickley first argues that the no-duty rule should have been applied, because "[t]he risk of being struck with a batted ball is inherent in playing—and observing—the game of baseball." *Borough of Sewickley's Motion for Post-Trial Relief*, ¶ 41. This Court disagrees. The risk of being struck with a ball, and the expectation that one may be at risk of being struck, varies wildly depending on the situation. For example, a player in the field would necessarily expect batted balls in his or her direction, whereas a spectator using an interior walkway of a large professional baseball stadium may expect to be insulated from that risk. In *Jones v. Three Rivers Management Corp.*, our state Supreme Court considered the latter scenario, and held that the plaintiff could not "properly be charged with anticipating as inherent to baseball the risk of being struck by a baseball while properly using an interior walkway," and thus found that the no-duty rule was improperly applied. 394 A.2d 546, 551-552 (Pa. 1978).

Similarly, in the case at bar, Plaintiff was injured inside his team's dugout, which, in youth baseball, is usually fully fenced-in, and one of the few places on or near a youth baseball field where a person might expect to be protected from batted balls. Indeed, batted balls reaching

the inside of youth baseball dugouts are not common, frequent, or expected. Accordingly, this Court was correct in declining to apply the no-duty rule.

While Sewickley cites several cases wherein courts have dismissed baseball-related injury claims under the no-duty rule, each is inapposite to this case. In *Bowser v. Hershey Baseball Association*, a youth baseball coach was struck by a batted ball while standing in "the vicinity of the players' bench," but there was no representation that the plaintiff believed he was protected by fencing, nor was there an assertion that the area should have been protected by fencing. 516 A.2d 61, 62 (Pa. Super. 1986). Moreover, moments before the accident, the *Bowser* plaintiff was facing the outfield with his back to home plate, and was struck immediately after turning back around. *Id.* In *Iervolino v. Pittsburgh Athletic Company*, a fan sitting behind the Pittsburgh Pirates dugout was struck by a batted foul ball. 243 A.2d 490 (Pa. Super. 1968). However, the *Iervolino* plaintiff had been attending games in said seats for over 15 years, and knew that her seats, being unusually close to home plate with no protective barrier, were especially vulnerable to batted balls. *Id.* at 491.

Comparing the *Jones* and *Iervolino* cases, *supra.*, is particularly instructive in deciding when the no-duty rule should be applied. In *Iervolino*, the Superior Court applied the no-duty rule where the spectator was injured by a foul ball while seated seven or eight rows back along the first base line. *Id.* The Superior Court held that the plaintiff "assumed the risks incident to the game," and that "the risk of being struck by a foul ball during the regular play of a game is one of those risks." 243 A.2d at 492. However in *Jones*, the Supreme Court held that the no-duty rule did not apply where a spectator was struck with a ball while in a concourse walkway, outside of the seating area. 394 A.2d at 552. Similarly, while the no-duty rule might apply where a participant was running on the base paths, *Craig*, 951 A.2d 372, and at or near the field of play

during batting practice, *Bowser*, 516 A.2d 61, the rule should not be extended to situations where a player is actually inside a dugout, required by little league rules to be "fenced in," specifically for the safety of the players, T.T. 139:2-9; 157-16-23; 196:5-198:4. This court finds the no-duty rule inapplicable where a little league baseball player is injured while in a dugout which is supposed to provide protection from foul balls.

Furthermore, *Jones* makes it clear that a case should go to the jury where "the Plaintiff introduces evidence that the amusement facility in which he was injured deviated in some relevant respect from established custom." 394 A.2d at 550. In this case, Plaintiff produced ample evidence that the fencing and dugouts at Chadwick Field deviated from established custom, in fact that they were in violation of the rule as set forth by little league baseball, in not providing ample protection for those within the dugout. T.T. 139:2-9; 157-16-23; 196:5-198:4. In addition to inadequate fencing, Plaintiff also established that the bench provided for the players was actually too close to the field of play (17 feet vs. 25 feet), T.T. 196:12-24, which would allow even less time for someone in the dugout to react to a ball hit in that direction.

The risk of being struck by a baseball during a little league game, while seated in the dugout, is not a risk that is common, frequent, expected or inherent within little league baseball, *Craig,* 951 A.2d at 375, and therefore the no-duty rule does not apply to the facts of this case. Sewickley owed a duty to Plaintiff, under the rules of little league baseball and otherwise, to provide a dugout that is safe from batted balls and other intrusions, and failed to do so in this case.

Sewickley next asserts that the applicability of the no-duty rule was a question of fact for the jury, and that this Court improperly denied its request to charge the jury on the applicability of the no-duty rule. However, "[w]hether a duty exists is a question of law for the trial court to

decide." *Brisbine v. Outside In School of Experiential Education, Inc.*, 779 A.2d 89, 95 (Pa. Super. 2002). It logically follows then that the applicability of the no-duty rule is also a question of law for the court to decide, and this Court knows of no baseball injury case in which the jury was asked to apply the no-duty rule as a question of fact. *See Bowser*, 516 A.2d at 62-63 (Superior Court affirmed grant of compulsory nonsuit at the completion of plaintiffs' testimony); *Oliver v. Chartiers-Houston Athletic Ass'n*, 28 Pa. D.&C. 4th 484, 489 (C.P. Washington Co. 1995) (trial court granted defendants' motion for judgment on the pleading after determining the no-duty rule applied); *Craig*, 951 A.2d at 375-376 (Superior Court affirmed grant of summary judgment after determining the no-duty rule applied); *Loughran v. The Phillies*, 888 A.2d at 877 (Superior Court affirmed grant of summary judgment after determining the no-duty rule applied); *Jones*, 349 A.2d at 552-553 (Supreme Court affirmed trial court's determination that no-duty rule did not apply; defendant did not appeal jury charge that plaintiff was a business invitee).

This Court did not err in allowing Drs. Burg and Melnick to testify as to causation and prognosis

Sewickley next alleges this Court erred in allowing Plaintiff's witnesses, Drs. Timothy Burg and Melvin Melnick, to provide opinion testimony regarding causation and prognosis. Plaintiff's pretrial statement timely identified Drs. Burg and Melnick as expert witnesses who would be called to testify at trial, and Sewickley was provided with their treatment notes. The doctors' videotaped depositions were then taken, and played during the trial. Sewickley contends that, at the outset of the doctors' video depositions, Plaintiff represented that the doctors "were being deposed as treating physicians only," yet Plaintiff's counsel "improperly and intentionally elicited opinion testimony that exceeded the scope" of the medical records provided. *Borough of*

Sewickley's Motion for Post-Trial Relief, ¶ 55. Sewickley then submitted motions *in limine* pursuant to Rule 4003.5 to preclude the doctors from testifying as to prognosis and causation, which this Court denied. T.T. 20:10-11.

The doctors' opinions as to prognosis and causation are excludable under Rule 4003.5 if said opinions were "acquired or developed in anticipation of litigation or for trial." Pa.R.Civ. P. 4003.5. When expert opinions are "not acquired or developed with an eye toward litigation, Rule 4003.5 is inapplicable." *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 531-532 (Pa. 1995). Plaintiff argues that Rule 4003.5 does not apply here, as "Dr. Burg and Dr. Melnick rendered these opinions as part of [Plaintiff]'s treatment, not in anticipation of litigation or for the purpose of trial." *Brief in Opposition to Defendant Borough of Sewickley's Motion for Post-Trial Relief*, 23. Plaintiff also notes that he "sought these doctors for treatment completely independently of his attorney," *id.* at 23, in contrast with *Smith v. Southeastern Pennsylvania Transportation Authority*, wherein the trial court found an expert doctor's testimony "was developed in anticipation of litigation" because the plaintiff was referred to said doctor by his attorney, 913 A.2d 338, 341 (Pa. Cmwlth. 2006). Notably, Sewickley does not actually argue that the doctors' opinions were acquired or developed in anticipation of litigation, *Borough of Sewickley's Motion for Post-Trial Relief*, ¶¶ 53-67, and this Court accepts Plaintiff's assertion that the doctors' opinions were not acquired or developed with an eye toward litigation.

This Court notes that there is no dispute that Drs. Burg and Melnick were properly and timely identified as expert witnesses in Plaintiff's pretrial statement. Sewickley cites an alleged violation of Pa.R.C.P. 4003.5, although that rule specifically deals with "Discovery of Expert Testimony," and this does not appear to be a discovery dispute. (Rule 4003.5 states that "a party may through interrogatories require . . . the substance of facts and opinions to which the expert is

expected to testify."). Sewickley does not indicate that any such interrogatories were served on Drs. Burg or Melnick through the Plaintiff or otherwise, and/or not answered. In any event, Rule 4003.5 does not apply in this case as Dr. Burg and Dr. Melnick were the Plaintiff's treating physicians, and were not retained "in anticipation of litigation." *Id.*; *see also Miller*, 664 A.2d 525 (Pa. 1995) (holding that Rule 4003.5 should not be used to prevent an expert from testifying as to opinions developed during his or her work duties, and not in the capacity of a paid expert). *Smith*, also cited by Sewickley, would also not apply to our case as the proposed expert in that case, Dr. Schall, was never identified as an expert prior to trial. 913 A.2d at 339-340. Again, that is different from our case, in which Drs. Burg and Melnick were properly and timely identified as experts as required.

Moreover, the doctors' testimony is permissible under *Polett v. Public Communications, Inc.*, 126 A.3d 895 (Pa. 2015), in which a treating physician was permitted to testify as to causation even though he had not filed an expert report. The trial court allowed the physician's testimony because: (1) his opinion as to causation was not developed in anticipation of litigation, and (2) there was no unfair surprise to the defendants, as they had "full access" to the physician's treatment notes and had participated in his deposition. *Id.* at 924-927. The Supreme Court of Pennsylvania affirmed the trial court's ruling that the physician's testimony was not barred by Pa.R.C.P. 4003.5. *Id.* at 927-928.

It seems Sewickley is actually arguing Plaintiff violated Pa. R.C.P. 212.2 by not providing an expert report, although the note to Rule 212.2(5) clearly states that "the notes or records of a physician may be supplied in lieu of written reports." Again, it is undisputed that Drs. Burg and Melnick's records were provided to Sewickley, in conformity with Rule 212.2, prior to trial, and they were properly identified as expert witnesses. Therefore, Plaintiff is in

compliance with Rule 212.2. Sewickley next apparently argues that the actual testimony of Drs. Burg and Melnick, specifically including opinions regarding causation and prognosis, was outside the scope of the records provided. However, even a cursory reading of the records confirms that is not the case. Plaintiff saw Drs. Burg and/or Melnick, at the Children's Institute on three occasions: February 24, 2017, April 18, 2017, and November 15, 2017. Those records note the following findings of Dr. Melnick:

> Zachary was in his usual state of good health until 4/13/2015 when he was hit on the temple by a foul ball at a baseball game. He has had a personality change since then with emotional lability and "sticky" thinking which has obsessive-compulsive features. . . . Cognitive changes secondary to head injury. . . . Personality changes secondary to [traumatic brain injury]. Headaches. Mood lability. "Sticky" thinking.

Brief in Opposition to Defendant's Motion in Limine to Limit Testimony of Dr. Melvin Melnick and Dr. Timothy Burg, Ex. A, p. 1, 3-4. Moreover, Dr. Burg's findings included:

> The patient is a 13-year-old boy with past medical history of a traumatic brain injury which occurred on April 13, 2015 when he was hit in the left temporal region with a foul ball at a baseball game. This led to an epidural bleed requiring a craniotomy. Since that time the patient has had multiple issues including cognitive deficits, depression, insomnia, headaches, and behavioral issues. . . . Referral to Psychiatry at the Children's Institute for medication adjustment for behavioral issues. . . . At next visit will consider OMT/neck stretches for headaches. Other future considerations include [illegible] and Botox injections. . . . He is here today with his parents who are also concerned about his aggressive behavior . . . Per his parents his personality is completely different compared to before his injury. His mother stated he is a completely different kid. He does have some learning disabilities now and is in a school to accommodate for those deficits. Socially he has lost all of his friends since the injury and is not get out much [sic].

Id. at p. 11, 13.

The last record goes on to list numerous recommendations for future treatment, including medications, referral to psychiatry, increased exercise, traumatic brain injury support group, and follow-up visits. *Id.* at p. 15. This Court finds that the records provide sufficient information that would allow Drs. Burg and Melnick to provide causation and prognosis testimony. There was no "prejudice" or "unfair surprise," as alleged by Sewickley, because all of the testimony provided by Drs. Burg and Melnick was within the fair scope of the records that Sewickley had in its possession prior to trial. In fact, Sewickley's own expert, Michael Franzen, Ph.D., specifically indicates in his expert report that he reviewed the records from the Children's Institute, *Defendants' Supplemental Pretrial Statement*, Ex. A, p. 2-3, and those records were addressed by Dr. Franzen in his testimony, *Dr. Franzen deposition transcript*, pp. 13-14, 20-16, 98-99.

This Court did not err in allowing Dr. Bizzak to testify as to the speed of the batted ball

Plaintiff's witness David J. Bizzak, Ph.D., P.E., a mechanical engineer who specializes in accident reconstruction, estimated that Plaintiff had only .45 seconds to react to the batted ball which injured him. T.T. 335:9-337:10; 346:7-10. Sewickley contends that Dr. Bizzak's testimony was improper as it "lacked any scientific basis." *Borough of Sewickley's Motion for Post-Trial Relief*, ¶ 72. This Court disagrees.

Dr. Bizzak testified that he used a laser survey to measure that the straight-line trajectory distance between home plate and where the ball hit Plaintiff was, at most, 38 feet. T.T. 339:10-22; 343:17-344:5. As calculating reaction time requires a value for the speed of the ball, and the speed of the ball which injured Plaintiff was not measured, Dr. Bizzak estimated a speed of 60 miles per hour. *Id.* at 353-356. However, Sewickley argues that the 60 mile per hour value is an assumption unsupported by "an authoritative or generally accepted source," and simply drawn from a 1995 article which, Sewickley holds, "did not actually include the findings described by

[Dr. Bizzak]." *Borough of Sewickley's Motion for Post-Trial Relief*, ¶ 71. Thus, Sewickley contends that Dr. Bizzak's estimate is "improper because it was premised on the unsupported assumption about the ball's speed." *Id.* at ¶ 72.

In *Snizavich v. Rohm & Hass Co.*, our Superior Court held that, for expert testimony to be proper, it "must point to, rely on or cite some scientific authority—whether facts, empirical studies, or the expert's own research—that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion." 83 A.3d 191, 197 (Pa. Super. 2013). Accordingly, Dr. Bizzak's estimate properly relies on "Two Methods for Recommending Bat Weights"—a peer-reviewed article in a scholarly engineering journal—by A. Terry Bahill and Miguel Morna Freitas, both University of Arizona professors.[3] The article, which is founded on the authors' own research and cites 16 other scholarly sources, certainly qualifies as an empirical study under *Snizavich*. That Dr. Bizzak relied on an estimate, or that said estimate was possibly premised on a suboptimal data sample, does not render his process or conclusions unscientific. Indeed, Sewickley was able to vigorously cross-examine Dr. Bizzak, and make the jury aware of all the purported deficiencies in his data and methods.

Finally, this Court notes that Dr. Bizzak's estimate was conservative. Dr. Bizzak testified that the article's 60 miles per hour estimate was for 9- and 10-year-olds, and, as Plaintiff and his teammates "were a bit older," he felt the 60 miles per hour figure represented a "lower bound" estimate. T.T. 345:16-24. Dr. Bizzard stressed that even if the batted ball had traveled at 40 miles per hour, Plaintiff's reaction time would have only been .75 seconds. *Id.* at 356:8-11.

[3] The full citation for the article upon which Dr. Bizzak relied is: Bahill, A. Terry and Freitas, Miguel Morna, "Two Methods for Recommending Bat Weights," *Annals of Biomedical Engineering* 23, no. 4 (Jul.-Aug. 1995): 436-444.

This Court did not err in allowing the summary of Ms. Fawber's life care plan to go to the jury room

Sewickley last argues that this Court erred in allowing a summary of the life care plan of Plaintiff's witness Heidi Fawber—a life care planner, who testified as to Plaintiff's proposed future medical expenses—to go to the jury room during deliberations. Sewickley argues that "[b]ased on the temporal relationship between the jury's verdict and their review of this document, as well as the similarity between the monetary damages awarded and the figures within the life care plan, Sewickley believes the jury placed undue prejudicial emphasis on this exhibit." *Borough of Sewickley's Motion for Post-Trial Relief*, ¶ 82.

Initially, it should be noted that Ms. Fawber's life care plan did not go out to the jury. Rather, a summary of the life care plan, which was specifically requested by the jury, was what was sent to the jury room during deliberations.[4] "[T]he determination of what documents should go out with the jury is within the discretion of the trial judge." *Mineo v. Tancini*, 502 A.2d 1300, 1304 (Pa. Super. 1986); *see also Wagner v. York Hosp.*, 608 A.2d 496, 503 (Pa. Super. 1992). Specifically, our state appeals courts have consistently held that calculations of damages may go out with the jury. However, exhibits not supported by evidence, not properly admitted into evidence, and lacking a proper jury instruction may not go out with the jury. *Mineo*, 502 A.2d at 1304-1305; *Phoenix Mut. Life Ins. Co. v. Radcliffe on the Delaware, Inc.*, 266 A.2d 698, 703 (Pa. 1970) ("[A]ppellant urges that it was error for the trial court to permit a paper setting forth Phoenix's calculation of damages to go to the jury. However, this action, accompanied by the proper admonition that such a paper was not evidence, was entirely a matter for the trial judge's

[4] It is noted that this Court initially ruled against sending the life care plan to the jury. T.T. 1225:17-1226:9. However, during deliberations, the jury asked to see the summary of the life care plan, and, against Defendant Sewickley's objections, this Court allowed the summary to go to the jury. *Id.* at 1236:12-1237:5.

discretion.); *Solomon v. Luria*, 246 A.2d 435, 440 (Pa. Super. 1968) ("A calculation of damages is proper so long as the paper contains no items not supported by evidence, and the jury are instructed as to the nature thereof and the effect to be given thereto.").

In the case at bar, Ms. Fawber testified at great length regarding her life care plan. T.T. 546-608. The exhibit that was shown to the jury was simply a summary of her calculations, which were supported by evidence, specifically her lengthy testimony, and properly admitted into evidence, as Exhibit 19, during trial. *Id.* at 684:9-687:12. Furthermore, the jury was thoroughly instructed on how to evaluate expert witness testimony and the Plaintiff's claim for future medical expenses. *Id.* at 1178:19-1180:9, 1188:6-11. Accordingly, this Court was properly within its discretion in sending the life care plan summary out with the jury.

For all of the foregoing reasons, this Court enters the following:

ORDER OF COURT

AND NOW, this 8th day of June 2018, upon consideration of Defendant Borough of Sewickley's Motion for Post-Trial Relief, all briefs thereupon, and oral argument held before this Court on April 20, 2018, it is hereby ORDERED, ADJUDGED, and DECREED that Defendant Borough of Sewickley's motion is DENIED.

BY THE COURT:

Patrick M. Connelly, Judge